THE CONSTITUTIONAL COURT OF TURKEY

SELECTED JUDGMENTS

2014

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(Individual Application)

2014

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FOREWORD

The individual application remedy provided individuals with a domestic safeguard at the highest level against public actions or omissions intruding fundamental rights and freedoms. Individuals have gained direct access to the Turkish Constitutional Court, and that in turn increased the human rights awareness among the mass public. The individual application also prompted the development of the human rights jurisprudence within the Turkish legal system.

The individual application proved to be an effective remedy in protecting rights and freedoms thanks to the rights-based approach adopted by the Constitutional Court. In the course of individual application, the Constitutional Court has addressed many legal issues arising in the context of human rights law as well as certain chronicle problems such as lengthy trials.

Despite the relatively short time period, the Constitutional Court has built considerable case-law since the individual application started to operate in 2012. This volume of the book includes selected admissibility decisions and judgments rendered by the Constitutional Court in 2014 within the scope of individual application. These judgments, many of which attracted high public attention as well, bear significance with regards to the development of case-law.

Sincerely wishing that this book will contribute to upholding the rule of law and protecting rights and liberties of individuals.

Prof. Dr. Zühtü ARSLAN
President of the Constitutional Court

INTRODUCTION

After settling down the issues related to admissibility criteria to a certain degree in past years 2012 and 2013, the Sections of the Court, when necessary the Plenary, could concentrate more on the issues related to the merits of the applications.

Although the issues related to admissibility criteria were clarified in many aspects during the previous time period, this volume of the book includes a few inadmissibility judgments relating to fundamental rights in addition to the judgments on the merits of the applications. While selecting the judgments that are reviewed on merits, those including a violation of rights were preferred specially.

As it was the case in previous time periods, such criteria as the importance of the judgments in the development of the case-law, their potential to serve as a precedent for similar cases and the public interest that they attract were observed in selecting the judgments to be included in the book.

As for the classification of judgments, the sequencing was primarily based on the related articles in the Constitution providing fundamental rights, then the judgments on each fundamental right were sequenced in chronological order, taking judgment dates into account.

In individual application judgments, the assessment of complaints concerning more than one right may be in question in a judgment (the right to fair trial, freedom of disclosure and dissemination of thought in the same judgment etc.). Within this framework, the basic point argued in a judgment was focalized while selecting the topic of the fundamental right, under which the judgment would be classified and the judgment is presented under the heading related to only one fundamental right. Furthermore, short abstracts of judgment were included in the table of contents of the publication for a better understanding of why the judgment was presented under that topic of right and to provide a general idea about the judgment.

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through laws, and the prolongation of the investigations and cases caused the accusations against some defendants to time out and the penalties for some defendants were issued to late and these incidents have led public officials who have tortured or allowed to practice it receiving no penalty or only too late, therefore it follows that there is a violation of the prohibition of torture guaranteed in Article 17 §3 of the Constitution regarding it's material and procedural aspect.

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and predictability. Therefore, in cases where the possibility of restriction of the freedom of expression (ex-officio blockage of access) is imposed, the scope and procedures regarding the use of such a competence should be defined with sufficient clarity. However, in the present case it is understood that the interference with the full blocking of access to youtube. com did not have a clear and distinct legal basis and was not foreseeable for the applicants.

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words are the "reflection of his inferiority feelings" towards the other parties criticism that didn't include insults and or harshness. The Constitutional Court, assessed in this case that the decision that the applicant was fined to pay 3500.00 Turkish Liras in the damages proceedings against her constitutes an un-proportionate interference with the applicant's right to freedom of expression.

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the reasons for disciplinary punishment and the rejection of the case by the courts of rank are convincing, in other words, sufficient. In spite of all this, even though the punishment is slight, it has the quality of discouraging the members of the union, such as the applicant, from participating in the legitimate strikes or days of action aimed to defend their interests. Consequently, there was a violation of Article 51 of the Constitution on account of the interference with the right to union.

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RIGHT TO LIFE (ARTICLE 17 § 1)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

RAHİL DİNK AND OTHERS

(Application no. 2012/848)

FIRST SECTION
JUDGMENT

President	:	Serruh KALELİ
Justices	**:**	Zehra Ayla PERKTAŞ
		Burhan ÜSTÜN
		Nuri NECİPOĞLU
		Zühtü ARSLAN
Rapporteur	**:**	Özcan ÖZBEY
Applicants:		Rahil DİNK
		Hosrof DİNK
		Delal DİNK
		Arat DİNK
		Sera DİNK
Counsels	**:**	Att. Fethiye ÇETİN
		Att İsmail Cem HALAVURT
		Att. Hakan BAKIRCIOĞLU
		Att. Ayşenur DEMİRKALE

I. **SUBJECT-MATTER OF THE APPLICATION**

1. The applicants alleged that the investigation that had been launched upon the incident whereby their first-degree relative was murdered was not carried out in an effective manner especially with respect to the public officials. The applicants further alleged that the investigation file had been kept secret from them and that no document was provided to them, and that the requirements of the judgment delivered by the European Court

of Human Rights (ECtHR) on 14/9/2010 were not fulfilled within domestic law. Therefore, the applicants claimed that Articles 2, 10, 11, 17, 36 and 40 of the Constitution were violated.

II. APPLICATION PROCESS

2. The first application was lodged on 12/11/2012 with the Istanbul Judge's Office no. 3 (given jurisdiction under Article 10 of the Anti-Terror Law), and the second application was lodged on 3/3/2014 with the Regional Administrative Court of Istanbul. As a result of the preliminary examination of the petitions and annexes thereof as conducted in terms of administrative aspects, it was found that there was no deficiency that would prevent submission of them to the Commission.

3. It was decided on 10/6/2013 by the Third Commission of the First Section and on 12/3/2014 by the First Commission of the Second Section that the admissibility examination be carried out by the Section and that the file be sent to the Section.

4. Due to the fact that a legal connection was determined to exist ratione materiae and ratione personae in the examination of the applications lodged by the applicants with the claim that the right to life had been violated, it was decided by the Section on 25/3/2014 that the file no. 2014/3045 be joined and examined with the individual application no. 2012/848.

5. In the session held by the Section on 26/6/2013, it was decided that the examination of admissibility and merits of the application be carried out together.

6. The facts, which are the subject matter of the application, were notified to the Ministry of Justice on 27/6/2013. The Ministry of Justice submitted its observations to the Constitutional Court at the end of the additional period that was granted on 28/8/2013.

7. The observations submitted by the Ministry of Justice to the Constitutional Court was notified to the representative of the applicants on 18/9/2013. The applicants submitted their counter-opinions to the Constitutional Court on 21/10/2013.

8. The Constitutional Court, by its letter dated 19/6/2013 and numbered 2012/848, requested within the scope of the current application "*an explanatory information note containing the actions and decisions that have been taken with regard to this investigation as well as approved copies of documents that are of a decisive nature and are deemed to be necessary in the file in order to determine the stage reached by the investigation file and the applicants' participation to the investigation*" from the Istanbul Chief Public Prosecutor's Office. Upon the request of the Constitutional Court, a DVD regarding the investigation was submitted by the Public Prosecutor's Office to the Constitutional Court on 12/11/2013.

9. Although the Constitutional Court requested additional information, by its letter dated 24/02/2014 and numbered 2012/848, from the Istanbul Chief Public Prosecutor's Office in order to determine the effectiveness of the investigation, it was stated in the written response of the Public Prosecutor's Office dated 26/2/2014 that "*there is a decision of restriction regarding the investigation file in question, that a copy of the investigation file was sent via digital media on 30/10/2013 on the condition that it be within the discretion of the Constitutional Court to prevent the secrecy of the investigation from being undermined and the evidence gaining public nature*", and a reference was made to the previous instruction note.

10. As a result of the ensuing correspondence and telephone conversations by the Constitutional Court, some additional information and documents were obtained from the Chief Public Prosecutor's Offices of Samsun, Trabzon and Istanbul on 10-18-24-27/6/2014.

11. In addition, the Ministry, in its observations dated 28/8/2013 pertaining to the facts that are the subject of the application, included certain information which was confirmed by the applicants in their statements in response to the observations of the Ministry.

12. The Ministry also indicated that due to the decision of restriction concerning the investigation in question within the scope of Article 153 of the Code no.5271, they were not able to submit detailed observations pertaining to the course and content of the investigation to the Constitutional Court, apart from the letter of the Istanbul Chief Public Prosecutor's Office dated 12/7/2013,.

III. THE FACTS

A. TheCircumstances of the Case

13. As expressed in the application form and its annexes thereof as well as the observations of the Ministry and in the correspondence that has been carried out, the facts can be summarized as follows:

1. Murder of Hrant Dink

14. Hrant Dink, the founder and chief editor of Agos Newspaper, was killed as a result of an armed assault on 19/1/2007 whilst he was leaving his work place in Istanbul.

15. Among those who have followed the case, Rahil Dink is the spouse of the deceased Hrant Dink, Hosrof Dink is his sibling, Delal, Arat and Sera Dink are his children.

2. Initiation of an Investigation and Restriction of the Investigation

16 On the date when Hrant Dink was murdered, an investigation was launched by the Istanbul Specially Authorized Chief Public Prosecutor's Office based on the file no. Hz.2007/972 (Hz.2007/115).

17. Upon the request made by the Istanbul Chief Public Prosecutor's Office within the scope of the investigation that was being conducted for the crime of "*being a member of a terrorist organization*" based on the file no. Hz.2007/972, it was decided with the letter of the 12th Assize Court of Istanbul, dated 8/10/2007 and numbered K.2007/286 that "*given the fact that a decision of restriction is deemed to be necessary in light of the possibility that the wanted individuals may learn that they are wanted and they may flee, destroy items and evidence of crime, that it may become more difficult to collect evidence and uncover all suspects and crimes in the event that the documents contained within the investigation file is examined and copies thereof are taken by the defense counsel and the attorneys, the examination and taking copies of the documents contained within the file by the attorney of the suspect, defense counsel and the attorney of the party damaged by the crime be restricted, save for legal exceptions*".

18. Although a case was filed with regard to certain suspects who were determined to have taken part in the incident as a result of the evidence

obtained in the investigation conducted by the Public Prosecutor's Office, the investigation file was left open considering the wide scope of the investigation and the possibility of obtaining new evidence. The file has been pending as of the date when the applicants resorted to individual application.

3. Judicial Process Carried Out Pertaining to Civilian Individuals Who Became Involved in the Murder

19. The investigation that was launched upon the murder was completed on 20/4/2007 with regard to 18 civilian suspects, and a case was filed before the Istanbul 14th Assize Court based on the indictment no. E.2007/368.

20. O.S., who is among the principal perpetrators of the murder of Hrant Dink and whose file was segregated due to being a minor, was sentenced to 21 years and 6 months' imprisonment by the Istanbul 2nd Juvenile Assize Court for the crime of intentional killing. This decision was upheld by the Court of Cassation and became final on 21/3/2012.

21. The decision pertaining to the other accused was declared by the Istanbul 14th Assize Court on 17/1/2012. In the decision, the accused Y.H. was sentenced to aggravated life imprisonment on the ground that he had instigated O.S. to commit the crime of murdering Hrant Dink with premeditation. The accused E.Y. and A.İ were sentenced to 15 years' imprisonment on the ground that they had aided and abetted O.S. in the crime of murdering Hrant Dink with premeditation. On the other hand, as the crime of "*being a leader of an armed terrorist organization*" attributed to Y.H. and the crime of "*being a member of an armed terrorist organization*" attributed to A.İ. were not proven, they were acquitted.

22. The Istanbul Chief Public Prosecutor's Office appealed the decision on the ground that the decision of acquittal given on account of membership of a terrorist organization due to the lack of evidence with respect to some of the accused was unlawful.

23. The Chief Public Prosecutor's Office at the Court of Cassation drafted a letter of notification on 10/1/2013 for reversal of the decision with

the justification that the crime of intentional killing had been committed within the framework of the organization's activity.

24. The 9th Criminal Chamber of the Court of Cassation, which carried out the appeal examination, decided on 13/5/2013 to reverse the judgment in question due to the fact that it had been decided to acquit the accused Y.H. of the crime of establishing and leading an armed criminal organization, the accused A.İ and E.Y. of the crime of being members of an armed criminal organization, the accused E.T, T.U. and Z.A.Y. of the crimes of being a member of an armed criminal organization and assisting murder. It was stated in the decision that the required conditions for an organization were assembled within the circumstances of the present case, that Y.H., one of the accused, decided upon Hrant Dink's murder as a crime that was aimed to be committed by the organization, that the other accused, who were understood to be members of the criminal organization, participated in the crime of murder by means of encouraging O.S. to commit the crime, reinforcing the decision to commit a crime, leading him in terms of how to commit the crime. This case is being carried out based on the file no. E.2014/221of the Istanbul 5thAssize Court.

4. Judicial Actions Carried Out Pertaining to Public Officials Due to Their Negligence in the Act of Murder

25. As per the information and documents mentioned above, the judicial actions that the Public Prosecutor's Office carried out pertaining to public officials whose connections with the incident were determined are summarized as follows:

a. Criminal proceedings conducted with respect to the officials of the Trabzon Gendarmerie

26. As a result of the investigation it carried out ex officio in addition to the complaint petition of the applicants dated 17/1/2008, the Istanbul Chief Public Prosecutor's Office issued a decision of lack of jurisdiction regarding the Trabzon Chief Public Prosecutor's Office for the crime of "*misconduct*" with respect to the officials of the Gendarmerie Command of Trabzon, by its decision dated 25/1/2008 and numbered K.2008/33 and for the crime of "*intentional killing due to negligent behaviour*", by its decision dated 28/4/2008 and numbered K.2008/201.

27. Through its indictments (File no. E.2007/2815 on 30/10/2007) (File no. E.2008/4010 of 25/12/2008), the Trabzon Chief Public Prosecutor's Office filed a case at the 2nd Criminal Court of Peace of Trabzon with regard to certain Gendarmerie personnel for the crime of "*neglect of duty*".

28. With the decision (File no. E.2008/615, K2011/669 of 2/6/2011) of the Court in question, it was decided to sentence the accused A. Ö., M. Y., V. Ş., O. Ş., H. Y. and H. Ö. Ü., who are gendarmerie personnel, to prison terms ranging between 4 to 6 months with the justification that "*even though they obtained detailed information pertaining to the assault, they did not notify the competent authorities of this information and thus they neglected their duty*".

b. Criminal proceedings conducted against the officials of the Istanbul Security Directorate

29. As a result of the investigation carried out by the Fatih Chief Public Prosecutor's Office against the public officials, who are members of the Istanbul Security Directorate, claimed to be negligent with regard to the Hrant Dink murder as per Article 9 of the Law no. 4483 on the Trial of Civil Servants and other Public Officials, in line with the decision issued by the Governor of Istanbul on 20/3/2008, it was decided not to give permission for investigation regarding the Istanbul Police Commissioner C.C. and the Deputy Director of the Intelligence Department B.K., and to give permission for investigation regarding the other six police officers serving for the intelligence and their superiors.

30. Upon the objection of the parties to this decision, while the decision of not granting permission for investigation was approved with the decision of the Regional Administrative Court of Istanbul (File no. E.2008/374 of 27/6/2008), it was decided to reverse the decision with respect to the officials regarding whom the permission for investigation had been granted by indicating that "*sufficient information and documents for the conduct of an investigation did not exist within the file*" and it was decided not to give permission for investigation with regard to these individuals.

31. It was thus decided (File no. K.2008/9680 of 22/10/2008) by the Fatih Chief Public Prosecutor's Office conducting the investigation that there were "*no grounds for prosecution*" regarding the public officials in question.

c. Criminal proceedings conducted as regards to the officials of the Samsun Security Directorate

32. Within the scope of the investigation that was carried out by the Samsun Chief Public Prosecutor's Office due to acts that amount to misconduct and violation of secrecy during actions taken by the relevant officials of Samsun Security Directorate with regard to O.S., who was apprehended in Samsun having fled after murdering Hrant Dink, a criminal case was filed in 2007 against M.B., the Head of Anti-Terrorism Section, and İ.F. who was serving as a police superintendent.

33. As a result of the trial conducted by the Samsun 4th Criminal Court of First Instance due to the failure to take the suspect into custody despite the written order of the Public Prosecutor and non-compliance with the rules that the statement of the suspect, who was a minor, could only be taken by the Public Prosecutor and that in the absence of an order by the Prosecutor, video and audio recording could not be made and no photograph could be taken and published, it was decided that (File no. E.2007/521, K.2008/587 of 22/10/2008) the accused in question be acquitted based on the justification that "*the action might require disciplinary sanction and there was no element pointing out the intention to the crime*".

34. Upon the appeal made by the Public Prosecutor and the applicants, the 4th Criminal Chamber of the Court of Cassation quashed (File no.E.2010/27631, K.2012/30616 of 17/12/2012) the acquittal decision of the Court with the justification that "*given the fact that the accused acted in violation of the provisions of the Law and the Regulation and thus led to the violation of the right to a fair trial of the suspect and the victims of the death incident, safeguarded in Article 36 of the Constitution and Article 6/2 of the ECHR, and thus to the victimization of individuals by means of acting in violation of the requirements of their duties; it was unlawful to deliver a decision of acquittal regarding the accused with undue justifications whereby the nature of the crime was wrongly evaluated without taking into consideration whether or not the material and moral circumstances of the crime of misconduct via executive action covered under Article 257/1 of the TCC were assembled, without discussing whether or not the intention of the accused was to send a message to the public opinion to the point that the crime committed by O.S., who was a suspect of the*

crime of murder, was the correct kind of behaviour and whether or not it was possible to implement Article 215 of the TCC with regard to them". As a result of the retrial conducted by the court by complying with the judgment of the Court of Cassation, it was decided on 18/6/2013 to "*adjourn the criminal case*" as per Article 1(1) of the Law no.6352 by considering the action of the two officials in question of publishing the photograph they had taken with the accused O.S. within the scope of the crime of "*praising the crime and the criminal*" and also taking into account the date of the crime, also to suspend the pronouncement of the judgment of the prison sentence of 5 months issued with regard to M.B. for the crime of "*misconduct*".

5. Application of the Applicants to the European Court of Human Rights (ECtHR)

35. The applicants applied to the ECtHR in 2008 and 2009 as a result of Hrant Dink's murder in addition to a number of claims with the allegation that the right to life had been violated under its substantive and procedural aspects. The ECtHR examined the five applications lodged by the applicants, who were Hrant Dink and his relatives, by joining them (see *Dink v. Turkey*, App. no. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14/9/2010).

36. The ECtHR decided on 14/9/2010 that, in addition to some other reasons of violation, Article 2 of the Convention, which regulates the right to life, had been violated under its substantive aspect with the justification that despite the existence of a clear and imminent danger against Hrant Dink's life, official authorities had not taken the necessary measures to prevent the murder; that the mentioned Article had also been violated under its proceduralaspect by concluding that the State had acted in violation of the liability to conduct an effective investigation with a view to determining and punishing the individuals who had been observed to be negligent due to the fact that the investigations that had been launched with regard to officials of the Security Directorate and the Gendarmerie as a result of their negligence in protecting Hrant Dink's life had been concluded with decisions of non-prosecution. As a result, the ECtHR held that 100.000 euros be paid jointly to the applicants Rahil Dink, Delal Dink, Arat Dink and Sera Dink and 5000 euros be paid to the applicant Hasrof

Dink under the circumstances of the present case by taking into account some other factors that constituted the reasons for violation.

37. The ECtHR made the following observations with regard to the actions carried out by relevant units regarding the public officials who had failed to prevent the occurrence of the incident through their negligent behaviour:

The ECtHR determined

- That officials of the Trabzon Police Department officially informed the Istanbul Police Department on 17/1/2006 that Y.H. was planning the murder of Hrant Dink, that his criminal record and personality were suitable to commit this crime, that however, the Istanbul Police Department had not taken any action upon the intelligence in question, that the Istanbul Public Prosecutor's Office had filed a criminal case with the indictment dated 20/4/2007 with regard to eighteen accused for the crimes of forming criminal organizations for terrorist acts and murder and being members of these or instigating these kinds of actions, and that this case continued to be heard by the Istanbul Assize Court;

- That a criminal case had been filed against the gendarmerie officials V.S. and O.S., with the indictment of the Trabzon Public Prosecutor's Office dated 30/10/2007, before the Trabzon Criminal Court of First Instance, that however, the application that had been made by the attorneys of the applicants against the decision of the Governor's Office dated 4/4/2007 and included the request that the responsibility of the superiors of the gendarmerie officials also needed to be sought was dismissed by the Trabzon Regional Administrative Court;

- That upon the denunciation of the Istanbul Public Prosecutor's Office, an investigation was filed by the Trabzon Public Prosecutor's Office with regard to those responsible at the Trabzon Police Department, that as a result, a decision of non-prosecution was issued on 10/1/2008, and that the objection made to this decision was dismissed by the Rize Assize Court on 14/2/2008;

- That the investigations conducted by the Istanbul Public Prosecutor with respect to certain officials at the Istanbul Police Department were concluded with a decision of non-prosecution due to the decisions of the Istanbul Regional Administrative Court dated 23/5/2007, 27/6/2008 and 15/11/2008 of not granting permission for investigation or cancelling the permissions that had already been granted;

- That the applicants had filed a criminal complaint with regard to the officials of the Samsun Security Directorate and the Gendarmerie for praising the murder of Hrant Dink and misconduct, on the ground that they took a photograph with O.S. -suspected murderer of Hrant Dink- whom they apprehended at the Samsun bus terminal while returning from Istanbul to Trabzon on the day after the date of murder, with a Turkish flag in his hands; that however, as a result of the criminal investigation conducted by the Samsun Public Prosecutor's Office, a decision of non-prosecution was delivered on 22/6/2007; that nevertheless, the Prosecutor had not ignored the possibility that certain procedural mistakes committed by members of the security forces (especially regarding the confidentiality of the investigation regarding minors) could be subject to the disciplinary proceedings; that the disciplinary investigations that were initiated against the security forces were concluded with the issuance of disciplinary sanctions due to the violation of the principle of confidentiality of the criminal proceedings and undermining the reputation of the security forces.

38. The ECtHR made the following observations while outlining the justifications for the violation of Article 2 of the Convention under its procedural aspect:

In summary, the ECtHR made the observations;

- That in the present case, the Istanbul Public Prosecutor's Office conducted a detailed and rigorous investigation regarding the manner in which the security forces of Istanbul and Trabzon managed the information they had obtained regarding the probability of this crime, that the Istanbul Public Prosecutor had uncovered the

series of potential acts of negligence among the security forces and that he had conveyed the information he had thus obtained to the investigation units in Istanbul and Trabzon also by indicating the identities of the officials who had been negligent in fulfilling the liability of protecting the applicant's life;

- That at the end of the investigations launched upon the denunciation of the Istanbul Public Prosecutor's Office and the order of the Ministry of Interior, the Governor did not give permission for the trial of the concerned members of the Gendarmerie with the exception of two non-commissioned officers before a criminal court,... that no conclusion was achieved as to why the Gendarmerie officers of Trabzon, who were authorized to take proper measures, remained passive after the transmission of the information by the two non-commissioned officers,

- That the decision of non-prosecution issued by the Trabzon Public Prosecutor's Office regarding the irregularities and negligence of the Trabzon police within the framework of the prevention of the crime contained arguments that were in contradiction with the other facts in the file, that the investigation did not provide any information as to why no action had been taken against the perpetrators of the murder despite the information that the police officers had;

- That no criminal prosecution could be launched against the Istanbul Police due to the annulment decision of the Istanbul Regional Administrative Court (with regard to the decision of the Provincial Administration Board of the Istanbul Governor's Office), that the Police Commissioner had also been left outside the scope of the investigation by the Provincial Administration Board, and that as a result, the matter as to why the Istanbul police did not take an action against the threat against Hrant Dink despite the information it had possessed prior to the murder could not be elucidated;

- That, as underlined by the Government, criminal proceedings are still pending before the Istanbul Assize Court against the individuals claimed to be the perpetrators of the assault and members of an extreme nationalist group, that however, apart from

the cases that had been filed against the two non-commissioned officers in Trabzon, all trials that evoked the responsibility of official authorities in preventing the crime only resulted in no prosecution, that since the criminal investigation with regard to the superiors was ended, the result of the on-going proceedings regarding the two non-commissioned officers was not of such a degree that may affect the previous observations;

- That moreover, the accusations regarding the Gendarmerie officers of Trabzon and police officers of Istanbul had been examined as to the merits only by the other officers who were all members of the executive and not completely independent from those who had been involved in the incindents (the Governor, the Provincial Administration Board), that this situation alone highlighted the weakness of the investigation in question, that the relatives of Hrant Dink had not been allowed to become a party to the trials regarding the police officers and the gendarmerie officers, that they had only been granted the right to lodge an objection with the superior authorities which merely conducts an examination over the case file, that the fact that a police chief had publicly displayed his extreme nationalist views and affirmed the actions of the individuals accused of murder was not thoroughly made the subject of an investigation,

- That the fact that the investigations that had been launched against the officials of the Trabzon Security Directorate and the Gendarmerie due to their negligence in protecting Hrant Dink's life resulted in decisions of non-prosecution amounted to the violation of the requirements of Article 2 of the Convention, which brought the liability of conducting an effective investigation with a view to determining the individuals whose negligence was observed and punishing these acts of negligence.

6. Judicial Actions Carried Out Pertaining to the Public Officials After the Judgment of the ECtHR

39. A petition was submitted by Fethiye Çetin, the attorney of the applicants, to the Istanbul Chief Public Prosecutor's Office on 17/1/2011. In the petition, a reference was made to the Dink judgment of the ECtHR

that had been finalized on 14/12/2010 (*Dink v. Turkey,* App. no. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14/9/2010) and it was requested that an investigation be carried out and a criminal case be filed with regard to approximately 25 public officials including the Governor of Istanbul M.G. and the Police Commissioner of Istanbul C.C..

40. As a result of the complaint filed by the applicants following the judgment of the ECtHR, a general investigation was launched by the Istanbul Chief Public Prosecutor's Office with regard to the public officials in question over the file no. Hz.2011/192 for the crimes of "*being a member of a terrorist organization, leading to intentional killing via negligent behaviour, forging documents and being an accessory to an intentional killing*".

41. The investigation that was conducted over the file no. Hz.2011/192 was later joined with the pending initial investigation file no. Hz.2007/972 on 13/10/2011.

42. On the other hand, upon the allegation of the applicants via their petition dated 20/7/2010 that M.G., who was the Governor of Istanbul on the date of the incident, had committed misconduct by means of not preventing the assassination that had been carried out against Hrant Dink with his negligent behaviour, a decision of non-prosecution was issued by the Istanbul Chief Public Prosecutor's Office on 10/4/2013 as a result of the investigation that was conducted over the file no.2007/972 with the justification that "*there were no grounds for the conduct of a prosecution with regard to the suspect since it was understood that a decision not to carry out any process had been delivered in the decision of the Chief Public Prosecutor's Office at the Court of Cassation (File no. Hz.2007/143, K.2007/57 on 14/11/2007) due to the lack of evidence indicating that the Governor of Istanbul M.G. had direct or indirect responsibility in Hrant Dink's murder and that it had been made the subject of a writ of incurred expenses*".

7. Judicial Actions Carried out Against the Public Officials Whom the Applicants Made the Subject of the Individual Application Registered under no. 2014/3045

43. Relying on the judgment of the ECtHR dated 14/9/2010, as per the provision "*Where it is determined by the final decision of European Court of Human Rights that a decision of non-prosecution was issued without conducting*

an effective investigation, an investigation shall be launched again if requested within three months following the finalization of the decision." which was regulated in paragraph (3) that was added to Article 172 of the Code no.5271 with Article 19 of Law no.6459 of 11/4/2013, the applicants filed a complaint before the Istanbul Chief Public Prosecutor's Office on 1/7/2013, in order that the requirement of the mentioned judgment of the ECtHR be fulfilled and that a new investigation be launched with regard to the public officials taking office at the Trabzon Police Department and Gendarmerie as well as the Governor's Office of Istanbul and Istanbul Police Department in respect of whom a decision of non-prosecution was rendered and whose names were stated in the petition of complaint.

44. The complaint petitions of the applicants were registered under the file no. Hz.2013/93822 of the Public Prosecutor's Office that was assigned to conduct general investigations. It was indicated by the Public Prosecutor's Office in question that some of the officials were executing their duties in Trabzon at the time when the crime was committed, the separated documents were registered under the investigation no. 2013/102053 and sent to the Trabzon Chief Public Prosecutor's Office on 19/7/2013 with a decision of rejection of venue. The file regarding M.G., the Governor of Istanbul, who was among those regarding whom a complaint had been filed, was separated and sent to the Chief Public Prosecutor's Office at the Court of Cassation, which is competent and has venue to conduct investigations pertaining to governors, based on the investigation number 2013/101995 along with the decision of lack of jurisdiction dated 19/7/2013.

45. The Public Prosecutor's Office, pointing out that the action alleged to have been committed by the suspects arose from administrative duty and also taking into account the amendment made to the Code no.5271, made a request to the Istanbul Governor's Office to obtain a permission for investigation with respect to E.G, the Deputy Governor of Istanbul, C.C., the Police Commissioner of Istanbul, Commissioners A. İ. G., B. K., İ. P., Chief Superintendent İ.Ş.E., Superintendent V.A. and police officers Ö. Ö. and B. T. regarding whom a complaint had been filed within the scope of the same investigation and whereby the legal process had been finalized since a permission for investigation with regard to them had not been granted as per the Law no. 4483.

46. In the report dated 21/11/2013 that was prepared by the Civil Service Inspector who was assigned to conduct a preliminary examination; it was indicated that the judgment of the ECtHR regarding Hrant Dink had been finalized on 14/12/2010, that Article 172(3) of the Code no.5271 came into force on 30/4/2013, that therefore investigations could be renewed only for those actions which are the subject of judgments of the ECtHR that were finalized after this date, that in the present case it was not possible for the investigation to be renewed, that on the other hand, the entirety of the matters alleged by the applicants in their petition dated 1/7/2013 had been evaluated in previous preliminary examinations and that these preliminary examinations were finalized after having gone through the review of administrative justice, that no additional information and documents that could affect the outcome of these preliminary examinations were submitted in the petition of complaint in question in order for the application to be put into action as per the Law no. 4483 and it was concluded that the permission for investigation with regard to the security officials whose names were cited should not be granted. Moreover, it was indicated in the same report that no preliminary examination had been conducted previously with regard to E.G., the Deputy Governor of Istanbul, that however, the individual whose name was cited met Hrant Dink on 24/2/2004, together with two officials of the National Intelligence Organization (MIT), that it was neither alleged in the statements made by Hrant Dink nor in the petition of complaint in question that there was a situation constituting a crime mentioned during this meeting, that the Deputy Governor did not serve as the President of the Provincial Protection Board between the dates of 6/10/2004 – 22/12/2008 when he was in office, that no recommendation had been made to him as to placing Hrant Dink under protection, that even if an accusation was made, the 5-year statute of limitations had expired with regard to the crime of misconduct as per the Law no.765 when the date of this meeting was taken into consideration, that for these reasons the permission for investigation regarding him should not be granted.

47. It was decided by the Governor H.A.M. with the decision of the Directorate General of the Provincial Administration Board of the Istanbul Governor's Office (File no. K.2013/141 of 28/11/2013) "*not to grant permission for investigation*" regarding the nine public officials whom a complaint had

been filed, in line with the observations and justifications contained within the preliminary examination report.

48. Upon the objection filed by the applicants against this decision on 23/12/2013, it was decided by the Regional Administrative Court of Istanbul (File no. K.2014/14 on 22/1/2014) that the objection be dismissed based on the justification that "*given that there is no finding of new evidence concerning the allegations subject of the decisions of no permission for investigation previously given and objected to, there are not sufficient information and documents to launch a preliminary investigation"*, and that the decision of not granting permission for investigation be upheld. This decision was notified to the applicants on 31/1/2014, the applicants lodged an individual application with the reference that the investigation had not been conducted in an effective manner within the legal period.

49. On the other hand, it was understood that a decision of non-prosecution had been issued on 21/2/2014 in the letter of the Istanbul Public Prosecutor (Bureau of Investigation for Terrorism and Organized Crime) dated 18/6/2014 in the investigation conducted based on the file (File no. 2013/93822) due to the decision of the Regional Administrative Court in question.

50. The Bakırköy 8th Assize Court, which examined the objection filed by the applicants on 19/3/2014, accepted the objection with its decision dated 21/5/2014 and annulled the decision of non-prosecution. However, a petition dated 4/6/2014 containing the opinion that the decision needed to be reversed for the sake of law with the justification that this decision was in violation of Article 9/3 of the Law no.4483, that it was not possible to conduct an investigation with regard to this crime and file a criminal case after the final decision delivered by the Administrative Justice units was sent by the Istanbul Chief Public Prosecutor's Office to the Directorate General of Criminal Affairs of the Ministry of Justice.

8. Action for Compensation Filed by the Applicants against the Administration

51. In addition, an action for non-pecuniary damages at the total amount of TRY 400.000 was filed by the applicant Hosrof Dink and his

sibling Yervant Dink against the Ministry of Interior with the claim that the administration had gross neglect of duty and objective responsibility in Hrant Dink's murder.

52. In the trial that was conducted by the Istanbul 10th Administrative Court, it was ruled with the decision (File no. E.2008/421, K.2010/1539 on 27/10/2010) that a total of TRY 100.000 be paid for non-pecuniary damages with the mention that "*it has been concluded that it was officially notified by the Trabzon Police Department to the Istanbul Police Department Directorate of Intelligence Section on 17/2/2006 that Y.H. plotted to murder Hrant Dink, that there was an explicit and imminent threat to Hrant Dink's life due to articles which were published in Agos Newspaper and attracted the reaction of some extreme nationalist groups, that the requirement of taking protection measures without waiting for Hrant Dink's request in person was not fulfilled under these circumstances, that what was done remained limited to the correspondence phase and the phase pertaining to the taking of protection measures was not initiated, that therefore the administration has gross neglect of duty in terms of protecting Hrant Dink's right to life.*"

9. Participation of the Applicants to the Investigation and Certain Actions Undertaken by the Public Prosecutor's Office

53. It has been observed that the processes for joining the investigations carried out under different files by the Chief Public Prosecutor's Office upon Hrant Dink's murder has been continuing as of 2013 (File no. Hz.2011/1345 was joined with File no. Hz.2007/972 on 15/2/2013), that while a general investigation has been carried out with regard to public officials based on the File no. Hz.2007/972 on the one hand, an investigation within the scope of the Law no. 4483 under the File no. Hz.2013/93822 of the Public Prosecutor's Office has been continuing upon the request of the applicants dated 1/7/2013 regarding the conduct of a new investigation on the other.

54. In order to contribute to the ongoing investigation process, the applicants had the opportunity to talk to the competent Public Prosecutor in person several times, analyze the findings in the report of the State Supervisory Council of the Presidency of the Republic and submit new petitions.

55. In the correspondence of the Istanbul Chief Public Prosecutor's Office (its Section given jurisdiction under Article 10 of the Anti-Terror Law) (File no. Hz.2007/972 on 12/7/2013), it was indicated that correspondence had been carried out with relevant institutions such as the Gendarmerie Command of Trabzon, the Police Department of Istanbul, the Directorate of Silivri Prison and the Malatya Chief Public Prosecutor's Office, that the evidence collection was still ongoing and that the investigation might be expanded depending on the responses coming from relevant institutions.

56. In line with the issues included in the Research and Examination Report of the State Supervisory Council (no. 2012/1 on 2/2/2012) with regard to the Hrant Dink murder and some new information obtained within the scope of the investigation, it has been observed that information pertaining to military personnel serving at certain places during the periods covering the date on which Hrant Dink was murdered and the time prior to it has been requested from the military authorities, that these kinds of correspondence continued as of 2012-2013; that due to the impossibility of fully elucidating the investigation and determining the suspects as well as collecting the evidence of crime in full, deciphering and uncovering the hierarchical structure of the group and apprehending them along with the evidence of crime through physical pursuit and observation and the lack of any other means of obtaining evidence, the registry, caller-called, message sent-message received and contacted telephone information for the years 2000-2012 pertaining to numerous telephone numbers that were determined was requested with the judge's decision dated 2/5/2012 and 11/10/2013; that correspondence was carried out with various institutions such as the National Security Council, universities, ministries, prisons and other prosecutors' offices with regard to individuals whose identities were determined within this framework, that their statements were obtained, that the persons whose statements were taken were asked whether or not public officials had any negligence or premeditation and that this situation was examined, that the taking of statements and declarations of witnesses, anonymous witnesses and suspects (some of whom were military personnel) who came upon instruction or with summons from different places continued as of 2012-October 2013; that the administrative investigation files and the evidence contained therein were examined

and the information of certain public officials were sought in 2011, that samples of certain information and documents from other courts where the other accused were being tried were made to be included in the investigation file; that the content of the denunciation letters regarding the fact that had been sent by different individuals as well as documents and petitions understood to have a connection with the investigation that was being carried out in the trial that was being heard at the 14thAssize Court of Istanbul and requested to be joined with the file was taken into account and that the investigation was expanded accordingly; that the applicants were able to contribute to the investigation via the reports, phone records, names and petitions (numerous petitions dated 2011) they submitted; that certain documents from the file were notified by the Public Prosecutor's Office to the applicants, that the applicants were able to request the expansion of the investigation in response (for instance, it is indicated in the petition of the applicants dated 22/3/2012 regarding Hrant Dink's murder that the report dated 22/2/2012 that had been prepared by the State Supervisory Council was notified to them on 27/2/2012 and that it was requested to expand the investigation regarding 18 matters within the scope of the issues covered in the report).

57. In addition, it has been determined that in the correspondence of the Istanbul Chief Public Prosecutor's Office (Bureau of Investigation for Terrorism and Organized Crimes) dated 10-18/6/2014, it was decided that the investigation of the Istanbul Chief Public Prosecutor's Office no. 2007/972 be conducted by the "*Bureau of Terrorism and Organized Crimes*" that had been constituted within the framework of the new regulation based on the investigation no. 2014/40810 due to the fact that the Assize Court given jurisdiction under Article 10 of the Anti-Terror Law had been abolished as per Article 1 of the Law no. 6526.

58. In the mentioned correspondence; it was indicated that in accordance with the amendment made to Article 153 of the TCC no. 5271 and upon the request of the applicants' attorney Hakan Bakırcıoğlu, a copy of the whole file had been provided to the applicants' attorney, that the relevant Prosecutor had evaluated the stages of the investigation along with the attorney whose name is cited, that there had been an effort to determine the connection of public officials with the murder, that information

and documents had been requested from numerous places within this framework, that 45 people were heard as witnesses, 3 people as anonymous witnesses and 8 people as statement owners between the dates of 10/12/2010 – 8/5/2014, that the liaison report associated with the HTS was obtained by experts in order to determine whether or not the accused who was involved in the Hrant Dink murder had a connection with the accused who had been tried in the Malatya Zirve Publishing House murder, Ergenekon, Balyoz and Kafes cases, that the report of the investigation that had been conducted pertaining to the matter of deletion of the records regarding the telephone inquiries at the Department of Intelligence on 20/5/2014 had been obtained, that they had arrived at the phase whereby individuals deemed to be suspects would be summoned and heard by means of deepening the investigation in order to determine whether or not public officials had had actions that would amount to assisting in criminal organization and whether or not they had responsibilities in the death of the relevant person through negligent behaviour.

10. Restriction Introduced to the Applicants' Authority to Examine the Files

59. As a result of the complaint filed by the applicants following the judgment of the ECtHR, upon the request filed within the scope of the investigation that was conducted by the Istanbul Chief Public Prosecutor's Office with regard to the public officials in question based on the file (File no. Hz.2011/192) for the crimes of "*being a member of a terrorist organization, leading to an intentional killing through negligent behaviour, forging documents and being an accessory to an intentional killing*" it was decided with the correspondence of the Istanbul 9th Assize Court on duty (File no. K.2011/56 on 7/2/2011) that "*the right of the suspect, defense counsel and the attorney of the party affected by the crime to examine and take copies of the documents contained within the file be restricted, save for legal exceptions, due to the examination of the documents by the suspects and their attorneys being objectionable given the nature of the investigation, the presence of the identities and telephone numbers of the suspects, the places where elements of crime belonging to the organization are hidden in the documents contained within the file, the names of several members of the organization in the communication interception minutes and due to the other documents being of the same nature.*"

60. Although the applicants applied to the Public Prosecutor's Office with their petition dated 10/9/2012 with the aim of obtaining copies of the documents and digital data contained within the file, the request in question was dismissed on the same day with the justification that there was a decision of confidentiality on the file.

61. The applicants applied to the Istanbul Assize Court on duty on 17/9/2012 and requested that the decision of confidentiality on the investigation file be removed by indicating that "*there had been numerous detailed news items or media outlets regarding the evidence and the accused in the case and the public opinion had information pertaining to the investigation and case in question, therefore, the continuation of the decision of confidentiality and the restriction of their right to take copies from the file as a party was unlawful*."

62. The Istanbul Judge's Office no. 3 (given jurisdiction under Article 10 of the Anti-Terror Law) dismissed the applicants' request with no right of appeal (File no. Misc. Works 2012/121 on 25/9/2012) with the justification that "*As per Article 153 of the TCC, the decision of restriction is valid until removed. It is clear that copies can be obtained from the relevant court as per TCC 153/4, following the acceptance of the indictment of the case*." This decision was notified to the applicants on 10/10/2012.

11. Report of the State Supervisory Council of the Presidency of the Republic

63. A report was prepared by the State Supervisory Council of the Presidency of the Republic regarding Hrant Dink' murder, which is understood to consist of 650 pages, on 2/2/2012. The 34-page summary section of the report was published on the website of the Institution (http://www.tccb.gov.tr/ddk/ddk50.pdf) "*due to the confidentiality of the preliminary investigation that is being conducted by the Public Prosecutor's Office regarding the same matter and other reasons*". In summary, the following matters were included in the published part of the report;

> "*It has been observed that numerous allegations have been made both in reports that have been prepared with regard to the matter and in media outlets, that almost all of these are the subject matter of judicial and administrative examinations and investigations and/or are being handled*

in ongoing investigations and prosecutions,

That 28 reports have been drafted by administrative units with regard to Hrant Dink's murder, that around 50 decisions have been delivered by the judicial authorities with regard for lack of jurisdiction, lack of competence and non-prosecution, that moreover, cases have been filed on the basis of two main indictments, that decisions of conviction have been delivered at both courts regarding the accused,

That it has been observed that within the scope of the murder of Hrant Dink, the chief editor of AGOS Newspaper, on 19/1/2007, the investigation regarding the personnel of the Gendarmerie Command of Trabzon was partially taken to the attention of the judiciary and that certain personnel have been convicted of the crime of neglect of duty, that the permission for investigation regarding the personnel of the MIT was granted, that however a decision of non-prosecution was delivered by the Chief Public Prosecutor's Office for statute of limitations, that decisions of conviction were delivered regarding the suspect of the murder and the instigators of the murder, that the investigations of the public prosecutors' offices as to whether other perpetrators and instigators were behind the murder and those initiated with regard to certain public officials in the aftermath of the judgment of the ECtHR were still ongoing,

That despite the fact that those who murdered Hrant Dink were apprehended by the security forces in a very short period of time, that the administrative investigation processes into the incident were completed and that the matter was referred to the judicial authorities with its several aspects and that the trial by courts of first instance was completed, the investigation and trial process could not be pursued in an effective, proper and speedy manner due to certain systemic problems, that therefore the public opinion and the family of Hrant Dink were not satisfied with the investigations/prosecutions that had been carried out by both the administration and the judicial authorities with regard to the murder, that especially, the allegations that the public officials alleged to have responsibility in the process in which Hrant Dink was murdered could not be tried and that the real perpetrators of the murder apart from those who had been apprehended could not be reached constituted the basis of

the criticism starting from the beginning of the investigation/prosecution processes,

That the first matter to be expressed with regard to the failure to protect Hrant Dink's right to life is the existence of certain structural problems pertaining to the security sector, that both the coordination gaps and internal/external supervision and civilian oversight gaps need to be bridged in this sector, that the 'basic perception error' that has existed for a long time in the implementation of the Law on the Trial of Civil Servants and other Public Officials no. 4483 also became apparent in the investigation and prosecution of the actions allegedly committed by public officials in the process during which Hrant Dink was murdered, that therefore, within the scope of the main action that took place with regard to Hrant Dink's murder; the negligence and mistakes of public officials need to be primarily investigated by authorities of judicial justice as per Articles 37, 38, 39 and 83 of the Code no.5237, that the primary nature of certain actions of public officials appearing as misconduct and negligence that surfaced prior to and after the murder need to be absolutely clarified during the judicial investigation and especially the trial phase within the scope of the main crime, that similarly, the evidence pertaining to actions that appear as misconduct and negligence need to be collected by the Public Prosecutor's Office without any restriction despite the administrative investigation processes that have been initiated, that due to the failure of not proceeding in this way, the capacity of the relevant Courts to have access to evidence and the truth has been restricted in the main case that has been heard at an instance of judicial justice,

That the deficiency in the administrative examinations and investigations that have been carried out with regard to public officials in connection with Hrant Dink's murder is a 'method error', that the acts of negligence of public officials that followed each other in succession were not examined as a whole within the framework of the Law no. 4483 and that separate investigations and examinations were conducted by different units as per both the venue and the location where the crime was committed, that the method error in question corresponds to one of the implementation errors brought forward by the Law no.4483, that the method in question that was followed in administrative investigations and examinations led to

the failure to evaluate the facts by means of considering them as a whole and to question all allegations together, that this situation resulted in the failure to grasp the severity of the actions of public officials during this process, to question whether or not there is a causal link with the principal action and thus to obtain a result from the administrative examination and investigations, that at the same time, the method in question that was followed also led in time to the emergence of reflexes such as each of the administrative units trying to shift/put the acts of negligence and errors on other units,

To conclude after having evaluated the information and documents pertaining to all of the examinations, research and investigations with regard to public officials in connection with the matter; the security department and gendarmerie personnel knew the existence of a threat against Hrant Dink, that the intelligence units did not conduct the necessary work, nor did they act in cooperation, with regard to Hrant Dink's protection, that although administrative authorities were in a position to be able to know the risks that emerged against Hrant Dink, the precautions that were necessary to prevent the hazard were not taken as a result of the chain of actions of those responsible at all levels, that the hazard materialized and Hrant Dink lost his life, that therefore the positive liability to protect the right to life, which is expressed both under Article 17 of the Constitution and Article 2 of the European Convention of Human Rights which is part of our domestic law, and that a gross neglect of duty was thus created, that with a view to ensuring the effective utilization of the rules of domestic law that guarantee the right to life in the aftermath of the occurrence of the death and displaying the responsibilities of the State officials or organs; the State organs immediately launched the required investigations in the domains of both criminal law and disciplinary law regarding the perpetrators of the incident that could be identified and the public officials who had negligence and fault in the incident, although the legally foreseen processes were abided by in the investigations that were conducted by administrative organs, it has been concluded that an effective outcome could not be obtained from the investigations that were conducted due to both the nature of legislative regulations pertaining to the trial of public officials and the errors/mistakes in the methods that were

pursued with regard to the matter of investigating public officials as well as other deficiencies, in this respect, the fact that certain public officials were included in the previously initiated investigation process by the Istanbul Chief Public Prosecutor's Office in the aftermath of the judgment of the ECtHR is considered to be positive, albeit belated, in terms of rectifying the erroneous practice mentioned above".

B. Relevant Law

64. Article 157(1) of the Code of Criminal Procedure no. 5271 of 4/12/2004, headed *''Confidentiality of Investigation'',* is as follows:

"*On the condition that cases in which the law applies another provision are reserved and it does not harm the defense rights, the procedural actions at the investigation stage shall be confidential.*

65. Article 153 of the Code no. 5271, headed "*Authority of defense counsel to examine file*", prior to the amendment made on 21/2/2014 is as follows:

The defense counsel may examine the content of the file and take a copy of the documents of his/her choosing free of charge at the investigation stage.

(2) If the defense counsel's examination of and taking a copy of the content of the file might jeopardize purpose of the investigation, said authority may be restricted by a decision of the criminal judge of peace upon request of the Public prosecutor.

(3) Provision of paragraph two shall not apply to the minutes containing the statement of the arrested person or suspect and the minutes concerning the experts' reports and other judicial actions during which the above mentioned are authorized to be present.

(4) The defense counsel may examine the content of the file and the safeguarded evidence, take copies of all minutes and documents free of charge as of the date on which the indictment is accepted by the court.

(5) The attorney of the person damaged by the crime shall also benefit from the rights stipulated in this article."

66. Paragraphs (2), (3) and (4) of the mentioned Article were abolished via the amendment that was made to Article 153 of the Code no. 5271 with Article 19 of the Law no. 6526 of 21/2/2014.

67. Article 234(1) of the Code no. 5271, headed *'' Rights of the victim and the complainant"*, is as follows:

> "*1) Rights of the victim and the complainant are as follows:*
>
> *a) At the investigation stage;*
>
> *1. Requesting collection of evidence,*
>
> *2. Requesting the copy of a document from the Public prosecutor on condition that it does not impair the purpose and confidentiality of the investigation,*
>
> *...*
>
> *4. Having the investigation documents and the seized and safeguarded property inspected through his/her attorney on condition that it complies with Article 153,*
>
> …"

68. Article 267(1) of the Code no. 5271, headed *''Decisions which may be opposed"*, is as follows:

> "*Decisions of the judge and, in cases shown by the law, decisions of the court may be3 opposed.*"

69. Article 172(3), headed "*Decision on No Grounds for Prosecution*", that was added to the Code no. 5271 as per Article 19 of the Law no. 6459 of 11/4/2013 that entered into force on 30/4/2013 is as follows:

> "*(3) (Additional paragraph: 11/04/2013-6459 D.N./19. art) In the event that it is determined that the decision on no grounds for prosecution is made without conducting an effective investigation by the final decision of European Court of Human Rights, an investigation shall be re-conducted if requested within three months following finalization of the decision.*"

IV. EXAMINATION AND GROUNDS

70. The individual application of the applicants (File no. 2012/848 of 12/11/2012) was examined during the session held by the Court on 17/7/2014 and the followings were decided.

A. The Applicants' Allegations

71. The applicants indicated that the investigation that had been conducted based on the file no. 2007/972 with regard to the murder of Hrant Dink, who was their relative in the first degree, had not been carried out with reasonable diligence and promptness, that the investigation file had been kept confidential vis-a-vis themselves, that potential suspects had been left without punishment and that the requirements of the judgment of the ECtHR had not been fulfilled at the current state of affairs, that in the investigation file of the same Public Prosecutor's Office no. 2013/93822 no permission for investigation with regard to public officials had been granted as a result of the investigation that had been conducted as per the Law no. 4483 and alleged that the right to life guaranteed under Article 17 of the Constitution had been violated under its procedural aspect; that moreover, since there was no effective remedy against the decision of confidentiality of the investigation, Article 40 of the Constitution had also been violated in conjunction with Article 17.

72. In addition, the applicants alleged that they had requested documents from the file of the Istanbul Chief Public Prosecutor's Office (File no. Hz.2007/972 of 10/9/2012), that however, this request of theirs had been dismissed due to the decision of confidentiality, that in this way their right to bring forward claims and guide the course of the trial by having access to information as plaintiffs had been prevented, that taking copies of the minutes and documents in the investigation file constituted an integral part of the right to legal remedies and thus the right to a fair trial, that in the investigation file of the same Public Prosecutor's Office (File no.2013/93822) no permission for investigation with regard to public officials had been granted as a result of the investigation that had been conducted as per the Law no. 4483, that as a result of the state's self-protection reflex, these had been made to benefit from special protection methods by committees that were not independent or impartial and that

for these reasons Articles 2, 10 and 36 and Article 11 in conjunction with these articles had been violated, and they requested TRY 500.000 in compensation.

B. The Constitutional Court's Assessment

1. Admissibility

a. Alleged Violation of the Right to Life

73. While an assessment as to the admissibility of the complaints was done in the observations of the Ministry concerning the applicants' claim that Article 17 of the Constitution was violated, it was stated that it needed to be considered that the investigation process was still going on, that in accordance with Article 45(2) of the Law on the Establishment and Trial Procedures of the Constitutional Court no. 6216 of 30/3/2012, an individual application could be lodged only after the entirety of remedies had been exhausted, and that this condition had not been fulfilled.

74. In response to the observations of the Ministry with regard to the admissibility of the application, the applicants claimed that they were aware that the investigation was still going on, that however, they could not access the content of the file due to the decision of confidentiality, that their request for the removal of the decision of confidentiality had been dismissed and that the remedies to this end had been exhausted, that therefore the Ministry's objection as to the non-exhaustion of remedies was not justified.

75. Firstly, whether or not the applicants have application capacity and benefit in the examination of the alleged violation should be examined. In Article 46(1) of the Law no. 6216, it is adjudged that only those whose current and personal right is directly affected due to the act, action or negligence that is claimed to result in the violation have the right to individual application. In line with the inherent nature of the right to life, an application towards this right regarding the people who have lost their lives can only be lodged by the late people's relatives who suffer from the death that has occurred (App. no. 2012/752, 17/9/2013, § 41). The applicants are the spouse, children and sibling of the individual who lost

his life in the incident that is the subject of the application, they submitted a petition of complaint with regard to the incident and participated in the investigation and prosecution phases from the beginning. Therefore, the applicants have benefit in the determination that the investigation that had been conducted with regard to the death incident amounted to the violation of the right to life under Article 17 of the Constitution, and there is no deficiency in terms of their capacity of application.

76. Secondly, in order for an action or decision to be the subject of individual application, all legal remedies that are envisaged in that regard need to be exhausted. The condition of exhausting the legal remedies stipulated in Article 45(2) of the Law no. 6216, is a natural outcome of the fact that the individual application is a final and extraordinary remedy to prevent the violation of fundamental rights. In other words, the fact that administrative authorities and courts of instance are primarily liable to resolve the violations of fundamental rights renders compulsory the condition of exhausting legal remedies (App. no. 2012/1027, § 20-21, 12/2/2013). Even though this condition is not absolutely necessary with regard to whether or not an investigation has been effective, the expectation as to how it will be concluded by the relevant public authorities with the condition that the investigation that is being conducted does not exceed a reasonable period would be in harmony with the secondary nature of the protection mechanism that has been introduced with individual application. Even though there are pending cases and investigations that are still being conducted and that have been finalized in addition to the cases that have been filed and concluded as a result of both the complaint of the applicants and the investigations that were conducted *ex officio* with regard to the incident that is the subject of the application, the fact that the procedural aspect of the State's positive liabilities within the scope of the right to life in the incident that is the subject of the application is examined by the Constitutional Court at this stage to determine whether or not a behaviour in line with these liabilities has been displayed will not be in contradiction with the secondary protection mechanism.

77. As soon as the moment they realize or must realize that an investigation will not be launched, that there has been no progress in the investigation, that an effective criminal investigation has not been carried

out and that there is not the smallest realistic chance that this kind of an investigation will be conducted in the future, individual applications lodged by applicants should be able to be accepted. In this kind of a situation that concerns the right to life, the applicants need to display the required care, be able to take initiatives and submit their complaints to the Constitutional Court without too much time elapsing. With regard to the investigation lasting too long and an application being lodged without the investigation process being completed, a very harsh attitude should not be adopted vis-a-vis the relatives of the deceased. However the determination of this situation will be naturally be evaluated depending on the circumstances of each case (for decisions of ECtHR in the same vein, see *Varnava and Others v. Turkey* [GC], no. 16064/90, 18/9/2009). Thus, in order to make a decision pertaining to the matter of exhausting legal remedies while the admissibility examination pertaining to the complaints of the applicants with regard to Article 17 of the Constitution is continuing, the scope of the State's positive liability to "*establish an effective judicial system*" in order to protect the right to life within the framework of Article 17 of the Constitution needs to be determined. Due to the fact that they are intertwined, it has been concluded that this assessment as to the admissibility should be conducted together with the examination as to the merits.

78. Therefore, it has been determined that the applicants' claims to the effect that Article 17 of the Constitution has been violated is not manifestly ill-founded as per Article 48 of the Law no. 6216. As no other reason for inadmissibility has been found, it should be decided that this part of the application is admissible.

79. The applicants also claimed that a decision of confidentiality had been delivered in the investigation conducted into the murder of Hrant Dink, who was their relative, and that since there was no effective remedy against this decision, Article 40 of the Constitution was also violated in conjunction with Article 17.

80. While a qualification-related assessment was made in the observations of the Ministry with regard to the claim of the applicants that Article 40 of the Constitution had been violated, it was indicated that the way the

complaints were phrased in the present application and their scope needed to be taken into consideration and that the complaint in this regard needed to be examined within the scope of Article 17 of the Constitution.

81. Even though no observations have been submitted by the Ministry with regard to the allegations that Article 40 of the Constitution had been violated, the applicants, in response to the observations of the Ministry as regards the qualification, stated that the allegations pertaining to Article 40 of the Constitution also needed to be examined by the Constitutional Court in addition to other allegations of violation. In their observations regarding the merits of the application, the applicants alleged that the remedy of application to the judge who examined the removal of the decision of confidentiality on the investigation file was not an effective remedy that provided the guarantees required by Article 40 of the Constitution to the applicants in the present case regarding the fact that an adversarial trial had not been conducted, that no hearings had been held and that the decision had been delivered without justification.

82. Since the applicants' allegations that the investigation had not been conducted in an effective manner were not found to be manifestly ill-founded and were examined within the framework of Article 17 of the Constitution, it was not deemed necessary in this context to evaluate the allegation that Article 40 of the Constitution had been violated and the complaints to this end were also examined within the framework of Article 17 of the Constitution.

b. Alleged Violation of the Right to A Fair Trial

83. The applicants alleged that, due to the confidentiality of the investigation, their right to bring forward claims and guide the course of the trial by having access to information as plaintiffs had been prevented, that taking copies of the minutes and documents in the investigation file constituted an integral part of the right to claim rights and thus the right to a fair trial, that permission was required to conduct investigations against the public officials, that therefore these individuals were allowed to benefit from special protection methods and that as a result, Articles 2, 10 and 36 of the Constitution as well as Article 11 in conjunction with these articles were violated.

84. In response to these allegations of the applicants, it was indicated in the observations of the Ministry that under Article 6 of the ECHR that regulates the right to a fair trial, the rights and principles with regard to the fair trial were applicable while deciding on the merits of *''disputes pertaining to civil rights and obligations''* and *''a criminal charge''*, that the fact that the applicants were not under any criminal charge in the criminal investigation in question needed to be taken into consideration and that therefore a decision of lack of jurisdiction *ratione materiae* needed to be given.

85. The Constitutional Court is not bound by the legal qualification of the facts made by the applicant, it appraises the legal definition of the facts and cases itself. For this reason, these allegations of the applicants have been considered by the Court to be related with Article 36 of the Constitution and evaluated within the scope of the right to a fair trial.

86. As per Article 148(3) of the Constitution and Article 45(1) of the Law no. 6216, real and legal persons who claim that, out of their fundamental rights and freedoms which are guaranteed by the Constitution, any right or freedom that is within the scope of the European Convention on Human Rights and its additional Protocols, to which Turkey is a party, is violated by public force are granted the right to individual application to the Constitutional Court.

87. According to the provisions of the Constitution and Code that are cited, in order for the examination of the merits of an individual application that is lodged with the Constitutional Court, the right, which is claimed to have been interfered by the public force, must fall within the scope of the ECHR (the Convention) and the additional Protocols to which Turkey is a party, in addition to its being guaranteed in the Constitution. In other words, it is not possible to decide on the admissibility of an application which submits an alleged violation of a right that falls outside the common protection area of the Constitution and the Convention

88. Article 36(1) of the Constitution, headed *"Freedom to claim rights"*, is as follows*:*

"Everyone has the right to make claim and defend themselves either as plaintiff or defendant and the right to a fair trial before judicial bodies through the use of legitimate ways and means."

89. As also stated in the Constitutional Court's judgments, Article 36(1) of the Constitution provides that everyone has the right to make claims and defend themselves either as plaintiff or defendant and the right to a fair trial before judicial bodies through the use of legitimate ways and means. Since the scope of the right to a fair trial is not regulated in the Constitution, the scope and content of this right needs to be determined within the framework of Article 6 of the Convention, headed "*Right to a fair trial*" (App. no. 2012/1049, 26/3/2013, § 22-27).

90. It is indicated under Article 6 of the ECHR regulating the right to a fair trial that the rights and principles with regard to a fair trial are applicable while deciding on the merits of *''disputes pertaining to civil rights and obligations''* and *''a criminal charge''*, and the scope of the right is thus restricted to these subjects. It is understood from this expression that in order to be able to lodge an individual application with the justification that the right to claim rights has been violated, either the applicant needs to be the party of a dispute pertaining to his/her civil rights and liabilities or a decision needs to have been delivered regarding a criminal charge pertaining to the applicant. Therefore, the applications based on the claim that the right to a fair trial has been violated –which are outside the circumstances that have been referred to– cannot be the subject of an individual application as they would be outside the scope of the Constitution and the Convention.

91. According to the case law of the ECtHR, individuals who are victims, those damaged by the crime, the plaintiffs or the intervening parties who request that third persons be indicted or sentenced in a criminal case are outside the field of protection of Article 6 of the Convention. The exceptions to this rule are the circumstances whereby a system that allows for claiming a civil right in the criminal case has been adopted or the decisions delivered as a result of the criminal case are also effective or binding in terms of the civil case (see *Perez v. France*, no. 47287/99, 12/2/2004, § 70).

92. With the entry into force of the Code no. 5271, the possibility of claiming a personal right in criminal trial was removed. Therefore, the applicants do not have the possibility of claiming their civil rights during the criminal trial process.

93. The applicants filed a criminal complaint to ensure the initiation of an investigation against the individuals whom they believe to have committed crimes, and their request is limited with the point that their right to claim rights and in this context their right to a fair trial were violated due to their inability to reach all information and documents pertaining to the criminal investigation actions that were conducted and the lack of an effective remedy against this.

94. For this reason, since the subject of the applicants' allegation of violation, which is based on Article 36 of the Constitution, is outside the field of protection of fundamental rights and freedoms that are guaranteed in the Constitution and fall into the scope of the Convention, this part of the application must be declared inadmissible due to "*lack of jurisdiction ratione materiae*".

2. Merits

a. Claims of the Applicants and the Observations of the Ministry

95. The applicants alleged that Article 17 of the Constitution, which guarantees the right to life, had been violated under its procedural aspect by indicating that the investigation that had been conducted into the murder of their first degree relative had not been conducted with reasonable diligence and promptness, that the investigation file had been kept confidential vis-a-vis themselves, that there was no effective remedy against the decision of confidentiality, that the suspects were left unpunished as a result of the examinations that had been conducted as per the Law no. 4483 and that the requirements of the judgments of the ECtHR had not been fulfilled at the current state of affairs.

96. According to the observations of the Ministry, while the complaints as to the violation of Article 17 of the Constitution were being evaluated, it was decided by the ECtHR upon the application lodged by the applicants

with regard to the murder of Hrant Dink that the right to life had also been violated under its procedural aspect in addition to its substantive aspect, and following the judgment of the ECtHR (see *Dink v. Turkey*, no. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14/9/2010), a new progress was achieved in the trial processes in terms of the effectiveness of the investigation.

97. In the observations of the Ministry, a reference was also made to the principles that were adopted by the ECtHR in terms of the right to life, and it was indicated that, within the context of the ECtHR case-law, the investigation needed to be as open (accessible) as required to the public oversight and the relatives of the victim in order for their legitimate interests to be protected, that however, the requirement of accessibility could not be considered as a definitive (automatic) requirement of Article 2 of the European Convention on Human Rights (ECHR) that would apply in all circumstances given the fact that the announcement or publication of police minutes or investigation documents could lead to certain sensitive (important) problems that could harm private individuals or other investigations, that therefore, the accessibility requirement of the investigation vis-a-vis the public or the relatives of the victim could be fulfilled at other appropriate phases of the procedure, that in some circumstances even announcing the result that is obtained to the public despite the fact that the investigation has been conducted in confidentiality could suffice, and that Article 2 of the Convention did not impose on the investigation authorities the liability of fulfilling every request made by the relatives of the deceased in order for the investigation measures to be taken.

98. In the observations of the Ministry, it was finally indicated that the provisions of the legislation that was in force were in line with the ECtHR principles to a great degree and it was emphasized that the assessment of the complaints to the effect that the right to life was violated under its procedural aspect was at the discretion of the Constitutional Court.

99. Against the observations of the Ministry regarding the merits of the application, the applicants indicated that the investigation file was not accessible due to the decision of restriction, that therefore it could not be claimed that they had participated in the investigation, that the fact that

the access to all documents had been absolutely and arbitrarily prohibited without justification, that the investigation had not been carried out with reasonable diligence and promptness and that the investigation had not been explained to themselves and to the public violated the obligation of effective investigation.

b. General Principles

100. Article 17(1) of the Constitution, headed *"Personal inviolability, corporeal and spiritual existence of the individual"*, *is as follows:*

> *"Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence."*

101. The right to life and the right to protect and improve one's corporeal and spiritual existence are among the rights which are closely tied, inalienable and indispensable. As specified by the Constitutional Court, the fundamental right over the integrity of life and body imposes positive and negative liabilities on States (see the Constitutional Court, E.2007/78, K.2010/120, 30/12/2010).

102. Within the scope of the right to life regulated in Article 17 of the Constitution, as a negative liability, the State has the liability not to end the life of any individual who is within its jurisdiction in an intentional and illegal way. Furthermore, as a positive liability, the State has the liability to protect the right to life of all individuals who are within its jurisdiction against the risks which may arise out of the actions of public authorities, other individuals or the individual himself/herself (the Constitutional Court, E.1999/68, K.1999/1, 6/1/1999). The State is responsible for protecting the corporeal and spiritual existence of an individual from all kinds of dangers, threats and violence (the Constitutional Court, E.2005/151, K.2008/37, 3/1/2008; and E.2010/58, K.2011/8, 6/1/2011).

103. In cases where the loss of life occurs under the conditions which can require the responsibility of the State, Article 17 of the Constitution imposes on the State the duty of taking effective administrative and judicial measures which will ensure that the legal and administrative framework that is formed in order to protect the right to life is duly applied and that the violations of this right are stopped and punished by making use of all

available facilities. This liability is valid for all types of activities, public or not, in which the right to life may be in danger.

104. However, by taking into consideration of the preference of the action to be taken or the activity to be carried out by evaluating, in particular, the unpredictability of human behaviours, priorities and resources, positive liability should not be interpreted in a way that will create extreme burden on the authorities. In order for a positive liability to arise, after it is accepted that it is known by the authorities that the life of a specific individual is in real and imminent danger or that the circumstances where this should be known exists, within the framework of this kind of a situation, it needs to be determined that they have not taken any measures at all or they have not taken measures in the required manner in order to prevent the realization of this danger within reasonable limits and the liabilities that are attributed to them (*for the decisions of the ECtHR in the same vein, see Keenan v. the United Kingdom, 27229/95, 3/4/2001, §§ 89-92; A. and Others v. Turkey, 27/7/2004, 30015/96, § 44-45; and İlbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey, 19986/06, 10/4/2012, § 28*).

105. As also stated in the decisions of the Constitutional Court, in circumstances where State officials or organizations are negligent to a point that surpasses erroneous considerations or lack of attention in death incidents occurring as a result of negligence, or in other words in circumstances where the authorities in question fail to take the required and sufficient measures to eliminate hazards occurring as a result of a hazardous activity by means of neglecting the duties attributed to them despite being aware of the potential consequences, regardless of the legal remedies that may have been applied to by individuals on their own initiative, the lack of any accusation against the individuals who have endangered the lives of people or the failure to try these individuals may result in the violation of Article 17 (App. no. 2012/752, 17/9/2013, § 60).

106. Therefore, the State has the liability to conduct a comprehensive and effective criminal investigation with regard to murders committed as a result of the actions of third persons. From the losses of life which occur as a result of the fact that preventive measures are not taken, in cases which require the responsibility of the State, within the scope of "*an effective judicial system*" which needs to be formed as per Article 17 of

the Constitution, there needs to be an independent and impartial official investigation procedure which meets minimum standards which are determined in terms of effectiveness and ensures that judicial sentences are imposed within the framework of the findings of the investigation. In such cases, competent authorities should work hard and immediately and initiate an investigation *ex officio* in order to determine primarily, the conditions in which the incident has occurred and dwell on the disruptions in the functioning of the review system, secondarily, the State officials or authorities that play a role in any way in the chain of facts in question (App. no. 2012/752, 17/9/2013, § 62; for decisions of the ECtHR in the same vein see *Budayeva and Others v. Russia*, 15339/02, 20/3/2008, § 142).

107. Therefore, the positive liabilities imposed on the State within the right to life also have a procedural aspect. Within the framework of this procedural liability, the State is obliged to carry out an effective official investigation which can ensure that those who are responsible for each fact of death which is not natural are determined and punished, if necessary, The main aim of this type of investigation is to guarantee the effective implementation of the law that protects the right to life and, in the facts in which public officials or institutions are involved, to ensure that they are accountable against the deaths which occur under their responsibility (for decisions of the ECtHR in the same vein see *Anguelova v. Bulgaria*, App. no. 38361/97, § 137; *Jasinskis v. Latvia*, 21.12.2010, App. no. 45744/08, § 72).

108. It is necessary to determine the type of investigation required by procedural liability in a fact depending on whether the liabilities as regards the essence of the right to life require a criminal sanction or not. In cases pertaining to deaths occurring as a result of intention or assault or ill-treatment, the State has the liability to conduct criminal investigations that can allow for the determination and punishment of those responsible for the case of lethal assault as per Article 17 of the Constitution. In these kinds of facts, the mere payment of compensation as a result of the administrative and civil investigations and proceedings is not sufficient to redress the violation of the right to life and to remove the victim status (App. no. 2012/752, 17/9/2013, § 55).

109. The aim of criminal investigations conducted is to ensure that the provisions of the legislation which protect the right to life are implemented

in an effective way and that those who are responsible are accountable with regard to the death incident. This is not a liability of result, but a liability to use the appropriate means. In addition, the assessments included herein do not mean in any way that Article 17 of the Constitution grants applicants the right to make third parties tried or punished due to a judicial crime (for decisions of the ECtHR in the same vein, see *Perez v. France*, 47287/99, 22/7/2008, § 70) or imposes a duty of concluding all trials with a conviction or a certain criminal sentence (for decisions of the ECtHR in the same vein, see *Tanlı v. Turkey*, 26129/95, § 111) (App. no. 2012/752, 17/9/2013, § 56).

110. The criminal investigations to be conducted should be effective and sufficient so as to allow for those who are responsible to be determined and punished. In order to be able to say that an investigation is effective and sufficient, investigation authorities need to act *ex officio* and collect all evidence which can enlighten the death and can be suitable for the determination of those who are responsible. Deficiencies in the investigation that would reduce the likelihood of discovering the cause of the incident of death and/or those who are responsible bear the risk of clashing with the rule of conducting an effective investigation (for the decisions of the ECtHR in the same vein, see *Hugh Jordan v. the United Kingdom*, 24746/94, 4/5/2001, § 109; and *Dink v. Turkey*, 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14/9/2010, § 78).

111. One of the matters which ensures the effectiveness of the criminal investigations to be conducted is the fact that the investigation and the consequences thereof are open to public review in order to ensure accountability in practice as in theory. In addition, in each incident, it should be ensured that the relatives of the person who passes away are involved in this process to the extent that it is necessary so as to protect their interests (for decisions of the ECtHR in the same vein, see *Hugh Jordan v. the United Kingdom*, 24746/94, 4/5/2001, § 109).

c. Application of Principles to the Present Case

112. In the present case, the relative of the applicants lost his life as a result of an armed assault due to the action of a third individual/ individuals on 19/1/2007. With regard to this incident, a legal and

administrative framework for the liability to protect the right to life, which is one of the liabilities of the State, needs to be constituted and it needs to be demonstrated (whether or not) the responsibility to implement this framework as it should be exists.

113. In order for a liability of the State to arise, it needs to be known by public officials that the life of a specific individual is in real and imminent danger or after the acceptance of the existence of circumstances where this should be known, within the framework of this kind of a situation, it needs to be determined that the public authorities have failed to take precautions in such a way as to prevent the realization of this danger within reasonable limits and the powers they have (§ 104).

114. However, as a result of the examination it carried out in the *Dink v. Turkey* case that had been filed regarding the same incident, the ECtHR concluded that the security forces either knew or were in a position to be able to know the likelihood of a potential attack towards the concerned was high with regard to the matter of the presence of an open and imminent threat to Hrant Dink's life, that however, they did not take the precautions that needed to be resorted to in order to prevent the occurrence of the envisaged hazard, it decided that Article 2 of the Convention had been violated from a material point of view and found it appropriate, by taking into account some other matters that constitute reason for violation, that 100.000 Euros be paid jointly to the applicants Rahil Dink, Delal Dink, Arat Dink and Sera Dink and 5000 Euros be paid to the applicant Hasrof Dink within the circumstances of the present case (see *Dink v. Turkey*, App. no. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14/9/2010, § 66-75) Therefore, with regard to the right violation that occurred as a result of the failure of the public authorities to take precautions, the applicants were no longer victims. As a result, since the applicants lost their victim status, there is no legal interest in the examination of the same reason of violation by the Constitutional Court for a second time.

115. On the other hand, it was decided in the judgment of the ECtHR that the procedural aspect of the right to life had also been violated due to the fact that an effective investigation had not been conducted regarding the determination of public officials who could have committed negligence

in the death of Hrant Dink. Fulfilling the requirement of this judgment is a duty of the State as per the Convention. When it is taken into account that as per Article 46 of the Convention with the heading "*binding force and execution of judgments*", that the State Parties have the liability to abide by the finalized decisions of the ECtHR, that the finalized judgments of the Court are sent to the Committee of Ministers that will supervise the execution, that in the event that the Committee of Ministers is of the opinion that a High Contracting Party refuses to abide by a final decision that has been delivered in a case to which it is a party, a formal notice will be served to the concerned Party, after which it has the authority to refer the matter of this State not fulfilling its obligation that is envisaged under Paragraph 1 of the same Article to the Court and that in the event that the Court determines that Paragraph 1 has been violated, it can send the case to the Committee of Ministers for its assessment of the measures that can be taken, it is clear that whether or not the judgment that was issued with regard to Hrant Dink was abided by needs to be supervised by the Committee of Ministers.

116. In order for the Constitutional Court to be able to conduct a new examination into the same matter despite the presence of a judgment of violation that was issued by the ECtHR with regard to the procedural aspect of the right to life in the present case, the victimization of the applicants need to not have been resolved with the judgment of the ECtHR. It is observed in the mentioned application that the investigation file pertaining to the murder of Hrant Dink has been open since the beginning and that the examination with regard to determining those responsible is still on-going. In this case, it cannot be claimed that the applicants' victim status has been terminated with the judgment of violation of the ECtHR. The Constitutional Court needs to examine especially whether or not, upon the judgment of the ECtHR, an effective investigation was carried out by the Public Prosecutor's Office with the aim of determining the public officials whose negligence has been observed in protecting Hrant Dink's life or who took part in the organization for committing the murder and sanctioning these actions.

117. The applicants alleged that the investigation into the incident was not carried out with reasonable diligence and promptness, that the

potential suspects were left unpunished and that the requirements of the judgment of the ECtHR were not fulfilled (§ 95). In the observations of the Ministry, it was indicated with regard to the matter that it was decided, upon the application lodged by the applicants, by the ECtHR on 14/9/2010 that the right to life had also been violated under its procedural aspect in addition to its substantive aspect with regard to the murder of Hrant Dink, that following the judgment of the ECtHR, new progress was achieved in the trial processes in terms of the effectiveness of the investigation (§ 96).

118. As it is also indicated in judgments of the ECtHR, in order to be able to refer to the effectiveness of an investigation, it is compulsory that the individuals who are assigned to conduct the investigation be independent from those individuals who could have been implicated in the events. Independence does not only require hierarchical or institutional independence, but also practical independence (see *Hugh Jordan v. United Kingdom,* App. no. 24746/94, 4/5/2001, § 120; and *Kelly and Others v. United Kingdom,* App. no. 30054/96, 4/5/2001, § 114). The investigation needs to be of the quality to be able to lead to the determination and punishment of those responsible (see *Paul and Audrey Edwards v. United Kingdom,* App. no. 46477/99, 14/3/2002, § 71). For an effective investigation in the sense of Article 2 of the Convention, the investigation needs to be carried out with reasonable diligence and promptness (see *Rantsev v. Cyprus and Russia*, App. no. 25965/04, 7/1/2010, § 233; *Çakıcı v. Turkey* [BD], App. no. 23657/94, 8/7/1999, § 80, 87, 106; and *Kelly and Others* mentioned above, § 97). During all this process, the relatives of the victim must be involved in the procedure to the extent necessary to safeguard his legitimate interest (see *Güleç v. Turkey*, App. no. 21593/93, 27/7/1998, § 82; and Kelly and Others, cited above, § 98).

119. In the present case it is observed that the investigation was carried out by means of following two separate procedures regarding the public officials. The first investigation was conducted over the file (File no. Hz.2007/972) by the Istanbul Specially Authorized Public Prosecutor's Office within the framework of general principles independent from the individuals alleged to have been implicated in the incident. The second investigation was conducted based on miscellaneous investigation numbers by the Offices of the Chief Public Prosecutors of Trabzon and Istanbul within the framework of the procedure envisaged by the Law no.

4483 and that resulted in decisions to the effect that there were no grounds for prosecution or any action being taken with regard to the other public officials who were determined to have a connection with the incident, with the exception of several tangible judicial actions pertaining to a number of officials of the Trabzon Gendarmerie.

120. Accordingly, as it is also emphasized in the ECtHR judgment pertaining to Hrant Dink (see *Dink v. Turkey*, 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14/9/2010, § 82), the fact that the public officials alleged to have been negligent with regard to the incident were not investigated by independent judicial units and that their roles in the incident were not determined from the date on which the murder occurred until the date of examination of the individual application (§ 39) despite the fact that the identities of the civil servants who had negligence in terms of fulfilling the liability of protecting the life of the deceased were determined and communicated to the investigation units in Istanbul and Trabzon after the murder by the Public Prosecutor of Istanbul weakened the effectiveness of the investigation. It is not possible to claim that the investigations pertaining to the public officials alleged to have had responsibility in Hrant Dink's murder were carried out as impartially, effectively, orderly and speedily as desired due to certain problems that were systemic and stemmed from practice.

121. When it is taken into account that in Hrant Dink's murder, the investigation of certain acts of the public officials that were observed, such as misconduct or neglect which occurred before or after the murder, were investigated within the scope of the Law no. 4483, that therefore the conduct of investigations with regard to the security personnel alleged to have been negligent in the committal of the murder was ensured by the Governor, who was their superior, that the Governor did not grant the permission for investigation as a result of the examination, that the objection that was filed against this decision was dismissed by the Regional Administrative Court, it has been observed that this situation prevented an effective investigation aimed at determining the responsibility of public officials and especially the clarification of the acts that could be attributed to these individuals at the investigation and trial phases within the scope of the principal crime. Competent authorities are expected to conduct effective investigations and prosecutions with the aim of reaching the material fact.

Under circumstances where due diligence is not shown in this respect, it can be said that the investigation procedure that is envisaged by the Law no. 4483 leads to the failure to conduct an effective investigation that would uncover the potential responsibilities of public officials in terms of the protection of the right to life.

122. On the other hand, as also indicated in the Report of the State Supervisory Council, it is understood that one of the practical errors led by the Law no. 4483 in administrative examinations and investigations that were carried out with regard to the public officials in connection with Hrant Dink's murder was a "*method error*", that the acts of negligence of the public officials that followed each other in succession were not examined as a whole within the framework of the Law no. 4483, that separate investigations and examinations were conducted by different units according to both their authorities and the location where the crime was committed. It has been determined that this method resulted in the failure to consider and evaluate the facts as a whole, to question jointly all allegations, to grasp the severity of the acts of public officials during the process, to discuss whether or not there was a causal link with the principal act and thus to obtain a result out of the administrative examinations and investigations all together (§ 63).

123. In the present case, it is observed that an effective investigation was not carried out into the matters that are indicated in the Report of the State Supervisory Council and determined by the ECtHR to be the reason of the violation. Therefore, it is understood that the victimization, which is based on the violation, was not resolved either. Indeed, it has been determined that the assessments of the ECtHR were not taken into consideration as they should have been in fulfilling the State's positive duty pertaining to determining and, if necessary, punishing the public officials, who are alleged to have responsibility in the chain of events, within the scope of an effective judicial system, that the efforts to remedy the problems of the system and method errors were not exerted with due diligence, immediacy and responsibility, and that the indications in this direction were far from being satisfactory. Moreover, given the fact that the decisions of non-prosecution that were issued during the investigation process without even referring to the statements of relevant public officials constitute a reason for violation in and of themselves, and when it

is also taken into account that no acceptable, transparent information and findings could be obtained to be able to consider the time that elapsed in the pursuit of the investigation to be reasonable, it cannot be said that the investigation was carried out in an effective manner in line with the State's positive liability.

124. Accordingly, since it has been understood that the statements of the public officials in Istanbul and Trabzon, whose identities were determined with the allegation that they were negligent in the incident, could not be taken by independent judicial units despite the fact that a lengthy period of time elapsed since the murder, that their roles in the incident could not be determined, that the relatives of the murdered individual could become aware of the investigation process or participate to it only through their own efforts, that the investigation was not conducted with reasonable diligence and promptness due to both the failure to show due diligence in implementing the legislation pertaining to the trial of public officials and the errors in the methods that were pursued while investigating the public officials and the failure of judicial units to act with sufficient speed and care; it should be accepted that this investigation, which was conducted in such a way as to bear prejudice to the essence of the right, was ineffective as a whole.

125. Since it has been determined that the investigation was ineffective, it has not been deemed necessary to separately examine the complaint of the applicants to the effect that the fact that the file had been kept confidential vis-a-vis themselves through the decision of restriction that was issued in the investigation phase and that there was no effective remedy against this constituted a violation of right.

126. For the explained reasons, it should be decided that the investigation that was reopened especially upon the judgment of the ECtHR against the Trabzon gendarmerie and security personnel and Istanbul police officials and administrative superiors, who were alleged to have had responsibility and negligence in the murder of Hrant Dink, was not effective as a whole and that the procedural liability that is a result of the positive liability of the State envisaged by Article 17 of the Constitution was violated.

V. APPLICATION OF ARTICLE 50 OF THE LAW NO. 6216

127. Paragraphs (1) and (2) of Article 50 of the Law no. 6216, headed *''Decisions"*, are as follows:

> *"(1) At the end of the examination of the merits, it shall be decided that the right of the applicant has been violated or has not been violated. In the event that a decision of violation is delivered, what needs to be done for the removal of the violation and its consequences shall be adjudged. However, legitimacy cannot be reviewed, no decision with the quality of an administrative act and action cannot be delivered.*
>
> *(2) If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favor of the applicant or the remedy of filing a case before the general courts may be shown. The court, which is responsible for holding the retrial, shall deliver a decision based on the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."*

128. In the application, it has been concluded that Article 17(1) of the Constitution has been violated under its procedural aspect. The applicants requested that the pecuniary and non-pecuniary damages they suffered be compensated.

129. Since it has been determined that on 14/9/2010 the ECtHR awarded 105.000 Euros to the applicants (§ 36) and that on 27/10/2010 the Istanbul 10thAdministrative Court awarded TRY 100.000 to the applicants (§ 52), it has been considered that the applicants will not be awarded further compensation in this respect.

130. It has been decided that the litigation costs of TRY 1,886.20 in total, which composed of the application fee of TRY 386.20 and the counsel's fee of TRY 1,500.00, incurred by the applicants and determined in accordance with the documents in the file, will be paid to the applicants.

VI. JUDGMENT

In the light of the reasons explained, it was **UNANIMOUSLY** held on 17/7/2014;

A. That,

1. the part of the application as to the alleged violation of Article 36 of the Constitution be declared **INADMISSIBLE** for "*lack of jurisdiction ratione materiae*";

2. its part as to the alleged violation of Article 17(1) of the Constitution under its procedural aspect be declared **ADMISSIBLE**,

B. That Article 17(1) of the Constitution was **VIOLATED** in terms of the State's procedural liability,

C. That the applicants' request for compensation **BE DISMISSED**,

D. That the litigation costs of TRY 1,886.20 in total, which composed of the application fee of TRY 386.20 and the counsel's fee of TRY 1,500.00, incurred by the applicants and determined in accordance with the documents in the file, **BE PAID TO THE APPLICANTS**,

E. That the payments be made within four months as of the date of application by the applicants to the Ministry of Finance following the notification of the decision; that in the event that a delay occurs as regards the payment, the legal interest be charged for the period that elapses from the date on which this period ends to the date of payment,

That a copy of the judgment be sent to the Istanbul and Trabzon Chief Public Prosecutors' Offices as per Article 50(1) of the Law no. 6216 in order for the violation and the consequences thereof to be redressed; and that a copy be sent to the applicants and the Ministry of Justice as per paragraph (3) of the same Article.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

SALİH ÜLGEN AND OTHERS

(Application no. 2013/6585)

SECOND SECTION
JUDGMENT

President	: Alparslan ALTAN
Justices	: Recep KÖMÜRCÜ
	Engin YILDIRIM
	Celal Mümtaz AKINCI
	Muammer TOPAL
Rapporteur	: Elif KARAKAŞ
Applicants	: 1- Salih ÜLGEN
	2- Mehmet Nuri ÜLGEN
	3- Fatma ÜLGEN
Counsel	: Att. Murat Rohat ÖZBAY

I. SUBJECT-MATTER OF THE APPLICATON

1. Indicating that the first applicant Salih Ülgen, , was wounded on 27/6/2006 as a result of a mine explosion in the area where he was grazing animals and the case that they had filed requesting compensation for the pecuniary and non-pecuniary damages that they have incurred was dismissed and not finalized within reasonable time. The applicants have alleged that their rights guaranteed by Articles 17, 36 and 40 of the Constitution have been violated and requested that such violations be identified and that the pecuniary and non-pecuniary damages they have incurred be compensated.

II. APPLICATION PROCESS

2. The application was lodged on 19/8/2013 via the 13th Civil Court of First Instance of Istanbul. As a result of the preliminary administrative examination of the petition and its annexes, it has been determined that there is no deficiency to prevent the submission thereof to the Commission.

3. It was decided by the Second Commission of the Second Section that the file be sent to the Section in order for its admissibility examination to be carried out by the Section.

4. In accordance with the interlocutory decision of the Second Section dated 4/12/2013, it was decided that the examination of admissibility and merits of the application be carried out together and a sample thereof be sent to the Ministry of Justice for its opinion.

5. The letter of opinion dated 4/2/2014 and No. 14755 of the Ministry of Justice was notified to the counsel of the applicants on 26/2/2014 and no counter-opinions in response to the opinion of the Ministry of Justice have been made by the applicants.

III. THE FACTS

A. The Circumstances of the Case

6. As expressed in the application form, the facts are summarized as follows:

7. On 27/6/2006, near the minefield that was set up as to ensure border security at a distance of 300 meters to the Ziyaret Infantry Border Company Command which is located on the Turkish-Iranian border in the district of Doğubeyazıt in the province of Ağrı, the first applicant, aged thirteen, Salih Ülgen who was grazing animals with two of his friends, aged eleven and twelve, entered the minefield in pursuit of the grazing sheep that have gone down along the wire fence on which there was a minefield warning sign.

8. Upon the explosion of the mine that they have found in the minefield, all three persons were wounded, the first applicant Salih Ülgen's right arm was severed from below his elbow and his body was injured in various locations.

9. With the request that the pecuniary and non-pecuniary damages that they have incurred due to the said incident be compensated, acting for and on behalf of Salih Ülgen and principally in their own name, Fatma Ülgen and Mehmet Ülgen have filed a case against the Ministry of National Defense requesting that a decision be given to the effect that pecuniary

damages of TRY 100,000.00 for the loss of capability to do work, TRY 420,000.00 as the cost for a prosthetic arm and a spiritual compensation of TRY 50,000.00 be paid to the first applicant and a spiritual compensation of TRY10.000,00 each for the second and the third applicants be paid separately.

10. The case was dismissed with the decision of the 2nd Administrative Court of Erzurum (File No: E.2007/167, K.2008/574 on 23/5/2008) . The justification section of the decision is as follows:

> *"It was understood that at the location where the incident took place, on the Turkish-Iranian borderline, mines were laid with the aim to protect the Ziyaret Border Company Post and that the terrain was a minefield where the vicinity of the place where the incident took place was surrounded by wire fence on which minefield warning signs hung, and that from the minutes of the judicial inspection at the place of the incident dated 28/6/2006 it was understood that within the minefield were herds of sheep, that these sheep were brought by the wounded children, and from the statement that was taken from the person who is an Infantry Corporal at the Ziyaret Border Company Post, who is the witness of the incident, that he was on watch at the post on the day of the incident, that he warned the three children who followed the herd of sheep that walked down by the wire fence that was marked with a minefield warning sign not to enter the minefield by blowing a whistle four times, that however the children did not heard his warning and entered the zone, that he once again warned them with the whistle and when the children did not egress the minefield he reported to the command of the post and that the explosion took place while the kids were playing with something in their hands. In this respect, as it is understood that the children did not comply with the warning of the watch post and that with the acceptance of the counsel of the claimant it is established that they entered the military restricted zone and played with the mine that was located inside the minefield, and as it was understood from the decision of the Office of the Chief Prosecutor of Doğubayazıt no. 2006/799 dated 6/11/2006 that it was determined that on the jack-knife which belonged to the claimant explosive residue containing TNT was found and that similar incidents had taken place on this site before, the conclusion that it was not possible that the families did not know the site was a minefield and that the incident resulted from the claimants' own negligence was reached and there is neither a negligence attributable to*

the administration nor, considering the course of the incident, any damage that has to be compensated by the administration in line with the principle of social risk.

As such, it was understood that in the occurrence of the incident in question the child of the claimants who entered the area that was known to be mined and around which were warning signs and wire fence and who started meddling with the mine with a jack-knife, and the mother and the father of the child who have failed to duly perform their duty of caring for and watching over their child were in complete negligence, hence the conclusion that it was necessary to dismiss the request for compensation since it would not be in compliance with the law to hold the defendant administration responsible for the damage and to sentence the latter to compensation."

11. The decision that was appealed by the claimants was approved by the decision of the 10th Civil Chamber of the Council of State (File No: E.2011/4372, K.2012/4251 on 8/5/2013). The applicants did not opt for the legal remedy of the correction of judgment.

12. The decision was notified to the counsel of the applicants on 25/7/2013.

13. The Ministry in its opinion dated 4/2/2013 (§5) has included the additional information below regarding the incident which is the subject of the application:

The Process of Criminal Investigation

14. Upon the mine explosion which is the subject of the application, within the scope of the investigation that was carried out by the Office of the Chief Prosecutor of Doğubayazıt regarding the officials of the 1st Mechanized Brigade Command all of the witnesses who were knowledgeable about and who saw the incident were heard, the required investigation on the incident site was carried out by specialist teams and pictures of the scene of the incident were taken. It was established that the scene of the incident was surrounded by wire fence on which warning signs showing that the site is a minefield were placed.

15. It was found out that the area where the incident took place was a Category 2 land military restricted zone and at the same time remained within the military security zone of the Ziyaret Border Company Post and at the end of the criminal examination that was conducted on the fragments of mine that were found at the scene of the incident as well as the knife belonging to the injured parties, explosive residue containing TNT have been found on the said knife.

16. The Office of the Chief Prosecutor of Doğubayazıt that has evaluated all the evidence that were obtained within the scope of the investigation concluded that the incident took place when the victims of the incident were playing with the mines (trying to open them) that they found there after their entry to the restricted minefield, and judged that there was no grounds for prosecution with the decision No. 2006/799 dated 6/11/2006.

