THE CONSTITUTIONAL COURT OF TURKEY

SELECTED JUDGMENTS

2015

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(Individual Application)

2015

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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 2015 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 considerably settling down the issues related to admissibility criteria in terms of individual application until 2015, the Sections of the Court, when necessary the Plenary, could concentrate more on the issues related to the merits of the individual applications. Thanks to this opportunity, there has been a significant increase in the number and diversity of the violation judgments. As a matter of fact, the first judgments finding a violation of the freedom of communication, the freedom of association and the right to hold meetings and demonstration marches were first rendered in 2015.

This book covers the judgments on the merits of individual applications as well as a limited number of inadmissibility decisions related to fundamental rights. In the selection of the judgments on the merits, especially the violation judgments are focused on, but certain judgments finding no violation are also included.

Apart from the judgments on the merits of the applications, the interim decisions issued under Article 49 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court and Article 73 of the Internal Regulations of the Court are also included in the book.

As in the previous periods, in the selection of the decisions and judgments, several factors such as their contribution to the development of the Court's case-law, their capacity to serve as a precedent judgment in similar cases as well as the public interest that they attract are taken into consideration.

The judgments are classified primarily relying on the sequence of the Constitutional provisions where relevant fundamental rights and freedoms are enshrined, and subsequently the judgments on each fundamental right or freedom are given chronologically on the basis of their dates.

Judgments rendered through individual application mechanism may contain assessments as to complaints raised under several rights and freedoms (assessments, in the same judgments, as to the complaints of alleged violations of the right to a fair trial as well as the freedom of expression and dissemination of thought and etc.). In this sense, the main issue discussed in the judgment is focalized while selecting the fundamental right title under which the judgment would be classified, and the judgment is presented under a title related to only one fundamental right.

Besides, short abstracts of the judgments are presented in the table of contents for a better understanding as to the classification of the judgments by the fundamental rights and freedoms as well as for providing a general idea of their contents.

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RIGHT TO LIFE (ARTICLE 17 § 1)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

MEHMET KAYA AND OTHERS

(Application no. 2013/6679)

SECOND SECTION
JUDGMENT

President	: Alparslan ALTAN
Justices	: Serdar ÖZGÜLDÜR
	Celal Mümtaz AKINCI
	Muammer TOPAL
	M. Emin KUZ
Rapporteur	: Cüneyt DURMAZ
Applicants	: 1. Mehmet KAYA
	2. Ayşe Gürsel KAYA
	3. Yüksel BOZKUŞ
	4. Ümmü İMER
	5. Doğan KAYA
	6. Erdal KAYA
	7. Göksel CAYNALI
	8. Melek VARTÜRK
	9. Erdoğan KAYA
Counsel	: Att. Adnan KAYA

I. SUBJECT-MATTER OF THE APPLICATION

1. The applicants stated that their relative who was a convict at a penal institution lost his life due to the negligence of officials, that the deceased was ill-treated by correction officers that no effective investigation was conducted with regard to the incident and it was ruled that there were no grounds for prosecution. They alleged that the right to life, the right to a fair trial, the right to an effective remedy and the prohibition of ill-treatment and torture were violated.

II. APPLICATION PROCESS

2. The application was lodged by the attorney of the applicants on 3/9/2013. In the preliminary examination held on administrative terms, it has been determined that there is no circumstance to prevent the submission of the application to the Commission.

3. It was decided by the Third Commission of the Second Section that the examination of admissibility is conducted by the Section and that the file is 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 jointly carried out.

5. The opinion submitted by the Ministry of Justice to the Constitutional Court with regard to the application on 31/3/2014 was notified to the applicants on 1/4/2014, the applicants submitted their counter-opinions on 24/4/2014.

III. THE FACTS

A. The Circumstances of the Case

1. The facts as expressed in the application form and the annexes thereof

6. While Erkan Kaya, who is the son of two of the applicants and the sibling of others, was serving his sentence as a convict at Muğla E Type Closed Penal Institution (Prison) since 2009, his father Mehmet Kaya, who is one of the applicants, applied to the Chief Public Prosecutor's Office of Izmir through his petition of 29/8/2012 and stated that his son forced to give his money by some convicts and correction officers, that he was beaten by the prisoners and subjected to torture and thrown to a cell by the correction officers as he did not give any tribute and filed a request for the transfer of his son to Aliağa Şakran Penal Institution. This request was dismissed.

7. On 7/1/2013, Erkan Kaya burnt his bed in the section he was staying and burns formed on his body as a result of the bed catching fire. Erkan Kaya, who was hospitalized, lost his life on 19/1/2013 while his treatment

was going on at İzmir Bozkaya Training and Research Hospital to which he was referred.

8. Following the occurrence of the incident, the Chief Public Prosecutor's Office of Muğla (the Chief Public Prosecutor's Office) initiated an investigation *ex officio* with the file No. 2013/290. Through the petition of 4/2/2013, the applicants requested that the matters which would be of importance for the consummation of the file and the collection of evidence be taken into consideration and that the persons who were negligent in the incident of death be detained.

9. Upon the application of Erdoğan Kaya, who is the elder brother of the deceased and one of the applicants, the Chief Public Prosecutor's Office took his statement on 17/1/2013. In his statement, Erdoğan Kaya briefly stated that he stayed at the same institution with his brother and that the reason why his brother burned himself and his bed was the unfair disciplinary penalties that were imposed. In his statement, the aforementioned person also stated that he initially stayed in the same ward with his brother, that they had problems with other people present in the ward and correction officers, that they filed a complaint to the administration and that their complaint was not duly handled.

10. In the witness statements were taken within the scope of the investigation, it was stated that the deceased had psychological problems and that he had previously committed similar bed burning actions.

11. Through its judgment with the Investigation No. 2013/290, K.2013/1168 of 8/5/2013, the Chief Public Prosecutor's Office ruled that there was no grounds for prosecution on the ground that it was understood that the fire was intervened by the officials in a very short period of time and the fire was contained, that the personnel of the institution did not have any negligence or delay with regard to the incident and the incident of death occurred as a result of burns and acute pneumonia which developed as a complication according to the report of the Forensic Medicine Group Presidency of Izmir of 24/4/2013.

12. The objection filed by the applicants against the aforementioned judgment was dismissed with the judgment No. 2013/1082 Misc. Works of 19/7/2013 of the Assize Court of Fethiye (Court) on the ground that

there was no aspect that was contrary to the procedure and law in the judgment on no grounds for prosecution.

13. This judgment was notified to the counsel of the applicants on 6/8/2013 and an individual application was lodged on 3/8/2013.

2. Developments before and after the incident which is the subject matter of the application as expressed in the opinion of the Ministry

14. In a minute kept by correction officers in August 2012, it was stated that the convict Erkan Kaya was interviewed and given advice at the chief officer's office when he returned from the hospital after other detainees and convicts conveyed to the prison administration the discomfort they felt about him and submitted a petition about this matter, that however, the convict showed aggressive behaviors, that the convict and his elder brother Erdoğan Kaya were taken to the observation section in order not to cause any incident, that the convict Erkan Kaya rushed out to the corridor and attempted to attack the officers on duty with a razor blade part the source of which was not known. While an attempt was made to talk to both convicts and calm them down, Erkan Kaya was neutralized and the razor blade part in his hand was taken, he continued to display aggressive behaviors, made threats and he was sent to the observation section in the right in Block C again after he was tranquilized.

15. Through its decision of August 2012, the Presidency of the Prison Disciplinary Board decided that the convict is sentenced to the deprivation of the admission of guests for one month and to being placed in a cell for 5 days. The objection filed against this decision on cell confinement was dismissed through the judgment of the Office of the Judge of Execution of 10/9/2012.

16. Before the incident, on 27/8/2012, the convict set aflame his bed in his room present in the Observation section at the left in Block C where he stayed. On 27/8/2012, a minute was kept by correction officers at the penal institution. In the aforementioned minute, it was stated that the convict Erkan Kaya submitted a petition in order to see the doctor, that he also verbally stated that he wanted to go to the hospital, that

the petition was approved by the correction officer on duty and sent to the infirmary of the institution, that when the infirmary was called by the officer on duty in order to receive information about his situation, it was said that the convict had canceled his appointment scheduled for the previous week at the hospital at his own will by writing a petition and that it was stated that he needed to be referred by the doctor of the institution and that another appointment needed to be taken from the hospital in order for him to go to the hospital. In the minute, it was also stated that when the officers on duty went to the Observation section at around 11.00 in order to notify the convict of the situation, the convict insulted and swore at them and said "*I want to talk to the chief officer, I have nothing to do with you, go and call the director, call the chief officer*", that it was seen that the convict set aflame his bed when they went to see the convict again after they went to talk to the shift supervisor and informed him about the situation. According to the minute, the officers on duty immediately intervened and the fire was extinguished, the convict swore at, threatened and insulted the director, chief officer and officers who were present while an attempt was made to remove the burnt bed from the room, the room of the convict was cleaned and he was sent to his room again.

17. Due to this action, the convict Erkan Kaya was sentenced by the Presidency of the Prison Disciplinary Board to cell confinement for 15 days on 6/9/2012; upon the objection of the convict against the judgment of dismissal of 24/9/2012 issued by the Office of the Judge of Execution of Muğla due to the application of the convict, the 2nd Assize Court of Muğla ruled on the dismissal of the objection on 9/10/2012. The penalty regarding the convict was executed.

18. Moreover, a criminal case was filed before the Criminal Court of First Instance of Muğla through the indictment of the Chief Public Prosecutor's Office with the investigation No. 2012/4609, E.2012/1952 of 25/9/2012 with the claim that he committed the crimes of damaging public property by burning and of insulting correction officers.

19. In addition, a criminal case was filed before the Criminal Court of Peace through the indictment of the Chief Public Prosecutor's Office of 2/10/2012 on the ground that he committed the crimes of an attempt to injure correction officers with a razor blade, and of insulting and

threatening officers on duty on 13/8/2012. It was ruled that there was no ground for prosecution about certain correction officers with regard to the crime of misconduct. In this judgment, it was stated that the convict Erkan Kaya was placed into the room No. D-7 again for administrative reasons upon his petition of 17/7/2012 and based on the decision of the Presidency of the Administration and Observation Board of the Prison.

20. On 9/11/2012, the Presidency of the Prison Disciplinary Board decided that the convict is sentenced to the deprivation of the admission of guests for 1 month and of cell confinement for 10 days due to some of his undisciplined behaviors based on a minute kept on 30/10/2012. The objection filed against this decision was also dismissed with the judgment of the Office of the Judge of Execution of 28/11/2012.

21. In the petition submitted by the convict Erkan Kaya to the Directorate of Prison on 28/12/2012, it is seen that he served his cell confinement between 18/12/2012 and 28/12/2012, that he stated at his own will that he wanted to stay in the Observation section for another week and requested that due action is taken.

22. In a minute kept by correction officers on 4/1/2013, it is stated that when the convict Erkan Kaya, who was staying at his own will in Room 5 of the Observation section on the left of the Prison, was told that he would be taken out of that section and taken to the ward and that he needed to prepare his belongings, Erkan Kaya was not removed from this section after the convict told the officer on duty "*I will not get out of the observation section in which I am staying, I will not write any petition with regard to it, I will not talk to anyone*".

23. The convict Erkan Kaya started a fire by burning his bed at 08.38 AM on 7/1/2013 while the execution of his penalty was going on in compartment 5 of the Observation section in the left in Block C based on the minute that was prepared after his request for staying under observation for another week following the cell confinement which he completed on 28/12/2012 and, following the expiry of this period, upon his statement on 4/1/2013 as to the effect that he would not get out of the observation section in which he was staying, he would not write any petition and he would not talk to anyone.

24. A minute dated 7/1/2013 was undersigned by correction officers with regard to this matter. According to this minute, it was stated that there was a sharp-tipped tool with an iron part of 3.5 cm and a wooden handle of 8.5 cm in the right hand of the convict while an attempt was made to take him out of the room and that it was taken from his hand and confiscated, that moreover, it was found out that the convict broke the washbasin and tiles when the burning room was checked.

25. On 15/1/2013, a minute was kept by the Chief Public Prosecutor as regards the images of the fire.

26. On 17/1/2013, Izmir Branch of the Human Rights Association sent a petition to the Chief Public Prosecutor's Office and the General Directorate of Prisons and Detention Houses (CTEGM). In this petition, it was stated that the applicant Mehmet Kaya applied to them and declared that his son was tortured, he was not allowed to see the doctor, his son was thrown into a solitary cell and he set aflame his bed, the guardians locked the doors and it was requested that necessary investigation be conducted in line with these statements and allegations of the applicant.

27. On 18/1/2013 and 20/1/2013, the Chief Public Prosecutor took the statements of nine people who were prison officers as witnesses with regard to the incident of fire.

28. On 18/1/2013, the Chief Public Prosecutor's Office ruled that there were no grounds for prosecution in relation to the investigation which was initiated upon the complaint filed by the applicant Erdoğan Kaya with the claim of torture as regards the prison officers and conducted based on the file with the investigation No. 2013/287. In the judgment, it was stated that Erdoğan Kaya specified, in his statement, that there was no case of torture and that there was a request for transfer to Izmir as his family was in Izmir. It was determined through the records of the institution that his brother Erkan Kaya was taken to the infirmary of the institution on various dates that therefore, the claim of torture was baseless, that necessary instruction was given to the institution for ensuring the security of life. It was understood from the statement of the aforementioned person that he did not have any problems. It was also

stated that no crime and crime element was present as a result of the investigation conducted as regards the claim of torture.

29. In the expertise report of 28/1/2013 which was drawn up as a result of the criminal examination which was made to be conducted on the sharp-tipped tool which was seized from the convict Erkan Kaya on the date of the incident, it was stated that it was a crochet needle used in knitworks and laceworks and that it was not forbidden according to the Law No. 6136.

30. On 30/1/2013, CTEGM sent a letter to the Chief Public Prosecutor's Office for the diligent examination of the matters specified in the petition submitted by Izmir Branch of the Human Rights Association.

31. The investigation initiated upon this petition of Izmir Branch of the Human Rights Association was joined with the investigation file No. 2013/290 that was conducted before the Chief Public Prosecutor's Office with regard to the incident of death.

32. Statement of İsmail Bulut, who was another convict at the same Prison, was taken as a witness on 19/2/2013.

33. As the convict Erkan Kaya died on 19/1/2013, it was ruled on 20/2/2013 that the criminal case filed against him due to his actions of damaging public property by burning and of insulting correction officers on 27/8/2012 be discontinued.

34. On 26/2/2013, it was ruled that the criminal case filed against the convict on 13/8/2013 for attempted assault, insulting and threatening correction officers be discontinued as the accused had passed away.

35. Erkan Kaya, who was the relative of the applicants, was examined by infirmary of the institution from time to time because of his psychological problems and he was diagnosed by the doctor with an anxiety disorder, polyneuropathy, depressive seizure, and various drugs were prescribed to him and he was made to use them. According to the records of the infirmary for the last 5 months during which he was at the prison, the convict was examined at the infirmary of the institution for a total of 24 times on various dates due to his various conditions and within this period, necessary examinations and treatments were applied

by taking him to- and from the Muğla University Training and Research Hospital 4 times and the Izmir Atatürk Training and Research Hospital 4 times.

36. Within the last seven months during which he was at the prison, the room of the convict Erkan Kaya was changed by the administration of the Prison many times and seven separate decisions of disciplinary penalty issued regarding him and were executed within the last six months.

37. An administrative investigation was initiated with regard to the Prison officers as regards the death of the convict on 7/1/2013 as a result of him setting aflame the bed in his room where he was under observation and the place where he stayed and as a result, it was decided through decisions No. 01 of 22/1/2013 and No.02 of 25/1/2013 that "*there is no ground for imposing a disciplinary penalty*" as it was understood that the prison officers had no negligence and fault and that, on the contrary, they intervened right on time and in a proper way.

B. Relevant Law

38. Article 6 of the Law on the Execution of Penal and Security Measures No. 5275 with the side heading "*Principles to be taken into consideration in the execution of prison sentences*" is as follows:

> *"(1) The regime of execution of prison sentences shall be regulated based on the main principles that are stated below:*
>
> *a) Convicts shall be kept at penal institutions within the framework of order, security, and discipline in a safe manner and by taking measures that will prevent them from escaping.*
>
> *b) It shall be ensured that convicts have an orderly life at penal institutions. Deprivation of freedom required by a freedom-restricting penalty shall be made to be served under the physical and spiritual conditions which ensure the protection of respect for human dignity. Other rights of convicts that are stipulated in the Constitution can be restricted in line with the rules prescribed in this Law on the condition that the main aims of execution remain reserved.*

c) The tools and facilities which are available for the rehabilitation of the convict shall be utilized in the execution of the penalty. The principles of lawfulness and compliance with the law shall be taken into consideration in the execution of penalty and rehabilitation efforts so as to ensure the inviolability of the rights of the convict granted by laws, regulations, and by-laws.

d) In the regime of execution with regard to the convicts who are found out not to have any requirement for rehabilitation, due care shall be taken to include individualized programs in proportion to the personality of these convicts and these matters shall be regulated with regulations.

e) The principles of justice shall be duly implemented in the execution of the penalty. To this end, penal institutions shall be inspected by qualified personnel based on the authorities granted by laws, regulations, and by-laws.

f) It shall be obligatory to take all kinds of protective measures in order to protect the right to life and bodily and spiritual integrity of convicts at penal institutions.

g) It shall be obligatory for the convict to comply with the provisions stipulated by laws, regulations, and by-laws in line with the purpose of execution.

h) The disciplinary penalties stipulated in the Law shall be imposed on those who are in violation of the order of the institution through the attitudes, behaviors, and actions shown in Laws. The authorities stipulated in the Law shall impose the penalties in line with their durations. The defenses and objections against the penalties shall also be filed to the authorities shown by the Law."

39. Article 16(1, 2) of the Law No. 5275 with the side heading "*Postponement of the execution of a prison sentence due to disease*" is as follows:

"(1) Execution of the penalty of a convict who has a mental disease shall be postponed and the convict shall be protected and treated at the health institution stipulated in Article 57 of the Turkish Criminal Code

until s/he recovers. The periods that elapse at the health institution shall be considered to have elapsed at the prison.

(2) As regards other diseases, the penalty shall continue to be executed in the sections of public health institutions that are allocated for prisoners. However, if the execution of prison sentence constitutes an absolute danger for the life of the prisoner even, in this case, execution of the penalty of the prisoner shall be postponed until s/he recovers."

40. Article 18 of the aforementioned Law with the side heading *"Execution of the penalties of convicts who have a psychological apart from a mental disease" is as follows:*

"(1) Penalties of those who have psychological apart from a mental disease resulting from imprisonment and other reasons and who are sent back to penal institutions by not considering it necessary to keep them at the hospitals of psychological and neurological diseases shall be executed in the special areas of the specified penal institutions.

(2) The specialists and other medical personnel needed by the penal institutions determined for the execution of penalties stipulated in paragraph one shall be provided by the Ministry of Health."

41. Article 57 of the aforementioned Law with the side heading "*Transfer due to disease*" is as follows:

"(1) A convict whose referral to a hospital is considered to be obligatory shall be hospitalized in the convict ward of the fully-equipped public or university hospital that is nearest to the place where s/he stays.

(2) It is possible to refer the convicts sent to these hospitals to the hospitals in other places through a health board report, in the event s/he has an emergency and life threat and through a report which is given by two doctors including a specialist of the disease, if any, approved by the chief doctor and which clearly states the reason for disease, why the treatment could not be administered at the hospital at which s/he is present, where and how the patient needs to be treated. In this case, the nearest public or university hospitals with a convict ward shall be preferred.

(3) It is necessary to certify through a health board report whether or not the follow-up and treatment of the convict will continue at these hospitals; otherwise, the convict shall be returned to his/her institution.

(4) The convict cannot be treated at private health institutions except for an emergency. In case of emergency, the Ministry of Justice shall be informed.

(5) In the event that it is determined through a health board report to be taken upon the proposal of the doctor of institution and the request of the most senior chief that it is not appropriate for the convict to stay at the institution where s/he stays due to medical reasons, s/he can be transferred to other institutions."

42. Article 71 of the aforementioned Law with the side heading "*Requests of a convict for examination and treatment*" is as follows:

"(1) A convict shall have the right to make use of examination and treatment facilities and medical devices for the protection of his/her physical and mental health and for the diagnosis of his/her diseases. For this, the convict shall be made to be treated firstly in the infirmary of the institution and, if it is not possible, in the convict wards of public or university hospitals."

43. In Articles 78 to 82 of the aforementioned Law, there are regulations with regard to the examination, treatment and health check of convicts, their referral to a hospital and the state of disease that will prevent execution.

44. The principles stipulated in the Law No. 5275 have been regulated in a more detailed way through the "*By-Law on the Management of Penal Institutions and Execution of Penal and Security Measures*" which was published in the Official Gazette No. 26131 of 6/4/2006.

IV. EXAMINATION AND GROUNDS

45. The applicants' individual application No. 2013/6979 of 3/9/2013 was examined during the session held by the court on 20/5/2015 and the following were ordered and adjudged:

A. The Applicants' Allegations

46. The applicants stated that their relative lost his life as officers did not take necessary measures although he had a psychological problem and he previously engaged in similar bed burning actions. They also stated that the deceased was ill-treated and tortured by correction officers, that no investigation was initiated on the officers who ill-treated the deceased and that it was ruled that there was no ground for the prosecution about the officers who were negligent in the death of the deceased. They stated that upon their objection against this judgment, the opinion of the Chief Public Prosecutor's Office was received by the Court, that however, the relevant opinion was not notified to them and that the judgment was delivered by the Court without holding a hearing and without hearing them out. They alleged that the right to life, the prohibition of ill-treatment and torture, the right to a fair trial, the right to an effective remedy and the right to trial by two instances were violated.

B. The Constitutional Court's Assessment

1. Admissibility

a. The Allegation of the Violation of the Prohibition of Torture and Ill-treatment

47. The applicants allege that their relative Erkan Kaya was ill-treated and tortured by correction officers before he died and that no investigation was initiated about the officers who ill-treated the deceased.

48. With regard to these allegations, it was stated in the opinion of the Ministry that it was seen in the corpse examination of Erkan Kaya conducted by the Chief Public Prosecutor's Office of Izmir on 19/1/2013 that no findings of traumatic battery, coercion and violence attesting to external assault and battery and firearm or penetrating stab wounds were present on the corpse.

49. Similarly, when the report prepared as a result of the standard autopsy of the convict conducted by the Forensics Medicine Group

Presidency of Izmir on 20/1/2013 is examined, it was stated that no finding other than an indistinct ecchymosis of 1x0.7 cm in the left side of the umbilicus and also no firearm wound and penetrating stab wound was found.

50. It is seen that the Chief Public Prosecutor's Office ruled on 18/1/2013 that there was no ground for prosecution in relation to the investigation which was initiated upon the allegations of the applicant Erdoğan Kaya with the allegation of torture as regards the prison officers. In the judgment, it was stated that there was no crime and crime element as a result of the investigation conducted with regard to the allegation of torture.

51. It was stated that the petition of the applicant Mehmet Kaya which was sent to the Chief Public Prosecutor's Office and CTEGM through Izmir Branch of the Human Rights Association and in which the allegations of torture were specified was joined with the investigation conducted as a regards the incident of death and that there was no finding of ill-treatment in the judgment on no grounds for prosecution issued on 8/5/2014 as regards the incident of death.

52. Article 17(1, 3) of the Constitution is 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"*

53. In the event that an individual has a defensible claim that s/he has been subjected by a public official to a treatment in violation of the law and in a way to violate Article 17 of the Constitution, it is necessary to conduct an effective official investigation with regard to the incident (*Tahir Canan*, App. No: 2012/969, 18/9/2013, § 25). However, in order to initiate an investigation into this matter, first of all, allegations with regard to torture and ill-treatment should be substantiated with appropriate evidence. In order to determine the factuality of

claimed incidents, it is necessary to have evidence that is far from all kinds of reasonable doubts. Evidence having such quality can also be composed of sufficiently serious, clear and consistent indications or some presumptions which cannot be rebutted. Only in the case of the determination of these appropriate conditions, can the existence of an obligation of investigation be mentioned (*Cuma Doygun*, App. No: 2013/394, 6/3/2014, § 28).

54. The investigation in question should be appropriate for identifying and punishing those who are responsible. Because if this is not possible, this article will become ineffective in practice despite the importance it encapsulates and, in some cases, 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. Within the scope of the positive liability of the State, the mere fact that no investigation has been conducted or that an insufficient investigation has been conducted can sometimes constitute to ill-treatment. In this context, it is necessary to immediately initiate an investigation, to conduct it independently, under public scrutiny and in a diligent and swift manner and it should be effective as a whole (*Tahir Canan*, § 25).

55. In the statements of the prison officials and another prisoner at the prison whose statements were taken during the investigation of the Chief Public Prosecutor's Office conducted as regards the incident which is the subject matter of the application, it is seen that they did not make any statement as to the effect that Erkan Kaya was subjected to a treatment as alleged by the applicants or that they did not mention any incident which could be considered to be within this scope. In the corpse examination and standard autopsy procedures which were performed following the incident and mentioned in the opinion of the Ministry, it is understood that there was no finding in this direction, either. The deceased was examined at the infirmary of the institution for a total of 24 times and within this period, his examination and treatment were made by taking him to the Muğla University Training and Research Hospital 4 times and the Izmir Atatürk Training and Research Hospital 4 times. In both the application file and investigation file, there is no information or document which leaves the impression that the applicant was subjected

to ill-treatment that would constitute a contrariety to Article 17(3) of the Constitution while he stayed at the prison.

56. It may be considered that it will be difficult for a person to obtain a medical report which will prove that s/he has been subjected to violence at the prison when especially his/her sensitive condition is taken into consideration. However, it was not determined that the deceased or his elder brother staying at the same Prison filed a request for examination and report as regards battery and ill-treatment during the treatment procedures or that they wanted to be examined by another doctor, either. It is seen that the applicants explained their relevant ill-treatment allegations only in general terms in both the complaint and objection petitions they submitted at the criminal investigation phase and their individual application petition and that they did not provide any detailed information with regard to what happened as told to them by the deceased himself.

57. As regards the complaints of Erdoğan Kaya, who is the elder brother of the deceased, on 16/12/2012 before the death of his brother, on the subject which was understood to be examined at the Chief Public Prosecutor's Office of Muğla, it was stated that no action was taken about the personnel on the ground that "*it is understood that Erkan Kaya continuously caused problems at the institution, insulted the personnel on duty, attempted to disrupt the peace and order of the ward, 2 separate penalties including one cell confinement were imposed on him, the personnel on duty fulfilled their duty within the framework of laws and instructions*". As specified in the opinion of the Ministry, on 18/1/2013, the Chief Public Prosecutor's Office of Muğla ruled that there were no grounds for prosecution in relation to the investigation No. 2013/287 which was initiated upon the complaint filed by the applicant Erdoğan Kaya with the allegation that the officers at the institution inflicted torture, on the ground that there was no crime and crime element (§ 28).

58. When the application at hand is considered in the light of these statements, it is necessary to rule that this part of the applicant is inadmissible as "*it is manifestly ill-founded*" because it is clearly understood that there is no evidence which is far from all kinds of reasonable doubts that render it possible to prove that the relative of

the applicants was subjected to torture or ill-treatment at the prison, that therefore, their allegations within the scope of Article 17(3) of the Constitution were composed of abstract and unproven allegations.

b. The Allegation of the Violation of the Right to Life

59. In the opinion of the Ministry in relation to the allegations of the applicants as to the effect that article 17 of the Constitution was violated, it was stated that while conducting an evaluation as regards the admissibility of the complaints, an obligation was imposed on individuals to have exhausted "*all of the administrative and judicial remedies prescribed in the law*" prior to resorting to the remedy of individual application for the act, action or negligence which they alleged to have caused a violation. It was also mentioned that there was no information in the application form as to the effect that the applicants filed any case for compensation against the relevant persons or the administration due to the incident which was made to be the subject of the complaint except for the criminal investigation. It was specified that the status of the victim would no longer exist in the event that a violation was determined by the authorities and this violation was redressed in an appropriate and sufficient manner through a judgment. It was stated that it would be sufficient to determine those who were responsible and to pay compensation through a legal or administrative procedure in the event that the incident of death did not occur intentionally and that in domestic law, there were judgments on this matter through which the relevant administration was found to be negligent and a compensation was adjudged.

60. It is obvious that the death which occurred in the incident that is the subject matter of the application did not occur as a result of an intentional action. In this case, it is necessary to decide whether or not a case is present such as a mistake of reasoning or a negligence exceeding carelessness of the persons who were authorized and responsible in the relevant incident or, in other words, their failure to take necessary and sufficient measures in order to eliminate risks emerging in the incident by ignoring the authorities granted to them although they were aware of the potential problems. Because in such cases, regardless of whichever remedies an individual has resorted to on his/her own initiative, the

failure to make any accusation against the persons who have caused the life of people to be in danger or the failure to try these persons may result in the violation of Article 17 (*Serpil Kerimoğlu and others*, App. No: 2012/752, 17/9/2013, § 60-62).

61. For this reason, in order to decide whether or not the remedies were exhausted with regard to the complaints of the applicants in relation to Article 17 of the Constitution as alleged in the opinion of the Ministry, it is necessary to determine the scope of the positive liability of the state for "*establishing an effective judicial system*" so as to protect the right to life within the scope of Article 17 of the Constitution and to what extent this liability, if any, was fulfilled in the incident which is the subject matter of the application.

62. Due to the reasons explained, it is necessary to examine this part of the application in terms of merits.

c. The Allegation of the Violation of the Right to an Effective Remedy and to a Fair Trial

63. The applicants have allegations regarding the right to life and the prohibition of torture and ill-treatment as well as allegations as to the fact that Articles 36 and 40 of the Constitution and Article 13 of the ECHR were violated on the ground that an opinion was received by the Court from the Chief Public Prosecutor's Office, that however, the relevant opinion was not notified to them, that the judgment was delivered by the Court without holding a hearing and without hearing them out and that no trial by two instances was held. As the allegations of the applicants in this direction were evaluated within the scope of the right to life, it was not deemed necessary to make any separate examination within the scope of these rights.

2. Merits

a. Allegation that the Measures Required for the Protection of Life were not Taken

64. The applicants allege that their relative Erkan Kaya lost his life as a result of the failure of the officers to take necessary measures although

he had psychological problems and previously committed similar bed burning acts.

65. In the opinion of the Ministry, the judgments of the ECtHR on the subject were included after it was stated that the ECtHR interpreted the liability of the state to protect life in a way that would cover the protection of individuals who were under the area of sovereignty of the state against suicide while evaluating the complaints as to the effect that Article 17 of the Constitution was violated. The Ministry expressed that the ECtHR, in its judgments on this subject, stated that the state's failure to take reasonable measures although it knew or was supposed to know that an individual constituted a risk for himself/herself could bring about a liability for it and that in this respect, any kind of deprivation of freedom, due to its nature, could cause a psychological breakdown for a detained or convicted person and thus, increase the risk of suicide for a fragile and vulnerable person. The Ministry also stated that the national legislation attributed prison officers the duty of being more sensitive and cautious about these persons and introduced measures aimed at preventing putting the lives of convicted persons at an unnecessary risk. It also stated that the principle of "*unpredictability*" of human behaviors also needed to be taken into consideration while identifying the scope of the political liabilities that needed to be fulfilled by the state as regards the incidents of suicide.

66. In the opinion of the Ministry, the following evaluations were made with regard to the present case: It was stated that the convict did not get on well with his friends in the ward at the prison apart from the bed burning action, that he displayed aggressive and undisciplined behaviors towards the prison administration, that many disciplinary penalties including in particular cell confinement were imposed on him due to his actions and that they were executed. It was also stated that cases were filed regarding him due to his actions against the officials of the institution, that moreover, the room of the convict was changed many times, that therefore, Erkan Kaya had a severe mental disorder, that the relevant person needed to be kept under a strict observation and that necessary preventive measures needed to be taken by competent authorities for the protection of his health. It was also stated in the

response letter of the General Directorate of Prisons and Detention Houses (CTGM) of the Ministry of Justice, whose opinion on the issue was requested, that the convict was examined at the infirmary of the institution from time to time due to his psychological problems and that he was diagnosed by the doctor of the institution with anxiety disorder, polyneuropathy and depressive seizure and various drugs were prescribed for him and that it was ensured that these drugs were administered. It was also stated that due attention was paid in order to ensure that the relevant person did not harm himself or others, that however, it was impossible to prevent the actions of those who were determined in this sense, that moreover, the family doctor who worked full-time at the institution was made to conduct necessary examinations, analyses, and treatments of the convicts and detainees who declared that they were sick and ill and that they were referred to the relevant hospitals in cases where the doctor deemed it necessary.

67. In the opinion of the Ministry, it was also stated against the allegations of the applicants as to the effect that the exact duration that elapsed between the commencement of the incident of burning and the intervention of the officials of the institution could not be determined with certainty and that the allegation of a late intervention was not responded to in a way that would certainly eliminate all kinds of doubts, that the fire was intervened and extinguished within one minute and thirteen seconds and that the convict was taken out of his room, that 112 Emergency Service was called immediately after burns were observed on his hands, knee and back and that the convict was hospitalized at the İzmir Bozkaya Training and Research Hospital, that the camera records were also present for the incident according to the response letter of CTEGM.

68. The applicants stated, briefly, against the opinion of the Ministry on the merits of the application that their allegations were not clearly objected to and that they repeated their claims with regard to the violation of the right to life.

69. Article 17(1) of the Constitution with the side 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."

70. The individual's right to life and the right to protect and improve his/her corporeal and spiritual existence are among the rights which are closely tied, inalienable and indispensable and the state has positive and negative liabilities on 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 (*Serpil Kerimoğlu and others*, § 50, 51).

71. 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. This liability is valid for all types of activities, be it public or not, in which the right to life can be in danger (*Serpil Kerimoğlu and others*, § 52).

72. In this context, the state also has the liability to take necessary measures in order to protect life against the risks arising out of the actions of an individual himself/herself under certain special conditions (*Sadık Koçak and others*, App. No: 2013/841, 23/1/2014, § 74). In order for this liability which may also be valid for the incidents of death which occur at prisons to emerge, it is necessary to determine whether or not the officials of prisons know or need to know that there is a real risk of an individual under their control killing himself/herself and, if such a situation is present, to examine whether or not they have done everything expected from them within the framework of reasonable measures and within the scope of the authorities that they

have in order to eliminate this risk (For the judgments of the ECtHR in the same vein, see *Keenan v. the United Kingdom,* App. No: 27229/95, 3/4/2001, § 90 and 91, *Tanrıbilir v. Turkey,* App. No: 21422/93, 16/11/2000, § 74). However, by taking into consideration of the preference of the action to be performed or the activity to be carried out by evaluating, in particular, the unpredictability of human behaviors, priorities and resources; the positive liability should not be interpreted in a way that will create an extreme burden on officials (*Serpil Kerimoğlu and others,* § 53; Sadık Koçak and others, § 74). In this framework, in an examination to be performed by the Constitutional Court, it is necessary to put forth whether or not a fault which exceeds a simple negligence or evaluation mistake can be attributed to the prison officials.