17. The objection that was made by the applicants in relation to the aforementioned decision was dismissed with the decision of the Assize Court of Iğdır No. 2006/273 dated 20/12/2006.

B. **Relevant Law**

18. The last paragraph of Article 125 of the Constitution is as follows:

> "*The administration shall be liable to compensate for damages resulting from its actions and acts.*"

19. Article 1 of the Law of Administrative Procedure No.2577 of 6/1/1982 with the side heading "*Scope and quality*" is as follows:

> "*Written trial procedure shall be applied in the Council of State, regional administrative courts, administrative courts and tax courts and the examination shall be carried out over the documents.*"

20. Article 14(3) and 14(4)of the Law No.2577 with the side heading "*The first examination on petitions*" are as follows:

> *"(3) The petitions shall be examined by a rapporteur judge to be assigned by the head of the chamber in the Council of State, and by the chief judge or a member to be assigned by him/her in the administrative and tax courts in terms of the following aspects in the following order:*

a) Competence and venue,

b) Breach of administrative authority,

c) Capacity,

d) Whether there is a final act to be performed that will be the subject of the administrative proceeding or not,

e) Statute of limitations,

f) Hostility,

g) Whether they comply with Articles 3 and 5 or not,

(4) If the petitions are considered to be contrary to the law in terms of these aspects, this matter shall be notified to the competent chamber or court with a report. No report shall be arranged for the petitions of a case to be settled through a single judge and the provisions of Article 15 shall be imposed by the related judge. The examination to be performed according to paragraph 3 and the procedures to be carried out according to this paragraph and paragraph 5 shall be finalized within fifteen days at most following the date on which the petition is received.

21. Article 20(1) and 20(5) of the Law No.2577 with the side heading "*Examination of the files*" are as follows:

"(1) The Council of State and administrative and tax courts shall perform by themselves all types of examinations pertaining to the cases which they are trying. The courts may request from the parties and other related authorities the submission of the documents that they deem necessary and the provision of all types of information within the specified period. It shall be obligatory that the decisions on this matter be fulfilled by those concerned within due period. In the event that there are valid reasons, this period may be extended for once only.

"(5) In the Council of State, regional administrative, administrative and tax courts, the files shall be determined by their subjects by the Board of Presidents for the Council of State; and by the High Council of Judges and Prosecutors for other courts according to their status of priority or urgency specified in this Law and other laws, examined in terms of the date on which they are received, by considering the priority actions to be announced in the Official Gazette and be finalized in the order that they are

completed. The files which are not covered by these shall be finalized in the order that they are completed and within six months at the latest following the date of completion.

22. Article 60 of the Law No. 2577 with the side heading of "*Notification work and fees*" is as follows:

All types of the notification work in relation to the Council of State and the regional administrative, administrative and tax courts shall be performed according to the provisions of the Notification Law. The fees in relation to the notifications to be made in this way shall be paid by the concerned in advance.

IV. EXAMINATION AND GROUNDS

23. The individual application of the applicants (App No:2013/6585 on 19/8/2013) was examined during the session held by the court on 18/9/2014 and the following were ordered and adjudged:

A. The Applicants' Allegations

24. Indicating that the mine explosion took place as the administration has not carried out the necessary precaution and control activities, that Salih Ülgen was wounded as a result of the explosion and his physical integrity was permanently damaged, that the trial which continued for about seven years was not concluded within reasonable time and that there are no legal remedies that they can use against the violations of the aforementioned rights, the applicants have claimed that their rights in Articles 17, 36 and 40 of the Constitution have been violated and requested that compensation for pecuniary and non-pecuniary damages be judged or a retrial be conducted.

B. **The Constitutional Court's Assessment**

1. Admissibility

a. Alleged Violation of Article 40 of the Constitution

25. The applicants, indicating that there is no national legal remedy whereby they can sound their complaints regarding the violations of rights

that they claim, have propounded that the right to an effective application that is guaranteed by Article 40 of the Constitution has been violated.

26. Article 48(2) of the Law No .6216 with the side heading *''The conditions for and the evaluation of admissibility of individual applications"* is as follows:

> "*The Court, ... can rule on the inadmissibility of applications which are manifestly ill-founded.*"

27. In Article 59(2)(d) of the Internal Regulation of the Constitutional Court entitled "*The individual application form and the annexes thereof*", it has been indicated that in the individual application form, which of the rights within the scope of the individual application has been violated for which reason and the justifications in relation thereto and concise explanations concerning the evidence shall be present.

28. Although the liability to prove their claims regarding the matter and to prove their claims concerning which provision of the Constitution has been violated, respectively by submitting evidence concerning the allegation of violation which is the subject of the application and by making explanations, rests with the applicant, the applicants have abstractly stated that there is no legal remedy whereby they can sound their allegations yet since it was understood that they did not bring forward neither any substantive explanation nor proof regarding for which of their claims and in what way there was no legal remedy, it has to be decided that this portion of the application is inadmissible for being *"manifestly ill-founded"* without being examined in terms of other conditions for admissibility.

b. Alleged Violation of Article 17 of the Constitution

29. In the opinion of the Ministry concerning the claims of the applicants that Article 17 of the Constitution was violated, no objections regarding the admissibility of the complaints have been made.

30. One of the conditions required in order for the application of principles concerning the right to life in an incident is that an unnatural death has taken place. However, in some cases, even if death does not take place, it is possible to examine the incident within the framework

of right to life. The ECtHR can also examine incidents of injury that do not result in death within the scope of the right to life by way of taking into consideration the degree of the force, the type thereof and the will and purpose underlying the use of force together with other factors. (see: *İlhan v. Turkey* [BD], 22277/93, 27/6/2000, §76; *Paşa and Erkan Erol v. Turkey*, 51358/99, 12/12/2006, §27; *Makaratzis v. Greece*[BD], 50385/99, 20/12/2004, §52).

31. In the incident which is the subject of the application, although the applicant Salih Ülgen has survived from the mine explosion that occurred with injuries, considering the lethal quality of anti-personnel land mines that are laid for the purpose of border protection and the danger of the life threatening situation that the applicant has survived it was concluded that the incident which is the subject of the application be examined within the framework of the right to life.

32. It is seen that the section of the application concerning the violation of the dimension of the positive liability to the right to life that is arranged in Article 17 of the Constitution is not expressly manifestly ill-founded pursuant to Article 48 of the Law No. 6216. As no other reason for inadmissibility was observed, it should be decided that this part of the application is admissible.

c. Allegation that the Case was not Concluded within Reasonable Time

33. The complaint of the applicants regarding the lengthiness of the trial is neither manifestly ill-founded, nor is there any other reason of inadmissibility for this complaint. Therefore, it must be decided that this section of the application is admissible.

2. Merits

a. Allegation that the Dimension of Positive Liability to the Right to Life has been Violated

34. The applicants have stated that the physical integrity of the first applicant has been permanently damaged as a result of his contact with the mine that has been laid with a consideration for public good and by way

of exercising public power, which was lying around in an uncontrolled and dangerous fashion as a result of failure to duly perform the activities of prevention and control, and claimed that the right to life which is regulated in Article 17 of the Constitution has been violated.

35. In the opinion of the Ministry concerning the claims of the applicants regarding the violation of Article 17 of the Constitution, it was indicated that according to the case law of the European Court of Human Rights the right to life charges the states with a positive liability so that they take the necessary precautions so as to protect the lives of the persons within the sovereign authority thereof, and yet such liability is not absolute and has to be interpreted within the scope of conditions and that the ECtHR has concluded in the Paşa and Erkan / Erol - Turkey application which is similar to the present application that the right to life was violated upon the failure of the state to perform its positive liability.

36. Moreover, the Ministry concerning the incident which is the subject of the application has stated that in the letter dated 7/2/2014 that was sent by the Chief of General Staff the information that *the minefield was not used as a pasture by the local people, that the animals were grazed in the area starting from a distance of one hundred meters from the border of the minefield, that the 'Instructions that have to be Observed by the Landowners During the Taming of their Lands and by Shepherds During the Grazing of Animals in Category 1 and Category 2 Land Military Restricted Zones' has been notified to the local people in the area, that in such instructions it was indicated that the wire fence barrier separating the minefield was not to be approached more than one hundred meters, that shepherds, herb pickers and workers shall not in any way tamper with and handle the exploded, unexploded ordnances, mines and military material that they see on the land, that they shall immediately inform the commander of the post and moreover, that the people coming to graze their animals have also been warned verbally about the minefields, that the periphery of the mine field was enclosed by one meter-high barbed and concertina wire whereupon minefield warning signs were displayed in a way to prevent the entrance of civilians to the zone and that the local people who came to graze their animals or to work in their fields have been informed about minefields and that such instructions have been notified to them and that the precautions that have been taken were sufficient* was included.

37. No statements in response to the opinion of the Ministry have been made by the applicants.

38. Article 17 of the Constitution with the heading *of "Personal inviolability, corporeal and spiritual existence of the individual "* is as follows*:*

> "- Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence."

39. The right to life and the right to protect and improve his/her corporeal and spiritual existence of an individual are among the rights which are closely tied, inalienable and indispensable and the state has positive and negative liabilities about this subject. The state, as a negative liability, has the liability not to terminate the life of any individual within its jurisdiction intentionally and in contrary to the law and, as a positive liability, has the liability to protect the right to life of all individuals within its jurisdiction against the risks arising out of the actions of public institutions, other individuals and the individual himself/herself (App. No: 2012/752, 17/9/2013, § 50-51).

40. According to the basic approach that the Constitutional Court has embraced in terms of the positive liabilities which the state has within the scope of the right to life, in the incidents of death which occur under the conditions which can require the responsibility of the state, Article 17 of the Constitution imposes the state the duty of taking effective administrative and judicial measures which will ensure that the legal and administrative framework that is formed in this matter is duly applied in order to protect the individuals whose life is in danger and that the violations as regards this right are stopped and punished by making use of all available facilities. Such liability, whether it be public or not, shall be valid regarding all sorts of activities whereby the right to life can be endangered (App. No: 2012/752, 17/9/2013, § 52), and the field of dangerous activities that are carried out so as to ensure public security is also within the scope of this liability.

41. The positive liability to protect life, charges the state with the duty to take general preventive security measures in order to protect the life of individuals who are within its area of sovereignty (For decisions of the ECtHR to a similar effect, see: *L.C.B v. United Kingdom*, 9/6/1998, §36;

Osman v. United Kingdom, 28/10/1998, §115; *Paşa and Erkan Erol v. Turkey*, 51358/99, 12/12/2006, §31).

42. Within this context, it must be stated that, within the scope of performance of the positive liabilities prescribed in Article 17 of the Constitution, the determination of the measures to be taken is an issue which is under the discretion of administrative and judicial offices. Many methods can be embraced so as to secure constitutional rights and positive liabilities can be carried out through another measure even if one fails in the performance of any measure that has been regulated within the legislation (App. No: 2013/2075, 4/12/2013, § 59).

43. In the incident which is the subject of the application it is seen that no claims have been asserted by the applicants concerning any deliberate action of the state or regarding the lack of existing legal and administrative framework concerning the prevention of entry to the minefield in the accident that occurred as a result of the explosion of the mine. In this case, whether or not the existing mechanisms have been effectively employed in the incident that occurred, whether or not the necessary and sufficient security measures were taken by public authorities so as to prevent the entry of civilian citizens into the minefield has to be investigated within the conditions of the incident and a decision has to be made regarding the claims concerning the violation of the right to life regarding positive liabilities.

44. In the incident which is the subject of the application, Salih Ülgen, who is one of the applicants, on 27/6/2006, entered the minefield that was set up to ensure border security at 300 meters to the Ziyaret Infantry Border Company Post which is on the Turkish-Iranian border in the district of Doğubeyazıt, in the Province of Ağrı that was in the proximity of where he was grazing animals with his two friends who were at the age of eleven and twelve and following the sheep that walked down along the wire fence on which was a minefield warning sign, he entered the minefield and when the mine that they found exploded, he lost a part of his right arm below the elbow and was injured at various places in his body. Due to the fact that the incident which is the subject of the application has taken place in a military zone the entry of civilians into which is prohibited, taking the necessary security measures so as to prevent their entry into the area

concerned in order to protect the lives of Salih Ülgen, the applicant, and his friends is within the scope of positive liabilities of the state in terms of Article 17 of the Constitution.

45. In the present incident, anti-personnel mines that have caused the injury of the first applicant have been laid with the aim to protect the Ziyaret Border Company Post, which is located on the Turkish-Iranian border. Of the information and documents that are among the contents of the file, in the letter dated 7/2/2014 of the Presidency of General Staff that has been submitted as an attachment to the opinion of the Ministry, it has been stated that the minefield was not being used as a pasture by the local people, that the animals would be grazed starting from a distance of one hundred meters from the border of the mined territory, that the minefield was enclosed by a meter-high barbed and concertina wire where minefield warning signs have been placed, that the people of the area had been informed about minefields and instructions had been notified to them and the people coming to work their land or graze their animals were warned about mined territories.

46. That being said, it was concluded that the measures that are said to have been taken by the authorities and the warnings of the soldiers on watch could not prevent the applicant and his friends, who cannot be expected to act like responsible adults, from entering the mined zone, that it was even possible for the herd of sheep to jump over the wire fences and that the security measures that needed to be taken so as not to allow the occurrence of the mine explosion that has led to permanent injury of Salih Ülgen of the applicants were not available at an adequate level in the present incident.

47. Due to the reasons explained, it should be decided that the right to life guaranteed in Article 17 of the Constitution was violated regarding the positive liability.

b. Allegation that the Case was not finalized within Reasonable Time

48. The applicants have claimed that the trial concerning the case that they have filed on 1/2/2007 was not finalized within reasonable time and

the right to a fair trial which is defined in Article 36 of the Constitution was therefore violated.

49. In its opinion, the Ministry of Justice, with reference to the resolutions of the Constitutional Court regarding the right to trial within reasonable time, has stated that the submission of an opinion regarding the claim of the applicant concerning the violation of the right to trial within reasonable time was not necessary.

50. According to the provisions of Article 148(3) of the Constitution and Article 45(1) of the Law No.6216, in order for the merits of an individual application made to the Constitutional Court to be examined, the right, which is claimed to have been intervened in by public power, must fall within the scope of the European Convention on Human Rights (the Convention) and the additional protocols to which Turkey is a party, in addition to it being guaranteed in the Constitution. In other words, it is not possible to decide that an application which contains a claim of violation of a right that is outside the common field of protection of the Constitution and the Convention is admissible (App. 2012/1049, 26/3/2013, § 18).

51. Paragraph one of Article 36 of the Constitution with the side heading "Freedom to claim rights" is as follows:

> *"Everyone has the right to make claims and defend themselves either as plaintiff or defendant and the right to a fair trial before judicial bodies through the use of legitimate ways and means."*

52. The relevant part of Article 6 of the Convention with the side heading of *"Right to a fair trial"* is as follows:

> *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing* ***within a reasonable time*** *by an independent and impartial tribunal established by law."*

53. The sub-principles and rights, which stem from the text of the Convention and the decisions of the ECtHR and are concrete manifestations of the right to a fair trial, are also, in principle, elements of the right to a fair trial stipulated under Article 36 of the Constitution. In many decisions

where it carried out the examination as per Article 36 of the Constitution, the Constitutional Court refers, within the scope of Article 36 of the Constitution, to the principles and rights that are either contained within the wording of the Convention or incorporated in the right to a fair trial through the case law of the ECtHR by interpreting the relevant provision in the light of Article 6 of the Convention and the case law of the ECtHR (App. No: 2012/13, 2/7/2013, § 38).

54. The right to a trial within reasonable time which constitutes the basis of the present application also falls within scope of the right to a fair trial in accordance with the aforementioned principles and moreover, it is clear that Article 141 of the Constitution which stipulates that the conclusion of cases with minimum expense and as soon as possible is the duty of the judiciary should also be taken into account in the evaluation of the right to a trial in a reasonable time as per the principle of holism of the Constitution (App. No: 2012/13, 2/7/2013, § 39).

55. As the aim of the right to trial within reasonable time is the protection of the parties against physical and moral pressures and distresses to which they will be exposed due to the long-lasting trial and since the requirement of showing due diligence in the settlement of a legal dispute cannot be ignored in the trial activity, it is necessary to evaluate whether the trial period is reasonable or not individually for each application (App. No: 2012/13, 2/7/2013, § 40).

56. Matters such as the complexity of a case, how many instances the trial has, the attitude of the parties and the relevant authorities during the trial and the quality of the interest of the applicant in the speedy conclusion of the case are the criteria to be taken into account in the determination of whether the duration of a case is reasonable or not (App. No: 2012/13, 2/7/2013, §§ 41-45).

57. However, none of the specified criteria is conclusive by itself in the evaluation of the reasonable period. By evaluating the total impact of these criteria through the determination of all delay periods in the trial process individually, which element is more effective in the delay of trial should be determined (App. No: 2012/13, 2/7/2013, § 46).

58. In order to determine whether the trial activity is conducted within a reasonable time or not, it is primarily necessary to determine the dates of beginning and completion which may vary depending on the type of dispute.

59. In accordance with Article 36 of the Constitution and Article 6 of the Convention, it is necessary to conclude disputes in relation to civil rights and liabilities within reasonable time. As it is seen that the case which is the subject of the application is a conflict concerning the applicants' request for compensation of the damage incurred upon the injury of the first applicant as a result of the mine explosion that has occurred in a military area, there is no doubt that the present trial that has been conducted as per the procedural provisions in the Law No. 2577 and which concerns the solution of such problem is a trial that concerns civil rights and liabilities.

60. In the evaluation of reasonable time with regard to disputes related to civil rights and liabilities, while the beginning of the period is, as a rule, the date on which the trial process that will conclude the dispute is commenced to be executed, in other words, the date on which the case is filed; in some special cases a previous date on which the dispute occurs can be accepted as the date of beginning by taking into account the quality of attempt (B. No: 2012/1198, 7/1/2013, § 45). A similar situation is present regarding the actual application, and the date of commencement of the period of time that shall be taken into consideration in the evaluation of reasonable time shall be the date of 2/10/2006 on which the applicants have made an application to the Ministry of National Defense for the compensation of the damages that they said to have incurred as a result of the damage incurred on the physical integrity as a result of the explosion of the mine.

61. In case the date on which the case was lodged is different from the date of commencement of the authority of the Constitutional Court regarding the examination of individual applications, the duration that shall be taken into consideration is not the time that has passed after the date of 23/9/2012 but the time that has elapsed since the commencement of the conflict (App. No: 2012/13, 2/7/2013, § 51).

62. The end of such a duration, on the other hand, is the date of finalization of the trial in a way whereby, most of the time, the duration of enforcement is also covered and regarding the application at hand, such duration is the date of 8/5/2013, which is the date of the decision of approval of the 10th Chamber of the Council of State No. M.2009/4372, K.2013/4251 (App. No. 2012/13, 2/7/2013, § 52).

63. From the examination of the trial process which is the subject of the application it is understood that the applicants have made an application to the Ministry of National Defense with the request for the compensation of the damages that they have incurred after when the first applicant, Salih Ülgen, on 27/6/2006, was grazing animals with his friends and followed the herd of sheep into the minefield where the mine that they found exploded and the part of his arm below his elbow was severed and he was wounded in various parts on his body, and that upon receiving no response to the said application, they lodged a case against the Ministry of National Defense on 1/2/2007 with the request for pecuniary and non-pecuniary damages be ruled. It is understood that the first examination of the file by the court took place on 14/2/2007, that, with the interlocutory decision dated 20/2/2007, information concerning the economic, financial and social statuses of the applicants were requested from the Office of the District Governor of Doğubayazıt so as to make a decision regarding the request of the applicants concerning legal assistance, that as per the response received via the letter dated 29/3/2007 it was decided that request for legal assistance be accepted and notification procedures were started, that the file has been proceeded upon observance of the period of responses and second responses and that on 23/5/2008, a ruling on the file had been made by the Court of first instance.

64. It is understood that upon the appeal of the decision an initial appeal examination minute was drawn up in due time by the Court of first instance on 31/10/2008 regarding the file, and that the file was developed and sent to the Council of State for the appeals examination and was registered on 7/4/2009 at the office of appeals and that regarding this file the Office of the Chief Prosecutor of the Council of State has submitted its opinion about one year and six months after the registration date of the file, and about two years and six months after the letter of opinion, on

8/5/2013 the decision of approval was taken by the 10th Chamber of the Council of State.

65. It is understood that the activity of trial being concluded with that regarding decision has lasted a total of six years, seven months and six days.

66. It is seen from the examination of the concerned trial documents that, regarding the case which was filed on 1/2/2007, the initial examination minutes have been drawn up by the court of first instance in due time as envisaged in Article 14 of the Law No. 2577, that the writing of the justified decision has been accomplished within reasonable time, that however, upon resorting to legal remedy some delays have occurred regarding the commencement of notification transactions and the transfer of the file to the Council of State and that the file which had to be finalized within six months at the latest starting from the date of development thereof as per Article 20 of the Law No. 2577 was decided upon about ten months after the date of development thereof and with that being said, the trial was finalized in less than two years.

67. In the evaluation of the legal remedy examination process, it is understood that upon the appeal of the decision of the court of first instance, a decision of approval was made after about four years and one month when the date of registration at the appeals authority is taken into consideration. Accordingly, it is understood that the duration of trial that has passed at the authority of legal remedy extended over a lengthy duration despite the provision prescribed in Article 20 of the Law No. 2577 that the files at the Council of State, regional administrative, administrative and tax courts shall be determined by their subjects by the Board of Presidents for the Council of State; and by the High Council of Judges and Prosecutors for other courts, according to their status of priority or urgency specified in the Law No. 2577 and other laws, examined in terms of the date on which they are received by considering the priority actions to be announced in the Official Gazette and finalized in the order that they are completed, and that the files that are excluded from this shall be decided upon in the order of their development and finalized within six months at the latest from the date of development thereof.

68. As much as the delays which can be attributed to competent authorities in the prolongation of the trial process can result from the failure to show due diligence for the speedy conclusion of trial, they can also arise out of structural problems and lack of organization. Because, Article 36 of the Constitution and Article 6 of the Convention impose the responsibility of regulating the legal system in a way which can fulfill the conditions of a fair trial including the liability of courts to conclude administrative applications and cases within a reasonable time (App. No: 2012/13, 2/7/2013, § 44).

69. Within this scope, in the event that the reasonable period is exceeded in trial due to reasons such as the structure of the judicial system, disruptions during routine duties at the office of the clerk of the court, delays in the writing of a judgment, in the sending of a file or document from one court to another and in the appointment of a rapporteur, insufficiency in the number of judges and personnel and the severity of workload, the responsibility of competent authorities comes to the fore (App. No: 2012/1198, 7/11/2013, § 55; App. No: 2013/695, 9/1/2014, § 40).

70. When the duration of the trial which is the subject of the application is evaluated, it is understood that a delay has occurred during the process of rendering a decision regarding the file by the Court of First Instance and during the process of the forwarding thereof to the Council of State, and that in the examination of the legal remedy the occurrence of similar drawbacks have been identified in the stage of rendering a decision, and under the light of the findings above the work load which especially results from the structure of the judicial system and the lack of organization have had an overwhelming effect regarding the elongation of the process of trial concerning the present application. However, in accordance with Article 36 of the Constitution and Article 6 of the Convention, since it is obligatory that the trial system to be regulated in a way to fulfill the conditions of fair trial including the liability of courts to conclude cases within reasonable time, it is clear that the structural and organizational deficiencies which are present in the legal system shall not be considered as an excuse for the non-conclusion of the trial activity in a reasonable time.

71. It was not determined that the attitude of the applicants had a special effect on the prolongation of the trial.

72. When the file is considered as a whole within the framework of such determinations it was concluded that, the dispute which is the subject of the application concerns the compensation of the pecuniary and non-pecuniary damages that have been incurred as a result of the injury which resulted from the explosion of the mine in the military zone, and that there is unreasonable delay in the trial activity the importance for the applicants of which is express and which has lasted six years seven months and six days, which is the subject of the application and which does not include any complexities whatsoever and where the courts of instance have not required any investigations or surveys or expert examinations other than the information and documents within the file.

73. Due to the aforementioned reasons, it should be decided that the applicants' rights to trial within reasonable time guaranteed by Article 36 of the Constitution was violated.

3. Article 50 of the Law No. 6216

74. In the event that the decisions regarding the full remedy action they have filed by mentioning that they have incurred damages as a result of the incident which is the subject of the application being finalized to their detriment is determined by the court to have led to a violation of right, the applicants have requested for the first applicant a compensation of TRY 750,000.00 for pecuniary damages in return for the loss of occupational earning capacity and for the cost of prosthetic arm, and a compensation of TRY 100,000.00 for pecuniary damages; and a compensation of TRY 50,000.00 each for the second and third applicants for spiritual damages, and should such request be dismissed, they requested that a decision of retrial be made regarding such dispute.

75. In the opinion of the Ministry of Justice, no opinion was expressed as regards the applicants' requests for compensation.

76. Article 50(2) of the Law No. 6216 with the side heading ''Decisions'' is as follows:

> *"If the determined violation arises out of a court decision, the file shall be sent to the relevant court for the holding of a retrial in order for the violation and the consequences thereof to be removed. In cases where there is*

no legal interest in holding a retrial, the compensation may be adjudged in favor of the applicant or the remedy of filing a case before the general courts may be shown. The court, which is responsible for holding the retrial, shall deliver a decision based on the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."

77. As it has been determined in the current application that Article 17 of the Constitution was violated, it should be decided that the file be sent to the relevant Court in order for the violation and the consequences thereof to be removed.

78. Even though a request for compensation for pecuniary and non-pecuniary damages was made by the applicants, as it is understood that the fact that a decision was delivered to send the file to the relevant Court for holding a retrial constitutes a sufficient compensation with a view to the claim of violation of the applicant, it should be decided that the requests of pecuniary and non-pecuniary damages by the applicants be dismissed.

79. When the trial process which is longer than six years seven months concerning the dispute to which the applicants are parties to is taken into account, it should be decided by discretion that a moral compensation of TRY 5,000.00 be paid to the applicants jointly in return for the moral damage which cannot be compensated only by the determination of the violation due to the lengthiness of the trial activity.

80. Although the applicants have made a request regarding compensation for pecuniary damages due to the lengthiness of the trial process, since it is understood that there is no link of causality between the violation that has been identified and the pecuniary damage claimed, it has to be decided that the requests of the applicants regarding pecuniary damages to be dismissed.

81. It should be decided that the trial expenses of TRY 1,698.35 in total composed of the fee of TRY 198.35 and the counsel's fee of TRY 1,500.00, which were made by the applicants and determined in accordance with the documents in the file, be paid to the applicants.

V. JUDGMENT

Due to the reasons explained: it was held **UNANIMOUSLY** on 18/9/2014 that;

A. The applicants'

1. Claim concerning the violation of the right to an effective remedy which is guaranteed by Article 40 of the Constitution be INADMISSIBLE for being 'manifestly ill-founded,'

2. Claim concerning the violation of the positive liability dimension of the right to life which is guaranteed by Article 17 of the Constitution be ADMISSIBLE,

3. Claim concerning the violation of the right to trial within reasonable time which is guaranteed by Article 36 of the Constitution be ADMISSIBLE,

B. That the applicants'

1. Right to life enshrined in Article 17 of the Constitution WAS VIOLATED in terms of positive liability,

2. Right to trial within reasonable time enshrined in Article 36 of the Constitution WAS VIOLATED,

C. That the file be sent to the relevant Court for a retrial to be carried out in order to remedy the violation and the consequences thereof which have been identified in terms of Article 17 of the Constitution,

D. That the applicants jointly BE PAID a compensation for non-pecuniary DAMAGES of TRY 5,000.00 for the establishment of the violation of their right to trial within reasonable time which is guaranteed in Article 36 of the Constitution and that other requests of the applicants regarding compensation BE DISMISSED,

E. That the trial expenses of TRY 1,698.35 in total composed of the fee of TRY 198.35 and the counsel's fee of TRY 1,500.00, which were made by the applicants BE PAID TO THE APPLICANTS,

F. That the payments be made within four months as of the date of application by the applicants to the Ministry of Finance following the notification of the decision; that in the event that a delay occurs as regards the payment, the legal interest be charged for the period that elapses from the date, on which this period comes to an end, to the date of the payment.

PROHIBITION OF TORTURE AND ILL-TREATMENT (ARTICLE 17 § 3)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

CEZMİ DEMİR AND OTHERS

(Application no. 2013/293)

FIRST SECTION
JUDGMENT

President	: Serruh KALELİ
Justices	: Zehra Ayla PERKTAŞ
	Burhan ÜSTÜN
	Nuri NECİPOĞLU
	Zühtü ARSLAN
Rapporteur	: Özcan ÖZBEY
Applicants	: Cezmi DEMİR
	Ertan DAĞABAKAN
	Hicrettin DAĞABAKAN

I. SUBJECT-MATTER OF THE APPLICATION

1. The applicants alleged that Articles 17 and 36 of the Constitution were violated, stating that they suffered torture and ill-treatment by the law enforcement staff during the time they were in custody at the Hamur District Gendarmerie Command between 3/11/2001 - 6/11/2001 on the suspicion of theft of telephone wires, that the investigation and prosecution which was started against the Gendarmerie staff who conducted such acts and the doctors who issued misleading reports, at the hospitals where the applicants were medically examined, in order to conceal the crime committed were not efficiently conducted, that some defendants were acquitted, that the lawsuit against a defendant was subject to statute of limitations and that the trial continued for more than 11 years.

II. APPLICATION PROCESS

2. The applications were lodged on 3/1/2013 with the High Criminal Court of Ağrı. In the preliminary examination of the petitions and the annexes thereof as conducted in terms of administrative aspects, it was

found that there was no deficiency that would prevent the referral thereof to the Commission.

3. It was decided by the Second Commission of the First Section on 23/10/2013 and 25/2/2014 and by the Second Commission of the Second Section on18/3/2013 that the admissibility examination be conducted by the Section and the file be sent to the Section.

4. In the examination of the applications that were lodged by the applicants, it was decided by the Section on 25/4/2014 that the files No: 2013/294 and 2013/545 be joined and examined with the individual application file (File No:2013/293) since it was found that there was a legal connection in terms of the subject matter.

5. In the session held by the Section on 26/6/2013, it was decided that the examination of admissibility and merits of the application be carried out together.

6. The facts and cases which are the subject matter of the application were notified to the Ministry of Justice on 27/6/2013. The Ministry of Justice presented its opinion to the Constitutional Court on 7/8/2013 at the end of the additional time period that was granted thereto.

7. The opinion presented by the Ministry of Justice to the Constitutional Court was notified to the applicants Hicrettin and Ertan Dağabakan on 6/9/2013. No opposing opinion was submitted by the applicants to the Constitutional Court.

III. THE FACTS

A. The Circumstances of the Case

8. As expressed in the application form and the annexes thereof, the relevant facts are summarized as follows:

1. Actions Taken Regarding the Applicants within the Scope of the Alleged Crime

9. As a result of the operation that was performed on 3/11/2001 by the District Gendarmerie Command upon a denunciation that the copper

wires belonging to Türk Telekom at the locality of Aşağı Karabal Köyü in Ağrı province were being cut and stolen, the applicants were arrested at the incident scene at around 22.30.

10. Among the applicants, Ertan Dağabakan was born in 1985 and was 16 years of age when the claimed incident occurred whereas the other two applicants were older than 18 years of age.

11. The applicants were kept in custody at the Gendarmerie Central Station Command for a total of three days between the dates of 3/11/2001 and 6/11/2001 upon the instructions of the Chief Public Prosecutor's Office of Hamur.

12. The statements of the applicants were taken by the Public Prosecutor's Office on 6/11/2001 and they were sent to Hamur Criminal Court of Peace with a request for their detention and, through the decision of the said Court (File No: Misc.2001/29 on 6/11/2001), the applicants were detained for the crimes of *"establishing an organization in order to commit a crime and theft"* and were sent to Ağrı Closed Penal Institution. The applicants were released by means of the decision of the same Court on 6/12/2001.

13. Within the scope of the investigation that was conducted by the Chief Public Prosecutor's Office of Hamur based on the file (File No: Invs. 2001/306), as per the decision of the said Prosecutor's Office (File No: Misc. 2001/28 on 30/11/2011), the crimes of "*establishing an organization in order to commit a crime"* and *"theft"* were separated and the crime of copper wire theft which was committed in the district of Hamur continued to be investigated based on the file (File No: Invs.2001/306) and the crime of copper wire theft which was committed within the borders of the province of Ağrı continued to be investigated based on the file (File No: Invs. 2001/311) whereas the crime of establishing an organization in order to commit a crime continued to be investigated based on the file (File No: Invs.2001/315) against the applicants.

14. Within the scope of the investigation that was conducted against the applicants, the investigation file (File No: Invs.2001/315) in relation to the claim of establishing an organization in order to commit a crime was

sent by the Chief Public Prosecutor's Office of Hamur to the Chief Public Prosecutor's Office of Ağrı through the Summary Record (File No:2001/13 on 20/12/2001) and the file (File No: Invs. 2001/311) in relation to the crime of theft which occurred outside the borders of the district of Hamur was sent by the Chief Public Prosecutor's Office of Hamur to the Chief Public Prosecutor's Office of Ağrı due to lack of venue.

15. Thereupon, a criminal case was filed against the applicants through the indictment of the Chief Public Prosecutor's Office of Ağrı (File No:2001/709 on 28/12/2001) for the crime of "*theft*" and, as a result of the trial held at the Criminal Court of First Instance of Ağrı, the applicants were acquitted through the decision of the said Court (File No:E.2001/799, K2002/87 on 28/2/2002) with the justification that "*there is no evidence in relation to the fact that they committed the attributed crime except for the statement at the Gendarmerie, that it is claimed this statement was taken under torture, that admission during interrogation which is performed in an environment where there is suspicion of torture cannot be accepted as evidence per se*" and this decision was not appealed and was finalized on 8/3/2002.

16. Furthermore, another criminal case was filed against the applicants at the High Criminal Court of Ağrı through the indictment of the Chief Public Prosecutor's Office of Ağrı (File No: 2002/8 on 31/1/2002) for the crime of "*establishing an organization in order to commit a crime*" and as a result of the trial that was held, the acquittal of the applicants was decided through the decision of the said Court (File No: E.2002/20, K.2002/56 on 2/4/2002) with the justification that "*evidence, which was free from all kinds of suspicion, was convincing and conclusive in relation to the fact that they committed the attributed crime, was not present*" and this decision was not appealed either and was finalized on 10/4/2002.

17. Yet another criminal case was filed against the applicants at the Criminal Court of First Instance of Hamur by the Chief Public Prosecutor's Office of Ağrı in relation to the crime of theft which was claimed to have been committed within the borders of Hamur district and was investigated based on the file (File No: Invs.. 2001/306) and their trial was continued based on the file (File No: E. 2001/88) of the Court.

2. Actions that were Taken upon the Applicants' Complaints of Ill-treatment

a. Applicants' Claims of Ill-treatment

18. In their statements that they gave on5/11/2001 before the Commander of the Station, İ.Ö. and his deputy, H.A., without the presence of their lawyers, applicants Ertan Dağabakan and Cezmi Demir admitted that they were present at the incident scene in order to cut down the cables on the poles which belonged to Telekom, that they hid when they saw the Gendarmerie vehicle, that, however, they were caught with the goods which were the subjects of crime and that they previously committed a couple of similar crimes whereas applicant Hicrettin Dağabakan stated that they went to the incident scene upon the request of a person for getting sugar beet carried in return for a fee. However, he disagreed when he saw this person and his two friends who were at the incident scene load the wires onto the trailer of a tractor and got the wires unloaded, that these three other people who he did not previously know but only agreed for business purposes ran away when they saw the Gendarmerie coming right at that moment and that they themselves did not run away and got arrested.

19. In their statements that they gave on 6/11/2001 at the Public Prosecutor's Office, applicants H. Dağabakan and C. Demir stated that they went to the incident scene in order to carry sugar beets upon their agreement with a person they did not know, that they saw other persons at the said scene, that the other persons ran away when the Gendarmerie came at that moment, that they were arrested themselves and that they did not commit the attributed crime whereas applicant E. Dağabakan admitted the crime and also applicant Cezmi Demir stated that he admitted at the Gendarmerie station since he was suffering from torture. In addition, all three applicants stated that they suffered from ill-treatment continuously when they were in custody, that they were battered on various parts of their bodies with truncheons, kicks and fist blows in order for them to admit to other incidents together with the crime that was the subject matter, that they were blindfolded, that they were subjected to insults involving swear words, that cold water was poured over their heads and that, therefore, they were lodging complaints against the officials. Upon

this claim, the Prosecutor's Office initiated investigation on that very same day and referred the applicants to the Healthcare Center in order for them to re-obtain reports. G.Ö., the doctor in charge, issued a report that the applicants did not have any marks of battering and coercion.

20. During their interrogation dated 6/11/2001, the three applicants did not admit to the crime and stated that their statements at the Gendarmerie were taken under ill-treatment that they were stripped of their clothes and were battered and that they admitted because they were afraid. Applicant E. Dağabakan stated that he also admitted to the crime at the Prosecutor's Office with the concern that they would be taken to the Station after the Prosecutor's Office and that he would suffer oppression once again. The applicants were detained on the very same day.

21. In their similar complaints at the High Criminal Court, the applicants declared in summary that, in order for them to admit to the attributed crime when they were in custody, they were blindfolded, that they were stripped off and they had to wait naked for the whole night separately at a cold place like a garage-storehouse, that they felt like they were frozen, that water was sprayed onto them with a hose, that they were battered on various parts of their bodies with a stick, that their hair was pulled and they were dragged on the ground, that their eyes were opened by İ.Ö. from time to time and he asked them the question on whether they were good boys then, that they were not even allowed to satisfy their need to use the bathroom, that their genital organs were squeezed with a tool and attempts were made to insert a truncheon therein, that they were left hungry and thirsty for three days, that they were subjected to strong swears and threats towards themselves and their families, that it was mostly İ.Ö., the Station Commander, who conducted such acts, that H.A. was also with him, that the doctor at Hamur Healthcare Center issued a report without performing an examination on them, that defendant İ.Ö. was angry and came in again after reading the report which was issued for them at Ağrı State Hospital, that they waited for an hour and a half, that defendant İ.Ö. came later and they went back to the district, that they were lodging a complaint against the defendants due to the fact that they were continuously subjected to torture during the custody period and they were involved in the court case with the title of the intervening party.

b. Medical Reports that were taken within the Scope of the Claims of the Applicants

22. It was stated on the reports having the same content which were issued about the applicants after the medical examination performed at Hamur Healthcare Center on 3/11/2001 when they were taken into custody that"*no findings are spotted as a result of the examination performed and there is no prejudice in their being taken into custody*".

23. The applicants underwent medical examination at Hamur Healthcare Center before being released from custody and referred to the Prosecutor's Office at around 08.30 on 6/11/2001 and it was stated on the first report dated 6/11/2001 which was issued by G.Ö., one of the doctors at the said Healthcare Center, about the three applicants that "*no mark of assault was found*".

24. In the second report dated 6/11/2001 which was once again taken from the same Healthcare Center and the same doctor after the applicants stated in their similar statements which they gave at the Prosecutor's Office that *"they were subjected to ill-treament in custody"*, also a similar finding was provided.

25. In his petition dated 7/11/2001 addressed at the Chief Public Prosecutor's Office, the attorney of the applicants stated "*that his clients were tortured by the officials during the period when they were in custody, that they still had the marks of torture on their bodies and he himself observed the marks during the interview he had with his clients in prison, that a report that was contrary to facts was issued due to the fact that the spouse of one of the commanders in charge at the station was working at the said healthcare center*" and requested that his clients be referred to the hospital once again and a doctor's report be issued for them.

26. Upon this request, the applicants were taken from the prison where they were detained under the supervision of İ.Ö., the station commander, and H.A., his deputy, and other officials who were claimed to have ill-treated the applicants and referred to Ağrı State Hospital for medical examination on 7/11/2001 and, in the report dated 7/11/2001 which was issued as a result of their examination at 18.40 by Y.İ. and Y.O., two of the

doctors at the hospital, made the statements "*that the patient had common hematoma on the upper right of his back which was thought to have occurred about 8-12 hours ago, that no new mark of battery-coercion was observed, that there is no threat to life, that there is no loss of work power or strength*" were included in relation to applicant Cezmi Demir, "*that the patient had redness on the back of his left leg, redness on the internal part of his right leg and redness at the right lower quadrant of his abdomen which were thought to have occurred about 8-12 hours ago, that no new mark of battery-coercion was observed, that there is no threat to life, that there is no loss of work power or strength*" in relation to applicant Hicrettin Dağabakan and "*that the patient had hematoma on the right upper arm and redness on the abdomen skin which were thought to have occurred about 8-12 hours ago, that no new mark of battery-coercion was observed, that there is no threat to life, that there is no loss of work power or strength*" in relation to applicant Ertan Dağabakan.

27. However, upon the objection of the attorney of the applicants to the Prosecutor's Office with the petition dated 9/11/2001 claiming "*that the report which was dated 7/11/2001 did not reflect the truth, that Doctor Y. İ. issued the said report under pressure from Gendarmerie officials*", the Public Prosecutor ensured that the applicants be referred to Ağrı State Hospital in order for them to undergo medical examination again.

28. In the report dated 12/11/2001 that was issued as a result of the examination of the applicants by the specialized doctors at Ağrı State Hospital, it was observed in relation to applicant Cezmi Demir that"*there is locally greenish ecchymosis and sensitivity on the right scapula in an area having an approximate size of 5x6 cm. Under such conditions, the patient is not subject to a life-threatening situation, there is a loss of 3-day work power and strength, there is no permanent mark on the face"*.It was observed in relation to applicant Hicrettin Dağabakan that *"there is a 1x1 cm greenish ecchymosis on the front part of the right and left legs, two 4x5 cm greenish ecchymoses on the front part of the left forearm and the front part of left arm, locally greenish ecchymoses of 1x2 cm on the sternum, 2x3 cm on the front part of the right shoulder, 2 cm on the front part of the right arm, 5x3 cm on the right lumbar part, the patient is not subject to a life-threatening situation, there is a loss of 5-day work power and strength,"* and it was observed in relation to applicant Ertan Dağabakan that *"there is a 1x2 cm crusted wound on the right McBurney's*

point and a 2x2 cm greenish ecchymosis on the front part of the right arm. Under such conditions, the patient is not subject to a life-threatening situation, there is a loss of 1-day work power and strength, there is no permanent mark on the face.".

29. After the court case that was lodged against the aforementioned doctors (§ 32, 33; G. Ö., Y. İ., Y. O.), upon the request of the Criminal Court of First Instance of Ağrı with the correspondence dated 5/6/2002 that the difference between the reports dated 6/11/2001, 7/11/2001 and 12/11/2001 which were issued in relation to the applicants be evaluated, it was stated in the correspondence of the Forensic Medicine Institution dated 12/7/2002 in the same way and in summary on the reports in relation to the applicants "*that the findings in the report dated 12/11/2001 occurred due to a blunt traumatic factor, that these findings were the same lesions as the lesions in the report dated 7/11/2001, that this situation occurred within a time span varying from 7 to 12 days before the date of the last report*".

30. In the report dated 2/1/2006 which was taken from the Presidency of Forensic Medicine Institution, it was stated in relation to applicant Cezmi Demir that, although it was indicated in his examination which was performed on 7/11/2001 that there was common hematoma in the upper right of his back, since it was noted in his examination performed five days later on 12/11/2001 that there was a greenish ecchymosis in the same area, the said lesion needed to be an ecchymosis rather than a hematoma, that the ecchymoses which occurred on the body as a result of blunt trauma changed color and healed. However, it was not possible to medically determine when these ecchymoses occurred only through the color changes in the ecchymoses as it was known that such color changes could vary according to the severity of the trauma, the characteristics of the object or objects and the part of the body that it was applied to, age, gender and physiological characteristics, that different colors may be observed around and in the middle of ecchymoses during their healing process, that some of the colors observed during the healing process such as red, purple, pink, green, yellow and blue could be seen together or intermediate colors that remain among these could also be seen.When statements such as greenish and yellowish was considered, which did not represent a definite color were also used while describing these intermediate colors, it was possible for the trauma that caused the ecchymosis which was described

as greenish on 12/11/2001 to have occurred within a 5-to-15 day period retrospectively from that date. It was not possible to determine an exact date, and, furthermore, the same points were noted in the reports that were issued separately for the other applicants.

c. Judicial Action Taken in Relation to the Public Officials

i. Court Cases Lodged as a Result of the Investigation

31. After the applicants stated in their similar statements at the Prosecutor's Office that "*they were continuously subjected to ill-treatment during the period when they were in custody in order for them to admit to the accusations that were directed at themselves and thus they were filing a complaint against the Gendarmerie officials*", an investigation based on the file registered with the number 2001/306 was started by the Prosecutor's Office on the very same day in order to probe into these claims.

32. As a result of the investigation that was carried out by the Chief Public Prosecutor's Office of Hamur and upon contradiction among the said reports, a criminal case was lodged at the Hamur Criminal Court of First Instance through the indictment dated 5/12/2001 and No.2001/71 in relation to Doctor G.Ö. who conducted the medical examination of the applicants on the date they were released from custody and issued the first reports about the applicants which stated that *"there was no mark of battering and coercion"* with a request for his penalization for the crime of *"issuing a report that is contrary to facts"* as per Article 354/4,5 of the Turkish Penal Code No.765 which was in force on the date of crime. The case was registered with the (File No: E. 2001/87) Hamur Criminal Court of First Instance, the first hearing thereof was held on 6/12/2001 and following the closing of this court later (through the decision of HCJP on 9/6/2004 and No:278) the file was sent to the Ağrı Criminal Court of First Instance and the trial was continued through the (File No:E. 2004/419) of the said court.

33. Furthermore, within the scope of the investigation which was carried out by the Chief Public Prosecutor's Office of Hamur based on the file (File No:Invs.2001/306) except for the court case lodged against Doctor G. Ö., the crimes of *"issuing a report that is contrary to facts"* and *"ill-treatment to other persons"* were also separated as per Miscellaneous Decision (File

No:2001/28 on 30/11/2001); and the file (File No: Invs.2001/314) that was executed in relation to Y.İ. and Y.O., the doctors at Ağrı State Hospital, for the crime of *"issuing a report that is contrary to facts"* was submitted to the Chief Public Prosecutor's Office of Ağrı with the decision of lack of venue dated and (File No:2001/11 on 7/12/2001), and a criminal case was lodged against the said persons at the Criminal Court of First Instance of Ağrı through the indictment of the Prosecutor's Office (File No: 2002/77 on 4/2/2002) with a request for the penalization thereof as per Articles 64/1, 354/4-5 of the abolished Law No.765. The said court case was registered in the File No.E. 2002/86 of the said court.

34. On the other hand, a criminal case was lodged with the Criminal Court of First Instance of Ağrı against İ.Ö., the Commander of Hamur District Gendarmerie Station, and H.A., his deputy, as per Articles 64/1, 354/4-5 of the Law No.765 through the indictment (File No:2002/192 on 26/3/2002) and , for the crime of *"instigating the issuance of a forensic report that is contrary to facts in order to conceal torture"* and the court case was registered (File No: E. 2002/213).

35. It was decided by the Court on 27/3/2002 that the above-mentioned court case (File No: E 2002/213) be joined with the court case (File No: E.2002/86) with reference to the presence of actual and legal connection between them.

36. On the other hand, the investigation file executed based on the file (File No: Invs.2001/312) in relation to İ.Ö. and H.A., the Gendarmerie officials, whom the applicants claimed to have tortured and ill-treated them during the period they were in custody, was sent to the Chief Public Prosecutor's Office of Ağrı through the Summary Record dated 7/12/2001 by the Chief Public Prosecutor's Office of Hamur on the justification that the action fell within the competence of an High Criminal court.

37. Thereupon, a criminal case was lodged at the High Criminal Court of Ağrı through the indictment of the Chief Public Prosecutor's Office of Ağrı (File No:2001/81 on 28/12/2001) against İ. Ö., the Gendarmerie Station Commander, and H.A., his deputy, for the crime of "*ill-treatment to other persons by a public official*" as per Article 243/1 of the Law No. 765.

ii. Statements by Defendants and Witnesses

38. In their statements and defenses at the stages of investigation and prosecution, İ.Ö., one of the defendants, stated, in summary, that; "*he was the station commander, the gendarmerie officials he instructed and sent upon the denunciation of theft arrested the applicants at the incident area and brought them to the station, he took statements himself during the three-day custody period, he had non-commissioned officer H.A., his deputy, with him during the taking of statements, he took the suspects to Ağrı State Hospital together with his deputy after release from custody upon the claims of ill-treatment, the reports which were issued were first submitted to him without cover so he talked to the doctor and had the reports put in an envelope, he did not exert any pressure on the said doctors in any manner during this process, he did not engage in any behavior of ill-treatment*", and, through a similar statement, defendant H.A. also pleaded not guilty. In the same manner, defendant G.Ö. stated that he examined the applicants and issued the reports without being subject to any pressure and he also suggested that he did not commit the attributed crime.

39. In his statement, defendant Y. O. stated, in summary, that; "*he was working as the doctor on duty at Ağrı State Hospital on the day of the incident, Doctor Y. was the active doctor on duty, the aggrieved were brought in for examination, they were examined by Doctor Y., Doctor Y. could not have a full grasp of the situation and asked him to re-do the examination, they undressed the aggrieved completely, the aggrieved had marks of battery and coercion but they thought a full opinion was not forged, then they issued a report that these marks occurred within the last 8 to 12 hours, their opinion was as such, they did not remember where the marks of battery and coercion were on the aggrieved, he delivered the reports to İ.Ö.*".

40. In his defense, defendant Y. İ. said, in summary, that; "*he worked at Ağrı State Hospital, he examined the aggrieved, he had hesitations when he looked at the lesions and that's why he called in Doctor Y.O., they examined the aggrieved one by one together with Y. O., they issued the reports and handed them in an envelope over to an official whose name he could not remember*".

41. In her statement, witness N. Ö. said; "*she worked as a nurse at Hamur Healthcare Center on crime, she was the wife of İ.Ö., one of the defendants, she was working as the polyclinic nurse on the incident and the gendarmerie brought*

in the aggrieved for examination around 16.00, the aggrieved were undressed and examined one by one and a report was issued that they did not have any marks of battery or coercion on their bodies, gendarmerie commanders were not allowed in during examination, the aggrieved did not put forth any complaints, but one aggrieved said he had a headache, no phone calls were received from anywhere during the examination.".

42. Witness S. S. stated in his statement that; "*he was working as the standby doctor at Ağrı State Hospital on the incident, the Chief Physician called him and said there was an official correspondence, he went to the ER following this, he completely undressed the aggrieved, he examined the aggrieved one by one, the wounds stated in all three reports on the aggrieved were healing wounds from about a week - ten days ago, they were wounds that could most possible have been caused by a blunt tool or object, the persons were examined to have bruises and ecchymoses on their bodies due to blunt trauma, the contents of the report dated 12/11/2001 were accurate*".

43. Witness Ş. Ö. said in his statement that; "*they performed the examination of three incoming persons upon the written request of the Chief Public Prosecutor's Office of Ağrı on 12/11/2001, the wounds on various body parts of all three persons were healing wounds from about a week - ten days ago, the wounds had occurred due to blunt trauma and they had greenish, healing bruises and ecchymoses on their bodies*".

iii. Decisions Rendered as a Result of the Prosecution Stage

44. As a result of the trial held within the (File No. E. 2002/86) of Ağrı Criminal Court of First Instance, through the decision (File No. E. 2002/86, K. 2002/506 on 9/10/2002) of the said Court, it was decided that the defendants Y.İ. and Y.O. were acquitted, taking into consideration their statements, on the justification of *"the legal elements of crime not having formed"*, and İ.Ö. and H.A., the other defendants, were acquitted on the justification that "*evidence which was free from all kinds of suspicion, was convincing, open and conclusive could not be obtained*", and this decision was not appealed to and finalized.

45. The lawsuit that was heard based on the file (File No: E. 2001/192) at Ağrı High Criminal Court for the crime of "*ill-treatment to others by a*

public official" was concluded with the decision of the said Court (File No: E. 2001/192, K. 2002/66 on 11/4/2002) and defendant H.A. was acquitted for his actions towards the applicants on the justification that there was noevidence which was free from sufficient suspicion, conclusive and convincing whereas defendant İ.Ö. was penalized with a total imprisonment of 30 months and 3 days and a penalty of disqualification from public office for 7 months and 15 days as per Articles 243/1 and 71 of the Law No. 765.

46. Following the fact that this decision was appealed to by the defendants and applicants on 24/4/2002, through the writ of the 8th Penal Chamber of the Court of Cassation (File No. E. 2003/1302, K. 2003/2451 on 23/6/2003), a decision of overturn was rendered on the justification that "*eliminating the contradictions among the three medical reports which were issued on the dates of 6/11/2001, 7/11/2001 and 12/11/2001 and sending the entire file to the Forensic Medicine Institution in order to exactly identify the time of occurrence of the determined findings and getting a final report, the judgment's being set through incomplete investigation although it was necessary to wait for the final judgments of the criminal cases which were lodged about the doctors and to evaluate all the evidence together to determine and appraise the legal statuses of the defendants*".

47. In the hearing held on 7/9/2004 by Ağrı High Criminal Court which accorded to the overturn and proceeded with the trial through the number M. 2003/141, it was decided that the court case (No. E. 2004/419) being tried at Ağrı Criminal Court of First Instance about Doctor G.Ö. be joined by the said court case, and the file, for the elimination of the deficits stated in the writ of the Court of Cassation, and the aggrieved, on hand , be sent to İstanbul Forensic Medicine Institution and the contradiction among the reports be eliminated.

48. As a result of the inclusion, in the file, of the report dated 2/1/2006 which was issued by the Forensic Medicine Institution and had similar determinations with the contents of the previous report (the report dated 12/7/2002), new judgments were rendered about all defendants. According to this, through the decision of Ağrı High Criminal Court (File No. E. 2003/141, K. 2006/117 on 1/6/2006), it was decided that H.A., one of the defendants, be acquitted, defendant G.Ö. be penalized with a judicial

fine of TRY 600.00 for the crime of neglect of duty and this penalty be postponed, defendant İ.Ö. be penalized with a total imprisonment of 30 months and 3 days and a penalty of disqualification from public office for 7 months and 15 days after being proven guilty for his actions towards the applicants.

49. After the appeal by the parties to this decision on 2-15/6/2006, through the writ of the 8th Penal Chamber of the Court of Cassation dated and (File No. E. 2008/200, K. 2010/9496 on 30/6/2010), it was decided that"*despite the fact that the judgment was appealed to by defendants İ. Ö., G. Ö. and their counsels as well as Attorney S.B., the attorney to Hicrettin Dağbakan and Cezmi Demir, the intervening parties, as the attorney to 'intervening parties Hicrettin Dağabakan, Ertan Dağabakan and Cezmi Demir', it was understood that the names of 'Ertan Demir and Hicrettin Demir' were included on the letter of notification as the intervening parties and the phrase 'attorney to the intervening party, Ertan Demir' as the appellant was included; on the other hand, the decision of acquittal about H.A., the defendant within the scope of appeal, was not indicated in the title of the letter of notification, and, thus, the file be handed over to the Chief Public Prosecutor's Office of the Court of Cassation without being examined on the condition that it be returned after examination following the completion of the stated corrections*". These corrections were made and the file was sent back to the 8th Penal Chamber of the Court of Cassation through the letter of notification of the Chief Public Prosecutor's Office of the Court of Cassation dated 21/9/2010.

50. In the writ of the 8th Penal Chamber of the Court of Cassation (File No: E. 2010/12971, K. 2011/5945 on 6/7/2011); it was stated that "*in the criminal case that was lodged against the intervening parties for the crime of establishing an organization to commit a crime, it was determined that the attorney who was delegated as counsel was delegated as counsel to defendants İ. Ö. and H. A. and this was contrary to the provision of Article and paragraph 38/b of the Code of Attorneys*" and it was decided that the judgment rendered about defendants İ. Ö. and H. A. be overturned and the court case about the other defendant G.Ö. be discontinued on the justification of statute of limitations and the decision of overturn about G.Ö. was finalized on the very same date.

51. As a result of the trial held by the Ağrı High Criminal Court in accordance with the writ of overturn, and (File No. E. 2011/176, K. 2012/95 on 10/4/2012) it was decided that in relation to the crime of "*ill-treatment by a public official to others*", H. A., one of the defendants, be acquitted whereas defendant İ. Ö. be penalized with a total imprisonment of 30 months and 3 days and a penalty of disqualification from public office for 7 months and 15 days due to his actions towards the applicant and the other two aggrieved persons.

52. The justification of the court in the said decision was as follows:

> *"…It is understood that the aggrieved were subjected to treatment that is incompatible with human dignity, is humiliating and has resulted in their suffering bodily or mental pain with their perception or willpower impacted at Hamur District Gendarmerie Station Command where they were brought as suspects for the crime of theft, that the action was perpetrated by the defendant İ. Ö., that the aggrieved were completely undressed and soaked with cold water during the custody period that was resorted to with the aim of getting the suspects of the incident confess their crimes and lasted for three days, that they were battered, that they were subjected to ill-treatment, that they were insulted, that their pride was trampled on. When the material findings in the reports that are determined and the consistent statements of the aggrieved in stages are analyzed, our court is of the fully conscientious conviction that defendant İ.Ö. committed the crime of torturing the three aggrieved persons which is attributed to him. The defenses of defendant İ.Ö. that he did not commit the crime attributed to him, that the said symptoms could occur after the suspects were released from custody are not found convincing when the scope of the entire file is taken into consideration and the penalization of the defendant as per Article 243/1 of the Turkish Penal Code No.765 is resorted to."*

53. The applicants lodged an individual application in relation to the incident through their petitions which were dated 3/1/2013.

54. On the other hand, after the decision dated 10/4/2012 was appealed by defendant İ.Ö. on 17/4/2012, it was decided that the judgment of the Court be upheld through the writ of the 8th Penal Chamber of the Court of Cassation dated 20/5/2013 and No. E. 2013/1460, K. 2013/15369 and an annotation of finalization was affixed to the decision about the defendants İ.Ö. and H.A. by the Court taking the very same date as basis.

B. Relevant Law

55. Article 230(1) of the abolished Turkish Penal Code No.765 of 1/3/1926 is as follows:

> *"For whatever the reason might be, any officer who displays neglect and procrastination in delivering his/her duty as an officer or does not fulfill the orders given by his/her superiors in accordance with law without any valid reason shall be penalized with an imprisonment of three months to one year and a heavy fine of one thousand liras to five thousand liras."*

56. Article 243 of the Code No. 765 is as follows:

> *"A penalty of heavy imprisonment up to eight years and a penalty of disqualification from public services on a permanent or temporary basis shall be given to officers or other public officials who torture or resort to cruel or inhuman or degrading treatment against a person to get them to confess their crime, to prevent an aggrieved person, a personal plaintiff, an intervening party or a witness from reporting incidents or due to the fact that they lodged complaints or made denunciations or stood as witnesses or for any other reason.*
>
> *The penalty that is to be issued in accordance with Article 452 shall be increased from one third to half if death occurs as a result of the act whereas the penalty that is to be issued in accordance with Article 456 shall be increased from one third to half in other cases."*

57. Article 354 of the Code No. 765 is as follows:

> *"If a physician, pharmacist, healthcare officer or any member of another healthcare profession issues a document, which is to be treasured as safe and reliable by the Government, in a way that is contrary to facts and just for favor, that person shall be penalized with an imprisonment of six months to two years and a heavy fine of one hundred million liras to three hundred million liras. The same penalty shall be given even about any person who willfully uses such a document that is issued contrary to facts.*
>
> …

If the document that is contrary to facts is issued in order to conceal or destroy the evidence of a previously committed crime or torture, other cruel or inhuman acts, the penalty to be given to the perpetrator shall be an imprisonment of four years to eight years.

…"

IV. EXAMINATION AND GROUNDS

58. The individual applications of the applicants (App. No. 2013/293 on 3/1/2013) were examined during the session held by the Court on 17/7/2014 and the following are ordered and adjudged:

A. The Applicants' Allegations

59. The applicants asserted that they were taken into custody, with the title of suspect, by the law enforcement forces running an investigation upon reports of telephone wire theft around Aşağı Karabal Village of Ağrı province where they went together for to load sugar beets in return for a fee on 3/11/2001, that they were kept in custody for three days and that, in order for them to admit to committing the said crime, the law enforcement officials continuously poured cold water over their heads, fisted them on the head, battered them in various parts of their bodies, kept them out in the cold, did not give them bread and water, uttered degrading words to them, that they were thus subjected to torture and ill-treatment.

60. Furthermore, the applicants stated that they were taken out of custody into Hamur Healthcare Center in order to undergo medical examination before being referred to the Public Prosecutor's Office, that a report reading *"there is no mark of battery and coercion"* was issued in relation to them since one of the nurses working at the center was the wife of defendant İ.Ö. whom they complained about due to torture and ill-treatment, that, upon their objection to that report, they were taken to Ağrı State Hospital for a repeat medical examination under supervision of the same law enforcement officials who ill-treated them and the report issued as a result of their examination by the doctors in charge was submitted to defendant İ.Ö., that İ.Ö. got angry when he examined those reports and went into the hospital again to get the contents changed.

61. Lastly, the applicants asserted that the criminal case lodged upon the complaint they made due to being subjected to torture and ill-treatment was not completed in a reasonable duration, that a decision satisfying the public opinion and conscience was not rendered despite the fact that eleven years elapsed following the incident, that the court case in relation to Doctor G.Ö. who was tried on the justification that he issued a forensic report contrary to fact in order to conceal torture abated due to statute of limitations, that some of the defendants were acquitted, that, due to these reasons, their rights in Articles 2, 3, 6, 8, 13 and 14 of the ECHR and Article 1 of the additional Protocol number 1 were violated and placed a request that a total of TRY 1.100.000 of compensation and trial expenses comprising of TRY 500.000 pecuniary compensation, TRY 500.000 non-pecuniary compensation and TRY 100.000 other expenses before courts of instance be paid.

B. The Constitutional Court's Assessment

1. Admissibility

62. The Constitutional Court is not bound by the legal qualification of the facts made by the applicant, it appraises the legal definition of the facts and cases itself. Therefore, the claims of the applicants were considered to be related to Articles 17/3 and 36 of the Constitution and were evaluated within the scope of the prohibition of torture and the right to a fair trial.

a. The Claim that the Right to a Fair Trial was Violated

63. The applicants stated that the criminal trial held against the law enforcement officials who, they claimed, tortured them was not concluded in a reasonable duration and asserted that their rights to a fair trial were violated.

64. In the Ministry opinion, the complaint that the right to a fair trial was violated was evaluated, the principles adopted by the European Court of Human Rights (ECtHR) were mentioned and it was stated that the ECtHR, noting the length of the investigation conducted as procedurally required by Article 3 of the Convention against those responsible, examined the complaints that Article 6/1 of the Convention was violated within the

scope of Article 3 and did not separately handle the complaints based on Article 6/1.

65. The applicants did not make any declaration against the opinion of the Ministry on the merits of the application.

66. Although the applicants asserted on the basis of the right to a fair trial that the court case lodged against the law enforcement officials exceeded a reasonable duration, since this matter also needed to be handled within the scope of the responsibility of the state to conduct an efficient investigation in relation to the prohibition on torture, a separate evaluation in terms of the right a to fair trial in relation to the said complaint was not carried out.

b. Alleged Violation of the Prohibition of Torture

67. As a result of the examination of the application, since it was understood that the claims regarding the prohibition of torture were not manifestly ill-founded and there was no other reason to require a decision on their inadmissibility, it needs to be decided that this part of the application is admissible.

2. Merits

68. Article 17(1) and 17(3) of the Constitution are as follows:

> *"Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence.*
>
> *...*
>
> *No one shall be subjected to torture or mal-treatment; no one shall be subjected to penalties or treatment incompatible with human dignity..*

69. Article 3 of the European Convention on Human Rights (ECHR) is as follows:

> *"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."*

70. The applicants alleged that they continuously suffered from torture and ill-treatment by law enforcement officials for the 3 days when they were in custody in order for them to admit to the attributed crime.

71. Upon the complaint they lodged due to being subjected to torture and ill-treatment, the applicants stated that they underwent the doctor's examination with the oversight of the persons who ill-treated them, that these individuals influenced and guided the doctors issuing the reports, that the criminal case lodged for the said crimes was not completed in a reasonable duration, that the court case in relation to Doctor G.Ö. who was tried on the justification that he issued a forensic report that was contrary to fact in order to conceal the crime abated due to statute of limitations, that some of the defendants were acquitted, and, due to these reasons, the trials were not held efficiently.

72. In the Ministry opinion, the complaints that the prohibition of torture was violated in terms of merits were evaluated and it was emphasized that it was understood from the file that the applicants were injured during the three-day period when they were kept in custody, that there was no explanation in the defenses of the defendants as to how this injury was caused, that the evaluation and discretion in relation to whether the prohibition of torture was violated in terms of merits rested with the Constitutional Court.

73. In relation to complaints that the prohibition of torture was violated in terms of procedure, the Ministry stated that the investigation was initiated in relation to the said perpetrators upon the complaint of the applicants and court cases were lodged, that, however, when all the trial phases were considered, the trial started on 6/11/2001 was completed with the decision of approval dated 20/5/2013, that therefore the trial process lasted for eleven years six months and fourteen days, that it was emphasized in many ECtHR judgments that the investigation and prosecution towards the allegations of torture and ill-treatment should be concluded rapidly and efficiently, that the discretion in relation to whether the prohibition of torture was violated in terms of procedure rested with the Constitutional Court.

74. The applicants did not make any declaration against the opinion of the Ministry on the merits of the application.

75. The examination of complaints in relation to the prohibition of torture needs to be handled separately for material and procedural dimensions

in connection with the negative and positive responsibility of the state. Therefore, the complaints of the applicants in the present incident will be evaluated separately in terms of the material and procedural liabilities of the state within the scope of Article 17(3) of the Constitution.

a. Alleged Violation of the Material Dimension of Article 17 of the Constitution

76. Considering that the criminal prosecution was held and one of the defendants was convicted for the crime of torture in the present incident, it needs to be examined whether this situation primarily offered a sufficient and efficient redress in terms of the applicants, in other words, whether the result of trial removed the title of aggrieved. Although it does not fall within the competence of the Constitutional Court to dwell on matters relevant to personal criminal responsibility and decide on whether individuals are guilty or not, the Constitutional Court has the competence to conduct constitutional reviews in cases where there is a clear disproportion between the gravity of an offense and the punishment given, in relation to practice for crimes of ill-treatment committed by public officials.

77. As stated in ECtHR judgments, although there is no final obligation for all judicial prosecution proceedings to be concluded with conviction or a certain sentencing, under no circumstances must courts allow life-threatening crimes and grave crimes against physical and mental integrity to remain unpunished or be subject to amnesty or statute of limitations. As guardians of laws enacted in order to protect the lives and physical and mental integrity of persons falling within the scope of their jurisdiction, judicial bodies needs to be determined to impose sanctions on those who are responsible and not allow a clear disproportion between the gravity of an offense and the punishment given. Otherwise, the positive liability of the state to protect, through laws, the physical and mental integrity of persons will not be fulfilled (see. *Ali and Ayşe Duran v. Turkey*, App. No: 42942/02, 8/4/2008; *Okkalı v. Turkey*, App. No: 52067/99, 17/10/2006).

78. Accordingly, in the said court case, due to the fact that rather than indicating that an act such as torture which constitutes a grave crime can be tolerated in no way, the Court rendered its judgment at the minimum

limit in a disproportionate way to extenuate the consequences of this act and that the court case was abated in terms of one of the defendants due to statute of limitations, it was concluded that the titles of applicants as the aggrieved were not removed.

i. General Principles

79. The incident that is the subject matter of the application is related to the claim that the rights to protect and develop their corporeal and spiritual existences of the applicants, who were under the supervision of the state, due to the oral and physical attack they were subjected to were violated.

80. Everyone's right to protect and develop their corporeal and spiritual existence is guaranteed in Article 17 of the Constitution. Protection of human dignity is the aim in paragraph one of the said article. In paragraph three, it is also provided that no one can be subjected to *"torture"* or *"torment"*, that no one can be subjected to a penalty or treatment which is *"incompatible with human dignity"*.

81. The liability of the state to respect the right of the individual to protect and develop his corporeal and spiritual existence requires that, firstly, public authorities must not intervene in this right, in other words, not cause any physical and mental injury to persons in ways that are stated in paragraph three of the said article. This is a negative obligation of the state, arising from the liability thereof to respect the bodily and mental integrity of the individual.

82. Furthermore, Article 17 of the Constitution also assigns the State the obligation to take measures to prevent the said persons from being subjected to torture and torment or a penalty or treatment which is incompatible with human dignity even if such treatment is perpetrated by third persons. Therefore, in the event that officials do not take reasonable measures to prevent the occurrence of a danger of maltreatment they know or need to know about, the State may end up with a responsibility within the meaning of paragraph three of Article 17. For a similar judgment by the ECtHR, see *Mahmut Kaya v. Turkey*, App. No: 22535/93, 28/3/2000, § 115).

83. On the other hand, in order for a treatment to fall into the scope of Article 17(3) of the Constitution, it needs to have attained a minimum level of gravity. This minimum threshold is relative and whether the minimum threshold is exceeded or not should be evaluated by taking into consideration the peculiarities of the present incident. In this context, factors such as the duration of treatment, the physical and mental effects thereof and the gender, age and health status of the aggrieved bear importance (App. No: 2012/969, 18/9/2013, § 23). The purpose and intention of treatment and the reasons behind can also be added to these elements that are to be taken into evaluation (For similar ECtHR judgments, see *Aksoy v. Turkey,* App. No: 21987/93, 18/12/1996, § 64; *Eğmez v. Cyprus,* App. No: 30873/96, 21/12/2000, § 78; *Krastanov v. Bulgaria,* App. No: 50222/99, 30/9/2004, § 53). Furthermore, the determination of whether ill-treatment occurred within a context where excitement and feelings were elevated (see *Eğmez,* § 53, above; *Selmouni v. France* [BD], App. No: 25803/94, 28/7/1999, § 104) is also another factor that needs to be taken into consideration.

84. Ill-treatment is graded and described in different concepts by the Constitution and the ECtHR considering the effect thereof on the person. Therefore, it is seen that there are some differences of intensity between the statements present in Article 17(3) of the Constitution. In order to identify whether a certain treatment can be considered as *"torture"* or not, it is necessary to observe the difference between the concepts of *"torment"* and *"incompatible with human dignity"* and torture as mentioned in the said paragraph. It is understood that this difference was introduced by the Constitution specifically in order to draw attention to the special situation in deliberate inhuman treatment which causes very grave and cruel pain and to do a sort of grading and that the said statements have a broader and different meaning than the elements of the crimes of *"torture"*, *"torment"* and *"insult"* which are regulated by the Turkish Penal Code No.5237.

85. Accordingly, it is possible to identify treatment that causes the greatest harm to the corporeal and spiritual integrity of the person within the context of constitutional regulation as *"torture"* (App. No: 2012/969, 18/9/2013, § 22). In addition to the gravity of treatment, the element of *"intention"* is also included in Article 1 of the United Nations Convention

against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, stating that the term *"torture"* covers intentionally inflicting severe pain or suffering for the purposes of obtaining information, punishing or intimidating or for any discriminatory reason.

86. Article 1(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which was adopted by the General Assembly of the United Nations on 10/12/1984 and entered into force on 26/6/1987 and to which Turkey became a party on 10/8/1988 is as follows:

> "*For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*"

87. Similarly, Article 15 of the said Convention includes the provision"*Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.*" and Article 16 includes the provision "*1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.*"

88. Inhuman treatment which does not extend to the level of "*torture*" but is premeditated, applied for hours within a long period of time and caused physical injury or intensive physical or spiritual suffering can be

defined as *"torment"* (App. No: 2012/969, 18/9/2013, § 22). In such cases, the pain that occurs in these forms must go beyond the pain that is inherent as an inevitable element in a legitimate treatment or punishment. Unlike torture, the intention of inflicting a suffering in line with a specific purpose is not sought in *"torment"*. (For a similar ECtHR judgment, see *Ireland v. United Kingdom,* App. No: 5310/71, 18/1/1978, § 167; the above-mentioned *Eğmez v. Cyprus,* § 78). The ECtHR considers treatment such as physical attack, battery, psychological interrogation techniques, keeping in bad conditions, deporting or extraditing the person to a place where he will suffer from ill-treatment, a person getting lost under state supervision, a person's home being destroyed, fear and concern caused by waiting for a long time for the execution of death penalty, child abuse to be *"inhuman treatment"* (see the above-mentioned *Ireland v. United Kingdom*; *Ilaşcu and others v. Moldova and Russia,* [BD], App. No: 48787/99, 8/7/2004, §§ 432-438; *Soering v. United Kingdom*, App. No: 14038/88, 7/7/1989, § 91; *Jabari v. Turkey,* App. No: 40035/98, 11/7/2000, §§ 41-42; *Giusto v. Italy,* App. No: 38972/06, 15/5/2007). Treatment with such qualities can be qualified as *"torment"* within the context of Article 17(3) of the Constitution.

89. It is possible to define lighter treatment that arouses feelings of fear, humiliation, grief and degradation in the aggrieved in a way to possibly humiliate and embarrass him or has a degrading quality which draws the aggrieved to act contrary to his own will and conscience as treatment or punishment that is *"incompatible with human dignity"* (App. No: 2012/969, 18/9/2013, § 22). In this definition, unlike *"torment"*, the treatment applied on the person creates a humiliating or degrading effect rather than physical or mental pain.

90. In order to identify which of these concepts constitutes a specific treatment, each given incident needs to be evaluated within its own special conditions. Although the fact that the treatment is perpetrated publicly plays a role in whether it is of a degrading quality incompatible with human dignity or not, in some cases it may suffice for ill-treatment at such a level that the person is humiliated in his own eyes (For a similar ECtHR judgment, see *Pretty v. United Kingdom,* App. No: 2346/02, 29/4/2002, § 52). Furthermore, although it is taken into consideration whether the treatment was perpetrated with an intention to humiliate or degrade, not

being able to determine such a purpose will not mean that there is no violation of ill-treatment. (For a similar ECtHR judgment, see *V. v. United Kingdom,* [BD], App. No: 24888/94, 16/12/1999, § 71). A treatment can both have the quality of being inhuman/torment and degrading/incompatible with human dignity (For a similar ECtHR judgment, see the above-mentioned *Ireland v. United Kingdom*). Every degrading treatment which is incompatible with human dignity may not have the quality to be inhuman/torment whereas all kinds of torture constitute an inhuman or degrading treatment at the same time. Conditions of detention, practice against the detainees, discriminatory behavior, insulting statements uttered by public officials, certain negative circumstances faced by the handicapped people, degrading treatment such as making the person eat or drink certain things that are not normal may prove to be treatment that is "*incompatible with human dignity*".

Threatening to engage in an act that is prohibited by Article 17(3) of the Constitution, on the condition that it is sufficiently close and real, may also involve the risk of bearing the result of the violation of this article. Therefore, threatening someone with torture may at least *constitute* a treatment that is *"incompatible with human dignity"*. (For a similar ECtHR judgment, see *Gäfgen v. Germany* [BD], App. No: 22978/05, 1/6/2010, § 91; *Campbell and Cosans v. United Kingdom,* App. No: 7511/76 – 7743/76, 25/2/1982, § 26).

Resorting to coercion towards a person who is deprived of his liberty as long as his actions and attitudes do not require the absolute use of force may bear the consequence of the staining of human dignity and the violation of the prohibition set forth in Article 17(3) of the Constitution as a principle.

As stated in many judgments of the ECtHR, the prohibition of torture is a regulation that is relevant to the fundamental values of the democratic society. Unlike the majority of the normative articles of the ECHR, Article 3 does not set forth an exception and cannot be suspended even in the case of a general danger which threatens the existence of the nation in accordance with paragraph 2 of Article 15 (see *Selmouni v. France* [BD], App. No: 25803/94, 28/7/1999, § 95; *Labita* v. Italy [BD], App. No: 26772/95, 6/4/2000, § 119). The ECtHR confirmed that, even under the most

challenging conditions such as the fight against terrorism and organized crime, the Convention prohibits, in definite phrases, torture and inhuman or degrading treatment or punishments no matter what the behavior of the aggrieved is (see the above-mentioned *Labita v. Italy*, § 119; *Chahal v. United Kingdom,* App. No: 22414/93, 15/11/1996, § 79).

In ECtHR judgments, it is stated that, in cases when a person is taken into custody in a healthy condition but injury is spotted on his body upon his release, the State has the responsibility to bring in a reasonable explanation about how the said injury happened and to submit evidence that will leave the claims of the aggrieved to this end in doubt, that, specifically in cases when the claims are confirmed by doctor reports, obvious problems will occur within the meaning of Article 3 of the Convention (see the above-mentioned *Selmouni v. France,* § 87; *Ferhat v. Turkey,* App. No: 12673/05, 25/9/2012, § 33).

Claims of ill-treatment need to be supported by appropriate evidence. (For a similar ECtHR judgment, see *Klaas v. Germany*, App. No: 15473/89, 22/9/1993, § 30). In order to determine that the claimed incidents are real, the existence of reasonable evidence that is far from all kinds of doubts is needed. Evidence having such quality can also be composed of sufficiently serious, clear and consistent indications or some presumptions, which cannot be proven otherwise. (For similar ECtHR judgments, see *Ireland v. United Kingdom,* App. No: 5310/71, 18/1/1978, § 161; the above-mentioned *Labita v. Italy*, § 121). In this context, the attitudes the parties adopt while evidence is collected needs to be taken into consideration (see *Tanlı v. Turkey,* App. No: 26129/95, 10/4/2001, § 109). Only in the case of the determination of these suitable conditions can the existence of ill-treatment be mentioned (App. No: 2013/394, 6/3/2014, § 28).

The role of the Constitutional Court in the examination of complaints regarding individual applications is of secondary quality and it needs to act very carefully in cases when it is inevitable for it to assume the role of a court of first instance due to the conditions brought along by certain situations (For a similar ECtHR judgment, see *McKerr v. United Kingdom,* App. No: 28883/95, 4/4/2000). There is a risk to encounter such a situation in the examination of the complaints that are lodged within the context of Article 17 of the Constitution. When claims are placed in relation to

the violation of the right to life and the prohibition of ill-treatment as guaranteed in the said article, the Constitutional Court should conduct a full examination in relation to this subject. (For a similar ECtHR judgment, see *Ribitsch v. Austria,* App. No: 18896/91, 4/12/1995, § 32). However, since it is the task of the courts of instance as a rule to evaluate the evidence in a court case that is being tried, the duty of the Constitutional Court is not to replace the evaluation which these courts conducted in relation to material incidents with its own evaluation (For a similar ECtHR judgment, see *Klaas v. Germany,* App. No: 15473/89, 22/9/1993, § 29; *Jasar v. "Former Yugoslavian Republic of Macedonia",* App. No: 69908/01, 15/2/2007, § 49). When a court case is being tried at courts of instance in relation to the claims of ill-treatment, the responsibility of penal law needs to be kept separate from the responsibility of the Constitution and of the international law. Out of the fundamental rights and freedoms guaranteed by the Constitution, the venue of the Constitutional Court is limited to those that are within the scope of the European Convention on Human Rights and the additional protocols thereto, to which Turkey is a party to. Therefore, the Constitutional Court does not have a task to get to a finding in relation to guilt or innocence within the context of criminal liability (For a similar ECtHR judgment, see the above-mentioned *Tanlı v. Turkey,* §§ 110 – 111). On the other hand, despite the fact that the findings of the courts of instance not being binding on the Constitutional Court, strong reasons need to exist, under normal conditions, in order to move away from the determinations these courts make in relation to material incidents (For a similar ECtHR judgment, see the above-mentioned *Klaas v. Germany,* § 30).

ii. Application of Principles to the Present Case

91. The applicants were taken into custody by Gendarmerie officials on 3/11/2001 on the suspicion of the crime of theft. No health problem was spotted in their examinations performed on the very same day. The applicants were released from custody on 6/11/2001 and it was stated in the report issued in relation to them that *"no mark of battery was observed"*. However, upon the applicants' statements which they gave at the Prosecutor's Office "*that they were continuously subjected to torture during the period when they were in custody in order for them to admit to the accusations that were directed at themselves, that Doctor G.Ö. who worked at the same*

healthcare center with the wife of the commander and who tortured them issued a report contrary to the facts and thus they were filing a complaint against the Gendarmerie officials and the hospital doctors", an investigation was initiated by the Prosecutor's Office on that very same day in order to delve into these claims and it was determined in the reports taken, in relation to the applicants, from other hospitals and the Forensic Medicine Institution that marks of battery were observed at various body parts of the applicants in the time period when they were in custody (§ 28, 29, 30). Furthermore, in their defenses, Gendarmerie officials İ.Ö. and H.A. did not make a convincing explanation as to how the injuries in custody occurred despite the fact that the applicants went into custody in good health.

92. On the other hand, Ağrı Criminal Court of First Instance rendered a decision of acquittal in the court case, which was filed against the applicants for the crime of *"theft"*, due to the presence of claims that the statements at the law enforcement, the only evidence against the applicants, were taken as a result of torture and Ağrı High Criminal Court rendered a decision of acquittal for the crime of *"establishing an organization to commit a crime"*, on the justification that *"evidence, which was free from all kinds of suspicion, was convincing and conclusive in relation to the fact that they committed the attributed crime, was not present*." In addition to that, the decision of conviction rendered by the Ağrı High Criminal Court in relation to Gendarmerie official İ.Ö. for the crime of *"ill-treatment to others"* was upheld by the Court of Cassation and was thus finalized whereas H. A. was acquitted due to insufficient evidence. Similarly, it was decided that defendants Y.İ. and Y.O. be acquitted for the crime of issuing reports that were contrary to facts. On the other hand, despite the fact that the act of the defendant G.Ö. who issued a report that the applicants had no marks of battery and worked at the same place with the wife, who is a nurse, of the defendant İ.Ö., who was convicted for the crime of ill-treatment to others, was deemed proven by the Court and he was convicted for the crime of neglect of duty, it was seen that, at the Court of Cassation stage, it was decided to abate the action due to statute of limitations.

93. The applicants asserted at the Prosecutor's Office and Court stages and in their individual applications that they were subjected, by the law enforcement officers, to battery with truncheons and fists at various parts

of their bodies for the three days when they were in custody, that they were blindfolded, that they were stripped off and had to wait naked for the whole night separately in a cold place like a garage-storehouse, that water was sprayed onto them with a hose, that their hair was pulled and they were dragged on the ground, that they were not allowed to satisfy their need to use the bathroom, that their genital organs were squeezed with a tool, that attempts were made to insert a truncheon in their genital organs, that they were left hungry and thirsty, that they were subjected to strong swears and threats towards themselves and their families. It is evident that it will be difficult, due to the difficulty of collecting evidence, for the applicants, who were disconnected from the outer world as they were in custody or for whom it was not possible at any time to see the doctors, attorneys at law, family relatives or friends that could support them and provide the required evidence, to support the complaints they lodged in terms of the behaviors of ill-treatment which they were subject to during custody. In relation to the claims of the applicants within this scope, it is possible to reach a conclusion only in the case that all the data within the file is examined together.

94. Accordingly, the consistent statements of the applicants at stages, the doctor reports taken from Ağrı State Hospital and the Forensic Medicine Institution and witness statements and the reasoned decision of the Court (§ 52) constituted a presumption for the trueness of the of applicants' claims. In the face of the determination, through the applicants' consistent statements and doctor reports, that the applicants who were taken into custody in good health and were injured after they were released from custody or suffered ill-treament that did not leave any physical marks, the liability to prove that this was not due to the acts of the law enforcement officers now rests with the administration. However, it was seen that the administration did not fulfill its liability to prove.

95. All the injuries indicated in various health reports about the applicants and the statements of the applicants in relation to the ill-treatment they were subjected to in custody made it clear that there was physical pain. The continuance of the incidents confirm that the attacks were intentionally inflicted on the applicants in order for them to make confessions about the incidents attributed to them. In other words, it is

understood that these acts were deliberately practiced on the applicants in order to get them to admit to committing the previously mentioned crime. The acts displayed are of a quality which intends to inflict physical and psychological pain to the applicants, to break their resistance and humiliate them and gives them the feelings of fear, concern and humiliation. There is a sufficient serious evidence element to say that these treatments have the quality of torture.

96. For whatever reason it might be, the use of physical force against a person whose liberty is restricted, as long as not fully required by the attitude of this person, degrades human dignity and, as a rule, violates Article 17(3) of the Constitution. Specifically considering the fact that one of the applicants was under age during the incident that took place in custody, it is indisputable that this applicant may be under a risk to live in continuous pain and concern in the future due to the intensity of the violence he suffered during custody.

97. Furthermore, it is apparent that the acts in the sense that the applicants, who were already in a very vulnerable situation due to being in custody, were subjected to verbal and physical assault despite the fact that it did not stem from their own behaviors and there was no force majeure, that, moreover, they were referred to hospitals under the supervision of those who resorted to such use of force and that doctor reports were issued under the guidance and influence of these persons all sustained the existence of threat towards the applicants and this constitutes an intervention to human dignity.

98. Furthermore, although it was determined that the motive in the acts of the Gendarmerie officials was to shed light on the crime of theft, when Article 17(3) of the Constitution is taken into consideration, the prohibition of ill-treatment needs not be violated, no matter what the act of the aggrieved or the motive of the officials are. No matter how high the importance of the motive is, torture, torment or treatment that is incompatible with human dignity cannot be perpetrated even under the most difficult conditions such as the right to life. As per paragraph two of Article 15 of the Constitution, the suspension of this prohibition is not allowed even in the cases of war, mobilization, martial law or state

of emergency. The philosophical basis that strengthens the quality of absoluteness of the right in the said articles does not allow any exception or justifying factor or the weighing of benefits, no matter what the act of the said person and the quality of the crime are.

99. It is determined that the treatments which are stated above and have the quality to be incompatible with human dignity, cause bodily or mental pain, influence the skills of perception or will and lead to humiliation were perpetrated with the aim of getting information from the applicants, get them to admit to the attributed crimes, punish or intimidate them and through methods added to each other for three days by inflicting violent physical pain or mental pain under a certain deliberateness. Accordingly, when the purpose, duration, physical and mental impact of the treatment that was deliberately perpetrated towards the applicants, one of whom was under age, are taken into consideration, and when the extent of the said acts and the fact that they were perpetrated intentionally by public officials on duty against the people concerned in order for the concerned to make confessions or provide information about the incidents attributed to them are considered and, furthermore, when the impacts caused by these treatments on the bodily integrity of the applicants are taken into consideration, it is concluded that it is possible to qualify them as torture.

100. On the other hand, due to the fact that the court case was subject to statute of limitations in terms of a defendant and that, in relation to the convicted gendarmerie official, when his acts of a grave quality as stated in the justification of the Court are taken into consideration, a disproportionate practice is carried out between the crime committed and the punishment given and that the punishment given did not create a deterring impact which could ensure the prevention of such illegal acts, it is understood that the state did not fulfill its positive liabilities in terms of protecting, through laws, the physical and mental integrities of the applicants in the said case.

101. In the light of the reasons explained, it is concluded that the prohibition of torture which is guaranteed in paragraph three of Article 17 of the Constitution was violated in terms of the material dimension thereof due to the acts the applicants were subjected to.

b. Alleged Violation of the Procedural Dimension of Article 17 of the Constitution

i. General principles

102. The applicants asserted that the court cases which were lodged due to them being subject to torture and ill-treatment and upon the complaints they filed against the law enforcement officers and the doctors who issued misleading reports in order to ensure the acts of these officials were not revealed were not completed in a reasonable duration, that the court case in relation to one of the defendants abated due to statute of limitations, that some of the defendants were acquitted, and, thus, the trial was not held efficiently.

103. Within the scope of the right regulated in Article 17 of the Constitution, the state has, as a positive liability, the liability to protect the right to protect the corporeal and spiritual existence of all individuals within its own sphere of authority against risks which may arise from the acts of both public authorities and of other individuals and of the person himself. The state is liable to protect the corporeal and spiritual existence of the individual from all kinds of dangers, threats and violence (App. No: 2012/752, 17/9/2013, § 51).

104. This positive liability which the state bears within the scope of the right to protect the corporeal and spiritual existence of the individual also has a procedural dimension. Within the framework of this procedural liability, the state is obliged to carry out an effective official investigation which can ensure that those who are responsible for all kinds of physical and mental assault incidents which are not natural are determined and punished, if necessary, The main aim of this type of an investigation is to guarantee the effective implementation of the law that prevents the said assaults and, in the incidents in which public officials or institutions are involved, to ensure that they are accountable for the incidents which occur under their responsibility. (For similar ECtHR judgments, see *Anguelova v. Bulgaria*, App. No: 38361/97, 13/6/2002, § 137; *Jasinskis v. Latvia*, App. No: 45744/08, 21/12/2010, § 72).

105. Accordingly, in the event that the individual has a defensible claim, that he was subjected, by a public official, to treatment in violation

of law and in a way that violates Article 17 of the Constitution, Article 17 of the Constitution requires, when interpreted together with the general liability in Article 5 with the side heading "*Fundamental aims and duties of the State*", the performance of an effective official investigation. This investigation should be suitable to identify and punish those responsible. If this is not possible, this Article will become ineffective in practice despite the importance it has and, under some circumstances, it will be possible for public officials to benefit from *de facto* immunity and abuse the rights of the persons who are under their control (App. No: 2012/969, 18/9/2013, § 25; for a similar ECtHR judgment, see *Corsacov v. Moldova*, App. No: 18944/02, 4/4/2006, § 68).

106. It is necessary to determine the type of investigation required by procedural liability in an incident depending on whether the liabilities as regards the essence of the right to protect the corporeal and spiritual existence of the individual require a criminal sanction or not. In court cases in relation to incidents of death and injury that occur as a result of deliberate treatment or assault or ill-treatment, as per Article 17 of the Constitution, the state has the liability to conduct criminal investigations with a quality to allow the determination and punishment of those responsible in the event of a lethal assault or assault causing injury. In such incidents, the payment of compensation as a result of the administrative and legal investigations and court cases held is not sufficient *per se* to eliminate this violation of rights and remove the title of the aggrieved (App. No: 2012/752, 17/9/2013, § 55).

107. The purpose of the criminal investigations conducted is to ensure that the legislation provisions which protect the corporeal and spiritual existence of the person are effectively implemented and those responsible account for the incident of death or injury. This is not a consequential liability but the liability to use the appropriate means. On the other hand, the evaluations included here does not mean in any way that Article 17 of the Constitution vests the applicants the right to get third parties tried or punished due to a forensic crime (for a similar ECtHR judgment, see *Perez v. France*, 47287/99, 22/7/2008, § 70) or the obligation to conclude all trials in conviction or a specific penal decision (see the above mentioned *Tanlı v. Turkey*, § 111) (App. No: 2012/752, 17/9/2013, § 56).

108. The criminal investigations to be conducted should be effective and sufficient in a way to allow the identification and punishment of those responsible. In order to be able to speak about an investigation as being effective and sufficient, the investigation authorities need to act *ex officio* and collect all the evidence that might shed light on the incident and help in terms of identifying those responsible. Therefore, the investigation required by the claims of ill-treatment should be conducted in an independent manner, rapidly and in depth. In other words, the authorities should seriously try to learn about the facts and cases and not take as basis the rapid conclusions devoid of grounds in order to conclude the investigation or justify their decisions (see *Assenov and others v. Bulgaria*, App. No: 24760/94, 28/10/1998, § 103; *Batı and others v. Turkey*, App. No: 33097/96 - 57834/00, 3/6/2004, § 136). Within this scope, the authorities should take all reasonable measures they can take in order to collect the evidence which is relevant to the said incident including the statements of eyewitnesses and the criminal expert analyses as well as other evidence (see *Tanrıkulu v. Turkey* [BD], App. No: 23763/94, 8/7/1999, § 104; *Gül v. Turkey*, App. No: 22676/93, 14/12/2000, § 89).

109. One of the factors ensuring the effectiveness of criminal investigations in relation to such incidents is that the investigation and the outcomes thereof be open to public scrutiny in order to ensure accountability in practice as it is the case in theory. In addition, in any incident, the participation of the aggrieved to this process in an effective manner should be ensured in order to protect their legitimate interests. (For a similar ECtHR judgment, see *Hugh Jordan v. United Kingdom*, 24746/94, 4/5/2001, § 109; *Oğur v. Turkey* [BD], App. No: 21594/93, 20/5/1999, § 92; *Khadjialiyev and others v. Russia*, App. No: 3013/04, 6/11/2008, § 106; *Denis Vassiliev v. Russia*, App. No: 32704/04, 17/12/2009, § 157; *Dedovski and others v. Russia*, App. No: 7178/03, 15/5/2008, § 92; *Ognyanova and Choban v. Bulgaria*, App. No: 46317/99, 23/2/2006, § 107).

110. Within the scope of the positive liability of the state, sometimes the fact that an investigation was not conducted on its own or that a sufficient investigation was not conducted may also constitute ill-treatment. Therefore, whatever the conditions are, authorities should act as soon as an official complaint is filed. Even if no complaint is filed, the

initiation of an investigation should be ensured when there are sufficient conclusive indications showing that there is torture or ill-treatment. In this context, it is necessary to immediately start an investigation, to conduct it independently, under public scrutiny and in a meticulous and fast manner and to make sure it is effective as a whole (App. No: 2012/969, 18/9/2013, § 25; for a similar ECtHR judgment, see the above mentioned *Batı and others v. Turkey*, §§ 133, 134).

111. In order for an investigation conducted regarding torture and ill-treatment perpetrated by public officials to be effective, the persons who are in charge of the investigation and that performs the examinations needs to be separate from the persons who are involved in the incidents (for similar ECtHR judgments, see the above mentioned *Oğur v. Turkey*, §§ 91-92; *Mehmet Emin Yüksel v. Turkey*, App. No: 40154/98, 20/7/2004, § 37; *Güleç v. Turkey*, App. No: 21593/93, 27/7/1998, §§ 81-82). The independence of the investigation requires not only the lack of hierarchical or institutional connection but also a concrete independence (for a similar ECtHR judgment, see *Ergi v. Turkey*, App. No: 23818/94, 28/7/1998, §§ 83-84). Therefore, in order to be able to speak of an effective investigation, firstly it needs to have the quality of being conducted independently.

112. The legal existence of a remedy that will ensure investigation is not sufficient *per se*; this remedy also needs to be effective *de facto* in practice and the authority that is resorted to needs to have the authority to handle the essence of the claim of violation. It may only be possible to speak of the effectiveness of the remedy only in the event that it can prevent the claim of the violation of a right, end it if it is going on or decide upon a violation of a right if it ended and offer a suitable compensation for this. In addition, when the claim of the violation of a right that occurred is the case, sufficient procedural guarantees need to be provided in terms of revealing those responsible in addition to paying compensation (App. No: 2012/969, 18/9/2013, § 26; for a similar ECtHR judgment, see the above mentioned *Aksoy v. Turkey*, § 95; *Ramirez Sanchez v. France*, App. No: 59450/2000, 4/7/2006, §§ 157-160).

When the case is an investigation conducted regarding complaints of ill-treatment, it is important that authorities act swiftly. In addition, it should be accepted that there may be reasons or challenges which

prevent progress in an investigation in a certain situation. However, in investigations regarding ill-treatment, the investigation needs to be conducted by authorities with the utmost speed and care in order to ensure loyalty to the state of law, prevent the image that unlawful acts are tolerated and encouraged, ensure any tricks or unlawful acts are not allowed and ensure the trust of the public is sustained. (For similar ECtHR judgments, see *Maıorano and others v. Italy*, App. No: 28634/06, 15/12/2009, § 124; *McKerr v. United Kingdom*, App. No: 28883/95, 4/5/2001, §§111, 114; *Opuz v. Turkey*, App. No: 33401/02, 9/6/2009, § 150).

Courts need to make all the efforts and resort to all means they can, specifically in order for an incident having the quality of torture and ill-treatment not to be subject to statute of limitations. When a criminal lawsuit in relation to the claims of ill-treatment is the case, a response which may be swiftly given by authorities may be considered as a basic element in terms of protecting the trust of the public in general within the principle of equality and allows avoiding all kinds of tolerance to be shown towards those who get involved in unlawful acts (For similar ECtHR judgments, see *Hüseyin Esen v. Turkey*, App. No: 49048/99, 8/8/2006; *Özgür Kılıç v. Turkey*, App. No: 42591/98, 24/9/2002).

In cases where a public official is charged with torture or ill-treatment, the ECtHR points out that, within the framework of the purposes of *"effective application"*, it is of great importance for penal proceedings and the process of rendering a judgment not to be subject to statute of limitations and amnesty or pardon is not to be rendered possible. Furthermore, the ECtHR drew attention to the importance of suspending the duty of an official against whom an investigation or prosecution is under way and of ostracizing him from the profession if he is convicted (see *Abdülsamet Yaman v. Turkey*, App. No: 32446/96, 2/11/2004, § 55).

ii. Application of Principles to the Present Case

113. On the basis of the evidence submitted, it is concluded that, as per Article 17 (3) of the Constitution, the State is responsible, within the scope of its negative liability, for the torture that the applicants were subject to. In addition, the complaints filed by the persons concerned are considered to be *"admissible"* within the scope of the right to effective investigation.

Accordingly, since authorities are under an obligation to conduct an effective investigation that will respond to the requirements stated above, it is first necessary to determine whether this obligation is conformed to or not.

114. The applicants asserted that the investigation was not conducted effectively at certain points. Within this scope, the applicants asserted that they were made to undergo doctor's examination under supervision of the persons who ill-treated them and that these persons influenced and guided the doctors who issued the report.

115. As stated in the above principles, in order for an investigation conducted about torture and ill-treatment perpetrated by public officials to be effective, the persons who are in charge of the investigation and that performs the examinations needs to be separate from the persons who are involved in the incident. In the present incident, although the investigation was conducted by the Public Prosecutor's Office, which is an independent unit, the fact that the persons who conducted judicial proceedings on behalf of the Prosecutor's Office were the persons who were personally involved in ill-treatment prevented the investigation from being effective. For the reason the likelihood of these persons to engage in the spoliation of potential evidence that could be against them is really high. In addition, there is the risk that these may act reluctantly in terms of collecting evidence that could be in favor of the aggrieved or mislead persons such as witnesses, the doctors and experts who would issue reports.

116. In the said incident, when the fact that the applicants who were subject to verbal and physical assault claimed that they were referred to hospitals under supervision of those who resorted to use of force and the doctor reports were issued under the guidance and influence of these persons (§ 26, 38, 41, 71) and that the conviction provisions confirming these claims (decisions in relation to G. Ö. and İ. Ö.) and the claims of ill-treatment of the applicants apart from being battered are taken into consideration, it is evaluated that the investigation was not conducted independently and effectively and this gave rise to the consequence of violation.

117. Furthermore, the applicants stated that the investigation was not effective due to the fact that a defendant was acquitted in the court case lodged for the crime of torture and, in addition, the court case lodged for the crime of issuing a report contrary to facts abated due to statute of limitations.

118. Due to a lack of evidence, a decision of acquittal was rendered by Ağrı High Criminal Court in relation to Gendarmerie official H.A. for the crime of ill-treatment of others. The purpose of Article 17 of the Constitution is to ensure that the legislation provisions in an incident of death or injury in relation to the corporeal and spiritual existence of the person are effectively implemented and those responsible are identified and accounted for. This is not a consequential liability but the liability to use the appropriate means. Therefore, there is no obligation that all the court cases lodged within this scope be concluded in conviction or a specific penal decision.

119. Upon the complaint of the applicants, investigation was also started against law enforcement official H.A. and a criminal case was lodged. However, evaluating the whole content of the file together with the applicants' stating that the person who battered them was İ.Ö. and, although being with İ.Ö., H.A. did not take part in the act of battering and with the defenses of the defendants, the Court decided on the acquittal of the defendant since there was a lack of sufficient evidence for conviction and this decision was reviewed, upheld and finalized by the Court of Cassation. In this context, since a reason which could lead to the conclusion that the proceedings conducted in relation to the said defendant during the trial procedure were insufficient and the justification was erroneous was not identified, it cannot be said that the investigation was ineffective to this end.

120. On the other hand, the court case in relation to defendant G.Ö., who was tried for the crime of issuing a report contrary to facts about the applicants, was subject to statute of limitations at the Court of Cassation stage despite the fact that he was convicted.

121. As a result of the investigation initiated on 7/11/2001 by the Chief Public Prosecutor's Office of Hamur against the said defendant upon the

complaint of the applicants, a criminal case was lodged at Hamur Criminal Court of First Instance on 5/12/2001 with a request that he be punished for the crime of *"issuing a report that is contrary to facts"*. The case was registered with the (File No: E. 2001/87) Hamur Criminal Court of First Instance, the first hearing thereof was held on 6/12/2001 and following the closing of this court later (through the decision of HCJP File No: 278 on 9/6/2004), the file was sent to Ağrı Criminal Court of First Instance and then the said court case was joined with the court case at Ağrı High Criminal Court where the other defendants were tried and continued to be heard there. Through the decision of this Court (File No: E. 2003/141, K. 2006/117 on 1/6/2006), the act of defendant G.Ö. was evaluated to be within the scope of the crime of neglect of duty and it was decided that he be penalized with an administrative fine of TRY 600 and this penalty be postponed. Upon the fact that the decision was appealed to on 5/6/2006, it was decided through the writ of the 8thPenal Chamber of the Court of Cassation dated and (File No: E. 2010/12971, K. 2011/5945 on 6/7/2011) that the court case in relation to the defendant be abated due to statute of limitations and this decision was finalized on the very same date.

122. Accordingly, the trial procedure in the two-stage trial process ended 9 years 7 months 29 days after the date when the complaint was lodged, i.e. on 6/7/2011, due to statute of limitations. However, as can be inferred from the principles above (§ 119, 120, 121), although the courts need to urgently conclude trials in relation to public officials who are charged with perpetrating torture and ill-treatment and the persons who facilitate the acts of these officials or commit other crimes by engaging in behaviors that protect them and, thus, make sure that they do not benefit from statute of limitations, it was determined that this sensitivity was not shown in the present incident. So it was seen that the court case in relation to defendant G.Ö., who was penalized by the Court of first instance on the admittance that material evidence against him were formed, was subject to statute of limitations at the Court of Cassation stage. Therefore, it is seen that there was a significant delay regarding the process before the Court of instance, that this delay was not based on a reasonable cause, that action was not taken urgently in a way to prevent the said public official's getting off without punishment.

123. The applicants lastly complained that the criminal case which was lodged for the said crimes was not completed despite the fact that eleven years elapsed.

124. In relation to the present incident, upon the applicants' claim that they were subjected to ill-treatment, an investigation was immediately started by the Public Prosecutor's Office on 6/11/2001. Taking into consideration the objections of the applicants, it was ensured that doctor reports were obtained by way of referring them to different hospitals. Upon the fact that injuries were mentioned in these reports, a criminal case was lodged on 28/12/2001 against İ.Ö. and H.A., the Gendarmerie officials whose responsibility was detected, for the crime of *"ill-treatment to others"* after all required evidence was collected. Furthermore, upon the fact that the report dated 12/11/2001 included findings other than the report dated 7/11/2001, a criminal case was lodged against the doctors who issued the report dated 7/11/2001 for the crime of issuing reports contrary to facts and against İ.Ö. and H.A. for the crime of instigating the doctors to commit this crime. In addition, a criminal case was lodged against Doctor G.Ö. who issued the report of release from custody on 6/11/2001 for the crime of issuing a report contrary to facts.

125. Some defendant doctors and defendants İ.Ö. and H.A. were acquitted for the crime of issuing a report contrary to facts and the crime of instigating to commit this crime which was attributed during the trial process and, through the decision of Ağrı High Criminal Court dated 1/6/2006, the judgment of conviction rendered in relation to defendant G.Ö. for the crime of neglect of duty was found to have been subject to statute of limitations on 6/7/2011 when the Court of Cassation conducted the appeal review and it was decided that the court case be abated.

126. On the other hand, as a result of the trial held by Ağrı High Criminal Court in accordance with the writ of overturn, through the decision (File No:E. 2011/176, K. 2012/95 on 10/4/2012), it was decided that in relation to the crime of "*ill-treatment of others*", H. A., one of the defendants, be acquitted whereas defendant İ. Ö. be penalized with a total imprisonment of 30 months and 3 days and a penalty of disqualification from public office for 7 months and 15 days due to his acts towards the three applicants. Following this decision's being appealed to by defendant İ.Ö. on 17/4/2012, it was decided that the judgment of the Court be upheld

through the writ of the 8th Penal Chamber of the Court of Cassation (File No: E. 2013/1460, K. 2013/15369 on 20/5/2013) and the said decision was finalized on the very same date.

127. Investigation and prosecution in relation to claims of torture and ill-treatment need to be concluded in a rapid and effective manner. When all the trial phases were considered, it was seen that the investigation started on 6/11/2001 and the subsequent trials were completed with the decision of approval dated 20/5/2013 by the Court of Cassation. Thus, it was determined that the trial process took 11 years 6 months and 14 days. Therefore, it cannot be mentioned that the trial before the courts of instance were given reasonable importance and concluded with the required urgency.

128. As a result, the extension of investigation and trials as mentioned above caused the allegations about some of the defendants to be subject to statute of limitations and the penalties about some defendants to be finalized very late and thus led to the consequence of public officials who perpetrated torture or who condoned the practice thereof did not receive any penalty or received them very late. In this situation, it cannot be said that the investigation was effective.

129. Due to the reasons explained, it is concluded that the procedural liability of the State to conduct effective investigation as set forth in Article 17(3) of the Constitution was violated.

V. **ARTICLE 50 OF THE CODE NUMBERED 6216**

130. Article 50(2) of the Law No. 6216 is as follows:

> *"(2) If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favor of the applicant or the remedy of filing a case before the general courts may be shown. The court, which is responsible for holding the retrial, shall deliver a decision based on the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."*

131. In the application, it was concluded that Article 17(3) of the Constitution was violated in its material and procedural dimensions. The applicants requested that the pecuniary and non-pecuniary damages they incurred be compensated for. The applicants did not submit any documents in relation to the pecuniary damages they claimed to have incurred to the Constitutional Court. In order for the Constitutional Court to be able to rule on pecuniary damages, a causality relation between the pecuniary damages which the applicants claim to have incurred and the request for compensation needs to be established. Therefore, the request for pecuniary damages by the applicants who do not submit any documents to the Constitutional Court should be turned down.

132. In return for the non-pecuniary damages at an extent which cannot be remedied only through the determination of violation due to the intervention on the right to protect the corporeal and spiritual existence of the applicants and the failure to conduct effective and deterring criminal investigation and prosecution about the incident, it is concluded that, by discretion, TRY 40.000 in non-pecuniary compensation needs to be paid separately to each applicant, considering the characteristics of the present incident.

133. Furthermore, it should be decided that the trial expenses in relation to the fee of TRY 198,35 determined as per the documents in the file be paid to the applicants and a copy of the decision be sent to the relevant court.

VI. **JUDGMENT**

In the light of the reasons explained, it is held **UNANIMOUSLY** on17/7/2014;

A. That the complaints asserted by the applicants in relation to the violation of Article 17(3) of the Constitution ARE ADMISSIBLE,

B. That the prohibition of torture which is guaranteed in Article 17(3) of the Constitution was VIOLATED in its material dimension,

C. That the prohibition of torture which is guaranteed in Article 17(3) of the Constitution was VIOLATED in its procedural dimension,

D. That, by discretion, TRY 40.000 in non-pecuniary damages BE PAID separately to each applicant, that other requests of the applicants in relation to compensation BE DISMISSED,

E. That the trial expenses in relation to the fee of TRY 198,35 paid by each applicant BE PAID TO THE APPLICANTS,

F. That the payments be made within four months as of the date of application by the applicants to the Ministry of Finance following the notification of the decision; that in the event that a delay occurs as regards the payment, the legal interest be charged for the period that elapses from the date, on which this period comes to an end, to the date of payment,

G. That a copy of the decision be sent separately to the applicants, the Ministry of Justice, the Ministry of Interior and the relevant Court as per Article 50 (3) of the Law No. 6216.

RIGHT TO PROTECT AND IMPROVE ONE'S CORPOREAL AND SPIRITUAL EXISTENCE (ARTICLE 17 § 1)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

GULSİM GENÇ

(Application no. 2013/4439)

FIRST SECTION
JUDGMENT

President	**:** Serruh KALELİ
Justices	**:** Burhan ÜSTÜN
	Nuri NECİPOĞLU
	Hicabi DURSUN
	Erdal TERCAN
Rapporteur	**:** Şebnem NEBİOĞLU ÖNER
Applicant	**:** Gülsim GENÇ
Counsel	**:** Att. Ayten ÜNAL

I. SUBJECT-MATTER OF THEAPPLICATON

1. The applicant alleged that as a result of the practice carried out as per Article 187 of the Turkish Civil Code No.4721, which prevents a married woman from utilizing her maiden name on its own, her rights defined under Articles 10, 12, 17 and 90 of the Constitution were violated, and requested the determination of the violation and the compensation of the damage she incurred.

II. APPLICATION PROCESS

2. The application was lodged on 17/6/2013 with the 4th Civil Court of First Instance of Istanbul. In the preliminary examination in terms of administrative aspects, it has been determined that there is no situation to prevent the submission of the application to the Commission.

3 It was decided by the First Commission of the First Section to send the file to the Section in order for its admissibility examination to be carried out.

4. In the session held by the Section on 7/11/2013, it was decided that

the examination of admissibility and merits of the application be carried out together.

5. The facts, which are the subject matter of the application, and a copy of the application were sent to the Ministry of Justice. In the correspondence of the Ministry of Justice dated 7/1/2014, it was indicated that no counter-opinion would be submitted with reference to the decision of the Constitutional Court (App No:2013/2187 on 19/12/2013).

III. THE FACTS

A. The Circumstances of the Case

6. The relevant facts, which are determined from the application petition and the trial file that is the subject of the application, are summarized as follows:

7. The applicant, who is a biochemistry expert, filed a case requesting changing her surname, which was changed into "Genç" due to marriage, back to "Dolgun", the surname which she possessed prior to getting married.

8. It was adjudged to dismiss the case with the decision of the 9th Family Court of İzmir (File No:E.2011/140, K.2011/389 on 5/5/2011).

9. The request for appeal brought forward by the applicant was rejected by the decision of the 2nd Civil Chamber of the Court of Cassation (File No:E.2011/13342, K.2012/30687 on 17/12/2012) and the decision of the court of first instance was upheld.

10. The request for correction of judgment brought forward by the applicant was rejected by the decision of the 2nd Civil Chamber of the Court of Cassation (File No: E.2013/5562, K.2013/10319 on 11/4/2013) and the decision of dismissal was notified to the counsel of the applicant on 17/5/2013.

B. Relevant Law

11. Article 187 of the Turkish Civil Code dated 22/11/2001 and No.4721 with the side heading ''Woman's surname'' is as follows:

"Upon marriage, the woman takes on the surname of her husband; however, she can use her previous surname before that of her husband with a written application that she makes to the marriage registry officer or, after that, to the civil registry administration. The woman who had been using two surnames previously can benefit from this right only for one family name."

IV. EXAMINATIONAND GROUNDS

12. The individual application of the applicant (App. No: 2013/4439 on 17/6/2013) was examined during the session held by the court on 6/3/2014 and the following were ordered and adjudged:

C. The Applicants' Allegations

13. The applicant alleged that her rights defined under Articles 10, 12, 17 and 90 of the Constitution were violated by indicating that she has been serving as a biochemistry expert in the public and private sector for long years, that her surname, which used to be "Dolgun" prior to getting married, was changed due to marriage to "Genç", that she had forged her person and identity in her education and working life until the date she got married with the surname "Dolgun" and that the case she filed with the request of using her former surname for this reason was dismissed.

D. The Constitutional Court's Assessment

1. Admissibility

14. As a result of the examination of the application, it must be decided that the application, which is not manifestly ill-founded and where no other reason is deemed to exist to require a decision on its inadmissibility, is admissible.

2. Merits

15. The applicant alleged that her right defined under Article 17 of the Constitution was violated due to the practice that was carried out based on Article 187 of the Code No. 4721 which prevents married women from using solely their surnames prior to marriage.

16. According to the provisions of Article 148(3) of the Constitution and Article 45(1) of the Law No. 6216, in order for the merits of an individual application made to the Constitutional Court to be examined, the right, which is claimed to have been intervened in by public power, must fall within the scope of the European Convention on Human Rights and the additional protocols to which Turkey is a party, in addition to it being guaranteed in the Constitution. In other words, it is not possible to decide on the admissibility of an application, which contains a claim of violation of a right that is outside the common field of protection of the Constitution and the Convention (App. No: 2012/1049, 26/3/2013, § 18).

17. The right of name, which is the subject of the applicant's violation claim, is regulated in Article 17 of the Constitution and Article 8 of the Convention.

18. Article 17(1) of the Constitution with the side heading "Personal inviolability, corporeal and spiritual existence of the individual " is as follows:

> *"Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence. "*

19. Article 8 of the Convention with the side heading ''Right to respect for private and family life'' is as follows:

> *"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

20. The concept of "private life", which is mentioned under the subcategory of the right to respect for private life, is interpreted quite broadly by the European Court of Human Rights (ECtHR) and they especially refrain from providing an exhaustive definition pertaining to this concept.

21. It is very important that the individual's individuality, that is, the qualities that set an individual apart from others and make him/her an individual are legally acknowledged and that these elements are guaranteed. Even though the concept of "freely developing one's personality" is included in various international human rights documents, it is seen that this concept is not explicitly pointed out within the framework of the Convention.

22. This being said, it is understood that in the case law of the inspection organs of the Convention, the concept of "the individual developing and fulfilling his/her personality" is taken as the basis in determining the scope of the right to respect for private life. In the evidence of the fact that the right to the protection of private life cannot be reduced to only the right to confidentiality, numerous rights that are compatible with the free development of personality are assessed within the scope of this right. Within this framework, the right of name, which is very important in terms of establishing relations with the outside world, is interpreted by the inspection organs of the Convention to be within the area of guarantee of the Article in such a way as to include the first name and surname.

23. Even though the ECtHR indicates that Article 8 of the Convention does not include a clear provision with regard to the matter of name and surname, it acknowledges that since it is a tool that is used in determining the individual's identity and family ties, it is of relevance to the right to respect for private and family life, which includes establishing relations with others up to a certain degree, and that the fact that the society and the State takes interest in the matter of regulating names as a matter of public law does not alienate this element away from the concepts of private and family life. Within this framework, it is understood that surname, which is seen to have been made the subject of ECtHR case law within the scope of changing surname as well as the surname of the child and woman, is within the area of protection of Article 8 of the Convention. According to the ECtHR, the surname is important in terms of the individuals being able to establish relationships that are social, cultural or of other types with other people in their private and family lives, in addition to the professional context,

and it assumes the function of introducing them to the outside world (Burghartz v. Switzerland, App.No. 16213/90, 22/2/1994, § 24; Stjerna v. Finland, App.No. 18131/91, 25/11/1994, § 37; Niemietz v. Germany, App. No. 13710/88, 16/12/1992, § 29).

24. In Article 17(1) of the Constitution, it is indicated that everyone has the right to protect and improve their corporeal and spiritual existence, and the right to protect and improve corporeal and spiritual existence included in this regulation corresponds to the right to physical and mental integrity guaranteed under the right to respect for private life within the framework of Article 8 of the Constitution and the right of the individual to realize himself/herself and to take decisions pertaining to himself/herself. It is clear that the surname, which identifies with the life of the individual, becomes an inseparable element of his/her personality, is one of the important differentiating factors in determining his/her identity as an individual and a personality right that is inalienable, indispensable and closely tied to the individual, is within the framework of the individual's spiritual existence.

25. In addition to the right to identity information such as gender, birth registry and information pertaining to family ties as well as the right to request changes and corrections to be made in these, the right of name is also considered by the Constitutional Court within the scope of Article 17 of the Constitution (App. No. 2013/2187, 19/12/2013, § 30; CC, M.2011/34, D.2012/48, D.D.30/3/2012; CC, M.2009/85, D.2011/49, D.D.10/3/2011).

26. It is seen that the practice in the form of the competent administrative and judicial instances not allowing the applicant within the framework of the trial that is the subject of the application to use only her surname prior to getting married affected the validity of the qualities of the surname of being inalienable, nontransferable and tied closely to the individual, which is one of the most important factors in determining the individual's identity, with a view to the surname of woman, it is clear that the indicated practice is an intervention towards the right to protect and improve spiritual existence, which is defined under Article 17 of the Constitution.

27. Even though no reason for restriction is envisaged under Article 17 of the Constitution with a view to the right to protect and improve spiritual existence, it cannot be stated that this is an absolute right, which cannot be restricted in any way. It is acknowledged that even rights for which no special reason for restriction is envisaged have certain limits stemming from their nature. Moreover, even though no reason for restriction is included in the Article that regulates the right, it can be possible to restrict these rights by relying on rules that are covered under other Articles of the Constitution. At this point the guarantee criteria included under Article 13 of the Constitution bear functional quality.

28. Article 13 of the Constitution with the side title "Restriction of fundamental rights and freedoms" is as follows:

> *"Fundamental rights and freedoms may only be restricted on the basis of the reasons mentioned in the relevant Articles of the Constitution and by law without prejudice to their essence. These restrictions cannot be contrary to the letter and spirit of the Constitution, the requirements of the democratic social order and of the secular Republic and the principle of proportionality."*

29. The indicated provision of the Constitution is of fundamental importance in terms of restricting rights and freedoms and the regime of guarantees, and it indicates by taking into account which criteria the lawmaker can restrict all the rights and freedoms contained within the Constitution. Since it is compulsory to implement the rules of the Constitution together and by taking into account the general rules of law within the framework of the principle of holism of the Constitution, it is clear that all guarantee criteria contained within the indicated regulation, notably the condition of restricting with law, also need to be observed in determining the scope of the right covered under Article 17 of the Constitution (App. No. 2013/2187, 19/12/2013, § 35).

30. The criterion of restricting rights and freedoms with law has an important place in constitutional law. When there is an intervention to a right or freedom, the first matter that needs to be determined is whether or not there is a legal provision that authorizes the intervention, that is, a legal foundation of the intervention.

31. Also in accordance with the wording of the Convention and the case law of the ECtHR, the legitimacy of an intervention to be made within Article 8 of the Convention is made conditional on the fact that the said intervention be made as per the law and in the event that it is determined that the intervention does not have the element of lawfulness, it is concluded that the intervention is in violation of the relevant Article without examining the other guarantee criteria stipulated in Article 8(2) of the Convention (See Fadeyeva v. Russia, App. No. 55723/00, 9/6/2005, § 95; Bykov v. Russia,App. No. 4378/02, 10/3/2009, § 82).

32. In order to accept that an intervention made within the framework of Article 17 of the Constitution fulfills the condition of lawfulness, it is compulsory for the intervention to have a legal basis.

33. In the incident that is the subject of the application, it is understood that the request of the applicant to use her surname prior to marriage was rejected by the court of first instance by indicating that the Code No. 4721 does not contain a provision whereby a married woman can use solely her surname prior to marriage without the surname of her husband.

34. Article 90(5) of the Constitution with the side heading "Ratification of international treaties" is as follows:

> *"International agreements which are duly put into effect shall have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. (Sentence added on May 7, 2004; Act No. 5170) In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail."*

35. With the indicated regulation, it is indicated that the regulations contained within international agreements on fundamental rights and freedoms, which are duly put into effect, have the power of law, and with the last sentence added to the paragraph with the amendment

made on 7/5/2004, a kind of hierarchy is established in our law between laws and international agreements on fundamental rights and freedoms and it is adjudged that the agreements will be prioritized in the event that there is a dispute between them. As per this regulation, in the event that there is a clash between an international agreement on fundamental rights and freedoms and a provision of a code, the provision of the agreement must be implemented with priority. In this case, implementers, notably judicial instances, who are in a position to implement a provision of an international agreement on fundamental rights and freedoms and a provision of a code, which clash with each other, to an incident at hand, have the liability to implement the agreement by ignoring the code.

36. As per the indicated regulation, by providing an area of direct implementation to the provisions of the Convention, which is among the fundamental documents of international human rights law and was also accepted and ratified by Turkey, the Convention became directly implementable in domestic law.

37. Whereas Article 8 of the Convention expresses respect for private and family life, Article 14 prohibits gender-based discrimination. In numerous decisions of the ECtHR where it accepts the obligation of a married woman to use the surname of her husband as intervention to private life by considering the surname of an individual to be within the framework of private life, applications pertaining to surname were examined within the framework of the principle of "protection of private and family life" contained within Article 8 of the Convention and it was concluded that the fact that the usage by the woman of solely her surname prior to marriage after getting married was not allowed by national instances was in violation of Article 14, which prohibits discrimination, in connection with Article 8 of the Convention, which envisages the confidentiality of private life (Ünal Tekeli v. Turkey, App. No. 29865/96, 16/11/2004; Leventoğlu Abdulkadiroğlu v. Turkey, App. No. 7971/07, 28/5/2013; Tuncer Güneş v. Turkey, App.No. 26268/08, 3/10/2013; Tanbay Tüten v.Turkey, App. No. 38249/09, 10/12/2013).

38. Matters pertaining to equality between genders and gender-based discrimination are also featured in a number of other international

law documents regarding human rights. It is regulated under Article 23(4) of the International Covenant on Civil and Political Rights of the United Nations, which Turkey ratified on 4/6/2003, that state parties shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution; and under Article 16(1)(g) of the Convention on the Elimination of All Forms of Discrimination against Women that state parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, specifically on the basis of equality of men and women, the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation.

39. As per Article 90(5) of the Constitution, the conventions are part of our legal system, and they have the quality of being implemented just like laws. Again according to the same paragraph, in the event that there is a dispute in implementation between a provision of a code and the provisions of an agreement on fundamental rights and freedoms, it is compulsory to accept the provisions of the agreement as the basis. This rule is a rule of implicit abolition, and it removes the capacity of being implemented of the provisions of laws, which clash with provisions of agreements on fundamental rights and freedoms (App. No. 2013/2187, 19/12/2013, § 45).

40. It is understood that the decision, which was delivered within the framework of the trial that is the subject of the application, was delivered by relying on Article 187 of the Code No. 4721. However, in light of the above mentioned observations, it is seen that the relevant provision of the Code clashes with the provisions of the Convention in question. In this case, it is concluded that the courts of instance, which resolve the dispute, must take into account the provisions of international conventions that need to be applied as per Article 90 of the Constitution with a view to the dispute that is the subject of the application, by not taking Article 187 of the Code No. 4721, which clashes with the ECHR and other international human rights agreements, as the basis for their decisions (App. No. 2013/2187, 19/12/2013, § 46).

41. With regard to the present application, it is understood that the objections of the applicant as to the point that the international agreements on fundamental rights and freedoms are to be implemented with priority compared to the provisions of laws and that within this framework the Convention and the case law of the ECtHR should be taken into consideration when resolving the dispute were not taken into account and discussed by judicial instances.

42. Due to the fact that the provisions of international conventions, which envisage the married man and woman to have equal rights in terms of their surnames after marriage, and regulations of domestic law, which envisage the obligation of the married woman to use the surname of her husband, contain different provisions regarding the same matter, it is concluded that the provisions of the relevant convention are the legal rule that need to be taken as the basis with regard to the present dispute, and it is understood that the intervention to the right of name of the applicant, which is guaranteed within the scope of her spiritual existence, does not fulfill the condition of lawfulness.

43. Within the framework of this observation that is made, it was not deemed necessary to separately assess whether other guarantee criteria were observed in relation to the intervention in question.

44. For the indicated reasons, it should be decided that the applicant's right to protect and improve spiritual existence guaranteed by Article 17 of the Constitution was violated.

45. As it was concluded that the applicant's right to protect and improve spiritual existence guaranteed by Article 17 of the Constitution was violated due to the fact that the condition of lawfulness of intervention was not fulfilled, it was not deemed necessary to separately assess her claims that Articles 10, 12 and 90 of the Constitution were violated.

3. Article 50 of the Law No. 6216

46. The applicant requested that damages be ruled upon.

47. Article 50(2) of the Law No. 6216 with the side heading ''Decisions'' is as follows:

"If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed, In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favor of the applicant or the remedy of filing a case before the general courts may be shown. The court, which is responsible for holding the retrial, shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."

48. As it was determined in the current application that Article 17 of the Constitution was violated due to the fact that the condition of lawfulness of intervention was not fulfilled, it should be decided that the file be sent to the relevant Court in order to remove the violation and the consequences thereof.

49. Even though a request for compensation was made by the applicant, as it was understood that the fact that a decision was delivered to send the file to the relevant Court for retrial constituted sufficient compensation with a view to the claim of violation of the applicant, it should be decided that the request of compensation by the applicant be dismissed.

50. It should be decided that the trial expenses of TRY 1,698.35 in total composed of the fee of TRY 198.35 and the counsel's fee of TRY 1,500.00 , which were made by the applicant and determined in accordance with the documents in the file, be paid to the applicant.

V. JUDGMENT

In the light of the reasons explained, it is UNANIMOUSLY held on 6/3/2014;

A.

1. That the claim of the applicant as to the fact that Article 17 of the Constitution was violated be **ADMISSIBLE**,

2. That her right to protect and improve spiritual existence guaranteed under Article 17 of the Constitution **WAS VIOLATED**,

B. That the file be sent to the relevant Court to carry out a retrial in order for the violation and the consequences thereof to be removed

C. That the request of the applicant regarding compensation be DISMISSED,

D. That the trial expenses of TRY 1,698.35 in total composed of the fee of TRY 198.35 and the counsel's fee of TRY 1,500.00, which were made by the applicant be PAID TO THE APPLICANT,

That the payments be made within four months as of the date of application by the applicant to the State Treasury following the notification of the decision; that in the event that a delay occurs as regards the payment, the statutory interest be charged for the period that elapses from the date, on which this duration ends, to the date of payment.

RIGHT TO PERSONAL LIBERTY AND SECURITY (ARTICLE 19)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

MEHMET İLKER BAŞBUĞ

(Application no. 2014/912)

SECOND SECTION
JUDGMENT

President	:	Alparslan ALTAN
Justices	:	Engin YILDIRIM
		Celal Mümtaz AKINCI
		Muammer TOPAL
		M. Emin KUZ
Rapporteur	:	Muharrem İlhan KOÇ
Applicant	:	Mehmet İlker BAŞBUĞ
Counsels	:	Att. Prof. Dr. Fatih Selami MAHMUTOĞLU
		Att. İlkay SEZER

I. **SUBJECT-MATTER OF THE APPLICATON**

1. The applicant alleged that his right to personal liberty and security, which is guaranteed in Article 19 of the Constitution, was violated during the investigation and prosecution conducted against him for being detained on remand as from 6/1/2012.

II. **APPLICATION PROCESS**

2. The application was directly lodged by the attorney of the applicant with the Constitutional Court on 22/1/2014. As a result of the preliminary examination that was carried out on administrative grounds, it was determined that there was no situation to prevent the submission of the application to the Commission.

3. It was decided by the Third Commission of the Second Section on 22/1/2014 that the examination of admissibility be conducted by the Section and the file be sent to the Section.

4. The facts and cases, which are the subject matter of the application, were notified to the Ministry of Justice on 24/1/2013. The Ministry of Justice presented its observation in relation to the application to the Constitutional Court on 24/2/2014.

5. The observation of the Ministry of Justice was notified to the applicant on 25/2/2014. The applicant submitted his counter-statements to the Constitutional Court on 26/2/2014.

III. THE FACTS

A. TheCircumstances of the Case

6. Having served as the Chief of General Staff of the Turkish Armed Forces between 2008 and 2010, the applicant retired with the rank of General.

7. Within the scope of the case (File No: E.2010/106) dealt with by of the 13th Chamber of the İstanbul Assize Court and publicly known as *"the case of Internet memorandum"*, the court decided in the hearing on 30/12/2011 that a letter be written to the Chief Public Prosecutor's Office of İstanbul for the evaluation and performance of due action about the former Chief of General Staff whose name is mentioned in the statements of the accused in relation to defense and the documents.

8. Within the scope of the investigation initiated by the Chief Public Prosecutor's Office of İstanbul, upon the notification made to the counsel of the applicant, the statement of the applicant was taken on 5/1/2012 for the offences of "*attempting to overthrow the Government of the Republic of Turkey or preventing it from doing its duties by use of force and violence*" and "*founding and leading an armed terrorist organization*" that are regulated in Articles 312 and 314 of the Turkish Criminal Code. Due to the said offences, the public prosecutor requested the incumbent court to detain the applicant.

9. The applicant was detained for the offences of "*attempting to overthrow the Government of the Republic of Turkey or preventing it from doing its duties by use of force and violence*" and "*founding and leading an armed terrorist organization*" with the decision of the 12th Chamber of the İstanbul Assize Court (File No: 2012/10 and dated 6/1/2012).

10. The indictment of 2/2/2012 that was issued by the Chief Public Prosecutor's Office of İstanbul in relation to the offences imputed to the applicant was accepted by the 13th Chamber of the İstanbul Assize Court, and a criminal case was filed (File No:E.2012/14). Since the case was requested to be joined with the file of the court (File No: E.2010/106) in the indictment, the case was joined with the file dealt with by the same court (File No: E.2010/106).

11. The applicant who was tried within the scope of the file no. E.2010/106 of the 13th Chamber of the İstanbul Assize Court attended hearing for the first time on 26/3/2012. The applicant objected to the jurisdiction of the court within the scope of trial; however, this objection was rejected by the Court.

12. The 13th Chamber of the İstanbul Assize Court joined the case in which the applicant was also being tried (File No: E.2010/106) with the file No: E.2009/191 publicly known as the *"Ergenekon case"*. The applicant requested that the decision of joinder be revoked and the files be separated; however, this request was rejected by the 13th Chamber of the İstanbul Assize Court.

13. In the file (File No: E.2009/191), the 13th Chamber of the İstanbul Assize Court pronounced the judgment in the hearing on 5/8/2013 and stating that the actions of the applicant as a whole constituted the offence of "*attempting to overthrow the Government of the Republic of Turkey or preventing it from doing its duties by use of force and violence*", ruled, only in terms of this offence, that the applicant be sentenced to lifelong imprisonment and his state of detention be continued. The applicant was not separately penalized for "*founding and leading an armed terrorist organization*".

14. On 12/8/2013, the applicant objected to the decision of his *de jure* detention which was rendered concurrently with the decision of conviction; however, his objection was dismissed by the decision (File No: Misc. 2013/553 and dated 22/8/2013) of the 14th Chamber of the İstanbul Assize Court.

15. The reasoned decision in relation to the judgment that was pronounced has not been included in the case file yet.

16. The applicant placed a request for release in the period when he was detained *de jure* following the decision of conviction. The 13th Chamber of the İstanbul Assize Court decided by its decision (File No: Misc. 2013/872 and dated 31/12/2013) that there were no grounds to render a decision on the applicant's request on the grounds that *"the prosecution phase was completed and the objection against the decision of de jure detention was dismissed"*.

17. The objection made against this decision was dismissed by the decision (File No: Misc. 2014/99 and dated 20/1/2014 of the 14th Chamber of the İstanbul Assize Court.

B. Relevant Law

18. The last sentence of Article 145(1) of the Constitution is as follows:

"Cases regarding crimes against the security of theState, constitutional order and its functioning shall be heard before the civil courts in any case"

19. Article 148(7) of the Constitution is as follows:

> *"The Chief of General Staff, the commanders of the Land, Naval and Air Forces and the General Commander of the Gendarmerie shall be triedin the Supreme Court for offences regarding their duties."*

20. Article 3 of the Law on the Fight Against Terrorism no. 3713 of 12/4/1991 is as follows:

> *"The crimes that are written in Articles 302, 307, 309, 311, 312, 313, 314, 315 and 320 and in paragraph one of Article 310 of the Turkish Criminal Code No. 5237 of 26/9/2004 are crimes of terrorism."*

21. Paragraphs one and two of Article 10 of the Law no.3713 is as follows:

> "*The court cases that are filed due to crimes that fall within the scope of this Law shall be heard in assize courts that are to be given competence in the provinces to be determined by the High Council of Judges and Prosecutors upon the proposal of the Ministry of Justice in a way that the jurisdiction may cover more than one province. The presidents and*

members of these courts cannot be assigned by the justice commission of judicial court to courts or work other than these courts.

Provisions in relation to persons whom the Constitutional Court and the Court of Cassation will try and provisions in relation to the duties of military courts shall be reserved."

22. Article 105 of the Law no. 6532 of is as follows:

"The following provisions shall be abolished:

…

6) Articles 250, 251 and 252 of the Code of Criminal Procedure No. 5271 of 4/12/2004,"

23. Paragraphs (4) and (7) of Provisional Article 2 of the Law no. 6352 is as follows:

"(4) The cases that are filed in the courts which are given competence in accordance with the repealed Article 250(1) of the Code of Criminal Procedure shall continue to be heard by these courts until they are finalized with a final judgment. No decision of lack of venue or lack of competence can be made in these cases. The provisions in relation to prosecution of Article 10 of the Law on the Fight Against Terrorism no. 3713 of 12/4/1991 shall also be applied in these cases.

(7) References in the legislation that are made to the assize courts which are established in accordance with Article 250(1) of the Code of Criminal Procedure shall be considered to have been made to the assize courts that are stated in Article 10(1) of the Law on the Fight Against Terrorism."

24. Article 100 of the Code of Criminal Procedure no. 5271 of 4/12/2004 is as follows:

"(1) A decision of detention can be made about the suspect or the accused in the presence of facts indicating the existence of strong suspicion of a crime and the presence of a ground for detention. A decision of detention cannot be made in the event that the importance of the case is not proportionate to the anticipated penalty to be given or the security measure.

(2) Grounds for detention may be considered to exist in the following circumstances:

a) The fact that the suspect or the accused escapes, hides or if there are concrete facts giving rise to the suspicion that the suspect or the accused will escape.

b) If the behaviors of the suspect or the accused give rise to strong suspicion on the matters of;

1. Destruction, concealment or alteration of evidence,

2. Making an attempt to exert pressure on the witness, the aggrieved or others.

(3) Grounds for arrest may be considered to exist in the presence of grounds for strong suspicions that the crimes below have been committed:

a) As stipulated in the Turkish Criminal Code no. 5237 of 26.9.2004 ;

…

11. Crimes Against the Constitutional Order and the Operation of the Said Order (Articles 309, 310, 311, 312, 313, 314, 315),"

25. Article 104 of the Law no. 5271 is as follows:

"(1) The suspect or the accused can request to be released at every phase of the investigation and prosecution stages.

(2) The continuation of detention of the suspect or the accused or the release thereof shall be decided by the judge or the court. The decision of rejection can be opposed to.

(3) When the file comes before the regional court of justice or the Court of Cassation, the decision pertaining to the request of release shall be made following the examination on the file by the regional court of justice or the relevant chamber of the Court of Cassation or the General Penal Assembly of the Court of Cassation; the said decision can also be made ex officio."

26. Article 232(3) of the Code no. 5271 is as follows:

"The justification of the judgment shall be put into the case file within fifteen days at the latest following its pronouncement if it has not been put into minutes completely."

27. Paragraphs (1) and (3) of (the repealed) Article 250 of the Code no. 5271 is as follows:

"(1) As stipulated in Turkish Criminal Code;

…

c) The cases that are filed due to the crimes that are defined in Chapters Four, Five, Six and Seven of Section Four of Book Two (excluding Articles 305, 318, 319, 323, 324, 325 and 332),

shall be heard in assize courts that are to be given competence in the provinces to be determined by the High Council of Judges and Prosecutors upon the proposal of the Ministry of Justice in a way that the jurisdiction may cover more than one province.

(3) Regardless of their titles and positions, those who commit the crimes that are mentioned in paragraph one shall be tried in the assize courts which are given competence with this Code. Provisions in relation to persons whom the Constitutional Court and the Court of Cassation will try and provisions in relation to the duties of military courts shall be reserved."

IV. EXAMINATION AND GROUNDS

28. The individual application of the applicant (File No:2014/912 and dated 22/1/2014) was examined during the session held by the court on 6/3/2014, and it was accordingly held:

A. The Applicant's Allegations

29. In relation to personal liberty, the applicant claims that,

i.Paragraphs two and three of Article 19 of the Constitution were violated due to the facts that the court which ordered detention and the

continuation of detention was not the court *"having jurisdiction"*; that the court having jurisdiction was the Constitutional Court with the title of Supreme Criminal Tribunal as per Article 148 § 7 of the Constitution; and that depriving from liberty *"was not in accordance with the procedure that was set forth by law"* within the scope of the principle of natural judge.

ii. As a person stands as an accused until finalization of the decision and is thus legally *"detained"*, the facts that his requests for release on the ground that the reasonable time period was exceeded were rejected by the judicial authority that did not have jurisdiction, without indicating *"relevant"* and *"sufficient"* justification and by means of repeating legal terms, and that the opportunity to be released by being subject to conditional bail was not taken into consideration were in breach of Article 19 § 7 of the Constitution,

iii. Article 19 § 8 of the Constitution was violated due to the fact that a decision was not rendered about his request for release after the judgment was rendered since the stage of prosecution continued until the final judgment was rendered.

B. Observations of the Ministry of Justice and Statement of the Applicant

30. The relevant sections of the observations submitted by the Ministry of Justice within the scope of the qualification of complaints are as follows:

> *"The applicant firstly claims that 'he was not tried by the court of venue and competence' (Application Form, pp. 4-6). When this claim is evaluated in terms of human rights adjudication, it is understood that the claim of the applicant is in relation to the right 'to be tried by a tribunal that is established by law' which is guaranteed in Article 6 § 1 of the European Convention on Human Rights ("the Convention"). Therefore, it is evaluated that it would be appropriate to review this claim within the scope of 'the right to a fair trial' and within the framework of the above-mentioned provision of the Convention and Article 37 § 1 of the Constitution which corresponds to this provision.*

The applicant claims that he was deprived of his liberty by a court not having jurisdiction and asserts that paragraphs 2 and 3 of Article 19 of the Constitution were violated. As a justification for this claim, he claims that the allegations about him are within the scope of task-related offences and he needs to be tried before the Constitutional Court with the title of the Supreme Criminal Tribunal due to these offences (Application Form, pp. 18-22). Our Ministry considers that these claims are strictly related to the claims in relation to the right "to be tried by a tribunal that is established by law" which is stated above (paragraph 3, above) and thus it is appropriate to examine them together.

The applicant claims that the fact that he has been detained for months (post-sentence detention) on the basis of an unjustified decision despite the fact that the short decision (judgment) is pronounced by the first instance court is contrary to Article 19 § 2 of the Constitution (Application Form, pp. 22-23). On the basis of the legal arrangement that the reasoned decision needs to be written within 15 days following the announcement of the short decision as per the provision Article 232 §) of the Code of Criminal Procedure, the applicant asserts that the principle that 'No one shall be deprived of his liberty save in accordance with a procedure prescribed by law' set forth in Article 5 § 1 of the Convention is violated due to the said reason.

The applicant requests that the case law of the Constitutional Court that has been established so far be changed in the light of paragraphs 2 and 3 of Article 19 of the Constitution and Article 5 § 1 (a) and (c) of the Convention and his existing legal status be considered as "detainee" in terms of also the Constitutional Court. He also claims that "the reasonable time period under detention was exceeded" within the meaning of Article 19 § 7 of the Constitution. According to the applicant, until the judgment of conviction is finalized, a person who is tried should be considered as a "detainee" within the meaning of Article 19 § 3 of the Constitution and his legal status should be considered as a "detainee" even if a decision of conviction about him was rendered by the first instance court. The applicant also asserts the following justification as an alternative to this argument of his: [Added within the meaning of (Convention, 5 § 1 a)] The starting point for "detention based on

judgment" "should not be the date of pronouncement of the judgment in relation to conviction with a short decision but the date of learning the justification of the judgment of conviction". As a result, the applicant asserts that the period of his detention was not reasonable.

Our Ministry considers that it would be consistent with the case law of the ECHR to qualify the complaints of the applicant that are summarized above within the framework of Articles 5 § 1 (a) and (c) and 5 § 3 of the Convention and corresponding paragraphs 2, 3 and 7 of Article 19 of the Constitution. However, it should be stated that the main complaint is that "the detention period is not reasonable" (Article 5 § 3 of the Convention and Article 19 § 7 of the Constitution). Given the date the application was filed, the question of law in relation to Article 5 § 1 (a) and (c) of the Convention and Article 19 §§ 2 and 3 of the Constitution is the admissibility criteria in relation to the examination of the said complaint. In summary, the applicant asserts that the reasonable time period under detention was exceeded and the reasons of the decisions in relation to detention did not fulfill the requirement of being "relevant" and "sufficient", included non-personalized and stereo-type justifications; that the reason why the conditional bail measure was insufficient was not explained; and that the trial process was not carried out meticulously (Application Form, pp. 23-29).

Lastly, on the basis of Article 19 § 8 of the Constitution, the applicant asserts that the decision dated December 31, 2013 of the 13th Chamber of the İstanbul Assize *Court did not fulfill the requirements of "habeas corpus" guarantee (Article 5 § 4 of the Convention) and thus the stated provision was violated.*

It is considered that the claims of the applicant on the fact that his personal liberty was violated is within the framework of Article 19 of the Constitution within the scope that the orders on detention and the continuation of detention that were given at each stage, namely the investigation, trial and post-conviction decision, were made by courts that did not have "jurisdiction"; that the requests for release were dismissed without indicating "relevant" and "sufficient" justification; and that no decision was rendered on the request for release after the judgment was issued.

31. The statement of the applicant within this scope is as follows:

Unlike the observations of the Ministry of Justice, it is asserted that the allegation that "he was not tried by a court having venue and competence" was in breach of not the right to fair trial but the provisions of Article 19 of the Constitution that guarantee personal liberty and security.

Since deprivation of liberty still continues and within the framework of the matters that are indicated in the application, the objections in relation to lack of jurisdiction ratione temporis and exceeding of prescribed time need to be dismissed."

32. The relevant sections of the observations of the Ministry of Justice within the scope of admissibility, in general terms, are as follows:

"It is submitted to the attention of the Constitutional Court that some parts of the complaints of the applicant in relation to the said right occurred before the date of September 23, 2012 (the date when the Constitutional Court's jurisdiction ratione temporis started) which was the date for the Constitutional Court to receive individual applications; and that such kind of complaints were met by an objection of "lack of jurisdiction ratione temporis ".

In relation to the complaint of the applicant on long detention, regard being had to the judgments of the ECHR (ECHR, Rahman v. Turkey, no. 9572/05, February 15, 2011, par. 22; Zeki Şahin v. Turkey, no. 28807/05, February 22, 2011, par. 26; Tokmak v. Turkey, no. 16185/06, February 16, 2010, par. 27; Yiğitdoğan v. Turkey, no.20827/08, March 16, 2010, par. 22) and the previous judgments of the Constitutional Court on this subject as well as the decision on the merits of the first instance court dated August 5, , it is seen that the applicant's detention [within the meaning of proceedings as to human rights] ended on August 5, 2013. Given the date of application, it is considered that it is within the Constitutional Court's discretion to assess whether the complaint on long detention and the other relevant complaints were submitted to the Constitutional Court within the application period of 30 days."

33. The relevant sections of the observations of the Ministry of Justice within the scope of the complaint on the court having jurisdiction are as follows:

> *"According to the provisions of 148 § 3 of the Constitution and of 45 § 2 of the Law no. 6216, in order to be able to apply to the Constitutional Court via individual application, the ordinary legal remedies must be exhausted. For this reason, it is essential that the alleged violations of fundamental rights and freedoms be brought forward first before, examined and resolved by, the inferior courts.*
>
> *The applicant maintained this allegation before both the prosecutor's office and the assize court. This applicant's allegation was evaluated both in the indictment of the prosecutor's office (Indictment dated February 2, 2012, pp. 3-8) and by the court during the hearing dated March 26, 2012 and was rejected.*
>
> *On the other hand, it is considered that the legal remedies have not been exhausted yet in terms of this complaint hereby which also has dimensions in relation to the right to fair trial (trial by a court that is established by law). As mentioned above, these two legal problems which are closely related to each other may be settled finally by the Court of Cassation at the stage of appeal only. Since the appeal stage for the file has not been finalized yet, it is thought that whether the legal remedies have been exhausted in terms of this complaint needs to be considered by the Constitutional Court.*
>
> *Furthermore, it should be stated that the implementation and interpretation of laws are within the venue of courts and it is important in terms of exhausting legal remedies to wait for the decisions of inferior courts as long as they are not explicitly arbitrary. A similar request was previously examined by the Court of Cassation and it is observed that the said request was dismissed by the Court of Cassation (Judgment of the 9th Criminal Chamber of the Court of Cassation dated October 9, 2013, no.E.2013/9110 – K. 2013/12351). Also taking into account this judgment of the Court of Cassation, it is considered that it is at the discretion of the Constitutional Court whether the implementation and interpretation of laws by the first instance court in the concrete case*

have any explicit arbitrariness in terms of the result achieved in terms of jurisdiction.

As is known, according to the case law of the ECHR, the implementation and interpretation of laws are within the jurisdiction of judicial bodies as long as they are not arbitrary, and the complaints on this matter in terms of Article 6 of the Convention are of the 4th degree. Indeed, the case law of the Constitutional Court has developed in this direction (Individual application judgment of the Constitutional Court no. 2012/869 of 16.4.2013, paragraph 20).

As a result, it is considered that it is useful to pay attention also to the information above while examining in terms of admissibility and merits of the applicant's allegations that he was deprived of his liberty by a court having no jurisdiction."

34. The statement of the applicant within this scope is as follows:

"As indicated in the application, no objection was asserted regarding the fact that the court did not have jurisdiction; that the criminal acts which were attributed in the indictment could not be considered within the scope of the imputed offences; that it would be a professional misconduct had the criminal acts been really committed and that the jurisdiction belonged to the Supreme Criminal Tribunal. The incumbent court reached a conclusion through an arbitrary interpretation without making a sufficient assessment in respect thereof.

35. The relevant sections of the observations of the Ministry of Justice within the scope of the complaint that the reasonable period under detention was exceeded are as follows:

"It is assessed that in terms of the requests for release and examinations as to objections that were decided upon before 23 September 2012, an objection was raised for lack of jurisdiction ratione temporis which is the same also for the complaints in relation to the justification of the said decisions.

Regarding the situation after the specified date, it is seen that the applicant was deprived of his liberty on 5 January 2012 and that his

detention ended on 5 August 2013 by the decision on the merits of the first instance court. Therefore, the total period during which the applicant was detained is one year and seven months.

According to ECHR judgments, in order for a person to be deprived of his liberty on the suspicion that he committed an offence, it is necessary to have reasonable suspicion or plausible reasons (raisons plausibles) for the fact that the person concerned committed the charged offences, and this necessity is a sine qua non condition in relation to detention. This condition must continue existing at any stage during which the person's continued detention is ordered. Besides, the person concerned must be released in case of discontinuance of the reasonable suspicion.

When the evidence obtained and the particular circumstances of the concrete incident are taken into consideration, the existence of reasonable suspicion must be sufficient to convince a completely objective observer who looks at incidents from an external point of view. When the evidence collected is submitted to an objective observer, if it is sufficient to form an opinion in the observer that the suspect or the defendant may have committed the charged offences, there is reasonable suspicion in the concrete incident. In other words, plausible reasons or reasonable suspicion requires "the existence of incidents, facts or information which was necessary to convince an objective observer that the accused may have committed the imputed offence". [Fox, Campbell and Hartley v. United Kingdom, no.12244/86 12245/86 12383/86, 30 August 1990, § 32; O'Hara v. United Kingdom, no: 37555/97, § 34).

According to the judgments of the ECHR, in order for a person to be deprived of his liberty within the scope of Article 5 § 1(c) of the Convention, "the existence of reasonable suspicion" at the beginning is sufficient and "reasonable suspicion needs to sustain its existence" for continuation of detention. However, the existence of reasonable suspicion is not sufficient per se for the continuation of detention beyond a specific time and the existence of a real public interest that will legitimize deprivation of liberty is sought.

In its judgments in the individual applications involving the allegation that the detention period exceeded the reasonable time

period, the Constitutional Court emphasizes that it is not possible to assess whether the detention period is reasonable within the framework of a general principle; and that whether the period during which an accused is kept under detention is reasonable or not must be assessed under particular circumstances of each case (individual application no:2012/1303 dated 21 November 2013; § 51; individual application no:2012/1272 dated 4 December 2013).

It is stated that the examination as to the admissibility and merits of the complaint that his detention exceeded the reasonable period of time must be made by taking into consideration the scope and unique complexity level of the case in which the applicant is being tried, whether or not the judiciary body has carried out the proceedings with due attention and diligence expected from it, the period of time during which the applicant was detained, the justifications that were submitted by the court for the continuation of the applicant's detention and specifically relied on since 27 July 2012 as well as in light of judgments of the ECHR.

36. The applicant's statement within this scope is as follows:

"Ordering continuation of the detention by repeating the matters that are stated in the application, without indicating "relevant" and "sufficient" justification and without "personalizing" the justification is in breach of personal liberty and security.

C. The Constitutional Court's Assessment

37. It is considered that the applicant's allegation that his personal liberty was violated is within the scope of personal liberty and security due to the facts that the decisions on detention and the continuation of detention that were made at each stage, namely the investigation, trial by the first instance court and post-conviction, were made by courts having no "*jurisdiction*"; that the requests for release were dismissed without indicating *"relevant"* and *"sufficient"* justification; and that no decision was made on the request for release after the judgment was issued.

38. The application involving the alleged violation of paragraphs two, three, seven and eight of Article 19 of the Constitution needs to be examined in terms of admissibility within the scope of the stages

covering the first instance proceedings and post-conviction, by taking into consideration the observations of the Ministry of Justice and the statements of the applicant.

1. Admissibility

a. Detention at the Stage of the First Instance Proceedings

39. Article 148 § 3 of the Constitution is as follows:

> *"Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities. In order to makean application, ordinary legal remedies must be exhausted."*

40. Article 47 § 5 of the Law no.6216 titled *''Procedure of individual application"* is as follows:

> "*The individual application should be made within thirty days starting from the date of the exhaustion of legal remedies; from the date when the violation is learned if no remedies are set forth.*" …".

41. In summary, the applicant stated that continuation of detention was ordered in a way to exceed a reasonable time through decisions that were taken by a judicial body which did not legally have *"jurisdiction"*, without indicating *"relevant*" and *"sufficient"* justification and by repeating legal statements; and that the opportunity to be released under conditional bail was not taken into consideration, which were in breach of his personal liberty.

42. It is primarily set out as a principle in Article 19 § 1 of the Constitution that everyone has the right to personal liberty and security. Thereafter, in paragraphs two and three, the cases under which a person may be deprived of his freedom on the condition that their forms and conditions are stipulated in law are enumerated in a non-exhaustive way. Therefore, a person may be deprived of liberty only in the event that one of the cases specified within the scope of the aforementioned Article of the Constitution exists (no.2012/239, 2/7/2013, § 44). Similar to the provisions that are included in the Constitution, it is stipulated in

Article 5 § 1 of the Convention that everyone has the right to personal liberty and security, that no one can be deprived of his/her liberty except for the cases that are specified in sub-paragraph (a) and (f) of the said paragraph and without being in conformity with the procedure that is set forth by law.

43. In Article 13 of the Constitution with the heading "*Restriction of fundamental rights and freedoms*", it is stipulated that fundamental rights and freedoms may only be restricted on the basis of the reasons that are mentioned in the relevant articles of the Constitution and by law without prejudice to their essence; and that these restrictions cannot be contrary to the letter and spirit of the Constitution, the requirements of the democratic social order and of the secular Republic and the principle of proportionality. The criterion in Article 19 of the Constitution that the forms and conditions of cases when the right to personal liberty and security may be restricted are stipulated in law is in congruence with the principle in Article 13 of the Constitution that fundamental rights and freedoms can only be restricted by law (no.2012/239, 2/7/2013, § 44).

44. The liability to ensure the conformity of the restrictions in relation to personal liberty and security with the principles and procedures that are stated in law belongs, in principle, to administrative bodies and courts of instance. The administrative bodies and courts are liable to obey the legal rules in relation to principle and procedure. The objective of Article 19 of the Constitution is to protect the individual from deprivation of his liberty in an arbitrary way, and, in exceptional cases that are set forth in the Article, the restrictions that are to be applied to personal liberty need to be in conformity with the objective of the Article and must not lead to any arbitrary practice. For this reason, as per the provision which is included in Article 19 § 3 of the Constitution that the forms and conditions of deprivation of liberty be stipulated in law, the Constitutional Court must examine whether applicant's detention has *"legal"* basis, and, in cases where law permits deprivation of liberty, whether the implementation of law is sufficiently accessible, irrefutable and predictable in order to prevent arbitrariness as per the principle of the rule of law (no.2012/239, 2/7/2013, § 45).

45. Accordingly, a person may be deprived of his liberty only in the event that one of the cases which are specified within the scope of Article 19 of the Constitution exists. The circumstanced under which the liberty of individuals may be restricted are listed in a limited way. In this framework, in accordance with Article 19 § 3 of the Constitution, persons against whom there is strong evidence of delinquency can only be detained through a decision by a judge in order to prevent their escape and to prevent the destruction and manipulation of evidence. Detention needs to be in conformity with the forms and conditions that are set forth in law. Article 5 § 1 of the Convention, it is stipulated that deprivation of liberty as set forth in cases which are stated in sub-paragraphs (a) and (f) can be carried out *"in accordance with the procedure that is set forth by law"*.

46. Taking into consideration the criteria to be in conformity with *"the forms and conditions that are set forth in law"* in Article 19 of the Constitution and *"the procedure that is set forth by law"* in Article 5 of the Convention, it is necessary to strictly conform to the condition of *"lawfulness"* in deprivation of liberty.

47. In the individual applications that are lodged with the claim that the ongoing detention is contrary to the law, the main aim of the complaints is to ensure determination that the detention is unlawful or that there is no reason or reasons that justify the continuation thereof. In the event that this determination is made, accordingly, the presence of the legal grounds shown as the justification for the continuation of the detention will come to an end and thus, it will pave the way for the person to be released. In an application lodged for this purpose, it will be taken into account whether an examination has been conducted during the appellate review in accordance with the principles such as the adversarial trial and/or the equality of arms. Therefore, individual applications which would be lodged due to the aforementioned reasons for rendering of a decision ensuring the concerned person's release may be filed as long as the state of detention continues and only after ordinary legal remedies are exhausted (no.2012/726, 2/7/2013, § 30).

48. However, if a decision has been rendered by the inferior court, the request in terms of individual application will be limited to the

determination of the unlawfulness of the *"detention on the basis of a criminal charge"* (no.2012/726, 2/7/2013, § 31).

49. If the person has been convicted through the first instance decision at a court case that he is being tried at without being released, the detention period ends as of the date of conviction. That is because, in that case, the legal status of the person goes out of the scope of being *"detained on the basis of a criminal charge"*, which constitutes the significant difference between the conditions of detention and adjudging a conviction in terms of the examination of individual application. Because of the fact that a decision on conviction has been rendered, it is proven that the charged crime is committed and that the perpetrator is responsible for this and thus a punishment restricting freedom is imposed on the accused. Together with the conviction, the strong suspicion of guilt and the detention on the basis of a ground for detention of the person ends. In this regard, the conviction decision shall not separately need to be finalized. The European Court of Human Rights ("the ECHR") and the Court of Cassation do not consider the status of being detained after the decision of conviction as detention. The ECHR considers the detention of a defendant who is convicted by the order of first instance court after the said decision of conviction to be *"detention after conviction"* as per Article 5 §1 (a) of the Convention and does not take it into consideration in the calculation of the detention period (no.2012/726, 2/7/2013, § 33).

50. The status of being deprived of one's liberty *"due to incrimination"* is considered to be within the scope of Article 5 § 1(c) of the Convention whereas the status of depriving from liberty that is considered to be *"detention after conviction"* is considered to be within the scope of Article 5 § 1 (a). In both cases, there is no doubt that the decisions that bear the consequence of deprivation of liberty need to fulfill the condition of being *"in accordance with a procedure prescribed by law"*.

51. The beginning of the period that is spent under detention *"due to incrimination"* is the date of being arrested and taken under custody in cases where the applicant is arrested and taken under custody for the first time, whereas it is the date of detention in cases where s/he is directly detained. The end of the period is, as a rule, the date on which

the individual is released or the date when the judgment is rendered by the first instance court (no.2012/1137, 2/7/2013, § 66). The evaluation as to whether the period that is spent under detention *"due to incrimination"* is reasonable or not will be made by taking into consideration the period that elapsed between the dates stated.

52. In the present case, the applicant was detained after he was interrogated by the public prosecutor on 5/1/2012 due to the imputed offences through the decision (no.2012/10 and dated 6/1/2012) of the 12th Chamber of the İstanbul Assize Court. His detention ended on 5/8/2013 when the conviction decision was announced during the applicant's detention pending trial.

53. It is understood that the applicant was deprived of his liberty *"due to incrimination"* until 5/8/2013 and that deprivation of liberty was within the scope of *"detention after conviction"* following the date of 5/8/2013.

54. In lieu of these determinations, an individual application that is based on claims of being deprived of liberty *"due to incrimination"* through unjustified decisions which are rendered by a court not having *"competence"* needs to be lodged after the remedies are exhausted at every stage when a decision ordering the continuation of detention pending the first instance trial and, except for release, within due time following the decision of conviction whereby the detention status ends. The ECHR also stated that an application within the scope of *"detention due to incrimination"* which is not lodged within six months following the decision of conviction is not within due time (*Atalay Öztürk v. Turkey*, (S.D.) no.54890/09, 7/1/2014, § 37-41)

55. One of the conditions for the admissibility of individual applications is the term of application. The period is a procedural condition that needs to be taken into consideration at any stage of the application.

56. As per Article 47(5) of the Law no.6216 and Article 64 § 1 of the Internal Regulations, individual applications need to be lodged within thirty days after the date when remedies are exhausted or the date when the violation is learned if no remedy is prescribed (no.2013/2001, 16/5/2013, §§ 14, 15).

57. In the concrete incident, the status of being detained *"due to incrimination"* ended on 5/8/2013 when the decision of conviction was announced during the applicant's detention pending trial.

58. It is concluded that in the application *statute of limitations* passed in terms of the complaints that paragraphs two, three and seven of Article 19 of the Constitution are violated.

b. Detention After the Decision of Conviction

59. In the case where the applicant was charged with "*attempting to overthrow the Government of the Republic of Turkey or preventing it from doing its duties*" *and "establishing and leading an armed terrorist organization",* the 13th Chamber of the İstanbul Assize Court (File No:E.2009/191 and dated 5/8/2013) held that the actions of the applicant as a whole constituted the offence of "*attempting to overthrow the Government of the Republic of Turkey or preventing it from doing its duties by use of force and violence*" and that the applicant be sentenced to a life-long imprisonment and his state of detention be continued.

60. On 12/8/2013, the applicant appealed the decision on the continuation of detention that was rendered concurrently with the decision of conviction at the end of the trial; however his appeal was rejected on 22/8/2013.

61. The reasoned decision in relation to the judgment that was pronounced has not been included in the file yet.

62. The applicant requested to be released in the period when he was under de jure detention following the decision of conviction. The 13thAssize Court of İstanbul decided on 31/12/2013 that there were no grounds for rendering a decision about the request. The applicant's appeal was rejected with the decision of the 14th Chamber of the İstanbul Assize Court on 20/1/2014.

63. The applicant points out that as the imputed acts are relevant to the duty, his detention continues through a court decision rendered by a court other than the Supreme Criminal Tribunal as stipulated in the Constitution and states that a decision must be rendered about the

request for release following the decision of conviction by considering the matters that are accepted as a ground for detention other than the *"criminal suspicion"* and also the conditional bail.

64. It is asserted that the liberty of the person is violated as the justification for the decision of conviction was not declared and that no decision was rendered with respect to the request for release in spite of the expiry of the statutory period pending the applicant's detention as required by the decision of conviction rendered by a judicial body which is legally not *"competent"* in terms of the condition of being in compliance with the procedure that is set forth by law.

65. It is seen that the complaints of the applicant in relation to the competence of the adjudication body and to the fact that a decision was not rendered on the request for release due to the fact that the justification of the decision of conviction was not put into the case file within the statutory period are not manifestly ill-founded. A complaint concerning the unlawfulness of the deprivation of liberty due to the decision that was made by a judicial body which was not *"competent"* may be raised only after ordinary legal remedies are exhausted as long as the detention continues.

66. As it is understood that the complaints in relation to *de jure* detention following the decision of conviction are not explicitly manifestly ill-founded and that there is no other reason for inadmissibility, this part of the application must be declared admissible.

2. Merits

67. Paragraphs one, two, three, seven and eight of Article 19 of the Constitution are as follows:

> *"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:*
>
> *Execution of sentences restricting liberty and the implementation of security measures decided by courts; arrest or detention of an individual*

in line with a court ruling or an obligationupon him designated by law; execution of an order for the purpose of the educational supervision of a minor, or for bringing him/her before the competent authority; execution of measures taken in conformity with the relevant provisions of law for the treatment, education or rehabilitation of a person of unsound mind, an alcoholic, drug addict, vagrant, or a person spreading contagious diseases to be carried out in institutions when such persons constitute a danger to the public;arrest or detention of a person who enters or attempts to enter illegally into the country or for whom a deportation or extradition order has been issued.

Individuals against whom there is strong evidence of having committed an offence may be arrested by decision of a judge solely forthe purposes of preventing escape, or preventing the destruction or alteration of evidence, as well as in other circumstances prescribed by law and necessitating detention. Arrest of a person without a decisionby a judge may be executed only when a person is caught in flagrante delicto or in cases where delay is likely to thwart the course of justice; the conditions for such acts shall be defined by law. …

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 ensurethe presence of the person at the trial proceedings or the execution of the court sentence.

Persons whose liberties are restricted for any reason are entitledto apply to the competent judicial authority for speedy conclusion of proceedings regarding their situation and for their immediate release if the restriction imposed upon them is not lawful.

68. Paragraphs one, three and four of Article 5 of the European Convention of Human Rights are as follows:

"1. "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases andin accordance with a procedure prescribed by law:

1. The lawful detention of a person after conviction by a competent court;"

…

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 authorised 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."

69. The applicant appealed the decision on his de jure detention as well as his conviction on 12/8/2013; however, his appeal was definitively rejected with the decision dated 22/8/2013 at the end of the evaluation that was made in accordance with the objection procedure (§ 14).

70. There is no hesitation that the applicant was under *de jure* detention following the decision of conviction dated 5/8/2013. Therefore, the status of the applicant has gone beyond the scope of *"detention in relation to suspicion of crime"* within the sense of Article 19 § 3 of the Constitution and has turned into *"detention in relation to a decision of conviction"* within the scope of paragraph two. At this stage, as per the relevant legislation, if the justification of the judgment that is the basis for depriving from liberty was not completely recorded in the minutes together with the judgment, it should be put in the case file within fifteen days at the latest following its pronouncement.

71. Furthermore, Article 104 of the Law no. 5271 includes the provisions that the suspect or the defendant can request his/her release at any stage of the investigation and prosecution phases; that whether the status of detention of the suspect or the defendant shall continue or

whether the suspect or the defendant will be released will be decided by the judge or the court; that the decision on the request for release shall be given by the relevant chamber of the Court of Cassation or the General Penal Assembly of the Court of Cassation when the file comes to the Supreme Court of Appeals.

72. In order to be able to make an appeal examination on the case in which the trial at the court of first instance ended, first the reasoned decision needs to be put in the case file and then the parties that make an appellate request need to have the opportunity to notify their objections, if any, in relation to the justification which sets the basis for the judgment pronounced.

73. Since the justification in relation to the final decision that is announced on 5/8/2013 was not put in the case file as of the date of application, it is seen that it is not possible to send the file to the Court of Cassation in order for an appellate examination and that it is not possible for the relevant Chamber of the Court of Cassation to give a decision in relation to the request for release.

74. The basis for the complaints of the applicant is that the decisions on depriving from liberty were made by a court that did not have *"competence"* and that depriving from liberty without a *"relevant"* and *"sufficient"* justification was sustained in a way to exceed *"reasonable duration"*. The applicant does not assert that his right to a fair trial within the scope of *'being tried by a judicial body that is established by law'* guaranteed in Articles 36 and 37 of the Constitution and in Article 6 § 1 of the Convention was violated. At this stage, the applicant complains about the lack of venue on the part of the judicial body rendering the decisions depriving him from liberty and about the unconstitutionality of these decisions.

75. It is seen that the offences that the applicant was charged with were taken as the basis in the determination of the judicial bodies which would run the investigation and prosecution; that the objections in relation to the competence of the court were rejected during the trial process by taking into consideration the offences that were claimed to have been committed (*attempting to overthrow the Government of the*

Republic of Turkey or preventing it from doing its duties by use of force and violence, founding and leading an armed terrorist organization) and that, as a result, the final decision was rendered at the end of the trial.

76. At the end of the case in which the applicant was tried under detention starting from 6/1/2012 for the offences of "*attempting to overthrow the Government of the Republic of Turkey or preventing it from doing its duties by use of force and violence*" and "*founding and leading an armed terrorist organization*" upon the indictment of the Chief Public Prosecutor's Office of Istanbul on 2/2/2012, the 13th Chamber of the İstanbul Assize Court decided on 5/8/2013 that the actions of the applicant as a whole constituted the offence of "*attempting to overthrow the Government of the Republic of Turkey or preventing it from doing its duties by use of force and violence*" and that the applicant be convicted only in terms of this offence. The applicant was not separately convicted of *"leading an armed terrorist organization"*.

77. It is stated as it is mentioned in the conclusion of the indictment that the applicant committed the offences he is charged with by "*conducting and organizing black propaganda and disinformation activities by means of the said Internet web sites and the memorandum that is issued with the purpose of legitimizing those web sites, openly issuing oral or written declarations in order to influence the ongoing investigation and prosecution towards Ergenekon Armed Terrorist Organization through the press statements he gave and various activities that he conducted in line with the objectives of the organization, pressurizing State administrators, debilitating the State authority, establishing an environment of chaos and disturbance by distorting public order in the country whenever necessary, provoking the public against the State administrators and establishing an environment of anarchy, thus attempting to partially or completely prevent the government from performing its duties through such methods of force and violence, managing the psychological operational activity through his position and influence on other suspects with the title of senior head as of the date of offence, guiding the members of the organization, all in order to establish a military coup environment in line with the objectives of Ergenekon Armed Terrorist Organization"*.

78. It is seen that the objection of the applicant in relation to the qualification of the acts and his assertion that the competent court is

the Supreme Criminal Tribunal in his case are not unfounded given the above-stated facts. The objection which is within this scope needs to be assessed in terms of the criterion that a person may be deprived of liberty only when it is in conformity with the procedure that is set forth in law.

79. As the appeal process in the trial is not finalized, the legal remedies in relation to the above-stated matters have not been exhausted yet. However, it is seen that there are constitutional guarantees also at this stage within the scope of being deprived of liberty. It needs to be examined *"as soon as possible"* whether deprivation of liberty is *"legal"* or not as per the rule *"For any reason whatsoever, an individual whose liberty is restricted has the right to apply to an authorized judicial body in order to ensure that a decision is made about his/her case as soon as possible and in order to be released immediately if such restriction is in violation of the law"* that is included in Article 19 § 8 of the Constitution.

80. As per this provision of the Constitution, an individual whose liberty is restricted has the right to apply to an authorized judicial body in order to ensure that a decision is given about his/her case as soon as possible and in order to be released immediately if such restriction is unlawful. As no distinction is made in the paragraph in terms of the reason for restriction, the right to application is not limited to being deprived of liberty due to strong suspicion of guilt and detention. This guarantee also applies to the cases of being deprived of liberty that are stated in Article 19 § 2 of the Constitution.

81. The notion of the lawfulness of deprivation of liberty also covers the principle that the body rendering the decision must be legally competent. In this framework, the objection of the applicant that the court which gave the decision on him was not competent, that it was the Supreme Criminal Tribunal which would deal with the case is relevant to the unlawfulness of deprivation of liberty.

82. It is apparent that the qualification of the acts in relation to the charged offences is directly related to the claim that the case needs to be heard at the Supreme Criminal Tribunal and that, in this framework, the objections in relation to the fact that the trial body was not competent as

well as to the qualification of acts will be considered by the appeal body *ex officio*.

83. However, it is seen that the restriction on the applicant's liberty may continue until a final judicial decision is rendered in relation to these matters. In the meantime, the applicant may be deprived of his liberty *"without conformity with the procedure that is set forth by law"* may arise. Therefore, it is necessary to eliminate through legal remedies the possibility that an irreparable victimization occurs on the part of the applicant by taking into consideration the objection in relation to the competence of the trial body at this stage.

84. Due to the fact that the reasoned decision has not been included in the file for a period exceeding seven months starting from the date of judgment, the applicant could not bring before the appeal body his claim that the decision on the continuation of his detention as well as his conviction was taken by an incompetent court is unlawful, and so is his deprivation of liberty. It cannot be said that the applicant's inability to challenge the unlawfulness of the decision whereby he deprived of liberty before the appellate authority is in compliance with the principles of legal security and legal certainty.

85. At the stage following the final decision rendered during the trial at the first instance court, the applicant lodged a request for release with the 13th Chamber of the İstanbul Assize Court which held the trial on 31/12/2013. As of this date, it is seen that the reasoned decision has not been announced by the Court and, in addition, it has been decided that there is no ground to render a decision on the request as *"the prosecution phase was completed and it was decided to reject the objection that was lodged against the decision of de jure detention"*. It has been accordingly observed that an effective judicial examination was not conducted as no examination as to the merits was made, which renders the right that is guaranteed in Article 19 § 8 of the Constitution dysfunctional.

86. Due to the reasons explained, taking into consideration the facts that an appellate examination could not be held since the reason was not announced in the period elapsing as from the announcement of the judgment; that the alleged deprivation of liberty is not lawful and the

request for release have not been examined by the appellate body, the trial court must render a decision on the request by also considering the possibility of conditional bail. The Constitutional Court therefore found a violation of Article 19 § 8 of the Constitution.

3. Article 50 of the Law no.6216

87. Under Article 50(1) of the Law no.6216, it is indicated that in the event that a violation decision is delivered at the end of the examination on merits, the necessary actions to remove the violation and its consequences are adjudged; however, a review for legitimacy cannot be done and any decision in the form of an administrative act and action cannot be delivered.

88. In the application, it has been concluded that Article 19 § 8 of the Constitution was violated. The applicant does not have any request for non-pecuniary compensation. In order to remove the violation within the scope of the right to personal liberty and security, the trial court must render a decision on the merits of the applicant's request for release by also taking into consideration the conditional bail.

89. It has been held that the trial expenses of TRY 1,706.10 in total, composed of the application fee of TRY 206.10 and the counsel's fee of TRY 1,500.00 which were made by the applicant, be reimbursed to the applicant.

V. JUDGMENT

In the light of the reasons explained, it was **UNANIMOUSLY** held on 6/3/2014 that;

A. The applicant's complaints

1. within the scope of being deprived of liberty pending his trial at the first instance court are INADMISSABLE due to *"statute of limitations"*,

2. Since the justification of the decision of conviction was not included in the case file within the statutory period, the complaints that no decision was given with respect to his request for release be declared ADMISSABLE,

B. Due to the facts that his allegation concerning unlawful deprivation of liberty is rejected by the incumbent court without being efficiently examined and that it could not be taken before the Court of Cassation since the reasoned decision in relation to conviction was not pronounced, Article 19 § 8 of the Constitution was VIOLATED within the scope of the right to personal *liberty and security,*

C. In order for due action to be taken and a decision to be taken in relation to the applicant's request for release, a copy of this judgment be sent to the incumbent court,

The trial expenses of TRY 1,706.10 in total, composed of the application fee of TRY 206.10 and the counsel's fee of TRY 1,500.00, which were made by the applicant, be REIMBURSED TO THE APPLICANT.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

HANEFİ AVCI

(Application no. 2013/2814)

SECOND SECTION
JUDGMENT

President	: Alparslan ALTAN
Justices	: Serdar ÖZGÜLDÜR
	Osman Alifeyyaz PAKSÜT
	Recep KÖMÜRCÜ
	Engin YILDIRIM
Rapporteur	: Serhat ALTINKÖK
Applicant	: Hanefi AVCI
Representative	: Att. Refik Ali UÇARCI

I. SUBJECT-MATTER OF THE APPLICATON

1. The applicant alleged that Articles 19 and 36 of the Constitution were violated by claiming that the arrest warrant issued on him was unlawful; that the objections which he filed against the court decisions as regards his detention and the continuation of detention were dismissed through stereotype justifications; that no effective legal remedy was present in domestic law against these decisions. The applicant also alleged that he was detained for an unreasonable period of time; that the continuation of his detention in spite of existence of no concrete evidence on his criminality hinders the presumption of innocence; that he was still detained on remand while some suspects who were accused of being a member of an organization within the scope of the same file were released.

II. APPLICATION PROCESS

2. The application was directly lodged with the Constitutional Court on 2/5/2013. As a result of the preliminary administrative examination

of the petition and its annexes, it has been determined that the application had no deficiency which would prevent its submission to the Commission.

3. It was decided by the Third Commission of the Second Section on 17/7/2013 that the examination of admissibility of the application be conducted by the Section and the file be sent to the Section.

4. The Section, in the session held on 12/12/2013, decided that the examination of admissibility and merits be carried out concurrently.

5. The facts which are the subject matter of the application were notified to the Ministry of Justice on 16/12/2013. The Ministry of Justice submitted its observations to the Constitutional Court on 17/2/2014.

6. The observations submitted by the Ministry of Justice to the Constitutional Court were notified to the applicant on 18/2/2014. The applicant submitted his counter-opinion to the Constitutional Court on 19/3/2014.

III. THE FACTS

A. The Circumstances of the Case

7. As expressed in the application form and the annexes thereof and the observations of the Ministry of Justice, the facts are summarized as follows:

8. The applicant was detained on the grounds of *"aiding and abetting the members of a terrorist organization, breaching the confidentiality of an investigation file, influencing those who were fulfilling their judicial duties and on the basis of the nature of the offences the suspect is charged with based on the allegation of causing the persons involved in anti-terrorism to become targets, the existing evidence against him, the presence of facts which gave rise to strong suspicion that he committed the charged offences, the fact that some of the offences he was charged with were among the ones stipulated in Article 100/3-a of the Code of Criminal Procedure, the fact that the evidence was not completely collected and the possibility of tampering with the evidence by the suspect due to his position"* through the decision of the 14th Chamber

of the İstanbul Assize Court (File No:2010/53 dated 28/09/2010) with the allegations that he aided and abetted a terrorist organization and its members, he breached the confidentiality of the investigation file, he influenced those who were fulfilling their judicial duties, he caused those who were involved in anti-terrorism to become targets within the scope of the investigation of the İstanbul Chief Public Prosecutor's Office no. 2009/1868.

9. On 5/10/2010, the applicant requested his release against the arrest warrant of the 14th Chamber of the İstanbul Assize Court dated 28/09/2010 by stating *"... that the reasons for detention were not read in his presence; that the existing evidence is in his favor; that during the interrogation he did not accept anything other than those written in the book written by him; that there is no action which constitutes an offence in the book; that he reflected on the future as it is his responsibility as an intellectual in this book relying on the right to freedom of thought and expression within the scope of Articles 9 and 10 of the European Convention on Human Rights ("the Convention"); that detention pending trial is exceptional according to the regulatory provisions on the limitation of arrest in Article 100 of the Code of Criminal Procedure within the framework of the libertarian understanding which brings the individual forward; that release pending trial has turned into a rule now; that the evidence on merits was completely collected; that there is no possibility his tampering with the evidence; that detention is indeed a measure; that it is highly probable for him to be acquitted in accordance with Article 223 § 2 of the Code of Criminal Procedure as there is no concrete, sufficient and material evidence about him; and that it should be decided that he be released justly or, if the court considers otherwise, by resorting to bail or one of the conditional bail measures according to the provisions of Article 200 and et. seq. of the Code of Criminal Procedure"*.

10. As a result of the examination carried out *ex officio* as regards the detention of the applicant by the 9th Chamber of the İstanbul Assize Court according to Article 108 of the Code no. 5271, the applicant's continued detention was ordered through its decision (Misc. No: 2010/1331 and dated 26/11/2010) on the grounds of *"... the nature of the offence he is charged with, the fact that the offences are among the ones stipulated in Article 100 § 3 of the Code No.5271, the fact that the reasons for detention still exist, the fact that the investigation has not been completed yet*

and the fact that the measures which are alternative to detention measure will be insufficient in terms of the suspect".

11. The indictment of the İstanbul Prosecutor's Office dated 24/1/2011 about 22 suspects also including the applicant was accepted by the 12th Chamber of the İstanbul Assize Court on 4/2/2011.

12. The 12th Chamber of the İstanbul Assize Court decided on the continuation of the applicant's detention at the first hearing of 13/4/2011.

13. On 19/4/2011, the applicant objected to the decision of the 12th Chamber of the İstanbul Assize Court on his continued detention at the hearing dated 13/4/2011. His objection was dismissed through the decision of the 13th Chamber of the İstanbul Assize Court (Misc. No: 2011/308 and dated 12/5/2011) on the grounds of *"... the sanction required by the offence imputed to the suspect, the findings indicating strong suspicion of guilt on his part and that the alleged offence is one of offences stipulated in Article 100/3 of the CCP"*.

14. The applicant applied to the incumbent court and requested his detention be ended on the dates of 17/11/2011, 6/2/2012, 30/4/2012, 6/7/2012, 7/8/2012, 5/10/2012, 26/11/2012, 4/1/2013, but his requests were dismissed by the court. The objections filed by the applicant to the decisions of dismissal delivered by the courts were also dismissed.

15. Lastly, the applicant applied to the 9th Chamber of the İstanbul Assize Court on 4/2/2013 and requested the termination of his detention and his release. The 9th Chamber of the İstanbul Assize Court decided on the applicant's continued detention during the 17th hearing dated 4/2/2013.

16. The applicant objected to this decision on his continued detention. His objection was dismissed through the decision of the 10th Chamber of the İstanbul Assize Court (Misc. No: 2013/78 and dated 7/3/2013). The decision of dismissal was notified to the applicant on 1/4/2013.

17. The applicant's detention was also assessed *ex officio* by the 9th Chamber of the İstanbul Assize Court on the dates of 22/6/2011, 21/7/2011, 10/1/2012, 21/6/2013, 19/7/2012, 6/9/2012, 20/11/2012,

18/12/2012, 22/1/2013, 26/2/2013 in accordance with Article 108 of the Code no. 5271, and a decision ordering the applicant's continued detention was delivered.

18. It was decided through the decision of the 9th Chamber of the İstanbul Assize Court on 19/7/2013 that the applicant be sentenced to imprisonment of five years and seven months for *"aiding an illegal armed terrorist organization, namely Devrimci Karargah (Revolutionary Headquarters) and its members"* in accordance with Articles 220 § 7 and 314 § 2 of the Turkish Criminal Code no. 5237, to imprisonment of five years and a judicial fine for *"carrying unregistered fatal full-automatic and semi-automatic guns"*; to imprisonment of two years and six months for *"influencing the officials who perform their judicial duties"*; as well as imprisonment of two years, two months and twenty days for *"breach of the confidentiality of the investigation"*. The court also ordered his continued detention and ruled that a criminal complaint be filed for the forgery of official documents.

19. The applicant's case has been pending at the appellate stage.

B. Relevant Law

20. Article 220 § 7 of the Code no. 5237 is as follows:

> *"A person who, without being involved in the hierarchical structure within the organization, knowingly and willingly aids the organization shall be penalized as a member of an organization.*
>
> *The penalty to be imposed due to becoming member to an organization can, depending on the nature of the aid provided, be abated by up to one thirds."*

21. Article 314 of the Code no. 5237 is as follows:

> *"(1) A person who forms or conducts an armed organization with the purpose of committing the offences in the fourth and fifth chapters of this section shall be penalized with a prison sentence of ten to fifteen years.*
>
> *(2) A prison sentence of up to ten years shall be imposed on those who join the organization defined in paragraph one."*

22. Article 100 of the Code of Criminal Procedure no. 5271 is as follows:

"(1) A warrant of detention can be issued about the suspect or accused in the presence of facts indicating the existence of strong suspicion of guilt and the presence of a ground for detention.

A warrant of detention cannot be issued in the event that importance of the case is not proportionate to the anticipated penalty and security measure to be imposed.

(2) Grounds for detention can be considered to exist in the following circumstances:

a) *If there are concrete facts indicating that the suspect or accused will escape and arising suspicion towards the suspect or accused escaping or hiding.*

b) *If the suspect or accused's behaviours give rise to strong suspicion on the matters of;*

1. Destroying, concealing or tampering with the evidence,

2. Attempting to exert pressure on the witness, aggrieved or others.

(3) Grounds for detention can be considered to exist in the presence of grounds for strong suspicion that the offences below have been committed:

…

11.

Offences Against the Constitutional Order and the Operation of Said Order (Articles 309, 310, 311, 312, 313, 314, 315),

…"

23. Article 108 of the Code no. 5271 is as follows:

"…

(3) The judge or court shall decide ex officio whether or not the continuation of detention of the accused held in a detention house will be necessary in each session or between sessions when conditions thus require or within the time period prescribed under paragraph one."

IV. EXAMINATION AND GROUNDS

24. The individual application lodged by the applicant (no. 2013/2814 and dated 2/5/2013) was examined during the session held by the Court on 18/6/2014, and accordingly it was held:

A. The Applicant's Allegations

25. The applicant;

i. Alleged that Article 13 of the Convention was violated by claiming that the decisions delivered by the court on the restriction of his freedom were contrary to law; that his requests for release were dismissed through stereotype justifications; and that there was no effective remedy to which he can resort in domestic law in order to challenge the illegal decisions on his detention and continued detention,

ii. Alleged that Article 5 § 1 of the Convention was violated by claiming that the decisions delivered as a result of the examinations as to his detention carried out *ex officio* by the relevant court in accordance with Article 108 of the Code no. 5271 were not notified to him; and that thus, he could not find an opportunity to challenge these decisions,

iii. Alleged that Article 5 § 1 of the Convention was violated by claiming that his detention was unlawful; and that his requests for release were dismissed through stereotype justifications without being based on any facts,

iv. Alleged that Article 5 § 1 of the Convention was violated by asserting that his objections as to the dismissal of his requests for release were also dismissed through stereotype justifications,

v. Alleged that Article 5 § 3 of the Convention was violated by claiming that there was no sufficient reason and reasonable doubt that would justify his continued detention; that the accusations against him were only based on the excerpts made from the book written by him without an inquiry into issues both against and in favour of him with respect to the restriction of his freedom and without any evidence; that he was detained for an unreasonable period of time; and that his

detention continued while some suspects who were accused of being a member of an organization within the scope of the same file were released,

vi. Alleged that *"the presumption of innocence"* set forth in Article 6 § 2 of the Convention was violated due to the continuation of his detention although no evidence proving his guilt was put forth between the date on which he was taken into custody and the date of his application with the Constitutional Court,

and reserved the right to claim for damages.

B. The Constitutional Court's Assessment

1. Admissibility

a. Alleged Non-Existence of an Effective Legal Remedy against Detention Orders

26. The applicant alleged that there was no effective remedy to which he can resort in order to challenge the detention order and the decision ordering his continued detention, which were delivered unlawfully.