73. As a natural consequence of the fact that the persons who are detained or the execution of the freedom restricting penalty of whom is commenced are deprived of many freedoms which they previously had and that they go through a significant change in their daily life, their psychological health may go into a decline and thus, the risk of suicide may increase for these persons who are in a fragile and vulnerable situation. For this reason, legal and secondary regulations should attribute to prison officials the duty of being more sensitive and cautious about these persons and ensure that measures aimed at preventing putting the lives of detained or convicted persons at risk are taken. To this end, first of all, it is necessary to follow the behaviors and health condition of the persons who stay at a prison and, if necessary, to make use of doctor examinations and, on the other hand, in terms of those who are understood to have a tendency towards this, to take necessary measures aimed at reducing such risks such as ensuring that they stay in the most appropriate places for them and seizing sharp objects, belts, washing lines or shoelaces which may be used in actions of suicide (For the judgments of the ECtHR in the same vein, see *Keenan v. the United Kingdom,* § 90 and 91; *Tanrıbilir v. Turkey,* § 74).

74. In this context, it can be expected from authorities to take measures which will minimize the possibility of a detainee or convict harming himself/herself to the extent that an excessive restriction will not be introduced to their personal liberty. Whether or not any more

stringent measures are necessary in respect of a convict or detainee and whether or not it is reasonable to impose them will depend on the circumstances of each case which is made to be the subject of an application (For a judgment of the ECtHR in the same vein, see *Keenan v. the United Kingdom,* § 92).

75. Within the scope of the right to life, the state needs to create a sufficient legal and administrative framework in order to primarily protect the life of the persons whose life may be in danger. The same liability is also valid for the protection of the life and health of the persons who are at prisons. It is seen that the follow-up, control and supervision procedures to be conducted by prison officials within this scope and other measures to be taken on this subject are regulated in detail in the aforementioned legislation (§§ 38-44). While there is no deficiency alleged by the applicants on this subject, it is also understood that there is no matter which needs to be considered and examined by the Constitutional Court in an ex officio fashion in terms of the incident which is the subject matter of the application.

76. Therefore, in the current application, within the framework of the aforementioned principles, first of all, it should be put forth whether or not the prison officials knew or were supposed to know the risk of suicide of Erkan Kaya.

77. It is understood that Erkan Kaya had previously been involved in a bed burning action that was similar to the bed burning action which took place on 7/1/2013 and led to his death and that moreover, he went to see the doctor for treatment in relation to his psychological disorders (§§ 14-35).

78. As specified in the opinion of the Ministry, it was determined that Erkan Kaya did not get on well with his friends in the ward at the prison apart from his bed burning action, that he engaged in aggressive and undisciplined behaviors towards the prison officials, that many disciplinary penalty decisions including in particular cell confinement were issued on him due to his actions within the period during which he was at Muğla Prison and that they were executed, that cases were filed against him due to his actions against the officials of the institution.

Moreover, the room of the convict was changed many times during this period.

79. It should be admitted that it was known or at least needed to be known by the prison officials that Erkan Kaya displayed aggressive attitudes especially within the last six months during which he stayed at the prison, that many penalties were imposed upon him and his dormitory was changed as he had problems with the officials and other persons staying at the prison, that as can be seen at first glance from the examination of the table showing the treatments and drugs administered on him since 2009, when it was considered that medical therapy was administered on him due to his psychological disorders within the same period and that he attempted to burn his bed in a similar way in August 2012 which was also included within the same period of time, he needed to be kept under observation in a more meticulous way and that he had the risk of harming himself or other people and of causing his or their death.

80. In this case, it is obvious under the conditions of the case at hand that necessary preventive measures needed to be taken by the officials so as to protect the health of Erkan Kaya and to ensure that he did not harm himself or other people.

81. In the Law No. 5275, it is prescribed that it shall be obligatory to take all kinds of protective measures in order to protect the right to life and bodily and spiritual integrity of convicts at penal institutions and also, to execute the penalties of those who have psychological diseases resulting from imprisonment and other reasons and who are sent back to penal institutions by not considering it necessary to keep them at the hospitals of psychological and neurological diseases in the special areas of the specified penal institutions.

82. It is not possible to identify the type of treatment required for the health and safety of a person who is at prison or who fulfills his military service and the place that is appropriate for him/her to stay only depending on his/her preferences in cases where it is obvious that the ability of reasoning of that person is not healthy with regard to these matters under the conditions of the relevant case (For the judgments

of the ECtHR in the same vein, *Kılınç and others v. Turkey*, App. No: 40145/98, 7/6/2005, § 51, *Kılavuz v. Turkey*, App. No: 8327/03, 21/10/2008, § 94).

83. In the present case, it was determined that the convict went to the infirmary of the institution many times and received psychological therapy within the period during which he was at Muğla Prison, that however, he got his patient appointment canceled by writing a petition at his own will once although he wanted to go to the infirmary. On the other hand, the brother of the deceased, Erdoğan Kaya, whose statement was taken in the investigation of the Chief Public Prosecutor's Office alleged that the reason for the previous bed burning action was the dismissal of his request for being taken to the infirmary. In the petition submitted by Erkan Kaya to the Directorate of Prison on 28/12/2012 just before his death, it is seen that he served a cell confinement between 18/12/2012 and 28/12/2012, that he stated on his own will that he wanted to stay in the section of the prison called "observation" for another week and requested that due action be taken and that he refused to be taken out of the Observation section at the end of the period of one week (§§ 21-22).

84. When the inconsistencies of Erkan Kaya with regard to his preferences for the place in which he would stay at the prison and his requests for treatment are taken into consideration together with his psychological problems, it does not seem possible to attribute solely to the cause of his death by burning his bed to him, taking into account his location and physiological health. As specified above and allowed for in the relevant legislation, it can be expected from authorities to take measures aimed at minimizing the possibility of self-harm of a detainee or convict in terms of keeping his/her health condition under control and determining the place in which s/he will stay in a way that will not be left only to his/her will. In terms of Erkan Kaya, it can be expected from the prison officials and the relevant health units to take more stringent measures such as keeping him under constant observation, if necessary, treating him at a psychiatric service in line with the opinions of a specialist doctor, identifying the part in which he would stay at the prison in order to prevent him from obtaining objects which he could

use to harm himself or to commit suicide and arranging his daily life accordingly.

85. When the conditions of the occurrence of the case at hand such as the fact that decisions were made as regards the determination of the place in which Erkan Kaya would stay according to his own assessments that were clearly not healthy, that a treatment during which only medical therapy was foreseen was administered with regard to his psychological disorders, that there was no information as to the fact that a joint evaluation was made between the administrative personnel of the prison and the doctors who worked at other institutions with regard to the method of treatment by considering the severity of the disease of the convict in relation to the form and place of treatment and that the convict was not prevented by the prison officials from having access to the lighter that was understood to be used for the purpose of setting aflame the bed as previously done by him are considered together, it cannot be said that necessary measures were taken by the prison officials within the framework of their authorities in order to prevent the death of Erkan Kaya.

86. Due to the reasons explained, it needs to be ruled that the liability to protect life required by the right to life was violated.

b. Allegations as Regards the Process of Criminal Investigation

87. The applicants state that a judgment of no grounds for prosecution was issued with regard to the officials who were negligent in the death of the deceased, that an opinion was received by the Assize Court of Fethiye from the Chief Public Prosecutor's Office upon the objection which they filed against this judgment, that however, the relevant opinion was not notified to them, that the judgment was delivered by the Court without holding any hearing and without hearing them and allege that no effective investigation was conducted.

88. It was stated in the opinion of the Ministry on the issue that, as per the case-law of the ECtHR, in order for a criminal investigation to be conducted in the context of the right to life to be effective, authorities needed to act *ex officio*, persons who are appointed for investigation and who conduct the investigation needed to be independent from the

persons who might have been involved in the incidents, the investigation process needed to be sufficiently transparent to the family of the deceased to protect their legitimate interests, it needed to be conducted at a reasonable speed and in a manner that allowed for the identification and, if necessary, punishment of those responsible.

89. In the opinion of the Ministry, it was stated, again based on the judgments of the ECtHR, that there was a liability in the case at hand not related to the conclusion reached, but to the means which bore this consequence, that the officials needed to take all reasonable measures that were expected from them for the collection of the evidence as regards the case at hand. It was also stated that each deficiency which could prevent the identification of the responsible person or persons in an investigation could harm its effectiveness and that the positive liability in the form of creating an effective judicial review did not necessarily require the filing of a criminal case in each incident or the delivery of a judgment of conviction in each criminal case and that providing victims with administrative and legal remedies could also be considered to be sufficient.

90. In the opinion of the Ministry, in relation to the current application, it was stated that an investigation was conducted by the Chief Public Prosecutor's Office of Muğla following the death of the relative of the applicants, Erkan Kaya, that the statements of the institution officials were received in their capacity as witnesses within the framework of this investigation, that as a result of the judicial investigation, it was ruled that there was no grounds for prosecution by stating that it was understood that the fire was intervened by the officials in a very short period of time and the fire was contained, that the personnel of the institution did not have any negligence or delay with regard to the incident and that the incident of death occurred as a result of burns and acute pneumonia which developed as a complication. It was also stated that the objection filed by the applicants against this judgment was dismissed by the Assize Court of Fethiye, that the conducted investigation focused on the fact that the officials of the institution took the necessary measures by intervening in the incident as soon as possible following the occurrence of the incident, that a separate

disciplinary investigation was conducted on the relevant personnel of the institution regarding the incident of death and that it was ruled that there were no grounds for any disciplinary penalty on the ground that they did not have any negligence and fault. It was also stated that the applicants' allegations as to the effect that the Assize Court of Fethiye which examined their objection against the judgment of no grounds for prosecution issued on the officials of the institution which they alleged to have negligence delivered its judgment without holding any hearing and without hearing them and that the opinion received from the Chief Public Prosecutor's Office was not notified to them could be evaluated while examining the effectiveness of the investigation conducted within the scope of the right to life.

91. Against the opinion of the Ministry, the applicants alleged, briefly, that they were not able to receive responses which would exactly correspond to their allegations regarding this part, that those who conducted the investigation were people that were not independent from the people involved in the incident and that it was not ensured that they participated in the process of investigation.

92. The procedural aspect of the positive liabilities which the state has to fulfill within the scope of the right to life regulated in Article 17 of the Constitution (§ 71) requires the performance of an independent investigation which allows for the revelation of all aspects of the relevant incident of death and the determination of individuals who are responsible. Within the framework of this procedural liability, the state is obliged to conduct an effective public investigation which can ensure that those who are responsible for each incident of death that is not natural are determined and, if necessary, punished (*Serpil Kerimoğlu and others*, § 54). In the event that this procedural liability is not duly fulfilled, it is not possible to determine whether or not the state has exactly fulfilled its negative and positive liabilities. For this reason, the liability of investigation constitutes the guarantee of the negative and positive liabilities of the state within the scope of this article (*Salih Akkuş*, App. No: 2012/1017, 18/9/2013, § 29).

93. The positive liability within the scope of the right to life does not necessarily require the performance of a criminal investigation in each

case. It may suffice that legal, administrative and even disciplinary remedies are available for victims in the incidents of death which occur due to negligence (*Serpil Kerimoğlu and others*, § 59). However, in terms of the case at hand which clearly occurred as a result of negligence, it is necessary to decide whether or not a case is present such as a mistake of reasoning or a negligence exceeding carelessness of the authorized and responsible persons in the relevant incident or, in other words, their failure to take necessary and sufficient measures in order to eliminate risks emerging in the incident by ignoring the authorities granted to them although they were aware of the potential problems. Because in such cases, regardless of whichever remedies individuals have resorted to on their own initiatives, the failure to make any accusation against the persons who have caused the life of people to be in danger or the failure to try these persons may result in the violation of Article 17 (*Serpil Kerimoğlu and others*, §§ 60-62).

94. The aim of criminal investigations to be conducted within the scope of the right to life 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, if any, in the incident of death which occurred are brought to justice in order for their responsibilities to be determined. This is not a consequential liability, but the liability to use the appropriate means. Provisions of Article 17 of the Constitution do not mean in any way that they grant applicants the right to have third parties tried or punished due to a certain crime or impose a duty of concluding all trials with a conviction or a certain criminal sentence (*Serpil Kerimoğlu and others*, § 56).

95. In order to ensure the effectiveness and sufficiency of the investigation, the investigation bodies need to take action *ex officio* and all evidence that could elucidate the incident of death and serve to identify those responsible need to be collected (*Serpil Kerimoğlu and others*, § 57; *Sadık Koçak and others*, § 94).

96. One of the matters which ensure the effectiveness of the criminal investigations to be conducted is the fact that the investigation or the results 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 passed away are involved in this process to the extent that it is necessary so as to protect their legitimate interests (*Serpil Kerimoğlu and Others*, App. No: 2012/752, 17/9/2013, § 58).

97. Evaluation of the evidence as regards the occurrence of an incident of death is the duty of administrative and judicial authorities. However, the Constitutional Court may need to examine the form of occurrence of the incident in order to understand the form of development of the incident which is the subject matter of the application and to objectively evaluate whether or not the allegations of the applicants as to the effect that the death of their relative was "*suspicious*" were responded by the investigation authorities and the courts of instance.

98. In the incident which is the subject matter of the application, given the investigation procedures conducted, it is seen that an investigation was conducted *ex officio* by the Chief Public Prosecutor's Office of Muğla in relation to the incident through which the relative of the applicants, Erkan Kaya burned his bed and got injured on 7/1/2013 and then, lost his life at the hospital where he was being treated on 19/1/2013, that within the framework of this investigation, statements of the officials of the institution were taken in their capacity as witnesses and that as a result of the judicial investigation; it was ruled that there was no grounds for prosecution on the ground that it was understood that the fire was intervened by the officials in a very short period of time and the fire was contained, that the personnel of the institution did not have any negligence or delay in the incident and that the incident of death occurred as a result of burns and acute pneumonia which developed as a complication.

99. However, in relation to the incident, as alleged by the applicants and put forth in the section where the liability of the protection of life was examined (§§ 64-86), it has been found out that there were many indications as to the fact that Erkan Kaya could attempt to perform such an action before his action that caused his death and that it could be expected from the officials to take more advanced measures by considering these indications. It was found out through the investigation conducted that the previous bed burning attempt of

Erkan Kaya, the problems that he experienced with the prison officials and other prisoners and the place changes that occurred and the disciplinary penalties imposed on him due to those circumstances and the psychological problems that he went through during the same period were both recorded by the prison administration through minutes and stated by the applicants and the prison officials and another prisoner whose statements were taken during the investigation process.

100. It is seen that no examination and evaluation was conducted within the scope of the investigation in relation to the matters which were of critical importance to elucidate all aspects of the incident of death and to determine those who were potentially responsible such as the determination of the health condition of Erkan Kaya prior to the incident, the examination of the process of treatment administered on him, the examination of how the method and place of the administered treatment and the part of the prison where he would stay were determined and to what extent the previous bed burning action and psychological problems of Erkan Kaya were taken into consideration in this determination and finally, from whom and how Erkan Kaya obtained the lighter which he used in order to set aflame the bed and the determination of the people who were responsible for this situation due to their positions.

101. As the incident was only evaluated in terms of whether or not the officials had any negligence as regards intervention in the incident following the fire although the incident had the aforementioned aspects and a judgment of no grounds for prosecution was delivered, it is concluded that the investigation was away from meeting the obligation of putting forth all aspects of the incident of death and allowing for the determination of those who were potentially responsible.

102. In connection with this, the failure to respond to the allegation of the applicants with regard to the different aspects of the incident which are specified above in the judgment of no grounds for prosecution and the judgment delivered upon objection during the phase of investigation and objection prevented the applicants from being involved in this process to the extent that it was necessary so as to protect their legitimate interests.

103. When the evaluations specified in this part with regard to the effectiveness of the investigation are considered as a whole, it is concluded that all aspects of the incident of death could not be put forth, that the persons who were potentially responsible were not determined and that it could not be ensured that the relatives of the deceased could be involved in this process to the extent that is necessary so as to protect their legitimate interests in the investigation conducted by the Chief Public Prosecutor's Office and that therefore, the investigation conducted in the case at hand could not ensure accountability in practice as well as in theory.

104. Due to the reasons explained, it needs to be ruled that the liability of an effective investigation required by the right to life was violated.

3. Article 50 of the Law No. 6216

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

> *"If the determined violation arises out of a court judgment, 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, a compensation can be adjudged in favor of the applicant or the remedy of filing a case before general courts can be shown. The court, which is responsible for holding the retrial, shall deliver a judgment 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 judgment of violation."*

106. As it was determined in the current application that Article 17 of the Constitution was violated in terms of the liabilities to protect life and conduct an effective investigation, it should be ruled that the file is sent to the relevant Chief Public Prosecutor's Office in order to remove the violation and the consequences thereof.

107. The applicants claimed pecuniary damages of TRY 100,000 in total composed of TRY 50,000 for each of the mother and father and non-pecuniary damages of TRY 375,000 in total composed of TRY 100,000 for each of the mother and father and TRY 25,000 for each of the siblings because of the violation of the right to life, the prohibition of ill-treatment and torture, the right to a fair trial and the right to an effective remedy.

108. The applicants did not submit to the Constitutional Court any document in relation to the material damages they claimed to have incurred. In order for the Constitutional Court to be able to rule on pecuniary damages, a causality relation needs to be established between the pecuniary damages which the applicants claim to have incurred and the request for compensation. It is necessary to dismiss the requests for pecuniary damages by the applicants who did not submit any document to the Constitutional Court.

109. Although it is concluded that establishing that the liability to conduct an effective investigation within the scope of the right to life was violated as well as ruling that the file be sent to the relevant Chief Public Prosecutor's Office so as to fulfill the requirement of the judgment constitute a sufficient compensation in terms of the allegation of violation of the applicants, as it is also ruled that the liability to protect life was also violated, it is necessary to rule *ex gratia* that non-pecuniary damages of net TRY 30,000 in total be paid to the mother, father, and siblings of the deceased Erkan Kaya.

110. The applicants also requested that the trial expenses and the counsel's fee be paid to them. It is ruled that the trial expense which is composed of the fee and the counsel's fee and made by the applicants be paid to the applicants.

V. JUDGMENT

In the light of the reasons explained, it is **UNANIMOUSLY** held on 20/5/2015

A. That the application

1. is **INADMISSIBLE** in terms of the allegation of the violation of the prohibition of torture and ill-treatment,

2. is **ADMISSIBLE** in terms of the allegations of the violation of the right to life,

B. That the liability to protect life and the liability to conduct an effective investigation within the scope of the right to life guaranteed in Article 17 of the Constitution were **VIOLATED** in the incident which is the subject matter of the application,

C. That it is **NOT NECESSARY** to conduct a separate **EXAMINATION** over the complaints of the applicants as regards the violation of Articles 36 and 40 of the Constitution,

D. That non-pecuniary **DAMAGES** of net TRY 30,000 **BE PAID** collectively and *ex gratia* to the applicants as per Article 50(2) of the Law No. 6216,

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 judgment; 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.

F. That other requests of the applicants in relation to additional compensation be **DISMISSED**,

G. 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 **COLLECTIVELY PAID TO THE APPLICANTS**,

H. That a copy of the judgment is sent to the relevant Chief Public Prosecutor's Office for due action.

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

K.A. (2)

(Application no. 2014/13044)

PLENARY
JUDGMENT

NON-DISCLOSURE OF IDENTITY

President	: Zühtü ARSLAN
Vice President	: Burhan ÜSTÜN
Vice President	: Engin YILDIRIM
Justices	: Serdar ÖZGÜLDÜR
	Serruh KALELİ
	Osman Alifeyyaz PAKSÜT
	Recep KÖMÜRCÜ
	Alparslan ALTAN
	Nuri NECİPOĞLU
	Hicabi DURSUN
	Celal Mümtaz AKINCI
	Erdal TERCAN
	Muammer TOPAL
	M. Emin KUZ
	Hasan Tahsin GÖKCAN
	Kadir ÖZKAYA
	Rıdvan GÜLEÇ
Rapporteur	: Cüneyt DURMAZ
Applicant	: K.A.
Counsels	: Atty. Abdulhalim YILMAZ
	Atty. Ferdi AMCA

I. SUBJECT-MATTER OF THE APPLICATION

1. The application concerns the alleged violation of the right to life and prohibition of torture and ill-treatment of the applicant, who is a Syrian national placed in administrative detention in the Kumkapı Foreigners' Removal Centre ("Kumkapı Centre") pending his deportation for *"posing a threat to public order or public safety or public health"*, as he would face the risk of being subject to torture and ill-treatment if deported; the alleged violation of the prohibition of penalty or treatment "incompatible with human dignity" due to the conditions at the Kumkapı Centre; as well as the alleged violation of the right to personal liberty and security due to the prolongation of his administrative detention.

II. APPLICATION PROCESS

2. The applicant lodged the individual applications nos. 2014/13044 and 2014/19101 on 11 August 2014 and 5 December 2014, respectively. After the preliminary examination in administrative terms of the application letters and annexes, the deficiencies found by the Court were remedied by the applicant. It was accordingly observed that there was no other deficiency to preclude referral of the applications to the Commission.

3. On 13 April 2015 and 14 April 2015 the First Commission of the Second Section and the Second Commission of the Second Section respectively decided that the admissibility examination be conducted by the Section.

4. As regards the individual application no. 2014/19101, as the applicant's allegation that he was facing a threat against his life or his physical or spiritual integrity was found serious, the Court *"indicated an interim measure"* on 10 December 2014 pursuant to Article 49 § 5 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, which is dated 30 March 2011, as well as Article 73 of the Internal Regulations of the Constitutional Court.

5. It was decided on 15 April 2015 that the individual application no. 2014/19101 be joined with the individual application no. 2014/13044 for

"being legally interrelated ratione personae"; that therefore, the individual application no. 2014/19101 be closed; and that the examination be conducted over the file no. 2014/13044.

6. On 16 April 2015 the Head of the Section decided that the examination as to admissibility and merits of the case be concurrently conducted; and that a copy of the application documents be submitted to the Ministry of Justice ("the Ministry") for its observations.

7. The observations submitted by the Ministry to the Constitutional Court on 15 May 2015 was notified to the applicant on 22 May 2015. The applicant submitted his counter-statements against the Ministry's observations on 15 June 2015.

8. On 5 February 2015 the applicant lodged an individual application with the Court for an interim measure for the third time. His application was given the number 2015/2243. It was held on 4 July 2015 that this individual application be joined with the individual application no. 2014/13044 for *"being legally interrelated ratione personae"*; that therefore, the individual application no. 2015/2243 be closed; and that the examination be conducted over the file no. 2014/13044.

9. At the meeting of 15 October 2015, the Second Section referred the individual application to the Plenary of the Court, pursuant to Article 28 § 3 of the Internal Regulations of the Court, as the individual application was by its very nature required to be adjudicated by the Plenary.

III. THE FACTS

A. The Circumstances of the Case

10. As indicated in the application form and annexes thereto, the facts may be summarized as follows:

11. The applicant, a Syrian national who was born in 1985 and residing at the town of Serekaniye, Kamışlı, Syria, left his country on 15 December 2013 due to ethnic, religious and political problems, unstable situation as well as notably the ongoing civil war and entered Turkey, along with a group of foreign nationals, through a region close to the Viranşehir district of Şanlıurfa. The applicant was arrested, along

with the group, by the gendarmerie while entering the country and subsequently taken to Viranşehir. He was then released after his photo had been taken. He then went to İstanbul.

12. Taken into custody by the police on 25 April 2014 at the Zeytinburnu district by virtue of the arrest and custody order of 22 April 2014, which was issued under the investigation no. 2014/1654 of the Kızıltepe Chief Public Prosecutor's Office, the applicant was questioned by the police for his alleged involvement in an incident taking place in Kızıltepe, Mardin.

13. On the same day the Kızıltepe Chief Public Prosecutor's Office ordered his release following his questioning, which was noted down in a record. However, the applicant was transferred to the Kumkapı Centre by the Police Department of the Deportation Procedures and Removal Centre on 26 April 2014 at 02:15 a.m. for *"ensuring the missing documents to be completed on the next workday…"*.

14. By the decision issued by the Provincial Security Directorate of the İstanbul Governor's Office ("Security Directorate"), which is dated 28 April 2014 and archive no. 47909374.52646 and file no. 2014/24024, the applicant was ordered to be placed in administrative detention pending his deportation for *"posing a threat to public order or public safety or public health"* pursuant to Article 54 (d) of the Law no. 6458 on Foreigners and International Protection, which is dated 4 April 2013.

15. The Kızıltepe Chief Public Prosecutor's Office rendered, by its decision dated 13 June 2014 and no. E.2014/1654 K.2014/832, a decision of non-prosecution for lack of evidence regarding his alleged membership of an armed terrorist organization.

16. The applicant's challenge for lifting the decision ordering his administrative detention was dismissed with final effect by the 11th Chamber of the İstanbul Magistrate's Court by its decision dated 24 June 2014 and miscellaneous no. 2014/329 on the ground that *"in the present case, the deportation order against the claimant was issued by the Governor's Office; that as he was a foreign national, there was a risk of his fleeing and disappearing; that he also failed to submit any document indicating that he had resorted to the administrative jurisdiction for revocation of the deportation*

order; and that therefore, there was no irregularity in the processes conducted". On 10 July 2014 this decision was served on the applicant's lawyer.

17. The applicant complains of the "extremely poor" physical conditions of the Kumkapı Centre. On 25 June 2014 the applicant's lawyer accompanied by an interpreter interviewed with him at the Kumkapı Centre. During this interview, the applicant gave the following information about the physical conditions of the Kumkapı Centre, as noted down in the interview report: *"there are nearly six rooms on the 3rd floor where he is placed; each room has about 15-16 bunk-beds; he is not staying in any of these rooms as the inmates are mainly drug addicted; there are always quarrels and brawls; they -approximately 12-13 persons- therefore stay in the television room on a foam-rubber mattress; the food is sometimes of poor quality; he avails himself of fresh air once a week during his first month (Sundays); however, he has not been allowed to take fresh air for the last one month; he is staying with persons with various injuries on their bodies due to which he is probably suffering from allergy; they do not receive assistance of a doctor; police officers sometimes distribute medicines but they have never been taken to a doctor; today, an inmate has attempted to hang himself on a rope and fortunately survived due to breaking of the rope; an Algerian inmate stabbed himself and mouths of 6 Iranian nationals were sewn up with a needle; the centre where they are detained cannot be a shelter even for animals"*.

18. By his letter of 25 June 2014 submitted to the İstanbul Governor's Office, the applicant applied for international protection (refugee status) and requested to be released from the Kumkapı Centre.

19. The İstanbul 3rd Magistrate Judge's Office asked, by its writ dated 24 July 2014 and miscellaneous no. 2014/169, the Security Directorate to submit relevant information and document regarding the decisions ordering the applicant's deportation and placement under administrative detention.

20. On 11 August 2014 the applicant lodged an individual application with the Constitutional Court in due time against the decision of 24 June 2014 which was rendered by the 11th Magistrate's Court. This application was assigned the number 2014/13044.

21. On 19 August 2014 the applicant applied to the Foreigners'

Department and Directorate General of Immigration Authority, Provincial Security Directorate of the İstanbul Governor's Office and requested to be released from the Kumkapı Centre and not to be deported by making reference to the decision of non-prosecution rendered by the Kızıltepe Chief Public Prosecutor's Office as well as the pending nature of the action brought by him on account thereof and of his individual application before the Court.

22. The action brought by him against his deportation order was dismissed by the 1st Chamber of the İstanbul Administrative Court by its decision no. E 2014/1371 K2014/1486 and dated 18 September 2014. The dismissal decision was served on the applicant on 5 November 2014.

23. In his second challenge against the administrative detention before the İstanbul Magistrate Judge's Office on 11 September 2014, the applicant requested that his administrative detention be discontinued and his immediate release be ordered, maintaining that the Kızıltepe Chief Public Prosecutor's Office rendered a decision of non-prosecution in respect of him; that he had applied for international protection and he was therefore under temporary protection; that the procedural safeguards set forth in Article 57 of Law no. 6458 were not afforded to him; and that his detention conditions at the Kumkapı Centre caused his physical and mental suffering as well as his being subject to maltreatment and humiliation.

24. This application was dismissed with final effect by the İstanbul 1st Magistrate Judge's Office by its decision dated 17 September 2014 and dated 2014/1058.

25. His subsequent challenges for the third and fourth times on the same matter were also dismissed with final effect, on similar grounds, by the İstanbul 4th Magistrate Judge's Office (decision dated 2 October 2014 and miscellaneous no. 2014/1503) and İstanbul 2nd Magistrate Judge's Office (decision dated 7 November 2014 and miscellaneous no. 2014/2450) respectively.

26. On 5 December 2014 the applicant lodged an individual application for an interim measure with the Court, for the second time, in due time against the decision of the 1st Chamber of the İstanbul

Administrative Court dated 18 September 2014. This application was assigned number 2014/19101.

27. 10 December 2014 the applicant's request for an interim measure against his deportation was accepted by the Court, which indicates *"as the alleged threat against the applicant's life or his physical or mental integrity has been considered serious at this stage and for securing effective implementation of the non-refoulement principle -an international principle-, by virtue of Article 49 § 5 of Code no. 6216 and Article 73 of the Rules of Procedures of the Constitutional Court"*. The Court accordingly ordered suspension of his deportation until a further decision.

28. Upon the interim measure indicated by the Court, the applicant's challenge against the decision ordering his administrative detention was accepted by the İstanbul 4th Magistrate Judge's Office by its decision dated 31 December 2014 and miscellaneous no. 2014/3324. Accordingly, the applicant's detention was discontinued on 6 January 2015. The reasoning of the said decision is as follows:

> *"… IT HAS BEEN DECREED:*
>
> *It appears that as indicated in the letter, dated 29 December 2014 and no. 47909374.52645(41261)S1-2014/124024, issued in reply to the writ submitted to our court by the Foreigners' Department, Provincial Security Directorate of the İstanbul Governor's Office, an action was taken against the person concerned for "his membership of a terrorist organization"; his deportation was ordered as per Article 54 (b), titled Persons subject to a Removal order, of the Law no. 6458 on Foreigners and International Protection; and pursuant to Article 57 § 3 of the Same Law providing for 'the duration of administrative detention in removal centres shall not exceed six months. However, in cases where the removal cannot be completed due to the foreigner's failure of cooperation or providing correct information or documents about their country [of origin], this period may be extended for a maximum of six additional months', he was ordered to be placed in administrative detention for one month.*
>
> *Regard being had to the file and evidence as a whole, it has been revealed that as the Constitutional Court suspended the de facto*

implementation of the deportation order by its decision no. 2014/19101 and dated 10 December 2014, which would render the administrative detention process dysfunctional. It has been accordingly decided that the applicant's request be accepted and his administrative detention be discontinued pursuant to Article 57 § 6 of Law no. 6458."

29. On 5 February 2015 following his release, the applicant lodged an individual application for an interim measure, for the third time, with the Court in due time against this act. This application was assigned number 2015/2243.

B. Relevant Law

30. Article 3 (d) and (r), Article 4, Article 53 § 3, Article 54 §§ 1 (d) and 2 and Article 55 § 1 (a) of Law no. 6458 read as follows:

*"**Definitions***

ARTICLE 3

…

d) Applicant: a person who made an international protection claim and a final decision regarding whose application is pending;

…

r) International protection: the status granted for refugee, conditional refugee, and subsidiary protection;

…"

*"**Non-refoulement***

ARTICLE 4

(1) No one within the scope of this of this Law shall be returned to a place where he or she may be subjected to torture, inhuman or degrading punishment or treatment or, where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion."

*"**Removal decision***

ARTICLE 53

…

(3) Foreigner, legal representative or lawyer may appeal against the removal decision to the administrative court within fifteen days as of the date of notification. The person who has appealed against the decision to the court shall also inform the authority that has ordered the removal regarding the appeal. Such appeals shall be decided upon within fifteen days. The decision of the court on the appeal shall be final. Without prejudice to the foreigner's consent, the foreigner shall not be removed during the judicial appeal period or in case of resort to the judgement…"

*"**Persons subject to a removal decision***

ARTICLE 54

(1) A removal decision shall be issued in respect of those foreigners listed below who/whose:

…

d) pose a public order or public security or public health threat;

…

(2) Removal of the applicant or those granted international protection status may be ordered only in case of existence of serious indications that they pose a threat to the country's safety or their final conviction on account of an offence posing a threat to public order."

*"**Exemption from removal decision***

ARTICLE 55

(1) Removal decision shall not be issued in respect of those foreigners listed below regardless of whether they are within the scope of Article 54:

a) when there are serious indications to believe that they shall be subjected to the death penalty, torture, inhuman or degrading treatment or punishment in the country to which they shall be returned to;"

31. Article 57, titled "*Administrative detention and duration of detention for removal purposes*", of Law no. 6458 reads as follows:

> *"(1) Where foreigners within the scope of Article 54 are apprehended by law enforcement units, they shall immediately be reported to the governorate for a decision to be made concerning their status. With respect to those where a removal decision is considered necessary it shall be issued by the governorate. The duration of assessment and decision-making shall not exceed forty-eight hours.*
>
> *(2) Those for whom a removal decision has been issued, the governorate shall issue an administrative detention decision for those who; bear the risk of absconding or disappearing; breached the rules of entry into and exit from to Turkey; have used false or fabricated documents; have not left Turkey after the expiry of the period granted to them to leave, without an acceptable excuse; or, pose a threat to public order, public security or public health. Foreigners subject to administrative detention shall be taken to removal centres within forty-eight hours of the decision by the [same] law enforcement unit that apprehended them.*
>
> *(3) The duration of administrative detention in removal centres shall not exceed six months. However, in cases where the removal cannot be completed due to the foreigner's failure of cooperation or providing correct information or documents about their country [of origin], this period may be extended for a maximum of six additional months.*
>
> *(4) The need to continue the administrative detention shall be regularly reviewed monthly by the governorates, and when consider it necessary. For those foreigners where administrative detention is no longer considered necessary, the administrative detention shall immediately be ended. These foreigners may be required to comply with administrative obligations such as to reside at a given address and report to the authorities in form and periods to be determined.*
>
> *(5) The administrative detention decision, the extension of the administrative detention period and the results of the monthly regular reviews together with its reasons shall be notified to the foreigner*

or, to his/her legal representative or lawyer. If the person subject to administrative detention is not represented by a lawyer, the person or his/her legal representative shall be informed about the consequence of the decision, procedure and time limits for appeal.