27. The Ministry of Justice stated that the complaint that the decisions delivered as a result of the judicial review of detention carried out *ex officio* by the courts were not notified to the applicant was related to Article 108 of the Code no. 5271; that such complaints were examined by the ECHR in accordance with Article 5 § 4 of the Convention, and that Article 5 § 4 of the Convention did not include the obligation of providing explanations for all grounds maintained by detained persons in all types of their requests for release; however it was necessary for the court dealing with these requests to include concrete claims and findings that would not cast suspicion on the lawfulness of detention.

28. The applicant reiterated his allegations in the application form and did not make a new statement on this issue.

29. In the examination of an individual application, the joint protection realm of the Constitution and the Convention is taken as

the basis for determining whether an alleged violation falls into the jurisdiction of the Constitutional Court in terms of the subject-matter (no. 2012/1049, 26/3/2013, § 18). The right to an effective remedy is set forth in Article 40 of the Constitution and Article 13 of the Convention.

30. It is not possible to evaluate in an abstract manner the applicant's alleged violation of the right to an effective remedy enshrined in Article 40 of the Constitution and Article 13 of the Convention given the expressions in the aforementioned Articles, and it is absolutely necessary to discuss them in conjunction with other fundamental rights and freedoms stipulated within the Constitution and the Convention. In other words, in order to discuss whether the right to an effective remedy has been violated or not, it is necessary to address the question in respect of which fundamental right and freedom the right to an effective remedy has been restricted (no. 2012/1049, 26/3/2013, § 33).

31. In the present case, the essence of the applicant's allegation is related to the fact that the objections which he filed to the detention orders were dismissed through stereotype justifications. It is necessary to examine this allegation within the framework of Article 19 § 7 of the Constitution.

b. The Allegation that He could not Find an Opportunity to Challenge the Decisions Delivered by the Inferior Court as a Result of the Judicial Review of Detention Carried Out *Ex Officio* as These Decisions were not Notified to Him

32. The applicant alleged that the decisions delivered by the inferior court as a result of the judicial review of detention carried out *ex officio* were not notified to him; and that therefore he could not find an opportunity to challenge these decisions.

33. In its observations, the Ministry of Justice stated that the relevant complaint was related to the judicial review carried out by the inferior court according to Article 108 of the Code no. 5271; that the applications as regards the unlawfulness of detention filed before a certain court in a way that would cover the examination of the objections filed against both the requests for release and the continuation of detention were assessed

by the ECHR within the framework of Article 5 § 4 of the Convention; and that judicial reviews which were periodically carried out on the continuation of detention did not fall into the scope of this right.

34. The applicant did not make any statements against the observations of the Ministry of Justice.

35. Article 19 § 8 of the Constitution is as follows:

> *"Persons whose liberties are restricted for any reason are entitled to apply to the competent judicial authority for speedy conclusion of proceedings regarding their situation and for their immediate release if the restriction imposed upon them is not lawful."*

36. Article 5 § 4 of the Convention is as follows:

> *"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."*

37. Article 19 § 8 of the Constitution and Article 5 § 4 of the Convention grant a person whose freedom is restricted for whatsoever reason the right to apply to a court which can speedily decide on the unlawfulness of his detention and order his release if his detention is not lawful. The aforementioned provisions of the Constitution and the Convention essentially constitute a guarantee for the judicial review of the requests for release or the decisions on the extension of detention in the cases which are tried before a court upon an application as regards the unlawfulness of detention (no. 2012/1158, 21/11/2013, § 30).

38. In Article 108 of the Code No. 5271, it is provided that it shall be decided by the magistrate judge upon the request of the Public Prosecutor during the investigation stage whether the continuation of detention will be necessary or not in the period during which the suspect is in a detention house and at intervals of thirty days at the latest, by taking into consideration the provisions of Article 100; that it shall be decided *ex officio* by the judge or the court during the prosecution stage whether the continuation of detention of the detained accused will be

necessary or not at each session or between sessions as required by the circumstances or within a period of thirty days at the latest.

39. The assessment to be carried out according to Article 108 of the Code no. 5271 is carried out on its own motion (*ex officio*), and it cannot be considered to be within the scope of the right to object before a judicial authority granted for a person whose freedom is restricted in accordance with Article 19 § 8 of the Constitution (no. 2012/1158, 21/11/2013, § 32).

40. Due to the reasons explained above, it should be decided that the applicant's complaints that *"the decisions delivered as a result of the judicial reviews of his detention carried out ex officio by the inferior court were not notified to him and that therefore he could not find an opportunity to object to these decisions" are inadmissible due to "lack of jurisdiction ratione materiae"*.

c. Alleged Deprivation of Liberty in spite of Non-existence of Strong Evidence of Guilt and Ground for Detention

41. The applicant alleged that he was deprived of his liberty although there was no strong suspicion of guilt and ground for detention.

42. In its observations, the Ministry of Justice stated that according to the judgments of the ECHR ,in order for a person to be deprived of his liberty with the suspicion that he has committed an offence, there needs to be reasonable suspicion or plausible reasons (*raisons plausibles*) as to the effect that the relevant person has committed the alleged offence; that this requirement is *sine qua non* in terms of detention and it needs to sustain its existence in every state during which detention continues; that the relevant person needs to be released at the moment at which reasonable doubt disappears; that reasonable doubt needs to be sufficient enough to convince an observer who overviews the incidents independently and is completely objective also given the collected evidence and the unique conditions of the given case; that a person who is suspected of having committed an offence should not be detained through a judicial decision which is completely devoid of any ground; that however detention of a suspect or accused by showing some

grounds justifying detention cannot be considered to be arbitrary; and that a similar approach has also been embraced by the Constitutional Court.

43. The applicant did not agree with the observations of the Ministry by asserting that he did not have any relations with the alleged organization and that he did not have any relation with the suspect N.K. who was alleged to be a member of the organization, except for their friendship. He stated that the allegation of breaching the confidentiality of the investigation did not reflect the truth; that the alleged possessing of an unregistered gun was not true; that the guns were registered according to the legislation of the state of emergency; and that the other guns at his home were registered in the name of his wife. The applicant also stated that the risk of flight was not a matter of concern as he had a fixed residence; that he did not have the possibility of tampering with the evidence as taped recordings which were put forth as evidence, his book, the guns which were claimed to be seized in Eskişehir were already secured by the judicial authorities. He also claimed that he was arbitrarily detained; that there was no public interest in his detention; and that the investigation authorities created the impression that an offence had been committed by leaking all data at their hands to the press.

44. Article 48 § 2 of the Code no. 6216 titled *''the conditions and evaluation of admissibility of individual applications''* is as follows:

> *''The Court can decide on the inadmissibility of the applications which are manifestly ill-founded.''*

45. The fact that everyone has the right to personal liberty and security is stipulated as a principle in Article 19 § 1 of the Constitution. The cases in which persons can be deprived of their liberty on condition of stipulating the way and conditions of such deprival are listed non-exhaustively in the second and third paragraphs. Therefore, the right to liberty and security of a person can only be restricted in the event that one of the cases specified within the scope of the aforementioned Article of the Constitution exists (no. 2012/239, 2/7/2013, § 43).

46. In Article 19 § 3 of the Constitution, it is provided that individuals against whom there is strong indication of guilt can only be detained through an order of a judge in order to prevent them from fleeing, destroying or tampering with the evidence or in similar cases specified in law which necessitate detention. Accordingly, the detention of a person primarily depends on the presence of a strong indication that he has committed an offence. This is sought *sine qua non* for detention Therefore, it is necessary to support an allegation with plausible and solid evidence. Nature of the cases and information which can be considered as plausible evidence is to a large extent based on the particular circumstances of each concrete case.

47. However, it is not always necessary that sufficient evidence had been collected at the moment of arrest or detention in order for a person to be accused of an offence depending on this qualification. As a matter of fact, the aim of detention is to execute the judicial process in a sound manner by proving the accuracy or removing the doubts which constitute the basis of the detention of a person during the executed investigation and/or prosecution. According to this, the facts that will form a basis of criminal accusation and the facts which will be discussed in the subsequent stages of proceedings and constitute a ground for conviction must not be considered to be of the same degree (no. 2012/1272, 4/12/2013, § 73).

48. Detention is specified in Article 100 and et. seq. of the Code no. 5271. According to Article 100, a person can be detained only in cases of strong indication of his guilt as well as a ground for detention. The grounds for detention are also specified in the same article. According to this, a decision on detention can be delivered (a) if the suspect or accused flees, hides or there are concrete facts which arouse the suspicion that he will flee, (b) if the behaviours of the suspect or accused constitute strong suspicion that he will 1) destroy, conceal or tamper with the evidence, 2) attempting to pressure witnesses, victims or others. In that provision, the offences in which a ground for detention will be assumed in the event that there is a strong suspicion that they have been committed are specified as a list (no. 2012/239, 2/7/2013, § 46).

49. On the other hand, as long as the rights and freedoms stipulated in the Constitution are not violated, the issues as regards the interpretation of the legal provisions or mistakes of law or facts in the first instance decisions cannot be handled in the examination of an individual application. The interpretation of the legal provisions on detention and their implementation are also within the scope of the discretionary power of the inferior courts. However, in case of comments which are clearly contrary to law or the Constitution or a clear arbitrariness in the discretion of the evidence, such decisions which result in the violation of a right and freedom should be examined in an individual application. A contrary consideration does not accord with the aim of introducing the individual application mechanism (no. 2012/239, 2/7/2013, § 49).

50. Within the scope of the investigation of the İstanbul Prosecutor's Office no. 2009/1868, the applicant was detained by the decision of the 14th Chamber of the İstanbul Assize Court (File No: 2010/53 and dated 28/09/2010) with the claim that he committed the offences of knowingly and willingly aiding and abetting a terrorist organization and its members, breaching the confidentiality of the investigation file, influencing those who were fulfilling their judicial duties, causing the persons involved in anti-terrorism to become targets.

51. *"Article 100 and et. seq. of the Code of Criminal Procedure"* were shown as the justification of his detention *"by considering the nature of the offences imputed to the suspect, the existing evidence against him, the presence of facts attesting to strong suspicion of his guilt, the fact that some of the charged offences were among the offences stipulated in Article 100/3-a of the Code of Criminal Procedure, the fact that the evidence was not completely collected, the possibility of destroying, concealing or tampering with the evidence by the suspect due to his position"*. When the indictment prepared by the Prosecutor's Office is examined, in brief, it is seen that a criminal case was filed on the ground that the applicant aided and abetted the members of the alleged *"Devrimci Karargah (Revolutionary Headquarters) Organization"*. He gave information to the suspect N.K. who was alleged to be the member of the organization within the scope of the investigation and helped him escape from police chase, which

was understood from the documents as regards the telephone calls explained in the book *"Haliçte Yaşayan Simonlar, Dün Devlet Bugün Cemaat"* written by the suspect and the content of the telephone calls he made with the suspect N.Ç..The actions which breached the confidentiality of the investigation were detected, fake identity cards, driving licenses and passports were seized in his residence situated in the province of Eskişehir, military documents specified as confidential were present among the other seized documents, voice recordings which were obtained as a result of illegal wiretapping in the searches conducted in his office in the Police Department of the province of Eskişehir were seized, and he hid information which qualified as personal data, that the guns whose license expired and aim of issue disappeared were seized in his residence.

52. From the examination of the case file, it is understood that there was sufficient suspicion and grounds for the detention of the applicant. There is no issue indicating the contrary in the application file either. In this case, it has been concluded that the applicant's allegation that he was detained and continuation of his detention was ordered although there was no concrete evidence indicating his guilt is not appropriate. The issue of whether the decisions on the continuation of detention were relevant and sufficient or not should be handled during the examination of his allegations that his requests for release were dismissed through stereotype justifications and that he was detained for a long time.

53. Due to the reasons explained, the applicant's allegation that *"he was deprived of liberty although there were no strong suspicion of guilt and grounds for his detention"* must be declared inadmissible for being *"manifestly ill-founded"*.

d. Alleged Violation of the Presumption of Innocence

54. The applicant alleged that his continued detention in spite of existence of no evidence indicating his guilt between the date on which he was taken into custody and the date of his application to the Constitutional Court was in breach of *"the presumption of innocence"*.

55. The Ministry of Justice stated that it was necessary to evaluate this allegation within the framework of Article 19 § 7 of the Constitution.

56. The applicant reiterated his allegation in the application form and did not make a new statement regarding this issue.

57. The essence of the applicant's allegation is related to the fact that he was deprived of his liberty and detained on remand for a long time although there was no strong suspicion of guilt and ground for detention on him. The applicant's allegation that he was deprived of liberty although there were no strong suspicion of guilt and ground for detention has been examined above and it has been decided that this claim is manifestly ill-founded (§§ 41-53). It is necessary to evaluate the applicant's allegation that the presumption of innocence was violated due to the fact that he was detained on remand for a long time within the framework of Article 19 § 7 of the Constitution.

e. Alleged Unreasonableness of the Detention Period

58. The complaint of the applicant as to the effect that the detention exceeded the reasonable period is not manifestly ill-founded. Besides, as there is no other reason for inadmissibility, this part of the insofar as it concerns this complaint is declared admissible.

2. Merits

59. The applicant alleged that his requests for release and the objections he filed upon the dismissal of his requests for release were dismissed through stereotype justifications without being based on any fact; and that he was detained for a long time.

60. The Ministry of Justice stated that, according to the judgments of the ECHR, the starting point for the calculation of the period of detention was the date on which an applicant was first arrested and taken into custody; that this period ended through the release of the person or the decisions of the inferior courts; that the detention turned into a state of "detention after conviction" together with the decision of the inferior court; that the presence of suspicion of fleeing, the risk of influencing the judiciary, the risk of committing an offence again or the danger of the disruption of public order were sufficient in order for the ongoing detention to be accepted as legitimate; that while evaluating whether a

period of detention that exceeded a certain period of time was reasonable or not, it was necessary to examine whether the reasonable doubt continued to be present or not, whether the court which conducted the trial showed necessary attention in terms of the speedy conclusion of the trial or not, whether the national judicial authorities discussed the issue of resorting to judicial control or not; that it was also necessary to handle the complexity of the case and the quality of the allegations, whether the alleged offence was within the scope of fight against organized offence or not in line with the particular circumstances of each application; and that the case-law of the Constitutional Court was also in this direction.

61. Moreover, the Ministry of Justice stated that it was necessary not to detain and extend the detention of a person who was suspected of having committed an offence through a court decision which was completely devoid of justification; that however the detention of a suspect or accused by showing some justifications that legitimized the detention could not be considered as arbitrary detention; that the delivery of a detention order or decision on the continuation of detention through extremely short justifications and without showing any legal provision could not be considered within this scope; and that a similar approach was also embraced by the Constitutional Court.

62. The applicant disagreed with the observations of the Ministry by stating that the provisions of conditional bail prescribed by the Code no. 6352 on the Amendment of Some Laws so as to Render Judicial Services Effective and the Postponement of Cases and Penalties as regards the Offences Committed through the Press were not applied on him; that he was not released although his co-accuseds were released; that the detention was intentionally sustained, that while the accused named N.K. who was claimed to be a member of the organization was released, he who was tried with the claim that he helped this person was detained on remand; that the posts of two policemen who were unlawfully wiretapping him were changed; and that an investigation was initiated against them; that he was detainede ın remand for a long time; and that his detention was unlawfully extended.

63. Article 19 § 7 of the Constitution is as follows:

> *"Detained individuals have the right to request being tried within a reasonable time and being released during investigation or prosecution. Release can be linked to a guarantee in order to ensure that the relevant individual is present at the court during trial or that the sentence is executed."*

64. In Article 19 § 7 of the Constitution, it is enshrined that the individuals who are detained within the scope of a criminal investigation have the right to request the conclusion of the trial within a reasonable period and being released during investigation or prosecution.

65. It is not possible to assess the question as to whether the period of detention is reasonable or not within the framework of a general principle. Whether the period during which an accused is detained on remand is reasonable or not should be evaluated depending on the particular circumstances of each case. The presumption of innocence that is stipulated as *"No one can be deemed guilty until they are found guilty by a court order"* in Article 38 of the Constitution requires that the liberty of an individual is essential, and detention is exceptional during the trial. The continuation of detention can be considered to be justified in spite of the presumption of innocence only if there is a public interest which has more precedence over the right to personal liberty and security enshrined in Article 19 of the Constitution (no. 2012/1137, 2/7/2013, § 61).

66. It is primarily the inferior courts' duty to ensure that detention does not exceed a certain period of time. To this end, all incidents which affect the aforementioned requirement of public interest should be examined by the inferior courts and these facts and cases should be put forth in the decisions as regards the requests for release (no. 2012/1137, 2/7/2013, § 62).

67. The measure of detention can be resorted to in the presence of a strong indication of guilt and in order to prevent these individuals from escaping, the destruction or alteration of the evidence. Even if these grounds for detention can be initially considered sufficient for the continuation of detention up to a certain period, after the expiry of this period, it is necessary to show that the grounds for detention still continue to exist together with their justifications in the decisions on the

continued detention. In the event that these justifications are considered as *"relevant"* and *"sufficient"*, whether the trial process has been diligently executed or not should also be examined. Factors such as the complexity of a case, whether it is related to organized offences or not or the number of the accused are taken into account for the evaluation of diligence shown in the functioning of the process. A conclusion can be reached on whether the period is reasonable or not when all these elements are evaluated together (no. 2012/1137, 2/7/2013, § 63). A conclusion can be reached on whether the period is reasonable or not when all these elements including the measures that the relevant authorities took in order to keep the period of detention at a reasonable level are evaluated together (no. 2014/85, 3/1/2014, § 43).

68. Therefore, in the evaluation of whether Article 19 § 7 of the Constitution is violated or not, basically, the justifications of the decisions as regards the requests for release should be considered and whether the decisions are sufficiently justified or not within the framework of the documents submitted in the applications of objection to detention filed by the individuals who are kept under detention should be taken into account. On the other hand, as long as a strong indication that a person who is detained in accordance with the law has committed an offence and one or more of the grounds for detention continue to exist, it is necessary, as a principle, to accept the state of detention up to a certain period as reasonable (no. 2012/1137, 2/7/2013, §§ 63-64).

69. On the other hand, the right to liberty should not be interpreted in a way that may result in rendering extremely difficult the effective fight of judicial authorities and security officers against organized offences in particular. As a matter of fact, the ECHR emphasizes that Article 5 § 1(c)of the Convention should not be interpreted in a way that may result in rendering extremely difficult the effective fight of security officers of the States that are party to the Convention against offences, in particular those which are organized (*Dinç and Çakır v. Turkey*, no. 66066/09, 9/7/2013, § 46).

70. The detention and the extension of the detention of a person through a court decision which is completely devoid of justification

is inadmissible (for the judgments of the ECHR in the same vein see *Nakhmanovic v. Russia*, no. 55669/00, 2/3/2006, § 70; *Belevitskiy v. Russia*, no. 72967/01, 1/3/2007, § 91). Nevertheless, it is not possible to say that the detention of a suspect or accused by showing justifications which legitimize detention is arbitrary. However, issuing a detention order or a decision on the continuation of detention through extremely short justifications and without showing any legal provision should not be considered within this scope (for a judgment of the ECHR in the same vein, see *Mooren v. Germany* [BD], no. 11364/03, 9/7/2009, § 79).

71. The failure of an objection or appeal authority to justify its relevant decision in a detailed way in cases where it agrees with the court decision which is the subject of the objection or appeal examination and the justifications in this decision does not, as a rule, constitute contrariety to the right to a reasoned decision (for a judgment of the ECHR in the same vein see *Garcia Ruiz v. Spain,* no. 30544/96, 21/1/1999, § 26).

72. The starting date of the period in the calculation of the reasonable period is the date of arrest and custody in cases where an applicant was previously arrested and taken into custody or the date of detention in cases where he has been directly detained. The end of the period is, as a rule, the date on which the person is released. However, if conviction of a person is decided in a case in which he is tried under detention, the state of detention comes to an end as of the date of conviction (no. 2012/237, 2/7/2013, §§ 66-67).

73. On the other hand, as long as a strong indication that a person who is detained in accordance with the law has committed an offence and one or more of the grounds for detention continue to exist, it is necessary, as a principle, to accept the state of detention up to a certain period as reasonable (no. 2012/1137, 2/7/2013, §§ 63-64).

74. The applicant primarily asserted that he was under detention for a long time. In the present case, the applicant was detained on 28/09/2010 and sentenced to an imprisonment and judicial fine through the decision of the 9th Chamber of the İstanbul Assize Court on 19/7/2013. According to this, the applicant was deprived of his liberty depending on a basis of incrimination for approximately 2 years and 10 months.

75. In the present case, the applicant also alleged that the justifications of the decisions on objection to detention and on the dismissal of objection were insufficient.

76. At the first hearing of the 12th Chamber of the İstanbul Assize Court on 13/4/2011, it was decided *"that the case file be joined with the case file of the 9th Chamber of the İstanbul Assize Court numbered E.2009/213; that the trial be proceeded in the case file of the 9th Chamber of the İstanbul Assize Court No. E. 2009/213; and* that the state of detention of the applicant continue on the ground that *"the alleged act is one of the offences stipulated in Article 100/3 of the Code of Criminal Procedure as it is understood that there are cases which show the presence of strong suspicion of offence that the accused are the members of the illegal armed terrorist organization "Devrimci Karargah" (Revolutionary Headquarters)".*

77. On 19/4/2011, the applicant requested *"that the decision on the continuation of the state of detention be lifted upon objection by considering his defence petition by stating that he was detained on 28/09/2010 and that he was taken before the court for the first time on 13/04/2011 after approximately 7 months; that Constitutional and statutory requests as regards defence were not fulfilled in any way during the stages of investigation and trial; that this right to liberty and security and right to a fair trial were violated"* against the decision that the 12th Chamber of the İstanbul Assize Court delivered on the continuation of the state of detention at the hearing on 13/4/2011.

78. The objection of the applicant was dismissed through the decision of the 13th Chamber of the İstanbul Assize Court (Misc. no. 2011/308 and dated 12/5/2011) on the ground of *"... the sanction required by the offence alleged to the suspect, the findings attesting to strong suspicion of guilt and that the alleged offence is one of the offences stipulated in Article 100/3 of the Code of Criminal Procedure".*

79. The applicant applied to the court with the request for the termination of the state of detention on the dates of 17/11/2011, 6/2/2012, 30/4/2012, 6/7/2012, 7/8/2012, 5/10/2012, 26/11/2012, 4/1/2013 at the subsequent stages of his trial. In summary, the requests of the applicant for release were dismissed with the justifications of the nature of the offences imputed to the applicant; that there were facts attesting to

strong suspicions of guilt as regards the alleged offences; that the alleged offences were among the catalogue offences; that the current evidence showed the existence of strong suspicion of guilt given all evidence within the file; that the detention period was reasonable; that there was a suspicion of fleeing for the applicant if released; that the application of the measure of conditional bail which was a less severe protective measure would be insufficient as regards the subject matter of the case. The objections filed by the applicant to the decisions of dismissal delivered by the courts were also dismissed.

80. Lastly, the applicant applied to the 9th Chamber of the İstanbul Assize Court on 4/2/2013 with the request for the termination of his detention and his release. The 9th Chamber of the İstanbul Assize Court, at the 17th trial of 4/2/2013, decided on the continuation of the applicant's detention by repeating its previous justifications.

81. The applicant contested this decision. His objection was dismissed through the decision of the 10th Chamber of the İstanbul Assize Court (Misc. No: 2013/78 and dated 7/3/2013) on the ground that *"the decision delivered by the* 9th Chamber of the İstanbul Assize Court *on the continuation of the state of detention on 4/2/2013 complies with the procedure and law".* The decision of dismissal was notified to the applicant on 1/4/2013.

82. The applicant's detention was also assessed *ex officio* by the 9th Chamber of the İstanbul Assize Court on the dates of 22/6/2011, 21/07/2011, 10/1/2012, 21/6/2013, 19/7/2012, 6/09/2012, 20/11/2012, 18/12/2012, 22/01/2013, 26/2/2013 in accordance with Article 108 of the Code no. 5271, and a decision was delivered on the continuation of his detention.

83. In the evaluation of whether Article 19 § 7 of the Constitution is violated or not, basically, the justifications of the decisions as regards the requests for release should be considered and whether the decisions are sufficiently justified or not within the framework of the documents submitted in the applications of objection to detention filed by the individuals who are detained on remand should be taken into account.

84. Although it is necessary, as a principle, to accept the state of detention up to a certain period as reasonable as long as a strong indication that a person has committed an offence and one or more of the grounds for detention continue to exist, while deciding on the continuation of detention especially after a certain period of time expires, it is an obligation to take into account the special case of the person who files a request for his release and to personalize the justifications of detention in this sense in addition to the general circumstances of the case.For this reason, assuming that others could also act in the same way by making a generalization in the evidence of the circumstances of some accused who are tried in the same case prevents personalization while it also does not accord with the understanding as to the effect that freedom is essential and detention is exceptional.

85. In the present case, when the justifications of the decisions delivered by the inferior courts on the objection to detention and the dismissal of objection are examined, it is seen that these justifications did not have diligence and content that would justify the unlawfulness of the continued detention and the legitimacy of detention and had the quality of being a repetition of the same matters.It cannot be said that these justifications are relevant and sufficient as regards the continuation of detention in the present case. Given the fact that the applicant was deprived of his liberty based on irrelevant and insufficient justifications, the period of detention in question cannot be evaluated as reasonable.

86. Due to the reasons explained, it must be decided that Article 19 § 7 of the Constitution was violated in terms of the complaint of the applicant *"that the period of detention is not reasonable and that the requests for release were dismissed through stereotype justifications"*.

3. Article 50 of the Code Numbered 6216

87. Article 50 §§ 1 and 2 of the Code No. 6216 is as follows:

> *"(1) At the end of the examination on merits, it shall be decided that the right of the applicant has been violated or has not been violated.*

In the event that a decision of violation is delivered, what needs to be done for the removal of the violation and its consequences shall be adjudged ...

(2) If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed,

In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favour of the applicant or the remedy of filing a case before the general courts may be shown.

The court which is responsible for holding the retrial shall render a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."

88. In the present application, it has been concluded that Article 19 § 7 of the Constitution was violated.

89. One copy of the decision should be sent to the incumbent court and the Court of Cassation.

90. The trial expenses of TRY 1,698.35 in total composed of the fee of TRY 198.35 and the counsel's fee of TRY 1,500.00, which were made by the applicant and determined in accordance with the documents in the file, be paid to the applicant.

V. JUDGMENT

In the light of the reasons explained, it is **UNANIMOUSLY** held on 18/6/2014 that;

A. The applicant's

1. Allegations that *"the decisions delivered as a result of the examinations of detention carried out by the Court of Instance ex officio were not notified to him and that therefore he could not find an opportunity of objecting to these decisions"* be **INADMISSIBLE** due to *"lack of jurisdiction ratione materiae"*,

2. Allegation that *"he was deprived of liberty although there were no strong suspicion of guilt and grounds for detention"* be **INADMISSIBLE** for being *"manifestly ill-founded"*

3. Allegation that *"the period of detention is not reasonable and that the requests for release were dismissed through stereotype justifications"* be **ADMISSIBLE**,

B. Article 19 § 7 of the Constitution was violated in terms of his complaint *"that the period of detention is not reasonable and that the requests for release were dismissed through stereotype justifications"*,

C. The trial expenses of TRY 1,698.35 in total composed of the fee of TRY 198.35 and the counsel's fee of TRY1,500.00, which were made by the applicant and determined in accordance with the documents in the file, be **PAID TO THE APPLICANT**,

D. One copy of the decision be sent to the incumbent court and the Court of Cassation,

E. The payments be made within four months as of the date of application by the applicant to the State Treasury following the notification of the decision; that in case of any delay in payment, the legal interest be charged for the period that elapses from the date, on which this period expires, to the date of payment.

RIGHT TO RESPECT FOR PRIVATE LIFE (ARTICLE 20)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

ERCAN KANAR

(Application no. 2013/533)

SECOND SECTION
JUDGMENT

President	:	Alparslan ALTAN
Justices	:	Osman Alifeyyaz PAKSÜT
		Recep KÖMÜRCÜ
		Engin YILDIRIM
		Celal Mümtaz AKINCI
Rapporteur	:	Muharrem İlhan KOÇ
Applicant	:	Ercan KANAR
Counsel	:	Att. Mustafa RÜZGAR

I. SUBJECT-MATTER OF THE APPLICATON

1. The applicant alleged that the right to a fair trial and the right to respect for private life were violated due to the fact that a report in which information regarding private life was included, which had a character of intelligence and was stated not to be used as evidence was used as evidence in an investigation conducted and a case filed and that a prosecution was not performed about the public officials related to this report.

II. APPLICATION PROCESS

2. The application was directly lodged by the counsel of the applicant on 9/1/2013. As a result of the preliminary examination of the petition and annexes thereof as conducted in terms of administrative aspects, it was found out that there was no deficiency that would prevent referral thereof to the Commission.

3. It was decided by the First Commission of the Second Section on 21/3/2013 that the examination of admissibility be conducted by the Section and the file be sent to the Section.

4. In the session held by the Section on 24/7/2013, it was decided that the examination of admissibility and merits be carried out together.

5. The facts, which are the subject matter of the application, were notified to the Ministry of Justice on 30/7/2013. The Ministry of Justice submitted its opinion to the Constitutional Court on 30/9/2013.

6. The opinion submitted by the Ministry of Justice to the Constitutional Court was notified to the applicant on 21/10/2013.

7. The applicant submitted to the Court his counter-opinions on 5/11/2013.

III. THE FACTS

A. The Circumstances of the Case

8. The relevant facts in the application petition are summarized as follows:

9. The applicant works as a freelance attorney registered at the Istanbul Bar Association.

10. In relation to some persons also including the applicant, the Branch Directorate of Anti-Terrorism of the Istanbul Police Department sent a letter to the file of the Chief Public Prosecutor's Office of Istanbul (File No:Invs.2009/1868 on 22/3/2011).

11. In the annex to this letter, a report with the character of intelligence which was prepared by the National Intelligence Organization (NIO) with the name "*Etüt*" (Research) on an organization named "*Devrimci Karargâh*" (Revolutionary Headquarters) (RH) aimed to realize an armed revolution and contained various determinations and evaluations on the organization was included. Under all pages of the research, the phrases "*Top Secret*" and "*This Information With the Character of Intelligence Cannot be Used as Legal Evidence*" are included.

12. In the chapter titled "*Prison Activities*" on page 31 of the mentioned report, the following expressions were included with regard to the applicant: "*… it is considered that the persons who met the members of the organization such as ... in prison can act as intermediary / messenger between the DK organization and its senior management and the aforementioned ones. In this context, Ercan KANAR ... an attorney of the Istanbul Bar Association who generally pursues the cases of the members of Devrimci Karargah (Revolutionary Headquarters) as well as families and the persons who are in the list of those who can visit are of importance.*"

13. At the end of the investigation conducted by the Chief Public Prosecutor's Office of Istanbul, a criminal case was filed on some persons not including the applicant before the 9thAssize Court of Istanbul with the indictment (File No: 2011/852 on 16/12/2011) drawn up due to the offenses of being a member of an armed terrorist organization, slander, using the identity or identity information which belong to others.

14. In the file (File No:E.2011/243) of the 9thAssize Court of Istanbul in which the applicant participated as a defense counsel, he requested the report prepared by NIO to be removed from the case file, the Court decided on the dismissal of this request at the hearing on 8/5/2012.

15. The file of the 9thAssize Court of Istanbul No:E.2011/243was joined in the file of the same Court No:E.2009/213 .

16. Five attorneys including the applicant whose names are stated in the report and who are registered at the Istanbul Bar Association filed a criminal complaint on the Branch Director of Anti-Terrorism of the Istanbul Police Department and NIO members who drew up the report before the Chief Public Prosecutor's Office of Istanbul on 29/3/2012 with the request that they be punished in accordance with the provisions of the Turkish Criminal Law with regard to the offenses of misuse of duty, insult, slander, the violation of the privacy of private life.

17. As the investigation on NIO members who were made the subject of complaint was subject to permission, the Chief Public Prosecutor's Office of Istanbul filed a request for permission from the Prime Ministry which was the institution authorized to grant permission.

18. In the letter sent by the Undersecretariat of NIO to the Chief Public Prosecutor's Office of Istanbul, it was notified that it was decided "*not to grant permission*" on the concerned persons through the Approval of the Prime Minister (No:1632 of 16/8/2012).

19. The Chief Public Prosecutor's Office of Istanbul requested information from NIO on the determination of whether or not the mentioned decision became final and the sending of the note of finalization, in the response given thereto, it was stated that "*Due to the fact that our Undersecretariat does not fall within the scope of the Law on the Trial of Public Servants and Other Public Officials, as the mentioned decision was not notified to any other person except for your Chief Public Prosecutor's Office, it was not possible to meet the matters in relation to the reference letter*".

20. Thereupon, the Chief Public Prosecutor's Office of Istanbul decided in final fashion on 23/11/2012 that "*there is no ground for investigation*" on the ground that a permission for investigation was not granted by the Prime Ministry.

21. This decision was notified to the applicant on 10/12/2012.

B. Relevant Law

22. Article 4(1)(a) of the Law on State Intelligence Services and the National Intelligence Organization No.2937 of 1/11/1983 with the heading "*The duties of the National Intelligence Organization*" is as follows:

> "*The duties of the National Intelligence Organization are as follows;*
>
> *a) To create national security intelligence of the Republic of Turkey on the current and possible activities which are directed from inside and outside against its country and nation and integrity, existence, independence, security, Constitutional order and all elements which constitute its national power throughout the State and to convey this intelligence to the President, the Prime Minister, the Chief of General Staff, the Secretary General of the National Security Council and the necessary institutions.*"

23. Article 125(1) of the Turkish Criminal Code No.5237 of 26/9/2004 with the heading "*Insult*" is as follows:

" (1) A person who attributes a concrete act or phenomenon, of a character which can hurt his/her honor and reputability, to an individual or who attacks the honor and reputability of an individual by way of cursing shall be penalized with a prison sentence of three months to two years or a judicial fine. In order for the defamation in absentia of the aggrieved to be able to be penalized, the act must be committed in the presence of at least three persons."

24. Articles 134 - 138 of the Turkish Criminal Code No.5237 are as follows:

"Violation of the confidentiality of private life

***Article 134**- (1) A person who violates the privacy of others shall be penalized with a prison sentence of one to three years. In the event that privacy is violated by way of recording images or sounds, the penalty to be imposed shall be increased by one fold.*

A person who unlawfully exposes images or sounds related to an individual's private life shall be penalized with a prison sentence of two to five years. The same penalty shall be decreed also in the event that the said exposed data is published through the press and publications."

"Recording of personal data

***Article 135**- (1) A prison sentence of six months to three years shall be imposed on a person who unlawfully records personal data.*

(2) A person who records the information related to an individual's political, philosophical or religious views, racial origins, and who unlawfully records information related to their moral dispositions, sexual lives, health conditions or connections to trade unions as personal data shall be penalized as per the provisions of the above clause."

"Unlawful delivery or acquisition of data

***Article 136**- (1) A person who unlawfully gives personal data to another, publishes or acquires it shall be penalized with a prison sentence of one to four years."*

"Qualified forms

Article 137*- (1) In the event that the crimes defined above are committed;*

a) By a public official and through the abuse of the authority arising from his/her office,

b) By exploiting the advantage provided by a certain profession or art,

The penalty to be imposed shall be increased by half."

"Not deleting data

Article 138*- (1) When those who are obliged to delete data from the system do not fulfill their duty despite the fact that the period of time set forth by law has expired, a prison sentence of six months to one year shall be imposed.*

25. Article 257(1) of the Turkish Criminal Code No.5237 with the heading "*Misconduct in office*" is as follows:

"A public official who, outside the circumstances otherwise set forth as a crime in the law, causes the grievance of individuals or loss to the public or who derive unjust benefit for persons by acting in contrary to the requirements of his/her duty shall be penalized with a prison sentence of six months to two years."

26. Article 267(1) of the Turkish Criminal Code No.5237 with the heading "*Slander*" is as follows:

"A person who attributes an unlawful act to an individual in order for the initiation of an investigation and prosecution or the imposition of an administrative sanction on him/her despite knowing that s/he has not committed said act by denouncing or filing a complaint with the competent authorities or through the press and publication shall be penalized with a prison sentence of one to four years."

IV. EXAMINATION AND GROUNDS

27. The individual application of the applicant (App No:2013/533 on 9/1/2013) was examined during the session held by the court on 9/1/2014 and the following were ordered and adjudged:

A. The Applicants' Allegations

28. The applicant alleged that Articles 2, 10, 20, 36, 40 and 125 of the Constitution were violated by stating that his personal information was collected by the National Intelligence Organization contrary to law in a report with the character of intelligence, that this report was included in the annex to the indictment prepared at the end of the conducted investigation, that information with regard to his personal, private and professional states was included in the report, that activities in relation to the profession of attorneyship were indicated as crime, that it was decided by the Chief Public Prosecutor's Office of Istanbul that there was no ground for prosecution due to the fact that a permission for investigation was not granted as regards the complaint on those who drew up the report.

B. The Constitutional Court's Assessment

29. In relation to the supply of information with regard to private life for the purpose of intelligence contrary to law and the use of a report containing this information in a process of investigation, the inclusion of this report in the file concerning the criminal case filed, the applicant filed a complaint on the public officials who drew up the report and used it in the investigation.

30. It is understood that, upon this complaint, it was decided by the Chief Public Prosecutor's Office of Istanbul that there was no ground for prosecution (*that there was no ground for conducting an investigation*) as a permission for investigation was not granted on NIO members who were claimed to have prepared the report.

31. Although the applicant asserts that Articles 2, 10, 20, 36, 40 and 125 of the Constitution were violated, it is understood that the violation of the right to respect for private life and the failure to conduct and conclude, in an effective and fair manner, the process of investigation initiated with the request for the punishment of the public officials about whom a complaint was filed due to this violation constituted the essence of his claims. For this reason, it has been concluded that the claims within the scope of the application need to be examined within the scope of Articles 20 and 36 of the Constitution.

1. Admissibility

a. Right to a Fair Trial

32. In its opinion, the Ministry of Justice stated that the applicant claimed that the right to a fair trial which fell within the scope of Article 6 of the European Convention on Human Rights (ECHR) was violated, that when this Article of the Convention was examined in terms of the persons who could be considered as victim, it would be seen that they were persons who were in the position of accused as for criminal proceedings and persons who were the party to a case as for proceedings other than criminal proceedings, that it was stipulated in Article 6 of the Convention which regulated the right to a fair trial that rights and principles in relation to the right to a fair trial were valid during the conclusion of the merits of "*disputes related to civil rights and obligations*" and a "*basis of incrimination*" and that the scope of the right was limited to these issues.

33. Moreover, the Ministry of Justice stated that it was stipulated in Article 6 of the ECHR which regulated the right to a fair trial that rights and principles in relation to a fair trial were valid during the conclusion of the merits of "*disputes related to civil rights and obligations*" and a "*basis of incrimination*" and that the scope of the right was limited to these issues.

34. Against this opinion, the applicant stated that a decision was issued on the public officials who drew up and used a document which was explicitly contrary to law without conducting an effective investigation and without a justification, that the freedom to claim rights was restricted in a way which did not accord with the principle of a fair trial.

35. Article 148(3) of the Constitution is as follows:

> *"Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities. In order to make an application, ordinary legal remedies must be exhausted."*

36. Article 45(1) of the Law on the Establishment and Trial Procedures of the Constitutional Court No.6216 of 30/11/2011 with the side heading *''Individual application right''* is as follows:

> *"Everyone can apply to the Constitutional Court based on the claim that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights and the additional protocols thereto, to which Turkey is a party, which are guaranteed by the Constitution has been violated by public force."*

37. According to the mentioned provision of the Constitution and the Law, in order for the merits of an individual application lodged to the Constitutional Court to be examined, the right, which is claimed to have been intervened in by public power, must fall within the scope of the ECHR and the additional protocols thereof to which Turkey is a party, in addition to it being guaranteed in the Constitution. In other words, it is not possible to decide on the admissibility of an application, which contains a claim of the violation of a right that is outside the common field of protection of the Constitution and the ECHR (App. No: 2012/1049, 26/3/2013, § 18).

38. Article 36(1) of the Constitution with the side heading *"Freedom to claim rights"* is as follows*:*

> *"Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures."*

39. The relevant section of Article 6 of the ECHR with the side heading *''Right to a fair trial''* is as follows:

> *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." ..."*

40. In Article 36(1) of the Constitution, it is stated that everyone has the right to make claims and defend themselves either as plaintiff or defendant and the right to a fair trial before judicial bodies through the

use of legitimate ways and means. As the scope of the right to a fair trial is not regulated in the Constitution, the scope and content of this right should be determined within the framework of Article 6 of the Convention with the side heading "*Right to a fair trial*" (App. No: 2012/13, 2/7/2013, § 38).

41. It is stipulated in Article 6 of the Convention which regulated the right to a fair trial that rights and principles in relation to a fair trial are valid during the conclusion of the merits of "*disputes related to civil rights and obligations*" and a "*basis of incrimination*" and the scope of the right is limited to these issues. From this expression, it is understood that, in order to lodge an individual application on the ground that the freedom to claim rights has been violated, it is necessary that the applicant be the party to a dispute in relation to his/her civil rights and obligations or that a decision has been issued on a basis of incrimination towards the applicant (App. No: 2012/917, 16/4/2013, § 21).

42. According to the case law of the European Court of Human Rights (ECtHR), while Article 6(1) of the Convention can be applied for the complaint of a party that intervenes in a criminal action (see *Perez v. France*, App. No: 47287/99, 12/2/2004, § 70-71), the case of filing a complaint only with the request for the punishment of the accused and with the motive of personal revenge remains outside the field of protection of Article 6 of the Convention (see *Sigalas v. Greece*, App. No: 19754/02, 22/09/2005, § 29). In order for such a right to fall within the field of protection, it is necessary that a system which makes it possible to have a civil claim in a criminal case be embraced or that the decision issued as a result of the criminal case be effective or binding for the criminal case.

43. In terms of our legal system, with the entry into force of the Law of Criminal Procedure No.5271 of 4/12/2004 the opportunity of having a personal claim in criminal procedure was removed and an applicant does not have the opportunity of asserting his/her civil rights in the process of criminal procedure. Moreover, in the present case, it is understood that the request of the applicant was limited to the punishment of the persons and that the effects of the decision issued

on no ground for prosecution were limited to the process of criminal procedure and that, when the claims of the applicant are taken into consideration, it did not have any binding effect in terms of a civil trial.

44. Due to the reasons explained, as it is understood that the subject of the claim of violation based on Article 36 of the Constitution falls outside the scope of the field of protection of fundamental rights and freedoms enshrined in the Constitution and stipulated within the scope of the ECHR, it should be decided that this part of the application is inadmissible due to *"lack of jurisdiction ratione materiae"* without it being examined in terms of the other conditions of admissibility.

b. Right to Respect for Private Life

45. While it is seen that it was not possible to initiate a judicial prosecution as regards the complaint of the applicant, that it was possible to examine the complaint within the scope of the application through a case to be filed before general courts, to determine the violation, if any, and to provide a just compensation, it has been concluded that it would not be fair to expect from the applicant to exhaust all legal remedies which could be effective in relation to his claim of violation.

46. It is understood that the claims of the applicant are not manifestly ill-founded and that there is no other reason for inadmissibility. Therefore, it should be decided that the application is admissible.

2. Merits

47. In its opinion letter, the Ministry of Justice states that the concept of private life does not have a single definition and is a broad concept (*Peck v. the United Kingdom* par. 57, *Pretty v. the United Kingdom*, par. 61). Moreover, the Ministry states that while the ECtHR accepted that intelligence agencies could be present in a democratic society in a legitimate way, it clearly expressed that the authority in terms of the secret surveillance of citizens could be accepted within the scope of the convention only in cases where it was absolutely necessary in order to protect democratic institutions, that democratic societies were threatened by very sophisticated methods of espionage and terrorism, that as a

result of this, it accepted the fact that the state was obliged to perform secret surveillance activities against destructive elements which acted in its own jurisdiction in order to be able to challenge these kinds of threats in an effective manner.

48. By stating matters which were similar to his statements within the scope of the application, the applicant requested that a decision be issued as to the effect that the right to respect for private life was violated.

49. Article 13 of the Constitution is as follows:

> *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevantarticles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of theConstitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality."*

50. Article 20(1) of the Constitution is as follows:

> *"Everyone has the right to demand respect for his/her private and family life. Privacy of private or family life shall not be violated."*

51. The right to respect for private life is enshrined in Article 20 of the Constitution. The state is liable not to intervene in the private and family life of persons in an arbitrary way and to prevent the unfair attacks of third parties.

52. The ECtHR states that the concept of private life is too broad a concept to be defined with all its elements, that it also covers the name and identity, individual development, family life of a person as well as his/her connection with the outer world, his/her relation with others, his/her commercial and professional activities (See *Niemietz v. Germany*, App. No: 13710/88, 16/12/1992, § 29-33).

53. Within the scope of an investigation to be conducted due to a violation as regards the right to respect for private life, it is necessary to examine primarily whether the protected interest is covered by the right, secondly whether there is an intervention in the interest which has been found to be within the scope of the right, in case of an intervention, and

whether this complies with the conditions prescribed in Articles 20 and 13 of the Constitution. Within this framework, it should be examined whether the intervention has a legal basis, it depends on one of the reasons for restriction stipulated in paragraph two of Article 20andthe principles of not infringing upon the essence, conformity with the requirements of the democratic society and proportionality are complied with.

54. It is necessary to accept that assessments which will create positive or negative associations in relation to the profession of attorneyship that the applicant professes and about his relations which have occurred due to his profession are related to private life. For this reason, there is no hesitation over the fact that the interest which is the subject of the application is covered by the right to respect for private life.

55. Nevertheless, given the fact that democratic societies face with complicated criminal methods, it is possible to need the existence of intelligence institutions in order for the democratic state of law and the rights and freedoms of individuals to be guaranteed and secret surveillance activities in order to fight against these kinds of crimes in an effective manner. However, the collection of information concerning the private lives of individuals through intelligence activities can only be considered legitimate to the extent that it is obligatory in order to protect democratic institutions (For the decision of the ECtHR in the same vein, see *Rotaru v. Romania,* App. No: 28341/95, 4/5/2000, § 47).

56. In this context, in Article 4 of the Law No.2937, the National Intelligence Organization has a duty assigned by law in order to create national security intelligence of the Republic of Turkey on the current and possible activities which are directed from inside and outside against its integrity, existence, independence, security, Constitutional order and to convey this intelligence to the necessary institutions. It is necessary to accept that the intelligence in relation to an illegal organization which aims to realize an armed revolution and the conveyance of this intelligence to the relevant institutions were realized within the scope of the mentioned duty.

57. In this context, it is understood that the intelligence report in which information related to the applicant is also included was

prepared based on the aforementioned legal provision, that it was directed towards the purposes of national security, public order and the prevention of the committal of crime.

58. The expressions as regards the applicant in the report which is the subject of the application in which an illegal organization is evaluated with its various aspects (§12) do not contain a judgment and certainty that the applicant has an association with this organization or the activities of the organization which constitute a crime and point to some phenomena towards the aim of monitoring the communication of the organization.

59. Nevertheless, given the fact that hearings are, as a rule, held in public, the consideration that the persons who met the members of the illegal organization in prison could act as intermediary/messenger between the senior management of the organization and those who were in the prison and that the applicant was among the persons who were of importance as an attorney who generally pursued the cases of the members of this organization cannot be accepted only as the determination of a phenomenon and situation. This consideration has the nature of giving rise to the constitution of a conviction in relation to the personality of the applicant. The consideration which could result in the constitution of this conviction became public with the inclusion of the report in the case file.

60. Although this consideration about the applicant which is related to his profession and can be considered as negative does not have legal certainty and does not constitute any basis for attribution about the applicant, it is necessary to accept that a severe intervention occurred as regards the private life of the applicant by making it public through the inclusion thereof in the case file. In a democratic society, the publicization of the information with the character of intelligence whose accuracy cannot be investigated and subjected to inspection in any way through its inclusion in the case file cannot be accepted. As the inclusion of the information related to the applicant on whom no criminal case was filed cannot be accepted as necessary in a democratic society, nor can it be said that it is proportionate.

61. In the face of these determinations, it should be decided that the right to respect for private life was violated due to the practice which bore the consequence of the publicization of the report which contained an assessment which could be considered negative within the framework of the relations of the applicant that occurred as a result of the profession of attorneyship that he professes.

3. Article 50 of the Law No.6216

62. In Article 50(1) of the Law No.6216, it is stated that in the event that a decision of violation is delivered, what needs to be done for the removal of the violation and its consequences shall be adjudged; however, it is provided that legitimacy review cannot be done, decisions having the nature of administrative acts and actions cannot be made.

63. In the application, it has been concluded that Article 20 of the Constitution was violated. The applicant filed a request for non-pecuniary damages of TRY 100.000 and pecuniary damages of TRY 100.000. However, no document was submitted as a basis for pecuniary damages.

64. In relation to the request of the applicant for non-pecuniary damages, it has been considered that the issued decision of violation is sufficient in terms of fair compensation. Neither did the applicant submit any document concerning the financial loss that he asserted to have incurred, nor did he put forth that the loss arose out of the violation in question. For this reason, it should be decided that request for pecuniary damages be dismissed.

65. It has been decided that the trial expenses of TRY 1,698.35 in total composed of the application fee of TRY 198.35 and the counsel's fee of TRY 1,500.00 , which were made by the applicant be paid to the applicant.

V. JUDGMENT

In the light of the reasons explained, it is **UNANIMOUSLY** held on 9/1/2014 that;

E. The applicant's

1. Complaints as to the effect that the right to a fair trial was violated are INADMISSIBLE due to "lack of jurisdiction ratione materiae",

2. Complaints as to the effect that the right to respect for private life was violated are ADMISSIBLE,

F. That Article 20(1) of the Constitution in relation to the right to respect for private life was VIOLATED,

G. That there is NO GROUND for a separate judgment for non-pecuniary damages as the decision of violation provides a fair compensation,

H. That the request for pecuniary damages be DISMISSED,

I. That the trial expenses of TRY 1,698.35 in total composed of the fee of TRY 198.35 and the counsel's fee of TRY 1,500.00 which were made by the applicant be PAID TO THE APPLICANT,

J. That the payment be made within four months as of the date of application by the applicant to the State Treasury following the notification of the decision; that in the event that a delay occurs as regards the payment, the statuory interest be charged for the period that elapses from the date on which this duration ends to the date of payment,

K. That a copy of the decision be sent to the relevant court.

FREEDOM OF RELIGION AND CONSCIENCE (ARTICLE 24)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

TUĞBA ARSLAN

(Application no. 2014/256)

PLENARY
JUDGMENT

President	: Haşim KILIÇ
Vice-President	: Serruh KALELİ
Vice-President	: Alparslan ALTAN
Justices	: Serdar ÖZGÜLDÜR
	Osman Alifeyyaz PAKSÜT
	Zehra Ayla PERKTAŞ
	Recep KÖMÜRCÜ
	Burhan ÜSTÜN
	Engin YILDIRIM
	Nuri NECİPOĞLU
	Hicabi DURSUN
	Celal Mümtaz AKINCI
	Erdal TERCAN
	Muammer TOPAL
	Zühtü ARSLAN
	M. Emin KUZ
	Hasan Tahsin GÖKCAN
Rapporteur	: Yunus HEPER
Applicant	: Tuğba ARSLAN
Counsel	: Att. Ali ÖZKAYA
	Att. Habibe SELİMOĞLU

I. SUBJECT-MATTER OF THE APPLICATON

1. The applicant who works as an attorney registered at the Ankara Bar Association, alleged that the fact that the judge granted a period to her client in order for her to be represented by another attorney and postponed the hearing by stating that the hearing would not be held because the applicant participated at a hearing wearing a headscarf was contrary to the freedom of religion and conscience, the right to defense and the right to access to court, the right to work and the prohibition of discrimination.

II. APPLICATION PROCESS

2. The application was directly lodged by the attorney of the applicant with the Constitutional Court on 8/1/2014. As a result of the preliminary examination of the petition and annexes thereof as conducted in terms of administrative aspects, it was found that there was no deficiency that would prevent referral thereof to the Commission.

3. It was decided by the First Commission of the Second Section on 16/1/2014 that the examination of admissibility be conducted by the Section and the file be sent to the Section.

4. In the session held by the Section on 29/1/2014, it was decided that the examination of admissibility and merits be carried out together.

5. The facts, which are the subject matter of the application, were notified to the Ministry of Justice on 29/1/2014. The Ministry of Justice presented its opinion to the Constitutional Court on 24/2/2014.

6. The opinion presented by the Ministry of Justice to the Constitutional Court was notified to the applicant on 25/2/2014. The applicant submitted her counter-opinions on 6/3/2014 and on 11/3/2014.

III. THE FACTS

A. The Circumstances of the Case

7. As expressed in the application form and the annexes thereof, the facts are summarized as follows:

8. The applicant works as a freelance attorney registered at the Ankara Bar Association.

9. The Council of State, through the decision of its Eighth Chamber (File No: E.2012/5257 of 5/11/2012) , stayed the execution of the phrase "heads uncovered" stipulated in Article 20 of the Code of Conduct, which was ratified in the IV. General Assembly of the Union of Turkish Bar Associations (TBB) on 8-9 January 1971 and entered into force upon its publication in the TBB Bulletin on 26 January 1971.

10. TBB, through its announcement (No: 2013/11 on 25/2/2003), made a call for all the Bar Associations to carry out their actions in line with the Judgment of the Council of State.

11. After the stay of the execution of the aforementioned phrase "heads uncovered", the applicant started participating at the hearings wearing a headscarf.

12. The applicant filed a divorce case before the 11thFamily Court of Ankara on 4/12/2012 on behalf of her client.

13. At the hearing on 11/12/2013 of the divorce case tried in the 11thFamily Court of Ankara (File No: E.2012/1629), the court judge stated that the applicant would not be able to serve at the hearing wearing a headscarf and for this reason, the hearing could not be held and granted a period for the client of the applicant to be represented by a new attorney until the next hearing. Justifications of the decision of the 11thFamily Court of Ankara as regards the subject are as follows:

> *"1- That the hearing be postponed to 06/02/2014, 11:40 as the attorneys cannot serve at the hearing wearing headscarves in accordance with the Bangalore Principles of Judicial Conduct, the Code of Conduct of the Council of Bars and Law Societies of Europe, the decisions of the ECtHR and the Constitutional Court as to the fact that a headscarf is a strong religious symbol and political symbol that is against secularism,*
>
> *2- That the period be granted to the plaintiff in order for her to be represented by another counsel until the next hearing,*
>
> *…"*

B. Relevant Law

14. The related part of Article 9 of the Attorney's Law No. 1136 of 19/3/1969 with the side heading "Attorney license and oath" is as follows:

> *"The licenses and the attorney's identity cards shall be printed and arranged by the Union of Turkish Bar Associations in a standard way. When the decision of the approval is issued by the Board of the Union of Turkish Bar Associations as specified in Article 7(4), the licenses shall be signed by the President of the Union and the President of the related Bar Association. The attorney's identity cards shall be valid as the official identity card to be accepted by all official and private institutions."*

15. Article 49 of the Law No: 1136 with the side heading "Official outfit of the attorneys" is as follows:

> *"The attorneys shall be obliged to appear in the courts with the official outfit that the Union of the Turkish Bar Associations will specify."*

16. Paragraphs one, two, seven and eight of Article 13 of the Regulation of the Attorney's Law of the Union of the Turkish Bar Associations with the side heading "Attorney's License, Oath and Attorney's Identity Card" are as follows:

> *"The attorney's license and the attorney's identity card shall be printed and arranged by the Union of Turkish Bar Associations in a standard way.*
>
> *The Union of Bar Associations of Turkey shall prepare the license of the candidate, who is admitted to the profession, on the basis of the data in his/her file, put an embossed stamp across his/her photograph and record it in the license book. The license, which is signed by the President of the Union of the Turkish Bar Associations, shall be sent to the related bar association for signature by the president of the bar association and given to the candidate after the signature has been completed. The identity card of the candidate, who is admitted to the profession, shall also be prepared with the license by the Union of the Turkish Bar Associations and sent to the related bar association for delivery to the concerned.*

…

Identity cards printed by the Union of the Turkish Bar Associations in a standard format and completed with the information received from the bar associations shall be sent to the related bar association for delivery to the concerned.

The attorney's identity card shall bear the quality of an official document."

17. Article 20 of the Regulation of the Attorney's Law of the Union of the Turkish Bar Associations with the heading "Outfit" is as follows:

"Attorneys shall be obliged to be dressed in the official outfit designated by the Union of the Turkish Bar Associations when they appear in courts, when they are on duty in the disciplinary boards of the Union of Turkish Bar Associations and the bar associations and when they attending the ceremonies for the attorney's oath.

The official outfit designated by the Union of the Turkish Bar Associations may also be worn in the general assemblies of the Union of the Turkish Bar Associations or the bar associations, and the official ceremonies where the members of judicial organizations appear in their official outfit.

Attorneys may not wear official outfit in courts except in lawsuits in which they exclusively serve as attorneys.

Attorneys shall be obliged to act in accordance with Article 20 of the Code of Conduct during their professional and jurisdictional activities."

18. Article 20 of the Regulation of the Attorney's Law of the Union of the Turkish Bar Associations with the heading "Outfit" is as follows:

"Attorneys and attorney interns shall serve in the courts with an attire and outfit worthy of the profession and with their heads uncovered. They shall appear at the hearings wearing the court dress, whose shape is designated by the Union of the Turkish Bar Associations, and a clean dress. Male attorneys shall wear ties to the extent permitted by the climatic and seasonal conditions."

19. The related part of the judgment of the Eighth Chamber of the Council of State (File No: E.2012/5257 of 5/11/2012) is as follows:

"…

When the action, which is the subject matter of the case, the request by the plaintiff for cancellation of this action and the content of the case petition are considered together; it is accepted that the request is related to the phrase "heads uncovered" stipulated in Article 20 of the Code of Conduct of the Union of the Turkish Bar Associations and no examination and evaluation will be made in terms of the other parts of this article.

Form and quality of the identity cards and licenses of the attorneys were designated while including the rules as regards these documents through the regulations made in the Attorney's Law and the Regulation; no designation was made as regards the photos to be used on the aforementioned documents. In these regulations; the official outfit, which needs to be worn by the attorneys in certain places and at certain times, was mentioned and it was understood that this outfit was the court dress designated by the Union of the Turkish Bar Associations and worn by the attorneys in the courts or certain ceremonies. On the other hand, in the Regulation, it was referred to the fact that the attorneys were obliged to act in accordance with Article 20 of the Code of Conduct during their professional and jurisdictional activities.

In the evidence of this reference, it was concluded that the attorney licenses could not be thought independently from the execution of the profession and the aforementioned article would also be valid for the attorney identity cars as it was part of the duty.

For this reason, it is necessary to consider the dispute, which is the subject matter of the case, as regards the phrase "heads uncovered" as stipulated in Article 20 of the Code of Conduct of the Union of the Turkish Bar Associations in the evidence of these explanations.

As only the service, which is performed, is a public service without evaluating the fact that the profession of attorneyship is a freelance profession, through the article, which is the subject matter of the case, a

practice, which had similar qualities with the rules brought about with the provisions of the legislation in force, with which the public officials comply, was implemented and these rules were also applied for the attorneys, who serve in a freelance profession.

As specified in the aforementioned rules, the attorneyship is a public service in terms of the service provided and a freelance profession as a professional activity. In this sense; as the profession has its unique rules, the profession of attorneyship is not considered within the definition of the public officer made in the Constitution. Subjecting them to the rules, to which the public officers are subjected, considering the fact that only the service, which is performed, is a public service through a contrary approach will not match with the quality and requirements of the profession.

The subjects, which are regulated in the superior legal norms to which a regulatory action is hierarchically related, need to contain the general and objective rules in a clear way. In cases where there is no clear regulation in the superior legal norms, it is not legally possible to make another regulation, which results in the prevention or limitation of the exercise of a right.

It is only possible to limit the fundamental rights and freedoms, which are enshrined through the Constitution and the international conventions to which we are party, by law in the event that the reasons stipulated in these articles exist without affecting the essence thereof and based on these reasons. It is also regulated in the Constitution that these limitations cannot be contrary to the essence and spirit of the Constitution, the requirements of the democratic societal order and of the secular republic and the principle of proportionality.

As can be understood from these explanations; a regulation, which goes beyond the purpose of the Law, was made by including this phrase, whose basis is not included in the Law, in the article, which is the subject matter of the case. Therefore, the rule, which is the subject matter of the case, has turned into a quality, whose basis is contrary to the Law.

As a matter of fact, it is also obvious that, although there is no limitation or prevention about this matter in the superior legal norm, which constitutes the basis thereof, the determination stipulated in the aforementioned article will result in the violation of the right and freedom to work, which is enshrined in the Constitution and the international conventions to which we are party, in connection with the freedom of religion and conscience, which is also enshrined with these regulations.

On the other hand; as the photo to be affixed to the identity card needs to have the qualities that will reflect the characteristics of the concerned and be in a way which will ensure that the holder is easily recognized because the identity cards are the official documents, which are used for recognizing persons, it is certain that no other element that will make it difficult to recognize needs to be present.

As a matter of fact, while determining the quality of the photos to be affixed to the identity cards and the international family record booklets in the Regulation on the Implementation of the Law of Census Services, it is pointed out that the women can issue a photo by wearing a headscarf on the condition that their foreheads, chins and faces are uncovered. Thus, the criterion as regards the photo to be issued by wearing a headscarf has been introduced in this way.

In this form; it is concluded that the phrase "heads uncovered" as stipulated in Article 20 of the Code of Conduct of the Union of the Turkish Bar Associations and the action performed based on this do not comply with the law as they are in contrary to the superior legal norms.

On the other hand, in the event that the actions, which are the subject matter of the case, are performed, it is clear that the damages which are difficult or impossible to compensate for will arise.

Due to the reasons explained; on 05.11.2012, it is decided by the majority of votes in terms of the justification that the execution of the action of the Union of the Turkish Bar Associations dated 3.11.2011 with the no. 5620 on the dismissal of the application of the plaintiff for

the renewal of the attorney identity card thereof upon the decision of the defendant administration about the renewal of the attorney identity cards in accordance with Article 20 of the Code of Conduct of the Union of the Turkish Bar Associations be stayed; it is unanimously decided that the execution of the basis of this action, which is the phrase "heads uncovered" as stipulated in Article 20 of the Code of Conduct of the Union of the Turkish Bar Associations, be stayed on the condition that the objection remedy is open before the Plenary Session of the Administrative Law Chamber within 7 (seven) days following the date of the notification of this judgment."

IV. EXAMINATION AND GROUNDS

20. The individual application of the applicant (App. No: 2014/256 on 8/1/2014) was examined during the session held by the court on 15/4/2014 and the following were ordered and adjudged:

A. The Applicant's Allegations

21. The applicant stated that the 8thChamber of the Council of State had decided on the stay of the execution of the phrase "heads uncovered" in the sentence "Attorneys and attorney interns shall serve in the courts with an attire and outfit worthy of the profession and with their heads uncovered" as stipulated in Article 20 of the Code of Conduct of the Union of the Turkish Bar Associations (TBB) through the decision (File No: E.2012/5257 on 5/11/2012), that, following this judgment, the judgment had been sent to all the bar associations for the performance of the action in line with the judgment of the Council of State through the announcement of the presidency of TBB (No: 201/11 of 25/2/2013). The applicant claimed that there was no rule that prevented the entry into the hearings wearing a headscarf after the judgment of the Council of State, therefore the interim decision of the 11th Family Court of Ankara as to the fact that she could not serve at the hearing wearing a headscarf had constituted contrariety with the freedom of religion and conscience stipulated in Article 24 of the Constitution, the right to a fair trial stipulated in Article 36 , the right to work stipulated in Article 49 and the prohibition of discrimination stipulated in Article 10.

B. The Constitutional Court's Assessment

1. Admissibility

a. Right to a Fair Trial

22. The applicant alleged that the right of her client to access to the court had been violated through the interim decision of the 11thFamily Court of Ankara as to the fact that she could not serve at the hearing wearing a headscarf, besides, as the client had been prevented to be represented by a counsel through the decision, which is the subject matter of the case, she had not been able to exercise the right to defend her client as an attorney before the court; for this reason, the right to defense had been limited.

23. In the opinion of the Ministry against the claims of the applicant, it was stated that as there was no crime alleged to the applicant in the fact, which is the subject matter of the application, the applicant was not the defendant or plaintiff of the aforementioned case; for this reason, there was no need to express an opinion about the claims of the applicants as to the fact that her rights to defense and access to the court had been limited.

24. The applicant repeated her statements in the application petition against the opinion of the Ministry on the merits of the application.

25. Article 45(1) of the Law on the Establishment and Trial Procedures of the Constitutional Court No.6216 of 30/3/2011 and with the side heading ''Right of individual application'' is as follows:

"Everyone can apply to the Constitutional Court based on the claim that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights and the additional protocols thereto, to which Turkey is a party, which are guaranteed by the Constitution has been violated by public force."

26. Article 46(1) of the Law No. 6216 with the side heading ''Those who have the right of individual application" is as follows:

"The individual application may only be lodged by those, whose current and personal right is directly affected due to the act, action or negligence that is claimed to result in the violation"

27. In Article 46 of the Law No.6216 with the heading "Those who have the right of individual application", the persons, who can lodge an individual application, are listed and according to paragraph (1) of the aforementioned article; three main prerequisites need to be presented together in order for a person to lodge an individual application before the Constitutional Court. These prerequisites are that "one of the current rights of the applicant is violated" due to the act or action or negligence of the public force that is stipulated in the application and alleged to have resulted in the violation, that the person is "personally" and "directly" affected due to this violation and that the applicant alleges that s/he is "aggrieved" as a result of this (App. No: 2013/1977, 9/1/2014, § 42).

28. In addition to these three main prerequisites, according to Article 45(1) of the Law No.6216 with the heading "Right of individual application", an application may only be lodged before the Constitution Court based on the claim that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights (ECHR) and the additional protocols thereto, to which Turkey is a party, which are guaranteed by the Constitution has been violated. According to the outcome of this, an individual, whose fundamental rights and freedoms enshrined in the Constitution, a right within the scope of the ECHR and, in addition, the protocols, to which Turkey is a party, are not directly affected, cannot acquire the status of "victim" (App. No: 2013/1977, 9/1/2014, § 43).

29. In the incident, which is the subject matter of the application, one of the parties serves as an attorney in a case that is tried in the 11thFamily Court of Ankara. In other words, the applicant is not one of the parties, but the attorney of a party. However, the right to a fair trial stipulated in Article 36 of the Constitution guarantees the rights, which arise out of the procedure, of the parties in the civil justice and of the individuals who are charged with a criminal offense, in the criminal

justice. In the present case, the individual, in whose right to access to the court and the right to defense are intervened with, is not the applicant, whose hearing was postponed and who was told that she would not be admitted to the next hearing because she was wearing a headscarf.

30. A current and personal right of the applicant, whose hearing was postponed and about whom it was decided that she would not be admitted to the next hearing because she was wearing a headscarf, was not directly affected in terms of the right to a fair trial. Being indirectly affected by this action does not grant the status of victim to the applicant in terms of this complaint. In this case, it cannot be stated that the action in question constitutes an intervention in the rights of the applicant. The applicant, who is not the victim of the action, does not have the right to lodge an individual application against this action (for a decision in the same vein see App. No: 2012/615, 21/11/2013, §§ 33-34).

31. Due to the reasons explained, as it is understood that the applicant does not have the title of victim in terms of the right to defense and the right to access to the court, it should be decided that this part of the application is inadmissible due to "lack of jurisdiction ratione personae" without examining the other conditions of admissibility.

b. **Freedom of Religion and Conscience, the Prohibition of Discrimination and the Right to Work**

32. The applicant claimed that although there was no rule that prevented the entry into the hearings wearing a headscarf, the interim decision of the 11th Family Court of Ankara as to the fact that she could not serve at the hearing wearing a headscarf had constituted contrariety with the freedom of religion and conscience stipulated in Article 24 of the Constitution, the right to work stipulated in Article 49 thereof and the prohibition of discrimination stipulated in Article 10 thereof.

33. The European Convention on Human Rights (Convention) and the additional protocols thereto do not guarantee the employment in the public service and the performance of a certain profession for the states that are party to the Convention. However, in the event that the complaints as regards some issues that can be considered within the

scope of the right to work are also related to the other rights protected in the Convention, the European Court of Human Rights (ECtHR) can make an examination by relating them with the related rights (for some decisions about the approach of the ECtHR, see Sidabras and Dziautas v. Lithuania, App. No: 55480/00 and 59330/00, 27/7/2004, §§ 46-67; Dahlab v. Switzerland (dec.), App. No: 42393/98, 15/2/2001).

34. While the freedom of work and contract that the applicant states in her petition and is stipulated in Article 48 of the Constitution is a fundamental right and freedom enshrined in the Constitution, it does not fall within the scope of the ECHR and the additional protocols thereto, to which Turkey is a party. However, the complaint of the applicant about the freedom of work and contract is associated with the freedom of religion and conscience and the prohibition of discrimination, which are present in the common field of protection of the Constitution and the ECHR.

35. Due to the reasons explained, the claims of the applicant as to the fact that Articles 48 and 49 of the Constitution were violated should be evaluated within the framework of the claims as to the fact that Article 24 of the Constitution was violated.

36. At the hearing of the 11th Family Court of Ankara on 11/12/2013, it was decided that the hearing not be held and be postponed because the applicant was wearing a headscarf and that a period be granted to the client of the applicant in order to hire a new attorney. The applicant claimed that there was no legal remedy to be resorted to against these interim decisions of the Court of First Instance. The Ministry of Justice has not presented any opinion about the non-exhaustion of remedies.

37. In Article 148(4) of the Constitution and Article 45(2) of the Law No.6216, it is stated that all administrative and judicial remedies, which are prescribed in the law for the act, action or negligence that forms the basis of the violation claim, needs to be exhausted before lodging an individual application. As required by the secondary quality of the individual application, the obligation to primarily eliminate the violations of the fundamental rights before the courts of instance requires the condition of exhausting the legal remedies (App. No: 2012/1027, 12/2/2013, §§ 19, 20; App. No: 2012/13, 2/7/2013, § 26).

38. In accordance with the principle of exhaustion of the ordinary legal remedies, the applicant needs to primarily convey the complaint, which she files before the Constitutional Court, to the administrative and judicial authorities of venue within due period in accordance with the due procedure, to submit the information and evidence that she has about this subject within due period and to pay required attention to following her case and application in this process. As a rule, admission and examination of an application by the Constitutional Court before the exhaustion of the remedies is not possible.

39. The reason for the existence of the rule of exhaustion of legal remedies is to grant the opportunity of preventing or correcting the alleged violations of the Constitution to the authorities, which perform the acts and actions of the public force, and particularly to the courts. Given the aim of the rule of exhaustion of the legal remedies to protect the human rights, it is necessary to apply it free from the formality and with a certain flexibility. On the other hand, the rule of exhaustion of the domestic remedies is a rule, which is neither certain, nor can be applied automatically; it is essential that the conditions of the present case be taken into account in supervision of the compliance with this rule. In other words, it is necessary to take realistic account not only of the existence of formal remedies in the legal systems but also of the context in which they operate as well as the personal circumstances of the applicant (see Kozacıoğlu v. Turkey [BD], App. No: 2334/03, 19/2/2009, § 40).

40. In the present case, the Court of First Instance delivered two interim decisions. The first of these is that the trial was not conducted and the hearing was postponed because the applicant was wearing a headscarf and the second one is that it granted a period to the client of the applicant in order to hire a new attorney. An applicant, who lodges an application to the Constitutional Court, needs to exhaust the domestic remedies, which are existing both in theory and in practice and which will ensure that the complaint is satisfied in the event that s/he directly applies and which provide a chance of success to a reasonable extent. Even if it is possible to file a complaint to the High Council of Judges and Prosecutors (HCJP) about the Judge of First Instance because of his

failure to apply the judgment of the Eighth Chamber of the Council of State on 5/11/2012, as it is not possible for the HCJP to supervise and lift the interim decision of the court of first instance, this remedy cannot be considered as a remedy that will satisfy the complaint of the applicant.

41. Even if it is possible for the applicant to apply to the same court for the review and lifting of the interim decision delivered by the 11th Family Court, as the Court of First Instance expressed its opinion about this subject previously and as it does not seem possible that it will change this decision, this remedy may not be accepted as an effective legal remedy (for a decision in the same vein see App. No: 2013/7521, 4/12/2013, § 30, 31, 34, 38, 39).

42. Under the current conditions, in our legal system, there is no administrative or judicial remedy that is effective, but sufficiently clear in practical terms at the same time which will review this interim decision of the Court of First Instance and determine the contrariety with the law and, if necessary, lift the interim decision delivered by the Court. For these reasons, the application is not admissible in terms of the exhaustion of the legal remedies.

43. The complaints of the applicant as to the fact that the freedom of religion and conscience and the prohibition of discrimination were violated because she was excluded from the hearing as she was wearing a headscarf are not manifestly ill-founded. Besides, as there is no other reason for inadmissibility, it must be decided that the part of the application as regards these complaints is admissible.

2. Merits

a. Freedom of Religion and Conscience

44. The applicant stated that everyone possessed fundamental rights and freedoms which were personal, inviolable, inalienable and indispensable according to the Constitution and that the fundamental rights and freedoms could only be limited within the framework stipulated in the Constitution. The applicant advocated that she wore a headscarf in line with her religious belief, that she was not admitted

to the hearings because she was wearing a headscarf, that it constituted intervention in the freedom of religion and conscience stipulated in Article 24 of the Constitution. The applicant alleged that the fundamental rights and freedoms stipulated in the Constitution could only be limited by law without interfering with the essence thereof, but that the prevention of her attendance at the hearings although there was no legal provision as regards the fact that she could not attend at the hearings wearing a headscarf constituted the violation of Article 24 of the Constitution.

45. The Ministry of Justice

i. Stated that the complaints of the applicant under this heading should be evaluated under Article 9 of the Convention and Article 24 of the Constitution. In the opinion of the Ministry, the importance of the freedom of religion and conscience for the society was reminded of and it was stated that the wearing of religious clothing, caps, veils or symbols were accepted as religious behaviors of individuals in the ECHR case law, that for this reason wearing of the veil or a religious symbol by individuals on their own volition and with the will of abiding by the religious commandments should be considered within the scope of the freedom of religion and conscience.

ii. Besides, the Ministry, in its opinion, reminded that the ECtHR delivered decisions of violations by stating that the states did not secure the freedom of religion and conscience in a sufficient manner in contrary to the positive liabilities in Article 9 in the interventions made by the states in the right of the individuals in the event that it cannot be proven that the wearing of religious symbols such as a cross, headscarf and veil harms the professional image and interests of others.

iii. The Ministry considered that the states had broad discretionary power over the regulations as regards the freedom of religion and conscience in the established case law of the ECtHR, that the ECtHR made evaluations within the doctrine of discretionary power based on some restrictive regulations and judicial decisions in the domestic law as for the applications previously lodged to the ECtHR on the similar subject, but that in recent years, as a result of the expansion of

the democratization and freedom areas of the governments, limitations as regards the attire and outfit including a headscarf were lifted. In the opinion of the Ministry, it was notified that the phrase "*Dress, trousers, skirt shall be clean, decent, ironed and plain, shoes and/or boots shall be plain and have normal heels, be polished, the head shall always be uncovered, hair shall be combed well or tied up, nails shall be normally clipped*" stipulated in Article 5 of the Regulation on Attire and Outfit of the Personnel Employed in Public Institutions and Organizations was abolished through the resolution of the Council of Ministers (File No:2013/5443 on 4/10/2013) as for the freedom of attire and outfit. Following the aforementioned resolution of the Council of Ministers, it was made possible for the women to work in the public institutions and organizations by covering their heads.

46. The applicant agreed with the opinion of the Ministry and requested that a decision be delivered in order to confirm that her rights stipulated in Article 24 of the Constitution had been violated.

47. Paragraphs one, two, three and five of Article 24 of the Constitution with the heading "Freedom of religion and conscience" are as follows:

> *"Everyone has the freedom of conscience, religious belief and conviction.*
>
> *Acts of worship, religious rites and ceremonies shall be conducted freely, as long as they do not violate the provisions of Article 14.*
>
> *No one shall be compelled to worship, or to participate in religious rites and ceremonies, or to reveal religious beliefs and convictions, or be blamed or accused because of his religious beliefs and convictions*
>
> …
>
> *No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political interest or influence, or for even partially basing the fundamental, social, economic, political, and legal order of the State on religious tenets."*

48. Paragraphs (1), (2) and (3) of Article 18 of the International Covenant on Civil and Political Rights of the United Nations (UN) are as follows:

> *1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
>
> *2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
>
> *3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*

49. Article 9 of the Convention with the heading ''Freedom of thought, conscience and religion'' is as follows:

> *1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
>
> *2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*

50. In Article 24(1) of the Constitution, it is stated that everyone has the freedom of conscience, religious faith and conviction, in paragraph two thereof, it is emphasized, as a natural consequence of this freedom, that prayers, religious rituals and ceremonies are freely performed on the condition that they are not in violation of the provisions of Article 14 that bans the misuse of the freedoms. In paragraph three, the principle

as to the fact that no one can be forced to attend prayers, religious rituals and ceremonies and to reveal their religious faith and convictions; that no one can be condemned and blamed for their religious faith and convictions is included.

51. The freedom of religion and conscience is one of the indispensable elements of the democratic state that is stipulated in Article 2 of the Constitution. Similarly, the ECtHR also accepts the freedom of religion and conscience as one of the most important principles of the democracy, which is the basic element of the European public order. In its judgment of Kokkinakis v. Greece, the ECHR put forth the importance of the freedom in Article 9 of the Convention for the pluralistic democratic society in this way:

> *"As enshrined in Article 9 (art. 9), freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it." (Kokkinakis v. Greece, App. No. 14307/88, 25/5/1993, § 31)*

52. That both the religion is one of the main sources that the individuals, who are devoted to a religion, refer to so as to understand and give meaning to the life and it has an important function for the shaping of the social life is present in the origin of the fact that the freedom of religion and conscience is one of the foundations of the democratic society. Because of this function, it has been accepted at international level that the individuals have freedoms of religions and faith within certain measures independently from the positions of the religions against the freedoms. Just as other freedoms, the freedom of religion was also enshrined with certain legal and constitutional guarantees as a result of a long and difficult process. As a matter of fact, the freedom of religion is a right that is protected in most of the international declarations and conventions as regards the human rights at universal and regional level.

53. The fact that the right protected by Article 24 of the Constitution is indispensable is because the freedom of religion and conscience is of vital importance for establishment and sustainment of the foundation of an effective and meaningful democracy based on the rule of law. On the other hand, the freedom of religion and conscience can only be protected in a democracy based on the understanding of recognition, pluralism and impartiality.

54. In the context of the freedom of religion, "recognition" requires that the state accepts the existence of all religious and faith groups as regards the state-individual relations. The policy of the state for the pluralistic recognition on one hand forces the state to treat everyone equally in the society and on the other hand, does not allow the state to embrace any religion or ideology in an official way. The pluralism is only possible when everyone takes part in the social and political life through his/her own identity and as himself/herself. The pluralism cannot be mentioned in a place where the differences and those, who are different, are not recognized and protected against the threats. In the pluralistic society, the state shall be obliged to ensure that the individuals live as required by their own world views and faiths. The state does not have the authority to accept one of the views or life styles present in the society as "wrong". In this context, unless the reasons for limitation stipulated in the Constitution are present, making the differences exist together is a requirement of the pluralism although the majority or the minority does not like it. The third understanding that protects the freedom of religion and conscience is the impartiality arising out of the secularism which is the guarantee of the protection of the freedom of religion and conscience of the individuals in an equal way.

55. The freedom of religion and conscience, whose meaning and scope are defined with Article 24 of the Constitution and Article 9 of the Convention, guarantee that everyone "has the freedom of manifesting his/her religion or belief", "has the freedom of changing his/her religion and belief", that individuals have the belief and conviction that they desire and that they do not have any belief and conviction (See AYM, E.1997/62, K.1998/52, K.T.16/9/1998). In other words, as the individuals cannot be forced to manifest their religious or conscientious convictions

and pray in any fashion, to practice religion and to participate in rituals, they cannot be condemned and blamed due to their prayers and religious practices and the religious faiths and convictions that they have manifested either.

56. As a matter of fact, the ECtHR, by stating "While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to manifest one's religion. Bearing witness in words and deeds is bound up with the existence of religious convictions." (Kokkinakis v. Greece, App. No: 14307/88, 25/5/1993, § 31), declared that Article 9 of the Convention protected two areas as regards the freedom of religion and conscience. The first of these is the internal area where everyone has the absolute freedom of thought, religion and conscience, the second one is the external area, which occurs as a result of manifestation of this right and is limited.

57. In parallel with Article 9 of the Convention, Article 24 of the Constitution recognizes and protects the internal area of the freedom of religion and conscience by guaranteeing that the individual has or does not have any belief, that s/he can freely change his/her belief, that s/he cannot be forced to manifest his/her belief, that s/he cannot be condemned and put under pressured due to these and similarly recognizes and protects the external area of the freedom of religion and conscience through the right of manifesting one's religion or belief by teaching, practice and by praying and performing a ritual either alone or in community with others.

58. The internal area of the freedom of religion and conscience that defines the right of an individual to choose his/her religion and the fact that s/he cannot be forced to manifest or change his/her religion, that s/he cannot be condemned, be pressured due to these and that the state cannot impose a certain religion or belief on the individuals is outside all types of influence of the lawmaker in a democratic, secular state of law. This matter has been explained in the justification of Article 24 through the phrase ".. the freedom of religious faith and conviction shall not be subjected to any limitation due to its quality. This matter has been clearly stipulated in Article 15". In fact, in Article 15 of the Constitution,

it is clearly stated that no one can be forced to manifest his/her religion, conscience, thoughts and convictions and blamed due to these even in times of war, mobilization, martial law or states of emergency.

59. Article 24 of the Constitution does not protect any behavior arising out of- or inspired by a religion or belief and does not guarantee the right to behave in a way required by a belief in the public space in any case. The freedom of manifesting one's religion and belief may only be limited due to the reasons specified in paragraph five of Article 24 of the Constitution and under the conditions in Article 13 of the Constitution.

60. The ECtHR explained that the only reason for placing limitations on the freedom of manifesting one's religion and belief in accordance with Article 9 of the Convention was to reconcile the interests of the various groups and ensure that everyone's beliefs are respected in democratic societies, in which several religions coexist within one and the same population (Kokkinakis v. Greece, App. No. 14307/88, 25/5/1993, § 33).

61. Following these general explanations, first of all, it should be determined whether the applicant has a right protected by Article 24 of the Constitution or not and, if yes, whether there is an intervention in this right of hers or not. In the event that the existence of an intervention in a right of the applicant protected by Article 24 of the Constitution is determined, it should be evaluated whether this invention meets the conditions of being prescribed by law within Article 13 of the Constitution, being directed towards a legitimate aim and being necessary in a democratic society or not.

A. Concerning the Existence of the Intervention

62. It is clear that it is difficult to define the concepts of "conscience", "religious faith"" and "conviction" stipulated under of Article 24(1) of the Constitution. Due to this difficulty, rather than making an extensive definition, it should be evaluated whether a behavior is within the field of protection of Article 24 of the Constitution or not depending on the conditions of the present case.

63. While evaluating the scope of the right to manifest religion or faith, the references made to the states of manifestation in Article 24 of the Constitution and the international conventions should also be taken into account. As a matter of fact, in accordance with Article 24 of the Constitution and Article 18 of the International Covenant on Civil and Political Rights (ICCPR) and Article 9 of the Convention, the manifestation was generally accepted as "practices, prayers, teaching and rituals" of "a religion or faith". As can be understood from these terms, the texts of the Convention that define the manifestation mostly focus on the religious manifestations such as "prayer" and "ritual". However, as the term of "exercise of the faith" is much more inclusive than other types of manifestation, it requires handling thereof in a more detailed way. For example, as a result of this requirement, the Human Rights Committee of the United Nations, in the General Comment No. 22 of on Article 18 of the ICCPR, gave a list of various types of behaviors that evaluated the content of the terms "teaching, practice, prayer and ritual" in a broader manner. According to the Committee:

> *"The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, the participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications."*

64. However, it cannot be said that the international conventions put forth which types of faith may be manifested in a complete manner. The first difficulty that occurs in determination of the scope of the manifestation of a "faith" occurs in determination of whether the said "faith" is really existing or not and of what its status is. The second

difficulty is the problem of proving that the manifestation occurs in accordance with the principles of the said religion or faith.

65. The bodies of the Convention abstained from evaluating the extrovert behaviors within Article 9 of the Convention in the applications, in which a faith does not come into prominence, but which mostly contains the expression of personal desires or thoughts. Tendency of the court and the Commission was to assume that the behavior was the expression of an opinion rather than a faith in cases where a certain behavior required by a religion or faith did not exist (inter alia to other decisions see Pretty v. United Kingdom, App. No. 2346/02, 29/4/2002, § 82).

66. As preventing an individual from acting in accordance with his/her religion or faith will result in weakening of the faith itself and the violation of the freedom of religion and faith of the individual, while evaluating the manifestation of the faith of the individual, it becomes important to determine whether the manifested behaviors are the "practice" of the faith or not. Should the "practice" be perceived only as the behaviors that are similar to the prayer or should all the behaviors, orders and teachings that are important for the religion or faith be evaluated within this concept? For the solution of this problem, the ECtHR, in some of its decisions, embraced an approach as to the fact that there needs to be a relation between the behavior that defines the manifestation and the religion or the faith (Arrowsmith v. United Kingdom), App. No. 7050/75, 12/10/1978, §§ 43-44; X v. Austria, App. No. 8652/79, 15/10/1981). The ECtHR has mostly used this "criterion of requirement" for determining whether the behaviors, which are encouraged or allowed by a religion or faith, but which are not compulsory for the manifestation of the said religion or faith are covered by Article 9 (for a similar decision, see Khan v. United Kingdom, App. No. 11579/85, 7/7/1986). As a rule, in this test of requirement, the applicant needs to demonstrate that a behavior or activity of his/hers limited by the public force is a practice arising out of his/her faith. Therefore, the matter to be questioned is the relevance of the limitation against the applicant with his/her religious faith; that is, in other words, the relation of the behavior that the applicant is forced to- or abstains from engaging in with his/her faith.

67. In order to overcome the difficulties encountered in completely revealing whether a behavior constitutes an aspect of any religion or faith that may be manifested, whether there is a structural or theoretical connection between the religion and faith and the revealed behavior, the time and place of occurrence of the behavior and whether the individual puts forth the faith as the reason for his/her behavior are the important points to be taken into account while making this determination.

68. Nevertheless, except for the state of meeting an urgent social need, it may be decided by the members of the said religion or faith how a religion or faith may be manifested in the best way or whether a behavior is a requirement of a religion or faith that the applicant has put forth. In other words, the understanding of the applicant as regards the exercise of his/her religion or faith and his/her explanations arising out of this understanding need to be taken into account as long as they are not clearly baseless or illogical.

69. However, in order to be sure about the reality of the statements of the applicant, it may be necessary to confirm the explanations that s/he has made about his/her religion or faith. In this context, in addition to the statement of the applicant in relation to his/her religion and faith, the opinions of the authorities as regards the religion or faith which is the subject matter of the application can also be taken into account.

70. Nonetheless, as may some religions and faiths not envisage any hierarchical structure, it needs to be kept in mind that the teachings of most of the religions or faiths which have a certain hierarchical structure may be interpreted in various forms in most of these religions or faiths. The differences in the same faith are frequently observed among the members of a certain faith and furthermore, the judicial bodies are not sufficiently equipped to resolve this type of differences in terms of the provisions of the freedom of religion and conscience by themselves. Besides, the guarantee as regards the manifestation may not be accepted to be limited to the faiths shared by all the members of a religious faith. Especially in this sensitive area, investigating which members of a certain religion or faith understand the orders of their common faith more correctly cannot be considered within the judicial activity and the trial authority.

71. While evaluating whether a behavior is a requirement of a religion or faith that the applicant has put forth or not, it is necessary to avoid acting in a way such as making a decision on what a member of a religion or faith can do without his/her faith being violated; in other words, on what an individual needs to believe in and how s/he needs to behave.

72. Similarly, questioning the comments of the applicants as regards their own religions and what "the common religious practices" are, is outside the relevance of the judicial bodies. A contrary approach will mean that the courts or the bodies which exercise the public force will determine what the applicants believe in about the practices of the religion or faith is "legitimate" by replacing the conscientious evaluation thereof with their own value judgments. As specified in one decision of the American Supreme Court, the courts or the bodies which exercise the public force must not presume to decide on the plausibility of a religious claim (see American Supreme Court, Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 6/11/1989). However, if necessary to repeat, such an approach will not mean that Article 24 of the Constitution will protect every behavior arising out of- or inspired by a religion or belief and guarantee the right to behave in a way required by a belief in the public space in every case (see § 50).

73. The applicant advocated that her dressing style was one of the rules of the Islam religion, of which she was a member, to be certainly fulfilled, that for this reason her removal from the court by the judge while she was present at the hearing as the attorney was a clear intervention in her right to freely manifest her religion. Moreover, the applicant based her explanations as to the fact that wearing a headscarf or her behavior of rejecting the taking off thereof at the hearing was a practice to be fulfilled in terms of the Islam religion on the related Verses included in the Holy Quran, Hadiths and the opinions of the Presidency of Religious Affairs on this matter, put forth that wearing a headscarf and her rejection of taking it off during the hearing of a court was necessary in terms of the Islam Religion.

74. In terms of these aspects, it is necessary to accept that wearing of a headscarf by women with the belief that it is an order of the Islam religion is a subject that may be considered within the ordinary meaning of Article 24 of the Constitution.

75. As it was accepted by the ECtHR that wearing a headscarf must be considered within the freedom of religion (see Leyla Şahin v. Turkey, App. No. 44774/98, 29/6/2004, § 71), it was also accepted by the Human Rights Committee established in order to observe the implementation of the International Covenant on Civil and Political Rights of UN in the countries, which are party thereto. In the decision that the Human Rights Committee delivered about Uzbekistan, it was stated that the use of the unique religious headscarves constituted an aspect of the religious life to be protected:

> *"The applicant victim claims that her rights of freedom of thought, conscience and religion were violated and she was excluded from University because she wore a headscarf for religious reasons and refused to remove it. The Committee considers that the freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion. Furthermore, the Committee considers that to prevent a person from wearing religious clothing in public or private may constitute a violation of article 18, paragraph 2, which prohibits any coercion that would impair the individual's freedom to have or adopt a religion." (see Raihon Hudeyberganova v. Uzbekistan, App. No. 931/00, 5/11/2004, § 6.2).*

76. In this respect, it must be accepted that the public force acts and actions that place limitations on the place and style of wearing a headscarf as required by the religious faith constitutes an intervention in one's right to freely manifest his/her religion.

77. These interventions will constitute a violation of Articles 13 and 24 of the Constitution unless they are the constitutional prohibitions stipulated in paragraphs two and four of Article 24 of the Constitution and they fulfill the condition of being prescribed by laws and they fulfill other conditions stipulated under Article 13 of the Constitution.

78. Article 13 of the Constitution states "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 society and the secular republic and the principle of proportionality." This article of the Constitution puts forth what criteria may be used by the lawmaker to limit all the rights and freedoms. In other words, the criteria of guarantee stipulated in Article 13 of the Constitution are valid for all the limitations placed by law on the rights and freedoms and form the limit of limitation.