(6) The person placed in administrative detention or his/her legal representative or lawyer may appeal against the detention decision to the Judge of the Magistrate's Court. Such an appeal shall not suspend the administrative detention. In cases where the petition is handed to the administration, it shall immediately be conveyed to the competent magistrate judge. The magistrate judge shall finalize the assessment within five days. The decision of the magistrate judge shall be final. The person placed in administrative detention or his/her legal representative or lawyer may further appeal to the magistrate judge for a review should that the administrative detention conditions no longer apply or have changed.

(7) Those who appeal against an administrative detention action but do not have the means to pay the attorney's fee shall be provided legal counsel upon demand, pursuant to the Legal Practitioner's Law no. 1136 of 19/03/1969."

32. Article 58, titled "*Removal Centres"* and taking effect on 11 April 2014 pursuant to Article 125 of the same Law of Law no. 6458, reads as follows:

"Foreigners subject to administrative detention shall be placed in removal centres."

33. Article 6 § 1 of the Temporary Protection Regulation taking effect upon being promulgated in the Official Gazette dated 22 October 2014 and no. 29153 reads as follows:

"(1) No one within the scope of this Regulation shall be returned to a place where he or she may be subjected to torture, inhuman or degrading punishment or treatment or, where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion.

(2) The Directorate General may take administrative actions regarding foreigners who cannot be removed from our country pursuant to the paragraph (1) even though they are to be removed from our country pursuant to relevant legislation."

34. Provisional Article 1 of the above-cited Regulation is as follows:

"(1) The citizens of the Syrian Arab Republic, stateless persons and refugees who have arrived at or crossed our borders coming from Syrian Arab Republic as part of a mass influx or individually for temporary protection purposes due to the events that have taken place in Syrian Arab Republic since 28 April 2011 shall be covered under temporary protection, even if they have filed an application for international protection. Individual applications for international protection shall not be processed during the implementation of temporary protection.

(2) Those among the foreigners covered under paragraph (1), who filed international protection application prior to 28 April 2011, shall be covered under temporary protection upon their request.

(3) Those who have obtained residence permits after 28 April 2011 but whose residence permits were not extended or were cancelled and those who have requested protection at the end of the duration of their visas or visa exemption period shall be covered under temporary protection without prejudice to provisions under Article 8. General provisions shall apply to those among these [foreigners] who do not request protection.

(4) Identification documents issued prior to the entry into force date of this Regulation shall substitute temporary protection identification documents until the issuance of the temporary protection identification documents laid down in Article 22. Foreigner identification number may be issued to the holders of this document under the Law No. 5490.

(5) Proceedings for entry into our country from Syria or exit from our country to Syria by third country nationals, excluding the foreigners covered under paragraph (1), shall be conducted at the border gates and in the framework of general provisions."

35. Articles 17 and 23 of the Law no. 5683 on Residence and Travels of Foreigners in Turkey, which is dated 15 July 1950 and was abolished by Article 124 § 1 of Law no. 6458, read as follows:

"Article 17: Foreigners who take refuge in Turkey for political reasons can only reside in the localities allowed by the Ministry of Internal Affairs.

Article 23: Persons whose expulsion has been ordered but who cannot leave Turkey because they cannot obtain their passport or for any other reasons, shall be obliged to stay in the places indicated to them by the Ministry of Internal Affairs."

36. Article 33, titled *"Prohibition of expulsion or return ("refoulement")"*, of the Convention relating to the Status of Refugees, which was adopted on 28 July 1951 and promulgated in the Official Gazette dated 5 September 1961 and no. 10898, reads as follows:

"1. No Contracting State shall expel or return (" refouler ") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

37. Article 3 of the European Convention on Establishment, which was adopted on 13 December 1955 and promulgated in the Official Gazette dated 12 April 1989 and no. 3527, reads as follows:

"1) Nationals of any Contracting Party lawfully residing in the territory of another Party may be expelled only if they endanger national security or offend against public order or morality.

2) Except where imperative considerations of national security otherwise require, a national of any Contracting Party who has been so lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion and to appeal to, and be represented for the purpose before, a competent authority or a person or persons specially designated by the competent authority.

3) Nationals of any Contracting Party who have been lawfully residing for more than ten years in the territory of any other Party may only be expelled for reasons of national security or if the other reasons mentioned in paragraph 1 of this article are of a particularly serious nature."

38. Article 13 of the International Covenant on Civil and Political Rights reads as follows:

"An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

39. Standards adopted by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on the matter (CPT/Inf/E (2002) 1 – Rev. 2010 see *http://www.cpt.coe.int/lang/tur/tur-standards.pdf)* insofar as relevant read as follows:

"48. Specific mention should be made of outdoor exercise. The requirement that prisoners be allowed at least one hour of exercise in the open air every day is widely accepted as a basic safeguard (preferably it should form part of a broader programme of activities). The CPT wishes to emphasise that all prisoners without exception (including those undergoing cellular confinement as a punishment) should be offered the possibility to take outdoor exercise daily. It is also axiomatic that outdoor exercise facilities should be reasonably spacious and whenever possible offer shelter from inclement weather.

…

29. In the view of the CPT, in those cases where it is deemed necessary to deprive persons of their liberty for an extended period under aliens legislation, they should be accommodated in centres specifically designed for that purpose, offering material conditions and a regime appropriate to their legal situation and staffed by suitably-qualified personnel. The

Committee is pleased to note that such an approach is increasingly being followed in Parties to the Convention.

Obviously, such centres should provide accommodation which is adequately furnished, clean and in a good state of repair, and which offers sufficient living space for the numbers involved. Further, care should be taken in the design and layout of the premises to avoid as far as possible any impression of a carceral environment. As regards regime activities, they should include outdoor exercise, access to a day room and to radio/television and newspapers/magazines, as well as other appropriate means of recreation (e.g. board games, table tennis). The longer the period for which persons are detained, the more developed should be the activities which are offered to them.

…

79. Conditions of detention for irregular migrants should reflect the nature of their deprivation of liberty, with limited restrictions in place and a varied regime of activities. For example, detained irregular migrants … should be restricted in their freedom of movement within the detention facility as little as possible…"

40. Articles 1 and 4 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the Resolution no. 43/173 of the General Assembly of the United Nations, which is dated 9 December 1988, read as follows:

"Principle 1 – Liability to treat in a humane manner

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person."

Principle 4 – Judicial review of detention and other measures

Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to effective control, of a judicial or other authority."

41. Relevant part of the Resolution no. 44 on *"Detention of Refugees and Asylum-Seekers"*, which is issued by the Executive Committee of the UN High Commissioner for Refugees, reads as follows:

> *"The Executive Committee,*
>
> *Recalling Article 31 of the 1951 Convention relating to the Status of Refugees.*
>
> *…*
>
> *(f) Stressed that conditions of detention of refugees and asylum seekers must be humane. In particular, refugees and asylum-seekers shall, whenever possible, not be accommodated with persons detained as common criminals, and shall not be located in areas where their physical safety is endangered."*

42. The Human Rights Institution of Turkey ("HRIT") issued a Report on İstanbul Removal Centre of 2014 with respect to the Kumkapı Centre. The visit forming a basis for the report was paid on 2 May 2014, which was about one week after the applicant was taken to the Kumkapı Centre, namely 26 April 2014. In the report which was also available in the Institution's web-site (see *www.tihk.gov.tr/www/files/5476057c62b42çpdf)*, comprehensive information is given on the qualifications of the Kumkapı Centre as well as the services provided for those placed in this Centre.

43. Certain information included in this report and needed to be taken into consideration with respect to the applicant is as follows:

> *"A. INFORMATION OBTAINED FROM THE CENTRE'S AUTHORITIES*
>
> *13. At the İstanbul Foreigners' Removal Centre, there are 350 persons by 2 May 2014. On 28 April 2014, the total inmates placed in the centre was 384 of whom 228 were male, 149 were female and 7 were children.*
>
> *- Every day, on average 30 or 40 persons are taken to the Centre and persons nearly in the same number leave the Centre.*

- If the foreigner does not wish to return his country and has lodged an application, the asylum process shall last for 3-4 months on average.

- Sağlık A.Ş., a company working under the Metropolitan Municipality, carries out general cleaning once every two months. Wards are cleaned by the inmates.

- A doctor pays a visit to the Centre once a week on Thursdays. Those who are sick are provided with medicine.

- A nurse is available at the Centre between 08:00 a.m. and 05:00 p.m.. In case of any emergency, 7/24 ambulance service is provided.

- Daily allowance for food is 9 Turkish liras (TRY), and the food service is provided by the firm winning the tender. This amouınt is inadequate given the conditions of İstanbul. Inmates are provided with hot meals for lunch and dinner, and monthly calorie calculation is taken into consideration.

- During seasons when the weather is nice, inmates are allowed to take fresh air after 05:00 p.m.. However, they are not allowed to do so in winters in order to avoid them getting sick. Tha yard is allocated for the use of officials from the security directorate and for vehicles entering and existing the Centre.

…

B. INFORMATION OBTAINED FROM THE INMATES

14. In the place separated from the administrative units with iron doors, there are wards (units). The wards' doors are open. It appears that in general, the wards are very dirty, uncared and over-crowded; that female inmates are washing their cloths by hand; that and there are no duvet covers and pillows. There is a large hall used as a corridor and dining hall. There are three sports equipment in the corridor.

C. OBSERVATIONS AND ASSESSMENTS

1. Not Allowing the Inmates to Take Fresh Air

…

16. The Centre's administrator stated, during the interview, that the administration was trying to provide the inmates with the opportunity of taking fresh air at the yard for 45 minutes after 05:00 p.m. on weekdays and for 2-3 hours on a daily basis at weekends; that however, the inmates were not allowed to take fresh air during winter for the fear that they might get sick, and in the same vein, the inmates did not in fact wish to do so due to cold. The administrator also noted that there was no place where the inmates could safely take fresh air.

17. The inmates interviewed during the inspection also noted that they were not provided with the opportunity of fresh air as indicated. The visit was paid in May. The last time when female inmates were allowed to go out to the yard was two weeks ago. There were inmates who noted that they had been in the Centre for three or four months during which they were allowed to go out only twice and who had a one-year-old baby.

…

21. In the same vein, the report of 2012 issued by the Human Rights Investigation Committee of the Grand National Assembly of Turkey indicates "…placing illegal migrants in a place with no opportunity to take fresh air as they might flee is not found appropriate." It is inadequate for the inmates to go out for a short time only once a week due to understaffing. To take fresh air is a requisite of the right to life, and inmates should be ensured to take fresh air, at any time they wish, on every day of the week".

…

23. However, the main reason for not allowing the inmates to go out to the yard is that there are vehicles entering and exiting the Centre and therefore, the security could not be maintained; and that if they were allowed to go out in winter, they would probably get sick. In this respect, the administration noted that as parking was not allowed, during the working hours, around the Centre given its location, the yard was therefore used as a parking area.

24. As regards the inmates' inability to go out to the yard, the administration pointed out the question of security at the yard as it was

assigned as an area whereby vehicles entered and exited the Centre and where they were parked. Therefore, the inmates were not allowed to go out to the yard as they might flee.

…

2. Overcrowding

…

29. Normal capacity of the İstanbul Foreigners' Removal Centre is 300 in total, out of whom 200 are male and 100 are female. During the first week of the inspection, there are 384 inmates placed in the Centre. The Non-Governmental Organizations also state that there are generally 400-500 inmates in the Centre.

30. In a place of 64 square meters, 40 inmates are being held. During the inspection at the wards, it has been observed that the bunk beds are attached to each other, and the wards are overcrowded to an intolerable extent. As there is no empty bunk bed, some of the inmates are sleeping on the ground on blankets.

…

31. Even in the capacity of 300 inmates, a space of nearly 3 square meters is assigned per capita in the Foreigners' Removal Centre, which is less than a half of the space laid down in the CPT standards. Besides, the Centre is sheltering 400-500 inmates on average. Therefore, it is undoubtedly far below the standard set by the CPT (a space of minimum 7 square meters for each detainee or convict) (for CPT's standard, see CPT/Inf (92)3 § 43 http://www.cpt.coe.int/turkish.htm). As a matter of fact, this issue was discussed in the ECHR's judgment in the case of Yarashonen where the ECHR noted that when the number of male inmates was considered to be 297 as indicated in the GNAT's report, the space allocated per capita was 2.27 square meters, which was even per se in breach of Article 3 of the Convention" (see footnote 5)."

44. In the ECHR's judgment in the case of *Yarashonen v. Turkey* (no. 72710/11, 24 June 2014, § 18), the information provided by the Turkish

Government on the Kumkapı Foreigners' Removal Centre is summarized as follows:

> *"The Government submitted that the Kumkapı Centre where the applicant was detained had a capacity of 300 persons. The detainees were accommodated on three floors: the first two floors were reserved for male detainees, and the third floor for females. There were five dormitory rooms on each floor, measuring 50, 58, 69, 76 and 84 sq. m respectively. There were fifteen to twenty beds in each of the ten rooms reserved for male detainees and all rooms were sufficiently ventilated. There were also five showers and six toilets per floor, as well as a cafeteria measuring 69 sq. m, where breakfast, lunch and dinner were served daily on each floor. The detainees had the right to outdoor exercise in suitable weather conditions. A doctor was present on the premises every Thursday and the detainees also had access to medical care in cases of emergency. As for the hygiene in the facility, there were six cleaning staff working full time at the removal centre, and the building was disinfected whenever necessary."*

45. The Human Rights Investigation Commission of the GNAT paid an official visit to the Kumkapı Centre in May 2012. In the report issued thereafter, it is indicated that although it is reported that the Centre had a capacity of 300 persons, there were a total of 397 inmates accommodating at the Centre; 391 were males, 97 were females and 7 were children.

IV. EXAMINATION AND GROUND

46. The Constitutional Court, at its session of 11 November 2015, examined the application and decided as follows:

A. The Applicant's Allegations

47. The applicant, a Syrian national and placed in administrative detention at the Kumkapı Centre by the date when he lodged his first two individual applications, maintained that he had been placed in administrative detention for deportation based on the intelligence that he was a member of the terrorist organization; that due to dismissal, with final effect by the first instance court, of his action brought against his deportation order, his deportation came into question; that the

conclusion was reached on the basis of the administration's defence submissions; that the inferior court failed to take into consideration the fact that a decision of non-prosecution had been rendered at the end of the criminal investigation conducted against him; that although he had requested international protection and he was taken under temporary protection, he was still placed in administrative detention unlawfully; that in case of being deported, he would face the risk of being killed, tortured and ill-treated; and that he was placed in administrative detention in a way that would harm his physical and mental integrity and under conditions incompatible with human dignity. He accordingly alleged that there had been violations of the right to life, the prohibition of torture and maltreatment, the right to property, the right o legal remedies as well as the right to liberty and security. He also requested the Court to indicate an interim measure pursuant to Article 73 of the International Regulations of the Constitutional Court and to be awarded compensation.

B. The Court's Assessment

48. The Court, which is not bound by the applicant's legal qualification, examined his complaints under the right to life, the prohibition of torture and maltreatment and the right to personal liberty and security, safeguarded by Articles 17 and 19 of the Constitution, as well as in conjunction therewith, the right to legal remedies safeguarded by Article 40 of the Constitution.

1. Alleged Violation of Article 17 of the Constitution due to the risk of being killed and being subject to torture and ill-treatment in case of deportation

49. The applicant maintained that in case of his deportation to Syria where there had been turmoil since 2011, he would face the risk of being killed as well as being subject to torture and torment.

50. In its observations, the Ministry, making a reference to the ECHR's judgments, noted with respect to the applicant's allegations that the Contracting Parties were entitled to monitor the foreigners' entry into and stay within the country as well as their deportation;

that the right to political asylum was not laid down in the European Convention on Human Rights ("Convention") or its Protocols; that a Contracting Party was in principle entitled to accept a foreigner into the country, to deport a foreigner having illegally entered, and trying to stay within, the country or to repatriate the foreigner to the country where he had committed an offence; as well as to expel the foreigner, who had committed an offence in another country, to that country; and that however, these powers conferred on the State were limited to the risk of violation of human rights; It also noted that Article 3 of the UN Convention of 1984 against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment prohibits *"expulsion, refoulement or extradition of a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture"*; that according to the ECHR, if there were substantial grounds to believe that there was a real risk that he would be subjected to treatment contrary to Article 3 in the event of his return, the foreigner's deportation may engage the responsibility of that State under the Convention, and in that case, Article 3 of the Convention imposed an obligation not to deport the person in question to that country.

51. The Ministry also stated in its observations that the civil insurrection erupting in Syria on 15 March 2011 turned into a civil war during the period having elapsed; that the instability in the country led the Syrians to engage in forced migration in pursuit of safe places; that pursuant to the Directive no. 62 on Acceptance and Accommodation of the Citizens of the Syrian Arab Republic and Stateless Persons Residing in the Syrian Arab Republic, who had entered Turkey for mass asylum (adopted by the Ministry of Internal Affairs on 30 March 2012), the Syrians in Turkey were taken under temporary protection; that the persons arriving in Turkey from the Syrian Arab Republic since 28 April 2011 acquired a legal status by virtue of Law no. 6458 and Article 1 of the Temporary Protection Regulation of 13 October 2014, which was put into force pursuant to Article 91 of Law no. 6458; that accordingly, citizens of the Syrian Arab Republic as well as stateless persons residing in the Syrian Arab Republic, who were under temporary protection could not be deported; however, applications lodged individually by these

persons for international protection would neither be put in process. The Ministry further indicated that as maintained by the applicant, he filed an application with the İstanbul Governor's Office for being granted refugee status on 25 June 2014 but he could not receive any favourable or unfavourable reply; that he brought this claim also before the 1st Chamber of the İstanbul Administrative Court during the proceedings whereby he challenged the deportation order against him; and that the administrative court dismissed the applicant's request for revocation of the deportation order but did not make any inquiry and assessment as to the applicant's legal status (whether being under temporary protection or an asylum-seeker).

52. Article 46 of Code no. 6216, titled "*Persons who have the right to individual application*", lists the persons who may lodge an individual application. According to this provision, three basic preconditions must exist concurrently in order for a person to submit an individual application to the Constitutional Court. These preconditions are: "*a current right of the applicant must be violated*" due to an act, action or negligence of the public authority which gives rise to the application and is alleged to have caused a violation; the individual must be "*personally*" and "*directly*" affected by this violation; and as a result, the applicant must bring himself/herself forward as a "*victim*" (see *Onur Doğanay*, no. 2013/1977, 9 January 2014, § 42).

53. Removal of the victim status depends especially on the nature of the right alleged to be breached, justification of the decision finding a violation as well as on the question whether the losses suffered by the relevant party continue or not following the decision. The conclusion as to whether the redress provided for the applicants is appropriate and sufficient may be reached after all circumstances of the case are assessed by having regard to the nature of the breach of the fundamental right and freedom in question. (*Sadık Koçak and Others*, § 84).

54. Within this framework, in cases where execution of a deportation order is no longer possible in respect of the persons whose deportation has been ordered, these persons cannot be said to have victim status. The word "victim" denotes that the person concerned has been deported or run the risk of being directly deported. Therefore, a person cannot be

considered to be a victim due to deportation orders which have been withdrawn, which are temporary or are not permanently enforceable. In cases where execution of a deportation or extradition order has been stayed indefinitely or otherwise deprived of legal effect, the same stance must be adopted (for the ECHR's judgment in the same vein, see *A.D. and Others v. Turkey*, no. 22681/09, 22 July 2014, §§ 79-80).

55. In the impugned case, it has been observed that a deportation order was issued against the applicant who subsequently brought an action before the administrative court for revocation of the order; however, his action was dismissed. As noted in the Ministry's observations, the applicant filed an application, with the İstanbul Governor's Office on 25 June 2014, for international protection (refugee status); however, his application was not concluded. On the other hand, pursuant to Provisional Article 1 of the Temporary Protection Regulation, which took effect upon being promulgated in the Official Gazette dated 22 October 2014, it is set forth that those who have arrived in Turkey from the Syrian Arab Republic since 28 April 2011 are under temporary protection and cannot be deported; and that however, their individual applications for international protection will not be put in process. In his action brought for revocation of the deportation order, the 1st Chamber of the İstanbul Administrative Court dismissed his request but did not make any inquiry and assessment as to his legal status; namely whether he was entitled to a temporary protection status or to an international protection.

56. In the system introduced through Law no. 6458, the applicant has the status of an applicant pursuant to Article 54 § 2 of this Law by 25 June 2014 when he primarily applied for international protection. Pursuant to the same paragraph, a deportation order may be issued only *in case of severe indication that the person concerned poses a threat to the country's safety or is convicted of an offence posing a threat to public order"* (see above § 30). The applicant, a Syrian citizen, acquired temporary protection status by virtue of Provisional 1 of the Temporary Protection Regulation taking effect on 22 October 2014. It has been accordingly envisaged that he could not be deported; and nor his application for international protection shall be put in process. It must be ascertained

how these changes in the applicant's legal status have a bearing on his deportation for *"posing a threat to public order or public safety or public health"*, which forms a basis for his deportation order and administrative detention order issued pursuant to Article 54 (d), and thereby on his being placed in administrative detention. The decision rendered by the administrative court, given the applicant's then legal status, at the end of the action brought against the deportation order -but without considering the temporary protection status obtained by the applicant subsequent to the final decision- as well as the decisions issued by the magistrate judge's offices in concluding the applicant's challenges against the administrative detention order do not have any decisive effect on his current legal status within the meaning of Law no. 6458.

57. The Temporary Protection Regulation defines "temporary protection" as the protection afforded to foreigners who were forced to leave their country but could not return there; who have arrived at, or crossed, our borders in mass or individually during this mass immigration with a view to obtaining urgent and temporary protection and whose request for international protection cannot be individually taken into consideration. In this sense, in line with the international law and practices, Turkey affords "temporary protection" to the foreigners of Syrian nationality by way of fulfilling the following basic elements of the temporary protection: 1. Unconditional access to the country by virtue of open border policy; 2. Implementation of non-refoulement principle without any exception; 3. Meeting the basic needs of those who have entered the country.

58. The UN High Commissioner for Refugees acknowledges that Syrians, refugees and stateless persons from Syria, who are seeking for international protection as a part of the temporary protection regime put into effect by the Turkish Government, have been accepted to Turkey and shall not be repatriated to Syria against their will.

59. In the light of the above-cited findings, it has been observed that there is no deportation order which has been executed or likely to be executed actually in respect of the applicant granted temporary protection status of which safeguards are set out by the Temporary Protection Regulation issued on the basis of Law no. 6458; that he cannot

be deported under Article 17 of the Constitution; that it is therefore impossible to accept that the applicant has the victim status in terms of the alleged violations of the right to life or the prohibition of torture and maltreatment as he might face the risk of being subject to a treatment likely to give rise to such violations.

60. As a matter of fact, upon the interim measure indicated by the Court in respect of the applicant, the İstanbul 4th Magistrate Judge's Office, examining his challenge to the administrative detention order, decided by its decision of 31 December 2014 to discontinue his administrative detention as well as to release him if the deportation process could not be immediately completed. Accordingly, the applicant being notified of the necessity to submit signature at fortnightly intervals was released on 6 January 2014.

61. For these reasons, the Court has found inadmissible the alleged violations of the right to life and the prohibition of torture and maltreatment due to deportation for incompatibility *ratione personae* as the applicant had no victim status.

2. Alleged violations of Articles 17 and 40 of the Constitution due to inadequate conditions of his administrative detention pending deportation

62. The applicant maintained that Articles 17 and 40 of the Constitution had been breached on the grounds that he was placed in administrative detention at the Kumkapı Centre, pending his deportation, in a manner that would impair his physical and mental integrity and under conditions incompatible with human dignity; and that there was no effective remedy to challenge these conditions.

63. In its observations, the Ministry noted that as the domestic legal remedies did not fulfil the standards set by the ECHR, Law no. 6458 was adopted by way of a legislative amendment; that the Law entered into force after being promulgated in the Official Gazette dated 11 April 2013 and no. 28615; and that it was also indicated in the same Law that the contested provisions of the legislative amendments would take effect one year later. The Ministry further stated that in the present case, the applicant filed challenge, twice under Law no. 6458, to his administrative

detention at the removal centre, before the magistrate judge's offices and also brought an action before the administrative court for annulment of his deportation; and that however, as it appeared from the petition submitted by the applicant, he had not filed a request, with the relevant administrative authority, regarding a change in the poor living conditions of the Kumkapı Centre.

64. In his counter-statements against the Ministry, the applicant maintained that filing an application with the administration for his complaints regarding the conditions at the Kumkapı Centre would not be effective in practice; that no reply was taken in return for the applications filed for several persons with the Security Directorate on various dates, and written and oral applications filed in respect of him were also left unanswered; that besides, he was detained at the removal centre without his consent, and therefore, the liability resulting from the incompatibility of the detention conditions with Article 17 of the Constitution was not attributable to him; that for instance, his petition of 30 October 2014 regarding his dental treatment was left unanswered; and that there was no effective legal remedy to challenge the conditions he had suffered.

a. Admissibility

65. In order to decide whether the legal remedies have been exhausted insofar as it concerns the allegations raised in this part of the application, the right to legal remedies safeguarded by Article 40 of the Constitution, must be examined, under its substantive aspect, in conjunction with Article 17 of the Constitution.

b. Merits

i. Alleged violation of the right to legal remedies enshrined in Article 40 of the Constitution in conjunction with Article 17 thereof

66. The applicant maintained that his detention conditions at the Kumkapı Centre were in breach of his physical and mental integrity as well as incompatible with human dignity; that there were no effective administrative and judicial remedy whereby he could raise his complaints.

67. Article 40, titled *"Protection of fundamental rights and freedoms"*, of the Constitution reads as follows:

> *"Everyone whose constitutional rights and freedoms have been violated has the right to request prompt access to the competent authorities.*
>
> *The State is obliged to indicate in its proceedings, the legal remedies and authorities the persons concerned should apply and time limits of the applications…"*

68. Article 13, titled *"Right to an effective remedy"*, of the European Convention on Human Rights ("Convention") reads as follows:

> *"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."*

69. Article 40 of the Constitution secures the right to request prompt access to the competent authority for everyone whose rights and freedoms enshrined in the Constitution have been violated.

70. The administrative and judicial remedies which are prescribed for acts or actions allegedly constituting a violation and all of which must be exhausted before lodging an individual application with the Court are to be accessible, capable of offering redress as well as, once exhausted, to offer a reasonable prospect of success for affording redress for the alleged violation. Therefore, the existence of these remedies must be sufficiently certain not only in theory but also in practice or must be at least proven not to be ineffective (see *Ramazan Aras*, no. 2012/239, 2 July 2013, §§ 28-29).

71. The scope of the safeguard afforded to persons under the right to an effective remedy varies depending on the nature of the applicant's complaint. However, it must be noted in general that the legal remedy prescribed by Article 40 of the Constitution must be "effective" in law as well as in practice in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that has already occurred (for the ECHR's judgment in the same vein, see

Ananyev and Others v. Russia, no. 42525/07 and 60800/08, 10 January 2012, § 96).

72. However, in cases where the right in question is the prohibition of "torture", "maltreatment", or penalty or treatment "incompatible with human dignity", which is safeguarded by Article 17 of the Constitution, a legal remedy may be said to be effective only when it is capable of preventing the alleged violation -and in certain circumstances must be punitive as well- and, if necessary, of providing reasonable redress for any violation that has already occurred as a complementary element, as a requisite of the absolute nature of this prohibition. Otherwise, merely providing a redress for such kind of violations would (partially/ implicitly) justify those suffered by persons subject to such treatments as well as diminish, to an unacceptable degree, the State's liability to ensure the detention conditions corresponding to the standards enshrined by the Constitution. Therefore, as in the present case where what is complained of is "detention under conditions incompatible with human dignity", a remedy which is capable of ensuring improvement/ enhancement in detention conditions as well as offering redress for damage resulting therefrom may be said to be effective. As a matter of course, as regards the applications where the applicant is no longer detained at the impugned place, there must exist compensatory remedies to cover pecuniary and non-pecuniary damages that have already sustained (for the ECHR's judgment in the similar vein, see *Anenyev and Others v. Russia*, § 98).

73. The ECHR also acknowledges that the special importance attached by the Convention to that provision requires that the States establish, over and above a compensatory remedy, an effective mechanism in order to put an end to any such treatment rapidly (see *Yarashonen v. Turkey*, § 61).

74. In the present case, it has been observed that the applicant lodged his first two applications in the course of his detention at the Kumkapı Centre and his last application following his release by virtue of the Court's decision. Accordingly, the remedy, which the applicant should have, must be capable of both improving the alleged poor conditions of the Kumkapı Centre and of offering redress for the damages he sustained on account of these conditions.

75. It is set out in Article 53 of Law no. 6458 that a foreigner in respect of whom a deportation order has been issued may challenge the deportation order before the administrative court within 15 days as from the notification of the order. This remedy provides for conducting the general review by the administrative court in respect of the impugned deportation act but does not include any information as to the scope of the examination to be conducted by the administrative court in respect of special considerations.

76. It is set forth in Article 57 of Law no. 6458 that the relevant governor's office shall regularly assess whether the continued administrative detention is necessary on monthly basis; that if there is no such necessity, the administrative detention of the foreigner concerned shall be immediately ended; that the administrative detention order, the extension of such order and the results of the monthly regular assessments by the Governor's Office along with the grounds thereof shall be notified to the foreigner, or his legal representative or lawyer; that the foreigner under administrative detention or his legal representative or lawyer may challenge these orders before the magistrate judge's office; and that furthermore, in case of any alleged discontinuance of, or change in the conditions justifying, administrative detention, the person concerned may once again apply to the magistrate judge.

77. The legal remedy set forth in Article 57 of Law no. 6458 does not afford a special type of administrative or judicial mechanism which provides the opportunity for a review of the compatibility of detention conditions with Article 17 § 3 of the Constitution or in case of an unconstitutionality, for improving the conditions or ending the detention, which sets the conditions of detention, and which involves judicial review of such conditions. It has been observed that the remedy before the magistrate judge's offices, which is contemplated as a judicial remedy, is intended for review of the lawfulness of the administrative detention order; that in the present case, upon the applicant's challenges against this order, the incumbent magistrate judge's offices made assessments merely to that end but not in respect of the allegedly poor conditions of detention put forward by the applicant in his petition.

78. In the present case, the Ministry did not provide, with the Constitutional Court, any information demonstrating that there was an administrative and judicial remedy capable of improving the conditions at the Kumkapı Centre. In its observations, the Ministry did neither submit any information indicating that the applicant's written requests for improving his detention conditions and ending his detention had been replied. On the other hand, the applicant informed the Court of the fact that his written and oral requests for receiving dental treatment had been left unanswered by the administration, which was the same for the other inmates of the Kumkapı Centre. Besides, the applicant substantiated his allegation that the legal arrangement whereby the relevant governor's office would regularly assess whether the continuation of administrative detention was necessary on monthly basis and, if not necessary, the administrative detention would be immediately ended was not applicable in practice in that he could not receive any reply in spite of having filed applications with the Security Directorate, the Directorate General of Immigration Authority and the magistrate judges (see §§ 21-25). Besides, even if it is assumed that the detention conditions at the foreigners' removal centre are subject to review, it is not clear on the basis of which standards these standards would be assessed.

79. The report issued by the HRIT contains the following information in this respect: *"… It is not possible in practice for the foreigners to complain of the human rights violations they have sustained at the removal centres. As the applicants are foreigners, do not know Turkish and have limited access to legal assistance, there are very few complaints raised as regards the judicial review of the Centre and its officers. As those detained at the Centre are generally deported, it is hardly possible for them to come back to Turkey. Therefore, the impugned incidents are not brought before the judicial authorities."*

80. The ECHR also dealt with applications of the same nature as that complained of in the present case. In its relevant judgments, the ECHR notes that the Turkish Government did not, however, submit a single judicial or administrative decision showing that a migrant detainee had been able to vindicate his or her rights by using the remedies suggested, that is, where recourse to an administrative court or authority had led to the improvement of detention conditions and/or to an award of compensation for the anguish suffered on account of the adverse

material conditions; and that it likewise failed to provide an explanation as to why they could not submit any such examples (see *Yarashonen v. Turkey*, § 63; and *Abdolkhani and Karimnia v. Turkey*, no. 30471/08, 22 September 2009, § 25).

81. In the light of these findings, it has been observed that there was no effective administrative and judicial remedy, available in theory and in practice, for the applicant placed in administrative detention for deportation.

82. For these reasons, it has been concluded under the particular circumstances of the present case that as regards the alleged violation of Article 17 of the Constitution due to the impugned detention conditions, there was no effective legal remedy as set forth in Article 40 of the Constitution and thus, there was a breach of this right.

ii. Alleged Violation of Article 17 of the Constitution due to detention conditions at the Kumkapı Centre

83. The applicant maintained that the Kumkapı Centre was overcrowded and dirty; that as there was no space in the dormitory rooms, he stayed in the TV room with 12 or 13 persons on a foam-rubber mattress; that there was no standard in the quality of foods; that he had access to fresh air once a week at the outset but he could never avail of this opportunity in the recent period; that the persons accommodated in the Centre were troubled and diseased and he was worried that they could harm him or he could fall sick; that there was no sufficient treatment opportunity; that the procedures carried out were not subject to judicial review; and that he had been placed at the Kumkapı Centre for over 8 months in total under inhuman and degrading conditions. He accordingly alleged that Article 17 of the Constitution and Article 3 of the Convention were violated (see § 17).

84. In its observations, the Ministry indicated, by making a reference to the ECHR's judgements, as regards the allegations raised in this part that overcrowding of the places where the persons who are under administrative detention were placed as well as inadequacy of the services concerning heating, health, sleep, food, recreation opportunities and communication with the outside world may amount to inhuman

or degrading treatment; that cumulative effects of the detention conditions must also be taken into consideration in assessments as to such conditions; that the alleged ill-treatment must be substantiated with appropriate evidence; that the ECHR has several times dealt with the conditions at the Kumkapı Centre; that the document concerning the applicant's detention conditions at the Kumkapı Centre, which was submitted to the Ministry, did not include sufficient information, and the Ministry could not also exchange any correspondence on the matter within the prescribed period; and that for these reasons, it would be much more appropriate to take into consideration the opinion submitted by the Ministry of Internal Affairs in assessing whether the applicant's detention conditions were contrary to Article 3 of the Convention and Article 17 of the Constitution.

85. Any information on the detention conditions of the Kumkapı Centre at the relevant time was submitted neither by the Ministry nor by the Ministry of Internal Affairs although requested. However, the above-cited report of the HRIT, dated November 2014 (see §§ 42 and 43), includes comprehensive information on the ventilation, cleaning, health-care and food provision opportunities provided for those placed at the Kumkapı Centre. It is indicated in the report that the delegation paying the visit, which formed the basis for the report, was consisted of the members and experts of the HRIT as well as academicians, representatives of the non-governmental organisations and lawyers; that along with the negotiations held with the official from the Directorate General of Immigration Authority and the Centre's administrator, one-on-one negotiations were held with those accommodated at the Centre, and thereby obtaining information on the general conditions and services of the Kumkapı Centre; and that the units within the Centre notably the men's and women's wards were visited and inspected.

86. Although there are certain discrepancies, for the Court, between the issues asserted by the applicant in support of his allegations and the findings and conclusions drawn from the above-cited report, the Court has considered that it has sufficient material and substitutive elements capable for ensuring assessment of the applicant's detention conditions at the Kumkapı Centre.

General Principles

87. Article 17 of the Constitution safeguards everyone's right to protect and improve their corporeal and spiritual existence. The first paragraph thereof is intended for protecting human dignity. Its third paragraph provides for that no one shall be subjected to "torture" or "mal-treatment" and that no one shall be subjected to "penalties or treatment incompatible with human dignity".

88. The obligation incumbent on the State to respect for individual's right to protect and improve his corporeal and spiritual existence primarily requires public authorities not to interfere with this right; in other words, to avoid harming the physical and mental integrity of the individuals as specified in Article 17 § 3 of the Constitution. It is the State's negative duty stemming from its obligation to respect for the individuals' physical and mental integrity (see *Cezmi Demir and Others*, no. 2013/293, 17 July 2014, § 81).

89. For a treatment to fall into Article 17 § 3 of the Constitution, it must have attained the minimum threshold of severity. This minimum threshold may vary and must therefore depend on the particular circumstances of each case. In this sense, in determining the level of severity, factors such as the duration of impugned treatment, its physical and mental effects as well as sex and age of the applicant; and state of health of the victim are of importance (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 23). The aim and motivation of the alleged treatment may also be added to these factors (see *Cezmi Demir and Others*, § 83).

90. Given its effects on individual, ill-treatment is graded and defined with different terms in the Constitution and the Convention. Therefore, it appears that the expressions included in Article 17 § 3 of the Constitution involves difference not in terms of intensity. In order to ascertain whether a treatment may be qualified as "torture", it is necessary to consider the distinction between the notions of "mal-treatment" as well as treatment "incompatible with human dignity" and the notion of torture that are specified in the said provision (see *Cezmi Demir and Others*, § 84).

91. Less severe treatments degrading in nature, which arouse feelings of fear, anguish or inferiority capable of humiliating and embarrassing individuals or which cause the victim to act against his own will and conscience, may be characterised as "treatment or penalty incompatible with the human dignity" (see *Tahir Canan*, § 22). Unlike "mal-treatment", such treatment creates, beyond any physical or mental suffering, a humiliating or degrading effect on the individual (see *Cezmi Demir and Others*, § 89).

92. As cited above (see § 89), in order to determine under the scope of which notion a treatment falls, each concrete case must be assessed in the light of its own particular circumstances. Although public nature of a treatment plays a role in its qualification as a degrading treatment which is incompatible with human dignity, the sense of inferiority felt by the individual may also suffice, in certain circumstances, to form such ill-treatment. Besides, it is also taken into consideration whether the treatment is applied with the intent of humiliation or degradation. However, the failure to establish such an intent would not mean that the treatment does not amount to an ill-treatment. Degrading treatments in the form of poor detention conditions, practices suffered by the detainees, discriminatory behaviours, libellous expressions by the public officers and providing individuals with unusual foodstuff may also amount to treatment "incompatible with human dignity" (see *Cezmi Demir and Others*, § 90).

93. As in the present case, an individual may be arrested or placed in detention pending his deportation (see *Rıda Boudraa*, no. 2013/9673, 21 January 2015, § 73). For the material conditions -to which the foreigners placed in administrative detention for this purpose have been subjected- to fall into the ambit of Article 3 of the Convention and Article 17 of the Constitution, they must attain a minimum threshold of severity. In making such an assessment as to this minimum threshold of severity, all information of the conditions, notably the duration of the impugned treatment, its physical or mental effects as well as the victim's sex, age and state of health must be taken into consideration (see *Rıda Boudraa*, § 60; for the ECHR's judgments in the same vein, see *Kafkaris v. Cyprus*, no. 21906/04, 12 February 2008, § 95; and *Yarashonen v. Turkey*, § 71).

94. A treatment is described as "inhuman", if it has been premeditated and has caused actual bodily injury or physical or mental suffering, and degrading if it has been "such as to arouse in [its] victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (see *Rıda Boudraa*, § 61).

95. In determining whether a penalty or treatment is "degrading" within the meaning of Article 17 of the Constitution and Article 3 of the Convention, it is necessary to ascertain whether the aim of this penalty or treatment is to offend and humiliate the person concerned as well as, given its effects, whether the measure has a bearing on his personality. However, in the absence of any such motivation, it cannot be said that the probability of a breach of Article 17 of the Constitution is out of the question. For a penalty or treatment to be qualified as "inhuman" or "degrading", the suffering and humiliation involved must go beyond that inevitable element of suffering and humiliation connected with a legitimate treatment or penalty (see *Rıda Boudraa*, § 62).

96. The extreme lack of personal space in the detention area weighs heavily as an aspect to be taken into account for the purpose of establishing whether the impugned detention conditions were "degrading" from the point of view of Article 17 of the Constitution (see, for the ECHR's judgment in the same vein, *Yarashonen v. Turkey*, § 72). It appears that the applicant, maintaining that the detention conditions at the Kumkapı Centre were inhuman and humiliating, referred to the overcrowding of the Centre, his inability to sleep in the dormitory and instead his staying at the TV room as well as to his psychological problems and impairment of his health on account of his detention conditions.

97. In this respect, the ECHR notes that whereas the provision of four square metres of living space remains the acceptable minimum standard of multi-occupancy accommodation, the circumstances under which an applicant has less than three square metres of floor surface at his or her disposal would lead to a violation of Article 3 (see *Hagyó v. Hungary*, no. 52624/10, 23 April 2013, § 45; and *Yarashonen v. Turkey*, § 72). Besides, the ECHR considers it a basic safeguard of prisoners' well-being that they be allowed at least one hour of exercise in the open air every day (see *Ananyev and Others v. Russia*, § 150).

98. Quite apart from the necessity of having sufficient personal space, other aspects of physical conditions of detention are relevant for the assessment of compliance with Article 17. Such elements include access to outdoor exercise, natural light or air, availability of ventilation, and compliance with basic sanitary and hygiene requirements (see *Yarashonen v. Turkey*, § 73). The standards adopted by the CPT with respect to *"migrants under detention"* (§ 39) point out that in those cases where it is deemed necessary to deprive persons of their liberty for an extended period under aliens legislation, they should be accommodated in centres specifically designed for that purpose, offering material conditions and a regime appropriate to their legal situation and staffed by suitably-qualified personnel; that such centres should provide accommodation which is adequately furnished, clean and in a good state of repair, and which offers sufficient living space for the numbers involved; that care should be taken in the design and layout of the premises to avoid as far as possible any impression of a carceral environment; that as regards regime activities, they should include outdoor exercise, access to a day room and to radio/television and newspapers/magazines, as well as other appropriate means of recreation; and that the longer the period for which persons are detained, the more comprehensive should be the activities which are offered to them. In this scope, the CPT notes that all prisoners without exception (including those undergoing cellular confinement as a punishment) should be offered the possibility to take outdoor exercise daily; and that outdoor exercise facilities should be reasonably spacious and whenever possible offer shelter from inclement weather. It is obvious that this standard which is adopted in respect of prisoners is applicable *a fortiori* to *"the migrants under detention"*.

99. The above-cited standards (see §§ 96-98) in principle lay down the minimum standards for the Court to consider in its examinations in this regard. However, these standards must be separately examined in the light of particular circumstances of each concrete case.

Application of Principles to the Present Case

100. In the application file, there is no precise information as to the living conditions of the Kumkapı Centre, notably to the living space

per capita, at the time when the applicant was placed there. Besides, neither the applicant nor the Ministry of Internal Affairs and the Ministry submitted to the Court any precise information about the room where the applicant was staying and number of his roommates. The Court having limited information at its hand was to obtain an approximate value for the space per capita at the Kumkapı Centre by dividing the total surface assigned to the inmates by the number of inmates.

101. As stated in the report issued by the Human Rights Institution of Turkey, the total capacity of the Kumkapı Centre, which was reported by the Centre's administration, was 384 by 28 April 2014 and 350 by 2 May 2014. As indicated by its administration, nearly 30-40 persons leave the Centre everyday but new foreigners approximately in the same number are taken to the Centre. According to the applicant and the officials of the NGOs whose opinions are reflected in the HRIT's report, number of foreigners accommodated at the Centre are 400-500. Given the information provided by the Centre's administration and the fact that number of foreigners taken to and discharged from the Centre is almost the same, it may be accepted that the minimum number of inmates at the relevant time was 350-380. The applicant's allegation to the effect that *"approximately 12-13 persons stay in the television room for lack of space in the dormitories"* is supported with the information included in the Report: *"In a place of 64 square meters, 40 inmates are being held. During the inspection at the wards, it has been observed that the bunk beds are attached to each other, and the wards are overcrowded to an intolerable extent. As there is no empty bunk bed, some of the inmates are sleeping on the ground on blankets"*. It was accordingly concluded that there were, at the relevant time, a minimum of approximately 350 inmates at the Kumkapı Centre, which is above the reported capacity of the Centre, namely 300 inmates.

102. As regards the determination of the width of the space assigned to those placed at the Centre, it appears from the report and opinions prepared concerning the Kumkapı Centre that the official capacity of the Centre was accepted, during all the time including the one when the applicant was accommodated, to be 300; and that there was no significant change in the space assigned to the inmates. As also noted by the officials of the Centre whose opinions are also included in the HRIT's

report, it is not even possible to make a substantial change in the space allocated to the inmates as the Centre is located in the city centre with dense buildings. Regard being had to the above-cited information concerning the Centre as a whole (see §§ 42-45), it has been understood that the total surface assigned to the inmates, both male and female, is nearly 1.000 square meters; and that there has been no change in the width of this space in the recent period including that of the applicant's detention.

103. It accordingly appears that the minimum space per capita at the Centre is approximately 3 square meters.

104. In such removal centres, distress suffered by those due to provision of scarce space may in some circumstances be compensated for by the freedom to spend time away from the dormitory rooms, which may be taken as a factor in assessing the living conditions under Article 17 of the Constitution (see, for the ECHR's judgment in the same vein, *Yarashonen v. Turkey*, § 78).

105. When the applicant's living conditions are examined within this framework, it has been observed that as expressed in the HRIT's report, in the space separated by iron doors from the administrative units at the Kumkapı Centre, there are a large hall used as a corridor and a dining hall, apart from the wards (units); that there are three sports equipment in the hall; and that due to lack of space in the dormitory rooms, the applicant together with a group of individuals stayed in the TV room. It has been accordingly understood that communal spaces at the Kumkapı Centre are very limited and used for sleeping due to lack of space in the dormitory rooms. In this connection, it appears that the inmates confined to overcrowded dormitory rooms with only beds and lockers have no access to any opportunity which could relieve them.

106. In addition to the above-cited assessments, the inmates should be, in the light of the standards set by the CPT in this respect, provided with the opportunity to have access to at least one-hour outdoor exercise every day, as a measure likely to prevent them from maintaining their daily lives under intolerable conditions.

107. As indicated in the HRIT's report, the Centre's manager stated that they were trying to enable those under detention at the Centre to

take fresh air at the yard for 45 minutes during weekdays and for 2-3 hours at weekends (see § 43). In this regard, the applicant alleged that although he was allowed to have access to ventilation once a week at the outset, he was not provided with this opportunity in the recent period (§ 83). Some of the inmates whose opinions were included in the report also noted that they were not allowed to receive fresh air; and that moreover, some of them were not even provided with this opportunity for weeks, whereas some of them were provided only twice during 3-4 months.

108. It has been observed that the opportunity of fresh air "tried to be provided" as reported by the officials of the Centre was even far below the CPT's standards. Besides, as explicitly shown by the acknowledgement of the Centre's officials that the inmates could not be provided with the ventilation opportunity due to security concerns as the yard was being used as a car park as well as due to winter conditions (see § 43), it has been concluded that the fresh air opportunity actually provided for the individuals accommodated at the Centre was far below the minimum level indicated by the CPT's standards. Undoubtedly, the conditions under which those individuals who are neither a detainee nor a convict may avail themselves of the fresh air and which are below the CPT's standards, are not at acceptable level.

109. Regard being had to these findings as a whole, it has been concluded that the overcrowding of the Kumkapı Centre where living space per capita was under 3 square meters as well as the conditions under which the applicant was accommodated at the Kumkapı Centre would *per se* exceed the level associated with the treatment *"incompatible with human dignity"*, which is prohibited under Article 17 of the Constitution; that the inadequate communal areas other than the dormitory rooms, which may enable inmates to relieve themselves, and more importantly, very limited opportunity of fresh air afforded to the applicant also aggravated the applicant's conditions at the Kumkapı Centre; and that the applicant's being placement in administrative detention under these circumstances for over 8 months constituted a manifest breach of Article 17 of the Constitution.

110. As the findings reached up to so far were sufficient to accept that the treatment suffered by the applicant at the Kumkapı Centre went

beyond the humiliation and anguish involved in case of an individual's arrest or detention pending his deportation in accordance the procedure prescribed by law, the Court did not find it necessary to make a separate examination, under Article 17 of the Constitution, as to the applicant's allegations concerning poor hygiene conditions and inadequate health-care services and foodstuff as well as lack of communication with the outside world, which fell within the scope of this heading.

111. For these reasons, it has been concluded that under the particular circumstances of the present case, Article 17 of the Constitution was violated as the detention conditions at the Kumkapı Centre amounted to a treatment *"incompatible with human dignity"*.

3. Alleged Violations of Articles 19 and 40 of the Constitution for Being Placed in Administrative Detention and Lack of an Effective Remedy to Challenge His Detention

112. The applicant maintained that he was taken into custody within the scope of an investigation conducted by the Kızıltepe Chief Public Prosecutor's Office; that in spite of the prosecutor's order for his release following his questioning, the Security Directorate did not release him but took him to the Kumkapı Centre where he was placed in administrative detention; and that he was deprived of his liberty for over 8 months in the absence of a judicial decision ordering his detention and he was still under "administrative detention" without any legal basis as of the date of his first individual application. He further asserted that although Law no. 6458 allowed a challenge to his administrative detention before the magistrate judge as well as regular review of this detention by the governor's office on monthly basis (review of the administrative detention), he could not effectively make use of these remedies in practice; that the magistrate judge's offices before which he challenged his administrative detention, dismissed his challenges without making a substantive assessment as to the reasons of his administrative detention; that his being deprived of liberty on the basis of abstract allegations and only for security concerns of the administration was considered lawful by the incumbent magistrate judge's offices; and that there were therefore violations of Article 19 §§ 1, 4, 6, 7, 8 and 9 and Article 40 of the Constitution.

113. In the Ministry's observations, it was stated with respect to the allegations under this heading that the ECHR considered that detention at the removal centre amounted to deprivation of liberty within the meaning of Article 5 of the Convention; that detention might be considered lawful within the meaning of Article 5 § 1 of the Convention only when it was based on one of the exceptions listed in sub-paragraphs (a) to (f); that where the 'lawfulness' of detention was in issue, including the question whether 'a procedure prescribed by law' had been followed, the Convention referred essentially to national law and laid down the obligation to conform to the substantive and procedural rules of national law; that in order to avoid arbitrariness in this respect, national law including arrangements as to deprival of liberty must be sufficiently accessible, precise and foreseeable in its application; and that deprival of liberty must be lawful under domestic law and must not contain any element of arbitrariness.

114. It was further indicated that Law no. 6458, which was adopted in order to eliminate the legal gap in this respect, embodied a detailed legal arrangement as to the foreigners' detention pending their deportation; that the applicant was placed in administrative detention by virtue of this Law; that he challenged twice his administrative detention before the magistrate judge's office; that as noted before, the nationals of the Syrian Arab Republic seeking for shelter due to the civil war were accorded temporary protection and could not be deported; that pursuant to Article 57 of Law no. 6458, the foreigners against whom a deportation order had been issued could only be placed in administrative detention; and that in the light of the above-cited provisions and basic principles, it would be for the Court, in assessing the alleged violation of the applicant's right to personal liberty and security, to determine whether he was among those who might be placed in administrative detention by means of determining his legal status.

115. The right to effective legal remedies before any judicial authority, which is safeguarded under Article 19 § 8 of the Constitution for individuals deprived of their liberty, is a *lex specialis* form of the right to prompt access to competent authority safeguarded in Article 40 of the Constitution in respect of those whose constitutional rights and

freedoms have been violated. Therefore, in the present case, the Court did not find it necessary to make a separate examination under Article 40 of the Constitution.

a. Admissibility

116. The applicant's allegations that he was placed in administrative detention at the Kumkapı Centre for deportation without a legal basis, that he was not duly informed of the processes carried out in respect of him and of the grounds thereof, that there was no effective remedy to challenge such processes are not manifestly ill-founded. Nor did the Court find any other ground to declare these complaints inadmissible. Therefore, the Court declaring this part of the application admissible proceeded with its examination as to the merits.

b. Merits

i. Alleged Unlawfulness of His Administrative Detention

117. The applicant maintained that he had been placed in administrative detention for deportation, but his administrative detention had no legal basis; that although Law no. 6458 offered the opportunity to file a challenge with the magistrate judge and there was a legal arrangement envisaging that the governor's office would regularly review the detention on monthly basis (review of the administrative detention), he was not ensured to effectively avail himself of these opportunities in practice.

118. Making a reference to the ECHR's judgments rendered on various dates, the Ministry in its observations indicated that such kind of applications were dealt with under Article 5 § 1 of the Convention. The applicant reiterated his former counterstatements against the Ministry's observations without presenting any new submissions.

119. Article 19 §§ 1, 2, 4, 8 and 9 of the Constitution reads 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 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.

…

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.

(As amended on October 3, 2001 by Article 4 of Law no. 4709) 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."

120. Article 5 §§ 1 (f), 2, 4 and 5 of the Convention is 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 and in accordance with a procedure prescribed by law:

…

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

…

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

…

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

121. In Article 19 § 1 of the Constitution, it is set out in principle that everyone has the right to personal liberty and security. Article 19 §§ 2 and 3 provides that individuals may be detained under the circumstances enumerated therein with due process of law. Therefore, the right to liberty and security may be restricted only in cases where one of the circumstances specified in this article exists (see *Ramazan Aras*, 2 July 2013, § 43).

122. In paragraph 8 of the same article, which sets forth *"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"*, the right to apply to a competent judicial authority against the deprivation of liberty is enshrined. On the other hand, in Article 5 §§ 1 and 4 of the Convention, it is set forth that everyone has the right to liberty and security, and it is also enshrined that in cases where an individual is deprived of liberty, he is entitled to apply to a tribunal

which would review the lawfulness of such deprivation and, if unlawful, be capable of ordering his release.

123. The authority to place in administrative detention is an exceptional power introduced by Article 19 of the Constitution and Article 5 of the Convention. It is accordingly possible to arrest or detain a foreigner, pending his deportation or extradition, in compliance with the procedure terms and conditions of which are indicated by law (see *Rıza Bodraa*, § 73). In such cases, administrative detention may be ordered merely for the purpose of conducting deportation or extradition processes, without the need for existence of any ground such as prevention of his committing an offence or his fleeing. However, unless deportation or extradition processes are conducted "with due diligence" pursuant to Article 19 of the Constitution, the person concerned can no longer be free and the deprivation of his liberty can no longer be said to be legitimate (for the ECHR's judgments in the similar vein, see *A. and Others/the United Kingdom*, no. 3455/05, 19 February 2009, § 164; and *Abdolkhani and Karimnia v. Turkey*, § 129).

124. As an exceptional practice leading to deprivation of liberty, administrative detention must be lawful and must not amount to an arbitrary treatment. This measure must be subject to review to a reasonable extent required by a democratic state of law; its conditions must comply with generally recognized standards and must not amount to a humiliating, degrading and inhuman treatment; and those placed in administrative detention must be provided with basic procedural rights and safeguards. The said provisions of the Constitution and Convention intend to secure a legal position with more safeguards in respect of personal liberty by seeking the condition that terms and conditions of certain circumstances whereby the individual is deprived of his liberty must be prescribed by law (see *Rıza Boudra*, § 74 and, for the ECHR's judgments in the same vein, *Abdolkhani and Karimnia v. Turkey*, § 129; and *A. and Others v. the United Kingdom*, § 164).

125. A legal arrangement to be made with a view to satisfying the requirements of Article 19 of the Constitution must explicitly set forth the procedural safeguards such as conditions of detention pending deportation, its term, extension of term, its notification to the person

concerned, available remedies against the administrative detention, access to lawyer and providing assistance of an interpreter for the person placed in administrative detention. Otherwise, it cannot be said that individuals are sufficiently protected against arbitrary deprivation of liberty and that such deprivation is lawful (see, for the ECHR's judgments in the same vein, *Abdolkhani and Karimnia v. Turkey*, § 135).

126. As indicated in the Ministry's observations, Law no. 6458 enacted on this issue sets forth that out of the foreigners in respect whom a deportation order has been issued, those *"who bear the risk of absconding or disappearing; breached the rules of entry into and exit from to Turkey; have used false or fabricated documents; have not left Turkey after the expiry of the period granted to them to leave, without an acceptable excuse; or, pose a threat to public order, public security or public health"* shall be subject to administrative detention order issued by the governor's office; that the term of administrative detention shall not exceed six months; that the governor's office shall regularly review whether the continued administrative detention is necessary on monthly basis, and when required, it shall not be necessary to wait for the expiry of 30 days for review of administrative detention; for those foreigners where administrative detention is no longer considered necessary, the administrative detention shall immediately be ended; that these foreigners may be required to comply with administrative obligations such as to reside at a given address and report to the authorities in form and periods to be specified; that the administrative detention decision, the extension of the administrative detention period and the results of the monthly regular reviews together with its consequences shall be notified to the foreigner or, to his legal representative or lawyer; that the person placed in administrative detention or his legal representative or lawyer may appeal against the detention decision before the magistrate judge that shall adjudicate the appeal within five days; and that a further appeal may be lodged with the magistrate judge.

127. It is evident that the legal arrangement prescribed in this Law explicitly affords a procedure which will be complied with in conducting the deportation process and is capable of precluding any arbitrariness. In the present case, it must be accordingly assessed whether this procedure was conducted with due diligence.

128. As inferred from the application form and annexes thereto, on 25 April 2014 the applicant was arrested and taken into custody by the police in Zeytinburnu district of İstanbul. On the very same day at 00:00 a.m. his release was ordered, by the Kızıltepe Chief Public Prosecutor's Office, following his questioning, and a report was issued in this regard. However, as also revealed from another report, the applicant was taken to the Kumkapı Centre by the Police Department of the Deportation Procedures and Removal Centre on 26 April 2014 at 02:15 a.m. for *"the missing documents to be completed on the next workday…"*. On 28 April 2014 upon the request of the Security Directorate and order of the Governor's Office, a deportation order as well as an administrative detention order pursuant to Article 57 § 3 of the same Law were issued in respect of the applicant for *"posing a threat to public order or public safety or public health"* pursuant to Article 54 of Law no. 6458. He challenged the administrative detention order before the magistrate judge's office on 19 June 2014 as well as the deportation order before the administrative court on 27 June 2014.

129. Given these procedures carried out until that day, it has been observed that the reason underlying the applicant's arrest and custody was the investigation conducted by the Kızıltepe Chief Public Prosecutor's Office; that in spite of the decision taken by the Kızıltepe Chief Public Prosecutor's Office on the same day for his release, he was taken to the Kumkapı Centre; and that he was subsequently placed in administrative detention pending his deportation which was ordered by the İstanbul Governor's Office two days later, namely on 28 April 2014. It accordingly appears that his placement in the Kumkapı Centre between 25 April 2014 00:00 a.m. when his release was ordered and 28 April 2014 –at an unknown hour- when his placement in administrative detention was ordered was based on neither a judicial nor an administrative decision.

130. It is revealed from the administrative detention order issued against the applicant, in conjunction with the deportation order, on 28 April 2014 that the applicant was considered to *"pose a threat to public order or public safety or public health"*. As noted above, application of a measure such as issuing an administrative detention order against

the person concerned pending his deportation is not necessarily conditioned upon any ground such as prevention of his commission of an offence or his absconding (see § 123). Therefore, unlike the applicant's allegation, the Kızıltepe Chief Public Prosecutor's decision ordering his release or the decision of non-prosecution issued in respect of him at the end of the investigation does not automatically render his deprivation of liberty unlawful. In this respect, as in the present case, the administration -relying on the information at its hand as well as the judicial investigations conducted against such persons- may decide to place those concerned in administrative detention for grounds such as posing a risk to public order, public safety or health or involving the risk of absconding (which may be considered less severe than the grounds required for detention during a criminal investigation) provided that it is for conducting the deportation process. It cannot be nevertheless said that a lawfully issued administrative detention order provides the administration with the opportunity to continue applying this measure for an indefinite period of time. Also during the period when the administrative detention order is in force, it is necessary to afford procedural guarantees which are explicitly prescribed by a legal arrangement and capable of reviewing whether the administrative detention measure is applied in accordance with the requirement of "due diligence", thereby precluding any risk of arbitrariness.

131. Regard being had to the present case in terms of the procedural guarantees prescribed in Article 57 of Law no. 6458 for the placement in administrative detention, it has been observed that the applicant was not informed of the ground requiring his placement at the Kumkapı Centre; that the Governor's Office failed to review on monthly basis the necessity to continue the administrative detention; that it is uncertain whether such an assessment was made; if conducted, neither the applicant nor his lawyer was notified in respect thereof; that the total administrative detention served by the applicant, namely 8 months and 10 days, exceeded the six-month period, the legal time-limit prescribed for administrative detention; and that nor was the applicant notified of the grounds justifying the extension of this six-month time-limit.

132. As to the appeal remedy before the magistrate judge that is

envisaged for the administrative detention orders, it has been observed that the applicant asserted through his challenges before the magistrate judge that in spite of the decision ordering his release, which was issued by the Kızıltepe Chief Public Prosecutor's Office, he was placed in administrative detention at the Kumkapı Centre on 25 April 2014 without being notified of the reason thereof; that the Kızıltepe Chief Public Prosecutor's Office rendered a decision of non-prosecution in respect of him; that he had applied for an international protection and that he was under temporary protection; that therefore it was not possible for him to be deported and placed in administrative detention; that he was not provided with the procedural guarantees set forth in Article 57 of Law no. 6458; that he suffered humiliation and physical and mental distress due to his detention conditions at the Kumkapı Centre; and that as the maximum period of six months had been exceeded in his case, he requested that the administrative detention order be lifted and his immediate release be ordered.

133. It appears that in rendering their decisions with final effects about the applicant's challenges, the magistrate judges took into consideration the information about the applicant which was provided by the Foreigners' Department and took the relevant steps in respect of him for "his membership of a terrorist organization"; that on 28 April 2014 his administrative detention was ordered pursuant to Article 54 (d) of Law no. 6458; and that as this administrative detention process was contrary neither to procedure nor to law, they rejected the applicant's challenges. It has been observed that these decisions did not contain any assessment as to the applicant's allegations as to his application for international protection and his status of temporary protection, which are of importance for the applicability of deportation process underlying the administrative detention order and which are decisive for the continuation of his administrative detention as well as his allegations as to the alleged incompatibility with the procedural guarantees afforded by Law no. 6458 to those whose administrative detention has been ordered.

134. Accordingly, it is evident that the procedure whereby a foreigner's detention is ordered pending his deportation, his continued detention is ordered and a time-limit is prescribed for the length of

such detention is explicitly set forth in Law no. 6458; and that the applicant was placed in administrative detention, for the purpose of conducting the deportation process, in compliance with the ground and procedure specified in this legal arrangement, except for the fact that the administrative detention order was issued with a delay of two days. However, it has been concluded that neither the relevant authority issuing the administrative detention order and envisaged to review the detention order on monthly basis nor the magistrate judges examining the applicant's challenges took into consideration the changes in his legal status, which were decisive for the application of the deportation order and which could ensure his release at an earlier date and allow for the implementation of other measures prescribed in Article 54 of Law no. 6458 (his application for international protection as well as his being granted temporary protection). Nor did they consider whether the ground for placing him in administrative detention was sufficient to order the continuation of his administrative detention. It has been accordingly considered that the administrative detention process pending the applicant's deportation cannot be said to have been conducted with "due diligence". In other words, in the present case, it cannot be concluded that the applicant was afforded necessary safeguards against the arbitrariness of deprivation of liberty and that accordingly, his administrative detention was "lawful".

135. Consequently, the Court found a violation of Article 19 § 2 of the Constitution in so far as it concerned the applicant's complaints under this heading.

ii. Alleged Failure to Be Duly Notified of the Reason for Administrative Detention

136. The applicant alleged that he had not been notified of the reason for detention when he was taken to the Kumkapı Centre. The Ministry's observations do not include any explanation in this respect.

137. In Article 19 § 4 of the Constitution, it is prescribed that 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.

138. The requirement that legal and factual facts forming a basis for the arrest and detention of an individual must be explained in a simple and non-technical language which could be easily understood would ensure the person whose restriction has been restricted to have recourse to a competent judicial authority with a view to ensuring that a decision be rendered in respect of him within a short time and, if the restriction is unlawful, he be immediately released under Article 19 § 8 of the Constitution. Content of the information notified as well as whether the notification was made promptly must be assessed according to particular circumstances of every concrete case (for the ECHR's judgment in the same vein, see *Abdolkhani and Karimnia v. Turkey*, § 136).

139. In this respect, it is set forth in Article 57 of Law no. 6458 that the administrative detention order, its prolongation as well as consequences of the monthly reviews by the Governor's Office, along with the grounds thereof, be notified to the foreigner or his representative or his lawyer; and that the foreigner placed in administrative detention or his legal representative or his lawyer may raise a challenge to these processes (see § 76).

140. In the impugned case, it appears from the written record of the interview between the applicant and his lawyer, which was held on 25 June 2014 *"He was taken under custody while walking along the road in Zeytinburnu. He was questioned by the police and then taken to the Foreigners' Department. He had been detained in Kumkapı for two months but did not know the reason thereof. The police arresting him told that they would release him following his questioning which would approximately last for two hours. However, I have not been released yet despite two months having elapsed. There were 7-8 police officers and they made me sign documents that were unknown to me"*.

141. In his petition of 27 June 2014, which was submitted to the administrative court, he claimed that he became aware of the deportation order issued against him when his lawyer requested, on 23 June 2014, a copy of the document included in his file; and that the deportation order had been notified neither to him nor to his lawyer.

142. There is no such information in the report included in the applicant's file and concerning his release ordered by the Kızıltepe Chief

Public Prosecutor's Office following his questioning and in the report concerning his being taken to the Police Department of the Deportation Procedures and Removal Centre on 26 April 2014 at 02:15 a.m.. In consideration of the fact that the decision ordering his deportation and his placement in administrative detention is dated 28 April 2014, it has been observed that it was not also possible for the applicant to be informed, in the course of his transfer to the Kumkapı Centre, of legal and factual reasons underlying his detention.

143. The applicant further alleged that although his lawyer's identity and residence was available in his file kept by the Governor's Office, he was not also notified of the reviews monthly made as to the necessity of his continued administrative detention; that therefore, he could not learn the reason of his continued detention; and that nor was he notified of the reason requiring his continued detention in spite of the expiry of the maximum period of 6 months.

144. As inferred from the above-given information, the applicant was firstly placed in detention at the Kumkapı Centre at 02:15 a.m. on 26 April 2014; that the reports and documents annexed to the application form do not contain any information indicating that the applicant had been notified thereof; that neither the Ministry nor the Ministry of Internal Affairs submitted any information on this matter; and that accordingly, there is no information indicating that he was informed of the reasons underlying his detention at the Kumkapı Centre.

145. It has been concluded that in the present case, the applicant was not notified in time of the decisions ordering his administrative detention and its continuation as well as of the information concerning himself; and that therefore, he was precluded from using the opportunities to request speedy conclusion of the proceedings regarding him as well as to request his release if his detention was unlawful.

146. For these reasons, the Court found a violation of Article 19 § 4 of the Constitution.

iii. Alleged Lack of an Effective Remedy to Challenge the Administrative Detention

147. The applicant maintained that although Law no. 6458 allowed a challenge to his administrative detention before the magistrate judge as well as regular review of this detention by the governor's office on monthly basis (review of the administrative detention), he could not effectively make use of these remedies in practice; that the magistrate judges before which he challenged his administrative detention, dismissed them without making a substantive assessment as to the reasons of his administrative detention; that his being deprived of liberty on the basis of abstract allegations and only for security concerns of the administration was considered lawful by the incumbent magistrate judges; and that there were therefore violations of Articles 19 § 8 and 40 of the Constitution.

148. Article 19 § 8 of the Constitution reads 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."*

149. Article 5 § 4 of the Convention reads 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."*

150. Article 19 § 8 of the Constitution and Article 5 § 4 of the Convention entitle a person whose freedom is restricted for whatsoever reason to apply to a court which can speedily decide on the lawfulness of his detention or administrative detention and order his release if his detention is unlawful. These provisions essentially constitute a guarantee for review of the requests for release or of the decisions ordering extension of detention through the cases brought before tribunals upon a challenge as to the unlawfulness of detention (see *Firas Aslan and Hebat Aslan*, no. 2012/1158, 21 November 2013, § 30).

151. Given the particular circumstances of the present case, Article 19 § 8 of the Constitution entitles a person who has been deprived of his liberty by way of arrest or detention to apply to a competent judicial authority as to the procedural and substantive conditions underlying the lawfulness of the deprivation of his liberty. The examination to be made by the competent judicial authority concerning the complaints raised by the person deprived of his liberty must be of judicial nature as well as afford safeguards appropriate for the challenges raised by this person (see *Firas Aslan and Hebat Aslan*, § 64).

152. Such judicial review must ensure release of the person concerned when necessary so that such a legal remedy would offer sufficient prospects of success not only in theory but also in practice. Otherwise, such remedy cannot be said to be accessible and effective (see, for the ECHR's judgment in the same vein, *Abdolkhami and Karimnia v. Turkey*, § 139).