79. For this reason, it is necessary to determine whether the intervention in a fundamental right and freedom is in line with the conditions of bearing no prejudice to the essence prescribed under Article 13 of the Constitution, of being indicated in the relevant article of the Constitution, of being prescribed by laws, of not being contrary to the letter and spirit of the Constitution, the requirements of the democratic societal order and of the secular Republic and to the principle of proportionality or not. During this review, the Constitutional Court will primarily examine whether the intervention fulfills the condition of lawfulness or not. Because it will be concluded that an intervention, which is not based on the law, violates a Constitutional right or freedom without examining whether it is in line with the other guarantees such as bearing no prejudice to the essence, being one of the requirements of the democratic societal order and the proportionality or not. For this reason, it is initially necessary to evaluate the lawfulness. In the event that the condition of lawfulness is fulfilled, it should be reviewed whether the intervention is made towards the aim envisaged in the Constitution and then, whether it is in line with the other conditions or not.

B. Being Prescribed by the Laws

80. The applicant alleged that there was no legal basis as to the fact that there was a ban on the wearing of a headscarf by the attorneys at the hearings, that previously there was a rule in the Professional Principles of the Union of the Bar Associations as regards the fact that the attorneys must take part at the hearings with their heads uncovered, that the execution of this rule was stayed through the judgment of the 8th Chamber of the Council of State on 5/11/2012, that the judgment of the Council of State was announced to all the bar associations through the decision of the Presidency of the Union of the Bar Associations on

25/2/2013 and that it was requested to take action in line with this decision, that therefore; there was no provision of any law or legislation as to the fact that she could not participate at the hearings by wearing headscarf on the date of the incident.

81. Democracies are regimes in which the fundamental rights and freedoms are ensured and guaranteed in the broadest manner. The limitations which bear prejudice against the essence of the fundamental rights and freedoms and render them completely non-exercisable cannot be considered to be in harmony with the requirements of a democratic societal order. As a result, the fundamental rights and freedoms may be limited exceptionally and only without prejudice to their essence to the extent that it is compulsory for the continuation of the democratic societal order and only with law. Similarly, due to this reason, the criterion for limiting the rights and freedoms by law has an important place in the constitutional law (see AYM, E.2006/142, K.2008/148, K.T. 24/9/2008).

82. When there is an intervention in a right or freedom, the matter to be primarily determined is whether there is a legal basis of the intervention or, in other words, whether there is a provision of the law that grants authorization for the intervention or not. In order to accept that an intervention made within Article 24 of the Constitution meets the condition of lawfulness, it is compulsory that the intervention has a "legal" basis (for a decision that attracts attention to the condition of lawfulness in another context, see App. No: 2013/2178, 19/12/2013, § 36).

83. In accordance with the wording of the Convention and the case law of the ECtHR, the legitimacy of an intervention to be made within Article 9 of the Convention is made conditional on the fact that the said intervention be made in accordance with the "law" (prescribed by law) and when it is determined that the intervention does not have the element of lawfulness, it is concluded that the intervention is in contrary to the relevant article without examining the other guarantee criteria stipulated in paragraph (2) of Article 9 of the Convention (For judgment of the ECtHR in the same vein, see Hasan and Chaush v. Bulgaria [BD], App. No: 30985/96, 26/10/2000, §§ 84-86).

84. The criterion of "limiting by law" or "the principle of lawfulness" are included in Article 9 of the Convention that regulates the freedom of religion and faith as a criterion of limitation and guarantee. However, the concept of "prescribed by law" stipulated in the Convention is not the exactly same with "the principle of lawfulness" stipulated in the Constitution (see §§ 94-95). The ECtHR gives a broader meaning to the concept of "being prescribed by law" than the meaning given to the principle of lawfulness in Turkish law.

85. According to Article 87 of the Constitution, "enacting, amending and abolishing laws" is the duty and authority of the Grand National Assembly of Turkey. The law, as a legislative act, is the product of the will of the Grand National Assembly of Turkey, The law is the acts, which are excluded from the decision of the parliament and performed by the Grand National Assembly of Turkey, whose authority is granted by the Constitution, by complying with the procedures of lawmaking prescribed in the Constitution. The rule stipulated in Article 7 of the Constitution "The legislative power belongs to the Grand National Assembly of Turkey on behalf of the Turkish Nation. This power cannot be delegated" covers the meanings of the law in material and form without making any differentiation. The meaning of Article 7 of the Constitution is that the power of lawmaking cannot be delegated to another authority and that, as a natural consequence thereof, a regulation which is to be made with a law according to the Constitution cannot be made by another authority.

86. However, in accordance with Article 8 of the Constitution "The executive power and duty are exercised and performed by the President and the Council of Ministers in accordance with the Constitution and laws". In this respect, as the legislative power and duty is to be exercised "in accordance with the laws", it is possible for the legislative body to be contented with establishing the main rules as regards the subjects that may be regulated with the law and to leave the secondary and the implementation rules to the administrative regulatory actions in addition to these.

87. In other words, a subject, which does not have to be certainly regulated by the law according to the Constitution, may be left to the

regulatory actions of the administration on the condition that it has a legal basis. However, Article 13 of the Constitution as to the fact that the fundamental rights and freedoms may only be limited by the law does not allow the executive body and the administration to limit a right and freedom through a first-hand regulatory action in the absence of a provision of the law.

88. Moreover, except for the social and economic rights in accordance with Article 91(1) of the Constitution, no regulation may be made as regards the fundamental rights and freedoms through the decree in the force of law. Therefore, it is not possible to make a regulation as regards the limitation of the fundamental rights and freedoms, which cannot even be regulated through a decree in the force of law, through the first-hand administrative regulatory actions according to the Constitution.

89. In the field of the fundamental rights and freedoms, the legislative body is obliged to make foreseeable regulations that do not allow for the arbitrariness. Granting a very broad discretionary power that may pave the way for the arbitrary practices to the administration may be in contrary to the Constitution. The formal existence of the laws as regards the limitation of the fundamental rights and freedoms may not be considered to be sufficient; at the same time, the quality of the laws should also be examined. The measures to be taken by the executive body based on the order of the law in a field as regards the fundamental rights and freedoms must have an objective quality and must not grant a broad discretionary power that will pave the way for the arbitrary practices to the administration (see CC, AYM, E.1984/14, K.1985/7, K.T. 13/6/1985). In the contrary case, a contrariety will also occur with Article 13 of the Constitution as to the fact that the fundamental rights and freedoms may only be limited by law.

90. The present case must be evaluated in line with the aforementioned principles. It was concluded through the judgment of the Eighth Chamber of the Council of State on 5/11/2012 that the phrase "heads uncovered" stipulated in Article 20 of the Professional Rules of the Union of the Bar Associations was a regulation that did not have any basis in the law and exceeded the aim of the law;

that the Professional Rule did not comply with the law due to the aforementioned phrase stipulated in the rule, which is the subject matter of the case, although there was no limitation in the superior legal norm and it was decided that the execution of the said rule be stayed. On the other hand, according to the judgment of the Council of State, the provision stipulated in Article 49 of the Law no. 1136 "The attorneys shall be obliged to appear in the courts with the official outfit that the Union of the Turkish Bar Associations will specify" does grant the Union of the Bar Association with the authority of making a limitation about headscarves.

91. Therefore, in the current situation, it is understood that there is no accessible, foreseeable and final provision of the law which prevents the arbitrary behaviors of the bodies that limit the freedom of religion and faith of the applicant and exercise the public force as sought by Article 13 of the Constitution and which helps the individuals be informed about the law.

92. In the incident, which is the subject matter of the application, the request of the applicant to take part at the hearing by wearing a headscarf was dismissed with the justification that "the attorneys cannot serve at the hearing wearing headscarves in accordance with the decisions of the ECtHR and the Constitutional Court as to the fact that a headscarf is a strong religious symbol and political symbol that is against the secularism".

93. The meaning that the ECtHR gives to the regulation of "being prescribed by law" which is the equivalent of "prescribed by law" in the original texts of the Convention has a meaning that exceeds the concept of "code" in Turkish law and can only be defined with the term "law". When there is an intervention in a right or freedom, the ECtHR primarily reviews whether the intervention has a "legal basis" or not. In other words, the ECtHR does not apprehend the code from the term "law" in terms of the form, examines the quality of the regulation to be accessible, foreseeable and final rather than the source of the legal regulation that places the limitation (See Hasan and Chaush v. Bulgaria [BD], App. No: 30985/96, 26/8/2000, § 85). Due to this approach, the word "code" or

"law" in the phrase of being prescribed by law according to the ECtHR covers not only the written law, but also the precedent law.

94. As a matter of fact, the ECtHR examined the condition of being prescribed by law in the evidence of its own autonomous principles of interpretation and decided that the rights may be limited in the absence of the formal provisions of the law in its judgment Leyla Şahin v. Turkey, which is the most important decision that it has delivered as regarding headscarves and on which the 11thFamily Court of Ankara based for its interim decision (see Leyla Şahin v. Turkey, App. No. 44774/98, 29/6/2004, § 51).

95. The judgments of the Constitutional Court, which the ECtHR used as a basis for its decision Leyla Şahin v. Turkey and on which the 11th Family Court of Ankara based as regards the present case, which is the subject matter of the application, were delivered in 1989 and 1991. In 1988, an article was added into the Law no. 2547 and the provision was added: "It is obligatory to wear a modern outfit and to have a modern appearance in the higher education institutions, classrooms, laboratories, clinics, polyclinics and corridors thereof. It is free to cover the neck and the hair with a covering or veil due to the religious faith". This provision was annulled by the Constitutional Court with the justification that "in a secular state, the legal regulations cannot be made according to the religious rules" (see AYM, E.1989/1, K.1989/2, K.T. 7/3/1989). After the annulment judgment, in 1990, the provision was added into the Law no. 2574: "it is free to wear any attire and outfit in the higher education institutions on the condition that they are not in contrary to the laws in force". The request for the annulment of the regulation was dismissed, but in the justification of the judgment of the Constitutional Court, it was determined that the "freedom" "does not cover the covering of the neck and hair with the veil due to the religious faith and the religious clothes" (See CC, E.1990/36, K.1991/8, K.T. 9/4/1991).

96. Although, the law created by the judge is accepted as a source of the law in some fields of Turkish law, it can never acquire a status of rule with the quality of "law" in a field that is organized based on a completely formal principle of lawfulness such as limitation

of the human rights and freedoms. On the other hand, the fact that the intervention made in a fundamental right and freedom acquires continuity and becomes accessible and foreseeable does not transform the action of the public force, which is the basis of the intervention, into a "law". The acceptance of a contrary thought will mean the acceptance of the fact that the violations of right arising out of an act or action of the public force that is accessible and foreseeable have the "legal" bases.

97. Finally, in the ECtHR judgment Leyla Şahin v. Turkey there is not a decision of violation, but a decision of compliance with the Convention. As a rule, the fact that the ECtHR did not decide on the violation means that the contracting state will not result in the violation in the event that it fails to make any attempt. Nevertheless, making regulations that will strengthen the fundamental rights and freedoms even more in the same subject or abolition of the existing limitations does not mean that it will certainly constitute a contrariety with the Convention except for the case where it prejudices the rights of the other people living under the sovereignty of the state.

98. According to Article 13 of the Constitution, a law is certainly needed for the limitation of the fundamental rights. There is no legal limitation as to the fact that the attorneys will take part at the hearings "their heads uncovered". Neither the ECtHR's judgment Leyla Şahin nor the judgments of the Constitutional Court dated 1989 and 1991, on which the ECtHR based and which became the basis of the practice as regards the attire and outfit of the students in Turkey, may not be accepted as the rules that meet the "condition of lawfulness" stipulated in the relevant provision of Article 13 of the Constitution as to the fact that the fundamental rights and freedoms may only be limited by law.

99. In the present case, at the hearing that the applicant took part in the capacity of the attorney, it is understood that the intervention in the freedom of religion and conscience, which was made through the fact that the Court of First Instance did not hold and postponed the hearing because she wore a headscarf and that it granted a period to the client of the applicant in order to hire a new attorney, does not meet the condition of lawfulness.

100. As it was determined that the intervention did not meet the condition of lawfulness, it was not considered necessary to separately evaluate whether the criteria such as being covered by one of the legitimate aims, which are to be existing in the presence of an intervention in the freedom of religion and conscience and which is prescribed in Article 13 of the Constitution (see §§ 78-80) and stipulated in the relevant article of the Constitution, and not being in contrary to the requirements of the democratic societal order were complied with.

101. For the aforementioned reasons, it should be decided that the applicant's freedom of religion and conscience guaranteed by Article 24 of the Constitution was violated.

b. Prohibition of Discrimination

102. The applicant reminded that everyone is equal before law without being subject to any discrimination based on language, race, color, gender, political opinion, philosophical belief, religion, sect or similar grounds; that it was regulated that the State bodies and the administrative authorities were obliged to act in accordance with the principle of equality before law as regards all their actions. The applicant asserted that she was prevented from exercising the rights granted to the other attorneys as she could not take part at the hearing wearing a headscarf and that her failure to participate at the hearing wearing a headscarf although the attorneys who do not wear a headscarf could participate had the quality of discrimination.

103. The Ministry of Justice stated that the complaints of the applicant under this heading should be evaluated under Article 14 of the Convention and Article 10 of the Constitution. In the opinion of the Ministry, it was stated that treating the individuals in the same situation differently without any objective and reasonable ground would create the discrimination and the judgments of the ECtHR on the discrimination were pointed out. Moreover, in the opinion of the Ministry, it was stated that a general measure or policy, which had deleterious effects on a group of people although it did not target a certain group, may be accepted as the discrimination and it was stated that the discrimination may also arise from not only a legal measure,

but also an actual situation. In the opinion of the Ministry, it was stated that the current practice in Turkey was the participation of the female attorneys at the hearings irrespective of them wearing a headscarf or not, that the ECtHR emphasized that the case of the discrimination which arose as the applicant experiences a different treatment than the individuals in the same situation with the applicant when these individuals experience a positive treatment was the main characteristic of the ordinary discrimination (Eweida and Others v. United Kingdom, App. No: 48420/10, 36515/10 and 59842/10, 15/1/2013).

104. It was concluded that the applicant's freedom of religion and conscience guaranteed by Article 24 of the Constitution was violated. On the other hand, the claim of the applicant as regards the violation of the prohibition of discrimination forms an important aspect of the present application. For this reason, it is also necessary to examine the case in terms of the principle of equality and the prohibition of discrimination.

105. Paragraphs one, two, four and five of Article 10 of the Constitution with the heading "Equality before law" are as follows:

> *"Everyone is equal before the law without distinction as to language, race, color, sex, political opinion, philosophical belief, religion and sect, or any such grounds.*
>
> *Men and women have equal rights. The State has the obligation to ensure that this equality exists in practice Measures taken for this purpose shall not be interpreted as contrary to the principle of equality.*
>
> *…*
>
> *No privilege shall be granted to any individual, family, group or class.*
>
> *State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings"*

106. Article 14 of the Convention with the heading ''Prohibition of discrimination'' is as follows:

> *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

107. The principle of equality and the prohibition of discrimination are the concepts which can sometimes be used together and can sometimes be used in order to express the same thing. Today, the principle of equality is an inseparable part of the international conventions on the human rights. In other words, the principle of equality and the prohibition of discrimination are accepted as the basic legal norm that is at the top of the international law. In this respect, the principle of equality should be accepted as both a right in itself and a basic principle that is prevalent for the exercise of the other human rights and freedoms.

108. Even if Article 10 of the Constitution is regulated in the form of the "prohibition of discrimination", it is necessary to put the prohibition of discrimination in an effective way as the principle of equality has a normative value to base on in every case in the constitutional context (See AYM, E.1996/15, K.1996/34, K.T. 23/9/1996). In other words, the principle of equality also contains the prohibition of discrimination as a substantial standard norm.

109. The potential scope of the principle of equality and the prohibition of discrimination was not limited through the phrase "everyone" stipulated in paragraph one of Article 10 of the Constitution which reads "Everyone is equal before the law without distinction as to language, race, color, sex, political opinion, philosophical belief, religion and sect, or any such grounds.". Besides, in the same paragraph, by adding the principle that no discrimination may be made based on the "similar grounds", it was stated that the bases of the discrimination were not only limited to those listed in the article and the subjects, over which no discrimination may be made, were extended (See AYM, E.1986/11, K.1986/26, K.T.4/11/1986).

110. Article 10 of the Constitution has not placed any limitation about the individual that will make use of the principle of equality and the scope of the principle. In accordance with the provision stipulated in Article 11 of the Constitution which reads "The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals", it is obvious that the principle of equality regulated in the chapter of "general principles" of the Constitution is also valid for the listed bodies, institutions and individuals. In addition, in accordance with the provision stipulated in last paragraph of Article 10 of the Constitution which reads "State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings.", the legislative, executive and judicial bodies and the administrative authorities are responsible for acting in accordance with the principle of equality and the prohibition of discrimination.

111. In Article 138 of the Constitution, it is prescribed that the judges will deliver a decision in accordance with the Constitution and law. Therefore, the Constitutional provisions are also included among the law that the judge will implement. When Articles 11 and 138 of the Constitution are evaluated together, it occurs that the judges are responsible for implementing the principle of equality stipulated in Article 10 of the Constitution.

112. As no definition of the prohibition of discrimination is made in the Constitution, it is not possible to make a definition which has the standards that can be valid for every present case either. However, the Constitutional Court defined the principle of equality as follows:

> *"The principle of equality stipulated in Article 10 of the Constitution is valid for those who have the same legal situation. The legal equality rather than the actual one was prescribed with this principle. The aim of the principle of equality is to ensure that the individuals in the same situation be subjected to the same action before the laws, to prevent the discrimination and the granting of the privileges. Through this principle, the same rules were applied for some individuals and communities in the*

same situation and the violation of the principle was prohibited before law. Equality before law does not mean that everyone will be subjected to the same rules in every aspect. Characteristics in the situations of some individuals or communities may require different rules and practices for them. If the same legal situations are subjected to the same rules and different legal situations are subjected to the different rules, the principle of equality prescribed in the Constitution is not harmed." (See AYM, E.2009/47, K.2011/51, K.T. 17/3/2011).

113. The ECtHR briefly defines the discrimination in its case law as "treating differently, without an objective and reasonable justification, persons in relevantly similar situations" (see, Zarb Adami v. Malta, App. No. 17209/02, 20/6/2006, § 71).

114. The principle of the prohibition of discrimination contains the rejection of the provision of the opportunities or the deprivation from the opportunities based on religion, political opinion, sexual and gender identity, which are the elements of the personality of an individual and which are the personal preferences, or based on the personal characteristics such as gender, race, disability and age, which cannot be preferred in any way.

115. It is obvious that the different treatment directed towards the applicant is related to the exercise of the right of the freedom of religion (§ 75). The Judge of the Court of Instance asks that all the attorneys take part at the hearing as heads uncovered. According to ECtHR "A difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group" (see, DH v. Czech Republic, App. No. 57325/00, 13/11/2007, § 184). In other words, if the same treatment is applied for the individuals in different situations, but this treatment affects a certain individual or the members of a group in a disproportionate and negative way, then the discrimination can be mentioned.

116. In the incident, which is the subject matter of the application, while it was asked all the female attorneys to uncover their heads at the hearing, this situation negatively affects the applicant as it reveals

a religious behavior that is a personal preference of the applicant or, in other words, she wears a headscarf that is the manifestation behavior of the applicant's desire to fulfill the orders of the religion that needs to be considered as her "personal quality".

117. The matter to be evaluated at this phase is whether a different treatment was really applied for the applicant or not and whether this different treatment occurred on a basis prohibited in Article 10 of the Constitution or not.

118. Although the applicant, who states that she has a desire to apply her religious faith in a strict manner, is not allowed to take part at the hearing as she wears a headscarf, the female attorneys, who do not wear a headscarf, take part at the hearings. No claim was made as to the fact that the applicant and the other female attorneys, who were allowed to take part at the hearings, were in different situations.

119. At this phase, it is necessary for the bodies, which exercise the public force, to base the privileged treatment on the valid and objective justification, to show the coercive social reasons why the applicant is not allowed to take part at the hearings just because she wears a headscarf while all the female attorneys, who do not wear a headscarf, are allowed to take part at the hearings under the condition of the present case.

120. The ECtHR decided that the prohibition of discrimination stipulated in Article 14 of the Convention did not prohibit the differences in treatment which were mainly based on an objective evaluation of the different factual situations and which established a fair balance between the protection of the interests of the society and the respect for the rights and freedoms enshrined in the Convention. The ECtHR put forth the criteria as regards the implementation of Article 14 as follows:

> *"It is important, then, to look for the criteria which enable a determination to be made as to whether or not a given difference in treatment, concerning of course the exercise of one of the rights and freedoms set forth, contravenes Article 14. On this question the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable*

justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration; the principles which normally prevail in democratic societies should be taken into account. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 (art. 14) is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized." (see Belgian Linguistice Case v. Belgium, App. No. 1474/62, 23/7/1968, § 10)

121. The criterion that the ECtHR put forth contains two elements: the determination of a legitimate aim for the different treatment, which is a liability for the state, and the evaluation of whether there is a "reasonable relation of proportionality" between the different treatment and the pursued aim.

122. While the different treatment behaviors that are referred to the Constitutional Court are evaluated, in the event that the state fails to enforce the claimed discrimination in any way, then this claim of the applicant will come through apart from the exceptional cases. If the explanations are made as regards the aim of the different treatment behavior, it is necessary that the justifications that are put forth have a reasonable basis and that the justifications be based on the evidence.

123. In the opinion document of the Ministry of Justice, no explanation was made as regards the aim of the different treatment behavior that the judge of the 11th Family Court of Ankara engaged in by stating that the applicant could not take part at the hearing wearing a headscarf and that for this reason the hearing would not be held. Moreover, the Ministry seems to accept that the behavior exhibited against the applicant constituted a different treatment (§ 105).

124. At this phase, it should be evaluated whether the justification of the 11th Family Court of Ankara has a legitimate and reasonable basis or not and whether a fair balance has been established between the protection of the interests of the society and the rights and freedoms enshrined in the Constitution or not.

125. The 11th Family Court of Ankara based its decision as to the fact that the applicant could not take part at the hearing wearing a headscarf

and that for this reason the hearing could not be held on the justification that "a headscarf is a strong religious symbol and political symbol that is against the secularism" (§ 13).

126. In the event that the manifestation behavior of any religious faith constitutes the basis for the different treatment, it is possible to accept it as legitimate only if the manifestation behavior of the religion is directed towards "the protection of the rights and freedoms of others" and "the maintenance of the public order" (for the criteria used in the context of Article 9 of the Convention, see Leyla Şahin v. Turkey, App. No. 44774/98, 29/6/2004, § 108). As it was not explained, in the decision of the 11th Family Court of Ankara, how the rights and freedoms of others would be damaged and how the public order would be damaged when the attorney took part at the hearing, it was not stated for what reason the wearing of the symbols that imply the religious identities of the attorneys was a behavior that must be prevented as a response to a coercive societal need either.

127. Consideration of a religious symbol as a compulsory religious duty by the members of the religion that use it is an understandable situation. The issue that needs to be questioned is the effect that the perception of a religious symbol as compulsory creates over the others. Each symbol, whether it stems from a religion or a secular world view, may create a psychological pressure on those who are against it. These effects are inevitable in the pluralistic societies where the people with different faiths and thoughts live. In the societies, where the majority is the member of a certain religion, it is easier for those who are in the minority to feel themselves under such a pressure. In this case, the duty of the State is not to prohibit the symbols of the faiths based on the assumptions or, in other words, to limit the rights and freedoms (for a similar approach, see Şerif v. Greece, App. No. 38178/97, 14/12/1999, § 53); but to take the measures which will not prevent the exercise of the freedom of religion and conscience by the majority, which will prevent the oppression of the minority against the majority and which will ensure that the individuals live in mutual recognition and tolerance (see § 132).

128. As a matter of fact, in another context, the ECtHR stated "the role of the authorities in a situation of conflict between or within religious groups is not to remove the cause of tension by eliminating

pluralism, but to ensure that the competing groups tolerate each other" (see, Supreme Holy Council of the Muslim Community v. Bulgaria, App. No. 39023/97, 16/12/2004, § 96). In other words, the primary duty of the state is to ensure peaceful coexistence of the people whose faiths, thoughts and lifestyles that are in conflict with each other and to secure a pluralistic environment in the society, where all types of faiths can express themselves.

129. In this context, it should be remembered that the ideals and values of the democratic society need to be based on dialogue and a spirit of compromise that will entail the mutual concessions on the part of the individuals. Then, the duty of the democratic state is to take the necessary measures against the possible behaviors that will constitute a crime such as the exercise of pressure, coercion and resorting to violence. Attempting to prohibit the elements that may create tension in the society rather than this requirement of the pluralism and political impartiality has the potential of creating an oppressive, totalitarian and homogenization-oriented regime (for similar evaluations, see Leyla Şahin v. Turkey, App. No. 44774/98, 29/6/2004, dissenting opinion of Tulkens, § 1). Pluralism is not a concept that means the coexistence of those individuals, whose identities are repressed and freedoms are limited. Pluralism requires that the individuals take part in the common places with their identities.

130. In order for the argument as to the fact that some religious behaviors may be limited in order to "protect those who are in the minority" (see Leyla Şahin v. Turkey, App. No. 44774/98, 29/6/2004, § 99) to be valid, it may be necessary to analyze the factual situation that is based on the evaluation of the conditions of the present case, not based on the possibilities. Even if the women, who wear a headscarf, are shown to be in the majority, it is necessary to show in which way the attorneys, who wear a headscarf, create pressure on those, who do not look like themselves, based on the substantial facts. The principle of just trial also entails this. However, in Turkey, any claim on how a headscarf has created pressure on the others and the data based on the substantial facts could not be put forward.

131. Finally, a thought as to the fact that the prohibition of headscarf is necessary to ensure "impartiality" and "pluralism" in the society

brings about the thought as to the fact that the state is authorized to determine what is "normal" and "correct" in the field of religion and faith. Deciding on whether a headscarf, just as any religious behavior, is an expression of a political opinion, not a religious faith or not is outside the field of interest of the Constitutional Court. On the other hand, the mistake of attributing political meanings to the symbols that people wear is associated with putting forth "a coercive societal need".

132. The 11th Family Court of Ankara included the justification as to the fact that "a headscarf is a strong religious symbol against the secularism" in its decision. In order to resolve the relation between a headscarf and the secularism, it is necessary to remind some principles put forward in a recent decision of the Constitutional Court, in which the relation between the secularism and the freedom of religion and conscience was evaluated.

133. Secularism is one of the fundamental principles that has been included in our constitutions since 1937. The concept of secularism is stipulated in the Preamble and Articles 2, 13, 14, 68, 81, 103, 136 and 174 of the Constitution. In the aforementioned articles, secularism is regulated as a political principle that determines the position of the state against the religious faiths. In other words, secularism is a feature of the state, not the individual or society (See CC, AYM, E.2012/65, K.2012/128, K.T. 20/9/2012).

134. When the historical development of secularism is examined, it is seen that the concept has two different interpretations and practices depending on the differences in the approach towards the phenomenon of religion. Of these, the religion according to the strict secularism understanding is a phenomenon, which is only present in the conscience of the individual and which must certainly not be reflected in the social and public space by going beyond this. More flexible or libertarian interpretation of the secularism is inspired by the determination that the religion is a social phenomenon in addition to its individual dimension. This secularism understanding does not confine the religion into the inner world of the individual, perceives it as an important element of the individual and collective identity, and allows for its social visibility. In a secular political system, the individual preferences in the religious subjects and the lifestyle that they shape are outside the intervention,

but under the protection of the state. In this respect, the principle of secularism is the guarantee of the freedom of religion and conscience (See AYM, E.2012/65, K.2012/128, K.T. 20/9/2012).

135. The religions and faiths affect the lifestyles, identities of the members thereof and their relations with other individuals. It is a historical and sociological reality that the societies vary in terms of the religion and faith, that there are different religions, faiths or disbeliefs in the society. For this reason, one of the main aims of the democratic and secular state is to establish political orders, where the individuals will live together in peace with the faiths they have by protecting the social diversity (See AYM, E.2012/65, K.2012/128, K.T. 20/9/2012).

136. Secularism is a constitutional principle which ensures the impartiality of the state against the religions and faiths, determines the legal position of the state against the religions and faiths, duties and authorities and limits thereof. The secular state is the state which does not have an official religion, which treats the religions and faiths equally, establishes a legal order where the individual may freely learn and live their religious faiths in peace, guarantees the freedom of religion and conscience. The separation of the state and the religion is a requirement of the freedom of religion and conscience and is also necessary for the protection of the religion against the political interventions and the maintenance of the independence (See AYM, E.2012/65, K.2012/128, K.T. 20/9/2012).

137. Those who have different religious faiths or those who do not have any faith are under the protection of the secular state. As a matter of fact, according to the definition made in the justification of Article 2 of the Constitution, "The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble." The state is obliged to take the necessary measures in order to prepare the environment, where the freedom of religion and conscience can materialize (See AYM, E.2012/65, K.2012/128, K.T. 20/9/2012).

138. In this sense, the secularism encumbers the state with the negative and positive liabilities. The negative liability entails that the

state does not adopt a religion or faith in an official manner and that it does not intervene in the freedom of religion and conscience of the individuals unless there is force majeure. The positive liability brings about the duty of the state to remove the barriers in front of the freedom of religion and conscience, to provide an appropriate environment where the individuals can live as they believe and the opportunities required therefor. The source of the positive liability that the secularism encumbers on the state is Articles 5 and 24 of the Constitution. According to Article 5 of the Constitution, one of the fundamental aims and duties of the State is "to work in order to remove political, economic and social barriers restricting the fundamental rights and freedoms of the individual in a way which does not accord with the principles of social state of law and justice and to prepare the conditions required for the development of the material and spiritual existence of individuals."

139. It is indisputable that secularism is an indispensable principle and is necessary for the protection of the democratic system in Turkey as specified in the judgment of the Constitutional Court dated 7 March 1989 (See AYM, E.1989/1, K.1989/12, K.T. 7/3/1989) Nevertheless, the freedom of religion and conscience is also one of the foundations of the democratic societies and the pluralistic secularism understanding becomes the guarantee for the freedom of religion and conscience by allowing for the social visibility and by keeping the individual preferences in the religious subjects outside the intervention, but under the protection of the state (§ 137).

140. One of the main aims of the democratic and secular state is to establish political orders, where the individuals will live together in peace with the faiths they have by protecting the social diversity (§ 135). In the societies, where the pluralistic secularism understanding is accepted, there is an opportunity of ensuring peaceful coexistence of the people, whose faiths, thoughts and lifestyles that are in conflict with each other, and of securing a pluralistic environment in the society, where all types of faiths can express themselves. Seeing the pluralism and social diversity as an element that threatens the social unity without considering these opportunities leads to a monolithic society understanding that does not accord with the democracy.

141. The applicant stated that she also adopted the principle of secularism and that she did not intend to make this principle a question of debate. On the other hand, secularism needs to have a reasonable basis even if its justification is legitimate and in this respect, sufficient evidence should be presented as to the fact that the behaviors, attitudes or actions of the applicant were in violation of this principle and the evidence should be provided for the justification of the secularism. Provision of the evidence is a test that the ECtHR always applies in its judgments (see (Kokkinakis v. Greece, App. No. 14307/88, 25/5/1993, § 49).

142. In order to be able to state that the justification of secularism has a reasonable basis, it is necessary to show that a headscarf, which the applicant claimed to be wearing as a religious requirement, is aggressive or intervenes in the faiths of the others, is oppressive, provocative, has an aim of imposing its own faith by force or disrupts the social functioning, causes some disorders and irregularities. However, such a claim was neither stated by the Ministry nor shown in the decision of the 11thFamily Court of Ankara.

143. If the only meaning of any manifestation behavior of a religion is interpreting it as a religious challenge against the secular state, then it means ignoring the capacity of the members of this religion to define their own actions. It is possible to accept that the limitation as regards any right enshrined in the Constitution is legitimate not based on the concerns and assumptions, but only by putting forth the facts, which will be indisputable, and the reasons, which are legally unquestionable. The case law of the ECtHR in this aspect is as to the fact that the simple claims are not sufficient in the event that an intervention is made in a fundamental right and freedom and that these claims need to be supported with the substantial examples (Smith and Grady v. United Kingdom, App. No. 33985/96 and 33986/96, 27/9/1999, § 89). For this reason, in accordance with the principle of just trial, the responsibility of proving through the substantial evidence that the manifestation behavior of a religion or faith is in contrary to the pluralistic meaning of the secularism does not belong to the applicant, but to the state, which imposes a limitation through this justification. The law predicates on the "existing" and no decision can be delivered according to the suspicion and the possibilities in the future.

144. Finally, the consideration of the assumption that a headscarf is a "religious and political symbol" that is "against the secularism" in the context of the freedom of expression may make it easier for us to evaluate the effects that those who wear a headscarf create on those who do not wear it. The ECtHR has never accepted the interventions made in the freedom of expression with the justification that they are not adopted by everyone and that they may disturb the others. In fact, no limitation has been introduced to the freedom of expression and dissemination of thought with regard to content within the scope of Article 26 of the Constitution, only in areas such as racism, hate speech, war propaganda, encouraging violence and incitation, calls to riot or justifying terrorist acts, which are the borderlands of these freedoms, it was accepted that the State authorities disposed of a broader discretion margin in their interventions (for a judgment of the ECtHR in the same vein see Gözel and Özer v. Türkiye, § 43453/04, 31098/05, 6/7/2010 § 56). Then, while the sayings, which may be considered to be encouraging the hatred based on the religion or faith, can be protected within the scope of the freedom of expression of thought (Gündüz v. Turkey, App. No: 35071/97, 4/12/2003 § 40); similarly, it is necessary to be based on very important justifications that prevent the others from exercising their rights and freedoms in order for the manifestation of the religion by wearing a headscarf to be prohibited.

145. At this phase, the matter to be examined is whether a reasonable relation of proportionality is really put forth between the tool that the state uses and the aim that it attempts to achieve or not. More serious the different treatment is accepted, more important justifications the state needs to present in order to justify this different treatment. In other words, when there is a potentially serious discrimination, in general, the discretionary area granted to the state will be narrower.

146. After it is stated that no discrimination will be made on the grounds of "language, race, color, gender, political opinion, philosophical belief, religion and sect" in Article 10(1) of the Constitution, it is also stated in the continuation of the paragraph that no discrimination will be made on the "similar grounds". Thus, the Constitution-maker attached special importance to some types

of different treatments and listed them by name; moreover, in the same paragraph, the potential scope of the principle of equality and the prohibition of discrimination was not limited by including the principle that no discrimination will be made on the "similar grounds". It should be stated that the Constitution considered the different types of treatment it listed by name as more important and the interventions made in these types may only be justified in the event that "very important justifications" are presented.

147. The consideration of a measure taken as proportionate can only be the case in the event that it is not possible to reduce the social conflicts and tensions by protecting the pluralism, which is the requirement of the democracy. Therefore, the state primarily needs to attempt to take the necessary measures in order to reduce the tension by protecting the rights and freedoms of the others and the pluralism, to impose a limitation unless these measures are sufficient and to the extent that the present conditions require. No sound decision may be delivered about this subject without questioning to what extent the state fulfills this duty.

148. In the present case, it is obvious that the different treatment directed towards the applicant is related to the exercise of the right of the freedom of religion. As no substantial facts were presented except for the abstract evaluation of the 11th Family Court of Ankara as to the fact that a headscarf of the applicant prevented the others from exercising their rights and freedoms, it was not shown which measures were taken in order to protect the pluralism before the limitation of a fundamental right and freedom either. In this case, it cannot be said that the failure to admit the applicant to take part at the hearings wearing a headscarf is proportionate.

149. In the recommendation that the Parliamentary Assembly of the Council of Europe published in 1999, it was stated that the states had a duty to facilitate the religious practices among the religions including supporting the tolerance, dress (Recommendation no. 1396, 27/6/1999, § 8). According to the recommendation, the only opinion that is outside this protection area is the extremist behaviors that prevent the others from exercising their rights and freedoms. Then, in order to be able to assert that the limitations as regards the manifestation behavior

of a religion or faith is reasonable, it is necessary to show based on the substantial facts that this behavior has prevented the others from exercising their rights and freedoms. In cases where it cannot be shown that the limitations as regards the religion or faith are reasonable, a discrimination may be made due to the different practices towards those who state that they wear a headscarf in order to fulfill the requirements of that religion and faith and the others.

150. In the international texts in relation to the prohibition of discrimination, it is expected that the states not only do not make any discrimination, but also take necessary measures in order to prevent the discrimination in the entire social life. As a matter of fact, Article 4 of Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of the General Assembly of the United Nations, which is directly related to the subject, stated "all States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life".

151. Similarly, in Article 2 of the International Covenant on Civil and Political Rights as regards the discrimination, the UN also encumbered the states with the duty of preventing the discrimination based on the religion or faith. Article 2 of the aforementioned Covenant is as follows:

> *"1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*
>
> *2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."*

152. The applicant works as an attorney and, more specifically, the international agreements were ratified in order to prevent that the attorneys are not subjected to any discrimination while performing their professional activities. Article 23 of the UN Basic Principles on the Role of Lawyers (Havana Rules), which was ratified on 7/9/1990, stated "Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly". Article 10 of the same declaration imposes the governments the duty of not subjecting the lawyers, like other citizens, to the discrimination due to their belief:

> *"Governments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, color, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status..."*

153. In the present case, while no reasonable and objective basis was shown for the prevention of the applicant from taking part at the hearing wearing a headscarf required by her religious faiths, no claim as to the fact that a headscarf prevented the others from exercising their rights and freedoms and was the source of the social conflicts and tensions and no data based on the substantial facts could be put forward either. Consequently, an attorney, who wears a headscarf, was put in a disadvantageous situation when compared to those who do not wear a headscarf by preventing her from entering into the hearings.

154. For the aforementioned justifications, it should be decided that Article 10 of the Constitution that was considered with Article 24 of the Constitution was violated.

c. Article 50 of the Law No. 6216

155. The applicant requested that the non-pecuniary damages of TRY 50,000.00 be adjudged.

156. In the opinion of the Ministry of Justice, no opinion was expressed as regards the request of the compensation of the applicant.

157. Article 50(2) of the Law No.6216 with the side heading ''Decisions" is as follows:

> *"If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed, In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favor of the applicant or the remedy of filing a case before the general courts may be shown. The court, which is responsible for holding the retrial, shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."*

158. As it was determined in the current application that Article 24 of the Constitution was violated because the condition of lawfulness for the intervention could not be fulfilled and Article 10 of the Constitution was violated because the female attorneys wearing a headscarf were put in a disadvantageous situation when compared to those who do not wear a headscarf, it should be decided that the file be sent to the relevant Court in order to remove the violation and the consequences thereof.

159. As it was understood that a decision delivered in order to send the file to the relevant Court so as to fulfill what was required by the decision was sufficient compensation for the claim of violation by the applicant although the request of spiritual compensation was made by the applicant, it should be decided that the request of the spiritual compensation by the applicant be rejected.

160. It should be decided that the trial expenses of TRY 1,706.10 in total composed of the fee of 206.10 and the counsel's fee of TRY 1,500.00, which were made by the applicant and determined in accordance with the documents in the file, be paid to the applicant.

V. JUDGMENT

In the light of the reasons explained: it was held on 25/6/2014

A.

UNANIMOUSLY that the applicants claim that her right to defense and right to access to the court were violated be INADMISSIBLE due to "*lack of jurisdiction ratione personae*",

her claim as to the fact that Article 24 of the Constitution was violated be ADMISSIBLE,

her claim as to the fact that Article 10 of the Constitution was violated be ADMISSIBLE,

B. BY MAJORITY OF VOTES and the dissenting opinion of Zehra Ayla PERKTAŞ that the freedom of religion and conscience guaranteed by Article 24 of the Constitution was VIOLATED,

BY MAJORITY OF VOTES and the dissenting opinions of Osman Alifeyyaz PAKSÜT and Zehra Ayla PERKTAŞ that the prohibition of discrimination guaranteed by Article 10 of the Constitution was VIOLATED,

C. that the file be sent to the relevant Court in order for the violation and the consequences thereof be removed,

D. that the request for non-pecuniary damages by the applicant be REJECTED

E. that the trial expenses of TRY1,706.10 in total composed of the fee of TRY 206.10 and the counsel's fee of TRY 1,500.00 , which were made by the applicant be PAID TO THE APPLICANT,

F. That the payments be made within four months as of the date of application by the applicant to the Ministry of Finance following the notification of the decision; that in the event that a delay occurs as regards the payment, the statutory interest be charged for the period that elapses from the date, on which this period comes to an end, to the date of payment.

DISSENTING OPINION

1. The system, which is accepted as the European Court of Human Rights (ECtHR) for the examination of the individual applications and adopted in the case law of the Constitutional Court that has gained stability in line with the criteria of the ECtHR since 23.9.2012, is to deliver a judgment as regards the violation and not to carry out an examination as regards the violation and the removal of the violation and not to carry out a separate examination as regards the violation of the prohibition of discrimination (the principle of equality).

2. The Prohibition of Discrimination stipulated in Article 14 of the European Convention on Human Rights (ECHR) and the principle of Equality Before Law in Article 10, which is the equivalent thereof in our Constitution, may not be the subject of a separate examination of a fundamental right on the part of the applicant. Otherwise, in each decision of violation, it is also necessary to deliver a judgment as to the fact that the applicant is subjected to a different treatment when compared to the other individuals that exercise the same fundamental right or freedom in the society at the same time and that accordingly the prohibition of discrimination is violated and, as a matter of fact, such a practice does not accord with the abstract and principal quality of the articles in the ECHR and the Constitution as regards the prohibition of discrimination.

3. In the case, as for the prevention made against the applicant, the professional rules and the case law of the ECtHR and the Constitutional Court were shown as the justifications. Yet, it is known that some attorneys wearing a headscarf could enter into the hearings during the same period upon the judgment of the Council of State. Therefore, the violation of the fundamental right that the applicant was subjected to resulted from the exercise of the discretionary power about the interpretation of the legislation and the different judicial decision by the court.

4. The claims of the applicant were evaluated by the Constitutional Court in terms of the legal basis, the obligation and proportionality in a democratic society and it was decided that the fundamental right in

Article 24 of the Constitution had been violated. I totally agree with this part of the judgment. On the other hand, this determination of violation is valid for the special case as regards the application and does not mean that it is necessary to grant an absolute freedom for the religious clothes or symbols just as all the other clothes under every circumstance and condition and in every environment. The evaluations as to the fact that some limitations may be prescribed by law and on the condition that it is necessary and proportionate in a democratic society about the place and form of the rituals and symbols as regards the religion in order to ensure that the public order and the faiths of the others are protected as explained in detail in the judgment of the Constitutional Court (File No: E:2008/16, K:2008/116) and in the judgments of the ECtHR referred to in the justification of the judgment prove to be valid.

5. For this reason, I do not agree with the evaluations made in the justification of the judgment in terms of the "prohibition of discrimination" which is not directly related to the removal of the violation as regards the freedom of religion and conscience of the applicant.

Justice
Osman Alifeyyaz PAKSÜT

DISSENTING OPINION

1. The applicant who works as an attorney registered at the Ankara Bar Association, alleged that the fact that the judge granted a period to her client in order to for her to be represented by another attorney and postponed the hearing by stating that the hearing would not be held because she participated at a hearing with a headscarf was contrary to the freedom of religion and conscience, the right to defense and the right to access to court, the right to work and the prohibition of discrimination.

2. When it is observed that the applicant performs a duty with a public nature, I do not agree with the counter majority opinion by thinking that there is no violation of a right according to the freedom of religion and conscience stipulated in Article 24 and the principle of equality before law stipulated in Article 10 of the Constitution in terms of the public order as specified in the judgments of the Constitutional Court (File No: E.1989-1 K.1989-12 on 7.3.1989), (File No:E.1990-36 K.1991-8, on 9.4.1991),(File No: M.2008-16 D.2008-116 on 5.6.2008).

Justice
Zehra Ayla PERKTAŞ

FREEDOM OF EXPRESION (ARTICLE 26)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

YAMAN AKDENİZ AND OTHERS

(Application no. 2014/3986)

SECOND SECTION
JUDGMENT

President	: Alparslan ALTAN
Justices	: Serdar ÖZGÜLDÜR
	Osman Alifeyyaz PAKSÜT
	Celal Mümtaz AKINCI
	M. Emin KUZ
Rapporteur	: Esat Caner YILMAZOĞLU
1st Applicant	: Yaman AKDENİZ
Counsel	: Att. Hüsnü ÖNDİL
2nd Applicant	: Mustafa Sezgin TANRIKULU
Counsel	: Att. Berk BAŞARA
3rd Applicant	: Kerem ALTIPARMAK

I. SUBJECT-MATTER OF THE APPLICATON

1. The applicants have alleged that due to the action of the Presidency of Telecommunication and Communication (TİB) in relation to the blocking of access to the web site with the domain name twitter.com which they are a user of, Articles 26, 27, 40 and 67 of the Constitution have been violated and that there is no effective remedy against the said action.

II. APPLICATION PROCESS

2. The applications have been submitted directly to the Constitutional Court on 24-25/3/2014. As a result of the preliminary administrative examination of the petitions and their annexes, it has been determined that there is no deficiency to prevent the submission thereof to the Commission.

3. It has been decided that the applications no. 2014/3987 and 2014/4091 of similar essence be joined with the application no. 2014/3986 due to the fact that they have the same legal character regarding their subjects and that the examination be conducted over this file.

4. It has been decided by the President of the Section on 28/3/2014 that the examinations for admissibility and merits be conducted together and that a copy of the application be sent to the Ministry of Justice.

5. Considering it as a requisite to urgently make a decision in relation to the applications as per Article 71(2) of the Internal Regulations of the Constitutional Court, the Section has evaluated the application in terms of its admissibility and merits without waiting for the response of the Ministry.

III. THE FACTS

A. The Circumstances of the Case

6. As expressed in the application form and the annexes thereof, the facts can be summarized as follows:

7. The applicants are active users of the web site with the domain name twitter.com which is a social media platform.

8. The TİB has implemented a decision for protection measure on the basis of the judgments of the Istanbul Chief Public Prosecutor's Office dated 7/3/2014 and No. 2011/762, of the 2nd Criminal Court of Peace of Samsun dated 4/3/2014 and No. 2014/223, of the 5th Criminal Court of Peace of İstanbul Anatolia dated 18/3/2014 and No. 2014/181 and of the 14th Criminal Court of First Instance of İstanbul Anatolia dated 3/2/2014 and No. 2011/795 and access to the web site twitter.com has been blocked.

9. The decision of the TİB is as follows:

> "…
>
> *The Presidency of Telecommunication and Communication functions*

in line with the Law No. 5651 and other relevant provisions in the legislation.

Upon complaints from our citizens, the judgments to block access have been rendered by the courts of the Republic of Turkey due to the violation of personal rights and of privacy on Twitter.

These judgments have been submitted to the Presidency of Telecommunication and Communication, and our Presidency requested from Twitter that the relevant content be removed.

However, despite all our bona fide efforts for the implementation of the court judgments, Twitter has remained indifferent with regards to the said judgments and failed to recognize the court judgments.

The said web site which is based abroad has ignored the judgments rendered by the courts of the Republic of Turkey.

Hence, the measure to block access to Twitter has been implemented in line with the court judgments since there was no other choice left to prevent the non-recoverable future injuries to our citizens. The Presidency of Telecommunication and Communication is liable to implement court judgments within the framework of the principle of the state of law.

The blockage of access implemented as a precautionary measure will be ended if the said web site which is based abroad abides by the judgments of the Turkish courts and removes the illegal contents.

Respectfully announced to the Public."

10. The TİB has blocked access to Google DNS addresses as it has been found out that the users log in to the blocked web site twitter.com by changing their DNS settings.

11. The applicants have filed direct individual applications claiming that the lodging of an action for annulment before the administrative judiciary bodies against this decision of the TİB is not an effective remedy which needs to be exhausted.

12. Meanwhile, in relation to the case filed by the Presidency of the Union of Turkish Bar Associations against the said action of access-blocking by indicating the Presidency of Telecommunication and Communication and the Information and Telecommunications Technologies Authority as the adverse parties whereby a stay of execution was requested, the 15th Administrative Court of Ankara decided by majority of votes on 25/3/2014 on the stay of execution of the action which was the subject of the case until a new judgment was rendered after the defence statements of the administrations standing as defendants and their interlocutory judgment response were taken or the duration for defence and for response to interlocutory judgment expired.

13. The part in relation to the stay of execution in the said judgment of the 15th Administrative Court of Ankara is as follows:

> *"…*
>
> *Due to the facts that the action which is the subject of the case is in relation to the complete blockage of access to the web site with the domain name "twitter.com", that this is of a quality which may restrict the freedoms of expression and communication which are guaranteed by the Constitution of the Republic of Turkey and the European Convention on Human Rights and that, if implemented, it may cause damages which are difficult to compensate for, it was adjudicated by majority of votes on 25/3/2014 that the execution of the action which is the subject of the case be stayed until a new judgment would be rendered after the defence statement of the administration standing as defendant and its interlocutory judgment response would be taken or the duration for defence and for response to interlocutory judgment would expire… and that the administrations standing as defendants were given (15) days for defence and for responding to the interlocutory judgment."*

B. Relevant Law

14. Article 138(4) of the 1982 Constitution is as follows:

> *"Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution."*

15. The 1st sentence of Article 27(2) of the Law No. 2577 on Administrative Jurisdiction Procedure is as follows:

> *"In cases where both conditions; arise of damages which are difficult or impossible to compensate for as a result of the implementation of the administrative action and explicit contrariety to law of the administrative action, materialize together, the Council of State or the administrative courts can render a judgment on the stay of execution by indicating the justification after the defence statement of the administration standing as defendant is taken or after the duration for defence has expired. The execution of administrative actions the effectiveness of which will exhaust upon the execution thereof can be stayed without taking the defence statement of the administration in a way to be decided again after the defence is taken."*

16. Article 27(7) of the Law No. 2577 on Administrative Jurisdiction Procedure is as follows:

> *"As to the judgments concerning the stay of execution requests; objections can be filed for only once within seven days from the notification of the decision to the Boards of either the Administrative or Tax Law Chambers depending on the subject of the action if the judgment is rendered by the law chambers of the Council of State, to the nearest regional administrative court against the decisions of the regional administrative court, to the regional administrative court against the decisions of administrative or tax courts and against decisions rendered by a single judge and, during the judicial recess period, to the nearest court on duty or to the court on duty which the judge who rendered the judgment does not participate in against the decisions of the tax and administrative courts. Bodies to which the objections have been brought must decide on the objection within seven days after they receive the file. Decisions rendered upon objections shall be final."*

17. The 1st sentence of Article 28(1), titled "Consequences of decisions", of the Law No. 2577 on Administrative Jurisdiction Procedure is as follows:

> *"As to the requirements of the decisions of the Council of State, the regional administrative courts, the administrative and tax courts on*

the merits of the case and on the stay of execution, the administration shall be obliged to conduct acts or take actions without delay. Under no circumstances can the duration for this exceed thirty days starting from the notification of the decision to the administration."

18. Article 9(4) of the Law No. 5651 of 4/5/2007 - on the Regulation of Publications on the Internet and Fight against Crimes Committed by Means of Such Publications is as follows:

"The judge shall render his/her judgment on blocking access to be rendered within the scope of this Article by means of the method of blocking access to content (in the form of URL, etc.) only in relation to the publication, section, part where the violation of personal rights occur. The blockage of access to the entire publication on the web site cannot be decided on as long as this is not compulsory. However, if the judge is of the conviction that the violation cannot be prevented by means of the method of blocking access to content by indicating a URL address, he/she can decide that access to the entire publication on the web site be blocked on the condition that the justification for this decision is indicated."

IV. EXAMINATION AND GROUNDS

19. The application file was examined during the session of the Court on 2/4/2014 and the followings were decided:

A. The Applicants' Allegations

20. The applicants have asserted that access to twitter.com has been blocked through the implementation of a protection measure by the TİB on the basis of the judgments rendered by the Istanbul Chief Public Prosecutor's Office and some courts, that the court judgments indicated by the TİB as the basis of its action are not towards the complete blockage of access to the web site with the domain name twitter.com, that this practice is contrary to law and is of arbitrary nature, that it significantly restricts the right to disseminate information in addition to the opportunity to access information, that this practice blocks access to not only the information which is available on the said web site but also the information which will be shared on this social network in

the future and that, in its current form, it enables censorship which is absolutely prohibited in the Constitution and that the said action is contrary to the principles in relation to the freedom of expression as guaranteed in Article 10 of the European Convention on Human Rights (the Convention), which are adopted by the European Court of Human Rights (ECHR).

21. The applicants have also asserted that access can only be blocked with a court judgment and in relation to the part where the violation occurs in cases where there is a claim of violation of personal rights as per Article 9(4) of the Law No. 5651; that access to the entire web site can be blocked with a court judgment only on the condition that the justification for this is indicated; that it is a usurpation of function when the TİB decides on blocking access to a web site completely despite the court judgment ordering partial blockage on the basis of URL; that the TİB's complete blockage of access to the web site with the domain name twitter.com, despite the fact that the court judgments indicated as the basis of the TİB's decision of blockage are for the blocking of access to certain URL addresses, has no legal basis. The applicants have requested the determination of violation by asserting that the restriction in the form of blocking access violated their rights defined in Articles 26, 27, 40 and 67 of the Constitution, claiming that the blockage of access is contrary to the criteria on the restriction of fundamental rights and freedoms, that it does not strike the balance between the protection of privacy and the freedom of expression and that the blockage of access to the web site twitter.com immediately before the local elections to be held on March 30, 2014 creates an impact of indirect censorship.

B. The Constitutional Court's Assessment

1. Admissibility

22. The applicants have asserted that resorting to an administrative judiciary body against the said action is not an effective remedy and thus there is no need to exhaust this remedy.

23. During the assessment of the applications in relation to the blockage of access to the web site with the domain name twitter.com

by the Presidency of Telecommunication and Communication, it was decided on 25/3/2014 by the 15thAdministrative Court of Ankara that the execution of the said action be stayed in the action for annulment filed against the said action of the TİB by the Union of Turkish Bar Associations with a request for stay of execution.

24. It is understood that the said web site has not been opened for access by the administration which is obliged to conduct acts or take actions without delay as to the requirements of court judgments as per the provisions of legislation mentioned above (§ 14, § 17) despite the court judgment to that effect and that although it is stated in the law that the duration in relation to the execution of the court judgment cannot exceed thirty days, it is understood that this duration indicates the maximum duration. The implementation of a court judgment in a state of law requires not only an execution in form but also the elimination of the identified unlawfulness under objective conditions and within the shortest duration possible. Taking into account, also the fact that the judgment on a stay of execution regarding this matter is based on the determination that the conditions where damages which are difficult or impossible to compensate for arise as a result of the implementation of the administrative action and that the administrative action is clearly contrary to law exist together and considering the obligation for the administration to eliminate the negative impact caused by the action the stay of execution of which is decided, it is understood that this liability is not fulfilled due to the fact that the said web site has not been immediately opened by the TİB for access.

25. Freedom of expression is one of the foundations of a democratic society and it is among the indispensable conditions for the development of the society and the self-realization of the individual. Social pluralism can only be achieved in an environment of free discussion where all kinds of ideas can be freely expressed. In this context, establishing social and political pluralism is dependent on expression of all kinds of thoughts peacefully and freely. In the same manner, an individual can realize his/her unique personality in an environment where he/she can freely express his/her thoughts and engage in discussion (B. No: 2013/2602, 23/1/2014, § 41).

26. Taking into consideration the restrictive impact of the blockage of access to a social media web site which has millions of users in our country on the freedom of expression of these individuals, which is one of the foundations of a democratic society, it is an obligation emanating from the principle of the state of law that the conformity of such restrictions to the law be urgently checked and, in the case of identifying a contrariety to the law, that the said restrictions be immediately abolished. It is observed that despite the decision of stay of execution stated above in relation to the said administrative action, access to the web site with the domain name twitter.com which is the subject of the violation claim of the applicants, is still not possible. It is apparent that the information and thoughts shared on the social media in relation to certain incidents and cases may become outdated and lose their effect and value as time passes. Under these circumstances, it is concluded that it cannot be said that the court judgment provides an effective and accessible protection in terms of removing the violation and the negative consequences thereof against the uncertainty about when access to the web site will be possible again upon the enforcement of the court judgment and thus it is not an effective remedy for the applicants to apply to the administrative court.

27. As it is observed that the complaints of the applicants in relation to Article 26 of the Constitution are not manifestly ill-founded, the applications must be declared admissible.

2. Merits

28. The applicants have stated that the court judgments indicated by the TİB as the basis of blockage are not towards the complete blockage of access to the web site with the domain name twitter.com, that the fact that the TİB blocked access to the web site with the domain name twitter.com by trying out arbitrary methods of blocking access does not have any legal basis; that this action significantly restricts the right to disseminate information in addition to the opportunity to access information; that this action blocks access not only to the information which exists on the said web site but also to the information which will be shared on this social network in the future and that, in its current

form, it enables censorship which is absolutely prohibited in the Constitution.

29. The applicants have also stated that in the internet environment, access can only be blocked with a court judgment, that this blockage can only be imposed by means of blocking access to the content in relation to the part where the violation occurs, that access to the entire web site can be blocked with a court judgment only on the condition that the justification for this is indicated, that it is a usurpation of function when the TİB decides on complete blockage of access to the web site despite the court judgment ordering partial blockage on the basis of URL, that the TİB's blockage of access to the web site with the domain name twitter.com completely despite the fact that the court judgments indicated as the basis of the TİB's decision of blockage are only blocking access to certain URL addresses is legally not possible.

30. The applicants have also stated that the blockage of access to the said web site is contrary to the constitutional criteria on the restriction of fundamental rights and freedoms, that the balance between the protection of privacy and the freedom of expression cannot be stricken and that the blockage of access to the web site with the domain name twitter.com immediately before the local elections to be held on March 30, 2014 creates an impact of indirect censorship.

31. Article 13 of the Constitution, headed "*Restriction of Fundamental Rights and Freedoms*", is as follows:

> *"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 society and the secular republic and the principle of proportionality."*

32. Article 26 of the Constitution, headed *''Freedom of expression and dissemination of thought"*, is as follows:

> *"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 …

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.

Regulatory provisions concerning the use of means to disseminate information and thoughts shall not be deemed as the restriction of freedom of expression and dissemination of thoughts as long as the transmission of information and thoughts is not prevented.

The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law."

33. As per the said regulations, the freedom of expression covers not only the freedom to "have a thought and conviction" but also the existing freedom to "express and disseminate thought and conviction (opinion)" and the associated freedom to "receive and give information or opinion". In this framework, freedom of expression means that individuals can freely access news and information and other's thoughts, that they cannot be condemned for the thoughts and convictions they have and that they can freely express, tell, defend, convey and disseminate to others these through various methods by themselves or together with others (B. No: 2013/2602, 23/1/2014, § 40).

34. Freedom of expression is one of the foundations of a democratic society and it is among the indispensable conditions for the development of the society and the self-development and self-realization of the individual. The light of truth springs forth from collision of ideas. In this context, establishing social and political pluralism is dependent

on expression of all kinds of thoughts peacefully and freely. In the same manner, an individual can realize his/her unique personality in an environment where he/she can freely express his/her thoughts and engage in discussion. Freedom of expression is a value that we need in defining, understanding and perceiving ourselves and others and, in this framework, in determining our relations with others (B. No: 2013/2602, 23/1/2014, § 41).

35. As stated frequently in the judgment of the ECHR, in order for the freedom of expression to fulfil its social and individual function, not only the "information" and "thoughts" which are considered to be positive, accurate or not harmful by the society and the state but also the information and thoughts which are considered to be negative or inaccurate by the state or a segment of the society and are disturbing for them should be freely expressed and the individuals should be sure that they will not be subject to any sanctions due to these expressions. Freedom of expression is the basis of pluralism, tolerance and open-mindedness and without this freedom, it is not possible to speak of "a democratic society" (*Handyside/United Kingdom*, App. No: 5493/72, 7/12/1976, § 49).

36. The Constitution guarantees not only the thoughts and convictions but also the styles, forms and tools of expression. In Article 26 of the Constitution, the tools to be used in the exercise of the freedom of expression and dissemination of thought are stated to be "speech, writing, pictures or other media" and with the expression "other media", it is indicated that all kinds of tools of expression are under constitutional protection (App. No: 2013/2602, 23/1/2014, § 43).

37. In this context, the freedom of expression is directly related to a significant portion of other rights and freedoms guaranteed by the Constitution. The freedom of the press which guarantees the dissemination of ideas, thoughts and information by means of visual and printed media tools is also one of the tools to be used in the exercise of the freedom of expression and dissemination of thought. The freedom of the press is protected within the scope of Article 10 on the freedom of expression of the European Convention on Human Rights and is also

specially regulated in Articles 28 to 32 of the Constitution (App. No: 2013/2602, 23/1/2014, § 44).

38. In a democratic system, in terms of ensuring that those who possess the public powers exercise their authorities within the limits of the law, the press scrutiny and the public scrutiny play a role just as effective and are equally important as the administrative scrutiny and the judicial scrutiny. Since the functioning of the press which acts as a public observer on behalf of the society is dependent on its being free, the freedom of the press is a freedom which is applicable to and vital for everyone. (See the Constitutional Court, E.1997/19, K.1997/66, K.T. 23/10/1997), (for the judgments of the ECtHR in the same vein, see *Lingens v. Austria*, App. No: 9815/82, 8/7/1986, § 41; *Özgür Radyo – Ses Radyo Televizyon Yapım ve Tanıtım AŞ v. Turkey*, App. No: 64178/00, 64179/00, 64181/00, 64183/00, 64184/00, 30/3/2006, § 78; *Erdoğdu and Ince v. Turkey*, App. No: 25067/94, 25068/94, 8/7/1999, § 48; and *Jersild v. Denmark*, App. No: 15890/89, 23/9/1994, § 31).

39. The Internet has a significant instrumental importance in modern democracies in terms of the exercise of fundamental rights and freedoms, specifically of the freedom of expression. The social media platform that the Internet provides is of an indispensable quality for individuals to express, mutually share and disseminate their information and thoughts. Thus, it is apparent that the State and the administrative bodies need to behave very responsibly and sensitively in regulations and practices to be issued in relation to the Internet and social media tools which have become one of the most effective and widespread methods of expressing thoughts today.

40. The freedom of expression and dissemination of thought is not absolute and unlimited. In this context, while exercising the freedom of expression and dissemination of thought, attitudes and behaviours violating the rights and freedoms of individuals should be refrained from. As a matter of fact, the freedom of expression and dissemination of thought as guaranteed by Articles 26 and 28 of the Constitution can be restricted due to the reasons stated in these Articles in accordance with the conditions in Article 13 of the Constitution. As per Article 13 of the Constitution, restrictions on fundamental rights and freedoms

can only be imposed by the law and they can neither be contrary to the requirements of the democratic order of the society and the principle of proportionality nor infringe upon the essences of rights and freedoms.

41. It should be noted that the State and public bodies have discretion over the restrictions in relation to the freedom of expression. However, this sphere of discretion is also subject to the scrutiny of the Constitutional Court. During the scrutiny which will be conducted within the framework of the criteria of conforming to the requirements of the democratic order of the society, proportionality and not infringing upon the essence, instead of a general or abstract evaluation, there is a requirement to conduct a detailed evaluation which differs according to various elements such as the type, form and contents of the expression, the time when it is expressed, the quality of the reasons for restriction. The criteria of not infringing upon the essence or conformity with the requirements of the democratic society require that the restrictions on the freedom of expression should primarily be in the form of a compulsory or exceptional measure and that they should be considered to be the last remedy to be resorted to or the last measure to be taken. As a matter of fact, the ECHR concretizes being a requirement in the democratic society as a "pressing social need". According to this, if the restrictive measure is not in the form of meeting a pressing social need or is not the last remedy to resort to, it cannot be considered as a measure which is in conformity with the requirements of the democratic order of the society. Similarly, while looking into the existence of a pressing social need, an abstract evaluation should not be made but various elements such as the title of the individual who gets involved in the medium of expression and who also expresses, the identity and level of reputation of the targeted individual, the content of the expression, the contribution the expressions make to a discussion in relation to the general interest which concerns the public opinion. (For the ECHR judgments on this subject, see *Axel Springer AG v. Germany*, [GC], App. No: 39954/08, 7/2/2012; *Von Hannover v. Germany* (no. 2), [GC], 40660/08 and 60641/08, 7/2/2012).

42. The interference made by the public authority should be based on reasonable grounds and during the restriction of rights and freedoms,

the essences of the rights should not be infringed upon and such restrictions should be proportional. Restrictions which significantly complicate and make difficult the exercise of the right in conformity with the objective thereof implicitly render it useless and eliminate its impact and infringe upon the essence (see the Constitutional Court, E.2006/121, K.2009/90, K.T. 18/6/2009). Through the principle of proportionality which is described as striking a fair balance between the objective of restriction and the means of restriction, the aim is to prevent regulations which restrict rights and freedoms more and introduce more severe liabilities on individuals who will exercise the rights although it is possible to attain the objective of restriction by means of less restrictive or less severe measures. Thus, if a restrictive measure taken in order to attain a specific objective is more severe and strict than required, that restriction is neither proportional nor in conformity with the democratic order of the society (App. No: 2013/2602, 23/1/2014, § 51).

43. The State has both positive and negative liabilities in relation to the freedom of expression. Within the scope of their negative liabilities, the public authorities should not ban the expression and dissemination of thought as long as this is not compulsory within the scope of Articles 13 and 26 of the Constitution whereas, within the scope of their positive liabilities, they should take the measures necessary for the actual and effective protection of the freedom of expression (for similar observations of the ECHR, see *Özgür Gündem v. Turkey*, App. No: 23144/93, 16/3/2000, § 43). While striking this balance, through the limited reasons and legitimate objectives prescribed in the law within the scope of Articles 13 and 26 of the Constitution, it is necessary to observe a proportional balance between the objective and means of restriction, and the essence of the right should not be infringed upon by taking into consideration the requirements of the democratic order of the society (App. No: 2013/2602, 23/1/2014, § 56).

44. The Constitutional Court will determine, according to the unique character of each case, whether an interference is required in a democratic society, whether the essence of the rights has been infringed upon during the interference and whether the interference has been proportional or not (App. No: 2013/2602, 23/1/2014, § 61).

45. In the concrete case, the applicants have asserted that their freedom of expression is violated due to the blockage of access to the web site with the domain name twitter.com which they are users of. Following the explanation of the general principles, during the application of these general principles to the concrete case, it will be determined "whether there is an interference or not", if there is, "whether the interference is based on reasonable grounds or not", if there are reasonable grounds, "whether the interference is required for the democratic order of society and whether it is proportional or not".

46. Although it is understood in the case which is the subject of the application that the TİB has blocked access to the web site twitter.com on the basis of some court judgments, it is also understood upon the examination of the judgments submitted as basis that the said judgments only block access to certain URL addresses and that no judgment is rendered by the courts of instance in relation to directly blocking access to the web site twitter.com.

47. It is apparent that the decision of the Presidency of Telecommunication and Communication in relation to the blockage of access as per the relevant provisions of law requires a court judgment as a rule, that the competent courts to this end are the criminal courts of peace and that the judgments rendered by the courts are protective measures of criminal procedure in terms of their nature. According to this, the TİB can only enforce a judgment for blockage on the basis of a court judgment that is rendered to this end and that conforms to the style prescribed in this judgment.

48. It is stated above (§§ 37-40) which general principles would be used as basis of action in relation to whether the interference by the TİB, which is a public administration, to block access to a web site is required in a democratic society or not and whether the interference has been proportional or not. As per Article 13 of the Constitution, the restrictions towards the fundamental rights and freedoms shall be prescribed by law and the restrictions shall be in conformity with the law. In the concrete case, it is observed that the action of blocking access is not performed on the basis of URL but by means of blocking access to the entire web site.

Taking into consideration the regulations present in the Law No. 5651, it is obvious that the action which goes beyond the court judgments indicated to be the basis of the decision of the TİB and which brings along the complete blockage of access to the web site twitter.com that is a social media network with millions of users does not have any legal basis and that the blockage of access to this social sharing web site without a legal basis and by means of a decision of prohibition whose borders are not definite constitutes a severe interference with the freedom of expression which is one of the most basic values of democratic societies.

49. Under these circumstances, taking into consideration the importance, in a democratic state of law, of the freedom of expression which constitutes the subject of the claim of violation that is the subject of the individual application, it needs to be decided that the freedom of expression of the applicants which is protected by Article 26 of the Constitution is violated due to the fact that the blockage of access to the web site with the domain name twitter.com by the TİB is a severe interference with the freedom of expression of not only the addressees of the judgments which are indicated to be the basis of this blockage and are rendered on the basis of URLs but also of all users who make use of the twitter.com network and that this does not have any legal basis.

V. JUDGMENT

In the light of the reasons explained, it was **UNANIMOUSLY** held on 2/4/2014;

A. That the application must be declared **ADMISSIBLE**,

B. That the freedom of expression of the applicants guaranteed by Article 26 of the Constitution was **VIOLATED**,

C. That a total of TL 1.706,10 comprising of an individual application fee of TL 206,10 and a counsel's fee of TL 1.500,00 **BE PAID** to the applicant Yaman Akdeniz; a total of TL 1.706,10 comprising of an individual application fee of TL 206,10 and a counsel's fee of TL 1.500,00 **BE PAID** to the applicant Mustafa Sezgin Tanrıkulu; and the trial expenses comprising of an individual application fee of TL 206,10 **BE PAID** to the applicant Kerem Altıparmak,

D. That the payments be made within four months from the date of application of the applicants to the State Treasury following the notification of the judgment; if there happens to be a delay in payment, legal interest be accrued for the period elapsing from the date when this duration ends until the date of payment, and

E. That a copy of the judgment be sent to the Information and Communication Technologies Authority, the Presidency of Telecommunication and Communication and to the Ministry of Transport, Maritime Affairs and Communications in order for the **VIOLATION AND THE CONSEQUENCES THEREOF** to be redressed as per paragraphs (1) and (2) of Article 50 of the Law No. 6216.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

YOUTUBE LLC CORPORATION SERVICE COMPANY AND OTHERS

(Application no. 2014/4705)

PLENARY
JUDGMENT

President	: Haşim KILIÇ
Deputy President	: Serruh KALELİ
Deputy President	: Alparslan ALTAN
Justices	: Serdar ÖZGÜLDÜR
	Osman Alifeyyaz PAKSÜT
	Zehra Ayla PERKTAŞ
	Recep KÖMÜRCÜ
	Engin YILDIRIM
	Nuri NECİPOĞLU
	Hicabi DURSUN
	Celal Mümtaz AKINCI
	Erdal TERCAN
	Muammer TOPAL
	Zühtü ARSLAN
	M. Emin KUZ
	Hasan Tahsin GÖKCAN
Rapporteur	: Esat Caner YILMAZOĞLU
1st Applicant	: Youtube LLC Corporation Service Company (App.No:2014/4705, App.No:2014/4737)
Representative	: John Kent WALKER
Counsel	: Att. Gönenç GÜRKAYNAK
2nd Applicant	: Kerem ALTIPARMAK (App.No:2014/4767, App.No:2014/5543)

Counsel	: Att. Çiğdem DURKAN
3rd Applicant	: Yaman AKDENİZ (App.No:2014/4769, App.No:2014/5542)
Counsel	: Att. Çiğdem DURKAN
4th Applicant	: Mustafa Sezgin TANRIKULU
Counsel	: Att. Berk BAŞARA
5th Applicant	: Metin FEYZİOĞLU
6th Applicant	: Erol ERGİN
Counsel	: Att. Serkan ŞAHİN
7th Applicant	: Mahmut TANAL
8th Applicant	: Mesut BEDİRHANOĞLU
Counsel	: Att. Ferit ALGAN

I. SUBJECT-MATTER OF THE APPLICATON

The applicants alleged that Articles 22, 26, 27, 40, 48 and 67 of the Constitution were violated due to the action of the Presidency of Telecommunication and Communication (TIB) on 27/3/2014 regarding the blocking of access to the video-sharing website www.youtube.com.

II. APPLICATION PROCESS

1. The applications were lodged directly with the Constitutional Court on the dates of 4/4/2014, 7/4/2014, 8/4/2014, 14/4/2014 and 24/4/2014. As a result of the preliminary administrative examination of the petitions and their annexes, it has been determined that there is no deficiency to prevent the submission thereof to the Commission.

2. Due to the fact that the applications numbered 2014/4717, 2014/4737, 2014/4767, 2014/4769, 2014/4817, 2014/4853, 2014/4883, 2014/5137, 2014/5542 and 2014/5543 have similar subjects, it was decided that they be joined with the application numbered 2014/4705 and that the examination be carried out based on this file.

3. The First Section decided that the examination of admissibility and merits of the application be carried out together and that a copy of it be sent to the Ministry of Justice, that it be examined without waiting for the response of the Ministry by finding it necessary that the decision be immediately delivered regarding the applications in accordance with Article 71(2) of the Internal Regulation of the Constitutional Court and that it be referred to the Plenary for deliberations in accordance with Article 28(3) of the Internal Regulation of the Constitutional Court as it deemed it necessary for the application to be concluded by the Plenary due to its quality.

4. In order to be able to elucidate certain technical matters in the incident that is the subject of the application, officials of the TIB were invited to the Plenary to provide information, explanations were made by the President of the TIB Ahmet Cemalettin Çelik, the President of the Legal Department Ali Erten and IT and Internet Specialist Mustafa Küçükali on 29/5/2014.

III. THE FACTS

A. TheCircumstances of the Case

5. As expressed in the application form and the annexes thereof, the facts can be summarized as follows:

6. Of the applicants,

a) The first applicant, Youtube LLC Corporation Service Company, is the owner and user of the website youtube.com.

b) The other applicants use the website youtube.com to obtain information and to share information in its capacity as content provider.

7. The TIB blocked access to the website youtube.com on 27/3/2014 and published the announcement "*As a result of the technical examination and legal assessment conducted as per the Law No.5651, based upon the decision of the Presidency of Telecommunication and Communication No.490.05.01.2014-48125 of 27/3/2014 regarding this website (youtube.com), an administrative measure is applied by the Presidency of Telecommunication and Communication .*" on this address, intended for users.

8. Against the TIB's action of blocking access, Youtube LCC filed an action for annulment requesting the stay of execution with the Presidency of the Ankara Administrative Court on Duty.

9. Upon the request of the Public Prosecutor's Office of Gölbaşı (Ankara) (File No:2014/1051 of 27/3/2014) , with the decision of the Criminal Court of Peace of Gölbaşı (File No: Misc. Works 2014/358 on 27/3/2014), it was decided that access to 15 URL-based youtube.com accounts be blocked. It was also decided that access to the entirety of the broadcast on the website be blocked through IP (Internet Protocol Address) and domain name in the event that the requirement of the decision of the TIB to the effect that access to the content in question be blocked was not fulfilled within the notified period, that the blocking of access continue until the contents in question and other contents of the same quality be definitively removed, that the decision be sent to the Chief Public Prosecutor's Office for the execution of the judgment and to take the necessary action.

10. TIB changed the announcement at the entry of the website in question on 28/3/2014 to read "*A PROTECTION MEASURE is applied regarding this website (youtube.com) by the Presidency of Telecommunication based on the decision of the Criminal Court of Peace of Gölbaşı (File No:2014/358 on 27/3/2014) and as per Article 8§1(b) of the Law No.5651.*"

11. On 2/4/2014, the Presidency of the Union of Turkish Bar Associations requested the review and lifting of the decision of the Court in question to block access by applying to the Criminal Court of Peace of Gölbaşı. The Criminal Court of Peace of Gölbaşı reviewed its first decision in its decision (File No: Misc. Works 2014/381 on 4/4/2014) and decided on the continuation of the decision regarding the blocking of access to 15 URL-based youtube.com accounts, that however, since the blocking of access to the website *"youtube.com"* violated the the freedom of expression, guaranteed under Article 26 of the Constitution, of all of its users, the decision regarding the blocking of access to all broadcast be lifted.

12. It was understood that the decision of the Criminal Court of Peace of Gölbaşı (File No:Misc Works 2014/381 on 4/4/2014) regarding

the lifting of the blocking of access to the website "*youtube.com*" was notified to the TIB on the same date with the document registration No:2014/175774, that however, the website was not opened to access.

13. An objection was filed by the Presidency of Telecommunication and Communication with the Criminal Court of First Instance of Gölbaşı against the decision of the Criminal Court of Peace of Gölbaşı (File No:Misc Works 2014/381 on 4/4/2014).

14. It was decided by the Criminal Court of First Instance of Gölbaşı (File No: Misc Works 2014/81 on 4/4/2014) that the decision regarding the blocking of access to 15 URL-based (Uniform Resource Locator) "youtube" accounts be continued, that access to the entirety of the broadcast of the website in question be blocked in the event that the required action was not taken by the concerned despite the notification of the blocking of access by the TIB to the contents (links) written above to "youtube.com" and that the blocking of access be continued until the contents, which are the subject of the crime, were definitively removed.

15. As of the date of 7/4/2014, the announcement "*A PROTECTION MEASURE is applied regarding this website (youtube.com) by the Presidency of Telecommunication and Communication based on the decision of the Criminal Court of Peace of Gölbaşı (File No: 2014/358 on 27/3/2014) and the decision of the Criminal Court of First Instance of Gölbaşı (File No:2014/81 on 4/4/2014) and also as per Article 8(1)(b) of the Law No.5651.*" by the TIB appears at the entry of this address as the justification of the blocking of access to the website youtube.com.

16. Upon the objection of the Chief Public Prosecutor's Office of Gölbaşı to the effect that the decision delivered by the Criminal Court of First Instance of Gölbaşı on 4/4/2014 was contrary to Article 268 of the Law of Criminal Procedure No.5271 and that it must be declared null and void, it was decided by the Criminal Court of First Instance of Gölbaşı (File No:Misc. Works 2014/91 on 9/4/2014) that the previously issued decision (File No:Misc. Works 2014/81) be declared null and void due to a clear violation of procedure and venue as per paragraphs (1) and (2) of Article 268 of the mentioned Law, that the decision pertaining to the blocking of access to the 15 links stipulated in the decision of the

Criminal Court of Peace of Gölbaşı (File No:Misc. Works 2014/38 on 4/4/2014) regarding the lifting of the decision as to the blocking of access to the entirety of the content on the website youtube.com be continued and that the website www.youtube.com in question remain open to access in this manner, that a copy of the decision be sent to the TIB, the Information and Communication Technologies Authority (BTK) and the Ministry of Transport, Maritime Affairs and Communications.

17. Despite the decision of the Criminal Court of First Instance of Gölbaşı (File No: 2014/91 on 9/4/2014), the video-sharing website "youtube.com" was not opened to access. The justification for the decision not to open the website to access was announced to the public as follows:

> *"As it is known, based upon the Decision of the Criminal Court of Peace of Gölbaşı (File No: Misc. Works 2014/358 on 27/03/2014) with the purpose of preventing the disclosure of State secrets and also due to contents that amount to insult to Veteran Mustafa Kemal Atatürk, as per the Article 8(1)(b) and Article 8(4) of the Law No.5651, the implementation of a measure to block access was initiated by the Presidency of Telecommunication and Communication.*
>
> *With the decision of the Criminal Court of Peace of Gölbaşı (File No:2014/381 on 04/04/2014) the decision as to the blocking of access to the entirety of the broadcast on the concerned website (youtube.com) indicated in the decision numbered Misc. Works 2014/358 was lifted. Upon the objection of the Chief Public Prosecutor's Office of Gölbaşı, with the decision of the Criminal Court of First Instance of Gölbaşı (File No: Misc. Works 2014/81 on 04/04/2014), it was ruled upon that the access to the entirety of the broadcast of the website youtube.com be blocked and that the blocking of access be continued until the removal of the contents that are the subject of crime in the event that the concerned website does not take the required action. It was decided to maintain the decision regarding the blocking of access to 15 links indicated in the decisions of the Criminal Court of First Instance of Gölbaşı (File No: Misc. Works 2014/91 and Misc. Works 2014/381 on 09/04/2014) and to open the website youtube.com to access. It was determined that*

some of the contents at the 15 links included in the decision numbered Miscellaneous Action 2014/381 and that at some of the links the content was not definitively removed but access from Turkey was blocked by Youtube, but that access from abroad was still possible. Since 27/03/2014, a total of 151 links carrying the same content were determined on the concerned website, a notification was made to Youtube for the removal of these contents. It was determined that some of these contents were removed by Youtube, that in some other links only access to the content from Turkey was blocked, but that access from abroad was possible. Moreover, it is observed that some links carrying the same content are still being broadcast. On the other hand, warning messages were sent to youtube due to the contents that amount to insult to Veteran Mustafa Kemal Atatürk, and since the contents in question were not removed, a measure to block access was implemented as of 27/03/2014 as per Article 8(1)(b) Article 8(4) of the Law No.5651. Due to the fact that some of the contents in question are still being broadcast on the concerned website, the measure to block access to the website youtube.com is being pursued.

18. In the meantime, in the case filed by Youtube LCC against the decision to block access, the 4th Administrative Court of Ankara ruled on the stay of execution in its decision (File No: E. 2014/655 on 2/5/2014). The mentioned decision was notified to the TIB on 7/5/2014.

B. Relevant Law

19. Article 138(4) of the Constitution is as follows:

"Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution."

20. The 1st sentence of Article 27(2) of the Law on Administrative Procedure No.2577 is as follows:

"In cases where both conditions; arise of damages which are difficult or impossible to compensate for as a result of the implementation of the administrative action and explicit contrariety to law of the administrative action, materialize together, the Council of State or the administrative

courts can render a judgment on the stay of execution by indicating the justification after the defense statement of the administration standing as defendant is taken or after the duration for defense has expired. The execution of administrative actions the effectiveness of which will exhaust upon the execution thereof can be stayed without taking the defense statement of the administration in a way to be decided again after the defense is taken."

21. The 1st sentence of Article 28(1), titled "Consequences of decisions", of the Law No.2577 is as follows:

"As to the requirements of the decisions of the Council of State, the regional administrative courts, the administrative and tax courts on the merits of the case and on the stay of execution, the administration shall be obliged to conduct act or take action without delay. Under no circumstances can the duration for this exceed thirty days starting from the notification of the decision to the administration."

22. Article 8 of the Law on the Regulation of Publications on the Internet and Fight Against Crimes Committed by Means of Such Publications No. 5651 of 4/5/2007 is as follows:

"(1) A decision of blocking of access shall be issued concerning publications, which are made on the Internet and regarding which there is sufficient reason for suspicion that their content constitute the following crimes:

a) The following crimes stipulated in Turkish Criminal Code No.5237 of 26/9/2004;

1) Inducing to suicide(Article 84),

2) Sexual abuse of children (Article 103(1),),

3) Facilitating the use of drugs or stimulant substances (Article190),

4) Procurement of substances that are hazardous for health (Article 194),

5) Obscenity (Article 226),

6) Prostitution (Article 227),

7) Providing a place and means for gambling (Article 228),

b) Crimes stipulated by the Law on Crimes Committed Against Atatürk No.5816 of 25/7/1951.

(2) The decision of blocking of access shall be issued by the judge at the investigation stage, by the court at the prosecution stage. During the investigation phase, in circumstances where delay would be inconvenient, the blocking of access can also be decided by the Public prosecutor. In this case, the Public prosecutor shall present his/her decision to the judge's approval within twenty-four hours and the judge shall make a ruling within twenty four hours at the latest. In the event that the decision is not approved within this period, the measure shall be immediately lifted by the Public prosecutor. The decision of blocking of access can be issued in a limited manner for a certain period if it is considered to be of the quality to ulfil the aim. An objection can be filed against the decision regarding the blocking of access issued as a protection measure according to the provisions of the Law of Criminal Procedure No.5271 of 4/12/2004.

(3) A copy of each of the decision of blocking of access issued by the judge, the court or the Public prosecutor shall be sent to the Presidency in order for the required action to be performed.

(4) The decision of blocking of access shall be issued ex officio by the Presidency in the event that the content or hosting provider of the publications whose content constitute the crimes stipulated under clause one is located abroad or regarding publications whose content constitute the crimes stipulated under subparagraphs (2), (5) and (6) of paragraph (a) of paragraph one even if their content or hosting provider is located within the country. This decision shall be notified to the access provider and it shall be requested that it ulfil the required action.

(5) The required action for the decision of blocking of access shall be fulfilled immediately and within twenty-four hours starting from the moment of notification of the decision at the latest.

(6) In the event that the identities of those who have made the publications, which constitute the subject of the decision of blocking of

access issued by the Presidency, a criminal complaint shall be filed by the Presidency at the Chief Public Prosecutor's Office.

(7) In the event that a decision to the effect that there are no grounds for prosecution is issued at the end of the investigation, the decision of blocking of access shall automatically remain null and void. In this case, the Public prosecutor shall send a copy of the decision to the effect that there are no grounds for prosecution to the Presidency.

(8) In the event that a decision of acquittal is issued at the prosecution phase, the decision of blocking of access shall automatically remain null and void. In this case, a copy of the decision of acquittal shall be sent to the Presidency by the court.

(9) In the event that the content whose subject constitutes the crimes stipulated under paragraph one is removed from broadcast, the decision of blocking of access shall be lifted by the Public prosecutor at the investigation phase, by the court at the prosecution phase.

(10) The officials of hosting or access providers that do not ulfil the required action for the decision of blocking of access issued as a protection measure shall be sentenced to five hundred to three thousand days of judicial fine in the event that the action does not constitute another crime that requires a more severe punishment.

(11) In the event that the decision of blocking of access issued as an administrative measure is not fulfilled, an administrative fine of ten thousand New Turkish Liras to a hundred thousand New Turkish Liras shall be imposed by the Presidency on the access provider. In the event that the decision is not fulfilled within twenty-four hours starting from the moment when the administrative fine is imposed, a decision can be issued by the Institution to cancel the authorization upon the request of the Presidency.

(12) The legal remedy can be seized as per the provisions of the Law of Administrative Procedure No.2577 of 6/1/1982 against the decisions regarding administrative fines imposed by the Presidency or the Institution due to misdemeanors defined in this Law.

(13) An objection can be filed by the Presidency as per the provisions of the Law of Criminal Procedure Law No.5271 of 4/12/2004against the judge and court decisions sent to the Presidency to carry out the actions.

(14) (Additional: 12/7/2013-6495/47 Art.) In the event that the institutions and organizations defined under Article 3(ç)(1) of the Law on the Regulation of Taxes, Funds and Shares Collected from Proceeds of Games of Chance No.5602 of 14/3/2007 determine that crimes, which fall within their field of duty, are committed on the Internet, they can issue a decision of blocking of access regarding these publications. The decisions of blocking of access shall be sent to the Presidency of Telecommunication and Communication in order to be implemented.

(15) The judge's decision issued during the stage of investigation as per this Article and the judge's decision issued as per Articles 9 and 9/A shall be issued by the criminal courts of peace determined by the High Council of Judges and Prosecutors in places where there are more than one criminal court of peace.

IV. EXAMINATION AND GROUNDS

23. The application file was examined during the session of the Court on 29/5/2014 and the followings were decided:

A. The Applicants' Allegations

24. The claims brought forward by Youtube LLC Corporation Service Company, one of the applicants, are summarized as follows: The applicant indicated that;

a) In addition to being the owner of the website youtube.com, he was also a user of the mentioned site, and therefore, the blocking of access to the site violated his rights,

b) It was not demonstrated in the decision of the Criminal Court of Peace of Gölbaşı No.2014/358 based on content under which URL addresses the access was blocked, that although it was indicated in the mentioned court decision that within the framework of the investigation (No:2014/1051on 27/3/2014) conducted by the Chief Public Prosecutor's

Office of Gölbaşı regarding political and military espionage and the crime of declaring information that needed to remain confidential, conversations between high level civilian and military state officials, which needed to remain confidential for the security and domestic or foreign political interests of the State, were recorded and published on the internet, that, in order to halt the continuation of the crime being committed, a decision was delivered to block the access to the URLs, which are the subject of the decision, as per paragraph one of Article 22 of the Constitution and Article 328(1) and Article 330(1) of the Turkish Criminal Code and to continue the blocking of access until these URLs and contents of the same quality were definitively removed, the expression "*similar content*" was not sufficiently clear,

c) The decision of blocking of access could not be delivered as per the above mentioned Article 22 of the Constitution and Articles 328/1 and 330/1 of the Turkish Criminal Code, that the decision of blocking access to the entirety of the website based on the indicated justifications was disproportionate; that the blocking of access continued despite the fact that the decision regarding the blocking of access to the entire broadcast was lifted with the decision of the Criminal Court of Peace of Gölbaşı (File No: 2014/381 on 4/4/2014) and it was decided to block access to 15 URL addresses only,

ç) Although the access was finally blocked ex officio by the TIB with the justification that Article 8(1)(b) of the Law No.5651 was violated, no authority was bestowed upon the administration to block the entirety of the access to the site, that, moreover, it was not indicated under which URL address the content that caused the violation was located and that the element of reason of the administrative action was explicitly stated and that the interference was disproportionate and that the blocking of the entire access to the site was restrictive of the company's commercial freedom,

and the applicant alleged that his rights defined under Articles 26 and 48 of the Constitution were violated.

25. The claims brought forward by the applicants Kerem Altıparmak, Yaman Akdeniz, Mustafa Sezgin Tanrıkulu, Metin Feyzioğlu, Erol Ergin, Mahmut Tanal and Mesut Bedirhanoğlu are summarized as follows:

The applicants indicated that:

a) Internet broadcasting was evaluated by the European Court of Human Rights within the framework of the freedom of expression, that the website youtube.com was widely used by individuals for purposes of independent journalism and democratic communication within the framework of the concept of "*citizen journalism*" in our country and across the world and that the mentioned site was one of the platforms where the freedom of expression was exercised in the most efficient manner;

b) Despite the fact that the blocking of access imposed regarding the entirety of the mentioned site was lifted with a court decision, the access to the site was still blocked based on administrative decisions of arbitrary nature;

c) The blocking of access to this site, where all sorts of artistic and scientific content can be shared, was of negative quality in terms of the freedom of expression and bore severe consequences, that the access of individuals to information and documents over the mentioned website was also a matter of relevance to the private lives of these individuals, that the right to privacy and protection of private life defined under Article 20 of the Constitution was also violated with the imposition of blocking of access to the entire site;

ç) The fundamental rights stipulated under the relevant Articles of the Constitution could only be restricted with a judge's decision, not by an administrative institution, that even in circumstances where delay would be problematic, it was envisaged that decisions delivered within the framework of the authority of restriction to authorities except for a judge's decision needed to be submitted to the approval of a judge within 24 hours and that there was no exception to this rule;

d) A similar regulation was also included under Article 8 of the Law No.5651, that by indicating that granting the authority to the administration to deliver a decision of blocking of access in certain circumstances as per Article 8(4) was contrary to the Preamble as well as Articles 6 and 9 of the Constitution, and that the fact that the

administration issued a judicial decision by replacing the judicial instance amounted to usurpation of function;

e) The expression "*in the event that the content and hosting provider of the publications whose content constitute the crimes stipulated under paragraph one is located abroad*", which is included under Article 8 of the mentioned Law, was conditional on the existence of a crime and referred to the measures to be taken with regard to this crime, that therefore, the authority granted here was clearly a judicial police authority and that the decisions on this matter could only be delivered by judicial authorities, and that the administration could play a role only in the implementation of the decision;

f) The systematic interpretation of the Constitution demonstrated that the mentioned rule was contrary to the Constitution; that the relevant judgment concerned the decisions of blocking of access to a website, which falls within the scope of private life, that Article 20 of the Constitution regulated that decisions, which amount to an interference with private life, could only be delivered with judicial decisions and that the same system was also envisaged in international conventions on human rights, that, seen from this perspective, the opposite situation, that was, leaving the decision of restriction to administrative institutions instead of judicial organs, was clearly against the fundamental rights and freedoms regime of the Constitution and the criterion of conformity to the wording and spirit of the Constitution, which was considered under Article 13 of the Constitution to be one of the conditions of restriction.

g) Although the TIB relied on the justification of ex officio blocking of access as per the Law on Crimes Committed against Atatürk No.5816, that an ill-intentioned individual uploading a content that insults Atatürk to Youtube could lead to the consequence of millions of users not being able to access billions of content, that this situation was contrary to Article 13 of the Constitution due to the fact that it amounted to a disproportionate restriction;

ğ) It was indicated in the decision of the Criminal Court of Peace of Gölbaşı No.2014/358 that within the framework of the investigation (No:2014/1051 on 27/3/2014) conducted by the Chief Public Prosecutor's

Office of Gölbaşı regarding political and military espionage and the crime of declaring information that needed to remain confidential, conversations between high level civilian and military state officials, which needed to remain confidential for the security and domestic or foreign political interests of the State, were recorded and published on the Internet, that although, in order to halt the continuation of the crime being committed, a decision was delivered to block the access to the URLs, which are the subject of the decision, as per Article 22/2 of the Constitution and Article 328(1)and Article 330(1) of the Turkish Criminal Code and to continue the blocking of access until these URLs and contents of the same quality were definitively removed, the decision of blocking of access, which can be issued as a protection measure within the framework of the Law No.5651, was an exceptional situation envisaged only for catalog crimes; that due to the fact that the crime types under Article 8 were listed in a restrictive manner, the protection measure could not be resorted to with regards to, for instance, crimes pertaining to political or military espionage regulated under Article 328(1) of the TCC or crimes pertaining to declaring information that needed to remain confidential regulated under Article 330(1), that otherwise, a conclusion could be drawn to the effect that this mechanism could be envisaged for all crimes without opting for a restricted enumeration by the law maker, that, in turn, would be against the principle that the law maker did not conduct an exercise in futility;

h) It was also not possible to block access as per Article 8(1)(b) of the Law No.5651, which was demonstrated by the TIB as the justification for the decision of blocking, that the definition of crime referred to by the mentioned provision of the Article and defined by the Law No.5816 and the justification for the blocking were different, that the restriction in the form of blocking of access was against the criteria pertaining to the restriction of fundamental rights and freedoms;

and the applicants alleged that their rights defined under Articles 22, 26, 27, 40, 48 and 67 of the Constitution were violated.