153. As explained in detail in the section where compliance of the applicant's administrative custody with Article 19 § 2 of the Constitution is discussed, it has been concluded that Law no. 6458 provides for a procedure which would be followed and capable of preventing arbitrariness likely to occur during the enforcement of deportation orders; that however, this process was not operated in a way that would ensure conduction of administrative detention process pending deportation "with due diligence"; and that the available remedies in the present case were not capable of affording an opportunity for effective examination of the applicant's allegations as to the developments likely to ensure his release.

154. It has been further decided that the applicant was not duly notified of the reasons for his deprivation of liberty (see §§ 136-146); and that this fact in itself meant that the applicant's right to appeal against his detention was deprived of all effective substance (see for the ECHR's judgment in the same vein *Abdolkhani and Karimnia v. Turkey*, § 141). Therefore, the applicant was also deprived of the opportunity to request speedy conclusion of his case as well as his immediate release if his detention was unlawful.

155. As explained in the last two paragraphs above, it has been observed that available remedies prescribed in Law no. 6458 and capable of ensuring his release following a re-assessment to be made on the basis of the changes in applicant's legal status were not effectively operated in the present case.

156. Consequently, the Court has found a violation of the applicant's right to apply to an effective judicial authority, which is safeguarded by Article 19 § 8 of the Constitution, in relation to the substantive and procedural conditions underlying the lawfulness of his deprivation of liberty.

4. Application of Article 50 of Code no. 6216

157. Article 50 § and 2 of the Code no. 6216 on the Establishment and Rules of Procedures of the Constitutional Court reads 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 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 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. The applicant claimed 30,000 Turkish liras (TRY) as non-pecuniary damage due to distress and aguish he suffered on account of the infringement of his fundamental rights and freedoms, TRY 7,995.93 as pecuniary damage for the loss of income during the period he was placed in administrative detention and for his necessary expenses, as well as TRY 2,318 for the court expenses.

159. In the present case, the Court indicated an interim measure for the applicant and thereby halted his deportation. The Court also found violations of Article 17 § 3, 40 and 19 §§ 2, 4 and 8 of the Constitution due to the applicant's placement in administrative detention and conditions of his administrative detention. Given the particular circumstances of

the present case, the Court awarded, as non-pecuniary compensation, a net amount of TRY 10,000 to the applicant for the non-pecuniary damage which could not be compensated by merely finding a violation.

160. As the Court found no causal link between the applicant's claim for the pecuniary damage he allegedly sustained and the damage, his claim must be rejected.

161. The total court expense of TRY 1,706.10 including the court fee of TRY 206.10 and the counsel fee of TRY 1.500, which is calculated over the documents in the case file, must be reimbursed to the applicant, and a copy of the judgment would be sent to the İstanbul 1st, 2nd and 4th Magistrate Judge's Offices as well as to the 1st Chamber of the İstanbul Administrative Court.

V. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 11 November 2015 that

A. The applicant's request for concealing his identity in public documents be ACCEPTED;

B. 1. The alleged violations of the right to life and the prohibition of torture and mal-treatment due to deportation order be DECLARED INADMISSIBLE for *lack of competence ratione personae*;

2. The alleged violations of Articles 17 and 40 of the Constitution due to the conditions of his administrative detention pending deportation as well as violation of Article 19 of the Constitution for being placed unlawfully in administrative detention and lack of an effective remedy to challenge his detention be DECLARED ADMISSIBLE;

C. 1. Article 17 § 3 of the Constitution was VIOLATED in so far as it concerned the allegation that the detention conditions at the Kumkapı Centre attained the level of "treatment incompatible with human dignity";

2. Article 40 of the Constitution was VIOLATED in so far as it concerned the alleged lack of an effective remedy to raise his allegations

that his detention conditions had been in breach of Article 17 of the Constitution;

3. Article 19 § 2 of the Constitution was VIOLATED in so far as it concerned the allegation that his placement in administrative detention had no "legal" basis;

4. Article 19 § 4 of the Constitution was VIOLATED in so far as it concerned the allegation that the reason underlying the administrative detention had not been duly notified;

5. Article 19 § 8 of the Constitution was VIOLATED in so far as it concerned the alleged lack of an effective remedy whereby he could challenge the administrative detention;

D. Pursuant to Article 50 § 2 of the Code no. 6216, a net amount of TRY 10,000 be PAID to the applicant as non-pecuniary compensation, and his other claims for compensation be DISMISSED;

E. The total court expense of TRY 1,706.10 including the court fee of TRY 206.10 and the counsel fee of TRY 1.500, be REIMBURSED TO THE APPLICANT;

F. The payment be made within four months as from the date when the applicant applies to the Ministry of Finance following the notification of the judgment. In case of any default in payment, legal INTEREST ACCRUE for the period elapsing from the expiry of four-month time limit to the payment date.

G. A copy of the judgment be SENT to the İstanbul 1st, 2nd and 4th Magistrate Judge's Offices as well as to the 1st Chamber of the İstanbul Administrative Court.

RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE (ARTICLE 20)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

SERAP TORTUK

(Application no. 2013/9660)

FIRST SECTION
JUDGMENT

President	: Serruh KALELİ
Judges	: Burhan ÜSTÜN
	Hicabi DURSUN
	Erdal TERCAN
	Zühtü ARSLAN
Rapporteur	: Şebnem NEBİOĞLU ÖNER
Applicant	: Serap TORTUK
Counsel	: Att. Cavit ÇALIŞ

I. SUBJECT-MATTER OF THE APPLICATION

1. By alleging that her rights defined in Articles 2, 13, 20, 21, 22, 36 and 38 of the Constitution were violated as she was dismissed from public office as a result of a disciplinary investigation initiated regarding her upon the speculation that some videos with sexual content involving the applicant were published on the internet. The applicant requested for the delivery of a decision as to the effect that the violation is determined, that a retrial is held, that in the event that the holding of a retrial was not adjudged, the pecuniary and non-pecuniary damages which she incurred be compensated.

II. APPLICATION PROCESS

2. The application was directly lodged with the Constitutional Court on 26/12/2013. In the preliminary examination that was carried out in administrative terms, it has been determined that there is no circumstance to prevent the submission of the application to the Commission.

3. It was decided by the Third Commission of the First Section on 25/4/2014 that the file is sent to the Section in order for the examination of admissibility to be conducted by the Section.

4. On 11/7/2014, it was decided by the Head of the Section that the examination of admissibility and merits of the application be jointly carried out.

5. The facts, which are the subject matter of the application, and a copy of the application was sent to the Ministry of Justice for its opinion. The opinion letter of the Ministry of Justice of 13/8/2014 was notified to the counsel of the applicant on 26/8/2014 and no counter-opinion was submitted by the counsel of the applicant against the opinion of the Ministry of Justice.

III. THE FACTS

A. The Circumstances of the Case

6. The relevant facts as determined from the application form and the annexes thereof and the content of the trial file which is the subject matter of the application are summarized as follows:

7. Upon the speculation as to the effect that a video with sexual content which was alleged to have belonged to the applicant was present on a user account which was created on behalf of the applicant in a social media site while she was working at Gülhane Military Medical Academy (GATA) as a civilian official nurse after she graduated from the Health Vocational College of GATA, and a disciplinary investigation was initiated regarding the applicant.

8. In the expertise report of the Presidency of the Criminal Department of Gendarmerie of 1/11/2011 which was provided at the stage of investigation, as a result of the comparison of the head shot which belonged to the applicant and the videos which were present on the internet, it was stated that the conclusion was reached as to the effect that the persons in question were the same person. On the other hand in the report of 8/12/2011 which was drawn up by the same unit, it was stated that it was not technically possible to obtain the level of detail

which was required for the identification of findings such as the suture scar and skin deformation which the applicant specified in her defense and stated were formed as a result of a medical intervention, since the resolution of the relevant videos were too low.

9. Through the decision of the High Disciplinary Board of the Ministry of National Defense (File No: MÜT-11-5470-J, of 27/6/2012), in the face of the defense of the applicant as to the effect that the videos were illegally published and the publication of the mentioned videos with her consent would be contrary to the natural course of life, it was stated that even if it could be considered that the videos in question with sexual content were illegally obtained and published on her Facebook page, it was proven through established judicial practices that a disciplinary investigation could be conducted through all sorts of evidence in administrative law, that within this scope, the act of the applicant was evaluated as performing disgraceful and shameful actions in a quality and degree which does not accord with the status of a public servant. The special laws which would apply to public servants who were assigned at Turkish Armed Forces were provided in Articles 232 and 233 of the Laws of Public Servants No.657 of 14/7/1965; that therefore, it was allowed by laws that stricter rules be applied regarding the public servants who were assigned at Turkish Armed Forces in terms of disciplinary law and that while there was no reward or certificate of achievement in the personal file of the applicant, the nature of the act had the characteristic of seriously harming the reputation of Turkish Armed Forces and the penalty of dismissal from public office was imposed on the applicant in accordance with clause (g) of subparagraph (E) of Article 125(1) of the Law No.657 and Article 13(5)(3) of the Regulation on the Disciplinary Boards and Disciplinary Chiefs of the Public Servants Who Are Assigned at Turkish Armed Forces of 11/3/1983.

10. A case was filed by the applicant before the High Military Administrative Court with the request for the stay of execution and revocation of the disciplinary penalty imposed and it was claimed through the case petition and the petitions submitted at stages that the videos in question were published in a Facebook account opened on

behalf of her, that it was not known by whom the specified account was opened, that the videos did not belong to her and that the sharing of the mentioned videos by her through an account opened with her own name was contrary to the natural course of life, that even if it was accepted that the videos in question belonged to her, the videos which were secretly shot and understood to be recorded in a house setting completely consisted of actions that belonged to her private life , that in this respect, it would not be a case that they would have an impact on the disturbance of the order and discipline within the institution as they were not videos which were recorded within the institution or in a way which would be connected to her duty and that the administration could not strike the balance between the requirements of the service and public interest and personal benefit by not exercising its discretionary power in a correct manner especially at the point of imposing a lower penalty.

11. In the defense of the defendant administration, it was stated that although the videos with sexual content in question could be considered to have been illegally published, as public officials accepted to abide by the rules which the relevant legislation prescribed while starting to serve and the actions of the applicant which were the subject matter of the disciplinary investigation were disgraceful and shameful actions in a quality and degree which would not accord with the status of a public servant, the matters which she stated in her defense did not have any legal validity.

12. The High Military Administrative Court adjudged on the dismissal of the request for the stay of execution through the decision of the Presidency of the Department on Duty (File No: E.2012/419 of 23/8/2012)

13. In the opinion of the Office of the Chief Public Prosecutor of the High Military Administrative Court (File No: 2012/2862 of 10/12/21012), it was stated that it could not be determined by whom and in which way the videos which were shot in a house setting and needed to remain within the scope of the privacy of private life were published on the Facebook page and how long they remained on this page, that it could not be explained in the defense of the administration by whom and in

which way these videos were obtained, that therefore, it was concluded that the videos which were stated to have belonged to the applicant through the criminal report were obtained and published without the consent of the applicant and in an illegal manner, that within this scope, it could not be mentioned that the administration exercised its discretionary power in line with the principle of proportionality by abiding by objective criteria and by striking a balance between public interest and personal benefit and an opinion was expressed as to the ruling of the revocation of the action which was the subject matter of the case.

14. In the expertise report of the Presidency of the Criminal Department of Gendarmerie of 22/3/2013 which was provided during the trial, it was stated that, depending on the quality of the videos, it was not possible to identify the suture scar and skin deformation which the applicant claimed to be present on her body.

15. Through the decision of the Second Chamber of the High Military Administrative Court (File No:E.2012/721, K.2013/516 of 24/4/2013) , the case for revocation was dismissed by stating that the execution of public service through the agents who lost the required reputation could result in the shaking the confidence of individuals in the administration, that the disciplinary investigation was separate from the criminal prosecution in accordance with Law No.657.Therefore, an action which required the penalty of dismissal from public office did not certainly need to be a disgraceful offense in terms of criminal law, that for this reason, the term of "*disgraceful and shameful action in a quality and degree which did not accord with the status of a public servant*" had a broader scope than the disgraceful offenses stipulated in Article 48 of the Law No.657. And it was understood that the videos with sexual content in question were recorded by the applicant herself and transferred to another person through computer, therefore, the videos were opened to access to others by the applicant on the internet and that the relevant videos were received from a user account page which belonged to her, that within this scope, the evidence in question could not be considered to have been illegally obtained.

16. The request for correction brought forward by the applicant was dismissed through the decision of the Presidency of the Second Chamber of the High Military Administrative Court (File No: E.2013/961, K.2013/1431 of 4/12/2013) and the decision was notified to the counsel of the applicant on 18/12/2013.

17. An individual application was lodged on 26/12/2013.

B. Relevant Law

18. Clause (g) of subparagraph (E) of Article 125(1) of the Law No.657 with the side heading ''*Types of disciplinary penalties and actions and cases to which penalty will be imposed*'' 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:*
>
> *...*
>
> *E - Dismissal from public office: Shall be dismissal from public office without being appointed again.*
>
> *The actions and cases which require the penalty of dismissal from public office are as follows:*
>
> *….*
>
> *g) Performing disgraceful and shameful actions in a quality and degree which do not accord with the status of a public servant."*

19. Article 125(3) of the Law No.657 with the side heading "*Types of disciplinary penalties and actions and cases to which penalty will be imposed*" is as follows:

> *"The penalty which is one degree lower can be imposed with regard to the penalties to be imposed on the public servants whose works during their previous services are positive and who have received a reward or certificate of achievement ."*

20. Article 13(5)(g) of the Regulation on the Disciplinary Boards and Disciplinary Chiefs of the Public Servants Who Are Assigned at Turkish Armed Forces of 11/3/1983 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:

...

5 - Dismissal from public office: It shall be dismissal from public office without being appointed again.

The actions and cases which require the penalty of dismissal from public office are as follows:

….

g) Performing disgraceful and shameful actions in a quality and degree which do not accord with the status of a public servant."

IV. EXAMINATION AND GROUNDS

21. The individual application of the applicant (App. No: 2013/9660 of 26/12/2013) was examined during the session held by the court on 21/1/2015 and the following was ordered and adjudged:

A. The Applicant's Allegations

22. The applicant alleged that her rights defined in Articles 2, 13, 20, 21, 22, 36 and 38 of the Constitution were violated by stating that she was dismissed from public office as a result of an investigation which was initiated regarding her upon the publication of videos with sexual content on the Internet, allegedly belonging to her, without her consent. The applicant also alleged that the relevant videos did not belong to her, that however, even if it were to be assumed that these videos belonged to her, she was punished because of an action which occurred in her private life and did not take place while on duty nor was related to her duty. It was not certain that how and by whom the videos which allegedly belonged to her were shot, when and by whom they were shared on the internet, therefore, the videos which were published without her consent and information were taken into consideration in the administrative investigation and trial regarding her although they qualified as evidence obtained by illegal means. Even if it was thought that the videos in

question belonged to her and were recorded by her, the sharing of these videos by her on the internet would be contrary to the natural course of life, that for this reason, the sharing of the mentioned videos on the internet would be contrary to law and needed to be considered as illegal evidence in this respect, .The possibility of obtaining the mentioned videos through photomontage by combining the figures of face and naked woman was present and that the request that this doubt needed to be eliminated was not met at the stage of trial The applicant alleged on that she was dismissed from public office due to an act in the form of allowing her videos with sexual content to be shot in a way which would lead to the result of the incident gaining publicity by being published a social media site. However, the acts which were the subject matter of the disciplinary trial could be related to the period before she was admitted to public service and that there was no such reason as the publication of obscene videos among the cases which prevented admission to public service in Article 48 of the Law No.657, therefore, in the face of the possibility that the acts which were the subject matter of trial could belong to the process before the public service, they could not form the basis for the penalty of dismissal from public office and the mentioned action was voidable in this respect. Moreover, the action could be statute barred in terms of the initiation of a disciplinary investigation and the imposition of a disciplinary penalty in this respect, that the phrase of "*disgraceful and shameful actions*" stipulated in clause (g) of subparagraph (E) of Article 125(1) of the Law No. 657 and considered as the legal basis of the disciplinary penalty was limited to the offenses listed in clause (5) of subparagraph (A) of Article 48(1) of the same Law which specified the general and special conditions to be sought in those who would be admitted to public service and that this scope could not be extended with interpretation. Within this context, it was not legally possible to impose the penalty of dismissal from public office regarding the applicant by considering the actions performed as disgraceful and shameful actions in a quality and degree which did not accord with the status of a public servant although they were not listed among the offenses stipulated in Article 48 of the Law and that it did not accord with the principle of the state of law. The disciplinary penalty imposed against her action did not comply with the principle of proportionality and that her right to

defense was restricted due to the fact that some documents which were taken as the basis for the judgment were not notified to her.

B. The Constitutional Court's Assessment

23. It was asserted by the applicant that her rights defined in Articles 2, 13, 20, 21, 22, 36 and 38 of the Constitution were violated. 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. In the present case, it was considered to be appropriate to evaluate it in terms of Articles 20, 36 and 38 of the Constitution depends on the nature of the claims of violation.

1. Admissibility

24. In the examination conducted, since it is understood the application is not manifestly ill-founded, and there is no other reason which would require a decision of inadmissibility, it must be decided that the application is admissible.

2. Merits

25. The applicant alleged that her rights defined in Articles 20, 36 and 38 of the Constitution were violated due to the fact that she received the penalty of dismissal from public office as a result of a disciplinary investigation initiated regarding her upon the speculation that her videos with sexual content were on the internet.

26. In the opinion letter of the Ministry of Justice, it was stated that one of the legal interests which were protected within the scope of Article 8 of the European Convention on Human Rights (Convention) and Article 20 of the Constitution was "*the right to privacy*" and that this right also covered the ability of an individual to control the information related to him/her, that for this reason, the revelation and dissemination of any information that belonged to an individual without his/her own consent would result in the violation of the right to privacy. However, the disciplinary sanction on the applicant was imposed by the institution to which she was affiliated on the basis of a need that met a social reality and that while imposing the penalty of dismissal from public office

regarding the applicant, the fact that it was not deemed appropriate to impose a lower penalty by accepting that the nature of the action had the characteristic of seriously harming the reputation of Turkish Armed Forces while there was no reward or certificate of achievement in her personnel file either needed to be taken into consideration in the evaluation of the matter of proportionality.

27. According to the Article 148(3) of the Constitution and Article 45(1) of the Law on the Establishment and Trial Procedures of the Constitutional Court No. 6216 of 30/11/2011, in order for the merits of an individual application lodged with the Constitutional Court to be examined, it is necessary that the right which is claimed to be intervened by the public power be enshrined in the Constitution and that it also be covered by the Convention and the additional protocols to which Turkey is a party. 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 (B. No. 2012/1049, 26/3/2013, § 18).

28. The right to privacy of private life which is the subject of the claim of violation of the applicant is regulated in Article 20 of the Constitution and Article 8 of the Convention.

29. Article 20 of the Constitution with the side heading of "*Privacy of private life*" 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.*
>
> *Unless there exists a decision duly given by a judge on one or several of the grounds of national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms of others, or unless there exists a written order of an agency authorized by law, in cases where delay is prejudicial, again on the above-mentioned grounds, neither the person, nor the private papers, nor belongings of an individual shall be searched nor shall they be seized. The decision of the competent authority shall be submitted for the approval of the judge having jurisdiction within twenty-four hours. The judge shall*

announce his decision within forty-eight hours from the time of seizure; otherwise, seizure shall automatically be lifted.

Everyone has the right to request the protection of his/her personal data. This right includes being informed of, having access to and requesting the correction and deletion of his/her personal data, and to be informed whether these are used in consistency with envisaged objectives Personal data can be processed only in cases envisaged by law or by the person's explicit consent. The principles and procedures regarding the protection of personal data shall be laid down in law. ."

30. 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 well-being 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."

31. The concept of private life is a broad concept which does not have a complete definition. In this context, the legal value which is protected is, in essence, individual independence and while, on one hand, this protection refers to the fact that everyone has the right to live in an environment which is away from all undesired interventions and special for them, on the other hand, it is clear that the concept of private life cannot be reduced to the concept of everyone maintaining their personal life as he or she desires and keeping the outer world separate from this circle. In this respect, Article 20 of the Constitution guarantees the maintenance of a private social life (B. No. 2013/1614, 3/4/2014, § 31).

32. One of the legal interests which are protected within the scope of the right to respect for private life is the right to privacy of an individual. However, the right to privacy does not only consist of the right to be left alone, but this right also covers the legal interest of an individual

to be able to control the information regarding him/her. An individual has an interest in the fact that any information in relation to him/her cannot be revealed, disseminated without his/her own consent, that this information cannot be accessed by others and used in contrary to his/her consent, that in short, this information remains confidential. This matter points to the right of an individual to determine the future of the information regarding him/her (AYM, E. 2009/1, K. 2011/82, K.T. 18/5/2011; E. 1986/24, K. 1987/7, K.T. 31/3/1987).

33. With this aspect, private life points to a conceptual and physical area in which individuals can primarily develop their own individuality and enter into the most private relations with other individuals. This area of privacy covers a private area in which the State cannot intervene or can intervene at a minimum level for legitimate purposes. The place of the right to privacy of an individual is, as a rule, the private area. However, the right to the protection of private life can also extend to public space in certain cases. Because, the concept of legitimate expectation allows for the protection of the privacy of individuals also in public space in certain circumstances (B. No. 2013/1614, 3/4/2014, §§ 33-34).

34. 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 (*Koch v. Germany*, App. No.497/09, 19/7/2012, § 51).

35. Nevertheless, in the case-law of the review bodies of the Convention, it is understood that the concept of "*the development and realization of the personality of an individual*" was taken as the basis for the determination of the scope of the right to respect for private life. In the face of the fact that the right to the protection of private life cannot only be reduced to the right to privacy, many legal interests which are consistent with the development of personality in a freely have been included in the scope of this right. However, there is no doubt that actions and behaviors with sexual content which take place especially in private are included in this field.

36. In Article 20 of the Constitution, it is stated that everyone has the right to respect for his or her private life and the privacy of private life cannot be violated and the right to privacy of private life included in this regulation corresponds to the right guaranteed within the scope of the right to respect for private life within the scope of Article 8 of the Convention. It is clear that the privacy area of an individual and his/her actions and behaviors that take place in this area are also within the scope of the private life of the individual. The right to privacy and the protection of the confidentiality of the information as regards this area are also considered by the Constitutional Court to be within the scope of Article 20 of the Constitution (AYM, E. 2009/1, K. 2011/82, K.T. 18/5/2011; E. 1986/24, K. 1987/7, K.T. 31/3/1987).

37. In terms of the present case, it is clear that the applicant was not dismissed from public office as a result of a disciplinary investigation which was conducted for professional purposes. As understood from the process of disciplinary investigation, the decision of dismissal from public office and the decision of the court of instance, the behaviors of the applicant within the scope of her private life were particularly decisive in the process which is the subject of the application. Under these conditions, it is clear that the decision of dismissal from public office which was issued by showing elements belonging to her private life as justification constituted an intervention in the right to privacy of private life of the applicant.

38. In Article 20 of the Constitution, while some reasons for restriction which are understood to be relevant to all aspects of this right are included in terms of the right to privacy of private life, even the rights for which no specific reason for restriction has been envisaged have some restrictions stemming from their nature, moreover, it can be possible to restrict these rights also based on the rules included in other Articles of the Constitution. At this point, the guarantee criteria included under Article 13 of the Constitution bear functional quality (B. No. 2013/2187, 19/12/2013, § 33).

39. Article 13 of the Constitution with the side heading "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."*

40. 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 the criteria which the lawmaker takes into consideration and 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 law rules 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 20 of the Constitution (B. No. 2013/2187, 19/12/2013, § 35).

41. The criterion of restricting rights and freedoms with the law has an important place in the constitutional jurisdiction. 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 (App. No. 2013/2187, 19/12/2013, § 36).

42. It is understood that the disciplinary sanction which is the subject matter of the application and the ongoing judicial process were conducted on the basis of clause (g) of subparagraph (E) of Article 125(1) of the Law No.657 and Article 13(5) (g) of the Regulation on the Disciplinary Boards and Disciplinary Chiefs of the Public Servants Who Are Assigned at Turkish Armed Forces.

43. It is clear that disciplinary sanctions are established in order to sustain the order of a public or private organization, to ensure that it works in an efficient, fast and useful manner, to protect its honor and reputation. The aim of disciplinary penalties especially in terms of individuals who perform the public duty is to attach a public

officer to the duty, to ensure that public service is duly performed and accordingly, to ensure the peace of institutions. Disciplinary penalties are imposed in order to ensure that public services are duly performed and that public servants act in harmony within a hierarchical order. The phrase "*to ensure that public services are duly performed ...*" stipulated in Article 124(2) of the Law No.657 also puts forth the indicated aim of disciplinary penalties. In this context, the imposition of some restrictions especially in relation to the actions and behaviors of public officers as a result of sanctions as regards the disciplinary law depend on the indicated legitimate bases.

44. However, in spite of the indicated legitimate bases, it is obligatory to establish a proportion between an intervention made in the fundamental rights of an individual and the legitimate aim sought with this intervention. In Article 13 of the Constitution, three separate measures of guarantee are also included in the form of the elements of requirement, the essence of a right and proportionality in a democratic society for being considered in the evaluation of this proportion.

45. The applicant claims that the investigation conducted on her private life and her dismissal from public office as a result of this constituted a disproportionate intervention in the right to privacy of private life guaranteed in Article 20 of the Constitution, states that as also understood from the documents included in the file of the disciplinary investigation initiated on her, this investigation did not cover the activities within the scope of her duty, that there were elements as regards private life such as actions with sexual content which were claimed to have taken place in her area of privacy behind the investigation in question. She claims that the investigation in question, with this aspect, was directly about her private life, that moreover, the type of administrative sanction imposed on her, that is, her dismissal from public office constituted an extremely severe penalty and that the option of imposing a lower penalty was ignored.

46. Modern democracies are regimes in which fundamental rights and freedoms are ensured and guaranteed in the broadest manner. It cannot be accepted that the restrictions which bear prejudice to the essence of

fundamental rights and freedoms and restrict them in a considerable manner or render them completely non-exercisable accord with the requirements of a democratic societal order. As the aim of a democratic state of law is to ensure that individuals exercise rights and freedoms in the broadest manner, it is necessary to predicate on an approach which brings the individual forward in legal regulations. For this reason, not only the measure of the imposed restrictions but also all elements thereof such as its conditions, reason, method and the legal remedies which are prescribed against the restriction should be evaluated within the scope of a democratic societal order.

47. The essence of a right means the core which, when violated, renders the fundamental right and freedom in question meaningless and with this aspect, provides a minimum inviolable area of guarantee for the individual in terms of each fundamental right. In this framework, it should be accepted that the restrictions which considerably make the exercise of a right difficult, make the right non-exercisable or remove it violates the essence of the right. In the context of the right to privacy of private life, it is clear that the interventions which bear the consequence of the removal of this right, the rendering thereof non-exercisable or making the exercise thereof extremely difficult will also violate the essence of this right. The aim of the principle of proportionality is the prevention of the restriction of fundamental rights and freedoms more than necessary. In accordance with the judgments of the Constitutional Court, the principle of proportionality covers the elements of proportionality that define the availability which means the fact that the means used for restriction is suitable for achieving the aim of restriction, the obligation which points the obligation of the restrictive measure in order to achieve the aim of restriction and the fact that the means and aim are not within a disproportionate measure and the fact that the restriction does not impose an immoderate measure (AYM, E.2012/100, K.2013/84, K.T. 4/7/2013).

48. At this point, in order to determine whether or not a restriction has been made by complying with the indicated criteria, in the face of the legitimate aim which formed the basis of the measure which is claimed to have constituted an intervention and have violated the

right to privacy of private life, it is obligatory to determine whether or not a fair balance was struck between the consideration of the severity of the sacrifice which was incumbent upon the individual and the protection of the requirements of the pursued general interest and the fundamental right of the individual. This balance which is valid in terms of the restriction of all fundamental rights and freedoms stipulated in the Constitution through Article 13 of the Constitution should also be taken into account in the restriction of the right to privacy of private life. While it is possible to restrict the right to privacy of private life, there should be no disproportionality between the legitimate aim prescribed in the restriction and the means of restriction, attention should be paid to striking a fair balance between the general interest which can be achieved by the limitation and the loss of the individual whose fundamental right and freedom is restricted (B. No. 2013/1614, 3/4/2014, § 49).

49. Public authorities have discretionary power in two separate stages of the process of the restriction of a right. The first of these is the selection of the criterion of restriction. The second one is the requirement of the restriction made in order to achieve the legitimate aim pursued within the framework of the relevant criterion of restriction. However, this discretionary power granted to public authorities is not unlimited and it is necessary that the measure which is the subject of the claim of a violation accord with the constitutional fundamental rights and freedoms, that is, the arguments used for the legitimization of the intervention be available, obligatory and proportionate.

50. The indicated discretionary power has a separate scope which is specific for each case. Depending on the elements such as the quality of the guaranteed right or legal benefit and the importance thereof in terms of an individual, the scope of this authority becomes narrow or wide.

51. When important rights or legal interests which belong to the area of privacy or are related to the existence or identity of an individual are in question, discretionary power is narrower. In this context, when the aspects of the right to privacy of private life such as the right to sexuality and the right to privacy are in question, it is necessary to keep discretionary power more narrow and it is obligatory that particularly

serious reasons be present for interventions in these areas (For a decision of the ECtHR in the same vein, see *Dudgeon v. the United Kingdom*, App. No. 7525/76, 22/10/1981, § 52). Because, it is clear that the confidentiality of the area of privacy and the right to respect for this area are one of the most necessary and fundamental rights for the security, existence, and identity of an individual.

52. On the other hand, it is natural that public authorities have a broad discretionary power which varies depending on the quality of the activity and the aim of the restriction in an area such as personnel regime which is subject to strict rules and conditions. In this context, in the face of the fact that the concept of private life does not only point to the area of privacy, but it guarantees that individuals sustain a private social life, it is clear that especially public officials can be subjected to restrictions in terms of some elements of private life which become integrated with their professional lives. Nevertheless, these individuals, as in the restrictions prescribed for other individuals, need to benefit from minimum criteria of guarantee (For a decision of the ECtHR in the same vein, see *Ozpınar v. Turkey*, App. No. 20999/04, 19/10/2010). It is obligatory to take into account whether or not a fair balance has been struck in particular between the right to privacy of private life which is one of the fundamental rights of an individual and the legitimate interest in ensuring that public service is performed in accordance with the aforementioned bases.

53. Although it is clear that the disciplinary sanction which is the subject of the application is based on the aforementioned legitimate bases, it is necessary that the restriction which is understood to have constituted an intervention in the private life of the individual not render the indicated right by violating its essence. At this point, specifically for the present case, it should be examined whether or not a fair balance was struck between the individual interest of the applicant within the scope of Article 20 of the Constitution and the interest of public or similarly, the interest of another individual.

54. From the evaluation of the administrative and judicial process which is the subject matter of the application, it is seen that upon

the speculation as to the effect that a video with sexual content which was claimed to have belonged to the applicant was present on a user account which was opened on behalf of the applicant , a disciplinary investigation was initiated on her, that in the expert report received in the process of disciplinary investigation, as a result of the comparison of the relevant videos and the head shot of the applicant, a conclusion was reported as to the effect that the persons in the video and the photo were the same person, that however, in the expert report which was provided within the scope of the request of the applicant that a detailed analysis be conducted by considering her body lines and the scars which she claimed to be present on her body, it was established that it was not technically possible to conduct a detailed analysis due to the quality of the videos whose resolution is low, that, through the decision of the High Disciplinary Board of the Ministry of National Defense of 27/6/2012, even if it could be considered that the videos in question were illegally obtained and published on her Facebook page, it was proven through established judicial practices that a disciplinary investigation could be conducted through all sorts of evidence in administrative law, that within this scope, the act of the applicant was evaluated as performing disgraceful and shameful actions in a quality and degree which did not accord with the status of a public servant, that the applicant was sentenced to the penalty of dismissal from public office.

55. It is understood that in the opinion of the Office of the Chief Public Prosecutor submitted within the scope of the case filed by the applicant with the request for the revocation of the relevant action, it was concluded that especially the mentioned videos were obtained and published in contrary to the consent of the applicant and it was determined that the videos in question were shot in a house setting, that in the defense of the administration, it was stated that although the videos with sexual content in question could be considered to have been illegally published, as public officials accepted to abide by the rules which the relevant legislation prescribed while starting to serve and the actions of the applicant which were the subject matter of the disciplinary investigation were disgraceful and shameful actions in a quality and degree which would not accord with the status of a public servant,

the matters which she stated in her defense did not have any legal validity, that in the decision of the Second Chamber of the High Military Administrative Court of 24/4/2013, it was stated that it was understood that the videos in question were recorded by the applicant herself and transferred to another person through computer, that therefore, the videos were opened to access to others by the applicant in the internet environment and that the relevant videos were received from a user account page which belonged to her, that thus, the evidence could not be considered to have been illegally obtained and that the request of the applicant was dismissed and that the request for correction which had been filed was not accepted, either.

56. The right to privacy primarily corresponds to a spatial area and this area is the house and premises of an individual. It is necessary to evaluate in the evidence of some criteria whether or not the measures which affect an individual outside this place will be examined within the scope of the right to privacy of private life. In this respect, the right to privacy which is within the scope of guarantee of Article 20 of the Constitution, as a rule, does not extend to public space. When an individual gets into public space, that is, becomes visible, the right to privacy protected in the sub-category of the right to privacy of private life, as a rule, cannot be asserted. In this context, although the area of applicability of the right to privacy within the scope of the right to privacy of private life is, as a rule, the area of private life, some public spaces or contexts in which individuals interact with other persons can also be within the scope of the right to the protection of private life. Moreover, the right to privacy of private life provides an individual with a personal area in which s/he can act freely and develop and realize his/her personality. Therefore, the fact that an individual opens his/her private life on his/her own automatically decreases his/her right to respect for private life to a certain extent (App. No. 2013/1614, 3/4/2014, §§ 62-63).

57. In nearly all of the justifications of the decisions issued in the administrative and judicial processes which are the subject matter of the application, it is seen that it was stated that although the videos with sexual content in question could be considered to have been illegally

published, as public officials accepted to abide by the rules which the relevant legislation prescribed while starting to serve and the actions of the applicant which were the subject matter of the disciplinary investigation were disgraceful and shameful actions in a quality and degree which would not accord with the status of a public servant, the matters which she stated in her defense did not have any legal validity and that it was stated that the videos in question covered the actions of sexual content which were understood to have been recorded in a house setting.

58. The applicant who bears a certain responsibility as a public servant was involved in the system of discipline and attitude arising out of being a public official on her own will by accepting this duty. This system which depends on the aforementioned bases, due to its nature, imposes on the rights and freedoms of an individual restrictions which cannot be imposed on any citizen. Because public interest expects full compliance from public officials in terms of the professional and ethical rules with which they need to comply. It is clear that the behaviors of the applicant which are contrary to professional and ethical rules especially in terms of some elements of private life which can be associated with her professional life may have a certain effect on the reputation of public officials and, in this context, of public service. However, although it was stated in the decision of the court of first instance that it was understood that the videos in question were recorded by the applicant herself and transferred to another person through computer, that therefore, the videos were opened to access to others by the applicant in the internet environment and that the relevant videos were received from a user account page which belonged to her and the title of the applicant as a public official was emphasized in the justifications of the relevant disciplinary decisions and judicial decision, it is understood that the actions and behaviors of the applicant which are the subject matter of the present case are related to the actions of private life which took place in her field of privacy and for which no finding was established as to the effect that they were revealed with her consent.

59. The applicant was obliged to respond to the claims which were not only related to her professional life but also her private life in the

process of disciplinary investigation which was concluded with the penalty of dismissal from public office. In this context, it is seen that the claims directed towards the applicant were not only related to the execution of her duty, but rather related to the actions of private life which took place in her area of privacy. Therefore, the scope of the investigation which is the subject of dispute exceeds the limits of professional life. In this context, it is understood that it was determined, in the justifications of the decisions of the administration and judicial authorities, that the act which the applicant performed by way of shooting and publishing the videos which belonged to her actions with sexual content that were stated to have been recorded and transferred by the applicant to another person through computer, to have been opened to access to others by the applicant in the internet environment and to have been received from a user account page that belonged to her were within the scope of the disgraceful and shameful actions in a quality and degree which did not accord with the status of a public servant and that the results of the decisions were predicated on these justifications, that consequently, the disciplinary action which is the subject of the application and the behaviors which were made the subject of the judicial process were, in essence, the actions of private life which were not relevant to professional activity, but were included in her field of privacy .

60. It is clear that especially public officials can be subjected to restrictions in terms of some elements of private life which also become integrated with their professional lives. Nevertheless, in the face of the fact that the courses of action with similar characteristics have been included in which the disciplinary penalty to be prescribed can be determined through the appraisal by the administration of the severity and the level of importance there between in the regulation as to the effect that exhibiting attitudes and behaviors which are not suitable for the solemnity of a Public servant requires the penalty of warning, that exhibiting behaviors which have the quality of destroying the reputation and the feeling of trust of a Public servant outside service requires the penalty of condemnation, that performing disgraceful and shameful actions in a quality and degree which do not accord with the status of a

public servant requires the penalty of dismissal from public office within the scope of the acts and cases which require a disciplinary penalty stipulated in Article 125 of the Law No.657 and that similar regulations are also included in the provisions of the relevant Regulation, it is understood that the fact that the applicant received the penalty of dismissal from public office as a result of the disciplinary process on her has created an important effect on her professional life as well as her economic future as she was deprived of her main source of income and that it has become more important.

61. When the aforementioned disciplinary process and the justifications of the decisions of the administrative and judicial authorities are taken into consideration, as it is understood that, within the scope of the disciplinary penalty which was imposed on the applicant, a fair balance could not be struck between the general benefit which could be achieved by restriction and the loss of the individual whose fundamental right and freedom was restricted, it should be decided that the applicant's right to privacy of private life guaranteed in Article 20 of the Constitution was violated.

62. As it has been decided, by concluding that the applicant's right to privacy of private life guaranteed in Article 20 of the Constitution was violated, that the file be sent to the relevant Court to hold a retrial in order for the violation and the consequences thereof to be removed (§ 66), it has not been deemed necessary to separately evaluate the claim that the rights defined in Articles 36 and 38 of the Constitution were violated.

3. In Terms of Article 50 of the Law No.6216

63. The applicant requested that a judgment be delivered on the holding of a retrial on the dispute and, in the event that no legal benefit was observed in the holding of a retrial, pecuniary damages of TRY 303.148,00 and non-pecuniary damages of TRY 50.000,00 be adjudged.

64. In the opinion of the Ministry of Justice, no opinion was expressed as regards the request of the applicant for compensation.

65. Article 50(2) of Law No.6216 with the side heading *''Judgments"* is as follows:

> *"If the determined violation arises out of a court judgment, 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 judgment 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 judgment of violation."*

66. As it has been determined in the current application that Article 20 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.

67. Even though a request for pecuniary and non-pecuniary damages was filed by the applicant, as it has been understood that the fact that a judgment be delivered to send the file to the relevant Court for holding a retrial constituted a sufficient compensation with a view to the claim of violation of the applicant, it should be decided that the requests of the applicant for compensation be dismissed.

68. 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 held **UNANIMOUSLY** on 21/1/2015;

A. That the applicant's

1. The allegation as to the fact that Article 20 of the Constitution was violated is ADMISSIBLE,

2. Right to privacy of private life enshrined in Article 20 of the Constitution WAS VIOLATED,

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

C. That the requests of the applicant for compensation be REJECTED,

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,

E. That the payment 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.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

MARCUS FRANK CERNY

(Application no. 2013/5126)

PLENARY
JUDGMENT

President	: Zühtü ARSLAN
Vice-President	: Alparslan ALTAN
Vice-President	: Burhan ÜSTÜN
Justices	: Serdar ÖZGÜLDÜR
	Serruh KALELİ
	Osman Alifeyyaz PAKSÜT
	Recep KÖMÜRCÜ
	Engin YILDIRIM
	Nuri NECİPOĞLU
	Hicabi DURSUN
	Celal Mümtaz AKINCI
	Erdal TERCAN
	Muammer TOPAL
	M. Emin KUZ
	Hasan Tahsin GÖKCAN
	Kadir ÖZKAYA
	Rıdvan GÜLEÇ
Rapporteur	: Şebnem NEBİOĞLU ÖNER
Applicant	: Marcus Frank CERNY
Counsel	: Att. Nuri ALPER KEŞMER

I. SUBJECT-MATTEROF THE APPLICATION

1. The application is regarding the allegation that the right to respect for family life was violated since the application filed within the scope of the Convention of 25 October 1980 on the Civil Aspects of International

Child Abduction (Hague Convention) was dismissed upon the fact that a child in common was taken away by his/her mother from the United States of America (USA) and was not allowed to return.

II. APPLICATION PROCESS

2. The application was directly lodged with the Constitutional Court on 10/7/2013. In the preliminary examination held on administrative terms, it has been determined that there is no circumstance to prevent the submission of the application to the Commission.

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

4. In the session held by the Section on 18/2/2014, it was ruled that the examination of admissibility and merits for the application be jointly carried out.

5. The facts, which are the subject matter of the application, were notified to the Ministry of Justice and a copy of the application documents was sent for an opinion. The opinion letter of the Ministry of Justice of 21/4/2014 was notified to the counsel of the applicant on 29/4/2014 and no counter-opinion was submitted by the applicant against the opinion of the Ministry of Justice.

6. Since it was deemed necessary during the meeting held by the Second Section on 25/6/2015 that the application is ruled upon by the Plenary Assembly due to its nature, it was ruled that it be referred to the Plenary Assembly as per Article 28(3) of the Internal Regulation of the Constitutional Court.

III. THE FACTS

A. The Circumstances of the Case

7. The relevant facts as determined from the application form and the annexes thereof and the content of the trial file which is the subject matter of the application are summarized as follows:

8. The applicant is a citizen of the USA and he and A.A. who is a Turkish citizen have a child in common who was born on 31/5/2011.

9. An application was lodged by the applicant with the Department of State with regard to the initiation of return procedures within the scope of the Hague Convention with the allegation that the child in common was removed by his/her mother from the USA which was his/her habitual residence and was not allowed to return.

10. The request in question was conveyed by the Department of State of the USA to the Directorate General for International Law and Foreign Relations (Directorate General) of the Ministry of Justice which is the Turkish Central Authority within the scope of the Hague Convention.

11. On 19/1/2012, the request was conveyed by the Directorate General to the Chief Public Prosecutor's Office of Ankara for the initiation of the return procedures of the child.

12. An action for return was filed by the Chief Public Prosecutor's Office of Ankara through the indictment of 11/6/2012 based on the file of the 7th Family Court of Ankara No. E.2012/757.

13. Following the preliminary proceedings, a report was drawn up by the court on 16/6/2012, two hearings were held and the case was dismissed with a judgment (File No: E.2012/757, K.2912/1403 of 1/10/2012). As the reasoning of dismissal, it was stated that the parties had a child in common, that the parties lived in the USA and that the defendant woman came to Turkey with the child in common for her sister's wedding. It was also stated that thereupon, she filed for divorce based on the file of the 9th Family Court of Ankara No. E.2011/1268, that within the scope of the relevant case, it was ruled that temporary custody of the child is granted to the mother and that a personal relation is established between the applicant father and the child. It was stated that the conditions for prompt return as regulated in Article 12 of the Hague Convention did not materialize and the dismissal of the request was ruled upon by considering the age of the child and his/her dependence on the mother by a complete personal conviction.

14. As the judgment was appealed, it was approved through the judgment of the 2nd Civil Chamber of the Court of Cassation No. E.2012/26180, K.2013/3223 dated 12/2/2013 and it was stated in the justification of the judgment that it was ruled to dismiss the appeal as the objections which were not deemed as appropriate as it was understood from the scope of the file that the conditions for refusing to return did not materialize and that Article 13(1)(b) of the Hague Convention was taken into consideration.

15. The request for correction of judgment was dismissed through the judgment of the 2nd Civil Chamber of the Court of Cassation (File No: E.2013/9169, K.2013/13947 of 16/5/2013) and the judgment of dismissal was notified to the counsel of the applicant on 27/6/2013.

16. An individual application was lodged on 10/7/2013.

17. As a result of the process of return executed within the scope of the Hague Convention as well as the divorce filed by the applicant's wife based on the file of the 9th Family Court of Ankara No. E.2011/1268, it was ruled that the parties divorce, custody of the child in common be granted to the mother and that a personal relation be established between the applicant father and the child and the judgment became final on 13/10/2014 through the instance courts.

B. Relevant Law

18. Article 1 of the Law on the Civil Aspects and Scope of International Child Abduction No. 5717 of 22/11/2007 with the side heading *"Objective"* is as follows:

> *"The objective of the law is to arrange the procedures and principles in the implementation of the Civil Aspects of the International Child Abduction Convention dated October 25, 1980, in returning the wrongfully removed or retained children to their habitual residence in any Contracting State. "*

19. Article 2 of the Law No. 5717 with the side heading "*Scope*" is as follows:

"This Law shall apply to the children who are present in one of the contracting countries where they are habitually resident just before the violation of the rights to custody or to the establishment of a personal relation which are granted to a person or an institution for use by himself/herself/itself or together and were actually exercised when removal or retention occurred."

20. Articles 12, 13, 14 and 15 of the Law No. 5717

21. Article 1 of the Hague Convention is as follows:

"The objects of the present Convention are:

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State;

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."

22. The relevant part of Article 3 of the Hague Convention is as follows:

"The removal or the retention of a child is to be considered wrongful where:

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

23. Article 12(1-2) of the Hague Convention are as follows:

"Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child unless it is demonstrated that the child is now settled in its new environment."

24. Article 13 of the Hague Convention is as follows:

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or another body which opposes its return establishes that:

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

25. Articles 16 and 19 of the Hague Convention

IV. EXAMINATION AND GROUNDS

26. The individual application of the applicant (App.No: 2013/5126 of 10/7/2013) was examined during the session held by the court on 2/7/2015 and the following was ordered and adjudged:

A. The Applicant's Allegations

27. The applicant stated that in the judicial judgment delivered upon the application filed by him within the scope of the Hague Convention due to his wife, who is a Turkish citizen, removing and retaining their child in common from the USA, which was his/her country of habitual residence, was dismissed on the ground that the conditions for return did not materialize and the child needed the affection and attention of the mother because of his/her age. He also stated that the judgment was delivered without examining the allegations of the parties with diligence during the trial, without conducting the necessary expert examination and hearing the parties. He stated that while the exceptions in relation to return as specified in the Hague Convention were not taken into consideration in the judgment delivered, the local public prosecutor's participation in the proceedings on behalf of the Ministry of Justice was not ensured, either. He stated that although an exception with regard to the age of the child and the need for the affection and attention of the mother was not listed among the exceptions for the judgment of return in the Hague Convention, this matter was specified in the reasoning of the judgment. The applicant stated that the main purpose of the Hague Convention was to protect the right of a child, who was wrongfully removed from his/her habitual residence, to establish a direct and personal relationship with his/her mother and father by way of the prompt return of the child and preventing international child abduction. However, the provisions of the Hague Convention aimed at preventing the legitimization of similar actions were weakened due to the relevant applications of the instance courts which extended the scope of the cases that constituted as exceptions for return. He also stated that it was necessary to deliver a judgment in line with the provisions of the Hague Convention that was a decree in the force of law as per Article 90 of the Constitution, that the Hague Convention aimed to execute legal

proceedings with regard to custody and personal relation at the place of habitual residence of the child without interrupting the relations between the mother, father and child, that however, the provisions of the Hague Convention on merits and procedure which needed to be applied in the incident by the courts of instance were not taken into consideration. Consequently, the applicant stated that his personal relationship with his child was prevented. He alleged that his rights defined in Articles 36, 41, 90 and 138 of the Constitution were violated.

B. The Constitutional Court's Assessment

28. The Constitutional Court is not bound by the legal qualification of the facts made by the applicant. Although it was alleged by the applicant that his rights defined under Articles 36, 41, 90 and 138 of the Constitution were violated, it was deemed appropriate to make an assessment in terms of Articles 20, 36 and 41 of the Constitution in accordance with the nature of the allegations of violation.

1. Admissibility

29. As a result of the examination of the application, it must be ruled that the application is admissible as it is understood that it is not manifestly ill-founded and that there is no other reason that requires a judgment on its inadmissibility.

2. Merits

30. The applicant alleged that his rights defined in Articles 36 and 41 of the Constitution were violated due to the judicial judgments delivered upon the application filed by him within the scope of the Hague Convention since his wife removed their child in common from the USA which was his/her country of habitual residence and s/he was not allowed to return.

31. In the opinion letter of the Ministry of Justice, it was expressed that a similar opinion was prepared by the European Court of Human Rights (ECtHR) in similar applications by making an assessment in the context of Article 8 of the European Convention on Human Rights

(Convention) and by stating that it was deemed unnecessary to make a separate assessment in the context of Article 6. It was also stated that Article 8 of the Convention imposed on the state negative liabilities as well as positive liabilities, that while reviewing the necessity of an intervention in a democratic society in the cases related to the measures and protection orders taken about children, it was reviewed whether or not the reasonings shown were relevant and sufficient and whether or not the decision-making process was fair and whether or not the rights of the applicant within the scope of Article 8 of the Convention were respected in this process. It was stated that appropriate relations needed to be established between the mother, father, and child even after the divorce of the mother and father and the examples of cases and judgments brought before the ECtHR with similar allegations of violation were included.

a. General Principles

32. According to the provisions of Article 148(3) of the Constitution and Article 45(1) of the Law on the Establishment and Trial Procedures of the Constitutional Court No. 6216 of 30/11/2011, in order for the merits of an individual application lodged with the Constitutional Court to be examined, it is necessary that the right which is alleged to be intervened by public authority be enshrined in the Constitution and that it also be covered by the Convention and the additional protocols to which Turkey is a party. In other words, it is not possible to rule on the admissibility of an application, which contains an allegation of violation of a right that is outside the common field of protection of the Constitution and the Convention (*Onurhan Solmaz,* App. No: 2012/1049, 26/3/2013, § 18).

33. Article 20 of the Constitution with the side heading "*Privacy of private life*" 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.*
>
> *Unless there exists a decision duly given by a judge on one or several of the grounds of national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights*

and freedoms of others, or unless there exists a written order of an agency authorized by law, in cases where delay is prejudicial, again on the above-mentioned grounds, neither the person, nor the private papers, nor belongings of an individual shall be searched nor shall they be seized. The decision of the competent authority shall be submitted for the approval of the judge having jurisdiction within twenty-four hours. The judge shall announce his decision within forty-eight hours from the time of seizure; otherwise, seizure shall automatically be lifted.

Everyone has the right to request the protection of his/her personal data. This right includes being informed of, having access to and requesting the correction and deletion of his/her personal data, and to be informed whether these are used in consistency with envisaged objectives. Personal data can be processed only in cases envisaged by law or by the person's explicit consent. The principles and procedures regarding the protection of personal data shall be laid down in law."

34. Article 41 of the Constitution with the side heading *"Protection of the family, and children's rights"* is as follows:

"Family is the foundation of the Turkish society and based on the equality between the spouses.

The State shall take the necessary measures and establish the necessary organization to protect the peace and welfare of the family, especially mother and children, and to ensure the instruction of family planning and its practice.

Every child has the right to protection and care and the right to have and maintain a personal and direct relationship with his/her mother and father unless it is contrary to his/her high interests.

The state shall take measures for the protection of the children against all kinds of abuse and violence."

35. 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 well-being 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."

36. The right to respect for family life is enshrined in Article 20(1) of the Constitution. Given the reasoning of the article, it is seen that the necessities that the public authorities cannot intervene in private life and family life and that a person should be able to arrange and live his/her personal and family life as s/he desires is emphasized, and the relevant regulation constitutes the Constitutional equivalence of the right to respect for family life protected within the framework of Article 8 of the Convention. Moreover, it is obvious that Article 41 of the Constitution needs to be taken into consideration especially as regards the assessment of positive liabilities in relation to the right to respect for family life as per the principle of holism of the Constitution.

37. Main relations within family life are relations between man and woman and parent and child. Civil marriage unities, as a rule, are guaranteed within the scope of family life and the children who are born within a marriage are automatically considered as a part of the marriage relation. In this framework, it is necessary to accept that a bond is formed which establishes family life between a child and the parent from the birth of the child (For a judgment of the ECtHR in the same vein, see *Gluhakovic v. Croatia*, App. No: 21188/09, 12/4/ 2011, §§ 54, 60). In the incident which is the subject matter of the application, the applicant's child was born within marriage and s/he is a part of the family which legally exists. In this context, the relevant relation between the applicant and his child is sufficient for the establishment of family life.

38. The main element of family life is the development of family relations in a normal way and, accordingly, the family member's right to live together. It is not possible to consider the scope of this right independently from the liability of respect for family life.

39. The wish of parents and children to live together is an indispensable element of family life and the fact that the joint life between the mother and father comes to an end in legal or actual terms does not eliminate family life. It is obvious that the family life between a parent and the child will also continue following the cessation of the joint life by the mother and father and the right to respect for family life of the mother, father and child also includes the measures aimed at reuniting the family in specified cases. The relevant liability is valid not only for the disputes as regards public authorities keeping children under protection, but also for disputes among parents or other family members with regard to custody and the establishment of personal relation (For a judgment of the ECtHR in the same vein, see *Berrehab v. the Netherlands*, App. No: 10730/84, 21/6/1988, § 21; *Gluhakovic v. Croatia*, §§ 56-57).

40. The liability which is valid for the state within the scope of the right to respect for family life is not only limited to the avoidance of intervention in the specified right in an arbitrary way, but it also covers positive liabilities in the context of ensuring respect for family life in an effective manner in addition to this negative liability. The relevant positive liabilities make it obligatory to take measures aimed at ensuring respect for family life, even if it is within the scope of interpersonal relations (For a judgment of the ECtHR in the same vein, see *X and Y v. the Netherlands*, App. No: 8978/80, 26/3/1985, § 23).

41. In terms of the liability of the state to take positive measures, Articles 20 and 41 of the Constitution contain the right of a parent, the father in the present case, to request measures be taken so as to ensure the unity of him with his child and the liability of public authorities to take these sort of measures. It is clearly stated in Article 41 that every child has the right to have and maintain a personal and direct relationship with his/her mother and father unless it is contrary to his/her high interests. However, this liability is not absolute and the quality and scope of the measures to be taken may vary depending on the specific circumstances of each case (For a judgment of the ECtHR in the same vein, see *Ignaccolo-Zenide v. Romania*, App. No:31679/96, 25/1/2000, § 94; İlker Ensar Uyanık v. Turkey, App. No:60328/09, 3/5/2012, § 49).

42. In many cases brought before the ECtHR, the ECtHR expresses that respect for family life imposes on public authorities a positive duty in the form of uniting a parent and his/her children and that this situation is also valid for cases in which separation is caused not by the state, but by a parent, that the positive liability in this field requires both the creation of a regulatory judicial framework protecting the rights of individuals and the taking of appropriate measures that will be actually implemented , which are aimed at securing respect for family life even in terms of relations between individuals (*Hokkanen v. Finland*, App. No: 19823/92, 23/9/1994, § 58; *Glaser v. the United Kingdom*, App. No: 32346/96, 19/9/2000, § 63; *Bajrami v. Albania*, App. No: 35853/04, 12/12/2006, § 52).

43. Nevertheless, it is not easy to pinpoint under which conditions the positive liabilities within the scope of the right to respect for family life require the performance of positive actions due to the nature of the relations within the scope of the relevant right. The ECtHR also accepts that the concept of respect does not have a certain definition especially when positive liabilities are the case and that the requirements of this concept vary significantly from one case to another when differences in the cases encountered and practices followed in contracting states are considered (For a judgment of the ECtHR in the same vein, see *Abdulaziz, Cabales and Balkani v. the United Kingdom*, App. No: 9214/80, 28/5/1985, § 67).

44. The right of the mother, father, and children to live together is an essential element of family life and in the event that the rights to custody and to the establishment of a personal relation granted to the other spouse are unlawfully prevented by the mother or the father although the relationship between the mother and father does not cease to exist in legal terms, the liability of the state to ensure that a regulatory judicial framework aimed at protecting the rights of individuals is created and that the appropriate measures which will be actually implemented are taken constitutes an aspect of positive liabilities in the context of the right to respect for family life. In this context, international child abduction cases caused by parents constitute an important group of cases that require an assessment in the context of the right to respect for family life.

45. International child abduction has various impacts on both children and parents, and especially, the child who is the victim of this action is not only deprived of his/her contact with the other parent and of the feeling of love, affection, and protection that is s/he needs to receive therefrom, but s/he is also away from his/her own home environment and s/he is generally transferred to a new culture, a different legal system, language and a different social structure and these differences bring into question serious problems in terms of the right to respect for family life.

46. International child abduction cases require a serious cooperation at an international level and one of the most important means in terms of this cooperation is the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. The ratification of the Hague Convention signed on behalf of Turkey on 21 January 1998 was approved with the Law No. 4461 of 3 November 1999 and following the approval with the Resolution of the Council of Ministers No. 99/13909 of 29 December 1999, it was published in the Official Gazette No. 23965 of 15 February 2000 and the Convention whose instrument of ratification was handed over on 31 May 2000 entered into force on 1 August 2000.

47. In the most simple terms, the Hague Convention envisages a rapid procedure in relation to the settlement of international child abduction cases caused by a parent by prescribing the prompt return of the child that is illegally abducted or retained in one of the contracting states and in the event that a child who habitually resides in one of the contracting states to the Hague Convention is illegally abducted to another contracting state or retained there, except for the limited number of exceptional cases stipulated in the Convention, the competent authorities of the country where the child is present must promptly return the child to his/her country of habitual residence.

48. In international child abduction cases caused by the mother or father, the provisions of the Hague Convention have an important place in terms of the assessment of the positive liabilities of the state with regard to the right to respect for family life.

49. While the Convention draws up a general framework for the return procedure, it does not contain any provision in relation to the judicial procedure of the return application and leaves the designation of the competent authorities and procedure involved in the process to the contracting states. Turkey has also prescribed certain regulations with regard to its positive law and the implementation thereof for the applicability of the Hague Convention and the ratification of the Law No. 5717 is the most important step taken at this point. The practice which was executed within the scope of the Circular of the Ministry of Justice No. 65 of 1/1/2006 with regard to the implementation of the Hague Convention prior to the Law No. 5717 regained a more robust legal framework in this way. Moreover, the Circular No. 65 was amended with the Circular No. 65/2 of 16/11/2011 in order to harmonize it with the provisions of the Law No. 5717.

50. It is also seen that various aspects of the Hague Convention were referred to in many judgments of the ECtHR and that especially Article 8 of the Convention was interpreted by the Court in these cases in light of the Hague Convention. In addition, the ECtHR makes assessments by considering the provisions and implementation of the Hague Convention in the context of Article 6 of the Convention and especially in relation to the right to trial within a reasonable time and it is understood that while the condition of reasonable time is assessed during the examination conducted, especially the aspect of the interest that the applicant has in the speedy conclusion of the case is emphasized when compared to the criteria of the complexity of the case, the attitude of the parties and the attitude of competent authorities. According to the ECtHR, cases with regard to the right to retention are the cases which need to be concluded promptly for this very reason. The Court states that the Convention cannot be interpreted on its own but must be interpreted in harmony with the general principles of international law and indicates that in matters of international child abduction, the obligations that Article 8 of the Convention imposes on the Contracting States within the scope of the right to respect for family life must therefore be interpreted by taking into account the provisions of the Hague Convention (*Neulinger and Shuruk v. Switzerland*, App. No: 41615/07, 6/7/2010, §§ 131-132).

51. In this respect, the ECtHR emphasizes that it has the venue of reviewing the procedure followed by national courts and particularly determining whether or not national courts pay regard to the guarantees in the Convention and especially in Article 8 while interpreting and implementing the provisions of the Hague Convention and, in line with the principle of subsidiarity which is an important principle on which its review is based, does not subject to assessment the discretion of national courts in terms of return or the dismissal of return, but examines whether or not the conclusion reached by national courts strikes a balanced meeting the standards envisaged in Article 8 of the Contract and whether or not the conclusion reached means a violation of the right to the protection of family life in this sense.

52. Within the scope of the Hague Convention, the ECtHR has many judgments with regard to the right to retention and visit. In the mentioned judgments, it is seen that the Court interpreted the Hague Convention especially in the context of positive liabilities. In this sense, for example, the Court rules that Article 8 of the Convention was violated due to the failure of taking sufficient measures for ensuring the prompt return of the child in accordance with the liabilities within the framework of the Hague Convention, the failure to act diligently in ensuring the return of the child to his/her habitual residence and the trial held with regard to the request for return having taken longer than required (*Iglesias Gil and A. U. I. v. Spain,* App. No: 56673/00, 29/4/2003, §§ 56-63; *Sylvesterv. Austria,* App. No: 86/03, 24/4/2003, §§ 67-72; *Carlson v. Switzerland,* App. No: 49492/06, 6/11/2008, §§ 70-82; *Serghidesv. Poland,* App. No: 31515/04, 2/11/2010, §§ 72-75). According to the Court, the fact that a parent continues to live together with the child constitutes an essential element of family life in the meaning of Article 8(1) of the Convention. Article 8 of the Convention covers the right to request that necessary measures be taken which will ensure the reunion of a parent with his/her child as well as the liability of national authorities to take these measures. The decisive point in this matter is whether or not all reasonable measures expected from national authorities in order to facilitate the exercise of the right to custody, visit or live together granted to a parent through the legislation in force or court judgments are taken

by them. In this area, the positive liabilities imposed by Article 8 of the Convention on the Contracting States are interpreted in the light of the Hague Convention (*Neulinger and Shuruk v. Switzerland*, § 132).

53. It is seen that the Hague Convention, which has also become a part of Turkish law, contains guiding provisions in terms of the identification and implementation of its positive liabilities in relation to the right to respect for family life. For this reason, the provisions of the relevant Convention must be taken into consideration in the determination of the positive liabilities imposed on the state with regard to the right to respect for family life guaranteed in Articles 20 and 41 of the Constitution.

54. Aims of the Hague Convention are to ensure the prompt return of children who are brought to the contracting states by unlawful means or are again wrongfully retained in these states and to ensure the observance of the right to retention and visit in a contracting state by other contracting states in an effective manner. The Hague Convention aims to ensure the prompt return of a child who is abducted or wrongfully retained to his/her country of habitual residence and to reestablish the *status quo* before this case and provides a significant contribution to the sustainability of family ties in this sense. In order for the Hague Convention to have a scope of implementation, the habitual residence of the child needs to be in one of the contracting states and what is meant by this is the actual living place of the child. The presence of an unlawful removal or retention case and whether or not there is a violation of the right to retention within the scope of the Hague Convention are also determined according to the law of habitual residence. In other words, in order to make use of the guarantees envisaged by the Hague Convention, the removal or the retainment of a child must be considered as unlawful according to the law of habitual residence of the child. The habitual residence stipulated in the Hague Convention is the place which corresponds to the actual living place of the child just before the specified action of removal. In addition, as terminology differs in each legal system in terms of the rights to retention, authorities, and duties covered by the rights in relation to the care and custody of children must be taken into consideration rather

than how these rights are denominated in terms of the implementation of the Hague Convention.

55. In accordance with the Hague Convention, the contracting parties are liable to take all appropriate measures within their national borders so as to ensure the fulfillment of the aims of the Convention and to resort to the most rapid procedures to this end. This liability is quite important for the fulfillment of the positive liabilities prescribed by the right to respect for family life in the relevant cases.

56. In the presence of a request which falls within the scope of the Hague Convention, the judicial and administrative authorities of all contracting states are liable as per Article 11 of the Hague Convention to make necessary attempts as soon as possible in order to ensure the return of a child. The essential reason why certain time limitations are prescribed for the procedure of return is to prevent the child from getting used to the living conditions in the country to which s/he is abducted or in which s/he is retained, thus, the creation of a new living place and habitual residence for the child and the injury of the relations which need to be maintained between the child and the mother or father whose right to custody or personal relation is unlawfully removed.

57. In a request for return within the scope of the Hague Convention, if the parent who keeps the child does not agree to an amicable settlement after the place of the child is determined, a legal remedy can be resorted to in order to ensure the return of the child in accordance with Article 7(2)(f) of the Convention. In terms of the implementation of the Convention in Turkey, all legal procedures are carried out by the Chief public prosecutor's offices on behalf of the person, institution or organization that files a request for return. As per Article 6 of the Law No. 5717, the court that is competent in the cases for the return of the child is family courts or, in places where there is no family court, the civil courts of first instance and the court of the place where the child is found to be present has venue.

58. While the rule within the scope of the Hague Convention is prompt to return, the judgment of compulsory return has a series of

exceptions. These exceptions are specified in Articles 13 and 20 of the Convention and it is seen that the relevant provisions grant judicial authorities with the authority to dismiss the return of a child. The main aim of the Convention is to ensure the return of a child to his/her country of habitual residence and to ensure that judicial authorities of the habitual residence determine how the right to retention needs to be regulated by considering the interests of the child. Nevertheless, in the face of the fact that there may be cases where valid grounds for removal or retention exist or where the return may seriously harm the child, it is understood that certain guarantee provisions were introduced in the implementation of the Convention through the mentioned provisions of exception.

59. An exception which is commonly seen in practice is stipulated in Article 13(1)(b) of the Hague Convention. The regulation in question grants the relevant judicial authorities with the authority to dismiss the return if it is found that his/her return will expose the child to a physical or psychological danger or put him/her in an intolerable situation in another way. However, the relevant provision cannot be used as a means of assessing the merits of the right to retention. In addition, the stated exception is not equivalent to the concept of the high interest of the child and this provision of exception also covers the consideration of sensitivities and differences towards certain beliefs and thoughts as a reason for dismissing the return. Classical manifestations of a significant risk or intolerable situation are cases involving the claims of child abuse (physical and/or sexual) and domestic violence. In such cases, the request for return may be dismissed depending on the ground that there is a significant risk or intolerable situation (See *E. Pérez-Vera*, Explanatory Report on the 1980 Hague Child Abduction Convention, § 27-34, http://www.hcch.net/upload/expl28). In this sense, it is understood that while maintaining the aim of ensuring the return with regard to the Hague Convention, the function of safe return judgments aimed at ensuring the safety of the child upon his/her return also requires a diligent examination and farsighted practice.

60. The Hague Convention is, as a whole, based on the rejection of the case of international child abduction by all states and the thought

that the best way of fighting against these cases at an international level is not to provide a safeguard in the form of legal recognition towards the situations that are formed by the mentioned cases. For this reason, by also considering the aim of return which is the primary objective of the Hague Convention, it is obligatory to show utmost care for striking a sensitive balance between the mentioned provisions of exception and the interests of the child. Establishment of this balance is closely related to the execution of the positive liabilities of the state with regard to the right to respect for family life specifically for the cases in question.

61. In this respect, it needs to be accepted that a judgment which is delivered as regards the return of a child within the framework of the Hague Convention cannot be a judgment affecting the merits of the right to retention, that the requests for return within the scope of the Convention are not a lawsuit on the right to custody/retention, that a judgment of return is also not a judgment of the right to retention/ custody and this judgment is only aimed at returning the child to the jurisdiction which is the most appropriate one for delivering a judgment the merits of the right to retention and visit. As is clearly specified in Article 19 of the Hague Convention, it is also specified in Articles 12 and 15 of the Law No. 5171 that a judgment of return is not a judgment with regard to the merits of the right to retention. In this respect, the additional procedure on the merits of the dispute as regards the right to retention will be carried out by the competent authorities of the habitual residence following the return of the child. Since, the habitual residence is the place where the child has lived for a certain period of time before removal and therefore, where most of the evidence in relation to the determination of the most appropriate period for the right to retention is present for the child.

62. Solving the problems with regard to the interpretation of the legislation is primarily within the competence and responsibility of the courts of instance. This is also the case in circumstances where domestic law generally refers to an international law or international agreements. The role of the Constitutional Court is limited to determining whether or not the interpretation of these rules are compatible with the Constitution.

For this reason, the Constitutional Court has the authority to review the procedure followed by the courts of instance and especially to determine whether or not the courts pay regard to the guarantees in Articles 20 and 41 of the Constitution while interpreting and implementing the provisions of the Hague Convention.

b. Existence of the Intervention

63. In the present case, there is no doubt that the removal of the applicant's child from the country has an impact on the right to custody of the father and, accordingly, his right to establish a relationship with the child. In this sense, in terms of the application at hand, it is obvious that the restriction of the applicant's right to establish a relationship with his child through the dismissal of his request for the return of the child constitutes an intervention in the right to respect for family life.

c. Alleged Intervention

64. In Article 20 of the Constitution, while some reasons for restriction which are understood not to be relevant to all aspects of this right are included, even the rights for which no specific reason for restriction has been prescribed have some restrictions stemming from the nature of the right. Moreover, it may also be possible to restrict these rights based on the rules stipulated in other articles of the Constitution. At this point, the measures of guarantee stipulated in Article 13 of the Constitution have a functional quality (*Sevim Akat Eşki*, B. No: 2013/2187, 19/12/2013, § 33).