B. The Constitutional Court's Assessment

1. Admissibility

26. The applicants Yaman Akdeniz, Kerem Altıparmak and Metin Feyzioğlu work as academic members at various universities. These applicants stated that they carried out scientific studies in the field of human rights and criminal law, that they shared these studies through their accounts on the website youtube.com, that they also accessed the United Nations and Council of Europe texts and images, which were of relevance to their fields of study, over the site. The applicants Mustafa Sezgin Tanrıkulu and Mahmut Tanal currently serve as members of the Parliament from Istanbul, they indicated that they shared their speeches and activities within the legislative organ via the mentioned site, that furthermore, they benefited from the site in matters pertaining to human rights law, which was their field of study. The applicant Mesut Bedirhanoğlu stated that, in addition to being an active user of the site, he also shared footage of seminars, conferences and television programs related to his field of expertise via the mentioned website due to the fact that he was doing a doctorate on international human rights law. The applicant Erol Ergin stated that he had a membership to the mentioned site, that he regularly followed channels of his choosing and individuals who shared content via the profile he organized on the site according to himself, that in addition to writing opinions about these, there were also civil society organizations and professional organizations whose activities he regularly followed. The applicant Youtube LLC stated that in addition to being the owner of the mentioned site, due to the fact that it was a commercial company, of which he was a user, the site was effectively used in promoting its commercial activities.

27. In light of these explanations, it is understood that the applicants were directly affected by the administrative action pertaining to the blocking of access to the entirety of the website youtube.com.

28. The applicants alleged that the judicial remedies against the mentioned action of the TIB were exhausted, that moreover, applying to the administrative judicial instance was not an effective remedy, that therefore, this remedy did not need to be exhausted, that the legal

remedies were exhausted due to the fact that the decision of the Criminal Court of First Instance of Gölbaşı (File No: Misc. Works 2014/81 on 4/4/2014) regarding the acceptance of objection was final.

29. Article 148(3) of the Constitution is as follows:

> *''In order to makean application, ordinary legal remedies must be exhausted.''*

30. Article 45(2) of the Law on the Establishment and Trial Procedures of the Constitutional Court No.6216 of 30/3/2011, headed *''Right to individual application''* is as follows:

> "All administrative and judicial remedies stipulated in the law in relation to the act, action or neglect, which is claimed to have caused the violation, must be exhausted before the individual application is lodged."

31. According to the mentioned provisions of the Constitution and the Law, in order to be able to apply to the Constitutional Court via individual application, the ordinary legal remedies must be exhausted. The respect for fundamental rights and freedoms is a constitutional obligation of all State organs, the redress of rights violations that emerge as a result of neglecting this obligation is the duty of administrative and judicial authorities. For this reason, it is essential that claims to the effect that fundamental rights and freedoms have been violated be brought forward first before the courts of instance, and that they be evaluated and resolved by these authorities (App. No: 2012/403, 26/3/2013, § 16).

32. For this reason, individual application to the Constitutional Court is a legal remedy of secondary nature to be applied to in the event that the alleged rights violations are not redressed by the courts of instance. Due to the secondary nature of the individual application, the ordinary legal remedies must be exhausted in order for an individual application be lodged with the Constitutional Court. In accordance with this principle, the applicant needs to primarily convey the complaint, which he will lodge with the Constitutional Court, to the administrative and judicial authorities of venue within due period in accordance with the due procedure, to submit the relevant information and evidence

within due period and to pay required attention to pursue his case and application in this process (App. No: 2012/403, 26/3/2013, § 17).

33. In addition to being accessible, the remedies that must be exhausted must also be able to redress the violation and offer a reasonable chance of resolving the complaints of the applicant, when exhausted. As a result, including these remedies in the legislation is not sufficient per se, it should also be demonstrated that they are effective in practice (App. No: 2012/239, 2/7/2013, § 29). Moreover, the rule pertaining to the exhaustion of remedies is not absolute in nature. When it is evaluated whether this condition has been fulfilled or not, the specific conditions of each concrete application must also be taken into consideration. Therefore, not just the existence of a number of remedies in the legal system but also the conditions for the implementation thereof and the personal circumstances of the applicant must be taken into account in a realistic manner. As a result, the liabilities of the applicant in terms of the exhaustion of remedies need to be determined by taking the circumstances of the application into account.

34. In the incident that is the subject of the application, it is understood that against the decision of the Criminal Court of Peace of Gölbaşı to block access, a request was made by the Union of Turkish Bar Associations to re-evaluate this decision, that the decision regarding the blocking of access to the entirety of the site was lifted upon the acceptance of the request, that the access ban continued upon the acceptance of the objection made against the mentioned decision by the Criminal Court of First Instance, that finally upon the objection to the effect that the decision No:2014/81 delivered by the Criminal Court of First Instance was ''contrary to Article 268 of the Law No.5271 and that the decision that was delivered needed to be declared null and void'', it was decided with no right of appeal that "*the decision pertaining to the blocking of access to the 15 links be continued and that the website www.youtube.com in question be opened to access in this manner, that a copy of the decision be sent to the Information and Communication Technologies Authority, the Presidency of Telecommunication and Communication and the Ministry of Transport, Maritime Affairs and Communications*".

35. In addition, it is understood that in the case filed by Youtube LLC on 4/4/2014 against the action of the TIB with the request of stay of execution, it was decided by the 4th Administrative Court of Ankara (File No: E.2014/655 on 2/5/2014) to stay the execution and that the mentioned decision was notified to the TIB on 7/5/2014.

36. In this case, it is understood that multiple remedies that are considered to potentially exist were resorted to; that despite the final decision of the Criminal Court of First Instance of Gölbaşı and the stay of execution decision of the Administrative Court of Ankara, the access to the website in question continued to be blocked. However, the implementation of a judicial decision in a State of law requires not only a formal execution but also the elimination of the identified unlawfulness under objective conditions and within the shortest duration possible (App. No: 2014/3986, 2/4/2014, § 24).

37. The freedom of expression is one of the foundations of a democratic society and it is among the indispensable conditions for the self-improvement of the society and the individual. Social pluralism can only be achieved in an environment of free discussion where all kinds of ideas can be freely expressed. In this context, establishing social and political pluralism is dependent on expression of all kinds of thoughts in a peaceful and free manner. Similarly, an individual can realize his/her unique personality in an environment where he/she can freely express his/her thoughts and engage in discussion (App. No: 2013/2602, 23/1/2014, § 41).

38. Taking into consideration the restrictive impact, of the blockage of access to a social media website which is intensively and effectively used in our country, on the freedom of expression of the users, which is one of the foundations of a democratic society, it is an obligation emanating from the principle of the state of law that the conformity of such restrictions to the law be checked within the shortest amount of time possible and, that in the case of identifying a contrariety to law, the said restrictions be immediately abolished. It is observed that despite the court decisions stated above in relation to the decision to block access that is in question (§37), access to the website youtube.com, which is

the subject of the violation claim of the applicants, is still not possible. It is apparent that the information and thoughts shared on social media in relation to certain incidents and cases may become outdated and lose their effect and value as time passes. Within the framework of the present case, it is observed that neither is there a connection between the content upheld as the justification for the blocking of access to the mentioned site and the applicant, who are individual users, nor is there any claim to the effect that there is a content in the sites of which they are users that is the subject of blocking of access.

39. Social media, which Youtube is a part of, is a transparent platform where mutual communication takes place and which allows individual participation in the form of creating, publishing and commenting on media content. Today, websites such as these have become an important realm whereby all users of social media across the world can jointly engage in communication, comments, messages, information, criticism, sales and promotions take place. The social media platform provided by internet is indispensable in terms of the individuals' announcing, mutually sharing and disseminating their information and opinions and communicating, it is clear that interferences with these sorts of websites affect millions of individual users. Even though it has the characteristics of a measure, in the event that the access to the entirety of the website is blocked due to a content shared by a user, it becomes impossible for all individual users to benefit from the website. That the action required by the decision has not been taken until today despite the fact that a decision of stay of execution was delivered in the case filed by Youtube LLC, one of the applicants, in administrative justice with the request of stay of execution and that the uncertainty as to when the access to the site would be restored persists indicate that the remedy is not effective. Moreover, since opening the access to the website in its entirety as a result of the implementation of the decision of stay of execution will bear consequence with regard to the other applicants, who are understood to be users of the blocked website, expecting each individual user to resort to legal remedies again is not in compliance with the objectives of the principle of exhausting remedies, which is part of the individual application procedure. In this case, it has been concluded that the

remedy in question is not an effective remedy that needs to be exhausted with a view to resolving the fundamental right violation.

40. Since the complaints of the applicants in relation to Article 26 of the Constitution are not manifestly ill-founded and since no other reason of inadmissibility has been found, the applications must be declared admissible.

2. Merits

41. The applicants indicated, in summary, that the ex officio blocking of access by the TIB to the video sharing website youtube.com with an administrative decision was unlawful, that despite the fact that an ex officio decision of blocking of access could be delivered in connection with a limited number of allegations of crime enumerated under Article 8(1)of the Law No.5651 as per paragraph (4) of the same Article, the blocking of access to the website youtube.com with a justification that does not conform to the mentioned type of crime severely restricted the right to access information in addition to restricting the possibility of accessing videos published on the mentioned website, that this blocking blocked access not only to the information that currently exists on the mentioned website but also to information to be shared in the future; that the request of the Chief Public Prosecutor's Office of Gölbaşı and the decision of the Criminal Court of Peace of Gölbaşı (File No:2014/358 on 27/3/2014), indicated above, were also unlawful; that it was not possible to block access due to the crimes defined under Articles 328 and 330 of the Turkish Criminal Code that were put forward as the grounds for the decision of blocking of access; that the restriction regarding the blocking of access was contrary to the criteria pertaining to the restriction of fundamental rights and freedoms; and that the blocking of the entirety of access to the mentioned video sharing website was not in conformity with the constitutional criteria pertaining to the restriction of fundamental rights and freedoms, and that the principle of proportionality was not abided by (§§ 25, 26).

42. It was indicated in summary by the TIB officials, who were invited to provide information regarding technical matters in the incident that is the subject of the application, that with a view to implementing the

decision of blocking of access, first a notification was made to the content provider to remove the URL-based content by utilizing the warn-remove procedure, that in the event that this did not yield results, an effort was made to block access on a URL-basis in "http" type sites, that it was possible to overcome this blocking of access by using VPN (Encrypted Virtual Link) and TOR (Anonymity Network), that in addition, the blocking of access to "https" type sites was not technically possible, that with the establishment of the Union of Access Providers, institutional work was carried out with access providers in terms of URL-based blocking of content and that this work was still ongoing.

43. Even though the applicants alleged that their rights defined under Articles 22, 26, 27, 40, 48 and 67 of the Constitution were violated, the Constitutional Court, which is not bound by the judicial characterization of the incidents made by the applicants, evaluated the claims of the applicants within the framework of the freedom of expression.

44. Article 13 of the Constitution, headed "Restriction of Fundamental Rights and Freedoms", is as follows:

> *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevantarticles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of theConstitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality.."*

45. Article 26 of the Constitution, headed *''Freedom of expression and dissemination of thought''*, is as follows:

> *"Everyone has the right to express anddisseminate 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. …*
>
> *The exercise ofthese 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 protectingprofessional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.

Regulatory provisions concerning the use of means to disseminate information and thoughts shall not be deemed as the restriction of freedom of expression and dissemination of thoughts as long as the transmission of information and thoughts is not prevented.

The formalities, conditions and procedures to be applied in exercisingthe freedom of expression and dissemination of thought shall be prescribed by law. "

46. As per the said regulations, the freedom of expression covers not only the freedom to "*have a thought and conviction*" but also the existing freedom to "*express and disseminate thought and conviction (opinion)*" and the associated freedom to "*receive and give information or opinion*". In this framework, freedom of expression means that individuals can freely access news and information and others' thoughts, that they cannot be condemned for the thoughts and convictions they have and that they can freely express, tell, defend, convey and disseminate to others these through various methods by themselves or together with others (App. No: 2013/2602, 23/1/2014, § 40).

47. As frequently stated by the ECtHR in its judgments pertaining to the freedom of expression, in order for the freedom of expression to fulfill its social and individual function, not only the "information" and "thoughts" which are considered to be positive, accurate or not harmful by the society and the State but also the information and thoughts which are considered to be negative or inaccurate by the State or a segment of the society and are disturbing for them should be freely expressed and the individuals should be sure that they will not be subject to any sanctions due to these expressions. The freedom of expression is the basis of pluralism, tolerance and open-mindedness and without this freedom, and it is not possible to speak of "a democratic society" (Handyside v. United Kingdom, App. No: *5493/72, 7/12/1976, § 49).*

48. The means that can be resorted to in the exercise of the freedom of expression and dissemination of thought are listed in Article 26 of the Constitution as *''orally, in writing, in pictures or through other means''* and with the expression *''other means''*, it is demonstrated that all kinds of means of expression are under constitutional protection *(App. No:2013/2602, 23/1/2014, §43).*

49. In this context, the freedom of expression is directly related to a significant portion of other rights and freedoms guaranteed by the Constitution. The freedom of the press which guarantees the dissemination of ideas, thoughts and information by means of visual and printed media tools is also one of the tools to be used in the exercise of the freedom of expression and dissemination of thought. The freedom of the press is protected within the scope of Article 10 on the freedom of expression of the ECHR and is also specially regulated in Articles 28 to 32 of the Constitution *(App. No: 2013/2602, 23/1/2014, §44).*

50. In a democratic system, in terms of ensuring that those who possess the public powers exercise their authorities within the limits of the law, the press scrutiny and the public scrutiny play a role just as effective and are equally important as the administrative scrutiny and the judicial scrutiny. Since the functioning of the press which acts as a *public observer* on behalf of the society is dependent on its being free, the freedom of the press is a freedom which is valid and vital for everyone *(see AYM, E.1997/19, K.1997/66, K.T. 23/10/1997), (for judgments of the ECtHR in the same vein see Lingens v. Avusturya, App. No: 9815/82, 8/7/1986, § 41; Özgür Radyo-Audio Radio Television Production and Promotion Co. v. Turkey, App. No: 64178/00, 64179/00, 64181/00, 64183/00, 64184/00, 30/3/2006 § 78).*

51. The Internet has significant importance in modern democracies in terms of the exercise of fundamental rights and freedoms, specifically of the freedom of expression. Social media is a media channel that is a transparent platform where mutual communication takes place and which allows individual participation in the form of creating, publishing and commenting on media content. The social media platform that the Internet provides is of an indispensable quality for individuals to

express, mutually share and disseminate their information and thoughts. Thus, it is clear that the State and administrative authorities need to behave very sensitively in regulations and practices to be issued in relation to social media tools, which have become one of the most effective and widespread methods of not just expressing thoughts but also obtaining information in our day.

52. The State has both positive and negative liabilities in relation to the freedom of expression. Within the scope of their negative liabilities, public authorities should not ban the expression and dissemination of thought as long as this is not compulsory within the framework of Articles 13 and 26 of the Constitution; within the scope of their positive liabilities, they should take the measures necessary for the actual and effective protection of the freedom of expression (for a similar opinion of the ECtHR, see *Özgür Gündem v. Turkey*, App. No: 23144/93, 16/3/2000, § 43). While striking this balance, through the limited reasons and legitimate objectives prescribed in the law within the scope of Articles 13 and 26 of the Constitution, it is necessary to observe a proportional balance between the objective and tool of restriction and the essence of the right should not be infringed upon by taking into consideration the requirements of the democratic order of the society (App. No: 2013/2602, 23/1/2014, § 56). The Constitutional Court will determine, according to the unique character of each case, whether an interference is required in a democratic society, whether the essence of the rights has been infringed upon during the interference and whether the interference has been proportional or not (App. No: 2013/2602, 23/1/2014, § 61).

53. On the other hand, the freedom of expression and dissemination of thought is not absolute and unlimited. In this context, while exercising the freedom of expression and dissemination of thought, attitudes and behaviors violating the rights and freedoms of individuals should be refrained from. As a matter of fact, the freedom of expression and dissemination of thought as guaranteed by Articles 26 and 28 of the Constitution can be restricted due to the reasons stated in these Articles in accordance with the conditions stipulated in Article 13 of the Constitution. As per Article 13 of the Constitution, the restrictions on fundamental rights and freedoms can only be imposed by law and they

can neither be contrary to the requirements of the democratic order of the society and the principle of proportionality nor infringe upon the essences of rights and freedoms.

54. The criterion of restricting rights and freedoms with laws has an important place in constitutional law. When there is an interference with a right or freedom, the first matter that needs to be determined is whether or not there is a legal provision that authorizes the interference, that is, a legal foundation of the interference (App.No: 2013/2187, 19/12/2013, § 36). As a result, the interference with the freedom of expression, which is protected under Article 26 of the Constitution, needs to be envisaged by a law that has the characteristics required by the principle of lawfulness. It will be concluded that an interference, which does not carry the element of lawfulness, violates a constitutional right or freedom without examining whether or not it is in line with the other guarantees such as bearing no prejudice to the essence, being one of the requirements of the democratic social order and the proportionality.

55. It is not sufficient for the interferences with constitutional rights to be based on a law, this law also needs to bear such qualities as certainty and predictability. In other words, in order for the relevant individual to determine his/her behavior, the law needs to be easily accessible, understood by him/her albeit by receiving professional assistance when necessary and be explicit, clear and sufficiently distinctive (for judgments of the ECtHR in the same vein see *Altuğ Taner Akçam v. Turkey*, App.No: 27520/07, 25.10.2011, § 87; *Yıldırım v. Turkey*, App.No: 3111/10, 18.12.2012, § 57).

56. In circumstances where a decision is delivered to block access to a website, it is compulsory that the principles of legal security and legal certainty, which are among the preconditions of a state of law, be taken into consideration. The principle of legal security, which aims to ensure the legal security of individuals, requires legal norms to be predictable, individuals to be able to have confidence in the State in all of their acts and actions, and the State to avoid methods that would tarnish this feeling of confidence in its legal regulations. The principle of certainty refers to legal regulations being explicit, clear, understandable and

implementable in a way that will not give rise to any interruption and doubt in terms of both individuals and the administration, moreover, to them including protective guarantees against arbitrary practices of public authorities. In this respect, the text of a law should be drawn up at a level that will allow individuals to foresee in a certain clarity and accuracy which legal sanction or consequence is attributed to which concrete action and case by way of receiving legal aid when necessary. As a result, the potential effects and consequences of the law need to be sufficiently predictable prior to its implementation (AYM, E.2013/39, K.2013/65, 22/5/2013).

57. Websites with large numbers of users such as youtube.com, access to which has been blocked, significantly contribute to forming the society's agenda and facilitating the pursuit of the agenda and the exchange of information due to their capacity of storing and publishing lager quantities of data and the accessibility thereof (for judgments of the ECtHR in this matter see *Times Newspaper Ltd. v. The United Kingdom*, App. No: 23676/03, 10/6/2009, § 27).

58. For this reason, in circumstances where a means of restriction (ex officio blocking of access) regarding this matter is imposed by the public power to the rights enshrined in the Constitution and the European Convention on Human Rights, the scope and procedures pertaining to the utilization of this kind of an authority need to be defined in a sufficiently explicit manner in the relevant Law (see *Yıldırım v. Turkey, App .No: 3111/10, 18.12.2012*, § 59).

59. In the incident that is the subject of the application, it is understood that the TIB first blocked the access to the website youtube.com with the expression "*As a result of the technical examination and legal assessment conducted as per the Law No.5651, based upon the decision of the Presidency of Telecommunication and Communication (File No.490.05.01.2014-48125 and 27/3/2014) regarding youtube.com, an administrative measure is applied by the Presidency of Telecommunication and Communication*", that despite the fact that following the mentioned blocking decision, as a result of the judicial process that is described above in detail, with the decision of the Criminal Court of First Instance of Gölbaşı (File

No:2014/91 on 9/4/2014) it was decided with no right of appeal that the blocking of access regarding the 15 URL-based addresses of the website youtube.com be continued, that however, the website be opened to access by removing the blocking of access pertaining to the entirety of the website and that it was decided by the 4th Administrative Court of Ankara to stay the execution (File No: E.2014/655 on 2/5/2014) and that the mentioned decision was notified to the TIB on 7/5/2014, the action required by the decisions of the judiciary was not taken and that the ex officio blocking of access to the mentioned website was continued by bringing forward Article 8(1)(b) of the Law No.5651 as the justification.

60. When the incident that is the subject of the application is viewed in light of these phenomena and principles, the fact that the TIB applied administrative measures that need to be established on a URL basis in the form of a general ban geared towards the broadcast at an incomparably high number of URL addresses that are not related with the content that is the subject of the measure without exploring the existence of an interference measure that could be implemented merely towards the content the unlawfulness of which was established and was of a less severe nature, lead to the consequence of expanding the decision of measure in such a way as to block the access of users who are not the content or hosting providers of the content that is brought forward as the justification of the delivery of this decision (in the same vein see *Yıldırım v. Turkey, App. No: 3111/10, 18.12.2012,* § 63).

61. It is understood that it was decided ex officio by the TIB to block the access to the entirety of the website youtube.com by bringing forward Article 8(1)(b) of the Law No.5651 as the grounds and as per paragraph (4) of the same Article. It is seen that under Articles 8, 9 and 9/A of the Law No.5651, it is regulated that the measure of blocking access be decided upon by judges or courts, that, in the event that a decision is delivered by authorities other than courts, the decision be immediately submitted to court approval, that the decision to block access be principally delivered within the framework of the principle of blocking the access (on URL basis) to the harmful content. The blocking of access due to catalog crimes is regulated under Article 8 and it is adjudged under paragraph (2) of the Article that the decision to block

access shall be delivered by the judge during the investigation stage, by the court during the prosecution stage, that in circumstances during the investigation stage where delay would be problematic, it can also be decided by the Public prosecutor to block access, that in this case the decision shall be submitted to the approval of the judge within 24 hours and that the judge shall need to decide within 24 hours.

62. It is stated under Article 4 that "*The decision of blocking of access shall be issued ex officio by the Presidency in the event that the content or hosting provider of the publications whose content constitute the crimes stipulated under paragraph 1 is located abroad or regarding publications whose content constitute the crimes stipulated under clauses (2), (5) and (6) of sub-paragraph (a) of paragraph 1 even if their content or hosting provider is located within the country. This decision shall be notified to the access provider and it shall be requested that it fulfill the required action.*" It is understood that a regulation to the effect that the blocking via administrative action could be done in the form of blocking the access to the entirety of the website instead of on a URL basis is not included in any provision of the Law, that moreover, the restriction tools (blocking the access to the domain name, blocking the access via the IP address, blocking the access to the content and blocking the access via similar methods) with which the authority in this matter would be used to block the access to the content was not indicated by the administration with full clarity, that therefore, the scope and limits of the authority granted to the administration were unpredictable. Furthermore, it is not clear whether or not an authority similar to the authority granted to the judge under Article 9(4) of the Law to gradually block the access is also applicable with regard to the public administration. For this reason, it is seen that the scope and limits of the authority granted to the TIB with a view to blocking access are unclear due to the fact that its legal grounds do not fulfill the minimum condition for the principle of lawfulness, which is the obligation for the law to be understandable, clear and explicit.

63. It is understood from the explanations made above that the interference regarding the blocking of the entirety of access to the website youtube.com did not have sufficiently clear and distinct legal grounds and that, from this aspect, it was not found to have the quality

of being predictable from the point of view of the applicants. For this reason, it should be decided that the administrative action in question, which has the quality of being a severe interference with the freedom of expression of all the users that benefit from the website, violated the freedom of expression of the applicants, which is guaranteed under Article 26 of the Constitution.

Deputy President Serruh KALELİ and Member Engin YILDIRIM agreed with this opinion with different justifications.

Members Hicabi DURSUN and Celal Mümtaz AKINCI did not agree with this opinion.

V. JUDGMENT

In the light of the reasons explained, it was held on 29/5/2014, with the dissenting opinions of the members Hicabi DURSUN and Celal Mümtaz AKINCI, and **BY MAJORITY OF VOTES**;

A. That the application must be declared **ADMISSIBLE**,

B. That the freedom of expression of the applicants, guaranteed under Article 26 of the Constitution, was **VIOLATED**,

C. That TRY 1.912,20, which is the total of TRY 412,20 individual application fee (two applications) and TRY 1.500,00 counsel's fee, be **PAID** to Youtube LLC Corporation Service Company; TRY 412,20 individual application fee separately for their applications and TRY 1.500,00 jointly as the counsel's fee to Kerem Altıparmak and Yaman Akdeniz; TRY 1.706,10, which is the total of TRY 206,10 individual application fee and TRY 1.500,00 counsel's fee, to Mustafa Sezgin Tanrıkulu; TRY 1.706,10, which is the total of 206,10 TL individual application fee and TRY 1.500,00 counsel's fee, to Erol Ergin; TRY 1.706,10, which is the total of TRY 206,10 individual application fee and TRY 1.500,00 counsel's fee, to Mesut Bedirhanoğlu; TRY 206,10 of application fee to Metin Feyzioğlu; and TRY 206,10 of application fee to Mahmut Tanal as litigation costs,

D. That the payments be made within four months as of the date of application by the applicants to the Ministry of Finance following

the notification of the decision; that in the event that a delay occurs as regards the payment, the legal interest be charged for the period that elapses from the date, on which this period comes to an end, to the date of payment, and

E. That a copy of the judgment be sent to the Presidency of Telecommunication, the Information and Communication Technologies Authority and the Ministry of Transport, Maritime Affairs and Communications in order for the **VIOLATION AND THE CONSEQUENCES THEREOF** to be redressed as per paragraphs (1) and (2) of Article 50 of the Law No.6216.

DISSENTING OPINION

It is not possible to say that the freedom to explain and disseminate opinions and convictions, which serves to freely receive and give information without interference, included under Article 26 of the Constitution, is separate from the freedom of communication tackled under Article 22 of the Constitution.

Since social media is also an environment of communication in addition to being an area in which information and opinions are shared, there is no doubt that a restriction to be imposed upon social media will constitute an interference with the freedom of communication. In this case, it is an obligation that restrictions in relation to social media be in conformity with the principles contained under Article 22 of the Constitution. Within this framework, it is clear that the existence of legal grounds for interferences to be made with rights and freedoms will be sought.

It is concluded that rights guaranteed by the Constitution are violated even without examining the conformity of the interferences, which do not carry the element of lawfulness, with such other test guarantees as bearing no prejudice to the essence, being one of the requirements of the democratic societal order and proportionality.

It is seen that it is stated that the condition of lawfulness will be sought in exceptional reasons that authorize the restriction regarding

the utilization of the freedom of expression guaranteed under Article 26 of the Constitution, that it is possible only with a judge's decision or a decision of a competent instance approved by the judge to prevent the utilization or to bear prejudice to the confidentiality of the freedom of communication included under Article 22 of the Constitution.

This being the case, the Presidency of Telecommunication and Communication declared on 28/03/2014 that it imposed a protection measure in the form of closing the website to access with the thought that it automatically received authority also in accordance with Article 8(1)(b) of the Law No.5651 by exceeding the mentioned justification with respect to the judgment contained within the decision of the Criminal Court of Peace of Gölbaşı (File No:2014/358) that the access to 15 URL-based youtube.com accounts be blocked, that the access to the entirety of broadcast be blocked via IP and domain name in the event that the required action was not fulfilled.

Faced with objections raised subsequently and decisions to lift the blocking of access in relation to the entirety of the website youtube.com, it announced this time that it continued the measure of blocking access only in connection with Article 8(1)(b) of the Law No.5652, based on paragraph (4) of the same Article, it did not enforce the decision of stay of execution delivered by the 4thAdministrative Court of Ankara against this decision, despite the fact that it was notified to it.

Nevertheless, Article 8/1-b of the Law No.5651, which serves as the grounds for the expressions dated 28/03/2014 out of the expressions included in the justifications pertaining to the implementation of the decision of administrative measure by the Presidency of Telecommunication and Communication, is related to the crimes contained within the Law on Crimes Committed Against Atatürk No.5816. Given that the subject of the decision of the Criminal Court of Peace of Gölbaşı (File No:Misc. Works 2014/358) delivered upon the application of the Public Prosecutor's Office of Gölbaşı is "the prevention of recorded conversations, which need to remain confidential and are of relevance for the security of the State, from being published on the internet within the framework of the investigation it is conducting in

relation to political and military espionage and the crime of declaring information that needed to remain confidential", since it is understood that this matter is not related from a content point of view with the Article of the Law from which authority was allegedly derived, and moreover that it does not conform to the other types of crime listed under Article 8 and that for these reasons a protection measure could not be resorted to, it cannot be said that the public power utilized by the administration possessed legal grounds from this point of view. This interference, which does not bear the element of lawfulness, amounts to a violation.

In addition, it is understood that despite the decision of the Criminal Court of First Instance of Gölbaşı (File No: 2014/91 on 9/4/2014) to lift the blocking of the entirety of access to the website youtube.com and the decision of the 4thAdministrative Court of Ankara (File No:2014/655 on 2/5/2014) to stay the execution, the Presidency of Telecommunication and Communication continued its interference this time as per paragraph (4) of sub-paragraphs 1-b of Article 8 of the Law No.5651, by considering itself to be authorized ex officio in spite of the ambiguity contained within the Article.

It is an obligation for an interference with constitutional rights to have legal grounds. The requirement of the grounds to possess other qualities such as being certain and predictable first necessitates the existence of legal grounds including its conformity with the Constitution. Principles such as the comprehensibility, certainty and clarity of the existence of legal grounds render judicial legislation compulsory.

It cannot be said that the justifications of the decisions of the Presidency of Telecommunication and Communication pertaining to the implementation of administrative measure constitute legal foundation in this sense per se, nor do they carry constitutional guarantees. Especially given the obligation for restrictions pertaining to the freedom of communication guaranteed under Article 22 of the Constitution to be based on judge's decision, it is clear that the approach to the effect that the administration can implement the measure of blocking access unlimitedly by relying upon Article 8(4) of the Law No.5651 with

the justification that the crimes listed under this Article occurred is unacceptable. In order to be able to talk about the conformity of this authority with the Constitution, it must be utilized in emergency circumstances and be submitted to a judge's approval within 24 hours. Otherwise, the guarantees stipulated under Article 22 of the Constitution will be violated.

For the explained reasons; since it is understood that the justifications for the measures implemented by the Presidency of Telecommunication and Communication do not conform to the crime type justifications contained within the court decision that is taken as the basis for the implementation, and that paragraph (4) of sub-paragraphs 1/b of Article 8 of the Law No.5651, that is used ex officio in the decision to impose a measure, lacked legal grounds in addition to the principle of uncertainty included in the majority opinion, that therefore, the restriction imposed upon the freedom of expression enshrined under Article 26 of the Constitution does not bear the Constitutional criteria contained under Article 22(2) of the Constitution, while it was necessary to decide that Article 22 of the Constitution was also violated in addition to Article 26, the majority decision that contended merely with uncertainty and relied upon the violation of Article 26 was agreed with, with a different justification with the belief that the freedom of communication guaranteed under Article 22 was also violated.

Vice President	Justice
Serruh KALELİ	Engin YILDIRIM

DISSENTING OPINION

I believe that a decision of inadmissibility needs to be delivered regarding the application due to non-exhaustion of remedies against the action of the TIB to block the access to the website youtube.com in the concrete application.

Article 148(3) of the Constitution provides that:

Everyone may apply to the Constitutional Court on the grounds that

one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities. In order to make an application, ordinary legal remedies must be exhausted. ***In order to lodge an application, ordinary legal remedies must be exhausted.***

Article 45(2) of the Law No.6216, headed *''The right of individual application"*, provides that:

All administrative and judicial remedies stipulated in the law in relation to the act, action or neglect, which is claimed to have caused the violation, must be exhausted before the individual application is lodged.

According to the mentioned provisions of the Constitution and the Law, in order to be able to apply to the Constitutional Court via individual application, the ordinary legal remedies must be exhausted. The Constitutional Court has explained the purpose of the rule of exhausting remedies in its numerous decisions. The reason of existence of the condition to exhaust remedies is to give the opportunity to prevent and correct the violation of constitutional rights to courts of first instance, regional courts and courts of appeal prior to the lodging of individual application. This condition demonstrates that the primary protectors of fundamental rights and freedoms are the administrative authorities and the courts of instance, and that individual application to the Constitutional Court is a secondary/complementary protection mechanism.

As expressed in previous judgments of the Constitutional Court, the respect for fundamental rights and freedoms is a constitutional obligation of all State organs, and the correction of rights violations that emerge as a result of neglecting this obligation is the duty of the administrative and judicial authorities. For this reason, it is essential that claims to the effect that fundamental rights and freedoms have been violated be brought forward first before the courts of instance, and that they be evaluated and resolved by these authorities. In accordance with this principle, the applicant needs to primarily convey the complaint, which he will lodge with the Constitutional Court, to the administrative and judicial authorities of venue within due period in accordance with the due procedure, to submit the information and evidence he has regarding this subject within due period and to pay required attention to following his case and application in this process (Amongst numerous

judgments, see App. No: 2012/403, 26/3/2013, § 16 and 17; App. No: 2013/850, 19/12/2013, § 19; App. No: 2013/5028, 14/1/2014, § 23, 24; and App. No: 2012/254, 6/2/2014 § 31.)

In addition, if the exhaustion of remedies does not have an effect in the redress of the violation regarding the right of the applicant, in other words, if the remedy to be resorted to is ineffective or if a serious and irreversible danger towards the rights of the applicant will emerge in the event that the exhaustion of the remedy is waited for, the principle of respect for constitutional rights can require the Court to examine these applications (see App. No: 2013/1582, 7/11/2013, § 20).

In the present case, officials of the website Youtube.com applied to the Administrative Justice remedy, the decision of the 4th Administrative Court of Ankara to stay the execution was notified to the TIB on 7.5.2014, and the institution submitted its objections to this decision to the Court of First Instance. At the time when a decision regarding the present case was delivered by the Constitutional Court, the objection of the institution was not yet concluded. In addition, taking into consideration the fact that a week remained until the expiry of the thirty day period within which the TIB must implement the decision of stay of execution as per the Law of Administrative Procedure, the legal remedy had not been exhausted yet.

Given the TIB's obligation to implement the decisions of administrative justice, there is no uncertainty regarding the matter of when the access to the site is to be established by means of fulfilling the decision of the judiciary. In the present case, since the legal period provided to the TIB for the implementation of the decisions of the judiciary has not yet expired, it cannot be said that the decisions of administrative justice and especially the decisions of stay of execution do not provide an effective and accessible protection in terms of removing the violation and the negative consequences thereof. Had the court decision not been implemented despite the expiry of the period envisaged in the law, it could have been concluded that the application of the applicants to the administrative court was not an effective remedy.

The thought, which is included in the majority opinion, that the decisions of administrative justice and especially the decisions of stay of execution do not provide an effective and accessible protection carries within itself the danger of creating a chaos in the Turkish judicial

system. This would pave the way for individuals, who obtain decisions of stay of execution from authorities of administrative justice, to lodge individual applications to the Constitutional Court without waiting for the expiry of the periods, which are provided to the administration for the implementation of the decisions and envisaged in laws.

Finally, the administrative justice system has been functioning generally effectively for a very long time in our country. Of course it cannot be stated that some structural problems do not exist. Nevertheless, it is not possible to refer to such a structural problem in the present case. Ignoring the fact that the primary protector of fundamental rights and freedoms are the administrative authorities and courts of instance and that individual application to the Constitutional Court is a secondary protection mechanism will amount to depriving the administration, courts of first instance, regional courts and courts of appeal of the opportunity to prevent and correct the violation of constitutional rights. This kind of an approach bears, first and foremost, the danger of increasing the workload of the Constitutional Court to such a high degree with which the Court would not be able to cope.

Even more importantly, it is stated under Article 6 of the Constitution that "…*No person or organ shall exerciseany state authority that does not emanate from the Constitution.*". This would convey the image that the Constitutional Court pursues an activist policy by expanding the Constitutional authorities granted to it for the detriment of administrative and judicial authorities, and even by utilizing the authorities of other Constitutional organs which exercise sovereignty.

I am of the opinion that it should be decided that the individual applications are inadmissible due to the fact that the applicants applied to the Constitutional Court without exhausting the administrative legal remedy. Therefore, I do not agree with the majority opinion.

Justice
Hicabi DURSUN

DISSENTING OPINION

It was rendered in the Twitter judgment of our Court (App No: 2014/3986) that; "*Although it is understood in the case which is the subject of the application that the TIB blocked access to the website twitter.com on the basis of some court judgments, it is also understood upon the examination of the judgments submitted as basis that the said judgments only block access to certain URL addresses and that no judgment has been rendered by courts of instance in relation to (completely) blocking access to the website twitter.com.*" (§46) and by indicating in paragraph 48 of the same decision that "*...In the present case, it is observed that the action of blocking access is not performed on the basis of URL but by means of blocking access to the entirety of the website. Taking into consideration the regulations present in the Law No. 5651, it is obvious that the action which goes beyond the court judgments indicated to be the basis of the decision of the TIB and* ***which brings along the complete blockage of access****... **does not have any legal basis** and that the **blockage** of access to this social sharing website **without a legal basis** and by means of a decision of prohibition whose borders are not definite constitutes a severe interference with the freedom of expression, which is one of the most basic values of democratic societies.*" it is finally decided that the blocking of access to the website by the TIB **violated the freedom of expression** enshrined under Article 26 of the Constitution due to the fact that "***it lacks legal grounds***".

In other words, there was no legal grounds of the TIB's blocking of access to the entirety of twitter **even though there was not a court order regarding the blocking of access in its entirety**. This prerogative, which is manifestly ill-founded, was a clearly unlawful and "arbitrary" action. The fact that the decision of stay of execution of the 15th Administrative Court of Ankara delivered against this administrative action/act, which lacked legal grounds and thus was very clearly unlawful, was not implemented by the TIB resulted in the delivery of the violation decision, to which I also participated.

In the individual application (App No:2014/4705), which is the subject of the decision pertaining to the blocking of access to Youtube, Youtube LLC Corporation Service Company of the applicants is the owner of the website youtube.com, the other applicants are its users.

Upon the request of the Ministry of Foreign Affairs on 27.3.2014 regarding the "*blocking of access to 15 links, which are found on youtube and threaten national security in the first degree, and other addresses with similar content"*, the TIB contacted the representatives of the mentioned website in Turkey, indicated the URL addresses of the content in question and requested them to discontinue the broadcasting. When a result could not be obtained in this manner, an application was lodged on the same day with the Public Prosecutor's Office and the Criminal Court of Peace of Gölbaşı, and the blocking of access to the site was initiated by means of placing the announcement "*A PROTECTION DECISION is applied regarding this website by the Presidency of Telecommunication and Communication based on the decision of the Criminal Court of Peace of Gölbaşı (File No: 2014/358 on 27.3.2014)* ***as per paragraph 1/b of Article 8 of the Law No. 5651***." at the entry of the mentioned website as per the decision delivered by the court of first instance. As a result of the objections made to the Criminal Court of Peace and Criminal Court of First Instance of Gölbaşı against this decision, it was decided by the Criminal Court of First Instance of Gölbaşı with no right of appeal "*that the decision pertaining to the blocking of access to the 15 links be continued and that the website www.youtube.com in question be opened to access in this manner*."

In spite of these decisions, the blocking of access to the website youtube.com was not lifted. Because the TIB indicates that paragraph 1/b of Article 8 of the Law No.5651 provides an authority to impose a blocking of access without requiring a decision of the judiciary and that it imposed and continued the blocking of access as per this legal authority. The aforementioned paragraph of the Law pertains to the crimes committed via internet against Atatürk.

The TIB states that a total of 215 URL addresses amounting to insults to Atatürk were determined on the website youtube.com until 9.5.2014, that despite the fact that messages were sent and notifications were made to youtube pertaining to the removal of the content in question from the website, none of the contents contained within the 215 URL addresses were removed from broadcast on a global scale, that only the access to 134 was blocked from Turkey, that it is still possible to access 81 both from Turkey and from abroad.

Article 13 of the Constitution orders that "Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevantarticles of the Constitution without infringing upon their essence." According to the explanation of the officials of the TIB, it is seen that the site Youtube.com did not completely fulfill the TIB's request to block the broadcasts, which contain insults against Atatürk. Whether or not the website youtube.com was indifferent in the face of the TIB's request to block the entirety of the access to the broadcasts containing insultswhether or not it fulfilled its due responsibility, whether or not it displayed an effort regarding the matter of removing ongoing rights violations, on the other hand, whether or not the TIB utilized an authority stemming from the law, whether or not it brought prejudice to the essence of fundamental rights and freedoms while utilizing the authority, indeed whether or not the utilization was proportionate are matters that need to be evaluated and discussed in the appelate review first.

There are allegations to the effect that the mentioned company engaged in an indifferent and arbitrary attitude in the face of our country's requests while immediately fulfilling the demands and requests coming from the USA, and that it remained unmoved vis-a-vis phenomena other than the country where it is established and its commercial concerns. Fundamental rights and freedoms need of course to be protected; however, it should not be forgotten that almost no right or freedom is absolute and other rights and freedoms constitute the boundaries thereof. Moreover, it is stated under Article 14 of the Constitution with the heading "Prohibition of abuse of fundamental rights and freedoms" that; "None of the provisions of the Constitution can be exercised in the form of activities aiming to impair the indivisible integrity of the State with its territory and nation and to abolish the democratic and secular Republic, which is based on human rights. These cannot be interpreted in a way that enables the State or individuals to engage in an activity to abolish the fundamental rights and freedoms recognized by the Constitution or to restrict them more comprehensively than the manner specified in the Constitution."

It is stated under Article 26(2) of the Constitution with the heading "Freedom of expression and dissemination of thought" that; "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." Within the framework of these provisions and all other legislation, whether or not the acts and actions of the TIB and youtube along with it are in conformity with the law also needs to be evaluated in the legal remedy prior to individual application.

Websites with large numbers of users such as youtube.com, access to which was blocked, significantly contribute to forming the society's agenda and facilitating the pursuit of the agenda and the exchange of information due to their capacity of storing and publishing larger quantities of data and the accessibility thereof. This matter is really very important. However, as the service is provided, should this domain be open to the occurrence of attacks and insults to leaders and sacred values of nations, endangering a country's national security, the confidentiality of private life, dissemination of prostitution and obscenity, trampling on the moral values of the society, the exposure of state secrets? Should this and similar sensitivities not exist? Even if they do, should these be sacrificed for the sake of the freedom of expression and dissemination of thought? Or is it that these sensitivities, which are displayed for certain countries, may as well not be displayed for Turkey? I am of the opinion that this and many other similar matters are matters that need first be evaluated in the appelate review and by the public conscience.

According to the explanations that are made, it can be assessed that the blocking of access to the website youtube.com has legal grounds at this stage, and that the blocking was not entirely unlawful and arbitrary. In the event that there is a claim that the authority granted to the Institution by the law is used in violation of the law, first an application needs to be lodged with the administrative authorities and

the courts of instance. If a result cannot be obtained in this manner after the exhaustion of remedies, an individual application needs to be lodged (Code no. 6216, Art. 45/2).

Although some applicants considered the granting of the authority to the administration to deliver a decision of blocking of access in certain circumstances as per paragraph 4 of Article 8 as being against the Preamble as well as Articles 6 and 9 of the Constitution and they considered the administration's issuing a judicial decision by replacing the judicial instance as an usurpation of function, the venue to evaluate these claims is not the remedy of individual application. It is not legally possible to conduct an abstract review of norms during individual application. Besides, it is not quite possible to say in our incident that the institution engaged in usurpation of function by means of replacing the court of instance. Because the TIB alleges that it utilized the authority granted to itself by the Law No.5651. If the applicants allege that the act or action of the institution cause a violation, they should first exhaust the legal remedies envisaged for this matter.

"*The reason of existence of the condition to exhaust remedies is to give the opportunity to prevent and correct the violation of constitutional rights to administrative authorities and the courts of instance (courts of first instance, regional courts and courts of appeal) prior to the lodging of individual application. This condition demonstrates that the primary protectors of fundamental rights and freedoms are administrative authorities and courts of instance, and that individual application to the Constitutional Court is a secondary/complementary protection mechanism.*" (Guide Book on Individual Application to the Constitutional Court. Prof. Dr. Osman Doğru. Page: 102)

When it comes to assessing the claim that the administrative justice remedy was exhausted by the officials of the website youtube.com, that a decision of stay of execution was delivered by the court and that despite this the blocking of access was not lifted; the decision of stay of execution of the 4th Administrative Court of Ankara was notified to the institution on 7.5.2014, the institution used its legal right of objection against this decision and the objection of the institution had not been concluded at

the time when a decision was delivered by our Court. The is a possibility that the objection may be accepted.

For the reasons explained above, I am of the opinion that the individual applications, which the applicants lodged without exhausting the legal remedies, must be declared inadmissible for "non-exhaustion of remedies". Therefore, I do not agree with the majority opinion.

Justice
Celal Mümtaz AKINCI

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

ABDULLAH ÖCALAN

(Application no. 2013/409)

PLENARY
JUDGMENT

President	: Haşim KILIÇ
Vice President	: Serruh KALELİ
Vice President	: Alparslan ALTAN
Justices	: Serdar ÖZGÜLDÜR
	Osman Alifeyyaz PAKSÜT
	Zehra Ayla PERKTAŞ
	Recep KÖMÜRCÜ
	Burhan ÜSTÜN
	Engin YILDIRIM
	Nuri NECİPOĞLU
	Hicabi DURSUN
	Celal Mümtaz AKINCI
	Erdal TERCAN
	Muammer TOPAL
	Zühtü ARSLAN
	M. Emin KUZ
	Hasan Tahsin GÖKCAN
Rapporteur	: Yunus HEPER
Applicant	: Abdullah ÖCALAN
Counsels	: Att. Cengiz YÜREKLİ
	Att. Mazlum DİNÇ
	Att. Rezan SARICA

I. SUBJECT-MATTER OF THE APPLICATON

1. The applicant alleged that Articles 25, 26, 90 and 141 of the Constitution had been violated as a result of the court ruling to seize his book which was being printed and the dismissal of the objection against this decision.

II. APPLICATION PROCESS

2. The application was lodged on 7/1/2013 with the Istanbul Judge's Office No. 2 that was given jurisdiction under Article 10 of the Anti-Terror Law. The deficiencies found as a result of the preliminary administrative examination of the petitions and their annexes were made to be completed and it was determined that there was no deficiency preventing their submission to the Commission.

3. It was decided on 22/4/2013 by the Third Commission of the Second Section that the admissibility examination be carried out by the Section and that the file be sent to the Section as per Article 33(3) of the Internal Regulation of the Constitutional Court.

4. Pursuant to the interim decision of the Second Section dated 20/5/2013, it was decided as per Article 28(1)(b) of the Internal Regulation of the Constitutional Court that the examination on admissibility and merits be conducted jointly and that a copy be sent to the Ministry of Justice for its opinion.

5. The opinion document by the Ministry of Justice dated 18/7/2013 was notified to the applicant on 29/7/2013, and the applicant submitted his opinion to the Constitutional Court on 12/8/2013 within the due period.

III. THE FACTS

A. The Circumstanes of the Case

6. The relevant facts in the application petition and the opinion of the Ministry can be summarized as follows:

7. An investigation was launched by the Chief Public Prosecutor's Office of Istanbul (its Section authorized under Article 10 of the Anti-

Terror Law) against the publishing coordinator, editor and the individual responsible for the preparation for publishing of the book entitled *''the Kurdistan Revolution Manifesto, Kurdish Problem and Democratic Nation Solution (Defense of Kurds in the Grip of Cultural Genocide)''* (hereafter referred to as ''the book'') belonging to the applicant with the claim that a statement of the PKK was included and the propaganda of the PKK terrorist organization was made in the book.

8. Within the framework of the mentioned investigation, as per the written search warrant of the Chief Public Prosecutor's Office of Bakırköy dated 17/09/2012, 3000 forms pertaining to the book, 7 bound books, 1 unbound book and 20 book covers were confiscated during the search conducted at the workplace belonging to SM Printing House. The action of seizure was approved by the decision of the 6th Criminal Court of Peace of Bakırköy (File No. 2012/1737 Müt. on 18/09/2012).

9. In the statement made by the executives of SM Printing House, it was declared that 1.500.000 forms pertaining to the book in question had been sent by the company entitled Gün Printing Press to the workplace, that these forms had been sent to the mentioned printing house after having been transformed into books, that the forms and books confiscated at the workplace were the remaining products after the binding processes and that they were being kept at the workplace pending delivery to the customer.

10. Thereupon, it was decided with the decision of the 3rd Criminal Court of Peace of Küçükçekmece (File No: 2012/930 on 17/09/2012) that a search be conducted at the workplace belonging to Gün Printing Press and that evidence of crime be confiscated. During the search, 504 copies of the book in question were confiscated. It was stated by the executives of Gün Printing Press that 40.000 copies of the book had been printed and that all of them had been delivered to the executives of the publishing house.

11. Officials of the General Directorate of Security went to the address of Ararat Publishing House, which had published the book that is the subject of the application, located in Diyarbakır, but it was determined that the mentioned publishing house was not found at this address.

12. Within the framework of the investigation, by the letter of the Chief Public Prosecutor's Office of Istanbul (File No:Inv. 2012/1937 on 19/09/2012) stating that the propaganda of the PKK terrorist organization was made in the entirety of the August 2012 edition of the book, it was requested from the Istanbul Judge's Office No. 2 that was given jurisdiction under Article 10 of the Anti-Terror Law that the book in question be withdrawn and seized.

13. With its decision (File No: 2012/156 on 21/9/2012), the Istanbul Judge's Office No. 2 that was given jurisdiction under Article 10 of the Anti-Terror Law decided on the acceptance of the request and the confiscation of the book belonging to the applicant, as per Article 25(2) of the Press Law No.5187 of 9/6/2004.

14. The court based the justification of the seizure decision on the facts; that the author of the book in question was Abdullah Öcalan who was convicted of the crime of founding and leading an armed terrorist organization; that a region encompassing territories of Irak, Iran and Turkey was separated and highlighted with writings on the cover of the book; and that the propaganda of the PKK armed terrorist organization was made in pages 173, 178, 276, 278, 284, 304, 307, 312, 324, 327, 359, 391, 408, 412 and following pages.

15. The mentioned seizure decision was objected to on 27/10/2012 with the petition submitted by the counsels of the applicant to the Istanbul Judge's Office No. 2 that was given jurisdiction under Article 10 of the Anti-Terror Law; it was stated that crimes committed via printed works would occur at the time of publication as per Article 11 of the Law No.5178 but that all the books were seized by the relevant authorities without waiting for its distribution, and it was requested that the seizure decision be lifted and that the seized works be returned.

16. The objection of the applicant was dismissed *''with the legal remedy of objection being available''* with the decision of the Istanbul Judge's Office No. 3 given jurisdiction under Article 10 of the Anti-Terror Law (File No: Misc. Works 2012/173 on 9/10/2012) due to the classification and nature of the crime, the presence of strong suspicion of crime, the evidence available and the lack of a change in the reasons for seizure. The mentioned decision was served on the counsels of the applicant on 6/11/2012.

17. The counsels of the applicant objected this time on 8/11/2012 to the mentioned decision of the Istanbul Judge's Office No. 3 given jurisdiction under Article 10 of the Anti-Terror Law and the objection was dismissed with the decision of the Judge's Office No. 3 (File No: Misc. Works 2012/271 on 16/11/2012). The mentioned decision was served on the counsels of the applicant on 7/11/2012 and the remedies were thus exhausted.

18. As per the seizure decision of the Istanbul Judge's Office No. 2 that was given jurisdiction under Article 10 of the Anti-Terror Law, a search was conducted at an address serving as a textiles workplace. In the search conducted, 635 copies of the book in question were seized. The manager of the workplace declared in his statement that he was not aware of the books in question and that he did not know how they had ended up there. 632 of the 635 seized books were destroyed.

19. With the lack of jurisdiction decision of the Chief Public Prosecutor's Office of Istanbul (its Section authorized under Article 10 of the Anti-Terror Law) (File No: Inv. 2012/1937, Decision no. 2013/8, on 21/01/2013), the file was sent to the Chief Public Prosecutor's Office of Diyarbakır due to the fact that SM Printing House, where the book had been printed, had printed the book in the name of Ararat Publishing House.

20. The Chief Public Prosecutor's Office of Diyarbakır delivered a counter decision of lack of jurisdiction on 18/2/2013 by referring to the necessity of conducting the investigation concerning the book in question in Istanbul and sent the file to the Assize Court of Malatya for the resolution of the jurisdictional dispute.

21. The Assize Court of Malatya decided on 27/2/2013 that the investigation concerning the book in question should be conducted by the Chief Public Prosecutor's Office of Diyarbakır.

22. As per the decision of the Chief Public Prosecutor's Office of Diyarbakır (File No: Inv. 2013/728 on 19/03/2013) it was decided that there was no ground for prosecution regarding the suspects who were the publishing coordinator, editor and the individual responsible for the preparation of the book for publishing due to the fact that although under Article 26 of the Law No.5187 a period of 6 months is stipulated for filing

a case in crimes committed through the press, no case was filed within this period.

23. The book in question was confiscated as per Article 25(2) of the Press Law No. 5187 since it was considered that the expressions in the book were related to crimes stipulated in Paragraphs 2 and 5 of Article 7 of the Anti-Terror Law No. 3713 of 12/4/1991.

24. On the other hand, no condition as regards the period for the investigations to be carried out as per the Law No.3713 was envisaged. However, neither the applicant nor the Ministry of Justice reported that an investigation or a criminal case had been initiated against the applicant for having written the book.

B. The Book Subjected to the Application

25. In August 2012 Ararat Publishing House published a book written by the applicant, entitled *''the Kurdistan Revolution Manifesto, Kurdish Problem and Democratic Nation Solution (Defense of Kurds in the Grip of Cultural Genocide)''*. The book is composed of seven chapters except for the prologue, conclusion, epilogue and annexes and a total of 606 pages, and it does not contain a list of references or bibliography.

26. The book represents the final volume of the five-volume series which the applicant had prepared for the *''The Manifesto of Democratic Civilization* '' which he authored after his placement in prison. According to the information contained within the book, the five-volume series was prepared for the case before the European Court of Human Rights (ECHR) which was filed after the retrial of the applicant had been dismissed. According to the headings listed under the contents section, the author dwelled upon the following subjects: The conceptual and institutional framework; the Kurdish reality; the Kurdish problem and the Kurdish movement in the age of capitalism; the PKK movement and the revolutionary people's war; crisis in scientific socialism, the great conspiracy and the transformation of PKK; PKK, KCK and the democratic nation; the Middle-Eastern crisis and the solution of democratic modernity.

27. Although it was stated in the seizure decision of the Istanbul Judge's Office No. 2 that was given jurisdiction under Article 10 of the Anti-Terror

Law that the propaganda of the PKK terrorist organization was made in pages 173, 178, 276, 278, 284, 304, 307, 312, 324, 327, 359, 391, 408, 412 and following pages, the relevant paragraphs on these pages were not indicated. The following paragraphs in relation to the PKK terrorist organization are found on the mentioned pages of the book:

> *''In this process, not only was the dissolution of the Kurdish reality as an entity halted but significant ground was also covered in the path towards freedom especially through a resistance process which was kicked off with the Move of August 15th and went through very rough terrain under the leadership of the PKK from the very beginning. In the special war conducted with the substantial support (in exchange for submission to the global financial system in economic terms, providing full support to their regional policies, giving approval on the military front to the use of Turkey division of gladio, NATO's secret army) of foreign hegemonic forces (notably the USA, the UK and Germany), except for a bunch of traitors and collaborators, the Kurds were left alone and isolated in their war of existence and freedom..." (page 173)*

> *"…an attempt was made to terminate Kurdishness not only as a freedom movement, but also in its actual existence (even as an ontological entity as seen with the language ban). Despite its numerous shortcomings and mistakes, the Freedom movement developed under the leadership of the PKK against this unprecedented movement of slaughter did not only ascertain the Kurdish cultural existence but it also elevated it to an important phase as a freed entity. Developments in this direction also cast their influence on other parts of Kurdistan; in Southern Kurdistan it led to a political formation with a dominant nation-statist aspect, whereas it ended in the great awakening of the people, their participation in the Freedom movement and improvements they made in their democratic autonomies in Eastern and South-western Kurdistan.'' (page 178)*

> *''...During the times when we were a group, we could only call ourselves the revolutionaries of Kurdistan. We only dared to give ourselves a real name five years after having come into existence as a group. When the journey which started on the banks of Ankara's Çubuk Dam during the Newroz of 1973 ended up in the name of PKK in*

Fis village of Diyarbakır, we were to consider ourselves to have saved our honour. Could there be a greater objective than that? After all, the modern organization of the modern class had been established.'' (page 276)

''I was meticulous, we were meticulous in remaining loyal to the scientific socialism line of Marxism when we embarked upon the construction of the PKK. If it had not been for real socialism, there may never have been a group like the PKK. However, this reality does not prove that the PKK was an utter real socialist grouping in its infancy. Even though it's being heavily influenced by it, not all of its reality can be explained with real socialism... If we are now in the process of taking a look back and reinterpreting the PKK, we owe it to the philosophical transformation which does not absolutize the separation between the subject and the object, and also pay attention not to absolutize itself either... Reinterpreting the PKK within this framework, determining which global conditions and elements of material culture it relied on in the early 1970s, which main forms of consciousness, organization and action as well as which spiritual culture it took as the basis will serve to correctly identify the PKK movement as much as it will further elucidate its role in our day.'' (page 278)

''The main problem with the PKK's formation is the fact that it has remained ambiguous when it comes to the nation-statist ideology. Especially Stalin's theses about the national problem were influential on this matter. At its root, Stalin considers the national problem as a problem of founding a state. This approach of his has influenced the whole socialist system and liberation movements. The reduction of this right also acknowledged by Lenin to founding a state as the right of nations to self-determination, has been the root cause of all communist and socialist parties falling into ideological ambiguity. The model embraced by the PKK in solving the Kurdish problem, which was its main claim from the get go, was the model of founding a state brought forward by Stalin and also approved by Lenin…" (page 284)

"The fact that the conception of the PKK took place in Ankara is a typical reflection of the colonial policy. There have been numerous similar examples in the context of the relationship between the colony and the metropolis throughout the world. I tried to indicate that the inception out of Ankara was painstaking…" (page 304)

"…Indeed, during the inception period of the PKK, means of self defense were used without hesitation. The PKK had to organize itself as a sort of militia power. Otherwise, it would not have survived a day.'' (page 307)

"…Counter-revolutionary elements and groups which had been dissolved in Kurdistan, the collaborating class tendencies and personalities that were behind them were being resurrected in the ranks of the PKK and seeking their revenge from free Kurdishness…" (page 312)

"One of the most important consequences of the revolutionary people's war led by the PKK was the fact that it led to the reality of the democratic nation. In fact the reality of democratic nation was not clearly and explicitly determined and programmed in the ideological organization of the PKK. The concept of a nation in mastery of its ideology is the real socialist version of the nation-state…" (page 324)

"The struggle undertaken by the PKK during its ideological group stage against the dominant and oppressed nation-nationalism, continues in the form of a struggle for the democratic nation against both nation-statisms, based on the experience of the revolutionary people's war …" (page 327)

"[In 1992] The old diseases were intensifying and continuing in the ranks of the revolutionary struggle led by the PKK. Additional elements had been added to these diseases…." (page 359)

"The exposure of the crisis in scientific socialism through the inner dissolution in the Soviet Union and the Great Gladio Conspiracy of 1998 forced the PKK into fundamental transformation. The ambiguity during the ideological group phase, the fact that the state problem had not been resolved, and the failure to overcome the internal and external conspiracies that had been revealed in the experience of the revolutionary people's war led the PKK into a lengthy vicious circle, repeating itself, inching closer and closer towards a bottleneck and dissolution…" (page 391)

"Whether they stem from the old civilization and the capitalist modernity or from the life with a free identity, what has been experienced are problems which are different and more comprehensive than the old

problems. Therefore, the methods and tools for their solution will also be different. Neither could it be like the Kurd or Kurdistan of yesteryear, not could a struggle like the 'nationalitarians', the PKK, the HRK and the ERNK of the past could be undertaken. The enemy was no longer the old enemy either. Although distrusted, although shy, it had undergone a transformation which could accept the Kurd and Kurdistan and did not reject the free Kurdish identity all together. It is clear that all these historical and social transformations ask for a new definition of Kurdishness and of the PKK, that they highlight the need for new system concepts and institutions. We will try to develop a new definition of the PKK and of Kurdishness as well as new system concepts and institutions on this basis." (page 407-408)

28. On the pages 173, 178, 276, 278, 284, 304, 307, 312, 324, 327, 359, 391, 408 taken as the basis by the Istanbul Judge's Office No. 2 that was given jurisdiction under Article 10 of the Anti-Terror Law for its seizure decision, the organizational and ideological transformations experienced by the PKK terrorist organization since its foundation are generally dealt with from the author's own perspective.

29. On the other hand, it is argued in the introduction part of the book that getting stuck with nationalistic or statist solutions to, in the words of the author, the *''Kurdish problem''* deepens the deadlock, that this kind of an imposition cannot go beyond repeating the deadlock in the Palestine-Israel problem, that the Middle East will remain as the field of interest of hegemonic powers for another century unless the statist mentality is left behind and democratic tools of politics are put in place in the upcoming period; that the key role in the solution of the problems in the Middle East lie in *''the experience of democratic solution in Kurdistan''*. According to the author, "*…the common historical fate experienced by the Turks, the Arabs and the Persians, which are the main neighbouring nations of the region, as well as the more inner elements of Armenians, Assyrians and the Turkmen makes it possible for the democratic solution in Kurdistan to be disseminated across all of them via a domino effect.*" (Page 24)

30. In the first chapter of the book, the concepts of culture, civilization, hegemony, power, class, nation, colonialism, assimilation and genocide,

state under the circumstances of capitalist modernity, society, democracy and socialism are tried to be interpreted and defined by the author.

31. In the second chapter of the book, the historical formation of *''the Kurdish reality''* is attempted to be explained from the author's perspective. In this chapter, the historical process from the emergence of the first man to our current day in the region called *''Kurdistan''* is analyzed. Within this framework, the subjects of *''the Kurdish existence and the Islamic tradition''*, *''the Islamic culture and the Arab-Kurdish-Turkish relations''*, *''the Armenian-Assyrian-Jewish interaction within the Kurdish reality''* are examined; the theses that the Middle Eastern culture has been subdued under the hegemony of capitalist modernization, that the power and the society have been separated from each other in the Middle East are tackled. It is also stated in this chapter that *''Kurdistan''* has been the homeland of the Kurds since *''the proto-Kurds''*, and that the Republican ideology, defined by the author as *''fascism of the white Turks''*, has tried to dissolve *''the Kurdish reality''*. In the remaining part of the chapter, explanations regarding the transformations experienced by the Kurds in a part of Syria defined as *''Southern Kurdistan''* and a part of Iran defined as *''Eastern Kurdistan''* as well as the social, economic and cultural aspect of ''the Kurdish identity'' are covered.

32. In the third chapter of the book, the focus is put on the evolutions underwent by *''the Kurdish problem''* in history up to our day and *''the Kurdish movements''* seen in history from the author's perspective. In the fourth chapter the focus is on *''the PKK movement''*. In the fourth chapter, the applicant qualifies the actions carried out by the PKK terrorist organization until today as *''a revolutionary people's war''* and the ideology embraced by the PKK since the 1970s, which is the period of its foundation, is explained with a leftist language. The ideological transformations experienced by the PKK, its relations with other leftist organizations in Turkey, the military coup d'etat of 12th September and the developments in the following period are explained. In this chapter, the actions of the PKK are qualified as *''a revolutionary people's war''*; it is alleged that the forces of Gladio, the NATO and the USA are behind the security operations executed against the PKK. In this chapter, the clashes between the PKK and the security forces in the period after 12th September are depicted as *''a story of heroism''*.

33. The fifth chapter of the book begins with the subheading of *''the crisis in scientific socialism''*. In this chapter, the fact that Abdullah Öcalan was forced out of Syria, captured and brought to Turkey is qualified as an international conspiracy; it is advocated that those who organized the conspiracy aim the continuation of the deadlock between the Kurds and the Turks. It is alleged that the *''solution''* opportunities which emerged in the aftermath of Abdullah Öcalan's imprisonment were eliminated by the same forces.

34. In the sixth chapter of the book, the year 2003 and onwards is qualified as *''the new period''* and the ideological transformation seen within the PKK in this period is explained. In this chapter, it is alleged that the peaceful resolution of the Kurdish problem could be achieved with *''the right to become a democratic nation''*, that however, due to *''the genocidal war conducted by the nation states which share Kurdistan''* they are not favourable to a democratic solution, it is advocated that, in the light of the experience of the past thirty years, the most successful solution without feeling the need for Kurdish nation-statism and turning the dominant nation states into federation-type structures is the right to become a democratic nation.

35. In the seventh chapter of the book, the headings of *''the construction of the Republic of Turkey''*, *''Arab nation states and the construction of Israel''*, *''Iranian Shia nation statism and its role in the Middle East''*, *''the dissolution of nation states in Iraq, Afghanistan and Pakistan and the structural impasse of capitalist modernity''*, *''the nation state balance in the Middle East and the Kurdish problem''*, *''modernity wars in the Middle East and their potential consequences''*, *''the fate of capitalist modernity in the Middle East''*, *''the democratic modernity solution in the Middle Eastern crisis''* and *''the mentality revolution in the Middle East''* are included.

36. In the conclusion part of the book, it is argued that the United Nations, the European Union or other regional unions are unable to find a solution to any global or regional problem; that a union of democratic nations, and not the unions based on the nation state, will be able to find a solution to problems in the new period.

C. Relevant Law

37. Article 25 of the Law No. 5187, headed *''Seizure, prohibition of distribution and sale''*, is as follows:

> *"The Public prosecutor, or in circumstances where delay would be inconvenient law enforcement agencies, may seize a maximum of three copies of all kinds of printed works as evidentiary material for the investigation.*
>
> *On the condition that the investigation has been initiated, the entirety of printed works may be seized with the decision of the judge as regards the crimes stipulated in the Law on Crimes Committed Against Atatürk No.5816 of 25.7.1951, the revolution laws contained within Article 174 of the Constitution, Article 146(2), paragraphs one and four of Article 153, Article 155, paragraphs one and two of Article 311, paragraphs two and four of Article 312, Article 312/a of the Turkish Criminal Code and paragraphs two and five of Article 7 of the Anti-Terror Law No. 3713 of 12.4.1991.*
>
> *Regardless of their language, in the event that there is strong evidence to the effect that periodicals or non-periodicals and newspapers printed outside Turkey contain the crimes stipulated under paragraph two, their distribution and sale in Turkey may be prohibited with a decision of the criminal judge of peace upon the request of the Chief Public Prosecutor's Office. In circumstances where delay would be inconvenient, the decision of the Chief Public Prosecutor's office is sufficient. This decision is submitted to the approval of the judge within a maximum of twenty-four hours. In the even that it is not approved by the judge within forty-eight hours, the decision of the Chief Public Prosecutor's Office remains null and void.*
>
> *Those who intentionally distribute or sell the publications or newspapers which have been prohibited as per the above paragraph are responsible for the crimes committed through these publications just like the author of the work.*

38. Article 131(1) of the Law of Criminal Procedure No. 5271 of 4/12/2004, headed *''Return of confiscated items''* is as follows:

"(1) In the event that there is no need for safeguarding of the seized item in terms of investigation and prosecution or it is understood that it cannot be subjected to confiscation, ex officio return or return of the seized item that belongs to the suspect, accused or third parties upon request shall be decided by the Public prosecutor, judge or court. Decisions on overruling the motion may be opposed."

39. Article 132(1) of the Law No. 5271, headed *''Preservation or disposal of confiscated items''*, is as follows:

> *"(1) In the presence of the danger of incurring damage or significant loss in the value of the seized item, it may be disposed before finalization of the verdict.*
>
> *(2) The decision of disposal shall be made by the judge at the investigation stage, by the court at the prosecution stage.*
>
> *(3) Before the decision is made, firstly the suspect, accused or other concerned people who own the property shall be heard; the decision of disposal shall be notified to them.*
>
> *(4) The necessary measures for preservation of the seized property's value and for it not to incur damages shall be taken.*
>
> *(5) The seized property may be delivered to the suspect, accused or another person to be preserved on condition of taking the measures pertaining to the maintenance and supervision thereof and of immediately returning it when requested by the Chief Public prosecutor's office at the investigation stage, by the court at the prosecution stage. Said release may be subjected to the condition of showing a guarantee.*
>
> *(6) The seized property may, in the event that it is no longer needed to be kept as evidence, be delivered to the concerned in return for immediate payment of its current value. In this case, the paid current value shall constitute the subject of the decision of confiscation."*

40. Article 141(1)(j) of the Law No. 5271, headed *''Compensation request''* is as follows:

"Persons whose property or other assets have been seized although the conditions thereof are not present or for whose property or other assets the measures necessary for protection have not been taken or whose property or other assets have been used out of purpose or have not been returned on time,

…

May claim all kinds of material and spiritual damages from the State."

IV. EXAMINATIONAND GROUNDS

41. The individual application of the applicant (App No: 2013/409 on 7/1/2013) was examined during the session held by the Court on 25/6/2014 and the followings were ordered and adjudged:

A. The Applicant's Allegations

42. The applicant indicated that there was an interference with his freedom of thought and opinion due to the fact that his book which was in the process of being printed was seized; that he sent the book in question to the ECtHR and that he exercised his constitutional right by publishing this book. The applicant stated that Article 25 of the Law No. 5187 which formed the basis for the seizure decision was in violation of Article 10 of the European Convention on Human Rights (ECHR), that as per Article 90 of the Constitution the provisions of the ECHR should supersede in this kind of a situation and that the decisions of the judge's office regarding the seizure lacked justification; therefore he alleged that Articles 25, 26, 90 and 141 of the Constitution had been violated.

B. The Constitutional Court's Assessment

1. Admissibility

43. In its opinion letter, the Ministry's made no assessment as to the admissibility of the individual application.

44. Article 47(5) of the Law on the Establishment and Trial Procedures of the Constitutional Court Law No. 6216 of 30/3/2011, headed *''Individual application procedure''*, is as follows:

"The individual application should be made within thirty days starting from the exhaustion of legal remedies; from the date when the violation is known if no remedies are envisaged…"

45. The decision of the judge's office which is the subject of the application was served on the counsels of the applicant on 7/12/2012. The final day of the 30 day individual application period was on 6/1/2013 which was an official holiday. There is no special provision as regards the periods whose last day coincides with official holidays in the Law No. 6216.

46. However, Article 49(7) of the Law No. 6216 is as follows:

"In the examination of individual applications, in circumstances where this Law and Internal Regulation do not contain any provisions, the provisions of relevant procedural laws which are suitable to the nature of the individual application are applied."

47. As per the mentioned provision of the Law, the matter needs to be resolved within the framework of the provisions contained within the relevant procedural laws.

48. Article 93(1) of the Law of Civil Procedure No. 6100 of 12/1/2011, headed *''Effect of holidays''*, is as follows:

"… If the final day of the period coincides with a day of official holiday, the period expires at the end of working hours of the first working day following the holiday."

49. Article 39(4) of the Law No. 5271, headed *''Calculation of periods"*, is as follows:

"If the final day coincides with a holiday, it shall lapse on the following day of the holiday."

50. Article 8(2) of the Law of Administrative Procedure No. 2577 of 6/1/1982, headed *''General principles as regards periods''*, is as follows:

"…So much so that, the last day of the period coincides with a holiday, then the period shall be extended until the end of the working day after the holiday."

51. As demonstrated, the main procedural laws contain the rule that the periods whose last day coincides with an official holiday will be extended until the end of the first working day following the official holiday. There is no reason which requires this rule not to be applied to the periods pertaining to the individual application. Within this framework, it must be accepted that the application period of the applicant whose last day coincided with an official holiday was extended until 7/1/2013 which was the first working day following the official holiday and that the application to be made as of this date would be accepted to have been made within its due period.

52. It must be decided that the application, which is not manifestly ill-founded and where no other reason is deemed to exist to require a decision on its inadmissibility, is admissible.

2. Merits

53. The applicant claimed that Articles 25 and 26 of the Constitution which guarantee the freedom of thought and opinion and the freedom of expression and dissemination of thought had been violated due to the seizure of the book which is the subject of the application; moreover that the interference which is the subject of the complaint had the objective of blocking the access of the Turkish public opinion to information and science due to the fact that the printing and reading by the society of the book that is the subject of the application and other books of similar content is among the requirements of a democratic society.

54. The Ministry stated that 40.000 copies of the book in question had been printed, that however 1139 of these copies had been seized, that on the other hand a decision was delivered to the effect that there were no grounds for prosecution regarding the investigation file which contained the seizure decision which had served as the basis for the confiscation action.

55. In the opinion of the Ministry, it was stated that the freedom of expression formed one of the pillars of a democratic society in the context of Article 10 of the ECHR; that the freedom of expression applies not only for information and thoughts which are considered to be in favour,

harmless or trivial, but also for information and thoughts which are aggressive, shocking or disturbing for the State or a part of the society. Within this framework, it was stated that whether there had been an interference regarding the freedom of expression should be considered on the basis of whether the interference that had taken place was envisaged by the law, whether the interference was based on legitimate objectives and whether the interference was necessary in a democratic society.

56. The Ministry noted that Article 25 of the Constitution guaranteed the freedom to have thoughts, that Article 26 guaranteed the freedom to express thoughts, that in Articles 28, 29 and 30 of the Constitution additional guarantees pertaining to the freedom of the press were provided, that when the limitation provisions contained within the Constitution are taken in conjunction with Article 13 of the Constitution, the interferences to be made to the freedom of the press should be made in a narrow area.

57. Moreover, it was indicated in the opinion letter of the Ministry that the elements of crime contained within the Law Concerning Amendments Made in Various Laws within the Context of Human Rights and Freedom of Expression No. 6459 of 11 April 2013 and Article 6(2) of the Anti-Terror Law No. 3713 of 12/04/1991 had been redefined; that the printing and publishing of declarations and statements which contain force, violence or threats or which praise these methods or which encourage the use of these methods were accepted as crimes, and certain judgments of the ECtHR regarding Article 10 of the ECHR were recalled.

58. The applicant reiterated his statements in his application petition against the Ministry's opinion on the merits of the application, and also alleged that the Ministry's defense to the effect that only 1139 copies of the book in question had been seized did not rely on precise information, that the distribution of the book became impossible after the decision of seizure and prohibition, that for this reason a total damage, which was more substantial than the number of confiscated books, occurred; that instead of preservation of the copies of the book their destruction without waiting for the judicial process had led to a violation of rights.

59. Article 13 of the Constitution, headed *''Restriction of fundamental rights and freedoms''*, is as follows:

"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 cannot be contrary to the letter and spirit of the Constitution, the requirements of the democratic social order and of the secular Republic and the principle of proportionality."

60. Article 25 of the Constitution, headed *''Freedom of thought and opinion'',* is as follows:

"Everyone has the freedom of thought and opinion.

No one shall be compelled to reveal his/her thoughts and opinions for any reason or purpose; nor shall anyone be blamed or accused because of his/her thoughts and opinions."

61. Article 26 of the Constitution, headed *''Freedom of expression and dissemination of thought"*, is as follows:

"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.

Regulatory provisions concerning the use of means to disseminate information and thoughts shall not be deemed as the restriction of freedom of expression and dissemination of thoughts as long as the transmission of information and thoughts is not prevented.

The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law."

62. Article 28 of the Constitution, headed *''Freedom of the press''*, is as follows:

"The press is free, and shall not be censored. The establishment of a printing house shall not be subject to prior permission or the deposit of a financial guarantee

(Repealed on October 3, 2001; Act No. 4709)

The State shall take the necessary measures to ensure freedom of the press and information.

In the limitation of freedom of the press, the provisions of Articles 26 and 27 of the Constitution shall apply.

Anyone who writes any news or articles which threaten the internal or external security of the State or the indivisible integrity of the State with its territory and nation, which tend to incite offence, riot or insurrection, or which refer to classified state secrets or has them printed, and anyone who prints or transmits such news or articles to others for the purposes above, shall be held responsible under the law relevant to these offences. Distribution may be prevented as a precautionary measure by the decision of a judge, or in case delay is deemed prejudicial, by the competent authority explicitly designated by law. The authority preventing the distribution shall notify a competent judge of its decision within twenty-four hours at the latest. The order preventing distribution shall become null and void unless upheld by a competent judge within forty-eight hours at the latest.

No ban shall be placed on the reporting of events, except by the decision of judge issued within the limits specified by law, to ensure proper functioning of the judiciary.

Periodical and non-periodical publications may be seized by a decision of a judge in cases of ongoing investigation or prosecution of

crimes specified by law; or by order of the competent authority explicitly designated by law, in situations where delay may constitute a prejudice with respect to the protection of the indivisible integrity of the State with its territory and nation, national security, public order or public morals and for the prevention of crime The competent authority issuing the order to seize shall notify a competent judge of its decision within twenty-four hours at the latest; the order to seize shall become null and void unless upheld by a judge within forty-eight hours at the latest.

General provisions shall apply when seizing and confiscating periodicals and non-periodicals for reasons of criminal investigation and prosecution.

Periodicals published in Turkey may be temporarily suspended by court ruling if found to contain material which contravenes the indivisible integrity of the State with its territory and nation, the fundamental principles of the Republic, national security and public morals. Any publication which clearly bears the characteristics of being a continuation of a suspended periodical is prohibited; and shall be seized by decision of a judge."

63. The Constitutional Court is not bound by the legal qualification of the facts made by the applicant, it appraises the legal definition of the facts itself. The *''Freedom of thought and opinion'* is regulated in Article 25, and the *''Freedom of expression and dissemination of thought''* is regulated in Article 26 of the Constitution. The Constitution has made a distinction between having a thought and expressing a thought. Indeed, it is stated in the justification of Article 25 that *''With this Article, this freedom is separated from the 'Freedom of expression'. Even if in reality these two freedoms are interconnected; they are different from each other in terms of their qualities and consequences.''*.

64. The Constitutional Court has also made a distinction between the freedom of thought and conviction and the freedom of expression and dissemination of thought. Although these two freedoms were regulated within the same Article during the period of the Constitution of 1961, the Court has separated the right to have a thought from the right to express and disseminate a thought (see the Court E.1963/16, K.1963/83, 8/4/1963).

65. Article 10 of the ECHR contains a right *''to hold opinions''* within the framework of the freedom of expression. The freedom to hold opinions is the ability of an individual to have an idea without any fear or concern, without the interference of public authorities and without any restrictions and to act in line with these ideas. The ECtHR also indicated that the freedom to hold an opinion, which does not fall under the scope of the expression and dissemination of opinions, was under the protection of Article 10 of the ECHR (see *Vogt v. Germany,* App. No: 17851/91, 26/9/1995, § 54, 61).

66. The present application regards the confiscation and seizure of a book authored by the applicant. The decision of confiscation and seizure was delivered not because the applicant had a thought and conviction but because he had expressed and disseminated his thoughts. Therefore, since the examination of the application under Article 25 of the Constitution is not possible under the present circumstances, it must be examined under Article 26 of the Constitution which regulates the *''Freedom of expression and dissemination of thought''.*

67. The means which can be resorted to in the exercise of the freedom of expression and dissemination of thought are listed in Article 26 of the Constitution as *''by speech, in writing or in pictures or through other media''* and with the expression *''other media''*, it is demonstrated that all kinds of means of expression are under constitutional protection.

68. More detailed regulations regarding the freedom of the press are contained within the Constitution. The main regulation in the field of the freedom of the press is found under Article 28 of the Constitution. In addition to Article 28 of the Constitution, Article 29 refers to the right to publish periodicals and non-periodicals and Article 30 refers to the protection of press equipment. The right to use mass communication tools other than the press owned by public entities is regulated under Article 31 of the Constitution. Moreover, expressions contained within the provisions of the Constitution regulating the freedom of the press such as [those who...] *''write''*, *''print''*, *''give to someone else''*, *''preventing the distribution''*, *''confiscation''*, *''periodical publication''* and *''non-periodical publication''* may only be used for means of mass communication such as

''newspapers'', *''books''* and *''journals''* which can be printed and propagated. Therefore, according to the Constitution, the press is one of the means of mass communication; however, it is separated from other means of mass communication and specially protected.

69. After it is indicated under Article 28 of the Constitution that the press is free and that it cannot be censured, the confiscation of periodical and non-periodical publications is regulated under paragraph seven and the capture and seizure of periodical and non-periodical publications is regulated under paragraph eight. Therefore, individual applications regarding the confiscation, capture and seizure of printed publications must be examined under Article 28 of the Constitution.

70. The freedom of expression and dissemination of thought and the freedom of the press, which are not absolute rights but rights which can be limited, are subject to the limitation regime of the fundamental rights and freedoms contained within the Constitution. Reasons for limitation are included under Article 26(2) regarding the freedom of expression and dissemination of thought and paragraph four and following paragraphs of Article 28 regarding the freedom of the press. However, it is also clear that there must be a limit to the limitations aimed at these freedoms. The criteria under Article 13 of the Constitution must be taken into consideration as regards the limitation of fundamental rights and freedoms. As a result, the oversight concerning the limitations brought to the freedom of expression and dissemination of thought and the freedom of the press should be conducted within the framework of the criteria contained under Article 13 of the Constitution and within the scope of Articles 26 and 28 of the Constitution.

71. The application was made due to the confiscation and seizure of a book authored by the applicant. Moreover, although the applicant alleged that Article 90 of the Constitution had been violated as Article 25(2) of the Law No.5187 which was applied to the case was in violation of Article 10 of the ECHR, the main point of these claims concern the matter that the mentioned confiscation and seizure decision had violated the freedom of expression and dissemination of thought and the freedom of the press. Due to the fact that the Constitutional Court is not bound by the

legal qualification of the facts made by the applicant, the entirety of the applicant's claims will be examined within the framework of the freedom of expression and dissemination of thought and the freedom of the press.

a. Examination in Terms of Articles 26 and 28 of the Constitution

72. The freedom of expression and dissemination of thought refers to people's ability of having free access to the news and information, other people's opinions, not being condemned due to the opinions and convictions they have acquired and freely expressing, explaining, defending, transmitting to others and disseminating these either alone or with others.

73. The freedom of expression and dissemination of thought directly impacts a significant part of the other rights and freedoms enshrined in the Constitution. Indeed, the press, which is the main means of dissemination of thought through the press and publications in the form of newspapers, journals and books, is one of the ways of exercising the freedom of expression and dissemination of thought. The freedom of the press is guaranteed not as a separate Article in the ECHR but under Article 10 which regards the freedom of expression. Article 10 of the ECHR guarantees not only the contents of thoughts and convictions but also their means of transmission. On the other hand, the freedom of the press is specially regulated under Articles 28-32 of the Constitution.

74. The freedom of the press covers the right to explain and interpret thoughts and convictions via means such as newspapers, journals and books and the right to publish and distribute information, news and criticisms (see the Court, E.1996/70, K.1997/53, 5/6/1997). The freedom of the press ensures that the individual and the society are informed by performing the transmission and circulation of thoughts. The expression of thoughts, including those who oppose the majority, via all sorts of means, garnering supporters to the thoughts which have been explained, fulfilling and convincing into fulfilling the thoughts are among the requirements of the pluralistic democratic order. Therefore, the freedom of expression and dissemination of thought and the freedom of the press are of vital importance for the functioning of democracy.

75. In a democratic system, the practices and actions of the State should be under the supervision of the press and also the public opinion as much as the judicial and administrative officials. The written, audio and visual press guarantees the healthy functioning of the democracy and the self-fulfillment of individuals by meticulously inspecting the political decisions, acts and negligence of the organs which exercise public authority and facilitating the participation of citizens into the decision making processes (for judgments of the ECtHR in the same vein see *Lingens v. Austria*, App. No: 9815/82, 8/7/1986, § 41; *Özgür radio-Ses Radio Television Production and Promotion Corp. v. Turkey*, App. No: 64178/00, 64179/00, 64181/00, 64183/00, 64184/00, 30/3/2006 § 78; and *Erdoğdu and İnce v. Turkey*, App. No: 25067/94, 25068/94, 8/7/1999, § 48). As a result, the freedom of the press is a vital freedom which applies to everyone (see the Court, E.1997/19, K.1997/66, 23/10/1997).

76. The freedom of the press, which complements and ensures the exercise of the freedom of expression and dissemination of thought, is not absolute and limitless just like the freedom of expression and dissemination of thought. In order for the press to be able to fulfill its social mission, it needs to act with a sense of responsibility as much as it should be free. It is stipulated under Article 28(4) of the Constitution that the provisions of Articles 26 and 27 will be applied in the limitation of the freedom of the press. Thus, the freedom of the press has been subjected to the limitation regime contained within Article 26, which acts as the main provision regarding the freedom of expression and dissemination of thought, and Article 27 regarding artistic and academic expressions. Other limitations aimed at the freedom of the press are contained within paragraph 5 and following paragraphs of Article 28. Despite the fact that the press needs to abide by the limitations introduced in order to prevent threats against the internal or external security of the State, the indivisible integrity of the State with its territory and nation, encouraging offending, riot or insurgence stipulated under Articles 26, 27 and 28 of the Constitution, it also has the right to provide information in political matters. On the other hand, the people also have the right to obtain this kind of information. The freedom of the press constitutes one of the best means of transmitting various political opinions and attitudes to the public opinion and forming

a conviction regarding these (for judgments of the ECtHR in the same vein, see *Lingens v. Austria*, § 41-42; *Erdoğdu and İnce v. Turkey*, § 48).

77. In light of the principles explained above, first whether an interference exists or not and then whether the interference relies on valid ground will be evaluated in assessing whether the freedom of expression and dissemination of thought and, within this scope, the freedom of the press were violated or not in the incident which is the subject of the application.

i. Existence of the Interference

78. Due to the fact that no declaration was made by the competent authorities as to the printing of the book, how many copies had been printed and how many of them had been distributed could not be determined. However, 3.000 forms and 1.139 bound copies of the book which is the subject of the application were seized and 632 of the seized books were destroyed with the decision of the Istanbul Judge's Office No. 2 that was given jurisdiction under Article 10 of the Anti-Terror Law. The distribution of the book became impossible after the confiscation and seizure decision. The Chief Public Prosecutor's Office of Diyarbakır decided that there was no ground for prosecution regarding the publishing coordinator, editor and the individual responsible for the preparation of the book for publishing due to the fact that no case was filed within the 6-month period for filing cases in crimes committed through the press (see § 7, 22).

79. It is clear that an interference was made to the applicant's freedom of expression and dissemination of thought as a result of the confiscation, seizure and destruction acts regarding the book in question. On the other hand, just like the free printing of thoughts and information without being subject to prior control is part of the freedom of the press, the free distribution of printed works is also an inseparable part of the same freedom. Therefore, an interference was made with the applicant's freedom of expression and dissemination of thought and, within this scope, the freedom of the press through the prohibition of the distribution of the printed work, which is the subject of the application, and its confiscation. Moreover, no objection was submitted by the Ministry of Justice to the Constitutional Court regarding the existence of the interference.

ii. Interference Based on Valid Grounds

80. The interferences mentioned above will constitute a violation of Articles 13, 26 and 28 of the Constitution unless they rest on one or more of the valid grounds stipulated under Article 26(2) and Article 28(7) of the Constitution and they fulfill the conditions stipulated under Article 13 of the Constitution. As a result, whether the limitation is in line with the conditions of bearing no prejudice to the essence, being indicated under the relevant Article of the Constitution, being envisaged by law, not being contrary to the letter and spirit of the Constitution, the requirements of the democratic social order and of the secular Republic and the principle of proportionality envisaged under Article 13 of the Constitution or not needs to be determined.

1. Lawfulness of the Interference

81. The applicant did not make any claim regarding the existence of a contrariness against the condition of the interference being made with *''the law''* contained within Article 13, Article 26(5) and Article 28(7) of the Constitution. As a result of the evaluations which were made, it was concluded that the criterion of *''lawfulness''* under Article 25 of the Law No.5187, headed *''Seizure, prohibition of distribution and sale''*, was met.

2. Legitimate Purpose

82. The applicant alleged that the objective of the interference which is the subject of the complaint was to prevent the access of the public opinion of Turkey to information and science.

83. In the opinion letter of the Ministry of Justice, it was stated that the measure which had been taken against the applicant had been taken based on Article 25 of the Law No.5187.

84. In order for an interference made to the freedom of expression and dissemination of thought to be legitimate, it needs to be aimed at the objectives of protecting national security, public order, public security, the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing offending, punishing offenders, not revealing information duly classified as a State secret,

protecting the reputation or rights and private and family lives of others or protecting professional secrets set forth in the law or duly performing the duty of hearing cases stipulated under Article 26(2) of the Constitution. In addition, in order for an interference to the freedom of the press by means of confiscation and seizure of printed works to be legitimate, it needs to be aimed at the objectives of protection of the indivisible integrity of the State with its territory and nation, of national security, public order, public morality and of the prevention of offending stipulated under Article 28(7).

85. The decision of confiscation and seizure of the book which is the subject of the application was delivered on the grounds that the author of the book in question was Abdullah Öcalan who was convicted of the crime of founding and leading an armed terrorist organization, that a region encompassing territories of Irak, Iran and Turkey was separated and highlighted with writings on the cover of the book and that the propaganda of the PKK armed terrorist organization was made in certain sections (see § 27) of the book (see § 12-14). It was concluded that the decision of confiscation and seizure in question served as an extension of the objectives and activities determined by the State within the scope of the fight against the activities of the PKK terrorist organization.

86. The PKK, whose name in English is the Kurdistan Workers' Party, is an illegal armed terrorist organization. The PKK also used the names of KADEK, whose name in English is the Kurdistan Freedom and Democracy Congress, and Kongra-Gel, whose name in English is the People's Congress. The Kurdistan Communities Union abbreviated as KCK, which is referred to in the book in question, is the higher structure of the PKK (see pages 405-426 and 452-459 of the book); whereas the People's Defense Forces abbreviated as HPG is the armed wing of the PKK (see pages 485-488 of the book).