65. Article 13 of the Constitution with the side heading *"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."*

66. The indicated provision of the Constitution is of fundamental importance in terms of restricting rights and freedoms and of the regime

of guarantees, and it puts forth the criteria whereby the legislative body 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 restriction by law, also needs to be observed when determining the scope of the right covered in Article 20 of the Constitution (*Sevim Akat Eşki*, § 35).

i. Legality

67. The criterion of restricting rights and freedoms by law has an important place in the constitutional jurisdiction. When there is an intervention in 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, if there is a legal basis for the intervention (*Sevim Akat Eşki*, § 36).

68. With regard to the administrative and judicial procedure within the scope of the cases of international child abduction, there are detailed regulations in the relevant articles of the Hague Convention and the Law No. 5717. It is understood that there is a legal framework guaranteeing the protection of the applicant's family life in practice and in an effective manner and that the practice which is the subject matter of the application as regards the dismissal of the request for the return of the child was carried out on the basis of the mentioned provisions. As it is understood that the judgments of the courts of instance are based on the Hague Convention ratified by Turkey and the Law No. 5717 which came into force within this scope, the judgment on the dismissal of the request for the return of the child has a sufficient legal basis.

ii. Legal Purposes

69. It is stipulated in Article 41(2) of the Constitution that the state shall take the necessary measures and establish the necessary organization to protect children; in paragraph four the measures for the protection of the children against all kinds of abuse and violence shall

be prescribed. With regard to the judgments on the dismissal of the request for the return of the child in terms of the present application, it is understood that the courts of instance have pursued a legitimate purpose in the form of ensuring the health and safety of the child and that, within this framework, the intervention which is the subject matter of the application was based on legitimate grounds.

iii. Necessity and Proportionality in the Democratic Order of the Society

70. In order for an intervention which has a legal basis and pursues a legitimate purpose not to constitute a violation, it needs to comply with the criteria of guarantee of necessity in the democratic order of the society, without infringing upon the essence of the right and proportionality as stipulated in Article 13 of the Constitution.

71. Modern democracies are regimes in which fundamental rights and freedoms are ensured and guaranteed in the broadest manner. It cannot be accepted that the restrictions which infringe upon the essence of fundamental rights and freedoms and restrict them in a considerable manner or render them completely non-exercisable accord with the requirements of the democratic order of the society. As the aim of a democratic state of law is to ensure that individuals exercise rights and freedoms in the broadest manner, it is necessary to predicate on an approach which brings the individual forward in legal regulations. For this reason, not only the measure, but also all elements of the imposed restrictions such as their conditions, reason, method and the remedies which are prescribed against the restriction should be assessed within the scope of the democratic order of the society (*Serap Tortuk,* B. No: 2013/9660, 21/1/2015, § 46).

72. The essence of a right means the core which, when violated, renders the fundamental right and freedom in question meaningless and, with this aspect, provides a minimum inviolable area of guarantee for the individual in terms of each fundamental right. In this framework, it should be accepted that the restrictions which render the exercise of a right considerably difficult, make the right non-exercisable or removes it completely, infringes the essence of the right. In the context of the right

to respect for family life, it is clear that the interventions which bear the consequence of the removal of this right, the rendering thereof non-exercisable or making the exercise thereof extremely difficult will also harm the essence of this right. The aim of the principle of proportionality is the prevention of the restriction of fundamental rights and freedoms more than necessary. In accordance with the judgments of the Constitutional Court, the principle of proportionality covers the elements of proportionality that define the availability which means that the means used for restriction is suitable for achieving the aim of restriction, the obligation which points the imperativeness of the restrictive measure in order to achieve the aim of restriction and proportionality that implies the means and aim are not within a disproportionate measure and the restriction does not impose an immoderate measure (*Serap Tortuk*, § 47; AYM, E.2012/100, K.2013/84, K.T. 4/7/2013).

73. This balance which is valid in terms of the restriction of all fundamental rights and freedoms stipulated in the Constitution through Article 13 of the Constitution should also be taken into account in the restriction of the right to respect for family life. While it is possible to restrict the right to respect for family life, there should be no disproportionality between the legitimate aim prescribed in the restriction and the means of restriction, and attention should be paid to striking a fair balance between the interest which can be achieved through the restriction and the loss of the individual whose fundamental right and freedom is restricted. At this point, in order to determine whether or not a restriction has been made by complying with the indicated criteria, in the face of the legitimate aim which forms the basis of the measure which is claimed to have constituted an intervention and violated the right to respect for family life, it is necessary to take into consideration the severity of the sacrifice which was incumbent upon the individual and, especially when the disputes in relation to custody and personal relation are the case, to determine whether or not a fair balance was struck between the interests of the parent and the child.

74. The decisive matter in this area is whether or not the state has struck a fair balance on this subject within the sphere of discretion granted to it among the competing interests of the mother, father and

public order. However, it should be remembered that the interests of children are of a superior importance as regards the matters related to the right to custody and personal relation while striking this balance. Nevertheless, the parent's need for having a regular relationship with the child is another important factor that needs to be taken into consideration while striking a balance among the rights in question (İlker Ensar Uyanık v. Turkey, § 52).

75. Every child has the right to maintain a direct and regular personal relation with his/her parent unless otherwise required by his/her interests. The interest of the child points to the need for maintaining ties with his/her family except for the case where the family in question is unhealthy, on one hand, and covers the maintenance of the development of the child in a healthy and safe environment on the other hand. The same thought is also valid for the Hague Convention and the Convention requires, as a rule, that the abducted child be promptly returned unless his/her return exposes the child to a severe risk of physical or psychological harm or puts him/her in any other intolerable situation and aims to sustain family ties in this way.

76. In cases which are similar to the present case, the ECtHR also accepts that the assessment as regards the interests of the child and the parent must be conducted by national judicial authorities, but states that the trial procedure in relation to dispute needs to be fair and allow the relevant parties the opportunity to exercise all their rights and specifies that, in this respect, it has to determine whether or not national courts have conducted an in-depth examination of the situation of the family and particularly, of all factual, emotional, psychological, material and medical factors and whether or not a reasonable assessment and balancing have been made with regard to the interests of the relevant persons by way of determining the high interests of the child within an application on the return of the abducted child (İlker Ensar Uyanık v. Turkey, § 52; *Neulinger and Shuruk v. Switzerland*, § 139).

77. Although it is clear that the judicial practice which is the subject matter of the application is based on the aforementioned legitimate basis, it is necessary that the restriction which is understood to have

constituted an intervention in the family life of the individual does not render the indicated right meaningless by infringing upon its essence.

78. Although public authorities have a discretionary power in the process of the restriction of a right within the scope of the legitimate purposes pursued, the indicated discretionary power has a separate scope for each case. Depending on elements such as the quality of the guaranteed right or legal interest and the importance thereof in terms of an individual, the scope of this authority becomes narrower or broader and, especially when positive liabilities are the case, the type and scope of these liabilities require that a separate assessment be conducted for each case.

79. As for disputes that are similar to the present case, public authorities are liable to take measures which will facilitate cooperation between the mother and father. While the relevant public authorities have a certain sphere of discretion in striking a balance among the competing interests of the child, mother, father and public order, the matter which is of importance here is whether or not the relevant authorities have taken all sorts of measures required by the special circumstances of the case so as to facilitate the reunion of the family.

80. Undoubtedly, the determination as to what the high interest of the child means is the most important element that needs to be taken into consideration in these cases. In this respect, it is obvious that the judicial bodies which are directly in contact with the relevant parties are more advantageous in determining the indicated matter. Therefore, the duty of the Constitutional Court is not the regulation and determination of the matter of necessity of return in the requests for return with regard to the cases of international child abduction by replacing the courts of instance, but to review, within the scope of the relevant constitutional norms, whether or not the courts of instance act within the framework of the discretionary power granted thereto. In this context, the duty of the Constitutional Court in terms of the present case is not to replace the courts of instance which examine whether or not there is any risk of exposure to a severe psychological harm in case of the return of the child to the USA within the context of Article 13 of the Hague Convention .

Nevertheless, the Constitutional Court has the authority to determine whether or not the courts of instance protected the guarantees in Article 20 of the Constitution by way of establishing the balance that needs to be struck among the interests of the mother, father, child and the public while interpreting and implementing the provisions of the Hague Convention. For this reason, it is necessary to conclude whether or not the conclusion reached by the courts of instance complied with Article 20 of the Constitution or, in other words, whether or not the judgment on the dismissal of the return of the child to the USA was an intervention that was proportionate to the applicant's right for respect for family life.

81. Within the scope of the provisions of exception of return as stipulated in the Hague Convention, the determination of the necessity of return as well as whether or not a measure is sufficient in such cases should be evaluated together with the prompt application of the measure. Because the cases with regard to custody and the establishment of a personal relationship should be concluded in an immediate manner as the passing of time could bear non-recoverable consequences for the relations between the child and the parent with which s/he does not live together. In line with this acknowledgment, the Hague Convention has prescribed a series of measures in order to ensure the prompt return of a child who is wrongfully removed from a country or retained in a Contracting State. As for the disputes in relation to the right to respect for family life, in the fulfillment of positive liabilities, ensuring that the decision-making process is a fair process through which the relevant persons can submit their opinions in a complete manner is important as well as the speedy performance of the relevant administrative and judicial procedures. In this framework, the liability in relation to the procedure in the form of conducting the relevant judicial processes in an immediate manner, in a way that is open to the participation of parties and in compliance with the procedural requirements of the right to a fair trial need to be added into the content of the positive liability assessment with regard to the right to respect for family life within the scope of Article 20 of the Constitution.

82. In terms of disputes related to relations between parents and children, the ECtHR handles together the requirements that the trials in question contain the procedural requirements of the right to a fair trial and

that the appropriate measures for the union of the relevant parent and the child are taken and does not make any separate assessment with regard to Article 6 of the Convention in most cases (*Amanalachioai v. Romania*, App. No:4023/04, 26/5/2002, § 63, İlker Ensar Uyanık v. Turkey, § 33).

83. The courts of instance are obliged to act in a way to ensure the sustainability and effectiveness of the relations within the scope of family life in the assessment of the relevant requests for return. In this sense, the Constitutional Court which needs to assess whether or not the courts of instance exercised their discretionary power in a reasonable and prudent way especially with regard to the proportionality of the intervention has to examine whether or not the grounds alleged to justify the intervention were relevant and sufficient in this context (For a judgment of the ECtHR in the same vein, see İlker Ensar Uyanık v. Turkey, § 54).

84. The courts of instance need to put forth the reasoning of their discretion in detail so as to allow the relevant parent to make use of the opportunity of resorting to an effective remedy and predicate the reached conclusions on sufficient and objective data such as scientific opinions and reports with a sufficient clarity (For the judgments of the ECtHR in the same vein, see *Savinyv. Ukraine*, App. No: 39948/06, 18/12/2008, §§ 56-58; *Gluhakovic v. Croatia*, § 62).

85. From the assessment of the judicial process which is the subject matter of the application, it is seen that a request for return was filed by the applicant within the scope of the Hague Convention with the claim that the child in common was removed by his/her mother from the USA which was his/her habitual residence and that s/he was not allowed to return. Moreover, it is seen that the request was referred by the Department of State of the USA to the Directorate General for International Law and Foreign Relation of the Ministry of Justice which was the Turkish Central Authority within the scope of the Hague Convention and that a notification was sent on 19/1/2012 by the Directorate General to the Chief Public Prosecutor's Office of Ankara for the initiation of the return procedures of the child. It is also seen that an action for return was filed by the Chief Public Prosecutor's Office of Ankara through the indictment of 11/6/2012 based on the file of the 7th Family Court of Ankara No. E.2012/757. It is understood that following the preliminary proceedings report drawn up by the court on 16/6/2012,

two hearings were held and the dispute was resolved on 1/10/2012 and that as the ground for the dismissal, it was stated that the parties had a child in common, that the parties lived in the USA and that the defendant came to Turkey with the child in common for the wedding of her sister. It was also stated that thereupon, she filed for divorce with the 9th Family Court of Ankara No. E.2011/1268, that within the scope of the relevant case, it was ruled that temporary custody of the child be granted to the mother and that a personal relation be established between the applicant father and the child. It was stated that the conditions for prompt return as regulated in Article 12 of the Hague Convention did not materialize and that a complete personal conviction occurred with regard to the dismissal of the request by considering the age of the child and his/her dependence on the mother. It is also understood that the judgment became final on 16/5/2013 by going through the remedies of appeal and correction.

86. Within this framework, it is understood that the administrative and judicial process with regard to the request for return was completed within approximately one year and six months starting from 3/11/2011 on which the request was referred to the central authority of the USA and that the trial process including the stages of appeal and correction process was less than one year. Although the applicant does not have any allegation with regard to the prompt execution of the return process, it is seen that required diligence was shown by the relevant public authorities in relation to the prompt completion of the process in question. Nevertheless, the applicant alleges that facilities with regard to the procedure were not provided in terms of the trial by stating that the judgment was delivered without examining the allegations of the parties thoroughly during the trial process, conducting the necessary expert examination and hearing the parties and the local public prosecutor's participation on behalf of the Ministry of Justice was not ensured. From the examination of the relevant trial documents, it is seen that the applicant, through the petition of 20/7/2012, requested to participate in the lawsuit process for the return of the child, that subsequently, he submitted his allegations and defenses in writing by submitting a bill of answer on 27/7/2012 and essentially relied on the documents submitted by him in the process executed before the Directorate General. It is also seen that during the trial process, the parties were granted a period for

the submittal of their evidence at the hearing of 12/9/2012, that however, it was stated that no additional evidence was submitted by the counsel of the applicant at the subsequent hearing and they repeated their statements at the previous stages as they had previously submitted their evidence within the file. Although the evidence of the expert was also relied upon by the applicant's counsel in the annex of the bill of answer, it is understood that an expert examination was not resorted to by the court of the first instance which ruled that the request needed to be dismissed by considering that the conditions of prompt return as regulated in Article 12 of the Hague Convention did not materialize and by also considering the age of the child and his/her dependence on the mother. Although the applicant also stated that the failure to ensure the local public prosecutor's participation on behalf of the Ministry of Justice in the trial process was a deficiency with regard to the procedure, it is seen that no explanation was brought forward in relation to the negative impact of the relevant procedural deficiency on the trial process and its consequence and that the judgment of the court of the first instance was appealed by the relevant Chief Public Prosecutor's Office in terms of aspects relating to procedure and merits. In this sense, it is understood that the courts of instance delivered a judgment as a result of a trial procedure through where the applicant had legal representation, to submit his evidence and to object to the allegations of the opposing party.

87. Nevertheless, the applicant alleges that the provisions of the Hague Convention with regard to merits and procedure were not taken into consideration in the action for return, that the reasonings of the judgments of the courts of instance were contrary to the principles stipulated in the Hague Convention and that accordingly, his personal relationship with his child was prevented. Although it was stated in the judgment of the court of first instance that the request needed to be dismissed by considering that the conditions of prompt return as regulated in Article 12 of the Hague Convention did not materialize and by also considering the age of the child and his/her dependence on the mother, it is seen that no explanation was brought forward as to whether or not the presence of the child in Turkey was lawful as per the relevant provisions of the Convention, where the habitual residence to be taken as the basis for the judgment of return was and how it was

determined and in which way the conditions of return in Article 12 of the Convention did not materialize. It is stated that in the writ of approval of the Court of Cassation that it was understood that the conditions for refusing to return did not materialize and that Article 13(1) (b) of the Hague Convention was taken into consideration by the court of the first instance. When it is considered that no examination was conducted by the courts of instance with regard to the relevant provisions of exception and their applicability in the present case and no explanation was made in relation to this matter although it was stated in the appeal petition of the relevant Chief Public Prosecutor's Office that the action was settled according to the provisions of custody while the determination of habitual residence and the return of the child to his/her country of habitual residence were prescribed in the provisions of the Hague Convention and the Law No. 5717 and that subjective criteria such as the young age of the child and his/her dependence on the mother which had no place in application were relied upon and the conclusion was reached accordingly in the case and in spite of the objections of the applicant in the same vein, it is understood that the reasonings of the judgments were not relevant and sufficient in terms of the right to respect for family life and that the intervention in this right was not proportionate.

88. Due to the reasons explained, it should be ruled that the applicant's right to respect for family life guaranteed in Article 20 of the Constitution was violated.

Celal Mümtaz AKINCI disagreed with this opinion.

89. It has been concluded that the applicant's right to respect for family life guaranteed in Article 20 of the Constitution was violated and within the framework of the determinations made in this scope, it has not been deemed necessary to separately evaluate the applicant's allegation as to the fact that his right defined in Article 36 of the Constitution was violated.

3. Article 50 of the Law No. 6216

90. The applicant requested a judgment as to the determination of the violation and the retrial of the dispute.

91. In the opinion of the Ministry of Justice, no opinion was expressed as regards the removal of the consequences of the violation.

92. Article 50(2) of the Law No. 6216 with the side heading *"Judgments"* is as follows:

> *"If the determined violation arises out of a court judgment, the file shall be sent to the relevant court for holding a 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, a compensation can be adjudged in favor of the applicant or the remedy of filing a case before general courts can be shown. The court which is responsible for holding the retrial shall deliver a judgment based on the file, if possible, in a way that will remove the violation that the Constitutional Court has explained in its judgment of violation and the consequences thereof."*

93. Although it was determined that Article 20 of the Constitution was violated in the present application when it is considered that the judgment established with regard to the merits of the right to custody and personal relation as a result of the divorce case filed with the file of the 9th Family Court of Ankara No. E.2011/1268 became final on 13/10/2014 by going through the courts of instance, that through the relevant judgment, it was ruled that a personal relation is established between the applicant father and the child for certain periods by also considering the terms as regards the age of the child. Since the Hague Convention aimed to guarantee the interest as regards the maintenance of the relation between the mother or father who alleged to be the victim of the act of abduction and the child in common during the period when no evaluation was made with regard to the merits of the custody of the child yet, in this sense, the merits of custody and personal relation was concluded through the Court judgment which was understood to have become final during the process of application. With this aspect, it was not possible by way of ruling on retrial to reinvigorate the interest which was harmed in terms of the maintenance of the relations in the relevant interim period, that it was determined through the document with the case number of 11D010650 which was submitted by the counsel of the defendant mother to the individual application file and was stated to have belonged to the divorce case filed by the applicant before the Supreme Court of California that the matter to be resolved thereby was the division of property of the marriage as the dispute in relation to the right to custody and visit was settled by the Turkish Courts

that were considered to be competent, as no legal benefit has been considered in the holding of a retrial for the removal of the violation and the consequences thereof, it is necessary to rule on the dismissal of the applicant's request as to the holding of a retrial.

94. Although non-pecuniary damages is an appropriate remedy for the removal of the consequences of the violation which is the subject matter of the application, it has not been deemed necessary to rule on this matter as no request was filed by the applicant with regard to compensation.

95. It should be ruled 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 held on 2/7/2015

A.

1. UNANIMOUSLY that the applicant's allegation as to the fact that Article 20 of the Constitution was violated is ADMISSIBLE,

2. BY MAJORITY OF VOTES and with the dissenting opinion of Celal Mümtaz AKINCI that his right to respect for family life guaranteed in Article 20 of the Constitution WAS VIOLATED,

B. UNANIMOUSLY that his request for the holding of a retrial be REJECTED,

C. UNANIMOUSLY 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. UNANIMOUSLY that the payment be made within four months as of the date of application by the applicant to the Ministry of Finance following the notification of the judgment; 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,

E. UNANIMOUSLY that a copy of the judgment be sent to 7th Family Court of Ankara, the 2nd Civil Chamber of the Court of Cassation and the Directorate General for International Law and Foreign Relations of the Ministry of Justice for information.

DISSENTING OPINION

The applicant applied to the Department of State within the scope of the Hague Convention with the allegation that the child in common whose mother was a Turkish citizen was removed from the USA which was his/her habitual residence and taken to Turkey and was not allowed to return and this Department referred the request to the Directorate General for International Law and Foreign Relations of the Ministry of Justice As a result of the initiatives of the Directorate General, an action for return was filed before the 7th Family Court of Ankara through the indictment of the Chief Public Prosecutor's Office of Ankara. This action was dismissed on the ground "that the request needs to be dismissed by considering that the parties had a child in common in the USA where they lived, that the defendant woman came to Turkey with her child for the wedding of her sister, that thereupon, she filed a divorce case before the 9th Family Court of Ankara, that within the scope of this case, it was ruled that temporary custody of the child be granted to the mother and that a personal relation be established between the applicant and the child, that the conditions for prompt return as regulated in Article 12 of the Hague Convention did not materialize and by considering the age of the child and his/her dependence on the mother".

When the application file is examined, it is understood that the wife of the applicant came to Turkey with her child for the wedding of her sister with the consent of her husband (within his knowledge) and filed for divorce before the 9th Family Court of Ankara while she was in Turkey, that custody of the child in common was granted to the claimant mother in a temporary fashion in the meantime, that at the end of the case, it was ruled that the parties divorce, custody of the child be granted to the mother and a personal relation be established between the

child and the father and that the judgment was upheld by the Court of Cassation.

In this case, it does not seem possible to mention that the child was abducted to Turkey without the consent of his/her father. In order for the Hague Convention to take effect, it is necessary that a child is abducted and retained against the consent of his/her parent. The child came to Turkey with the consent of the applicant father and a divorce case was filed before the 9th Family Court of Ankara after s/he arrived therein, custody of the child who was three months old at the time was temporarily granted to the mother during the case and at the end of the case, it was ruled that custody be granted to the mother by considering that the child needed the care and affection of the mother and that a personal relation be established between the child and the father. As there is no de facto and de jure child abduction, it is not possible to implement the Hague Convention. If the child had been brought (abducted) to Turkey against the consent of the father, then the Hague Convention would have directly taken effect and it would have been necessary to discuss a ruling for the return of the child as per the Convention. The judgments of temporary and permanent custody delivered by the 9th Family Court of Ankara within the framework of the right to sovereignty prevented the Hague Convention on the Civil Aspects of Child Abduction from taking effect and being implemented. The court accurately referred to this matter in its judgment on the ground "*...that the request needs to be dismissed by considering that the conditions of prompt return as regulated in Article 12 of the Hague Convention have not materialized and by also considering the age of the child and his/her dependence on the mother...*".

Due to the reasons explained, I have not agreed with the majority opinion as to the effect that the right to respect for family life was violated as a result of the examination conducted in terms of merits also by way of considering the provisions of the Hague Convention.

Justice
Celal Mümtaz AKINCI

FREEDOM OF COMMUNICATION (ARTICLE 22)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

MEHMET KORAY ERYAŞA

(Application no. 2013/6693)

SECOND SECTION
JUDGMENT

President	:	Alparslan ALTAN
Justices	:	Recep KÖMÜRCÜ
		Engin YILDIRIM
		Celal Mümtaz AKINCI
		Muammer TOPAL
Rapporteur	:	Murat ŞEN
Applicant	:	Mehmet Koray ERYAŞA

I. SUBJECT-MATTER OF THE APPLICATION

1. Alleging that his rights to a fair trial, respect to private life and freedom of communication have been violated when his time with visiting family and counsel was restricted and monitored, and his access to Internet, which he deemed necessary in order to prepare his defense, was restricted at the Military Prison where he was detained, the applicant requested the revocation of the articles concerned in the regulation where such issues have been provided for, and compensation.

II. APPLICATION PROCESS

2. The application was lodged on 22/8/2013 with the 13th Civil Court of First Instance of Istanbul. The deficiencies detected as a result of the preliminary administrative examination of the petition and its annexes were made to be completed and it was determined that no deficiency preventing their submission to the Commission existed.

3. The Commissions Rapporteur-in-Chief ruled for the administrative rejection of the individual application on 30/1/2014, on grounds that the shortcomings identified were not remedied in due granted time.

4. The applicant's objection to the administrative rejection decision was admitted by the Second Commission of the Second Section on 17/9/2014 and it was decided that the examination of the admissibility of the application be conducted by the Section and the file be sent to the Section.

5. It was decided by the President of the Section on 30/10/2014 that the examinations for admissibility and merits of the application be jointly carried out and a copy be sent to the Ministry of Justice (Ministry) for its opinion.

6. The facts which are the subject matter of the application were notified to the Ministry on 30/10/2014. The Ministry submitted its opinion to the Constitutional Court on 30/12/2014 at the end of the additional period that was granted.

7. The opinion of the Ministry was notified to the applicant on 17/1/2015. The applicant submitted to the Constitutional Court his counter-opinion on 27/1/2015.

III. THE FACTS

A. The Circumstances of the Case

8. As expressed in the application form and the annexes thereof and the opinion of the Ministry, the circumstances of the case are summarized as follows:

9. Pursuant to the allegation that he committed the crimes of overthrowing the government by force and preventing the performance of the duties thereof as per the (annulled) Article 147 of the Turkish Criminal Code No. 765 of 1/3/1926, the applicant was under *de jure* detention on the date of the application at the Special Military Prison and Detention House of the 3rd Army Corps.

10. The applicant petitioned the 3rd Army Corps Command (the Command) for the allowance of a phone call to his counsel concerning the ongoing trial process regarding himself. In the petitioned request, it was acknowledged that it was not possible for the said counsel to

frequently come for he was located in İzmir, hence the importance of phone conversations with him/her.

11. The command, in the letter of response, indicated that the office of the legal advisor had specified the issues below in its examination of the matter:

> *"In the examination that was carried out, it was seen that a phone call to the counsel was not arranged for although the Law No. 5275 on the Execution of the Penal and Security Measures provides for the interception and recording of the phone calls between the detainee and the relatives thereof, which is interpreted as an intentional silence of the legislator on this matter. As a requirement of the rule that the counsel-client conversations cannot be tapped into, nor be recorded, it is seen that the Law does not grant any rights regarding a phone call between the counsel and the client.*
>
> *As the Presidency of the Third Chamber of the High Military Administrative Court indicated in its ruling (File No. E.2011/821, K.2011/472 of 27/1/2011), as long as a regulation concerning the detainee's phone conversation with his counsel is non-existent in line with the provisions of the Regulation on the Management of Military Prisons and Detention Facilities and the Execution of Penalties as well as in line with those of the Law No. 5275 and the By-Law on the Execution of Penalties and Security Measures, it is considered that there is no contrariety to the law in not allowing a phone call with his counsel to the petitioner for such a right is not granted.*

12. With his petition of 30/1/2012, the applicant informed the Command that his right to receive visitors was restricted, and requested that the visits are freed from limited duration, turned into open visits and furthermore the restrictions on the number of visitors, the duration and days of phone calls as well as the limitations on access to Internet be removed and that he was given the opportunity to write his defense.

13. The said request was dismissed by the Executive Officer as per Article 70 of the Regulation on the Management of Military Prisons and Detention Facilities and the Execution of Penalties (Regulation).

14. With his petition on 31/8/2012, the applicant requested a phone call with his counsel regarding the ongoing trial and a news piece in a newspaper. This request was also dismissed by the Executive Officer as per Article 66/A of the Regulation.

15. Upon such rejection of his requests, the applicant lodged a case with the High Military Administrative Court with a request for the annulment of the rejection rulings of the Command and the Executive Officer, and Articles 66/A and 70 of the said Regulation.

16. The court, with its judgment No. E.2013/177, K.2013/1006 of 11/7/2013, ruled for the dismissal of the request for revocation. The relevant part of the reasoning of the court is as follows:

> *"… the format of the meeting of the convict with the counsel has been provided in Article 59 of Law No. 5275; in Article 66, the coverage of the right to telephone call and in Article 83, the principles of visiting the convict have been specified. In Article 114 of the Law No. 5275, the rights of the detainee have been listed and in Article 116, it has been specified that those which purport a quality of compliance with the detention status can also be applied for the detainees. The right to meet with the counsel has been granted in Article 59 of the Law No. 5275, without mentioning the right to a telephone call with the counsel, and the right to call the counsel has not been regulated in Article 66 where the right to a telephone call has been regulated. The administration was allowed to regulate the day and the hour of the telephone call with a consideration for the number of telephones available at the facility and the order of applications for a call as well as the security of the facility. No limitations whatsoever shall apply for the face-to-face meeting of the detainee and the counsel. The detainee can meet his/her counsel anytime. There are no limitations on the detainee's communication with his/her counsel apart from the phone call, and no limitations shall be imposed to this effect. The detainee can request from the management of the penitentiary that his/her counsel is informed so that a face-to-face meeting with him/her can be arranged for so that s/he can prepare his/her defense. Management is also required to satisfy such a request. The claimant requests that telephone call with his counsel be allowed anytime he so wishes without*

being bound by any restrictions whatsoever. Meetings with the counsel cannot be tapped, nor be recorded and no limitations on meeting with the counsel within the scope of defense can be imposed. It is, for this reason that meeting with the counsel has not been regulated by the lawmaker. The absence of an authority not allowed by Law from the administrative regulation is legal. In Article 83 of the Law No. 5275 are provisions concerning issues such as a visit by blood relatives up to the third degree and of relatives by marriage and visits by a maximum of three non-relatives. Furthermore, principles of the convicts' use of Internet have been specified in article 67/3 of the Law No. 5275, providing that Internet can also be availed of, under supervision, if required by education and rehabilitation programs where in this Article are no further regulations concerning the use of the Internet apart from education and rehabilitation programs. Regulations similar to those in Law No. 5275 have also been included in the By-Law on the Management of Penal Institutions and the Execution of Sentences and Security Measures. All limitations and restrictions have been introduced by Law. Therefore, the regulations of the Regulation on the Management of Military Prisons and Detention Facilities and the Execution of Penalties, the revocation of which are being requested, are not considered as being contrary to higher norms, nor the limitations on the use of Internet and meetings with visitors and phone calls are seen to contradict the law."

17. The judgment was notified to the applicant on 26/7/2013.

18. The applicant lodged an individual application on 22/8/2013.

19. At the end of the individual application of the applicant concerning the file in relation to his detainment *de jure*, and upon the judgment of the Constitutional Court No. 2013/7800 of 18/6/2014, the Ministry stated that the right of the applicant to a fair trial as guaranteed in Article 36 of the Constitution was violated and that a judgment for a re-trial was delivered so as to remedy such violation. Then, in line with the additional judgment (File No: E.2010/427, K.2012/427 of 19/6/2014) of the 4th Assize Court of İstanbul Anadolu, which tried the applicant, the court ruled that the applicant is tried as a detainee and that the trial which was over be renewed. Within this framework, the execution of the

ruling concerning the applicant was suspended and the applicant was released.

B. Relevant Law

20. Article 2 of the Law No. 1721 on Governing Penitentiaries and Detention Houses of 14/6/1930 is as follows:

> *"…*
>
> *E) Instructions shall be prepared...*
>
> *...concerning how the convicts' letters and their conversations with those who come to visit them and their communication with the outside world will be regulated and controlled.*
>
> *…"*

21. Article 66 of the Law No. 5275 on the Execution of Penalties and Security Measures of 13/12/2004 is as follows:

> *"(1) Convicts in closed penitentiaries can make phone calls using the paid phones which are under the control of the management, as per principles and procedures specified in the by-law. The phone conversation is tapped and recorded by the management. This right can be limited for dangerous convicts and for those that are members of organizations.*
>
> *2) Convicts in open penitentiaries and those in education homes for children can make phone calls freely.*
>
> *(3) Immediate avail of convicts in open and closed penitentiaries of telephones and faxes which belong to the institution in the event of death, severe illness of their descendants, ascendants, spouses, and siblings as well as in the event of natural disasters shall be ensured. Such communication and correspondence shall be documented in the form of minutes, which shall be safeguarded in a special file.*
>
> *(4) Convicts in open and closed penitentiaries and in education homes for children cannot keep car-phones, wireless phones or mobile phones and similar communication devices, nor use them.*

22. Article 68 of the Law No. 5275 is as follows:

"(1) Apart from the limitations specified in this Article, the convict shall have the right to receive letters, faxes, and telegrams which have been sent to him/her as well as the right to send these under the condition that s/he shall bear the costs thereof.

(2) Letters, faxes, and telegrams which have been sent by the convict and which s/he receives shall be examined by the 'letter perusal' commission wherever such commission is available and, in institutions where the latter is not found, by the highest office.

(3) Letters, faxes and telegrams that endanger the order and security of the institution, that target its staff, that cause communication between the members of interest-driven criminal organizations or other criminal organizations and that include lies, wrong information, threats and slandering which may cause individuals and other organizations to panic shall not be given to the convict. If these are written by the convict, they shall not be sent.

(4) Letters, faxes, and telegrams which are sent by the convict to official authorities or to his/her counsel for his/her defense shall not be subject to examination."

23. Relevant paragraphs of Article 114 of the Law No. 5275 are as follows:

"…

(2) Convicts in phases of investigation and prosecution can accept visitors under the condition that the general order of the institution on such matters is adhered to. However, the Public Prosecutor during the investigation phase, the judge or the court in the prosecution phase can prohibit the convicts' reception of visitors for the soundness of the investigation or the case or can impose restrictions in this regard.

(3) Written correspondence and phone calls of convicts can be restricted by the Public Prosecutor during the investigation phase and by the judge or the court in the prosecution phase.

...

(5)Convict's communication with the counsel and their contact and meetings within the framework of the institutional order shall in no way be hampered, nor can such restrictions be imposed.

(6) Provisions included in the special law are reserved."

24. Article 115 of the Law No. 5275 is as follows:

"(1) Measures below can be imposed on convicts who are dangerous, who pose a threat to tamper with the evidence, who endanger the purpose or the security of the penitentiary or who exhibits behavior that can prepare the grounds to allow recidivism, by the Public Prosecutor during the investigation phase and by the judge or the court during the prosecution phase:

….

b) Restriction of his/her connection to the outside world, his/her reception of visitors and phone calls for a certain amount of time.

…"

25. Article 116 (1) of the Law No. 5275 is as follows:

"(1) Of the provisions on issues ... of this Law which has been regulated in Articles 9, 16, 21, 22, 26 to 28, 34 to 53, 55 to 62, 66 to 76, and 78 to 88, those that are of congruent quality with the detention status can be applied regarding convicts."

26. Article 244 (1) and the final paragraph of Article 244 of the Law on the Establishment and Trial Procedures of Military Courts No. 353 of 25/10/1963 is as follows:

"Penal judgments made by military courts shall not be carried out unless they are final. If a provision otherwise is not found in this Law and in the Military Penal Law, respective provisions of the Law on the Execution of Penalties and Security Measures No. 5275 of 13/12/2004 shall apply concerning the execution of penalties and security measures.

...

The modality of execution of penalties at military penal and detention houses shall be indicated in a regulation which shall be issued by the Ministry of National Defense..."

27. Respective articles of the Regulation on the Management of Military Prisons and Detention Facilities and the Execution of Penalties (Regulation) are as follows:

"Control of Communication:

Article 66 - Letters which are sent to and sent by all convicts and detainees shall be examined by the management of the military prison and detention house.

Letters which have been written by convicts and detainees shall be delivered to the management of the prison and detention house whereby the envelopes shall not be closed. Envelopes of the letters in the delivery of which no harm has been found shall be closed by the management of the military prison and detention house and delivered to the post office.