87. Not only is the PKK accepted as an armed terrorist organization by the Turkish judicial power, but it is also included under the name of *''PKK/KONGRA-GEL''* in the list of *''the principal terrorist organizations which currently pursue their activities in Turkey''* published by the Turkish National Police. The PKK has been accepted by the European Union as a terrorist organization since the Council Common Position of the Council

of Europe dated 27 December 2001 on the Application of Specific Measures to Combat Armed Terrorism Moreover, the PKK is also included in the list of terrorist organizations of the United States of America (USA) and accepted as a terrorist organization by numerous countries of the region such as Syria, Iraq and Iran and international organizations such as the United Nations and NATO. In addition, the PKK is also included in the list of drug traffickers of the USA.

88. It was concluded that the decision to seize the book which is the subject of the application was part of the efforts towards national security, public order, public security, preventing offending and punishing offenders within the scope of the fight against the activities of the PKK terrorist organization and that this bears a legitimate purpose within the scope of Article 26(2) of the Constitution regarding the freedom of expression and dissemination of thought and Article 28(7) regarding the freedom of the press.

3. Necessity and Proportionality in a Democratic Society

89. The applicant stated that the printing and reading by the society of the work which is the subject of the application and similar works is among the requirements of a democratic society due to the fact that Turkey is a cosmopolitan and multi-cultural country where many peoples such as the Turks, Armenians, Circassians, Kurds and Arabs live. The applicant alleged that the Kurdish problem in Turkey was discussed by the authorities and all parts of the society, that in a period where certain extreme thoughts which used to be considered as having the potential to cause disturbance in the society could be voiced everyday, the interference made to the freedom of expression by means of confiscating a work on the Kurdish problem was against the requirements of a democratic society.

90. It was stated in the Ministry's opinion letter that in the event that an interference aimed at the freedom of expression existed, whether *''relevant and sufficient justifications''* which would justify the measures taken were brought forward and whether *''there existed a reasonable balance between the objective and means of limitation''* needed to be evaluated in terms of the requirements of a democratic society.

91. The freedom of expression and dissemination of thought and the freedom of the press may be subject to certain limitations since they are not absolute. An evaluation needs to be conducted concerning the matter of whether the limitations listed under Article 26(2) of the Constitution regarding the freedom of expression and dissemination of thought and under Article 26(2) and paragraphs four and onwards of Article 28 regarding the freedom of the press (see § 85) are in harmony with the requirements of a democratic social order and the principle of proportionality guaranteed under Article 13 of the Constitution or not.

92. It is stated in the justification for the first version of Article 13 of the Constitution that *''The proportion which needs to be observed in the limitation of rights and freedoms; that is, the limit of limitation, is envisaged under paragraph two of the Article. In other words, the limitations to be brought to rights and freedoms or the limiting measures to be envisaged in relation to these should not be against the understanding of a democratic regime; they should be reconcilable with the widely accepted understanding of a democratic regime''*. It is stated in the justification for the amendment made in the Constitution with Article 2 of the Law Concerning the Amendment of Some Articles of the Constitution of the Republic of Turkey no. 4709 of 3/10/2001 that *''Article 13 of the Constitution is re-regulated in line with the principles contained within the European Convention on Human Rights''*.

93. The democracy stipulated by the Constitution of 1982 needs to be interpreted with a modern and libertarian understanding. The criterion of *''democratic society''* clearly reflects the parallelism between Article 13 of the Constitution and Articles 9, 10 and 11 of the ECHR which contain the *''requirements of a democratic social order''*. Therefore, the criterion of democratic society should be interpreted on the basis of pluralism, tolerance and open mindedness (for judgments of the ECtHR in the same vein, see *Handyside v. United Kingdom*, App. No: 5493/72, 7/12/1976, § 49; *Başkaya and Okçuoğlu v. Turkey,* App. No: 23536/94, 24408/94, 8/7/1999, § 61).

94. Indeed, as per the established case law of the Constitutional Court, *''Democracies are regimes in which the fundamental rights and freedoms are ensured and guaranteed in the broadest manner. The limitations which bear*

prejudice against the essence of the fundamental rights and freedoms and render them completely non-exercisable cannot be considered to be in harmony with the requirements of a democratic social order. As a result, the fundamental rights and freedoms may be limited exceptionally and only without prejudice to their essence to the extent that it is compulsory for the continuation of the democratic social order and only with law.'' (see the Court, E.2006/142, K.2008/148, 24/9/2008). In other words, if the limitation which is introduced halts or renders extremely difficult the exercise of the right and freedom by bearing prejudice against its essence, renders it ineffective or if the balance between the means and objective of the limitation is disrupted in violation of the principle of proportionality, it will be against the democratic social order (see the Court, E.2009/59, K.2011/69, 28/4/2011; the Court, E.2006/142, K.2008/148, 17/4/2008).

95. Hence, the freedom of expression and dissemination of thought and, within this scope, the freedom of the press, which constitute one of the main pillars of the society, apply not only for ''thoughts'' which are considered to be in favour, harmless or not worth attention, but also for news and thoughts which are against the State or a part of the society, which is shocking for them or which disturbs them. Because these are the requirements of pluralism, tolerance and open mindedness (see *Handyside v. United Kingdom*, § 49).

96. Another guarantee which will intervene in all kinds of limitations to be introduced to rights and freedoms is the *''principle of proportionality''* expressed under Article 13 of the Constitution. This principle is a guarantee which needs to be taken into consideration with priority in applications regarding the limitation of fundamental rights and freedoms. Although the requirements of a democratic social order and the principle of proportionality are regulated as two separate criteria under Article 13 of the Constitution, there is an inseparable bond between these two criteria. Indeed, the Constitutional Court drew attention to this relationship between necessity and proportionality in its previous decisions and decided that there needed to be a reasonable relationship and balance between the objective and the means by stating that *''[Each limitation aimed at fundamental rights and freedoms] needs to be examined to see whether it is of the necessary quality for the democratic social order, in other*

words, whether it fulfills the objective of public interest which is sought while serving as a proportionate limitation allowing for the least amount of interference to fundamental rights...'' (see the Court, E.2007/4, K.2007/81, 18/10/2007).

97. According to the decisions of the Constitutional Court, proportionality reflects the relationship between the objectives and means of limiting fundamental rights and freedoms. The inspection for proportionality is the inspection of the means selected based on the sought objective in order to reach this objective. As a result, in interferences introduced in the field of the freedom of expression and dissemination of thought and the freedom of the press, whether or not the interference selected in order to reach the targeted objective is suitable, necessary and proportionate needs to be evaluated (App. No: 2012/1051, 20/2/2014, § 84).

98. In this context, the main axis for the evaluations to be carried out with regard to the facts which are the subject of the application will be whether the courts of instance which caused the interference could convincingly put forward or not whether the justifications they relied on their decisions are in line with the principles of *''necessity in a democratic society''* and *''proportionality''* with a view to the freedom of expression and dissemination of thought and, within this scope, the freedom of the press (for judgments of the ECtHR in the same vein, see *Gözel and Özer v. Turkey,* App. No: 43453/04, 31098/05, 6/7/2010 § 51; *Gündüz v. Türkiye*, App. No: 35071/97, 4/12/2003 § 46). Therefore, in the event that it is accepted that the balance between the freedom of expression and dissemination of thought and the freedom of the press which were interfered with as a result of the measure for the confiscation of the book in question and the public interest in the confiscation of the book is proportionate, it might be concluded that the justifications regarding the confiscation of the book were convincing, in other words, relevant and sufficient (App. No: 2012/1051, 20/2/2014, § 87).

99. In the evaluations to be carried out, it should also be taken into consideration that the subjects covered in the book in question are related to social matters which concern a part of the society. Within the scope of Articles 26 and 28 of the Constitution, it should be pointed out that the authorities exercising public power have a very narrow margin

of discretion in the limitation of political discourses regarding public interest or discussions concerning social problems (for an opinion in the same vein, see *Başkaya and Okçuoğlu v. Türkiye*, § 62). On the other hand, although no limitation has been introduced to the freedom of expression and dissemination of thought, and within this scope, the freedom of the press with regard to content, in areas such as racism, hate speech, war propaganda, encouraging violence and incitation, calls to riot or justifying terrorist acts, which are the borderlands of these freedoms, the State authorities dispose of a larger discretion in their interferences (for judgments of the ECtHR in the same vein, see *Gözel and Özer v. Türkiye*, § 56; *Gündüz v. Türkiye*, § 40). Therefore, it should be first evaluated to see whether the propaganda of the PKK terrorist organization is made in the book in question as described in the justification for the confiscation and seizure decision of the Istanbul Judge's Office No. 2 that was given jurisdiction under Article 10 of the Anti-Terror Law.

100. In individual applications regarding the freedom of expression and dissemination of thought and the freedom of the press, *examining expressions by tearing them apart from their contexts* may lead to erroneous results in the application of the principles contained within Articles 13, 26 and 28 of the Constitution and in carrying out an acceptable evaluation of the obtained findings. Within this framework, the fact that, for instance, the expression of a thought constitutes a threat for *''national security''* when torn apart from its context, does not in and of itself justify an interference targeting this expression. Therefore, in the present application; the expressions related to the PKK terrorist organization and the context in which these are expressed, the identity of the author of the book, the time of its composition, its purpose, its potential impacts as described in the seizure decision of the Istanbul Judge's Office No. 2 that was given jurisdiction under Article 10 of the Anti-Terror Law and the entirety of the remaining expressions in the book should be considered and evaluated as a whole. Indeed, the ECtHR has always stressed in its established case law that in order to determine whether expressions or texts regarding expressions of thought incite to violence when considered in their entirety, it would be appropriate to take into consideration the terms used and the contexts in which these were written (*Özgür Gündem v. Turkey*, App. No:

23144/93, 16/3/2000 § 63; *Sürek v. Turkey,* App. No: 24762/94, 8/7/1999 § 12, 58).

101. The seizure decision refers to the justification that the author of the book is *''Abdullah Öcalan who is convicted of the crime of founding and leading an armed terrorist organization''*. The court of first instance evaluated the identity of the author of the book within the scope of the fight against terrorism and delivered the confiscation and seizure decision. Just like it cannot be justified to intervene in somebody's freedom of expression and dissemination of thought solely based on their identity, the mere fact that a member or leader of a banned organization expresses his/her thoughts and opinions does not justify an interference with the freedom of expression and dissemination of thought as well. Since this kind of an evaluation would prevent certain individuals and groups from benefiting from the rights enshrined under Article 26 of the Constitution, it cannot be accepted in terms of the exercise of constitutional rights (for judgments of the ECtHR in the same vein, see *Gözel and Özer v. Turkey*, § 52; *İmza v. Turkey*, App. No: 24748/03, 20/1/2009 § 25; *Sürek and Özdemir v. Turkey*, App. No: 23927/94, 24277/94, 8/7/1999 § 61). Moreover, the author of the book which is the subject of the application is one of the founders and the leader of the PKK terrorist organization and one of the key players in the grave acts of violence and the loss of life and assets seen in a part of Turkey. On the other hand, the thoughts contained within the book are primarily addressed to the members of this terrorist organization. As a result, the identities of the author of the book and the individuals he addresses as well as the thoughts and convictions expressed in the book need to be considered as a whole in the evaluation of the book, attention should be paid to the content of the thoughts in question and the context in which they are expressed.

102. The seizure decision also refers to the justification that *''a region encompassing territories of Irak, Iran and Turkey was separated and highlighted with writings''* on the cover of the book in question. The applicant alleged that the region depicted on the cover of the book defined the *''Kurdistan''* geography where the Kurds live, that events and phenomena occurring in this geography or directly or indirectly impacting this geography were indicated in the writings found on the picture; that the depicted borders

were not political but cultural and geographical borders, that moreover the region defined as *''Kurdistan''* in the content of the book was a cultural geography. The depiction of a geographical region where a certain group of people live alone cannot be qualified as the declaration of an expression targeting the integrity of the country where that region is located. However, the meaning of qualifying or depicting a part of the territory of Turkey as *''Kurdistan''* can only be determined through a joint evaluation of the expressions used in the book and the special circumstances under which the book was published.

103. The book which is the subject of the application alleges that the Turkish State aims to dissolve Kurdishness as an entity via its political, military, cultural and ideological policies and defines the conflict between the PKK terrorist organization and the security forces as a ''war of freedom'' (see § 27). In sections which served as the basis for the seizure decision and were considered as PKK propaganda (see § 27), it is claimed that the PKK fighting against notably the Turkish Armed Forces, but also against international powers such as the United States of America, Germany and NATO, that the PKK has halted the dissolution of the *''Kurdish reality''* with its acts and that the *''Kurdish reality''* has achieved significant gains in the path towards freedom. A first-hand account of the ideological and organizational transformations experienced by the PKK since its foundation is delivered, the reasons of these changes and transformations and the social, economic and ideological changes that occurred in the society as a result of the acts of the PKK are analyzed not only in the sections which were indicated in the seizure decision but throughout the book as a whole.

104. Even though the applicant uses strong expressions which can be interpreted as trying to justify the acts carried out by the PKK terrorist organization since its foundation by utilizing a Marxist rhetoric, he also states that the Kurdish problem is complicated and that it is clear that *''... all these historical and social transformations ask for a new definition of Kurdishness and of the PKK, that they highlight the need for new system concepts and institutions''*, that on this basis it tries to *''... develop a new definition of the PKK and of Kurdishness as well as new system concepts and institutions''* (see § 27). In the expressions in question, which served as the basis for the seizure

decision, the socio-economic transformations in Turkey and the countries of the region and the official policies implemented in the southeast of Turkey are analyzed by making the Kurdish problem the focal point from the historical and sociological perspective; the psychology of the impelling forces behind the opposition to state policies are tackled. Throughout the entire book, it is advocated that getting stuck with nationalistic or statist solutions to the Kurdish problem deepens the deadlock; that this kind of an imposition cannot go beyond repeating the deadlock in the Palestine-Israel problem, that the Middle East will remain as the field of interest of hegemonic powers for another century unless the statist mentality is left behind and democratic tools of politics are put in place in the upcoming period; that the key role in the solution of the problems in the Middle East lie in *''the experience of democratic solution in Kurdistan''*; that the Turks, Arabs, Persians, Armenians, Assyrians and the Turkmen who are neighbours in the region share a common historical fate, that there is a possibility that *''the democratic solution in Kurdistan''* may be disseminated across the whole Middle East *''via a domino effect''*.

105. The applicant reflects historical events from his own perspective, harshly criticizes Turkey's Kurdish policy and especially its activities in the southeast, and depicts a bad picture regarding the State of the Republic of Turkey and especially its security forces. Nevertheless, the applicant demands the recognition of, in his own words, the *''Kurdish reality''* and the use of peaceful means for the solution of the Kurdish problem instead of resorting to armed methods. Whether certain sections of the book in question contain *''calls to violence''*, *''calls to armed riot''* and *''calls to armed insurgency''* or not and whether the expressions in these sections *''are of the nature to cause an increase in violence by instilling a deep and unreasonable hatred"* or not'' (*Sürek v. Turkey*, App. No: 26682/95, 8/7/1999 § 62) need to be evaluated along with the thoughts contained within the book and explained above.

106. The right of the public to obtain information regarding the evaluation of the situation concerning social problems in Turkey and in the region with an opposition perspective in terms of the freedom of the press should also be taken into account. While evaluating whether the thoughts contained within the book indeed encourage hate and violence

or not, it should also be taken into consideration that the means used is a book which is aimed at the indoctrination of the *''changing''* ideology of the PKK terrorist organization, which addresses a narrower portion of the society in comparison to means of mass communication (for judgments of the ECtHR in the same vein, see *Alınak v. Turkey*, App. No: 40287/98, 29/3/2005, § 41).

107. Although some of the thoughts which served as the justification for the confiscation of the book are unacceptable for the large majority of the society and State officials, the thoughts contained within the book as a whole are based on, in the words of the applicant, the recognition of the Kurdish reality and the utilization of peaceful methods for the solution of the Kurdish problem instead of resorting to armed methods. The applicant alleged that the objective of the picture found on the cover of the book was not to demonstrate a new political, that it designated the geography where the subjects dealt with in the book took place; that the political, social and economic transformations in this geography could be undertaken via democratic procedures. The applicant, whose influence over the PKK terrorist organization continues, mainly advocates that means of democratic solution need to be given a chance. Therefore, the expressions contained within the book to the effect that *''an eventual period of war may be initiated''* in the event that the democratic solution does not materialize, when considered jointly with the context in which the book was authored, do not mean that the applicant encouraged violence and made a call for the conduct of terrorist acts. It was considered that these words of the applicant qualified as a prediction to the effect that the violence in South Eastern Anatolia could be reignited in the event that the democratic solution did not materialize.

108. When the book was examined as a whole, it was not considered that it praised violence; that it incited and encouraged individuals to adopt terrorist methods, in other words, to resort to violence, hatred, seeking revenge or to armed resistance *''in the upcoming period''* according to the applicant's conceptualization. On the contrary, the applicant analyzes the Kurdish issue from his own perspective in an environment where there armed clashes with the security forces have been absent for some time; he demands an end to the armed conflict and a consensus regarding

the democratic solution. It should be pointed out that the authorities exercising public power have a very narrow margin of discretion in the limitation of political discourses regarding public interest such as the matters explained by the applicant in the book or discussions concerning social problems. Thoughts which are not pleasant for the public authorities or a part of the society cannot be limited unless they encourage violence, justify terrorist acts and support the formation of the feeling of hatred (see § 105). Therefore, it was concluded that the interference with the applicant's freedom of expression and dissemination of thought and, within this scope, the freedom of the press for the reasons which served as the justification for the seizure of the book which is the subject of the application was not necessary and proportionate in a democratic society.

109. According to Article 25(2) of the Law No. 5187 which served as the basis for the seizure and confiscation decision, the entirety of printed works may only be confiscated with the decision of the judge on the condition that an investigation or prosecution has been initiated as regards the crimes stipulated in the Law on Crimes Committed against Atatürk No. 5816 of 25.7.1951, the revolution laws contained within Article 174 of the Constitution, Article 146(2), paragraphs one and four of Article 153, Article 155, paragraphs one and two of Article 311, paragraphs two and four of Article 312, Article 312/a of the Turkish Criminal Code and paragraphs two and five of Article 7 of the Anti-Terror Law No. 3713 of 12.4.1991. However, not only was there no investigation or prosecution regarding the applicant as regards the book which is the subject of the application (see § 24), but the investigation conducted concerning the publishing coordinator, editor and the individual responsible for the preparation of the book for publishing regarding the crimes listed under Article 25(2) of the Law No.5187 also ended in a decision of no grounds for prosecution.

110. Even though the investigation initiated regarding the publishing coordinator, editor and the individual responsible for the preparation of the book for publishing ended in a decision of no grounds for prosecution, searches were conducted in certain special venues for the confiscation of the book, the copies which were found were seized and a part of the confiscated books were destroyed.

111. The applicant alleged that the fact that the copies of the book were destroyed without waiting for the completion of the judicial process instead of being preserved also caused a violation of rights. As per the imperative provision of Article 28(8) of the Constitution, the general provisions are applied in the seizure and confiscation of periodicals or non-periodicals for the purposes of a criminal investigation. According to Article 132 of the Law No. 5271, an item which has been seized can only be disposed of before the finalization of the judgment with the decision of a judge. According to the documents submitted within the application file, no finalized court decision exists concerning the destruction of the books. Under Article 141(1)(j) of the Law No. 5271, it is regulated that individuals whose items or other assets have been decided to be seized but regarding the preservation of whose items the necessary measures have not been taken may claim their all sorts of damages from the State by way of filing an action for material and moral compensation. On the other hand, the nature and severity of the measure which was applied should also be taken into account in evaluating whether the interference was proportionate or not.

112. When the matters raised above were taken into consideration, it was concluded that the confiscation of the books in question and the destruction of a part of the confiscated books without abiding by the procedure envisaged in the law based on the decision of seizure which had the quality of a protection measure was disproportionate in relation to the targeted objectives and that, within this scope, it was not in line with the principle of necessity and proportionality in a democratic society. For these reasons, it should be decided that the applicant's rights of freedom of expression and dissemination of thought and the freedom of the press guaranteed in Articles 26 and 28 of the Constitution were violated.

b. Examination under Article 36 of the Constitution

113. The applicant alleged that Article 141 of the Constitution was violated since the decision of seizure of the Istanbul Judge's Office No. 2 that was given jurisdiction under Article 10 of the Anti-Terror Law and the decisions of the Istanbul Judge's Office No. 3 that was given jurisdiction under Article 10 of the Anti-Terror Law dismissing the objections lacked justification.

114. It was stated in the Ministry's opinion letter that whether *''relevant and sufficient justifications''* which would justify the measures taken which constituted an interference with the book authored by the applicant were brought forward and whether *''there existed a reasonable balance between the objective and means of limitation''* needed to be evaluated in terms of the requirements of a democratic society.

115. Article 141(3) of the Constitution, headed *''Publicity of hearings and the necessity of justification for verdicts''*, is as follows:

"The decisions of all courts shall be written with a justification."

116. Article 36(1) of the Constitution guarantees the right of everyone to be able to apply to judicial organs as plaintiffs and defendants and, as a natural consequence of this, their right to claim, defense and fair trial. Beyond having the quality of a fundamental right per se, the freedom of seeking rights guaranteed by the Article is one of the most effective guarantees which enables the due enjoyment of other fundamental rights and freedoms and their safeguarding. Therefore, it is clear that Article 141 which stipulates the necessity of the decisions of all sorts of courts to be written together with their justifications needs to be observed in determining the scope of the freedom to seek rights (App. No: 2013/307, 16/5/2013, § 30).

117. The courts and judicial authorities providing sufficient justification in the decisions they deliver constitutes one of the factors which enable the sound fulfillment of justice. As indicated in the justification of Article 141 of the Constitution, the sufficiently clear demonstration of the basis a decision relies on is important in terms of ensuring the inspection for compliance with fairness in applications to legal remedies. Another reasoning for the liability to deliver decisions with their justifications is the importance of the parties knowing whether their claims have been examined according to the rules in terms of ensuring confidence in courts in a democratic society.

118. The scope of the duty to provide justification varies according to the nature of the decision and the scope of this duty can be determined via an evaluation of the circumstances surrounding the present case.

Even though Article 141(4) of the Constitution renders the courts liable to provide justifications for the decisions they deliver, this liability cannot be understood to mean that it is necessary to provide a detailed answer to all claims (for judgments of the ECtHR in the same vein, see *Garcia Ruiz v. Spain*, App.No: 30544/96, 21/1/1999, § 26).

119. The right to decision with justification is applicable both for the decisions of the courts of first instance and the courts of objection and appeal. However, it is not compulsory for the justifications of the decisions of the appeal and objection instances, which are higher courts, to be detailed. It is sufficient for the appeal and objection authority to be of the same opinion as the decision of the court which conducted the trial and to reflect this into its own decision either by using the same justification or through a simple reference. The important matter at this point is that the appeal and objection authority shows in one way or another that it has examined the main elements brought forward in the objection, and that it has approved or reversed the decision of the court of instance after examination (App. No: 2013/3351, § 50, 18/9/2013).

120. In the seizure decision of the Istanbul Judge's Office No. 2 that was given jurisdiction under Article 10 of the Anti-Terror Law, the court based the seizure decision on three separate justifications; that the author of the book in question is Abdullah Öcalan who is convicted of the crime of founding and leading an armed terrorist organization, that a region encompassing territories of Irak, Iran and Turkey was separated and highlighted with writings on the cover of the book and that the propaganda of the PKK armed terrorist organization was made in pages 173, 178, 276, 278, 284, 304, 307, 312, 324, 327, 359, 391, 408, 412 and following pages (see § 14). The Istanbul Judge's Office No. 3 that was given jurisdiction under Article 10 of the Anti-Terror Law which is the objection authority dismissed the objection with general expressions such as "*the classification and nature of the crime*", "*the existence of facts indicating a strong suspicion of crime*" and "*the existing evidence*" without providing any concrete justification (see § 16, 17).

121. The decision to seize the book which is the subject of the application has the quality of a protection measure. When evaluating whether the

justification of the decision of confiscation was sufficient or not, it should also be taken into account that the protection measures which are resorted to in order to reach the material truth and to ensure the applicability of the decisions delivered in the end are temporary. Even though the presence of more substantial and convincing justifications is desirable in this case, it cannot be claimed that there is not sufficient justification among the justifications brought forward in the confiscation decision of the judge's office of first instance and the decision of the objection authority adopting the justifications of the judge's office of first instance.

122. For the explained reasons, when considered as a whole, it was concluded that Article 36 of the Constitution was not violated in terms of the right to decisions with justification.

3. Article 50 of the Law No. 6216

123. It is indicated under Article 50(1) of the Law No.6216 that in the event that a violation decision is delivered at the end of the examination on merits, the necessary actions to redress the violation and its consequences are taken; however it is adjudged that a review for legitimacy cannot be done and that a decision in the form of administrative act and action cannot be delivered.

124. A copy of the decision should be sent to the relevant Chief Public Prosecutor's Office for the return to their owners of all of the copies of the book, which is the subject of the application, indicated in the application petition and the opinion of the Ministry to have been confiscated and seized and the forms pertaining to the book upon their request on the condition that the provisions of the regulatory legislation regarding the printing and distribution of periodical publications remain reserved.

125. The applicant made a claim for the pecuniary and non-pecuniary damages sustained by him in the application petition; however, by his petition of 13/02/2013 he stated that he waived his claim of pecuniary and non-pecuniary damages. Therefore, there is no reason to deliver a decision regarding this matter.

126. It should be decided that the total trial expense incurred by the applicant in the amount of TRY 1,698.35, consisting of TRY 198.35 for fees

and TRY 1,500.00 for counsel's fee, as determined as per the documents in the file should be paid to the applicant.

V. JUDGMENT

In the light of the reasons explained, it was held on 25/6/2014;

A. **UNANIMOUSLY** that the application must be declared ADMISSIBLE,

B. **BY MAJORITY OF VOTES** and the dissenting opinion of Osman Alifeyyaz PAKSÜT, Zehra Ayla PERKTAŞ and Burhan ÜSTÜN that the right of freedom of expression and dissemination of thought and within this scope the freedom of the press guaranteed by Articles 26 and 28 of the Constitution WERE VIOLATED.

C. **UNANIMOUSLY** that Article 36 of the Constitution WAS NOT VIOLATED,

D. that the total trial expense incurred by the applicant in the amount of TRY 1,698.35, consisting of TRY 198.35 for fees and TRY 1,500.00 for counsel's fee, be PAID TO THE APPLICANT,

E. that the payment be made within four months starting from the application of the applicant to the Ministry of Finance following the notification of the decision; that the legal interest be applied for the period which elapses from the end of this period to the date of payment in the event that there is a delay in the payment, and

F. that the file be sent to the relevant Chief Public Prosecutor's Office in order to redress the violation and its consequences.

DISSENTING OPINION

1. In his book which consists of 7 chapters and was the subject of the violation decision, the applicant advocates especially in chapter 6 in summary that it is necessary to grant the Kurds the right to become a democratic nation in order to establish the peaceful solution which could not be realized due to *''the genocidal war conducted by the nation states which share Kurdistan''*, that the existing situation cannot be sustained for much longer, and states that "*either the two parties will enter into a peace and democratic solution process the main principles of which they agree upon, or a new and final phase of war, which will be way beyond the thirty years of war and very intensive, will be experienced*", outlines, as a continuation of his analysis, the strategy for how the impending war will be conducted and states the duties to be fulfilled by the PKK and the KCK in order to ***"conduct and improve the war which will potentially be executed simultaneously by tens of thousands of people day and night, in summer and in winter, in the villages and in the cities, in the mountains and in the plains"***. According to the applicant, in the event that the democratic solution path does not materialize, the PKK needs to conduct its activities "*on the scale of a real people's war*" and "*from then onwards, everything will come to meaning and have the right to exist either within an honourable peace and democratic solution or in relation to a total and final war*".

2. It is understood that the applicant's book, which was confiscated, has the objective, as per some of its sections, of determining the new political-military strategy of the thirty-year-old separatist terrorist movement, leading the public masses and armed militants, **preparing** for, in his own words, **a new war *"which will be way beyond the thirty years of war and very intensive"***. Even though the author of the book does not seem particularly to prefer war, he states that it should be kept as a real and serious option until he fulfills his objectives.

3. In all documents of international law and notably the Charter of the United Nations, the resolution of conflicts by the use of force is prohibited, it is indicated that states cannot use force or resort to the threat of using force against the sovereignty and territorial integrity of each other. According to international law, it is similarly prohibited for "*non-state*

actors" defined as elements which are not states but claim to represent the interests of people beyond the identity of a terrorist organization to resort to force and violence. Terrorism is categorically dismissed by the entirety of the international community, and it is accepted as the "*plague of our age*" which needs to be condemned regardless of its cause, justifications and the perpetrator or the victim. Terrorism has also been accepted as a crime against humanity. In its judgment *Herri Batasuna and Batasuna v. Spain*, the European Court of Human Rights did not find a violation of the Convention in the dissolution of the mentioned political party by evaluating jointly the serious and repeated acts and conduct amounting to reconciling with terrorism and the phenomenon of the lack of condemnation against terrorism. In the decision of the Constitutional Court (File No: E:2007/1, K:2009/4) (Dissolution of Political Party), a similar conclusion was made by examining the matter extensively with regards to political parties and the freedom of expression. Therefore, even if it were to be accepted for a moment that the book was authored to defend the rightful claims of people beyond a terrorist organization, the evaluation to be made as regards the threat of violence contained within the book will not change.

4. Even though the applicant does not consider the political and/or armed struggle he defends to be within the scope of terrorism and his expressions regarding the PKK remain at the level of praise (*revolutionary people's war, story of heroism*), he considers resorting to violence as a concrete and serious option as regards the "*Kurdish problem*" of which he claims to be an advocator, he even goes further by determining a strategy in this matter and giving "*preparation for war*" instructions to the concerned. The fact that this strategy is serious was proven with a rehearsal of what is written in the book through such actions as cutting off roads, setting up check points, firing on security forces, setting fire to construction machinery, forcing or deceiving minors into joining the organization, which were experienced in recent months.

5. When considered as a whole and in the light of concrete facts and cases as per both international law and human rights standards and our Constitution and positive law, it is clear that **the book** which glorifies violence, recommends the use of violence and force as a means of politics

and seeking rights, **threatens to use violence and terrorism in the pursuit of political goals cannot be considered within the scope of the freedom of thought**.

6. On the other hand, the applicant alleged that the fact that the book was destroyed without waiting for the completion of the judicial process also caused a violation of rights. According to Article 28(8) of the Constitution general provisions are applied in the seizure and confiscation of periodicals or non-periodicals for the purposes of a criminal investigation, according to Article 132 of the Code of Criminal Procedure (CCP) No.5271, an item which has been seized can only be disposed of before the finalization of the judgment with the decision of a judge. According to the application file, no finalized court decision exists concerning the destruction of the books. On the other hand, as per Article 141(1)(j) of the CCP, it is clear that in circumstances where a decision to seize items or other assets has been delivered but the necessary measures regarding the preservation of items have not been taken, the concerned may claim their all sorts of damages from the State by way of filing **an action for pecuniary and non-pecuniary damages**. Therefore, it cannot be suggested that the conditions required to make an individual application to the Constitutional Court have been met.

7. For these reasons, it is understood that the interference which consisted of the confiscation of the books in question based on the decision of seizure which served as a protection measure was in line with the principle of necessity and proportionality in a democratic society with regard to the targeted objectives.

8. It should be decided that the application is inadmissible, in the event that it is admitted, it should be decided that the applicant's rights of freedom of expression and dissemination of thought and the freedom of the press guaranteed by Articles 26 and 28 of the Constitution were not violated.

Justice
Osman Alifeyyaz PAKSÜT

DISSENTING OPINION

1. The applicant alleged that the fact that the copies of the book were destroyed without waiting for the completion of the judicial process instead of being preserved caused a violation of rights.

2. As per the imperative provision of Article 28(8) of the Constitution, the general provisions are applied in the seizure and confiscation of periodicals or non-periodicals for the purposes of a criminal investigation. According to the documents submitted within the application file, no finalized court decision exists concerning the destruction of the books. On the other hand, it should be taken into consideration that as per Article 141(1)(j) of the Law No.5271, individuals whose items or other assets have been decided to be seized but regarding the preservation of whose items the necessary measures have not been taken may claim their all sorts of damages from the State by way of filing an action for material and moral compensation.

3. When the matters raised above were taken into consideration, it was concluded that the interference which consisted of the confiscation of the books in question based on the decision of seizure which served as a protection measure was proportionate as regards the targeted objectives and thus in line with the principle of necessity and proportionality in a democratic society.

4. For these reasons, we do not agree with the majority opinion with the belief that the applicant's rights of freedom of expression and dissemination of thought and the freedom of the press guaranteed by Articles 26 and 28 of the Constitution were not violated.

Justice	Justice
Zehra Ayla PERKTAŞ	Burhan ÜSTÜN

SEPARATE OPINION

1. It was concluded by the distinguished majority of the Constitutional Court that the 'legitimate purpose' criterion of the inspection for lawfulness was met due to the fact that the limitation was set within the scope of the fight against the PKK terrorist organization, that however, the right to a decision with justification was not violated when the justification for the confiscation decision was taken into account, that however, it could not be suggested that the thoughts contained within the book, although not being welcomed by a part of the society, praise violence and that therefore a violation of right occurred due to the fact that the criterion of ''necessity and proportionality in a democratic society'' was not fulfilled in the incident. Since, according to my opinion, the legal reasons which led to a violation of the right to freedom of expression and the freedom of the press were different, while agreeing on the outcome of the decision, I felt necessary to write a different justification.

2. The right of everyone to express and disseminate thoughts is guaranteed under Article 26 of the Constitution and it is stated that this right may only be limited with the purposes stipulated under paragraph 2. It is indicated similarly under Article 10 of the ECHR that ''every individual has the freedom of expression and dissemination'', that however, this freedom may be limited ''through measures which are necessary in a democratic society'' with legitimate purposes. The reasons of 'protection of national security and territorial integrity' and 'the prevention of crime' are listed among the reasons for limitation. The exercise of the freedom of expression also requires the protection of the means of expressing thoughts. Indeed, the freedom of the press is guaranteed under Article 28 of the Constitution with the heading ''freedom of the press'', however, it is indicated under Paragraph 8 that; ''the general provisions are applied in the seizure and confiscation of periodicals or non-periodicals due to the fact that they constitute a crime or for the purposes of a criminal prosecution''. In line with these Constitutional regulations and the provisions of the Convention, the criminal norms as regards the freedom of expression and the limitation concerning the means of expressing thoughts are limited with the relevant special laws in our judicial system.

3. Regarding the book which the applicant wanted to have published, an investigation was launched by the Istanbul Chief Public Prosecutor's Office as regards the publishing coordinator, editor and the individual responsible for the preparation of the book for publishing with the claim that the propaganda of the terrorist organization was made and within this framework, certain book forms and printed copies were seized as a result of the searches which were conducted at the SM Printing House with the order of the Prosecutor's Office and at the Gün Printing Company with the decision of the 3rd Criminal Court of Peace of Küçükçekmece, dated 17.9.2012 and numbered 930. The decision of seizure of the Prosecutor's Office was approved by the decision of the 6th Criminal Court of Peace of Bakırköy (File No: Opn. 1737 on 18.9.2012). Moreover, it was decided upon the request of the Istanbul Chief Public Prosecutor's Office and with the decision (File No:156 on 21.9.2012) of the Istanbul Judge's Office No. 2 that was given jurisdiction under Article 10 of the Anti-Terror Law to seize the book with the justification that the propaganda of the PKK terrorist organization was made in the book, the objection made against this decision was dismissed with the decision (File No:173 on 9.10.2012) of the Istanbul Judge's Office No. 3 that was given jurisdiction under Article 10 of the Anti-Terror Law.

4. The provisions of law which served as the basis for the decision of seizure need to be scrutinized in order to be able to evaluate the legal process which took place as regard the book of the applicant.

5. Article 7/2 of the Anti-Terror Law No. 3713 which was in force at the time of the seizure decision is as follows: (Amended paragraph: 30/07/2003 - L.N. 4963 /30. art.) "*Those **who aid the members of the organization** established as per the above paragraph or **engage in propaganda so as to encourage resorting to violence or other methods of terror** are sentenced in addition to one to five years in prison and a heavy fine of five hundred million liras to a billion liras, even if their actions constitute another crime.*"

6. Article 25/2 of the Press Law No. 5187 is as follows: "*On the condition that the investigation has been initiated, **the entirety of printed works may be seized with the decision of the judge** as regards the crimes stipulated in the Law on Crimes Committed Against Atatürk No.5816 of 25/07/1951, the*

revolution laws contained within Article 174 of the Constitution, Article 146(1), paragraphs one and four of Article 153, Article 155, paragraphs one and two of Article 311, paragraphs two and four of Article 312, Article 312/a of the Turkish Criminal Code and paragraphs ***two and five of Article 7 of the Anti-Terror Law*** *No. 3713 of 12/04/1991."*

7. As per the above provisions regarding the restriction of the freedom of expression and the freedom of the press, two separate methods are envisioned in the special regulation separated from the general provisions of the CCP for the seizure of a printed work. As per Article 25/1 of the Press Law, the Public prosecutor, or in circumstances where delay would be inconvenient, law enforcement agencies, may seize a maximum of three copies of all kinds of printed works as evidentiary material for the investigation. On the other hand, two conditions are sought under paragraph two of the same Article for the seizure of the entirety of the printed work. The first is obligation that the crime which is the subject of the investigation must be a crime indicated under paragraph two, the second is the obligation that this decision must be delivered by a judge. With regards to these legal provisions, the seizure of 3000 forms and 8 books at the SM Printing House as per the written search warrant of the Chief Public Prosecutor's Office of Bakırköy on 17.9.2012 was unlawful. The fact that the seizure decision was later approved by the judge does not eliminate this unlawfulness.

8. Moreover, the criminal investigation which served as the basis for the seizure decision was not against the author of the book but against the publishing coordinator, editor and the individual responsible for the preparation of the book for publishing. However, although no case was filed and a decision of no ground for prosecution was delivered due to the fact that foreclosure period indicated under Article 26 of the Press Law had elapsed, the decision to destroy the books instead of terminating the seizure action was unlawful. Thus, it is understood that the criterion of lawfulness was not fulfilled in the inspection for violation of right.

9. In addition, in the justification of the distinguished majority, while the right to decision with justification within the scope of Article 36 of the Constitution was examined, it was considered that the justification of

the seizure decision of the Istanbul Judge's Office No:2 delivered on the grounds that the propaganda of the PKK terrorist organization was made based on the references to certain pages of the book and the evaluation of the expressions of thought in some paragraphs was sufficient. Although the protection measures are temporary, due to their effect of limiting individual freedoms, the justification for the relevant decision should at least sufficiently evaluate the present case and when read, create the idea that resorting to this measure was objectively compulsory. In terms of its sufficiency, the legal connection which the justification establishes with the incident that is the subject of the evaluation, and not its length or shortness, should be the measure. Even if the outcome of the protection measure is right in terms of that incident, in the event that the justification is not sufficient, it should be considered that Article 36 is violated. Although lengthy evaluations are made in the justification in question, the paragraphs of the book which formed the basis for the evaluation can, in essence, be considered within the scope of the freedom of expression. On the other hand, the expressions contained between the pages 420-422 of the book which are to the effect that unless the targeted objectives are accomplished, 'armed resistance will be a liability for the Kurdish people and the organization', are of the quality to show that the author still adopts and recommends the method of violence and terror and conducts the propaganda of the organization. Nevertheless, due to the fact that the justification for the search and seizure decision was far away from explaining the criterion of the limitation ''being compulsory for a democratic society'', it should be considered that the right to a decision with justification was violated.

10. When inspecting the claims of violation of the freedom of expression, the ECtHR requires the investigation of whether the expressed thoughts incite to violence or uprising or whether they contain hate speech or not. Additionally, when expressions of thought are evaluated, the prevailing circumstances should also be observed (see the judgments *Sürek v. Turkey*, *Gerger v. Turkey*, and *Aktan v. Turkey*).

11. In the justification adopted by the distinguished majority, it is suggested that the thoughts expressed in the book give, in the words of the author, a first-hand account of the historical process which elapsed since

the establishment of the PKK terrorist organization until today, explain the Kurdish reality within the framework of his opinions and suggest peaceful methods for the Kurdish problem. However, in most paragraphs of the book, it is seen in fact that there is an effort to legitimize the method and actions of the PKK terrorist organization. Similarly, it is indicated that unless the target-oriented democratic struggle yields results, armed resistance will become a 'liability' for the people and the organization (see Book, p. 421). The expressions in question are not predictions for the future. It is clear that the expressions amount to a call and encouragement to violence and uprising. The individual who expresses these words is not just anyone but the leader of the armed terrorist organization which executed the actions which resulted in the deaths of tens of thousands of people in the country. The proximity of the danger that these expressions, which are geared towards the organization whose acts still continue although reduced in the past year and its sympathizers may earn new members to the organization, lead at any moment to a new act of terror or uprising or result in an increase of these acts is clear beyond any need for explanation. The fact that these kinds of expressions are limited to a few pages does not reduce the danger. For the reasons explained, I am unable to participate to this section of the justification of the majority which regards this matter.

12. As a result, as explained above, I do not agree with certain legal reasons and sections of the justification adopted by the majority, however, I participate to the outcome of the decision with the belief that there was a violation of right due to the fact that the element of lawfulness was not met in the actions of the seizure, confiscation and destruction of the applicant's book and that the right to a decision with justification was violated.

Justice
Hasan Tahsin GÖKCAN

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

NİLGÜN HALLORAN

(Application no. 2012/1184)

SECOND SECTION
JUDGMENT

President	: Alparslan ALTAN
Justices	: Serdar ÖZGÜLDÜR
	Osman Alifeyyaz PAKSÜT
	Recep KÖMÜRCÜ
	Engin YILDIRIM
Rapporteur	: Yunus HEPER
Applicant	: Nilgün HALLORAN
Counsel	: Att. Kemal VURALDOĞAN

I. SUBJECT-MATTER OF THE APPLICATION

1. The applicant alleged that the freedom of expression and dissemination of thought guaranteed under Article 26 of the Constitution was violated due to the fact that she had been sentenced to pay compensation for the words that she had used in an electronic mail and the right to a fair trial guaranteed under Article 36 of the Constitution was violated. The applicant accordingly filed a request for non-pecuniary damages.

II. APPLICATION PROCESS

2. The application was directly lodged with the Constitutional Court on 19/12/2012. As a result of the preliminary examination of the petition and annexes thereof as conducted in terms of administrative aspects, it was found out that there was no deficiency to prevent the application from being assigned to the Commission.

3. On 24/12/2013, the First Commission of the Second Section decided that the examination of admissibility be conducted by the Section and the file be sent to the Section.

4. In the session held by the Section on 23/1/2014, it was decided that the examination of admissibility and merits be carried out together.

5. The facts which are the subject matter of the application were notified to the Ministry of Justice on 24/1/2014. The Ministry of Justice submitted its opinion to the Constitutional Court on 25/3/2014.

6. On 25/3/2014, the opinion presented by the Ministry of Justice to the Constitutional Court was notified to the applicant. On 7/4/2014, the applicant submitted her counter-statements against the opinion submitted by the Ministry to the Constitutional Court.

III. THE FACTS

A. The Circumstances of the Case

7. As expressed in the application form and the annexes thereof, the facts are summarized as follows:

8. The applicant was taking office as a Professor and Deputy Rector at the Ankara University at the relevant time.

9. O.Ö. who was another professor at the same university criticized the practices of the university administration in an electronic mail group of which 2158 persons were members. Criticisms of O.Ö. are as follows:

> *"A few questions in relation to the removal of turnstiles: 1. Why did the administration always remain silent although faculty members and students previously requested that the turnstiles be removed time after time and expressed their disturbances on this subject? 2. Can the administration explain to us why they have been removed now all of a sudden? 3. Is this action an investment for election? Hoping to receive a reply for the questions."*

10. On 8/2/2011, the applicant sent an electronic mail with the following content to the e-mail account of O.Ö. as a reply to his/her criticisms:

> *"Mr./Mrs. O.Ö, I perceive your interesting message as the mirror of your personality. To tell the truth, there are some people who react as the reflection of their feelings of inferiority no matter what is done and*

this is just what you do. This action is not an investment for the election. Believe me that nobody cares about which party you will vote for. As the administration, we are doing what needs to be done when necessary."

11. On 9/2/2011, O.Ö. ensured that all members of the e-mail group saw the e-mail that the applicant had only sent to him/her by forwarding it to the group.

12. On 23/2/2011, O.Ö. filed an action for compensation against the applicant before the 2nd Civil Court of First Instance of Ankara.

13. The 2ndCivil Court of First Instance of Ankara decided on 21 June 2011 that the applicant pay non-pecuniary damages of TRY 3500,00 to the plaintiff on the grounds ... "*In the reply provided by the defendant; no compliment was paid to the plaintiff, the discussion was not sustained in a way which was appropriate for the level of academic circle of which the parties were members or which was appropriate for the understanding of moderate people, a libel was made by seeing the thoughts in the discussion in which the plaintiff participated as the mirror of personality in which the feelings of inferiority were reflected. It was not sent as a reply in a private correspondence between two persons; on the contrary, it was sent to a communication site which was open to 2158 persons who were the faculty members of the Ankara University. A libelous reply was given to an unacceptable thought or explanation. Charging of a person who is a faculty member at the University or any person who does not have any title by an academician who is the deputy rector with the fact that s/he has the feeling of inferiority makes that person unhappy and violates his/her personal rights; it is deemed necessary to award non-pecuniary damage according to Article 49 of the Code of Obligations by considering the economic situation of the parties*".

14. Upon appeal, the decision was uphold with the judgment of the 4thCivil Chamber of the Court of Cassation dated 16 October 2012.

B. **Relevant Law**

15. Article 49 of the Turkish Law of Obligations No.6089 of with the side heading *''responsibility''* is as follows:

"Those who incur damages to others as a result of negligent and illegal acts shall be responsible for compensating for such damages.

Even though in case of absence of a rule of law that prohibits damaging acts, those who intentionally harm others as a result of unethical deeds and actions shall be responsible for compensating for such acts."

IV. EXAMINATION AND GROUNDS

16. The individual application no:2012/1184, dated 19/12/2012and lodged by the applicant was examined during the session held by the court on 16/7/2014,and it has been decreed:

A. The Applicants' Allegations

17. The applicant alleges that the freedom of expression and dissemination of thought guaranteed under Article 26 of the Constitution was violated due to the fact that she was sentenced to pay compensation for the words that she had used in an electronic mail. The applicant also alleges that the Court acted in a biased way against her and interpreted procedural rules to her detriment, which is in breach of the right to a fair trial.

B. The Constitutional Court's Assessment

1. Admissibility

18. The applicant asserted that the first instance court and the Court of Cassation interpreted procedural rules to her detriment. By considering the conditions about which the applicant complained and the form of expressing her complaints, it is necessary to examine these complaints within the context of Article 26 of the Constitution.

19. The applicant's complaints that being ordered to pay compensation due to the words that she had uttered against her addressee in a discussion between university professors amounts to a violation of the freedom of expression and dissemination of thought are not manifestly ill-founded. Moreover, it should be decided that the application is admissible as there is no other reason for inadmissibility.

2. Merits

a. Allegations of the Applicant and Opinion of the Ministry

20. The applicant stated that, in a discussion which started in relation to the removal of security turnstiles which had been located at the entrance points to Cebeci Campus of the University for long years and which were used in order to keep entries into the campus under control in an e-mail group of which lecturers and faculty members of the Ankara University were members, Professor O.Ö. who was one of the members criticized the Rector's Office of the University and related the removal to the Rectorial Elections which would be held two years later; and that she, as the deputy Rector, gave a reply to the Professor O.Ö.

21. The applicant stated that the term "*feeling of inferiority*" included in the e-mail was a scientific concept; that it was not used in order to insult the defendant; and that the author of the theory of the feeling of inferiority was Alfred Adler. The applicant also specified that there were many scientific studies on this subject; that everyone had such a feeling; that this feeling was a requirement of being a human and that the feeling of inferiority was different from "*inferiority complex*". The applicant asserted that she and the plaintiff criticized each other; that both parties had the right to criticize each other and the university; and that her punishment because she did not express her thoughts like moderate people, as specified in the reasoning of the Court of First Instance, was an unfair intervention in the freedom of expression and dissemination of thought.

22. The applicant asserted that she sent the e-mail in question only to the e-mail account of O.Ö.; that O.Ö. sent it to all group members; and that her punishment due to her words not uttered with the intent of insult and amounting to a reply to criticisms in the discussion which started within the framework of activities of the university administration amounted to a violation of the freedom of expression and dissemination of thought stipulated in Article 26 of the Constitution.

23. In the opinion submitted by the Ministry in respect of the applicant's allegations, the case-law of the European Court of Human Rights (ECtHR) was reminded, and it was stated that the applicant's complaints that an

intervention was made in her freedom of expression and dissemination of thought were required to be evaluated in terms of whether or not a fair balance was struck between the freedom of expression and dissemination of thought of the applicant and the private life of others.

24. The applicant reiterated her statements included in the application petition against the opinion of the Ministry on the merits of the application.

b. The Court's Assessment

25. In the defamation case which is the subject matter of the present application, the applicant was sentenced to pay a compensation of TRY 3,500.00 by accepting that the words used by her amounted to insult. Then, an intervention was made in the applicant's freedom of expression and dissemination of thought through the court's decision in question.

26. On the other hand, there is no dispute as to the fact that the intervention in question was "*prescribed by law*" in terms of Article 13 of the Constitution and "*pursued a legitimate aim*" in the form of "*the protection of the reputation or rights of others*" within the framework of Article 26 § 2 of the Constitution. In this case, it should be evaluated whether or not the intervention in question is "*necessary in a democratic society*" and "*proportionate*".

27. In the decision in which the applicant was sentenced to pay non-pecuniary damage due to the words that she had used in a public discussion in which the lecturers and faculty members of the Ankara University were included, it should be assessed whether or not a reasonable balance was struck between the applicant's freedom of expression and dissemination of thought and the protection of the reputation or rights of others in a democratic society.

28. Article 26 of the Constitution with the side heading *''Freedom of expression and dissemination of thought''* is as follows:

> *"Everyone has the right to express anddisseminate 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 intervention by official authorities. ...*

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.

Regulatory provisions concerning the use of means to disseminate information and thoughts shall not be deemed as the restriction of freedom of expression and dissemination of thoughts as long as the transmission of information and thoughts is not prevented.

The formalities, conditions and procedures to be applied in exercisingthe freedom of expression and dissemination of thought shall be prescribed by law. ."

29. As per the mentioned legal arrangement, the freedom of expression and dissemination of though covers not only the freedom of "*having a thought and conviction*" but also the existing freedom of "*expressing and disseminating thought and conviction (opinion)*" and the associated freedom of "*receiving and giving information or opinion*". In this framework, the freedom of expression and dissemination of thought means that a human can freely have access to news and information and others' thoughts; that he/she cannot be condemned for his/her thoughts and convictions; and that he/she can freely express, tell, defend, convey and disseminate to these thoughts and convictions to others through various methods by himself/herself or together with others (app. no: 2013/2602, 23/1/2014, § 40).

30. The presence of social and political pluralism is dependent on the expression of all kinds of thoughts in a peaceful manner and freely. In the same vein, an individual can realize his/her unique personality in an environment where he/she can freely express his/her thoughts and engage in discussion. Freedom of expression is a value that we need in defining, understanding and perceiving ourselves and others and, in this framework, in determining our relations with others (app. No: 2013/2602, 23/1/2014, § 41).

31. The European Court of Human Rights (ECtHR) frequently emphasizes that freedom of expression constitutes "*one of the main bases of a democratic society which is one of the essential conditions for the progress of society and the improvement of each person*". According to the ECtHR, "*In accordance with Article 10 §2, the freedom of expression applies not only for information and thoughts which are accepted to be in favor or are not considered to be harmless or not worthy of attention, but also for information and thoughts which are aggressive, shocking or disturbing for a part of the state or the society. These are the requirements of pluralism, tolerance and open mindedness without which there cannot be any democratic society.* (see *Handyside v. the United Kingdom*, app. no. 5493/72, 7/12/1976, § 49).

32. The state has positive and negative liabilities in relation to the freedom of expression of thought. Within the scope of negative liability, public bodies should not ban the expression and dissemination of thought as long as this is not compulsory within the scope of Articles 13 and 26 of the Constitution whereas, within the scope of positive liability, they should take the measures necessary for the actual and effective protection of the freedom of expression of thought (for a similar decision of the ECtHR, see *Özgür Gündem v. Turkey*, no: 23144/93, 16/3/2000, § 43).

33. It should be noted that the state and public bodies have discretion over the restrictions in relation to the freedom of expression of thought. However, this sphere of discretion is also subject to the scrutiny of the Constitutional Court. During the scrutiny which will be conducted within the framework of the criteria of conforming to the requirements of the democratic order of the society, proportionality and not infringing upon the essence, a detailed assessment which differs according to various elements such as the type, form and contents of the expression, the time when it is expressed, the quality of the reasons for restriction is required instead of a general or abstract evaluation. (no. 2013/2602, 23/1/2014, § 48).

34. The Constitutional Court defines democratic society as follows in its case-law: "*Democracies are regimes in which fundamental rights and freedoms are ensured and guaranteed in the broadest manner. The limitations which bear prejudice against the essence of fundamental rights and freedoms and render them completely non-exercisable cannot be considered to be in harmony*

with the requirements of a democratic social order. For this reason, fundamental rights and freedoms may be limited exceptionally and only without prejudice to their essence to the extent that it is compulsory for the continuation of democratic social order and only by law." (the Constitutional Court, no. E.2006/142, K.2008/148, dated 24/9/2008). In other words, if the limitation which has been imposed halts or renders extremely difficult the exercise of the right and freedom by infringing upon its essence, renders it ineffective or if the balance between the means and objective of the limitation is disrupted in violation of the principle of proportionality, it will be in breach of the democratic social order (see the Constitutional Court, no. E.2009/59, K.2011/69, dated 28/4/2011; the Constitutional Court, no. E.2006/142, K.2008/148, dated 17/4/2008).

35. The criteria of not infringing upon the essence or conformity with the requirements of the democratic society require that restrictions on the freedom of expression and dissemination of thought should primarily be in the form of a compulsory or exceptional measure;and that they should be considered to be the last remedy to be resorted to or the last measure to be taken. As a matter of fact, the ECtHR concretizes being a requirement in the democratic society as a "*pressing social need*". Accordingly, if the restrictive measure is not in the form of meeting a pressing social need or is not the last remedy to resort to, it cannot be considered as a measure which is in conformity with the requirements of the democratic order of the society (For the decisions of the ECtHR on this subject, see *Axel Springer AG v. Germany*, [GC], no: 39954/08, 7/2/2012; *Von Hannover v. Germany* (no.2) [GC], 40660/08 and 60641/08, 7/2/2012).

36. According to the conclusion made out of this, the freedom of expression and dissemination of thought which constitutes one of the main pillars of the society, applies not only for thoughts which are accepted to be in favour or considered to be harmless or not worthy of attention, but also for thoughts which are against a part of the State or the society, which are striking for them or which disturb them; because these are the requirements of pluralism, tolerance and open mindedness (see *Handyside v. the United Kingdom*, no.: 5493/72, 7/12/1976, § 49).

37. Another guarantee which will intervene in all kinds of limitations to be imposed on rights and freedoms is the *''principle of proportionality''*

expressed under Article 13 of the Constitution. This principle is a guarantee which needs to be taken into consideration with priority in applications regarding the limitation of fundamental rights and freedoms. Although the requirements of a democratic social order and the principles of proportionality are regulated as two separate criteria under Article 13 of the Constitution, there is an inseparable relation between these two criteria. Indeed, the Constitutional Court drew attention to this relationship between being necessary for a democratic societal order and the proportionality in its previous decisions and decided that the means which would ensure that fundamental rights would be accessed with the least intervention by stating that *''[Each limitation to be imposed on fundamental rights and freedoms] needs to be examined as to whether it is necessary for the democratic societal order, in other words, whether it fulfills the objective of public interest which is sought while serving as a proportionate limitation allowing for the least amount of interventionin fundamental rights...''* (the Constitutional Court, no. E.2007/4, K.2007/81, dated 18/10/2007).

38. According to the judgments of the Constitutional Court, proportionality reflects the relationship between the objectives and means of restricting fundamental rights and freedoms. The inspection for proportionality is the inspection of the means selected based on the sought objective in order to reach this objective. For this reason, in interventions in the field of the freedom of expression and dissemination of thought, it must be assessed whether or not the intervention selected in order to achieve the targeted objective is suitable, necessary and proportionate..

39. In this context, the main axis for the assessments to be made with regard to the facts which are the subject-matter of the application will be whether or not the instance courts which caused the intervention could convincingly put forward that the justifications they relied on in their decisions are in line with *''necessity in a democratic society''* and *''the principle of proportionality''* with a view to restricting the freedom of expression and dissemination of thought.

40. On the other hand, according to Article 26 of the Constitution, one of the reasons for the restriction imposed on the freedom of expression is the protection of the reputation or rights, private and family lives of others or their professional secrets prescribed by law.

41. The honour and reputation of an individual is included within the scope of "*spiritual existence*" which is stipulated in Article 17 of the Constitution. The state is obliged not to intervene in honour and reputation which are a part of the spiritual existence of an individual and to prevent the attacks of third parties (no: 2013/1123, 2/10/2013, § 35) The intervention of third parties in honour and reputation may also be made through means of communication such as electronic mails as well as many possibilities. Even if a person is criticized within the framework of a public debate through means of communication, the honour and reputation of that person should be considered as a part of his/her spiritual integrity.

42. The positive liability of the State within the framework of establishing effective mechanisms against the interventions of third parties on the corporeal and spiritual existence of individuals shall not necessarily entail the performance of a criminal investigation and prosecution. It is also possible to protect an individual against the unjust interventions of third parties through civil procedure. As a matter of fact, both criminal and legal protection have been envisaged in our country for the interventions which are made by third parties in honour and reputation. Insult is considered as a crime in terms of criminal law, as an unjust act in terms of private law and can be subjected to an action for compensation. Therefore, it is also possible for an individual to ensure a remedy through a civil case with the claim that an intervention has been made by third parties in his/her honour and reputation (no.: 2013/1123, 2/10/2013, § 35).

43. Within the framework of its positive liabilities in relation to the protection of the corporeal and spiritual existence of individuals, the state needs to strike a balance between the right to the protection of honour and reputation and the right of the other party to exercise the freedom of expression and dissemination of thought which is enshrined in the Constitution (For a similar decision of the ECtHR, see. *Von Hannover v. Germany* (no.2) [GC], no: 40660/08 and 60641/08, 7/2/2012, § 99).

44. The ECtHR, in *Axel Springer AG* case, developed some criteria towards determining whether or not conflicting interests are balanced in the event that there is a conflict between the freedom of expression and dissemination of thought and the reputations of others and accordingly,

whether or not the intervention is necessary and proportionate in a democratic society. These criteria were stated as a) contribution of reports or expressions in the press to a debate of general interest which concerns public, b) level of famousness of the person targeted and the aim of the report, c) prior conduct of the person concerned, d) method of obtaining the information and its veracity, e) content, form and consequences of the publication and f) severity of the sanction imposed (see *Axel Springer AG v. Germany*, [GC], no: 39954/08, 7/2/2012).

45. Among these criteria, especially "*level of famousness of the person targeted and the aim of the report*" has special importance. Indeed, the ECtHR makes evaluations by making a differentiation between simple citizens and public figures, between public officers and politicians in terms of the necessity of an intervention in the freedom of expression and dissemination of though in democratic societies within the scope of the protection of rights and reputation of others. Politicians and people who are known by public have to stand more criticism due to the function that they serve. For this reason, it is inevitable that politicians and officials who exercise public authority be more open to criticism when compared to simple citizens.

46. The Constitutional Court will assess, depending on the unique characteristics of each incident, whether or not an intervention is necessary in a democratic society, whether or not the essence of a right is infringed upon while the intervention is made, whether or not intervention is proportionate and whether or not a fair balance is struck between the freedom of expression and dissemination of thought and the right to the protection of honour and reputation of others in the event that they are in conflict with each other.

47. Therefore, in the event that it is accepted that the applicant's being sentenced to compensation due to the words that she had uttered in reply to the criticisms directed to her in public as the Deputy Rector of the Ankara University is proportionate, it may be concluded that justifications of the intervention made in the freedom of expression and dissemination of thought are convincing or, in other words, relevant and sufficient.

48. The applicant maintained that her statements that "*I perceive your interesting message as the mirror of your personality. To tell the truth, there are some people who react as the reflection of their feelings of inferiority no matter what is done,and this is just what you do*" which led her to be sentenced to compensation were made in reply to the statements of the plaintiff which defined the removal of security turnstiles as an election investment in the e-mail group; and that she did not have any intent of insult. According to the applicant, the idiom in question "*feeling of inferiority*" is a scientific definition and this feeling is present in everyone without any exception. In order to substantiate her allegations, the applicant relied upon the papers on this subject of Alfred Adler who is the founder of the School of Individual Psychology and puts forth the definition in question "*feeling of inferiority*" and a book named "*Aşağılık Duygusu ve Karakter*" (Feeling of Inferiority and Character) which is written on this subject, a master's thesis written on this subject and some internet articles.

49. The applicant relied upon the following views expressed in the works in question:

> *"the most important reason for a common resistance shown against innovations is envy which is one of the indications of the feeling of inferiority. As soon as an idea is put forth, the old, the young, the literate, the illiterate always hear the same thing and performs the same actions; try to reduce the importance of and undermine the value of the idea put forth. This state which is present in all of us is natural and is the result of the feeling of inferiority."*
>
> *"Each child brings along this or, in other words, the seeds of the feeling of inferiority while coming to the world."*
>
> *"People whose physical, mental structure is completely intact, social status is suitable and who are brought up through a very good education should not have had the feeling of inferiority. However, it is not the case and we see that people who grow up in a perfect way in all aspects are under the influence of the feeling of inferiority."*
>
> *"All people like being praised, loved, respected. Indeed, each person is under the influence of the feeling of inferiority in various degrees."*

50. According to the applicant, the feeling of inferiority in question is at the same time a feeling which makes people stronger, makes life more bearable and has positive aspects.

> *"According to Adler… it is the feeling of inferiority ... which forces people to become stronger creatures… and which compels them to strive in this or that way in order to ensure security. This feeling is a desire which is felt in order to find an appropriate aim so as to render life bearable by creating security and peace and which is not possible to be prevented."*

51. The 2nd Civil Court of First Instance of Ankara before which the applicant was tried accepted that the applicant did not praise the plaintiff; that she did not participate in the discussion in a way which was appropriate for the level of the academic circle of which the parties were members or which was appropriate for the understanding of moderate people; and that the words "*feeling of inferiority*" that the applicant had used amounted to insult in a way which would leave no room for doubt. Moreover, falling into error in the assumption of the incident, the Court accepted that the e-mail which was the subject matter of the case was not sent as a reply in a private correspondence between two persons but on the contrary, was sent to a communication site which was open to 2158 persons who were the faculty members of the Ankara University (see § 13).

52. It may not be sufficient to handle only the decisions rendered by the instance courts in the examination of the present individual application. Firstly, it should be taken into consideration that the words uttered by the applicant were only expressed in an e-mail which was sent to the electronic mail address of the plaintiff. Secondly, the expression "*reflection of the feelings of inferiority*" which was the subject matter of the trial should be evaluated within the whole content of the incident together with the entire speech in which it was used and without separating it from the context in which it was uttered.

53. The plaintiff's criticisms were in essence replied in the e-mail in question. The plaintiff stated that although it had been previously requested that the security turnstiles present at the entrance points to the campus be

removed time and again, the university administration remained silent about these requests and implied that sudden removal of turnstiles may be an election investment. In reply to this criticism, the applicant asserted that they, as the administration, did what should have been done at the university; and that this was not an election investment; that the criticism as to the removal of security turnstiles, which was requested by everyone, could only be based on psychological reasons. The applicant also stated that the criticism made by the plaintiff was "*a reflection of the feeling of inferiority*" as it was a reaction given no matter what was done by the university administration and criticized the plaintiff in this context.

54. The applicant maintained that the feeling of inferiority is the most important reason for a common resistance shown against innovations; that when an idea was put forth or a behaviour was exhibited, those who had this feeling tried to reduce the importance of, undermine the value of the idea put forth and asserted that this state which was present in each person was natural.

55. These expressions should be characterized as value judgments which contain assessments against the criticisms of the plaintiff. The accuracy of a value judgment is not provable and as it is not possible to prove value judgments as they are composed of the views and opinions of a person, requesting that they be proved will amount to the violation of the freedom of expression and dissemination of thought.

56. That being the case, under the conditions of the current case, the allegation that the value judgment which the applicant expressed did not constitute an insult can at least be partially supported with the defence submissions of the applicant and the academic articles added in the file as evidence (for similar assessments, see *Sorguç v. Turkey*, no: 17089/03, 23/9/2009, § 32). On the other hand, even if a statement is completely composed of a value judgment, the proportionality of an intervention should be determined depending on whether or not the statement under dispute is sufficiently supported with authoritative elements. Because, if a value judgment is not supported with authoritative elements, it may be disproportionate (see *Sorguç v. Turkey*, no: 17089/03, 23/9/2009, § 29).

57. In the present case, a discussion started among academic personnel concerning the removal of the security turnstiles which had been present at the entrance points to the campus of the Ankara University for long years. According to the information inferred from the file, it is thought that the security turnstiles in question are in conflict with the liberal appearance of universities and there has been a request for the removal of these turnstiles for a long time. Moreover, the removal of the turnstiles in question and the easing of strict security procedures applied during entries to- and exits from universities is considered as a positive practice by academic personnel including the plaintiff. However, the plaintiff made a criticism as to why the practice had been delayed up to that day while the applicant sent the e-mail which is the subject matter of the application to the plaintiff with the thought that the value of the positive practice performed was tried to be undermined.

58. When the aforementioned incidents are taken into consideration, there is a public interest in the discussion taking place as to the removal of the security turnstiles which were present at the entrance points to the university. Although the discussion in question was made in an e-mail group of the faculty members of the university and the plaintiff expressed his/her criticisms against the university administration in this mail group, the applicant made her statements which disturbed the plaintiff through an e-mail that she sent to the plaintiff's e-mail address. The applicant made a criticism on behalf of the university administration against the criticisms of the plaintiff through her own personal account and in a way that only the plaintiff was able to see rather than making a statement to which everyone were able to access. The first instance court considered that the applicant sent the electronic mail in question to the entire mail group. However, it should be noted that the applicant only sent the e-mail which is the subject matter of the case to the plaintiff.

59. In order to enable a person to exercise the right to the protection of his/her spiritual existence stipulated in Article 17(1) of the Constitution, the attack towards the reputation of the person must reach a certain level of severity and be such as to cause a damage for the exercise of the right to the protection and development of spiritual existence (for a similar assessment, see *A. v. Norway*, no: 2807006/, 9/7/2009, § 64). In the present

case, the applicant only sent her e- mail to the plaintiff, but the plaintiff ensured that the statements of the applicant were disseminated in a way which everyone who was the member of the e-mail group was able to read by sending to the entire e-mail group the e-mail which he/she asserted to have had libellous content and to have damaged his/her honour and reputation. While striking a fair balance between interests, this matter should also be taken into consideration.

60. According to the defence submissions of the applicant, she used the idiom "*feeling of inferiority*" both in order to draw attention to how disproportionate the plaintiff's criticisms were and as it was an idiom which could summarize her own criticism. However, in any case, it cannot be expected from the plaintiff to know the meaning to which the applicant assigns to the words that she used.

61. Identities of the parties to the discussion in question should also be taken into consideration. While the applicant is a faculty member who is the deputy rector, the plaintiff is a faculty member who does not have any administrative duty. In the event that the freedom of expression and dissemination of thought and the protection of the fame and reputation of others are in conflict, if the person whose fame is in question is a public official, the public duty that this person assumes should be taken into consideration during striking a balance (no: 2013/5574, 30/6/2014, § 71; for a decision of the ECtHR on the fact that protection will be more flexible for persons who are recognized by the public, see *Minelli v. Switzerland (s.d.),* no: 14991/02, 14/6/2005). Nevertheless, if the person whose fame is in question is a simple citizen as in the current application, protection should be made from a high level, and this situation should be taken into consideration during striking a balance.

62. In conclusion, in the discussion taking place between the faculty members and lecturers of the university for the removal of the security turnstiles which were present at the entrance points of the university and in which there was a public interest, the applicant who was the deputy rector of the university replied to the plaintiff in a harsh and stinging manner against the criticisms of the plaintiff by thinking that the value of the positive practice performed was tried to be undermined. While

the applicant, as a senior public official, needed to show more tolerance against the plaintiff's criticisms that the timing of the removal of security turnstiles was meaningful, she replied to the plaintiff's criticisms which did not contain any insult and were not harsh either in a much severer way and in the way that these words were "*the reflection of his/her feelings of inferiority*".

63. The word "*inferiority*" included in the applicant's words which are the subject matter of the case is used with the meanings of "*having a low quality*" such as "*coarseness*", "*commonness*" today. The applicant's statements that the criticisms of the applicant resulted from the feeling of inferiority and this feeling was present in each human; that people who grew up in a perfect way in all aspects were also under the influence of this feeling do not remove the negative feelings that the plaintiff had when he/she read the e-mail in question. Moreover, the fact that the applicant sent her critical statements only to the plaintiff does not remove the "*defamation*" stipulated in these statements.

64. The first instance court ruled that the applicant pay a compensation of TRY 3,500.00 by considering that the plaintiff was exposed to defamation, and the first instace decision was upheld by the Court of Cassation. In the examination of individual application, the Constitutional Court does not intervene in the courts' assessment of the facts in dispute and interpretation of the law as long as the constitutional rights of individuals are not violated. When the aforementioned matters are taken into account, it cannot be concluded that the intervention in which the plaintiff was sentenced to pay a compensation at the amount of TRY 3,500.00 in the action for compensation filed against her due to the words that she had used against the criticisms which the plaintiff directed to the administration of the Ankara University constituted a disproportionate intervention in the applicant's freedom of expression and disturbed, to the detriment of the applicant, the balance required to be struck between the plaintiff's right to request the protection of his/her right to reputation and the applicant's freedom of expression. For this reason, it should be held that there has been no breach of the freedom of expression and dissemination of thought guaranteed in Article 26 of the Constitution.

V. JUDGEMENT

In the light of the reasons explained, it was **UNANIMOUSLY** held on 16 July 2014 that

A. The application **be declared ADMISSIBLE** in terms of the freedom of expression and dissemination of thought,

B. With regard to the applicant's allegation that the freedom of expression and dissemination of thought was violated, there be no violation of Article 26 § 1 of the Constitution,

C. That the trial expenses be covered by the applicant.

RIGHT TO A FAIR TRIAL (ARTICLE 36)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

A. Ş.

(Application no. 2013/596)

FIRST SECTION
JUDGMENT

President	: Serruh KALELİ
Justices	: Zehra Ayla PERKTAŞ
	Burhan ÜSTÜN
	Hicabi DURSUN
	Zühtü ARSLAN
Rapporteur	: Bahadır YALÇINÖZ
Applicants	: E.T.Y.İ. A.Ş.
Counsel	: Att. Ahmet Mithat KILIÇOĞLU

I. SUBJECT-MATTER OF THE APPLICATION

1. The applicant alleging that the action for annulment it filed regarding the value added tax (VAT) levied and the tax loss fine was dismissed, therefore their rights defined in Articles 10, 36 and 73 of the Constitution were violated. The applicant requested that the violation be determined and that a decision be issued on the compensation of the pecuniary damages which they incurred due to the VAT levied with the tax loss fine.

II. APPLICATION PROCESS

2. The application was directly lodged with the Constitutional Court on 18/1/2013. As a result of the preliminary examination that was carried out in terms of administrative aspects, it was determined that there was no situation which prevented the submission of the applications to the Commission.

3. It was decided by the Second Commission of the First Section on 17/6/2013 that the file be sent to the Section in order for the examination of admissibility to be conducted by the Section.

4. It was decided by the Section during the meeting held on 10/10/2013 that the examinations for admissibility and merits be conducted together and a copy be sent to the Ministry of Justice for its opinion.

5. The facts and cases, which are the subject matter of the application, and a copy of the application were sent to the Ministry of Justice for its opinion. The opinion letter of the Ministry of Justice on 18/11/2013 was notified to the counsel of the applicant and the counsel of the applicant made its counter-opinions through the letter dated 4/12/2013.

III. THE FACTS

A. **The Circumstances of the Case**

6. As expressed in the application form and the annexes thereof, the facts are summarized as follows:

7. In accordance with the tax examination report dated ... and numbered ... arranged as a result of the examination of the accounts of the applicant for the years 2002, 2003, 2004 and 2005, on the ground that it did not calculate VAT over the invoice amounts that it paid with regard to the advertisement and publicity services abroad which it commissioned to the company named ... with whom it concluded a management agreement with regard to the golf course, hotel and holiday resort that it operated and did not submit the VAT statements numbered 2 in its capacity as the responsible party, a VAT of ... TRY and a tax loss fine of ... TRY were levied by transfer over this amount.

8. The action which was filed by the applicant with the request for the VAT and tax fine levied on was dismissed with the decision of the ... Tax Court dated 22/10/2008 and numbered... . The decision was issued with the majority of votes and the justification of the decision is as follows:

> *"From the evaluation of the aforementioned legal provisions together with the incident; it is clear that the advertisement and publicity services which the plaintiff institution procured abroad are directly related to the continuity and profitability of its commercial activities in Turkey, that this relation is ensured by increasing the number of clients benefiting from hotel management services which are the subject of activity and that*

consequently, the service has been utilized and it is concluded that the fact that these advertisement and publicity activities are carried out for potential clients abroad will not change the fact that the service provided is utilized in Turkey as mentioned.

In this case, as it is necessary to accept that the advertisement and marketing services which the plaintiff firm procured abroad are utilized in Turkey, there is no inappropriateness as regards the levies of fined value added tax made by transfer by the defendant administration on behalf of the plaintiff company which did not calculate value added tax and did not submit any statement to the tax office under which it was affiliated through the statement numbered 2 over the invoice amounts regarding these services in the capacity of the responsible party."

9. The decision was appealed by the applicant and the request for appeal was dismissed and the decision was approved through the decision of the ... Chamber of the Council of State dated 6/10/2011 and numbered... .

10. The request for correction filed against this decision was also dismissed with the decision of the same Chamber dated 26/11/2012 and numbered ... .

11. The decision was notified to the applicant on 4/1/2013.

B. **Relevant Law**

12. Article 30 of the Law of Civil Procedure No.6100 of 12/1/2011 with the side heading *''Principle of economy in procedure''* is as follows:

"The judge is liable to ensure that the trial is carried out in a reasonable amount of time and in an orderly fashion and unnecessary expenditures are not made."

13. Article 29 of the Law on Tax Procedure No.213l of 4/1/1961 with the side heading *''Tax levy by transfer''* is as follows:

"Tax levy by transfer is the levy of the tax that will be taken on grounds of a basis or a difference in the basis the amount of which is determined based on books, records and documents which are related to the tax and which have emerged after a tax is levied in any which way, or on legal criteria.

Provisions that are in their special laws concerning levy by transfer shall be reserved."

14. Article 341 of the same Law with the side heading "*Tax loss*" is as follows:

"Tax loss shall mean the failure to accrue the tax on time or accrual thereof deficiently as a result of the failure of the tax payer or the liable in timely performance of their duties in relation to taxation or their performance of such duties deficiently.

Causing a short come of accrual of the tax or unrightfully return thereof for personal, civil circumstances or with unrealistic declarations about the family status or in similar ways shall also have the consequence of tax loss.

Accrual of the tax later in cases written in the above clauses, or the completion thereof or the taking back of the unrightfully return shall not constitute an impediment against the application of penalty."

15. Article 6 of the Law No.3065 of 25/10/1984 with the side heading *''Performing actions in Turkey''* is as follows:

"Performing actions in Turkey shall mean:

a) The presence of goods in Turkey at the time of delivery,

b) (Amended: 27/1/2000 - 4503/3 art.) The performance of the service in Turkey or the utilization of the service in Turkey.

16. Article 9(1) of the same Law with the side heading *''Tax responsible"* is as follows:

"In cases where the taxpayer does not have any residence, office, legal headquarters and business headquarters in Turkey and in other cases where deemed necessary, the Ministry of Finance can hold responsible those who are party to the actions that are subject to tax for the payment of tax in order to keep the tax receivable secure."

IV. EXAMINATION AND GROUNDS

17. The individual application of the applicant (App No: 2013/596 on 18/1/2013) was examined during the session held by the court on 8/5/2014 and the following were ordered and adjudged:

A. The Applicants' Allegations

18. By stating that it concluded a management agreement with the company named ... with regard to the golf course, hotel and holiday resort which it operated and that it left the management of the enterprise to this company under certain conditions, that the publicity and marketing activities of the specified facilities abroad were also made by this company, that a total expense of ... TRY was made for publicity and marketing abroad in the period from June 2002 to December 2005, that in the tax examination report arranged on the applicant company, ... TRY for VAT and ... TRY for tax loss fine over this amount were levied on the ground that the service charge which was stated have been paid to the company named ... fell under the subject of VAT and the VAT statements numbered 2 were not submitted by the applicant in its capacity as the responsible party, the action filed with request for the cancellation of VAT and the tax fine levied on it was dismissed through the decision of the ... Tax Court and the decision became final by passing through legal remedies, that although there were circulars, administrative decisions and the Court case-law showing that the service which was the subject of the action was not subject to VAT, VAT and tax fine were levied on it, that even if it was accepted that the levied VAT was correct, the tax paid because of this service would be made the subject of reduction in the VAT statement numbered 1 and that the VAT amount paid in this way would not change, that for this reason, the imposed tax fine was not appropriate, that however, VAT and tax loss fine were levied and also that the action filed for the cancellation of the mentioned acts was dismissed by ignoring all these mentioned matters were contrary to the principle of equality and the right to a fair trial, that tax fine was created *mutatis mutandis* and that the conducted trial exceeded reasonable period, the applicant company claimed that its rights defined in Articles 10, 36 and 73 were violated and requested that a decision be issued for the compensation of the VAT and

tax loss fine which were unrightfully levied together with its interest from the collection thereof.

B. The Constitutional Court's Assessment

19. The Constitutional Court is not bound by the legal qualification of the facts made by the applicant. It is seen that the applicant is complaining about the result of the decision issued in the action that it filed and about the failure to conclude the trial within a reasonable time. For this reason, the claim of the applicant to the effect that the trial period is not reasonable as well as the claims that it has asserted by establishing a connection with the rights defined in Articles 10 and 73 of the Constitution have been evaluated within the scope of its claim in relation to the violation of the right to a fair trial.

1. Admissibility

a. Competence ratione materiae

20. The applicant asserted that its right defined under Article 36 of the Constitution was violated by stating that the case which it filed with the request for the cancellation of the act of levying the principle tax and tax fine together was not concluded within a reasonable time and that the decision of the court was not fair.

21. According to Article 148(3) of the Constitution and Article 45(1) of the Law No.6216, in order for the merits of an individual application made to the Constitutional Court to be examined, the right, which is claimed to have been intervened in by public power, must fall within the scope of the European Convention on Human Rights (Convention) and the additional protocols to which Turkey is a party of, in addition to it being guaranteed in the Constitution. In other words, it is not possible to decide on the admissibility of an application which contains a claim of violation of a right that is outside the common field of protection of the Constitution and the Convention (App. No: 2012/1049, 26/3/2013, § 18).

22. Article 36(1) of the Constitution with the side heading *"Freedom to claim rights"* is as follows*:*

"Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures.-"

23. Article 6(1) of the Convention with the side heading "*Right to a fair trial*"is as follows:

"In the determination of his ***civil rights and obligations*** *or of* ***any criminal charge against him****, everyone is entitled to a fair and public hearing* ***within a reasonable time*** *by an independent and impartial tribunal established by law." Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."*

24. In Article 36(1) of the Constitution, it is stated that everyone has the right to make claims and defend themselves either as plaintiff or defendant and the right to a fair trial before judicial bodies through the use of legitimate ways and means. The phrase "*fair trial*" contained in the Article was added to the Constitution through the Law on the Amendment of Some Articles of the Constitution of the Republic of Turkey No.4709 of 3/10/2001. Since the scope of the right to a fair trial is not regulated within the Constitution, the scope and content of this right needs to be determined within the framework of Article 6 of the Convention with the side heading "*Right to a fair trial*".

25. It is indicated under Article 6 of the ECHR which regulates the right to a fair trial that the rights and principles with regard to a fair trial are applicable during the conclusion on the merits of *''disputes pertaining to civil rights and obligations''* and *''a criminal charge''*, the scope of the right is thus restricted to these subjects. It is understood that in order to be able to lodge an individual application with the justification that the right to claim rights has been violated, either the applicant needs to be the party of a dispute pertaining to his/her civil rights and obligations or a decision needs to have been delivered regarding a criminal charge pertaining to

the applicant. Therefore, applications based on the claim that the right to a fair trial has been violated that are outside the circumstances that have been referred to cannot be the subject of an individual application as they would be outside the scope of the Constitution and the ECHR (App. No: 2012/917, 16/4/2013, § 21).

26. In this direction, given the case-law of the European Court of Human Rights (ECtHR) specifying the jurisdiction thereof in terms of subject within the context of Article 6 of the Convention, by considering the fact that tax matters form part of the hard core of public prerogatives as the relation between the taxpayer and the predominant society has a public nature, the Court accepts that tax disputes remain outside the scope of "*civil rights and obligations*" even if they necessarily create pecuniary effects for taxpayers (*Ferrazzini v. Italy* [BD], App. No: 44759/98, 12/6/2001, §29). However, the ECtHR, in its *Bendenoun v. France* decision, by considering that the law which regulates tax fines covered not a certain group with a special status, but all citizens who are taxpayers, that additional tax obligations did not serve the purpose of a monetary compensation in return for a damage, but served the purpose of being a sanction which deterred committing crimes again, that these were imposed according to a general rule which had the purpose of both deterrence and punishment, that the amount was a highly significant amount both for the applicant himself and for his company and that in the event that the applicant did not pay the prescribed amount, he could have been sentenced to imprisonment by criminal courts, considered this dispute within the scope of "*criminal charge*" and referred to the fact that Article 6 of the Convention could be applicable to this dispute (*Bendenoun v. France,* App. No: 12547/86, 24/2/1994, §47). On the other hand, the ECtHR, in its *Jussila v. Finland* decision, accepted that the criminal nature of the offense was sufficient to render Article 6 applicable even if the amount of the tax fine was low (*Jussila v. Finland* [BD], App. No:73053/01, 23/11/2006, §38). In its *Mieg de Boofzheim v. France* decision, it was determined that purely *"the interest for late payment"* which required the taxpayer to act in good faith did not constitute *"a criminal charge"* within the scope of Article 6, that for this reason, Article 6 was not applicable (*Mieg de Boofzheim v. France*, App. No: 52938/99, 3/12/2002, (s.d.)). On the other hand, in its *Georgiou v. the United Kingdom* decision, the ECtHR which examined the claim as to the effect that the right to a

fair trial of the applicant was violated in the case filed together against the principal VAT and the relevant tax evasion fine decided that the evasion fine consisted of the criminal charge, that given the quality of the incident, it was difficult to separate the parts related to the criminal charge from the parts related to the principal tax for which no criminal charge was present and that for this reason, it was compulsory that the evaluation to be made on the application would be in a way to cover the tax levy (*Georgiou v. the United Kingdom,* App. No: 40042/98, 16/5/2000). Through this decision, the ECtHR states that the right to a fair trial needs to apply to the entire case in the event that a case is filed together against principal tax and tax fines.

27. As a result of the determinations specified above, it was stated by the Constitutional Court that rights and principles with regard to the right to a fair trial stipulated in Article 6 of the Convention were applicable during the conclusion on the merits of *''disputes pertaining to civil rights and obligations''* and *''a criminal charge''* and the scope of the right was restricted to these subjects. In the decisions of the Constitutional Court, as the common field of protection of the Constitution and the Convention was taken as the basis for determining whether or not a claim of violation fell within the jurisdiction of the Constitutional Court in terms of subject, it was accepted that the applications based on the claim of violation of the right to a fair trial would remain outside the scope of the common field of protection of the Constitution and the Convention and that therefore, it would not be made the subject of an individual application except for the cases where the applicant was a party to a dispute relevant to civil rights and obligations or where a decision was issued on a criminal charge towards the applicant. In the case-law of the ECtHR, it is understood that the fact that the disputes which are made the subject of the application in terms of principal tax are disputes whose public nature is predominant between the taxpayer and the state party which is the tax creditor and that it is accepted that they are included within the hard core of the public authority of state parties play a role in reaching the conclusion that the tax disputes which do not have any criminal nature will remain outside the scope of guarantee of Article 6.

28. However, tax disputes in our legal system are settled within the administrative judiciary branch, not within a separate judiciary branch

and, on the condition that provisions in special laws are reserved, within the framework of a trial procedure which is subject to the same trial procedure with other administrative disputes, in general, in accordance with the Law of Civil Procedure No.2577 of 6/1/1982. Moreover, in the event that a behavior which is contrary to the liability of taxation is determined, the tax levied and the tax fine prescribed by the relevant administration are notified to the taxpayer within the scope of the same notice, the tax levied and the tax fines imposed are made the subject of a case within the same trial procedure, this organic link between principal tax and tax fine sustains its existence also in the phase of the collection of tax claim except for anomalous situations such as irregularity fines. In addition to this, in the event that a case filed against the actions of levy carried out *ex officio* or by transfer is partly or completely dismissed, in accordance with the relevant legislation, it is prescribed that the default interest to be calculated increases in direct proportion to the period of the case (see Article 112(3) of the Law No.213, Article 28(5) of the Law No.2577), it is understood that with this aspect, the right to trial within a reasonable time which is stipulated among the guaranteed provisions included within the right to a fair trial can play a functional role also in terms of the disputes which are related to principal tax and that with this aspect, purely tax disputes which are accepted as a relation whose public nature is mainly predominant is a relation which has important implications in the field of civil rights and obligations including in particular property right and within the specified determinations, it is concluded that tax disputes need to be evaluated within the scope of guarantee with regard to the right to a fair trial. In this case, claims of violation pertaining to the dispute that is the subject of the application, fall within the jurisdiction of the Constitutional Court in terms of subject.

29. Due to the fact that the other matters that have been made the subject of complaint in the application bear different qualities in terms of the other admissibility criteria, the examination pertaining to each complaint needs to be conducted separately.

b. The Claim that the Trial is Not Fair

30. The applicant claimed that the right to a fair trial was violated by stating that although there were circulars, administrative decisions and

the court case-law showing that the service which was the subject of the action was not subject to VAT, that VAT and tax fine were levied on it, that even if it was accepted that the levied VAT was correct, the tax paid because of this service would be made the subject of reduction in the VAT statement numbered 1 and that the VAT amount paid in this way would not change, that for this reason, the imposed tax fine was not appropriate, that however, VAT and tax loss fine were levied and also that the action filed for the cancellation of the mentioned acts was dismissed by ignoring all these mentioned matters.

31. In its opinion, the Ministry of Justice stated that as a rule, the material and legal mistakes which were made by local courts could only be made the subject of an individual application to the extent that the violation of the rights and freedoms which were guaranteed by the ECHR and the Constitution was in question, that even if Article 6 of the ECHR and Article 36 of the Constitution guaranteed the right to a fair trial, subjects such as the admissibility of information-documents or the evaluation of the legislation were primarily relevant to local courts, that the proving of the incidents in the action which was the subject matter of an individual application, the interpretation and application of legal rules, the admissibility and evaluation of evidence during trial and whether or not the remedy proposed by the courts of instance for a personal dispute was fair in terms of merits would not be subjected to evaluation in the examination of an individual application, that the tax imposed on the applicant was VAT and that the court of first instance decided as to the effect that the imposed tax was compliant with the legislation by exercising its discretion in the implementation of the relevant legal provisions, that the aforementioned matters needed to be taken into consideration in the examination of the complaints of the applicant in terms of admissibility and merits.

32. In its petition of answer, the applicant stated that its rightful application needed to be admitted.

33. Article 48(2) of the Law on the Establishment and Trial Procedures of the Constitutional Court No.6216 of 30/3/2011 with the side heading *''The conditions and evaluation of admissibility of individual applications''* is as follows:

"The Court can decide that applications which bear no importance as to the application and interpretation of the Constitution or regarding the definition of the borders of basic rights and freedoms and whereby the applicant has incurred no significant damages and the applications that are expressly bereft of any grounds are inadmissible."

34. Article 49(6) of the Law No.6216 with the side heading *''Examination as regards the merits"* is as follows:

"Examination of the sections of individual applications regarding a court decision shall be limited to whether or not a basic right has been violated and the determination of how such violation can be remedied. Examination on issues that have to be observed in legal remedies shall not be performed.

35. In accordance with the mentioned rules, proving the incidents that are contained within the case that is the subject of the individual application, interpretation and application of the rules of law, the admissibility and evaluation of evidence during the trial and whether or not a solution brought by courts of instance to an personal dispute is fair from a merits point of view shall not be subjected to assessment during the individual application examination. As long as the rights and freedoms stipulated in the Constitution are not violated and unless they contain any obvious arbitrariness, material and legal mistakes in decisions of courts of instance cannot be handled in the examination of an individual application either. In this framework, unless an evident discretionary mistake or an obvious arbitrariness is present in the appreciation of the evidence by the courts of instance, the Constitutional Court cannot intervene in this appreciation (App. No: 2012/1027, 12/2/2013, § 26).

36. In the incident which is the subject matter of the application, it is understood that it was asserted that in the tax examination report drawn up as a result of the examination of the accounts of the applicant company for the years 2002, 2003, 2004 and 2005, although the advertisement and marketing services which were procured abroad to ... company which was one of the partners of the applicant were utilized in Turkey, value added taxes with a tax loss fine were imposed by transfer on the ground that VAT was not calculated over the invoice amounts in relation to the services in

question and was not declared through the statement numbered 2 in the capacity as the responsible party, that in the action filed by the applicant company; it was not allowed to make use of conciliation before assessment, that the advertisement and publicity services in question were utilized abroad, that therefore, they were not subject to tax in accordance with subparagraph (b) of Article 6 Law No.3065, that moreover, the fined taxes imposed upon evaluations made by the examination personnel to the contrary although there were various advanced rulings published in this direction and it was requested that it be lifted.

37. ... the Tax Court, in its decision approved by the Council of State, dismissed the action on the ground that by considering together Articles 1, 8 and 9 of the Law No.3065, the advertisement and marketing services which were procured abroad were directly related to the continuity and profitability of commercial activities in Turkey, that this relation was ensured by increasing the number of clients benefiting from hotel management services which were the subject of activity and that consequently, the service was utilized in Turkey, that there was no inexactness in the fined VAT levies performed by transfer due to the fact that the applicant company did not calculate VAT over the invoice amounts in relation to these services and did not make any declaration to the tax office under which it was affiliated through the statement numbered 2.

38. It is understood that the claims of the applicant company are in relation to the interpretation of legislation and the result of the trial in terms of merits.

39. The right to a fair trial provides the individuals with the opportunity to review whether or not the trial process and procedure are fair, rather than the decisions delivered at the end of the case. For this reason, in order for the complaints as regards a fair trial to be examined in an individual application, the applicant needs to submit information or a document with regard to a deficiency, negligence or evident discretionary mistake or obvious arbitrariness which is not evaluated as for the elements that result in the creation of the court decision such as the fact that the rights of the applicant are not respected during the trial, that in this context, s/he is not informed about the evidence and opinions which the opposite

party presents during the trial or could not find the opportunity to object against them in an effective manner, that s/he could not present his/her own evidence and claims or that his/her claims as regards the settlement of the dispute have not been heard by the court of instance or that the decision does not have any justification. In the present incident, it is understood that the applicant company did not submit any information or document as to the effect that the trial process was contrary to fairness, which on the contrary, it mentioned the complaint as to the effect that the content of the decision issued as a result of the trial was not fair.

40. Due to the reasons explained, as it is understood that the claims asserted by the applicant have the quality of being a legal remedy complaint, that the decisions of the court of instance did not include any evident discretionary mistake or obvious arbitrariness, it needs to be decided that this part of the application is inadmissible as it is *"manifestly ill-founded"*.

c. The Claim that the Trial Period is not Reasonable

41. The action which is the subject matter of the application was filed prior to the date of 23/9/2012 which is the date of initiation of the venue of the Constitutional Court in terms of time and as it is understood that it is pending as of the date of application, examination of the application is within the venue of the Constitutional Court in terms of time. Moreover, although all of the administrative and judicial application remedies prescribed in the law for the act, action or negligence which is the basis of the claim of violation needs to be exhausted before lodging an individual application, as it is understood that there is no administrative or judicial application remedy which has a preventive effect against the prolongation of the trial or which has a quality of determining and compensating the damages which occur as a result of the failure to conclude the trial in a reasonable period, the application has a quality of admissibility in terms of the exhaustion of legal remedies (App. No: 2012/13, 2/7/2013, § 21-30).

42. Due to the reasons explained, it should be decided that the application which is not manifestly ill-founded and where no other reason is deemed to exist to require a decision on its inadmissibility is admissible.

2. Merits

43. The applicant claimed that the right to trial within a reasonable time was violated by stating that the administrative action that it had filed was concluded after a period which was longer than five years.

44. Article 141(4) of the Constitution with the side heading *''Publicity of hearings and the need for verdicts to be justified''* is as follows:

> *"It is the duty of the judiciary to conclude cases with minimum cost and as soon as possible."*

45. The sub-principles and rights, which stem from the text of the Convention and the judgments of the ECtHR and are concrete manifestations of the right to a fair trial, are also, in principle, elements of the right to a fair trial stipulated under Article 36 of the Constitution. In many decisions where it carried out the examination as per Article 36 of the Constitution, the Constitutional Court refers, within the scope of Article 36 of the Constitution, to the principles and rights that are either contained within the wording of the Convention or incorporated in the right to a fair trial through the case law of the ECtHR by interpreting the relevant provision in the light of Article 6 of the Convention and the case law of the ECtHR (App. No: 2012/13, 2/7/2013, § 38).

46. The right to trial within a reasonable time which constitutes the basis of the present application also falls into the scope of the right to a fair trial in accordance with the aforementioned principles and moreover, Article 141 of the Constitution which stipulates that the conclusion of cases with minimum expense and as soon as possible is the duty of the judiciary should also be taken into account in the evaluation of the right to trial within a reasonable time as per the principle of holism of the Constitution (App. No: 2012/13, 2/7/2013, § 39).

47. As the aim of the right to trial within a reasonable time is the protection of the parties against physical and moral pressures and distresses to which they will be exposed to due to the long-lasting trial and the provision of justice as necessary and the maintenance of confidence in law and the requirement of showing due diligence in the settlement of a legal dispute cannot be ignored in the trial activity, it is necessary to

evaluate whether the trial period is reasonable or not individually for each application (App. No: 2012/13, 2/7/2013, § 40).

48. Matters such as the complexity of a case, how many levels the trial has, the attitude of the parties and the relevant authorities during the trial and the quality of the interest of the applicant in the speedy conclusion of the case are the criteria to be taken into account for the determination of whether the period of a case is reasonable or not (App. No: 2012/13, 2/7/2013, §§ 41-45).

49. However, none of the specified criteria is conclusive by itself in the evaluation of a reasonable period. By evaluating the total impact of these criteria through the determination of all delay periods in the trial process individually, which element is more effective in the delay of trial should be determined (App. No: 2012/13, 2/7/2013, § 46).

50. In order to determine whether the trial activity is conducted within a reasonable time or not, it is primarily necessary to determine the dates of beginning and completion which may vary depending on the type of dispute.

51. In accordance with Article 36 of the Constitution and Article 6 of the Convention, it is necessary to conclude within a reasonable time the disputes which are related to civil rights and obligations and which are about a criminal charge in criminal domain. The cases which are included in the field of "*public law*" as per the provisions of the legislation included in the legal system, but which are about disputes that are decisive on the rights and obligations of a special character also fall into the scope of the protection of Article 36 of the Constitution and Article 6 of the Convention. In this respect, the guarantees included in the specified regulations will also apply to the cases which are filed for the request for the cancellation of an administrative decision which is claimed to have damaged the rights of the applicant (for a decision of the ECtHR in the same vein, see *De Geouffre de la Pradelle v. France*, App. No: 12964/87, 16/12/1992). In this context, it is understood that in the incident it is the subject matter of the application, the claims of violation as regards the action filed against the tax fine which contains the criminal charge together with the principal tax.

52. In the evaluation of reasonable period, while the beginning of the period is as a rule the date on which the trial process that will conclude the dispute is commenced to run, but in some special cases, by taking into account the quality of attempt, a previous date on which the dispute occurs can be accepted as the date of beginning (For the decisions of the ECtHR in the same vein, see *König v. Germany*, App. No: 51963/99, 23/5/2007, § 24; *Poiss v. Austria*, App. No: 8163/07, 2/4/2013, § 21). There is a similar situation in terms of the present application and the date of beginning of the time frame to be taken into consideration for the evaluation of a reasonable period is the date of 9/11/2007 on which the notices in relation to the VAT levies with tax loss fine were notified to the applicant.

53. As in the current application, in the event that the date on which the dispute commences is different from the date of commencement of the venue of the Constitutional Court regarding the examination of individual applications, the duration that shall be taken into consideration for the evaluation of a reasonable period is not the time that elapsed after the date of 23/9/2012, but the time that has elapsed since the date on which the dispute commenced (App. No: 2012/13, 2/7/2013, § 51).

54. In so far as it is understood from the examination of the trial process which is the subject matter of the application, VAT levies with a tax loss fine were made by the relevant directorate of tax office on the applicant based on the tax examination report dated 2/11/2007 and the relevant notices were notified to the applicant on 9/11/2007. Through the petition dated 6/12/2007, it was requested by the applicant from the ... Tax Court that the VAT levies with tax loss fine made based on the tax examination report be lifted. After the first examination minute drawn up on 7/12/2007, necessary notification actions were carried out; within the scope of the file which was understood to have been consummated as of 15/4/2008 upon the parties submitting their answers and secondary answers to the Court, it was decided that the action of the applicant be dismissed through the decision dated 22/10/2008. Upon the appeal of the decision with a request for the stay of execution on 17/12/2008, the ... Chamber of the Council of State, on 22/1/2009, decided that the request for the stay of execution be examined after the defense of the defendant administration was taken, approved the decision of the Court by dismissing the request for the stay of execution on 10/6/2009 and the request for appeal through its decision

dated 6/10/2011 and numbered... . The decision of the ... Chamber of the Council of State was notified to the applicant on 28/11/2011; upon the applicant's request for correction of judgment on 8/12/2011, the case file was sent to the ... Chamber of the Council of State again and the request for correction was dismissed through the decisions of the Chamber dated ... and numbered ... and this decision was notified to the applicant on 4/1/2013. It is seen that the decision was issued by the Court of first instance within 11 months and 13 days from the date of 9/11/2007 on which the dispute commenced and that the requests for appeal and correction were concluded by the appeal authority within 4 years, 1 month and 4 days from the date on which the decision was issued.

55. As the delays which can be attributed to competent authorities in the prolongation of the trial process can result from the failure to show due diligence for the speedy conclusion of the trial, so can they also arise out of structural problems and lack of organization. As a matter of fact, Article 36 of the Constitution and Article 6 of the Convention impose on the state the responsibility of regulating the legal system in a way which can fulfill the conditions of a fair trial including the liability of courts to conclude cases within a reasonable time (App. No: 2012/13, 2/7/2013, § 44).

56. Within this scope, in the event that a reasonable period is exceeded in trial due to reasons such as the structure of the judicial system, disruptions during routine duties at the office of the clerk of the court, delays in the writing of a judgment, in the sending of a file or document from one court to another and in the appointment of a rapporteur, insufficiency in the number of judges and personnel and the severity of the workload, the responsibility of competent authorities comes to the force.

57. When the trial process which is the subject matter of the application is evaluated, although it was determined that the case file which was consummated by the Court of first instance on 15/4/2008 was concluded on 22/10/2008, that the file was kept without carrying out a procedural act for the settlement of the dispute within this period which elapsed in-between, that on the other hand, the instance at which the evaluation of the failure to conclude the trial within a reasonable time was the period which elapsed during the evaluation of the legal remedy, that as a matter of fact, although a decision was issued on the stay of execution

twice in this phase of examination, that the conclusion of the request for appeal in terms of merits lasted for more than 4 years and that within this period, no procedural act was carried out by the relevant Chamber except for the decisions on the stay of execution and in the evidence of the aforementioned determination, it is understood that the workload and the lack of organization which arise from the structure of the judicial system, in particular, has a dominant effect on the prolongation of the trial period with regard to the present application. As Article 36 of the Constitution and Article 6 of the Convention makes it obligatory for the trial system to be regulated in a way to fulfill the conditions of fair trial including the liability of courts to conclude cases within a reasonable time, the structural and organizational deficiencies which are present in the legal system shall not be considered as an excuse for the failure to conclude the trial activity within a reasonable time.

58. It could not be determined that the attitude of the applicant had a special effect on the prolongation of the trial.

59. As a result of the evaluation of the application, although the dispute which is the subject matter of the application is relevant to whether or not the advertisement and marketing services which were procured abroad were utilized in Turkey and to whether or not this situation created a responsibility for submitting a VAT statement and in the settlement of the dispute, no research was conducted by the trial authorities except for the petitions of the applicant and the defenses of the defendant administration, the fact that the examination before the courts of instance lasted for a total period of 5 years and 17 days and that 4 years, 1 month and 4 days of this period elapsed in the legal remedy puts forth the fact that there is an unreasonable delay in the trial which is the subject of the complaint.

60. Due to the reasons explained, it should be decided that the applicant's right to trial within a reasonable time guaranteed by Article 36 of the Constitution was violated.

3. Article50 of the Law No.6216

61. The applicant requested that a decision be issued on the compensation of the VAT and tax loss fine which were unrightfully levied as of the date of collection together with its interest, but it did not file any

request for compensation due to the fact that the trial was not concluded within a reasonable time.

62. Article 50(2) of the Law No.6216 with the side heading *''Decisions"* is as follows:

> *"If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favor of the applicant or the remedy of filing a case before the general courts may be shown. The court, which is responsible for holding the retrial, shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."*

63. Although it has been determined in the application that Article 36 of the Constitution was violated, as it is understood that there is no causal relation between the request for compensation claimed by the applicant and the determined violation, it should be decided that the request of the applicant for pecuniary damages be dismissed.

64. It should be decided that the trial expenses of TRY 1,698.35 composed of the fee of TRY 198.35 and the counsel's fee of TRY 1,500.00 which were made by the applicant and determined in accordance with the documents in the file be paid to the applicant.

V. JUDGMENT

In the light of the reasons explained, it is **UNANIMOUSLY** held on 8/5/2014;

A. That the applicant's

1. Claim as to the effect that the right to a fair trial within the scope of Article 36 of the Constitution be INADMISSIBLE as it is "manifestly ill-founded",

2. Claim as to the effect that the right to trial within reasonable time which is guaranteed by Article 36 of the Constitution be ADMISSIBLE,

3. Right to trial within a reasonable time enshrined in Article 36 of the Constitution WAS VIOLATED,

B. Request for pecuniary damages that he alleged to have incurred due to the levied VAT and tax loss fine be DISMISSED,

C. That the trial expenses of TRY 1,698.35 in total, composed of the fee of TRY 198.35 and the counsel's fee of TRY 1,500.00 , which were made by the applicant be PAID TO THE APPLICANT,

D. That the payments be made within four months as of the date of application by the applicant to the Ministry of Finance following the notification of the decision; that in the event that a delay occurs as regards the payment, the legal interest be charged for the period that elapses from the date, on which this period comes to an end, to the date of payment.

RIGHT TO UNION (ARTICLE 51)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

TAYFUN CENGİZ

(Application no. 2013/8463)

SECOND SECTION
JUDGMENT

President	: Alparslan ALTAN
Justices	: Recep KÖMÜRCÜ
	Engin YILDIRIM
	Celal Mümtaz AKINCI
	Muammer TOPAL
Rapporteur	: Yunus HEPER
Applicant	: Tayfun CENGİZ
Counsel	: Att. Mustafa ERDOĞDU
	Att. Havva AKDOĞAN

I. SUBJECT-MATTER OF THE APPLICATON

1. The applicant, did not come to work in order to participate in a nationwide union call in Turkey which he was a member of. He alleged that he was given a warning penalty on the ground that he did not come to work without an excuse, that he was being punished because of his participation in trade union activities and this violated Articles 10, 36, 40 and 90 of the Constitution and his constitutional rights with regard to the right to freedom of assembly and association, and filed a claim for pecuniary and non-pecuniary damages.

II. APPLICATION PROCESS

2. The application was lodged by the applicant with the 1st Administrative Court of Mersin on 19/11/2013. As a result of the preliminary examination of the petition and annexes thereof as conducted in terms of administrative aspects, it was found that there was no deficiency that would prevent referral thereof to the Commission.

3. It was decided by the Second Commission of the Second Section on 19/2/2014 that the examination of admissibility be conducted by the Section and the file be sent to the Section.

4. In the session held by the Section on 13/3/2014, it was decided that the examination of admissibility and merits be carried out together.

5. The facts and cases which are the subject matter of the application were notified to the Ministry of Justice on 13/3/2014. The Ministry of Justice submitted its opinion to the Constitutional Court on 14/4/2014.

6. The opinion presented by the Ministry of Justice to the Constitutional Court was notified to the applicant on 14/4/2014. The applicant did not make a statement against the opinion of the Ministry.

III. THE FACTS

A. The Circumstances of the Case

7. As expressed in the application form and the annexes thereof, the facts are summarized as follows:

8. The applicant is a public official who is the member of the Trade Union of Education and Science Workers (EĞİTİM SEN).

9. Through the decision of the Administrative Board of EĞİTİM SEN on 6/3/2012, it was decided that an action for not coming to work be organized throughout the entire country under the name "*warning strike*" on the dates of 28 and 29 March 2012.

10. The applicant did not come to work on the aforementioned dates.

11. The District Directorate of National Education of Tarsus which the applicant was working at, punished the applicant with a warning penalty on the ground that "*he did not come to work without an excuse on the dates of 28-29 March 2012*" through its decision on 14/5/2012 as a result of the administrative investigation that it conducted on all trade union members who participated in the action.

12. The objection that the applicant filed against the decision in question was dismissed through the decision of the Governor's Office of Mersin on 13/6/2012.

13. The applicant filed an action for annulment before the administrative court on 20/7/2012 with the request for the cancellation of the disciplinary penalty imposed on him, the action was dismissed through the decision of the 1st Administrative Court of Mersin on 25/12/2012. The justification of the Court of First Instance is as follows:

> *"In Turkish law, the rights of public officials to establish trade unions and to be a member of trade unions are guaranteed through the Constitution and Laws, as a matter of fact, the Law on the Trade Unions of Public Officials No.4688, which qualified as a special law, was enacted in order to regulate the trade union rights of public officials and, in this context, public officials have the right to association in trade unions; however, it is not possible to speak of the right to "strike" of public officials in the face of the fact that there is no provision that grants the right to "strike" to public officials and that no legal regulations have been formulated in this direction in our domestic law.*
>
> *...*
>
> *Nevertheless, in relation to the right to strike, although this right is not clearly stated in Article 11 of the ECHR; while the granting of this right and the exercise thereof in line with its purpose undoubtedly constitute one of the most important trade union rights, it is necessary that an equitable balance be protected between the action performed, the results of this action and the purpose sought in order to protect the rights of the members of trade unions, that the method used be proportionate to the purpose sought while it is also necessary that the action in question does not have the quality to damage or prevent the fundamental rights and freedoms of other person or persons.*
>
> *In this case; when the fact that the plaintiff did not go to work uninterruptedly for two days on the dates of 28/29 March, that this situation not only constitutes contrariety with the principles of the continuity and sustainability of public services, but that within this period students were deprived of their right to education and training which is among their fundamental rights and freedoms, when considered together, there is no contrariety with law in the acts of the plaintiff which is the subject matter of the case as established by also taking into*

consideration his previous services in line with his action that was determined."

14. The applicant objected to the decision of the Court of First Instance; the decision of the Court of First Instance was approved through the decision of the Regional Administrative Court of Adana on 8/5/2013. The relevant part of the decision of the Regional Administrative Court is as follows:

"… [] although it is understood that it cannot be mentioned that it is necessary in a democratic society that public officials are punished with disciplinary penalties due to the fact that they participate in work stoppage actions, so as to protect, improve, develop their economic, social and professional rights and interests and, within this scope, their personal and monetary rights, their working conditions, to ensure that attention is drawn to these issues and that public opinion is forged and, in the event that they do not have any other option, in accordance with the decisions that the trade unions of which they are members of make; in the face of the fact that it is uncontentious that the reason why the plaintiff did not come to work was to ensure that the bill of the Law on Primary Education and Education be withdrawn and to prevent it from being negotiated and enacted at the General Assembly of the GNAT, it is concluded that there is no contrariety with law in the action which is the subject matter of the case. That the objection be dismissed due to the reasons explained...

15. The applicant's request for correction of judgment was dismissed through the decision of the Regional Administrative Court of Adana on 19/9/2013.

16. The writ of the Regional Administrative Court was notified to the applicant on 25/10/2013 and the applicant lodged an individual application to the Constitutional Court on 19/11/2013.

B. Relevant Law

17. Article 26 of the Law of Public Servants No.657 of 14/7/1965 with the side heading *''Prohibition of conducting collective actions and activities''* is as follows:

"It shall be prohibited for public servants to collectively withdraw from public service intentionally in a way which hinders public services or not to come to work or when they do come to work to conduct actions and activities which will bear the consequence of the slowdown or hindering of State services and affairs ".

18. The relevant part of Article 125 of the Law No.657 with the side heading *''Types of disciplinary penalties and actions and cases to which penalty will be applied''* is as follows:

"The disciplinary penalties which will be imposed on public servants and the actions and cases which require each of the disciplinary penalties are as follows:

...

C - Deduction from salary: Deduction from the gross salary of a public servant between the rates of 1/30 - 1/8.

The actions and cases which require the penalty of deduction from salary are as follows:

...

b) Failure to come to work for one or two days without any excuse,

…"

19. Article 135 of the Law No.657 is as follows:

"An objection can be filed to the disciplinary board against the penalties of warning, condemnation and deduction from salary given by the disciplinary chiefs, to the higher disciplinary board against the penalty of interrupting grade advancement.

The period of objection shall be seven days following the date of notification of the decision to the relevant person. The disciplinary penalties against which an objection is not filed within due time shall become final.

The authorities of objection shall be obliged to make their decisions within thirty days following the transfer of the objection petition and the decision and the annexes thereof to them.

In the event that the objection is accepted, disciplinary chiefs can commute or completely lift the penalty imposed by reviewing the decision.

Administrative justice remedy can be seized against disciplinary penalties."

20. The relevant part of the writ of the Plenary Session of the Administrative Law Chambers of the Council of State (File No:E 2009/63 K.2013/1998 on 22/5/2013) is as follows:

"…

In the dispute, determining whether or not the action of the plaintiff not to come to work for 1 day on 11/12/2003 by complying with the decision made by the authorized boards of the trade union of which s/he was a member will be evaluated within the scope of Article 125/C-b of the Law of Public Servants No.657 is of importance.

In the last paragraph of Article 90 of the Constitution of the Republic of Turkey No.2709, the provision "International agreements which are duly put into effect have the power of law. It is not possible to apply to the Constitutional Court with the claim that such agreements are contrary to the Constitution. (Additional sentence: 07/05/2004 - the Law No.5170/ art. 7) In the case of conflicts which may arise due to the fact that international agreements on fundamental rights and freedoms which are duly put into effect and the laws include different provisions on the same matter, the provisions of the international agreement will prevail." is included.

In Article 11 of the European Convention on Human Rights in which the "freedom of assembly and association" is regulated, the rule as to the effect that 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 their interests, that 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 crime, for the protection of health or morals or for the protection of the rights and freedoms of others, that this Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State" is included.

In its Kaya and Seyhan v. Turkey decision dated 15/09/2009 (application no. 30946/04); the European Court of Human Rights concluded that the imposition of a warning penalty on the teachers who were members of Eğitim-Sen as they did not come to work on 11/12/2003 due to the fact that they participated in a national action organized for one day in order to protest the bill of the law of public administration which was being discussed at the parliament by complying with the call of KESK (the Confederation of the Trade Unions of Public Workers) on 11/12/2003 had a quality of dissuading members of the trade union from participating in a legitimate strike or action days in order to protect their interests even if the penalty was minor, that the disciplinary penalty imposed on the teachers did not correspond to a "pressing social need" and that for this reason, it was not "necessary in a democratic society", as a result of this, it decided that Article 11 of the European Court of Human Rights was violated on the ground that the applicants' right to exercise the freedom of demonstration within the meaning of Article 11 of the ECHR in an effective manner was infringed in a disproportionate way.

In this case, no compliance with law has been observed in the action which is the subject matter of the case in relation to the imposition of the penalty of deduction from the salary of the plaintiff due to the action which does not constitute any disciplinary offense in accordance with Article 125/C-b of the Law No.657 as the plaintiff 's action of not to come to work in line with a trade union activity on 11/12/2003 will not be considered within the scope of the act of not coming to work for one or two days without any excuse and it is necessary to accept as an excuse the act of not coming to work for one day within the scope of a trade union activity.

…"

IV. EXAMINATION AND GROUNDS

21. The individual application of the applicant (App No:2013/8463 on 19/11/2013) was examined during the session held by the court on 18/9/2014 and the following were ordered and adjudged:

A. The Applicants' Allegations

22. The applicant asserted that he did not come to work by participating in the call of the trade union, of which he was a member of, made for not coming to work in Turkey as a whole, that however, he was given a warning penalty on the ground that he did not come to work without an excuse, that Article 90 of the Constitution and his constitutional rights in relation to the freedom of assembly and association were violated due to the fact that the penalty was imposed on the ground that he participated in trade union activities and that he was punished in contrary to the freedom of claiming rights stipulated in Article 36 of the Constitution, the right to equality stipulated in Article 10 of the Constitution, the right to and effective remedy stipulated in Article 40 of the Constitution, Article 11 of the European Convention on Human Rights (Convention) and Article 28 of the Charter of Fundamental Rights of the European Union, filed a request for pecuniary and non-pecuniary damages.

B. The Constitutional Court's Assessment

1. Admissibility

23. The applicant claimed that Articles 10, 36, 40 and 90 of the Constitution and his constitutional rights with regard to the freedom of assembly and association were violated.

24. In the opinion of the Ministry, it was stated that the complaints that the applicant expressed were related to the freedom of assembly and association defined in Articles 51, 53 and 54 of the Constitution and Article 11 of the Convention.

25. By considering the conditions which the applicant complained about and the form of expressing his complaints, it is necessary to examine these complaints within the context of Article 51 of the Constitution.

26. The applicant's complaints as to the effect that his Constitutional rights were violated due to the fact that he was punished on the ground that he participated in a trade union activity are not manifestly ill-founded. Moreover, it should be decided that the application is admissible as there is no other reason for inadmissibility.

2. Merits

27. The applicant asserted that the Board of EĞİTİM SEN of which he was a member of decided on 6/3/2012 that an action not to come to work for 2 days be organized as a whole on 28/29 March 2012 in Turkey in order to ensure that the negotiations of the Bill of the Law on Primary Education and Education which was held at the Grand National Assembly of Turkey on incident be terminated and that the Bill be withdrawn, that a disciplinary penalty being imposed on him due to the fact that he participated in the action in question was contrary to the Constitution. The applicant reminded that the ECtHR issued a decision of violation in similar applications previously, that moreover, the act of not coming to work within the scope of a trade union activity was accepted as an excuse in the steady case-law of the Council of State. Apart from these, the applicant also relied upon the circular of the Prime Ministry on 1999 and the letter of the Ministry of National Education on 2012 indicating that no disciplinary penalty must be imposed on the members of trade unions who did not come to work within the framework of a trade union activity.

28. The applicant stated that he participated in the event in question in order to show his democratic reaction by relying upon the rights granted in the domestic law and international law, that the right of public officials to collective action was absolutely recognized in the conventions of human rights, the Constitution and court decisions. Moreover, the applicant pointed out the fact that it was emphasized that the state was a social state of law in Article 2 of the Constitution, that employees and employers had the right to establish trade unions and framework organizations in order to protect and improve the economic and social rights and interests of their members in their working relations, to become a member of these trade unions and to carry out activities in this direction without getting prior permission in Article 51, that required measures would be taken to

ensure that employees get a fair wage which was proportionate with the work they did was stated in Article 55 and that the state would perform its duties in social and economic domains was emphasized in Article 65.

29. In the opinion of the Ministry, the case-law of the ECtHR was reminded of and it was stated that an evaluation needed to be done as to whether or not the intervention which was the subject matter of the application was necessary in a democratic society.

30. The freedom of association means the freedom of individuals to come together by creating a collective entity which represents them in order to protect their own interests. The concept of "*association*" has an autonomous meaning within the framework of the Constitution and the failure to recognize the activities that individuals perform continuously and in coordination as an association in our law does not mean that the freedom of association will not necessarily come to the fore within the scope of the provisions of the Constitution.

31. In democracies, the existence of organizations under which citizens will come together and pursue common goals is an important element of a sound society. In democracies, such an "*organization*" has fundamental rights which needs to be respected and protected by the state. Trade unions which aim to protect the interests of their members in the field of employment are an important part of the freedom of associations which is the freedom of individuals to come together by creating collective entities in order to protect their own interests.

32. The freedom of association provides individuals with the opportunity of realizing their political, cultural, social and economic goals in a collective manner. The right to trade union brings about the freedom of association of employees by coming together so as to protect their individual and common interests and, with this quality, is not seen as an independent right, but a form or a special aspect of the freedom of association (*Belgian National Police Union v. Belgium*, App. No: 4464/70, 27/10/1975 § 38).

33. The right to trade union and trade union activities are regulated between Articles 51 and 54 of the Constitution under the chapter "Social

and Economic Rights and Duties". The right to freedom of establishing trade unions or becoming members of trade unions is included in Article 51 of the Constitution.

34. Article 51 of the Constitution with the heading of *''Right to organize unions''* is as follows:

> *"Employees and employers have the right to form unions and higher organizations, without prior permission, and they also possess the right to become a member of a union and to freely withdraw from membership, in order to safeguard and develop their economic and social rights and the interests of their members in their labor relations no one shall be forced to become a member of a union or to withdraw from membership.*
>
> *The right to form a union shall be solely restricted by law on the grounds of national security, public order, prevention of commission 24 of crime, public health, public morals and protecting the rights and freedoms of others.*
>
> *The formalities, conditions and procedures to be applied in exercising the right to form a union shall be prescribed by law.*
>
> *...*
>
> *The scope, exceptions and limits of the rights of civil servants who do not have a worker status are prescribed by law in line with the characteristics of their services.*
>
> *The regulations, administration and functioning of unions and their higher bodies shall not be inconsistent with the fundamental characteristics of the Republic and principles of democracy ."*

35. Trade union rights and freedoms which are regulated in Articles 51-54 of the Constitution are completed with the relevant Conventions of the International Labor Organization (ILO) including, in particular, the Freedom of Association Convention and the Right to Organize and Collective Bargaining Convention and the European Social Charter which have introduced similar guarantees. While interpreting the scope of the trade union rights and freedoms regulated in Articles 51-54 of the Constitution, the guarantees which are included in these documents and interpreted by the relevant bodies should also be taken into consideration.

36. Article 51 of the Constitution brings about both negative and positive liabilities for the state. The negative obligation of the state not to intervene in the freedom of association of individuals and trade unions within the framework of Article 51 has been subjected to the conditions which allow for an intervention through the justifications stipulated in paragraphs two to six of Article 51. On the other hand, although the main aim of the right to trade union "*is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, there may in addition be positive obligations to secure the effective enjoyment of these rights*" (see *Wilson, the National Union of Journalist and Others v. the United Kingdom*, App. No: 30668/96, *30671/96 and 30678/96, 2/10/2002, § 41).*

37. Indeed, it is not always possible to make certain distinctions between the positive and negative obligations of the state. However, there is no change with regard to the criteria to be applied in relation to both of these obligations of the state. Irrespective of the positive or negative obligations of the state, it is necessary to strike a fair balance between the conflicting interests of the individual and the society as a whole. (see *Sorensen and Rasmussen v. Denmark, App. No: 52562/99 and* 52620/99, 11/1/2006 § 58). While deciding on whether or not this fair balance has been struck, the Constitutional Court will take into consideration the fact that the bodies which use public power has a certain discretionary margin in this field.

38. The right to trade union which is a right that can be restricted is subject to the restriction regime of the fundamental rights and freedoms contained within the Constitution. In paragraph two and subsequent paragraphs of Article 51 of the Constitution, the reasons for restriction over the right to trade union are included. However, it is also clear that there must be a limit to the restrictions aimed at these freedoms. The criteria under Article 13 of the Constitution must be taken into consideration as regards the restriction of fundamental rights and freedoms. For this reason, the review concerning the restrictions imposed on the right to trade union should be conducted within the framework of the criteria stipulated in Article 13 of the Constitution and within the scope of Article 51 of the Constitution.

39. In the light of the principles explained above, it needs to be

evaluated at first whether an intervention exists or not and then whether the intervention relies on valid reasons when assessing whether or not the right to trade union was violated in the incident which is the subject of the application.

i. Concerning the Existence of the Interference

40. The applicant claims that the fact that a warning penalty was imposed on him as he participated in a trade union action which was organized throughout the country constituted an intervention in his right to trade union. In the opinion of the Ministry, it was stated that these kinds of penalties constituted an intervention in the right to trade union. Through the punishment of the applicant due to his participation in an action which took place nationwide within the scope of a trade union activity, an intervention was made in the applicant's right to trade union.

ii. Interfernce on Justify Grounds

41. The intervention mentioned above will constitute a violation of Articles 13 and 51 of the Constitution unless they rest on one or more of the valid reasons stipulated under paragraphs two and six of Article 51 of the Constitution and they fulfill the conditions stipulated in Article 13 of the Constitution. As a result, whether or not the restriction is in line with the conditions of bearing no prejudice to the essence, being indicated under the relevant Article of the Constitution, being envisaged by laws, not being contrary to the letter and spirit of the Constitution, the requirements of the democratic social order and of the secular Republic and the principle of proportionality prescribed in Article 13 of the Constitution needs to be determined.

1. Lawfulness of the Interference

42. No claim was made as to the fact that there was contrariety with the condition of making the intervention with *''the law''* contained within paragraphs two, three and five of Article 51 of the Constitution in the intervention which was made. As a result of the evaluations made, it was concluded that Article 26 of the Law No.657 with the side heading "*Prohibition of conducting collective actions and activities*" and Article 125

thereof with the side heading "*Types of disciplinary penalties and actions and cases to which penalty will be applied*" fulfilled the criterion of "*lawfulness*".

2. Legitimate Purpose

43. The Court of First Instance stated that the intervention served the purpose of public order and the protection of the rights and freedoms of others on the ground that "*the plaintiff did not go to work uninterruptedly for two days on the dates of 28/29 March, that this situation constitutes contrariety with the principles of the continuity and sustainability of public services and that within this period students were deprived of their right to education and training which is among their fundamental rights and freedoms*". The applicant did not express any opinions on this subject.

44. In order for an intervention made in the right to trade union to be legitimate, this intervention must be made for the purposes of national security, public order, the prevention of the committal of crime, general health, general ethics and the protection of the rights and freedoms of others as stipulated in Article 51 of the Constitution and be made by law.

45. Even if it is accepted that the disciplinary penalty imposed due to the fact that the applicant did not come to work without an excuse targeted the legitimate purposes listed in paragraph two of Article 51 of the Constitution, when the evaluations that need to be made with regard to the necessity of intervention are taken into consideration, it is concluded that there is no need to solve the problem of the legitimacy of intervention.

3. Necessity and Proportionality in a Democratic Society

46. The applicant reminded the case-law of the ECtHR, the Council of State and the courts of instance in similar cases and the circular of the Prime Ministry of 1999 on not imposing a disciplinary penalty with regard to the actions organized within the framework of trade union activities and the opinion of the Legal Advisory Department of the Ministry of National Education as to the effect that the work stoppage action organized through the decision of a trade union be accepted as a trade union activity. The applicant stated that the imposition of a disciplinary penalty on a work stoppage action which was within the framework of a trade union

activity was contrary to the freedom of association in the face of the rules in question and the case-law of the courts.

47. It was stated in the opinion of the Ministry that in the event that an intervention aimed at the right to trade union existed, whether or not justifications which would justify the measures taken existed and whether or not *''there existed a reasonable balance between the objective and means of restriction''* needed to be evaluated with a view to the requirements of a democratic society.

48. As the right to trade union is not absolute, it can be subjected to some restrictions. An evaluation needs to be conducted concerning the matter of whether or not the restrictions listed in Article 51(2) of the Constitution (see § 41) regarding the right to trade union are in harmony with the requirements of a democratic societal order and the principle of proportionality guaranteed under Article 13 of the Constitution.

49. In the justification of the first version of Article 13 of the Constitution, it was reminded that the restrictions to be imposed on rights and freedoms must not be contrary to the understanding of a democratic regime; in the justification for the amendment made in the Constitution with Article 2 of the Law Concerning the Amendment of Some Articles of the Constitution of the Republic of Turkey No.4709 of 3/10/2001, it was stated that Article 13 of the Constitution was regulated in line with the principles in the Convention (App. No: 2013/409, 25/6/2014, § 92).

50. The concept of "democratic society" stipulated in the Constitution of 1982 needs to be interpreted with a modern and libertarian understanding. The criterion of *''democratic society''* clearly reflects the parallelism between Article 13 of the Constitution and Articles 9, 10 and 11 of the ECHR which contain this criterion. Therefore, the criterion of democratic society should be interpreted on the basis of pluralism, tolerance and open mindedness (for the decisions of the ECtHR in the same vein, see *Handyside v. United Kingdom*, App. No: 5493/72, 7/12/1976, § 49; *Başkaya and Okçuoğlu v. Turkey*, App. No: 23536/94, 24408/94, 8/7/1999, § 61).

51. Indeed, as per the established case law of the Constitutional Court, *''Democracies are regimes in which the fundamental rights and freedoms are*

ensured and guaranteed in the broadest manner. The limitations which bear prejudice against the essence of fundamental rights and freedoms and render them completely non-exercisable cannot be considered to be in harmony with the requirements of a democratic societal order. For this reason, fundamental rights and freedoms may be limited exceptionally and only without prejudice to their essence to the extent that it is compulsory for the continuation of democratic societal order and only by law." (AYM, E.2006/142, K.2008/148, K.T. 24/9/2008) In other words, if the limitation which is introduced halts or renders extremely difficult the exercise of the right and freedom by bearing prejudice against its essence, renders it ineffective or if the balance between the means and objective of the limitation is disrupted in violation of the principle of proportionality, it will be against the democratic societal order (App. No: 2013/409, 25/6/2014, § 94).

52. The freedom of association, in general, and the right to trade union, in particular, are among the freedoms which concretize political democracy which is one of the fundamental values adopted in the Constitution and constitute one of the fundamental values of a democratic society. The ability to discuss and settle issues in public forms the essence of democracy. The Constitutional Court emphasized in its previous decisions that the foundations of democracy were pluralism, tolerance and open mindedness (App. No: 2013/409, 25/6/2014, § 95). According to this, individuals who exercise the right to trade union make use of the protection of the fundamental principles of a democratic society such as pluralism, tolerance and open-mindedness. In other words, unless there is a case of provoking violence or the denial of democratic principles, even if some opinions expressed within the framework of the right to trade union and the form of expressing them are unacceptable in the eyes of competent authorities, the measures aimed at eliminating the freedoms of expression, association and trade union cannot serve democracy and yet, they imperil it. In a democratic society which relies upon the rule of law, the expression of different thoughts through the freedoms of trade unions or other means should be permitted. (For similar evaluations, see *Oya Ataman v. Turkey*, App. No: 74552/01, 5/3/2007, § 36).

53. Another guarantee which will intervene in all kinds of limitations to be introduced to rights and freedoms is the *''principle of proportionality''*

expressed under Article 13 of the Constitution. This principle is a guarantee which needs to be taken into consideration with priority in applications regarding the limitation of fundamental rights and freedoms. Although the requirements of a democratic societal order and the principle of proportionality are regulated as two separate criteria under Article 13 of the Constitution, there is an inseparable bond between these two criteria. As a matter of fact, the Constitutional Court examines whether or not there is a reasonable relation and balance between the objective and the means (App. No: 2013/409, 25/6/2014, § 96).

54. According to the decisions of the Constitutional Court, proportionality reflects the relationship between the objectives of limiting fundamental rights and freedoms and the means. The review of proportionality is the inspection of the means selected based on the sought objective in order to reach this objective. (App. No: 2012/1051, 20/2/2014, § 84; App. No: 2013/409, 25/6/2014, § 97). For this reason, in interventions made to the right to trade union, whether or not the intervention selected in order to achieve the sought objective is suitable, necessity and proportionality need to be evaluated.

55. In this context, the main axis for the evaluations to be carried out with regard to the incident which is the subject of the application will be whether or not the justifications which the courts of instance that caused the intervention relied on in their decisions are in line with *''necessity in a democratic society''* and *''the principle of proportionality''* with a view to restricting the right to trade union, could be convincingly put forth (App. No: 2013/409, 25/6/2014, § 98).

56. From its initial decisions on the subject, the ECtHR explained what the term "*necessary*" stipulated in paragraphs two of Articles 10 and 11 of the Convention meant. According the ECtHR, the term "*necessary*" implies "*a pressing social need*" (*Handyside v. the United Kingdom*, App. No. 5493/72, 7/12/1976, § 48). Then, it will be necessary to see whether or not a judicial or administrative intervention in the freedom of association and the right to trade union meets the pressure of a social need. In this framework, an intervention should be an intervention which is proportional to the legitimate purpose; secondly, the justifications which public authorities

show for the legitimacy of the intervention should be relevant and sufficient (*Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, App. No: 29221/95 29225/95, 2/10/2001, § 87).

57. Therefore, in the event that it is accepted that the balance between the right to trade union which was intervened due to the disciplinary penalty imposed on the action in the form of not coming to work within the framework of trade union activities and the public interest sought to be achieved through the disciplinary penalty is proportionate, it can be concluded that the justifications in relation to the imposition of the disciplinary penalty and the dismissal of the filed case by the courts of instance were convincing and, in other words, relevant and sufficient (for a similar approach in another context, see App. No: 2012/1051, 20/2/2014, § 87).

58. The disciplinary penalty which is the subject matter of the application should be examined in the light of all incidents. It was decided through the decision of the Board of EĞİTİM SEN dated 6/3/2012 that an action not to come to work in Turkey as a whole be organized on the dates of 28 and 29 March 2012 in order to ensure that the negotiations of the Bill of the Law on Primary Education and Education which were being held at the Grand National Assembly of Turkey on incident be terminated and that the bill be withdrawn. In other words, the date of the action which is the subject matter of the case was notified in the entire country in advance. It was not asserted that the organization of the action in question was objected by competent authorities, either. The applicant exercised his right to trade union by participating in this action (for a similar evaluation, see *Ezelin v. France*, App. No: 11800/85, 26/4/1991, § 41).

59. The applicant participated in the action in question and was punished with a warning penalty for not coming to work as organized by EĞİTİM SEN. In the event that a person fails to come to work within the framework of a trade union activity as in the incident which is the subject matter of the application, it is considered that the person uses his/her casual leave and no disciplinary investigation is initiated both in the ordinary practice of the administration and in the established case-law of the administrative justice. However, in spite of the case-law of the

administrative justice which has become established as to the effect that the members of trade unions will be considered to be on casual leave in the event that they do not come to work within the scope of a trade union activity, there is no legislative regulation which will ensure that the administration and justice act in a uniform way as a whole. For this reason, it should be noted that the persons who exercise their right to trade union in cases such as the one in the current application are under the threat of a disciplinary investigation.

60. On the other hand, although it is possible that the prohibition of a trade union activity as a whole or the subjection of its realization to severe conditions will damage the essence of the right, performing legal regulation with regard to the participation of the members of trade unions in the actions such as work stoppage and general regulatory actions depending on the legal regulations is in the discretion of legislative and executive bodies.

61. Given the fact that the applicant is a teacher at a public school, it is also necessary to note that public servants will not be able to be totally deprived of this right. Nevertheless, in cases where its necessity is indisputable in a democratic society, it is possible to introduce restrictions with regard to trade union activities in the military, police and some other sectors. It was not asserted that the applicant was at a position which would require subjecting him to these kinds of restrictions, either.

62. In spite of all these, even if the penalty imposed is petty, it has a quality to dissuade the persons who are members of a trade union, such as the applicant, from participating in the legitimate days of strike or action organized in order to defend their interests (see *Kaya and Seyhan v. Turkey*, App. No: 30946/04, 15/12/2009, § 30; Karaçay v. Turkey, App. No: 6615/03, 27/6/2007, § 37; *Ezelin v. France*, App. No: 11800/85, 26/4/1991, § 43).

63. Due to the reasons explained, even if the warning penalty about which a complaint is filed is a petty penalty, it is concluded that "*it is not necessary in a democratic society*" as it does not correspond to "*the pressure of a social need*". For this reason, it should be decided that the applicant's right to trade union guaranteed in Article 51 of the Constitution was violated.

3. Article 50 of the Law No.6216

64. Under Article 50(1) of the Law No.6216 (1), it is indicated that in the event that a violation decision is delivered at the end of the examination on merits, what needs to be done to remove the violation and its consequences are adjudged; however, it is adjudged that a review for legitimacy cannot be done, that a decision with the quality of administrative act and action cannot be delivered.

65. By considering that the warning penalty imposed on the applicant violated the right to trade union, a legal benefit was deemed to be present in the holding of a retrial in the case with regard to the cancellation of the disciplinary penalty action imposed on the applicant. It should be decided that the file be sent to the relevant Court to carry out a retrial in order for the violation with regard to the right to trade union and the consequences thereof to be removed.

66. In the application, it has been concluded that Article 51 of the Constitution was violated. The applicant filed a request for pecuniary damages of TRY 1.076,00 and non-pecuniary damages of TRY 1.000,00. The applicant also requested that the attorney's fees and the fees paid and other expenses made be paid.

67. The Ministry of Justice did not make any statements with regard to the amounts of damages which were requested by the applicant.

68. As it was decided that a retrial be held in the case with regard to the cancellation of the disciplinary penalty action imposed on the applicant and as the applicant can request his financial loss composed of the proceeding expenses which he made before the courts of instance and the attorney's fee during the retrial, it should be decided that the request for pecuniary damages be dismissed.

69. As it is considered that the determination of violation has provided sufficient satisfaction in terms of the applicant, in relation to the applicant's right to trade union, it should be decided that his request for compensation due to the intervention made in his right to trade union be dismissed.

70. It should be decided that the trial expenses of TRY 1,698.35 TRY in total composed of the fee of 198.35 and the counsel's fee of TRY 1,500.00 which were paid by the applicant and determined in accordance with the documents in the file be paid to the applicant.

V. JUDGMENT

In the light of the reasons explained; it is **UNANIMOUSLY** held on 18/9/2014;

A. That the application be ADMISSIBLE,

B. That Article 51 of the Constitution was VIOLATED due to the interference made with his right to trade union,

C. That the requests of the applicant for damages BE DISMISSED,

D. That the trial expenses of TRY 1,698.35 in total composed of the fee of TRY 198.35 and the counsel's fee of TRY 1,500.00 , which were paid by the applicant be PAID BACK TO THE APPLICANT,

E. That the payments be made within four months as of the date of the application by the applicants to the Ministry of Finance following the notification of the decision; that in the event that a delay occurs as regards the payment, the legal interest be charged for the period that elapses from the date, on which this period comes to an end, to the date of the payment,

F. That a copy of the decision be sent to the relevant court.

RIGHT TO VOTE, TO BE ELECTED AND TO ENGAGE IN POLITICAL ACTIVITY (ARTICLE 67)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

SEBAHAT TUNCEL

(Application no. 2012/1051)

FIRST SECTION
JUDGMENT

President	:	Serruh KALELİ
Justices	:	Zehra Ayla PERKTAŞ
		Burhan ÜSTÜN
		Nuri NECİPOĞLU
		Hicabi DURSUN
Rapporteur	:	Yunus HEPER
Applicant	:	Sebahat TUNCEL
Counsel	:	Att. Ercan KANAR

I. SUBJECT-MATTER OF THE APPLICATION

1. The applicant alleged that her rights to a fair trial and to political participation and freedom of expression were violated due to the implementation of the measure of judicial control in the form of "a ban on leaving the country ", although she was a member of parliament.

II. APPLICATION PROCESS

2. The application was lodged on 28/11/2012 with the 10th Assize Court of Istanbul. As a result of the preliminary examination of the petition and the annexes thereof as conducted in terms of administrative aspects, it was found that there was no deficiency that would prevent referral thereof to the Commission.

3. It was decided by the Second Commission of the First Section that the examination of admissibility be conducted by the Section and that the file be sent to the Section.

4. In the session held by the Section on 17/9/2013, it was decided that the examination of admissibility and merits be carried out together.

5. The facts and cases which are the subject matter of the application were notified to the Ministry of Justice on 25/9/2013. The Ministry of Justice presented its opinion to the Constitutional Court on 25/11/2013.

6. The opinion presented by the Ministry of Justice to the Constitutional Court was notified to the applicant on 30/12/2013. The applicant submitted her statements against the opinion of the Ministry of Justice to the Constitutional Court on 14/1/2014.

III. THE FACTS

A. The Circumstances of the Case

7. As expressed in the application form and the annexes thereof, the facts are summarized as follows:

8. The applicant was taken into custody on 5/11/2006 with the allegation of being a member of an armed terrorist organization and arrested on 8/11/2006.

9. Through the indictment of the Office of the Chief Public Prosecutor of Istanbul dated 13/11/2006, a criminal case was filed before the 10th Assize Court of Istanbul in order for the applicant to be punished with the claim that she committed the offense of being a member of an armed terrorist organization.

10. While the trial was going on, the applicant was elected as an independent member of parliament from Istanbul in the general elections for members of parliament dated 22/7/2007.

11. Upon the applicant's request for release, the 10th Assize Court of Istanbul decided on the release of the applicant on 24/7/2007. The court did not rule on any security measure on the applicant, either. The justification of the court's decision of release is as follows:

> *"it is understood… that when her trial was ongoing… she was elected as an independent member of parliament from the 3rd region of Istanbul in the general elections for members of parliament held on 22/7/2007; that through the examination of the member of parliament minutes of*

the Presidency of the Provincial Election Board dated 24/7/2007 for the XXIII. Period, the accused Sabahat Tuncel was elected as an independent member of parliament in the 3rd electoral district in Istanbul on 22/7/2007 and that in line with the relevant letter, her deputyship became official. As per Article 83 of the Constitution, the state of detention and trial of the accused Sabahat Tuncel, who is present in the case file of our court, will not be continued as a member of parliament from the offense of membership in a terrorist organization unless there is a decision by the assembly."

12. On 26/7/2007, the Office of the Chief Public Prosecutor of Istanbul objected to the justifications of the 10th Assize Court of Istanbul as included in the decision on the release of the applicant on 24/7/2007. The 10th Assize Court of Istanbul decided on the acceptance of the objection through its decision dated 26/7/2007 and decided on the removal of the explanations included in the decision on the release of the applicant with regard to Article 83 of the Constitution and on "*…correction of the justification of release as the reasons since the accused Sebahat Tuncel was elected as an independent member of parliament in the elections for members of parliament, that there is no possibility of escaping and of obfuscating the evidence left due to this fact*".

13. The applicant became an independent candidate for deputyship for Istanbul and was elected again in the General Election for Deputyship for the 24th Period held on 12 June 2011.

14. The 10th Assize Court of Istanbul decided on the punishment of the applicant with an imprisonment of 8 years and 9 months due to the offense of being a member of an armed terrorist organization and the implementation of the measure of judicial control "*a ban on leaving the country* a" until the decision became final on 18/9/2012. The justification of the court's decision of judicial control is as follows:

"On the implementation of the measure of judicial control "a ban on leaving the country" according to Article 109/3-a of the LCP regarding the accused given the amount of punishment imposed on the accused and the period during which she remained under detention…"

15. The application of objection that the applicant filed against the decision of the measure of judicial control was dismissed through the decision of the 11th Assize Court on 11/10/2012 and the decision became final on the same date and was notified to the applicant on 30/10/2012. The justification of the decision of dismissal is as follows:

> *"As it is understood that there is no inappropriateness in the decision of measure in the form of " a ban on leaving the country " as issued on the accused Sebahat TUNCEL among the measures of judicial control in the file of the 10th Assize Court of Istanbul (File No:E.2006/358) and at its hearing on 18/9/2012 and in the interlocutory decision of the 10th Assize Court of Istanbul on 25/9/2012, that the issued decision complies with the procedure and the law, …"*

16. The applicant appealed the final decision of the 10th Assize Court of Istanbul; the decision of the court of first instance was approved through the writ of the 9th Criminal Chamber of the Court of Cassation on 24/12/2013.

B. **Relevant Law**

17. Article 83 of the Constitution with the heading *''Parliamentary immunity''* is as follows:

> *"Members of the Grand National Assembly of Turkey shall not be liable for their votes and statements during parliamentary proceedings, for the views they express before the Assembly, or, unless the Assembly decides otherwise, on the proposal of the Bureau for that sitting, for repeating or revealing these outside the Assembly.*
>
> *A deputy who is alleged to have committed an offence before or after election shall not be detained, interrogated, arrested or tried unless the Assembly decides otherwise. This provision shall not apply in 39 cases where a member is caught in flagrante delicto requiring heavy penalty and in cases subject to Article 14 of the Constitution as long as an investigation has been initiated before the election. However, in such situations the competent authority has to notify the Grand National Assembly of Turkey of the case immediately and directly.*

The execution of a criminal sentence imposed on a member of the Grand National Assembly of Turkey either before or after his election shall be suspended until he ceases to be a member; the statute of limitations does not apply during the term of membership

Investigation and prosecution of a re-elected deputy shall be subject to the Assembly's lifting the immunity anew.

Political party groups in the Grand National Assembly of Turkey shall not hold debates or take decisions regarding parliamentary immunity.

18. Article 14 of the Constitution with the heading *''Prohibition of abuse of fundamental rights and freedoms''* is as follows:

"None of the rights and freedoms embodied in the Constitution shall be exercised in the form of activities aiming to violate the indivisible integrity of the State with its territory and nation, and to endanger the existence of the democratic and secular order of the Republic based on human rights.

No provision of this Constitution shall be interpreted in a manner that enables the State or individuals to destroy the fundamental rights and freedoms recognized by the Constitution or to stage an activity with the aim of restricting them more extensively than stated in the Constitution

The sanctions to be applied against those who perpetrate activities contrary to these provisions shall be determined by law."

19. Paragraphs numbered (1) and (2) of Article 314 of the Turkish Criminal Code No.5237 of 26/9/2004 with the heading *''Armed organization''* are as follows:

"Article 314- (1) A person who forms or conducts an armed organization with the purpose of committing the crimes in the fourth and fifth chapters of this section shall be penalized with a prison sentence of ten to fifteen years.

(2) A prison sentence of up to ten years shall be imposed on those who join the organized group defined in paragraph one."

20. Article 4(1)(b) of the Law on the Fight Against Terrorism No.3713 of 12/4/1991with the heading "*Offenses committed for the purpose of terrorism*" is as follows:

> *"The following offenses shall be considered to be a terror offense in the event that they are committed within the framework of the activity of a terrorist organization established in order to commit offenses in line with the aims specified in Article 1:*
>
> *The offenses stipulated in Articles 79, 80, 81, 82, 84, 86, 87, 96, 106, 107, 108, 109, 112, 113, 114, 115, 116, 117, 118, 142, 148, 149, 151, 152, 170, 172, 173, 174, 185, 188, 199, 200, 202, 204, 210, 213, 214, 215, 223, 224, 243, 244, 265, 294, 300, 316, 317, 318 and 319 and paragraph two of Article 310 of the Turkish Criminal Code*
>
> *…"*

21. Article 5 of the Law on the Fight Against Terrorism No.3713 with the heading "*Increase of penalties*" is as follows:

> *"The imprisonments or judicial fines to be determined on those who commit the offenses stipulated in Articles 3 and 4 according to the relevant laws shall be adjudged by way of increasing them by half. In the penalties to be determined in this way, the upper limit of the penalty which is determined for both that act and all kinds of penalties can be exceeded. However, an aggravated lifelong imprisonment shall be adjudged instead of a lifelong imprisonment.*
>
> *If it is prescribed that the penalty of the offense be increased in the relevant Article due to the fact that the offense is committed within the framework of the activity of the organization; an increase shall be made over the penalty only according to the provision of this Article. However, the increase to be made cannot be lower than two thirds of the penalty.*
>
> *The provisions of this Article shall not be applied to children ."*

22. The relevant paragraphs of Article 109 of the Law of Criminal Procedure No.5271 of 4/12/2004 with the heading "*Judicial control*" are as follows:

(1) It may be adjudicated for an accused to be placed under judicial control instead of being detained in the presence of grounds for detention set forth in Article 100 in the investigation carried out due to a crime.

...

(3) Judicial control includes subjugation of the accused to one or more of the liabilities shown below:

a) Not going abroad.

...

(6) The period spent under judicial control cannot be deducted from the penalty by considering it a ground for restriction of personal freedom. This provision shall not apply in cases set forth in sub-paragraph (e) of paragraph three of the Article.

(7) Provisions pertaining to judicial control may apply (...) for those released due to the expiration of the periods of detention prescribed in the laws."

23. Article 110 of the Law No.5271 with the heading *''Decision of judicial control and authorities to order"* is as follows:

(1) The suspect may be placed under judicial control at every phase of the investigation stage upon request of the Public prosecutor and decision of the criminal judge of peace.

(2) Upon request of the Public prosecutor, the judge, in application of judicial control, may place the suspect under one or more new liabilities; may wholly or partially revocate and amend the liabilities comprising the content of the judicial control or temporarily hold the suspect from abiding by some of these.

(3) Article 109 and provisions of this article shall be implemented by other judicial authorities having jurisdiction and competency at every phase of the prosecution stage when deemed necessary."

24. Article 111 of the Law No.5271 with the heading *''Revocation of the decision of judicial control"* is as follows:

(1) Upon motion of the suspect or accused, the judge or court may decide as per Article 110 (2) within five days after receiving the Public prosecutor's opinion.

(2) Decisions pertaining to judicial control may be objected."

IV. EXAMINATION AND GROUNDS

25. The individual application of the applicant (App No:2012/1051 on 28/11/2012) was examined during the session held by the court on 20/2/2014 and the following were ordered and adjudged:

A. The Applicants' Allegations

26. The applicant alleged;

i. That in the decision on 18/9/2012 of the 10th Assize Court of Istanbul before which she was tried due to the offense of being a member of an armed terrorist organization, a decision of judicial control in the form of the a ban on leaving the country was unlawfully issued on her, that the decision of judicial control and the decision of the court which made the examination of objection lacked justification and that for this reason, Article 141 of the Constitution was violated,

ii. That the prohibition of the ban on leaving the country had a restrictive quality, that the right to freedom and security was violated as a decision was issued on the objection filed against this decision without receiving the opinion of the applicant and her defense counsel,

iii. That the decision of judicial control "a ban on leaving the country " was an ideological and political decision, that for this reason, it had a quality of violating the principle of equality stipulated in Article 10 of the Constitution, that the fact that the prohibition of going abroad was imposed although there was no final decision had a quality of violating the presumption of innocence stipulated in Article 38 of the Constitution and Article 83 of the Constitution which regulates legislative immunity,

iv. That the implementation of the measure of the prohibition of going abroad in a way which was restricting the freedom of a member

of the parliament although there was no final judgment and a Parliament decision was not issued had a quality of violating the freedom of abode and travel regulated in Article 23 of the Constitution,

v. That the expression of thoughts was an inseparable part of her parliamentary activities, that the restriction of parliamentarians to go abroad within the framework of legislative activity was contrary to Article 26 of the Constitution which regulates the freedom of expression and dissemination of thought,

vi. That she was released through the decision of release of the 10th Assize Court of Istanbul on 14/7/2007 as there was no possibility of escaping for her, that however, the imposition of the prohibition of going abroad without depending on any justification in its decision on 18/9/2012 had a quality of violating her constitutional rights and filed a claim for damages.

B. The Constitutional Court's Assessment

27. In the opinion of the Ministry against the claims of the applicant, it was stated that our country was not a party to the Additional Protocol Numbered 4 of the European Convention on Human Rights (ECHR) in which the right to liberty of movement is regulated. The Ministry also stated that the complaints of the applicant needed to be examined within the framework of the right to free election stipulated in Article 3 of the Additional Protocol Numbered1 of the ECHR and Article 67 of the Constitution, that in the present case, the applicant did not encounter any obstacle with regard to participation in legislative activities in the Parliament, that whether or not the measure imposed on the applicant and the aim sought to be achieved were proportionate needed to be evaluated by the Constitutional Court.

28. Against the opinion of the Ministry on the merits of the application, the applicant repeated her statements in her application petition, moreover; she stated that parliamentary activities could not only be limited to intra-parliamentary activities, that the activities to be performed within the country or abroad needed to be handled within the framework of legislative immunity. The applicant asserted that the prohibition of going

abroad had the quality of violating the right to elect, to be elected and to engage in political activity as stipulated in Article 67 of the Constitution.

29. In criminal law, in order for an investigation or prosecution initiated due to a committed offense to be performed in a sound way, resorting to some measures can turn into an obligation. These measures can have the aim of ensuring that proceedings are conducted without delay and endangering them and that the decisions to be issued are implemented by way of the prevention of the escape of the suspect or accused, making the suspect or accused present at the trial, the prevention of the obfuscation of evidence. While protection measures are means used for maintaining the old situation during proceedings or ensuring that the decision to be issued is enforced, they are also temporary. The fact that a protection measure is temporary means that a measure comes to an end in the event that no reason which justifies this measure remains.

30. Protection measures are regulated in Articles 90 to 144 of the chapter four of the Law No.5271 with the side heading *''Protection measures"*. There amongst, measures such as arrest and taking under custody, detention, judicial control, search and seizure, the supervision of communication established through telecommunications, surveillance through undercover investigator and technical means are measures that restrict personal liberty.

31. Subjecting a suspect or accused to one or a few liabilities stipulated in the law is defined as judicial control in the event that the conditions of detention are present and on the condition that they are within the framework of proportionality and comply with the aims to be achieved with detention. In Article 109 of the Law No.5271 with the heading of *''Judicial Control''*, the means of judicial control introduced as an alternative to detention are listed. In Article 109 (3) (a), the measure "*a ban on leaving the country"* is accepted as a lighter protection measure which replaces detention.

32. As it is accepted as a judicial control measure, in order to be able to decide on the measure "*a ban on leaving the country"*, there need to be cases indicating the existence of a strong suspicion of crime stipulated in Article 10 of the Law No.5271 and a reason for detention.

1. Admissibility

a. Principle of Equality

33. The applicant asserted that the fact that the prohibition of going abroad was imposed on her because she had a conviction which did not become final due to political reasons while the prohibition of going abroad was not imposed even for parliamentarians on whom investigation files were present due to disgraceful crimes was discriminatory as it was an ideological and political decision and that, for this reason, "*the principle of equality before law*" regulated in Article 10 of the Constitution was violated.

34. When Article 148 of the Constitution and Article 45 of the Law No.6216 are taken into consideration, it is not possible to evaluate in an abstract manner the claims of the applicant as to effect that Article 10 of the Constitution and Article has been violated and it is certainly necessary to handle them in connection with another fundamental right and freedom which is the subject matter of the individual application (App. No: 2012/1049, 26/3/2013, § 33).

35. It is necessary to handle the applicant's claim with regard to the violation of the principle of equality within the framework of especially the right to personal liberty and security and the freedom of travel and in connection with these rights and freedoms. Therefore, the principle of equality does not have any independent protection function within the scope of an individual application and is a complementary right which guarantees the exercise and protection of other rights and their remedies (App. No: 2012/1049, 26/3/2013, § 34).

36. Due to the reasons explained, the claims of the applicant as to the fact that Article 10 of the Constitution was violated should be evaluated within the framework of the claims as to the fact that Articles 19 and 23 of the Constitution were violated.

b. Presumption of Innocence

37. The applicant asserted that the fact that the pohibition on going abroad was imposed on her without any court decision which became final

and had the quality of violating the presumption of innocence stipulated in Article 38 of the Constitution.

38. While the judicial control measures stipulated in Article 109 of the Law No.5271 with the heading "*Judicial control*" can be resorted to in order for the investigation or prosecution conducted due to the committed offense to be executed in a sound way, they can also be resorted to in order to ensure that the judgment ruled as a result of the prosecution is enforced. As a matter of fact, according to Article 110 of the Law No.5271 with the heading "*Decision of judicial control and authorities to order*", it is regulated that a decision of judicial control can be issued with the decision of a judge in each stage of the investigation and prosecution phase. On the other hand, in accordance with Article 111 of the Law No.5271 with the heading *''Revocation of the decision of judicial control"*, the legal remedy of objection is envisaged against the measure of "*a ban on leaving the country"*.

39. In the present incident, the 10thAssize Court of Istanbul, through its decision on 18/9/2012, ruled upon the measure of restriction on going abroad in order to ensure that the accused be prevented from escaping and that the issued decisions be implemented. The applicant resorted to the legal remedy of objection against this decision of the court of instance. The objection was dismissed through the decision of the 11thAssize Court of Istanbul which was the authority of objection on 11/10/2012 and the decision of judicial control became final on the same date. In this respect, in order to be able to rule upon the measure of "*a ban on leaving the country"* which replaces detention, it is not necessary that the merits of the trial which is conducted be finalized with a judgment, it is also not necessary that the court decision with regard to the merits of the trial to be finalized, either.

40. For the reasons explained, as no evident and visible violation has been detected in relation to the action of trial through which the applicant asserted that the fact that the imposition of the measure of the prohibition of going abroad on her without any court decision which became final with regard to the merits of the trial, had the quality of violating the presumption of discretionary, it should be decided that this part of the application is inadmissible due to the fact that "*it is manifestly ill-founded*" without examining it in terms of other conditions of admissibility.

c. Right to Personal Liberty and Security and the Freedom of Travel

41. The applicant asserted that the prohibition of going abroad had a quality of restricting freedom, that therefore, her right to liberty and security and freedom of abode and travel were violated.

42. Article 19 of the Constitution with the heading "*Personal liberty and security*" is as follows:

> *"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*
>
> *Execution of sentences restricting liberty and the implementation of security measures decided by courts; arrest or detention of an individual in line with a court ruling or an obligation upon him designated by law; execution of an order for the purpose of the educational supervision of a minor, or for bringing him/her before the competent authority; execution of measures taken in conformity with the relevant provisions of law for the treatment, education or rehabilitation of a person of unsound mind, an alcoholic, drug addict, vagrant, or a person spreading contagious diseases to be carried out in institutions when such persons constitute a danger to the public; arrest or detention of a person who enters or attempts to enter illegally into the country or for whom a deportation or extradition order has been issued.*
>
> *Individuals against whom there is strong evidence of having committed an offence may be arrested by decision of a judge solely for the purposes of preventing escape, or preventing the destruction or alteration of evidence, as well as in other circumstances prescribed by law and necessitating detention arrest of a person without a decision by a judge may be executed only when a person is caught in flagrante delicto or in cases where delay is likely to thwart the course of justice; the conditions for such acts shall be defined by law.*
>
> *Individuals arrested or detained shall be promptly notified, in all cases in writing, or orally when the former is not possible, of the grounds for their arrest or detention and the charges against them; in cases of offences*

committed collectively this notification shall be made, at the latest, before the individual is brought before a judge

The person arrested or detained shall be brought before a judge within at latest forty-eight hours and in case of offences committed collectively within at most four days, excluding the time required to send the individual to the court nearest to the place of arrest. No one can be deprived of his/her liberty without the decision of a judge after the expiry of the above specified periods These periods may be extended during a state of emergency, martial law or in time of war.

The next of kin shall be notified immediately when a person has been arrested or detained.

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.

Persons whose liberties are restricted for any reason are entitled to apply to the competent judicial authority for speedy conclusion of proceedings regarding their situation and for their immediate release if the restriction imposed upon them is not lawful.

Damage suffered by persons subjected to treatment other than these provisions shall be compensated by the State in accordance with the general principles of the compensation law.

43. Article 19 of the Constitution protects the right to personal liberty and security. In Article 19(2) of the Constitution, the cases which will constitute an interference in personal liberty are listed. In this context, the European Court of Human Rights (ECtHR) stated that the concept of "*freedom*" did not cover the physical liberty of a person (*Engel and Others v. the Netherlands,* App. No: 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, 8/6/1976, § 58). Although there is no doubt that people who are taken in custody and kept in a detention house, detained, sentenced to an imprisonment and kept in a prison are deprived of their freedom, deprivation of freedom may take place in many various forms and these concepts do not cover all states of deprivation of freedom. Types of

deprivation of freedom increase both through amendments in laws and with changes in the practices of public force (*Guzzardi v. Italy*, App. No: 7367/76, 6/11/1980 § 95). For this reason, it should be stated that "*personal liberty*" is an autonomous concept which needs to be separately evaluated in each incident.

44. The ECtHR stated that the restrictions which were aimed at the freedom of movement and were covered by Article 5 of the ECHR were different from the restriction of the freedom of travel which was a separate right and was guaranteed with Article 2 of the Additional Protocol No 4 to the ECHR. According to the ECtHR, an interference in the right to liberty and security in terms of Article 5 of the ECHR is an extreme form of the restriction of the freedom of travel within the scope of Article 2 of the Additional Protocol No 4 to the ECHR. The ECtHR stated that the difference between the restrictions aimed at the right to liberty and security and the restrictions aimed at the freedom of travel was not related to "*the quality and essence of the restriction*", that the difference there between was only a difference of "*degree and intensity*" (*Guzzardi v. Italy*, § 93). In the evaluation of degree or intensity in restrictions, various factors such as the type, period, effects and the form of application of the measure in question (*Guzzardi v. Italy*, § 92) and to what extent the daily life of an individual is kept under control by the state needs to be taken into consideration. In the evaluations in question, the present conditions of the case and the present situation of the applicant also needs to be taken into consideration.

45. Article 23 of the Constitution with the heading "***Freedom of abode and travel***" is as follows:

> *"Everyone has the freedom of abode and travel.*
>
> *Freedom of abode may be restricted by law in order to prevent offending, ensure social and economic development, realize sound and steady urbanization and protect public property;*
>
> *Freedom of travel may be restricted by law for investigation and prosecution of crimes and in order to prevent offending.*
>
> *The freedom of citizens to go abroad may only be restricted on*

the basis of a decision by a judge for the purpose of investigation and prosecution of crimes.

Citizens cannot be deported and cannot be deprived of their right to enter homeland."

46. Article 2 of the Protocol Number 4 to the ECHR Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and in the First Protocol thereto with the heading "*Freedom of movement*" is as follows:

"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 public order, for the prevention of crime, 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."

47. Both in Article 23 of the Constitution and in Article 2 of the Additional Protocol Number 4 to the ECHR, the right to the freedom of travel is present within the country of a state while the right to the freedom of leaving the country of a state in which a person is residing is also present. In the present incident, the security measure of "*a ban on leaving the country"* was ruled on, regarding the applicant by the Court of first instance in order to ensure that the punishment restricting freedom be enforced. This measure constitutes a restriction on the right of a person to leave the country.

48. The ECtHR decided that a restriction on the right of a person to leave the country constituted an interference which needed to be

evaluated within the scope of Article 2 of the Additional Protocol Number 4 to the ECHR (See *Riener v. Bulgaria,* App. No: 46343/99, 23/5/2006 §§ 110). Article 23(4) of the Constitution is as follows "A citizen's freedom to leave the country may be restricted only by the decision of a judge based on a criminal investigation or prosecution. ", it is understood that the prevention of a person from going abroad is within the scope of the freedom of travel stipulated in Article 23 of the Constitution.

49. Article 148(3) of the Constitution is as follows:

"Everyone can apply to the Constitutional Court based on the claim that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which is guaranteed by the Constitution has been violated by public force. In order to submit an application, ordinary legal remedies must be exhausted."

50. Article 45(2) of the Law on the Establishment and Trial Procedures of the Constitutional Court No.6216 of 30/3/2011 is as follows:

> *"Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities. In order to make an application, ordinary legal remedies must be exhausted."*

51. In Article 148(3) of the Constitution and Article 45(1) of the Law No.6216, it is provided that anyone can apply to the Constitutional Court based on the claim that from their fundamental rights and freedoms that are guaranteed by the Constitution, any that falls within the scope of the ECHR and its additional protocols to which Turkey is a party has been violated by public force.

52. In order for an application or complaint to fall within the scope of the jurisdiction of the Court in terms of subject, the right which is asserted by the applicant to have been violated should be protected through the ECHR and the additional protocols to which Turkey is a party to. It is not possible for the applications related to one of the provisions of the additional protocols to which Turkey is not a party to be examined by

the Constitutional Court. The framework of the applications that the Court can examine in relation to which rights have been drawn up by the Constitution and the Law No.6216 and it is not possible to extend the framework of this venue.

53. Our country is not a party to the Additional Protocol Number 4 to the ECHR. For this reason, no individual application can be lodged with regard to a complaint concerning the freedom of travel which falls within the scope of the mentioned Protocol and is stipulated in Article 23 of the Constitution (see *Nicolatos and Others v. Turkey,* App. No: 45663/99…(dec.), 1/6/2010; *Fathi v. Turkey,* App. No: 32598/06, 30/6/2009).

54. Due to the reasons explained, it should be decided that the part of the application which is relevant to the complaint concerning the freedom of travel stipulated in Article 23 of the Constitution is inadmissible due to *"lack of jurisdiction ratione materiae"* without it being examined in terms of the other conditions of admissibility.

55. It has been necessary to decide on the inadmissibility of the part of the prohibition of going abroad imposed on the applicant which is relevant to the complaint aimed at the freedom of travel stipulated in Article 23 of the Constitution due to *"lack of jurisdiction ratione materiae"*. For this reason, it should be decided that the claim of the applicant as to the effect that Article 10 of the Constitution was violated as evaluated within the framework of her claims as to the effect that Article 23 of the Constitution was violated is inadmissible due to "*lack of jurisdiction ratione materiae*" as the principle of equality is a complementary right which does not have any independent protective function and guarantees the exercise and protection of the right to personal liberty and security and the freedom of travel and their remedies.

d. Right to Elect, to Be Elected and to Engage in Political Activity

56. The Constitutional Court is not bound by the legal qualification of the facts made by the applicant, it appraises the legal definition of the facts and cases itself. It is concluded that the complaints of the applicant as to the effect that the expression of thoughts was an inseparable part of her parliamentary activities and that the restriction of parliamentarians

to go abroad within the framework of legislative activity was contrary to Article 26 of the Constitution which regulates the freedom of expression and dissemination of thought need to be evaluated within the scope of Article 67 of the Constitution in which "*The rights to elect, to be elected and to engage in political activity*" are included.

57. On the other hand, although the applicant asserted that she was released through the decision of release of the 10th Assize Court of Istanbul on 14/7/2007 as there was no possibility of escaping for her, that however, the failure to include sufficient and relevant justification with regard to the imposition of the prohibition of going abroad without depending on any justification in the decision of the same court dated 18/9/2012 violated her right in Article 141 of the Constitution, it is concluded that this part of the complaint also needs to be evaluated as a whole within the scope of Article 67 of the Constitution in which "*The rights to elect, to be elected and to engage in political activity*" are included by considering the form of expression of the complaint.

58. The complaints of the applicant as to the fact that the decision of judicial measure of the a ban on leaving the country issued on her did not contain any justifications and that her right to be elected was violated are not manifestly ill-founded. Moreover, as there is no other reason for inadmissibility, it needs to be decided that the part of the application as regards these complaints is admissible.

2. Merits

59. The applicant alleged that the decision of judicial measure in the form of the a ban on leaving the country had the quality of violating Article 83 of the Constitution which regulates legislative immunity as it prevented her legislative activities.

60. The Ministry of Justice stated that the applicant's complaints under this heading needed to be examined within the scope of Article 3 of the Additional Protocol No 1 to the ECHR and Article 67 of the Constitution. In its opinion, the Ministry stated that in the present incident, there was not an issue of whether or not the applicant could be elected as a member of parliament, that the issue was relevant to whether or not the right to

political participation was violated due to the decision of judicial control issued on the applicant who was elected as a member of parliament. In the opinion of the Ministry, it was stated that the applicant was sentenced to a punishment restricting freedom for a period of 8 years and 9 months, instead of the detention of the applicant the restriction of going abroad which was lighter was imposed by the court of instance and that this measure did not prevent the applicant from engaging in legislative activities in the parliament, that in this respect, it was necessary to evaluate whether or not the restriction imposed on the right to political participation through the measure imposed on the applicant was proportionate.

61. The applicant did not agree with the opinion of the Ministry, repeated her complaints which were in the application petition and in addition, requested that a decision be delivered determining that her rights stipulated in Article 67 of the Constitution were violated.

62. It is concluded that this complaint of the applicant which asserted that she was not able to completely fulfill the duty of deputyship as the restriction on going abroad was imposed on her although she was elected as a member of parliament is in essence related to the right to elect, to be elected and to engage in political activity and needs to be examined within the scope of Article 67 of the Constitution.

63. Article 67(1) of the Constitution with the heading *''Right to vote, to be elected and to engage in political activity.''* is as follows:

> *"In conformity with the conditions set forth in the law, citizens have the right to vote, to be elected, to engage in political activities independently or in a political party, and to take part in a referendum."*

64. Article 3 of the Additional Protocol No 1 to the ECHR is as follows:

> *"The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."*

65. In Article 67 of the Constitution, the right to elect, to be elected and to engage in political activity independently or within a political party is

guaranteed. Elections and political rights are the indispensable elements of a democratic state which is stipulated in Article 2 of the Constitution (AYM, E.2002/38, K.2002/89, K.T. 8/10/2002). Similarly, the ECtHR also accepts "*the right to free election*" as one of the most important principles of democracy, which is the basic element of the European public order. The ECtHR stated that the rights protected by Article 3 of the Additional Protocol Number 1 to the Convention were of vital importance for the establishment and sustainment of the foundations of an effective and meaningful democracy based on the rule of law (see *Mathieu-Mohin and Clerfayt v. Belgium*, App. No. 9267/81, 2/3/1987, § 47; *Danoka v. Latvia* [BD], App. No: 58278/00, 16/3/2006, § 103; *Yumak and Sadak v. Turkey* [BD], App. No: 10226/03, 8/7/2008, § 105).

66. The rights stipulated in Article 67(1) of the Constitution are directly related to the objective of realizing democracy. Political rights cover the rights to vote, to be a candidate and to be elected in elections as well as the right to engage in political activity. (App. No: 2012/1272, 4/12/2013, § 110). In a parliamentary democracy, deputies who are elected as the representatives of the public through the elections determined according to democratic procedures and principles, realize the connection between public and the political legitimacy of the parliament (App. No: 2012/1272, 4/12/2013, § 127).

67. However, the right to be elected covers not only the right to be a candidate in elections, but also the right of the relevant person to exercise his/her authority to represent *ipso facto* in his/her capacity as a member of parliament after being elected. In this context, an interference in the participation of the elected deputy in legislative activity can constitute an interference not only in his/her right to be elected, but also in the right of voters to express their free will (for the decision of the ECtHR in the same vein, see *Sadak and Others v. Turkey*, App. No. 25144/94, 26149/95, 26154/95, 27100/95, 27101/95, 11/6/2002, § 33, 40) and in the right to engage in political activity.

68. On the other hand, there are important connections between the right to elect, to be elected and to engage in political activity and the freedom of expression. As a matter of fact, based on the deputy-voter

relation, the ECtHR emphasized that the freedom of expression was important especially for the elected representatives of the public, that the deputy represented the voter, defended their interests by drawing attention to their demands, that therefore, an interference in the freedom of expression of an opposing deputy required a stricter review (see *Castells v. Spain*, App. No. 11798/85, 23/12/1992, § 42).

69. The parliament which is the holder of legislative authority and the deputies which comprise it are the representatives of different political views which are existing in the society within constitutional boundaries. The main field of duty of the deputies who are granted with the authority of decision-making on behalf of the public through free elections is the parliament and the field of duty that they own contains a superior public interest and importance (App. No: 2012/1272, 4/12/2013, § 128).

70. Although it can be said that restrictions can be brought in terms of political activities through laws within the specific conditions of each country, it is obvious that deputies have a constitutional protection in legislation activities. What matters is not to prevent the political will of public and not to neutralize the essence of a right. Disproportionate interferences which will prevent elected deputies from fulfilling their legislation activities will eliminate the authority of political representation created with public will, prevent the reflection of the will of voters in the parliament (App. No: 2012/1272, 4/12/2013, § 129).

71. On the other hand, the rights to elect, to be elected and to engage in political activity are not absolute and can be restricted for legitimate purposes. Although the reasons for restriction are not prescribed in Article 67 of the Constitution, some constitutional prohibitions are included. On the other hand, it is stated in Article 67 of the Constitution that political rights will be enjoyed "*in accordance with the conditions stipulated in law*". Thus, the Constitution accepts that a right can be restricted through a legal remedy. The facilities of restriction prescribed through the regulation exposed to restriction through a legal remedy also need to be evaluated together with Article 13 of the Constitution within the scope of the principle of the integrity of the constitution. In other words, it is clear that the restrictions aimed at the freedoms prescribed in Article 67(1) of

the Constitution need to have a limit. The criteria under Article 13 of the Constitution must be taken into consideration as regards the restriction of fundamental rights and freedoms. For this reason, the review concerning the restrictions imposed on the right to be elected and to engage in political activity should be conducted within the framework of the criteria stipulated in Article 13 of the Constitution and within the scope of Article 67 of the Constitution (see App. No: 2012/1272, 4/12/2013, § 131).

72. Similarly, the ECtHR also accepts that these rights can be restricted, however, states that these restrictions should not be at such an extent as to impair "*the free expression of the opinion of the people in the choice of the legislative body*" and in this sense, to prevent certain persons or groups from participating in the political life of the country, to impair the essence of the right in question and to eliminate its effect and should be proportionate to the prescribed aim (see *Mathieu-Mohin and Clerfayt v. Belgium*, App. No: 9267/81, 2/3/1987, § 52; *Tanase v. Moldova* [BD], App.No: 7/08, 27/4/2010, §§ 157, 158, 161).

73. In the present incident, the applicant was taken into custody on 5/11/2006 with the allegation of being a member of an armed terrorist organization and arrested on 8/11/2006. Through the indictment of the Office of the Chief Public Prosecutor of Istanbul on 13/11/2006, a criminal case was filed before the 10th Assize Court of Istanbul in order for the applicant to be punished with the claim that she committed the offense of being a member of an armed terrorist organization, the applicant was elected as an independent member of parliament from Istanbul in the General Election for Members of Parliament for the 23rd Period held on 22/7/2007 while the trial was going on under detention. Upon the applicant's request for release, the 10th Assize Court of Istanbul decided on the release of the applicant on 24/7/2007 on the ground that there was no possibility of escaping for her as she was elected as a member of parliament. The court did not rule on any security measure on the applicant, either. Therefore, neither the conducted prosecution nor the state of detention of the applicant constituted any obstacle to the fact that she was elected as a deputy. In this respect, there was no interference in the applicant's right to be elected, nor was any claim in relation to this asserted. As the applicant

was released after she was elected as a member of parliament, she took the oath at the Grand National Assembly of Turkey and started fulfilling her duty of deputyship *ipso facto*. The applicant became an independent candidate for deputyship from Istanbul and was elected again in the General Election for Deputyship for the 24th Period held on 12 June 2011.

74. However, the 10thAssize Court of Istanbul, through its decision on 18/9/2012, decided on the punishment of the applicant with an imprisonment of 8 years and 9 months due to the offense of being a member of an armed terrorist organization and the implementation of the measure of judicial control "a ban on leaving the country " until the decision became final. In other words, the measure of "*a ban on leaving the country* " which is the subject matter of the complaint of the applicant started to be imposed as of the date on which the applicant was sentenced to an imprisonment of 8 years and 9 months by the court of first instance.

75. The first issue which needs to be resolved in the present incident is to determine whether or not the measure of "*a ban on leaving the country* " constituted an interference aimed at the "*right to be elected*" and the right "*to engage in political activity*" which had an inseparable relation between the rights to elect, to be elected and to engage in political activity of the applicant who was a member of parliament. In the subsequent stages, it needs to be determined whether or not the interference whose existence was accepted was based on legitimate purposes, whether or not the right in question was restricted in a way which would damage its essence, whether or not the restriction was necessary in a democratic society and whether or not the means used were disproportionate.

i. Concerning the Existence of the Interference

76. The applicant stated that parliamentary activities were not only exclusive for the parliament itself, that at the same time, the prevention of parliamentary activities within the country or abroad was contrary to the legislative immunity, that she went abroad many times as a member of the Commission of Foreign Relations of the GNAT of the 23rd period, that she was not able to participate in parliamentary activities abroad with the imposition of the prohibition of going abroad.

77. It is clear that there are difficulties in making a comprehensive definition in a democratic society of the concept of "*engaging in political activity*" which is stipulated in Article 67(1) of the Constitution and is an autonomous concept. In the present incident, the actions of the applicant who is a political actor as she is a member of parliament, the actions that she performed in order to influence the political decisions of the society and the state needs to be accepted as political activity. While these actions can be performed within the country, they can also be performed abroad. Then, there is an interference aimed at the applicant's right to "*engage in political activity*" with regard to the prevention of the applicant from going abroad so as to engage in a political activity.

ii. Interference on Justified Grounds

78. The aforementioned interferences will constitute the violation of Articles 13 and 67 of the Constitution unless they are not among the constitutional prohibitions stipulated in Article 67(1) of the Constitution and they fulfill the conditions stipulated under Article 13 of the Constitution. Due to this reason, whether or not the restriction is in line with the conditions of bearing no prejudice to the essence, being indicated under the relevant Article of the Constitution, being prescribed by laws, not being contrary to the letter and spirit of the Constitution, the requirements of the democratic social order and of the secular Republic and the principle of proportionality as prescribed under Article 13 of the Constitution needs to be determined.

1. Being Prescribed by Laws

79. The applicant did not make any claims as to the effect that there was a contrariety to the provision of "*the exercise of these rights are regulated by law*" stipulated in Article 67(4) and the requirement of "*being prescribed by law*" stipulated in Article 13 of the Constitution. As a result of the evaluations which are made, it is concluded that Article 109 of the Law No.5271 with the heading "*Judicial control*" fulfills the criterion of *''being prescribed by law''*.

2. Legitimate Purpose

80. The applicant was sentenced to an imprisonment of 8 years and 9 months due to the offense of being a member of an armed terrorist organization and it was decided that the judicial control measure of the a ban on leaving the country be imposed in order to ensure that the imprisonment ruled is enforced after the finalization of the decision.. It is concluded that the mentioned measure of the a ban on leaving the country is a part of the precautions aimed at the punishment of criminals and has a legitimate purpose.

3. Necessity and Proportionality in a Democratic Society

81. Finally, it should be evaluated whether or not a reasonable balance has been pursued between the right of an applicant "to engage in political activity" in a democratic society and the public interest in the restriction of the applicant to go abroad within the period during which the file is under appeal examination in the decisions on the dismissal of the objection filed against this measure.

82. The Constitutional Court defined democratic society as follows in it's case-law: "*Democracies are regimes in which fundamental rights and freedoms are ensured and guaranteed in the broadest manner. The limitations which bear prejudice against the essence of fundamental rights and freedoms and render them completely non-exercisable cannot be considered to be in harmony with the requirements of a democratic societal order. For this reason, fundamental rights and freedoms may be limited exceptionally and only without prejudice to their essence to the extent that it is compulsory for the continuation of democratic societal order and only by law.*" (AYM, E.2006/142, K.2008/148, K.T. 24/9/2008). In other words, if the restriction which is introduced halts or renders extremely difficult the exercise of the right and freedom by bearing prejudice to its essence, renders it ineffective or if the balance between the means and objective of the restriction is disrupted in violation of the principle of proportionality, it will be against the democratic societal order (See AYM, E.2009/59, K.2011/69, K.T. 28/4/2011; AYM, E.2006/142, K.2008/148, K.T. 17/4/2008).

83. Another guarantee which will intervene in all kinds of limitations to be introduced to rights and freedoms is the *''principle of proportionality''* expressed under Article 13 of the Constitution. This principle is a guarantee which needs to be taken into consideration with priority in applications regarding the limitation of fundamental rights and freedoms. Although the requirements of a democratic societal order and the principles of proportionality are regulated as two separate criteria under Article 13 of the Constitution, there is a relation between these two criteria. Indeed, the Constitutional Court drew attention to this relationship between being necessary for a democratic societal order and proportionality in its previous decisions and decided that the means which would ensure that fundamental rights would be accessed with the least intervention will be preferred by stating that *''[Each limitation aimed at fundamental rights and freedoms] needs to be examined to see whether it is of the necessary quality for the democratic societal order, in other words, whether it fulfills the objective of public interest which is sought while serving as a proportionate limitation allowing for the least amount of intervention to fundamental rights...''* (AYM, E.2007/4, K.2007/81, K.T. 18/10/2007).

84. According to the decisions of the Constitutional Court, proportionality reflects the relationship between the objectives and means of limiting fundamental rights and freedoms. The inspection for proportionality is the inspection of the means selected based on the sought objective in order to reach this objective. For this reason, in interferences introduced in the field of the right to elect, to be elected and to engage in political activity, it needs to be evaluated whether or not the interference selected in order to achieve the targeted objective is suitable, necessary and proportionate.

85. In this context, the main axis for the evaluations to be carried out with regard to the facts which are the subject of the application will be whether or not the courts of instance which caused the interference could convincingly put forward that the justifications they relied on in their decisions are in line with the *''necessity in a democratic society''* and *''the principle of proportionality''* with a view to restricting the right to elect, to be elected and to engage in political activity.

86. In this framework, while deciding on the measure of protection from a ban on leaving the country regarding the people who are elected as members of parliament, courts need to show the existence of an interest which is much more overriding than the interest arising out of the right to be elected and to engage in political activity and which needs to be protected based on substantial facts (App. No: 2012/1272, 4/12/2013, § 114). As a result of this, while examining whether or not the interference aimed at the right of the applicant to be elected and to engage in political activities has reached the level of violating Article 67 of the Constitution, it should also be considered whether or not the claims that the applicant asserted with her election as a member of parliament were duly evaluated in the decision through which the measure of the a ban on leaving the country was imposed.

87. Therefore, in the event that it is accepted that the balance between the political and representation activities that the applicant was not able to perform as an elected member of parliament due to the measure of the ban on leaving the country and the public interest in the banning of the applicant from going abroad after the conclusion of the case with conviction until the appeal decision of the Court of Cassation is proportionate, it can be concluded that the justifications with regard to the measure of the ban on leaving the country are convincing or, in other words, relevant and sufficient.

88. The applicant asserted that the reason as to the effect that there was no possibility of escaping for her was predicated in the decision of release of the court of first instance dated 14/7/2007, that however, there was a conflict in the imposition of the prohibition of going abroad without depending on any justification in the decision of the same court dated 18/9/2012 and that this conflicting decision had the quality of violating her constitutional rights.

89. The Court of First Instance which ruled on the measure of the ban on leaving the country predicated her decision of the measure on the fact that the punishment restricting freedom ruled as 8 years and 9 months regarding the applicant was a long period, that the applicant was convicted of being a member of the illegal armed terrorist organization,

PKK, that the period of detention to be deducted from the penalty of the applicant was low when compared to the ruled penalty and decided on the measure of protection of "*the ban on leaving the country* " regarding the applicant so as to ensure that the judgment be enforced in the event that the decision became final. The punishment that restricted the freedom ruled regarding the applicant was later on approved with the writ of the Court of Cassation dated 24/12/2013 .

90. The applicant was released on the ground that there was no possibility of her escaping as she was elected as a member of parliament when her trial was going on under detention with the allegation of being a member of the armed terrorist organization, PKK. When it was decided that the applicant be released, there was no decision of conviction regarding her. However, it was decided, through the decision of the Court of first instance dated 18/9/2012, that the applicant be sentenced to an imprisonment of 8 years and 9 months on the ground that it was proven that she had committed the offense of being a member of the illegal armed terrorist organization, PKK. The Court of First Instance decided on the measure of the ban on leaving the country regarding the applicant following the decision of conviction. The court showed the justification of the measure as the length of the punishment restricting freedom ruled regarding the applicant and the length of the period remaining for the applicant to stay in prison in the event that the decision became final, the fact that the applicant was punished due to being a member of an armed terrorist organization.

91. In terms of the examination of an individual application, there is an essential difference between the status of the accused following the incrimination of a person and the status following the delivery of a decision of conviction regarding the same person. The concept of "*conviction*" means the "*determination of guilt*" due to an offense which is proven to have been committed. Conviction means being convicted by the court which holds the trial. When a decision of conviction has been made, it is accepted that it is proven that the charged crime is committed and that the perpetrator is responsible for this and thus a punishment restricting freedom and/or a fine are adjudged with regard to the accused.

With the conviction, the state of the person to be under strong suspicion of crime comes to an end. In this regard, the conviction decision shall not separately need to be finalized.

92. In the present incident, the applicant had the status of a person on whom a decision of conviction was issued as of the date of 18/9/2012 on which the court of first instance issued the decision of conviction. The security measure of the ban on leaving the country regarding the applicant was issued as a result of the judgment of conviction and predicated on the conviction. According to the justification of the Court of First Instance, there is a sufficient causality relation between the decision of conviction and the security measure of "*the ban on leaving the country* ". While the interference which consisted of the restriction of the applicant to go abroad in the process following the decision of conviction due to the decision of "the ban on leaving the country" which had the quality of a protection measure is not contrary to the requirements of a democratic society, it cannot be said that it is disproportionate in terms of the targeted objectives as the applicant was able to fulfill her duties of deputyship.

93. Due to these reasons, it should be decided that the applicant's right to elect, to be elected and to engage in political activity which is guaranteed in Article 67 of the Constitution was not violated.

V. JUDGMENT

In the light of the reasons explained, it is held **UNANIMOUSLY** on 20/2/2014;

A. That the applicant's

1. claims as to the effect that the presumption of innocence was violated be INADMISSIBLE as it is "manifestly ill-founded",

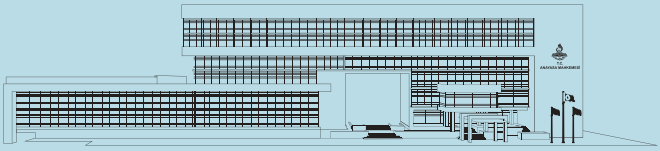
2. claims as to the effect that the freedom of travel was violated be INADMISSIBLE due to "*lack of jurisdiction ratione materiae*",

3. claims as to the effect that the principle of equality was violated be INADMISSIBLE due to "*lack of jurisdiction ratione materiae*",

4. claims as to the effect that the right to elect, to be elected and to engage in political activity was violated be ADMISSIBLE,

B. Article 67(1) of the Constitution was NOT VIOLATED in relation to the applicant's claim as to the effect that the right to elect, to be elected and to engage in political activity was violated,

C. That the trial expenses be charged on the applicant.



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