The letters, which have been sent to convicts and detainees, has been opened and examined and no harm has been found in the delivery thereof to the convict, shall be delivered to their recipients after marked 'SEEN.'

Letters which will be sent by all convicts in the military prison and detention house shall be processed as those of the enlisted.

(Amended Paragraph Five: Article 6 of the Regulation Concerning the Amendment of the Regulation on the Management of Military Prisons and Detention Facilities and the Execution of Penalties of 22.11.2010) Issue concerning how to benefit from tools of communication other than letters shall be regulated by way of instructions which shall be prepared by the management of the military prison and detention house. However, communication which is possible via mobile phones, radios, computers and similar devices shall be prohibited.

(Additional Paragraph Six: Article 6 of the Regulation Concerning the Amendment of the Regulation on the Management of Military Prisons and Detention Facilities and the Execution of Penalties of 22.11.2010)

Communication by way of fax and telegram using the PTT facilities is possible under the condition that the cost thereof is covered by the convict and the detainee. Letters, faxes, and telegrams sent and received by the convict shall be examined by the highest authority of the institution.

Phone call

Article 66/A - Convicts and detainees in the military prison and detention house can make phone calls to their spouses, blood and in-law relatives until the third degree and their custodian under the condition that this is documented.

...

Phone calls by convicts and detainees with affinities specified in this article shall be tapped by the staff tasked accordingly by the warden of the military prison and detention house and if possible, recorded via electronic devices.

Visiting Convicts and Detainees

Article 70 - Convicts and detainees can be visited within the scope of principles established by the management of the prison and detention house. There shall be four visits per month whereby there shall be one visit each week, one of which shall be open and three closed.

A panel demonstrating the days and hours of visitation of convicts and the rules that shall be observed by the visitors shall be hung at the gate of the military prison and detention house in a way visible by the visitors. It is possible for the warden of the military prison and detention house to arrange the visitation of convicts and detainees who constitute a significant danger at the military prison and detention house, those who are suspected to escape and of those who are inclined to forming groups for days other than the rest.

Days and hours of visits shall be planned by the warden of the military prison and detention house and implemented by the company commander or the superior of the institution, in the organization of which a military court has been established. Duration of the visit cannot be

arranged in such a way as to be less than half an hour and be in excess of one hour. Duration of the visit shall commence from the moment when the visit actually starts.

...

Meeting with the counsel and the notary

Article 70/A - The detainee shall meet with the counsel, without requiring a letter of proxy and as per the open visit procedure, and at all times and in an environment where the dialogue cannot be heard by others but also where the visits can be observed by the staff. Correspondence of such persons with the counsel shall not be subject to examination. In the investigation phase, three counsels at most can simultaneously meet with the detainee.

The convict and his/her counsel shall be allowed to meet as per the open visit procedure upon production of the professional identification, not on holidays but within working hours and at places provided for such visits where the dialogues cannot be heard but can be seen for reasons of security.

The records of the counsels' documents concerning the defense, files and of their dialogues with their clients shall not be subject to examination. However, in terms of the relation of the convicts who have been convicted as a result of offenses specified in Article 220 of the Law No. 5237, book two, chapter four, sections four and five with their counsels, upon the request of the military prosecutor and upon the judgment of a judge-class member of the military court staff, an official can accompany the counsel and the convict in such a visit in cases where the latter has committed acts which constitute a criminal offense, or endangers the security of the military prison and detention house, or in cases where findings and information that the convict acts as the intermediary to facilitate the communication of the members of terrorist or other criminal organizations are obtained; or the documents which have been given to these persons by the counsels thereof can be examined by the military court. The military court decides whether or not to give the document in whole or in part.

The convict shall have the right to meet his/her convicts who do not hold a letter of proxy at most three times within the scope of the performance of the profession of counseling.

Convicts and detainees can meet with the notary, on days other than holidays and during working hours, under the supervision of the administration and as per the open visit procedure under the condition that the professional identification is produced and that the visit concerns the profession.

International Documents

28. The part of the Recommendation REC (2006) No. 2 of the Council of Ministers of the European Council to the Member States Concerning the European Prison Rules, which relates to the relations of the convicts and detainees with their counsels and the outside world is as follows:

"Legal Advice

23.1. All prisoners are entitled to legal advice. The prison authorities shall provide them with reasonable facilities for gaining access to such advice.

23.2. Prisoners may consult on any legal matter with a legal adviser of their own choice and at their own expense.

23.3. Where there is a recognized scheme of free legal aid the authorities shall bring it to the attention of all prisoners.

23.4. Consultations and other communications including correspondence about legal matters between prisoners and their legal advisers shall be confidential.

23.5. A judicial authority may in exceptional circumstances authorize restrictions on such confidentiality to prevent a serious crime or major breaches of prison safety and security.

23.6. Prisoners shall have access to, or be allowed to keep in their possession, documents relating to their legal proceedings.

Contact with the outside world

24.1 Prisoners shall be allowed to communicate as often as possible by letter, telephone or other forms of communication with their families, other persons and representatives of outside organizations and to receive visits from these persons.

24.2 Communication and visits may be subject to restrictions and monitoring necessary for the requirements of continuing criminal investigations, maintenance of good order, safety and security, prevention of criminal offenses and protection of victims of crime. But such restrictions, including specific restrictions ordered by a judicial authority, shall nevertheless allow an acceptable minimum level of contact.

24.3 National law shall specify national and international bodies and officials with whom communication by prisoners shall not be restricted.

24.4. The arrangements for visits shall be such as to allow prisoners to maintain and develop family relationships in as normal a manner as possible.

24.5. Prison authorities shall assist prisoners in maintaining adequate contact with the outside world and provide them with the appropriate welfare support to do so.

…"

IV. EXAMINATION AND GROUNDS

29. The individual application of the applicant (App. No: 2013/6693 of 22/8/2013) was examined during the session held by the court on 16/4/2015 and the following was ordered and adjudged:

A. The Applicant's Allegations

30. Indicating that he was detained *de jure* at the Military Prison within the scope of the trial the appeal examination of which was ongoing at the Court of Cassation; that his defense, as well as his requests concerning following up a news piece about himself on the Internet and a phone call to his counsel, had been rejected as such

regulations were absent from the Execution Regulation; that, on the other hand, his open visits or phone call conversations with his family and other persons whenever he wanted were restricted despite various arrangements in Law No. 5275 and the Execution Regulation concerning the status of the detainees in prison; and that his phone calls and other communication capabilities were recorded or followed to the detriment of the privacy thereof and, moreover, he could not follow broadcasts/publications about himself for he was denied access to the Internet, hence failed to accede the information that he needed to prepare his defense and that such restrictions were imposed without reliance on any law or without a decision of a Public Prosecutor or a judgment of a court; the applicant alleged that his fundamental rights regulated in Articles 13, 19, 20, 22, 36 and 41 of the Constitution were violated and requested that the respective articles of the Regulation be revoked and he be compensated.

B. The Constitutional Court's Assessement

31. The Constitutional Court is not bound by the legal qualification of the facts made by the applicant. When the annexes of the application form are examined, it is seen that although the Applicant claimed that his fundamental rights regulated in Articles 13, 19, 20, 22, 36 and 41 of the Constitution had been violated, the application, for reasons stated here below, was perused within the framework of respect to family and private life, and the right to communication.

1. Admissibility

a. The Allegations Concerning the Violation of the Right to Communication

32. Indicating that he was detained *de jure* at the Military Prison within the scope of the trial, the appeal examination of which was ongoing at the Court of Cassation; that his defense, as well as his requests concerning following up a news piece about himself on the Internet and a phone call to his counsel to discuss such matters, were rejected as such regulations were absent from the Execution Regulation,

the Applicant claimed that his right to a fair trial was violated. Also, the Applicant claimed that his communication with his family and other persons had been recorded or controlled in a way to violate privacy.

33. Regarding the applicant's claims concerning the phone call with his counsel and access to the Internet, the Ministry, in its letter of opinion, indicated that the trials regarding the applicant were still ongoing, hence legal remedies remained yet to be exhausted. Apart from that, no evaluations as to the admissibility of the application concerning the freedom of communication were made. The Ministry has stated that requesting the opinion of the Ministry of National Defense regarding the material facts would be appropriate.

34. In his statement in objection to the opinion of the Ministry, the Applicant indicated that he had no applications regarding the trial file which was the material basis for his detention and that he made his application, in general, for prevention of detainees' communication with their counsels constituted a violation of the right to a fair trial. Concerning the following of his communication with his family and other persons, he reiterated what he had already indicated in the application form.

35. It is clear that the Applicant's claims that he could not have a phone call with the attorney are not to prepare his defense against the trial which was the basis of his detention on the date of the application. Being *de jure* detained, the Applicant alleged that prevention of the phone call with his counsel, in general, was in violation of his right to a fair trial. There are no reservations that such issues as ensuring adequate facilitation for the preparation of a defense against an ongoing trial and regarding the avail of attorney services fall within the scope of the right to a fair trial. However, with the judgment of the 4th Assize Court of İstanbul Anadolu concerning the re-trial, it was recognized that the procedure was ongoing and that the claims of the applicant stood the chance of a scrutiny at the Court, hence it was not deemed necessary to examine his claims separately within the framework of the right to a fair trial (Concerning the commencement of a re-trial upon the judgment to renew the trial being an effective way of application, see *Aziz Yıldırım*,

App. No: 2014/1957, 23/7/2014, § 57). Applicant's claims that he was not allowed to use the Internet media so as to enable the preparation of his defense were also considered to remain within the said scope of the right to a fair trial, hence not perused.

36. When the application form and its annexes are examined, the essence of the claims of the applicant concerns the facts that his communication with his counsel via a phone call was restricted and his communication with his family and other persons were controlled. The Constitutional Court is not bound by the legal qualification of the facts made by the applicant. For this reason, the applicant's claims that he was prevented from calling his counsel and that the privacy of his communication with his family and other persons was violated have been considered within the framework of the freedom of communication, which has been defined in Article 22 of the Constitution.

37. The recommendation to request the opinion of the Ministry of National Defense has been found illegitimate considering that information on the facts and circumstances in addition or different from what is within the scope of the existing file were not needed.

38. Applicant's application concerning the violation of his right to communicate defined in Article 22 of the Constitution as he was not allowed to make a phone call to his counsel as he was under *de jure* detention and that his communication with his family and other persons were controlled is not manifestly ill-founded and for no other reasons to require a ruling of inadmissibility are visible, it has to be ruled that it is admissible.

b. The Allegations Concerning the Violation of the Right to Respect for Private and Family Life

39. The Applicant claimed that his phone contact and open and closed visits with his visitors and his family whenever he wanted to do so were restricted and incoming phone calls were also prevented although this had no legal basis as a result of different arrangements made in the Law No. 5275 and the Regulation concerning the status of detainees in prisons, and although this did not rely on any decision by the Public Prosecutor, judge or court.

40. No assessment was made in the Ministry's opinion concerning the admissibility of the individual application. On the other hand, the Ministry considered that it would be appropriate to seek the opinion of the Ministry of National Defense concerning the claims that the applicant was denied phone contact or open visits with his family or that his visits were restricted.

41. For the applicant's claims in general were pertaining to the restriction of his meeting his family and other affinities and surveillance of such meetings and since he did not mention any practices other than the implementation of the provisions of the legislation concerning his meeting with his family and other affinities, requesting additional information and documents from the Ministry of National Defense was not considered to be a necessity.

42. As the applicant's application regarding the violation of his right to respect for his family and private life, which has been defined in Article 20 of the Constitution, was neither manifestly ill-founded nor any other reasons that require a decision in the direction of its inadmissibility were found, a decision as to its admissibility has to be made.

2. Merits

a. The Allegations Concerning the Violation of the Right to Communication

43. Indicating that Article 114 (3) of the Law No. 5275 provides that the Public Prosecutor or the Judge or the Court could impose restrictions on the detainees' correspondence and phone calls and that as per the paragraph (5) of the same Article it is essential not to prevent detainee's communication with the counsel and their meeting in respect of institutional rules, the applicant claimed that preventing his phone calls to his counsel were bereft of any legal basis. Furthermore, the applicant claimed that reading of his mail and interception and recording of his phone conversations despite the absence of a ruling of the court or of the judge concerning the restriction judgment in line with his detention as well as the absence of any legal grounds concerning such restriction of

his communication via mail and phone was a violation of the privacy of communication.

44. In its opinion, the Ministry assessed the applicant's inability to meet with his counsel within the scope of the right to a fair trial. In the evaluation carried out under the light of the case law of the ECtHR (European Court of Human Rights) and the right to a fair trial, the requirement to offer adequate facilitation so as to enable the preparation of the defense was emphasized and the importance of the right to access to a lawyer was touched upon. On the other hand, in its evaluation concerning the violation of the privacy of private life, it reminded of Article (8) of the European Convention on Human Rights (Convention) as being inclusive of the right to respect to communication. However, in general, it assessed the claims concerning the applicant not being able to meet with his family and other affinities. The Ministry made no other assessments concerning control and surveillance of communication.

45. In his declaration against the opinion of the Ministry, the Applicant stated that the Ministry has misunderstood his claims as his complaint in general concerned the prevention of detainees' communication with their counsels.

46. 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. No interventions on the exercise of such rights can be imposed by public authorities other than those which are legitimate and needed in a democratic society with the aim to protect national security, public security, national welfare, to prevent crime and disorder as well as to protect the general morals and the rights and freedoms of others."*

47. The ECtHR examines grievances concerning the right to communication within the framework of Article 8 of the Convention. Also, not a single Article in the Constitution to reciprocate Article 8 of the Convention is present. The right to communication, which is the

basis of the claims of the Applicant, is regulated in Article 22 of the Constitution.

48. Article 22 of the Constitution with the side heading of *''Freedom of the press''* is as follows:

> *"Everyone has the freedom of communication. Privacy of communication is fundamental.*
>
> *Unless there exists a decision duly given by a judge on one or several of the grounds of national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms of others, or unless there exists a written order of an agency authorized by law in cases where delay is prejudicial, again on the above-mentioned grounds, communication shall not be impeded nor its privacy be violated. The decision of the competent authority shall be submitted for the approval of the judge having jurisdiction within twenty-four hours. The judge shall announce his decision within forty-eight hours from the time of seizure; otherwise, seizure shall be automatically lifted.*
>
> *Public institutions and agencies where exceptions may be applied are prescribed in law.*

49. In Article 22 of the Constitution, it is provided that everybody has the freedom of communication and that the privacy of communication is fundamental. Article 8 of the Convention provides that everybody has the right to request that his or her correspondence is respected. The joint sphere of protection of the Constitution and the Convention provides protection also for the privacy of correspondence in addition to the freedom thereto, regardless of its content and form. Within the scope of communication, the security of the expressions of individuals which constitute the subject matter of their collective and mutual verbal, written and visual communications shall also be ensured. Communication activities which are performed via mail, electronic mail, telephone, fax, and Internet have to be considered within the scope of the right to correspondence and the privacy of communication (*Yasemin Çongar and Others* [GK], App. No: 2013/7054, 6/1/2015, §§ 48-50).

50. Preventing public authorities' arbitrary intervention in individual's right to communication and the privacy of the correspondence thereof comes within the scope of the securities the Constitution and the Convention offers. Control of the content of correspondence constitutes a gross intervention on the privacy of communication, hence the freedom of correspondence. Freedom of communication, on the other hand, is not absolute and comes with certain legitimate limitations. The specific criteria for such limitation within this scope have been listed in Article 22 (2) of the Constitution and Article 8 (2) of the Convention. Furthermore, in Article 22 (3), it is indicated that the public bodies and institutions which have been provided with exceptions shall be specified in the Law. So, the presence of legality and any circumstance that requires intervention in the scrutiny of the alleged interventions on the freedom to communicate shall be assessed with a consideration for the circumstances of each case.

51. Also, the convicts and detainees, with the exception of the right to individual freedom and security that can be considered as detention in legal terms in Article 19 of the Constitution (see İbrahim Uysal, B.No: 2014/1711, 23/7/2014, §§ 29-33) enjoy all fundamental rights and freedoms, generally, that fall under the joint sphere of protection of the Constitution and the Convention (For a similar judgment see *Hirst v. the United Kingdom (No. 2)*, App.No. 74025/01, 6/10/2005, § 69). . Also, these rights can be restricted in cases where reasonable necessities such as prevention of recidivism and ensuring discipline to ensure order and security in the penitentiary are present as an inevitable consequence of being confined in such an institution. However, restriction concerning the rights of the convicts even under such circumstances must satisfy, in line with the Law specified in Article 13 of the Constitution the conditions for being suitable for a democratic society and proportionate as well as law-based and legitimate (for a similar judgment, see *Silver and Others v. the United Kingdom*, App. No. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75, 25/3/1983, §§ 99-105).

52. In the incident which is the subject of the application are allegations concerning the two dimensions of the freedom to

communicate. The first concerns not allowing the applicant's phone call to his counsel. Whereas the other concerns reading mail and recording of phone calls within the scope of his relations with the outer world. These issues have been elaborated further, under separate headings, here below:

i. Prevention of Contacting His Counsel

53. Indicating that the detainee's correspondence with his counsel and their meeting within the scope of the institutional order is essential as per Article 114 (5) of the Law No. 5275 are essential, the applicant claimed that the prevention of his phone call with his counsel has no legal basis.

54. The Constitution and the Convention indicate that everybody has the freedom to communication. Within this context, there is no doubt that persons detained in prisons have the right to communication. However, the tools with which communication shall be made has not been explicitly provided in the Constitution and the Convention. Muteness of the Constitution and the Convention regarding the determination of tools of communication can be said to give rise to the consequence that all sorts of communication can be considered within this scope. Also, the larger margin of discretion that public authorities have regarding the determination of the freedom to communicate within prisons is a circumstance which is understandable in line with the quality and purpose of a prison. Within this context, it is obvious that the scope of the freedom to communicate is not inclusive of all tools of communication regarding convicts and detainees who are kept in prison. It shall be assessed whether or not it is of the proportion to remove the freedom to communicate entirely for detainees and convicts and whether or not the intervention which has been made upon the examination of the characteristics of present cases is in violation of the freedom to communicate. The basic approach in this context shall be to support the contact with the outer world of convicts and detainees.

55. Especially in cases where other means of communication are available and sufficient, it would not be possible to interpret Article

22 of the Constitution and Article 8 of the Convention in a way as if they provide security for the phone calls of the convicts and detainees (For similar judgments of the ECtHR see *EU v. The Netherlands*, App. No: 37328/97, 29/1/2002, §§ 92-93). The point of attention here is the requirement that the margin of discretion of public authorities regarding ensuring the communication of convicts and detainees with the outer world shall be interpreted widely. In cases where one or some of the methods of communication are available and sufficient, not allowing convicts and detainees their phone calls cannot be considered *per se* as the violation of the right to communicate. However, in cases where detainees and convicts within the scope of Article 22 of the Constitution, are given the possibility of a phone call in addition to other tools of communication, restrictions on such freedom need to be as per a legitimate cause and in line with the requirements of a democratic society, as well as proportionate.

56. Phone calls are recognized for convicts and detainees within the scope of Article 66 of the Law 5275. Regarding the case at hand, allowing detainees to make phone calls has to be a valid practice for the applicant considering the rule that among the articles concerning the rights, restrictions, and liabilities of convicts as provided in Article 116 of the same Law, those which are congruous to the state of detention can be applied to detainees. As a matter of fact, the principles concerning the applicant's phone calls have also been clarified as per Article 66/A of the Regulation. As such, there is no doubt that phone calls are also included within the scope of the freedom of convicts and detainees to communicate.

57. Convicts and detainees seeing their counsels within the framework of freedom to communicate is yet another issue which has to be assessed separately. All convicts and detainees, as specified in the Recommendations No. REC (2006) 2 of the Council of Ministers of the European Council to the Member States Concerning the European Prison Rules, have the right to get legal counsel. Within this framework, it is the liability of the prison management to provide the convicts and detainees with reasonable assistance. However, no material method has

been provided as a part of the said recommendations as to which tools of communication such liability is to be performed with. Determination thereof is the responsibility of public authorities.

58. Convicts' and detainees' meeting with a counselor an attorney has been regulated in diverse articles of the Law No. 5275. Convicts' meeting with an attorney has been regulated in Article 59 of the said Law. Then, regarding detainees, it is Article 114 (5) entitled the *'rights of detainees'* of the same Law which provides that detainees' communication with the attorney as well as their meetings within the scope of institutional order can neither be prevented nor limited in any way. The meeting procedure of the convicts specified in Article 59 has been accepted as well for detainees as per and under the condition not to contradict the condition of detention specified in Article 116.

59. As is the case with the case at hand, that the modality of execution of the sentences in military prisons and detention houses, and the issue that the respective provisions of the Law No. 5275 shall be applied in the execution of sentences and security measures as long as there are not any provisions otherwise in Article 244 of the Law No. 353, shall be regulated in a Regulation to be issued by the Ministry of National Defense. As such, in the case at hand, the applicant's having been kept at the military prison leads to no difference whatsoever regarding the articles of the Law which will be applied.

60. In the incident which is the subject of the application, applicant's request to have a phone call was rejected on the basis of arrangements in the Law No. 5275 (see. § 11). Similarly, in the case that the applicant has lodged with the High Military Administrative Court against the judgment of rejection of the Command and with the request that it be judged that the Regulation is rescinded, the Court made an assessment of the legal appropriateness of the Regulation on the basis of Law No. 5275.

61. Under the light of what has been specified here above, it is obvious that the applicant has the right to make phone calls. Furthermore, there are no legal obstacles regarding the meeting of the *de*

jure detained applicant with his attorney. However, the issue of whether means of communication via phone is inclusive of meeting with the attorney has to be clarified.

62. In the field of fundamental rights and freedoms, the legislative body is obliged to make foreseeable regulations that do not allow for arbitrariness. Granting a very broad discretionary power to the administration which may pave the way for the arbitrary practices may be 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 arbitrary practices of the administration (see AYM, E.1984/14, K.1985/7, K.T. 13/6/1985).

63. On the other hand, the Constitutional Court on issues such as the restriction of liberties which have to be regulated exclusively by law, has agreed that the law has to have determined basic principles, essentials, and the framework; and that regarding issues that the Constitution maker has explicitly provided that should be regulated by law, the transfer of the legislative power of issues concerning specialties and the technique of implementation to the executive body after having determined the ground rules cannot be interpreted as the transfer of the legislative power (Judgment of the Constitutional Court AYM. No. E.2014/133, K.2014/165 of 30/10/2014). In this context, it has been agreed that following the determination by the lawmaker of the basic principles, essentials and the framework in legal arrangements concerning the limitation of fundamental rights and freedoms, other details can be determined by way of regulatory transactions. Otherwise, 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.

64. It cannot be said that the freedom of correspondence defined in Article 22 of the Constitution secures exclusive phone calls of the convict and detainees in cases where other means of communication are made

available (see § 55). Also, there is no doubt that securing the phone communication of the applicant who was *de jure* detained in the present case, as required by Article 66 and by the indication of Article 116 of the Law No. 5275, is within the scope of Article 22 of the Constitution.

65. It must be determined whether or not the possibility of making phone calls which have been secured as per the regulations provided in Law No. 5275 with reliance upon Article 22 of the Constitution comprises of detainees' meetings with their counsels. In Article 114 (5) of the Law 5275, it has been provided that the detainee's communication with his counsel cannot be prevented or restricted. There is no doubt that the concept of communication also includes communication via phone. So, it has been agreed that the phone communication of the detainee who has been *de jure* detained in the present case cannot be prevented and restricted. Also, in the Law No. 5275 and in the Regulation, there are no provisions that the *de jure* detainee cannot have phone calls with his attorney.

66. As a matter of fact, the Command and the High Military Administrative Court which have rejected the applicant's request to make a phone call with his attorney have agreed as a justification that convicts' and detainees' phone calls with their counsels being private, applicant's phone call with his attorney would not be allowed (see § 11, § 16). Furthermore, the absence of any explicit regulation which allows the applicant's phone communication with his attorney was given as justification.

67. In the present case, with reliance upon the justification that an explicit regulation is required so as to enable the applicant's exercise of his freedom of communication in prison and that the private correspondence cannot be recorded, the applicant was not allowed a phone call with his attorney. In other words, although there are no prohibitive provisions on the issue of the detainee making a phone call with his attorney, the freedom to correspondence was violated with the justification that a phone call with an attorney had not been regulated. However, reasonable evaluation of this justification against the explicit regulation in Article 114 (5) is not possible. As a matter

of fact, what is essential against the provision of the Law is that a detainee's communication with his attorney must never be prevented or restricted in any way whatsoever. It is clear in Article 66 of the Law No. 5275 that the scope of communication is inclusive of communication via phone. Against the regulations provided in Articles 66 and 114 (5) of Law No. 5275, prevention of communication with his attorney of the applicant detained *de jure* with reliance upon justifications that such communication is being recorded and that there are no explicit provisions concerning correspondence with the attorney does not reciprocate the principle of legality. As a conclusion, it cannot be said that sufficient legal arrangements to justify the prevention of the *de jure* detained applicant's phone call with his attorney are in place within the framework of the provisions of the Law.

68. For reasons explained, it has to be decided that the prevention of applicant's phone call with his counsel is in violation of the right to communication which has been secured in Article 22 of the Constitution.

ii. The Allegations that His Correspondence with the Outside World via Phone and Mail Has Been Prevented

69. The applicant claimed that his correspondence with his family and others were intercepted, phone calls recorded and tapped despite the absence of both any legal grounds and a restriction judgment made by the Public Prosecutor, judge or a court in line with the purpose of detention was in violation of the freedom to communicate.

70. In the present case, the applicant alleged that his correspondence with his family and with other persons had been recorded regardless of the fact that the correspondence of persons who are in prison as detainees cannot be monitored without an explicit legal regulation differently from convicts. Hence, the claims of the applicant were rooted in the fact that the intervention in the privacy of communication took place without any legal regulation and that they purported no aspect of legality. Apart from this, the applicant did not mention any material incident.

71. Preventing public authorities' arbitrary intervention in individual's right to communication and the privacy of the

correspondence thereof comes within the scope of the securities the Constitution and the Convention offer (see §§ 49-50). Freedom of communication, on the other hand, is not absolute and comes with certain legitimate limitations. The specific criteria for such limitation within the scope of the subject matter of the application have been listed in Article 22 (2) of the Constitution and Article 8 (2) of the Convention. Furthermore, in Article 22 (3), it is indicated that the public bodies and institutions which have been provided with exceptions shall be specified in the Law.

72. The applicant did not mention any material incident regarding the recording and tapping of his phone calls and scrutiny of his mail. Then, it is obvious that the Military Prison Management monitored phone and mail correspondence of the applicant who was detained within the scope of Articles 66 and 68 of the Law No. 5275 and Articles 66 and 66/A of the Regulation. Hence, the examination of the application cannot be refrained from with the justification that the claims of the applicant not being based on events that are substantial and which took place, and that the applicant holds no status of any victimization (for similar judgments see *Klass v. Germany*, App. No. 5029/71, 6/9/1978, §§ 34-35, *Campbell v. the* United Kingdom, App. No: 13590/88, 25/3/1992, §§ 32-33). On the other hand, within the scope of the said regulations, recording of all phone calls by the Military Prison Management is obviously an intervention in the privacy of applicant's communication.

73. Respect to family life shall also be taken into consideration during the examination of the applicant's claims concerning tapping and recording of the phone calls he made with his family. In the case which is the subject matter of the application, inevitable consequences of being kept in prison and the issue concerning the privacy of communication with the family have to be taken into consideration collectively with reliance upon Articles 20 and 22 of the Constitution. Within this context, in the examination whether or not the intervention on the privacy of communication is in violation of the respect to family life as defined in Articles 20 and 22 of the Constitution and the freedom of communication, the intervention has to be checked as to its compliance

of the principles of legality, legitimate aim, requirement in a democratic society and proportionality.

74. In Article 22 of the Constitution, it has been specified that the intervention on the privacy of communication can take place upon the verdict of a judge and within the framework of aims specified in paragraph two. Yet, in paragraph three, it has also been specified that certain public bodies and institutions can be considered as exceptional with the law.

75. Determination of which paragraph of Article 22 of the Constitution the intervention of the Prison Management in the communication of convicts and detainees falls into the scope of is of importance regarding the legality of such intervention. For in the event of agreement that this falls under paragraph two, the intervention made without a verdict or an approval of the judge shall fail to satisfy the principle of legality. On the other hand, in the event that paragraph three is taken up on the agenda, it shall be assessed whether or not the lawmaker accepts the prison as an exceptional institution.

76. In the legislation are no explicit regulations as to prisons being of the exceptional public bodies or institutions specified in Article 22 (3) of the Constitution. Then, it has been provided that the regulation and control of the communication of convicts and detainees shall be carried out via by-law in line with Article 2 (e) of the Law No. 1721. On the other hand, it was indicated that this should be restricted as per the rules which have been provided in the Law under the condition that the other rights of the convicts involved in the Constitution and basic aims of execution remain reserved as per Article 6 (1) (b), and that regarding the detainees and as per Articles 66 and 68 of the Law No. 5275 and by indication of Article 116 thereof, that correspondence via phone, letters, fax, and telegram would be monitored. As such, it was seen that the articles of Law specified here above consider the prison as an exceptional public institution where the freedom to communicate can be restricted.

77. It cannot be said that the performance of the principle of legality is not possible by way of a general legal regulation concerning that

the freedom to communicate can be restricted. Other than that, basic principles which have to be present in the legal regulation which can be defined as the quality of the law made have to be determined and the limitations of offices to exercise their discretion have to be clarified. Within this context, as the Grand Chamber of the Court of Constitution has indicated in its judgment, the basic principles of the Law and the general framework have to be provided (see §§ 62-63). As a matter of fact, it cannot be said that Articles 66 and 68 of the Law 5275 meet these requirements neither concerning the claims of the applicant nor in general terms. Hence, it has to be accepted that the principle of legality has been satisfied regarding the limitation of the communication of the convicts and detainees in prison.

78. There is no doubt that the legitimate aim of the intervention is to ensure security in prisons and prevention of crime.

79. The applicant, in his allegations, mentioned concrete facts but made allegations as to the violation of the privacy of communication. Within this context, it cannot be asserted that taking of certain measures concerning the control of convicts' or detainees' communication by the administration in prisons from the viewpoint of the requirements of a democratic society is the consequence of the reasonable and natural requisites of depriving people of their freedom, nor that this is compliant to the freedom to communicate (for similar judgments, see *Campbell v. the United Kingdom*, § 44: *Silver and Others v. the United Kingdom*, § 98; *Golder v. the United Kingdom*, App. No. 4451/70, 21/2/1975, § 45; *Mehmet Nuri Özen and others v. Turkey*, App. No: 15672/08, 11/1/2011, § 51). On the other hand, regarding the incident which is the subject of the application, it cannot be said that prison administration's control of the communication of convicts and detainees is, in general, disproportionate.

80. For reasons explained, it has to be decided in this section of the application that the prevention of applicant's phone call with his counsel is *not in violation* of the right to communication which has been secured in Article 22 of the Constitution.

b. The Allegations Concerning the Violation of the Right to Respect for Private and Family Life

81. The applicant claimed that his correspondence with his family and others had been intercepted, phone calls had been recorded and tapped despite the absence of any legal grounds and a restriction judgment made by the Public Prosecutor, judge or a court in line with the purpose of detention.

82. The Ministry indicated in its opinion that the convicts' and detainees' maintaining their contact with their families and other affinities was the basic aspect of respect to private and family life and, however, this issue had to be considered in line with prevention of disorder and crime which is an inevitable consequence of conditions of detention. On the other hand, the Ministry with reference to the judgments of the ECtHR said that during the examination of the intervention in the right to respect to private and family life, an assessment as to legality, legitimate aim, requirement and proportionality in a democratic society had to be made.

83. The applicant, in his response to the opinion of the Ministry, alleged that visits of the detainees had not been as much limited as those of convicts, that his wife, kids and other visitors had had hardships as a result of not being able to visit him as they wished and for not being able to contact on the phone as they needed, that detainees maintenance of their contact with the outer world had not been subject to any legal limitations and that he was restricted whereas he should have been entitled to visitation of his family and to phone calls whenever he wished to and without limitation.

84. 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. No interventions on the exercise of such rights can be imposed by public authorities other than those which are legitimate and needed in a democratic society with the aim to protect national security, public*

security, national welfare, to prevent crime and disorder as well as to protect the general morals and the rights and freedoms of others."

85. Article 20 of the Constitution with the side heading *''Privacy of private life''* 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.

Unless there exists a decision duly given by a judge on one or several of the grounds of national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms of others, or unless there exists a written order of an agency authorized by law, in cases where delay is prejudicial, again on the above-mentioned grounds, neither the person, nor the private papers, nor belongings of an individual shall be searched nor shall they be seized. The decision of the competent authority shall be submitted for the approval of the judge having jurisdiction within twenty-four hours the judge shall announce his decision within forty-eight hours from the time of seizure; otherwise, seizure shall automatically be lifted

Everyone has the right to request the protection of his/her personal data. This right includes being informed of, having access to and requesting the correction and deletion of his/her personal data, and to be informed whether these are used in consistency with envisaged objectives. Personal data can be processed only in cases envisaged by law or by the person's explicit consent. The principles and procedures regarding the protection of personal data shall be laid down in law."

86. Article 41 of the Constitution with the heading *''Protection of the family, and children's rights''* is as follows:

"Family is the foundation of the Turkish society and based on the equality between the spouses.

The State shall take the necessary measures and establish the necessary organization to protect the peace and welfare of the family, especially mother and children, and to ensure the instruction of family planning and its practice.

Every child has the right to protection and care and the right to have and maintain a personal and direct relationship with his/her mother and father unless it is contrary to his/her high interests.

87. By taking into account provision of Article 20 (1) of the Constitution that "*Everyone has the right to demand respect for his/her private and family life*", a regulation similar to the one in Article 8 of the Convention on the right to respect to private and family life has been made. Also, a complementary regulation is also provided in Article 41 of the Constitution to specify the positive obligations of the state in terms of protecting the family in consideration of the role it plays in social life in addition to its social construct. Regarding the issue of respect to family life and the protection of such life, such regulations in Articles 20 and 41 of the Constitution necessitate a consideration which observes the interests of other members of the family and those of the society, in general, more than merely being an individual-oriented one. For this reason, in terms of respect to family life, Article 20 of the Constitution has to be applied together with Article 41.

88. As per Article 19 of the Constitution, restriction of convicts' and detainees' private and family lives is an inevitable and natural consequence of being legally confined in a prison. On the other hand, the right to respect convicts' and detainees' private and family lives mandate the prison management to employ measures to ensure the maintenance of convicts' and detainees' contact with their families (for similar judgments, see. *Messina v. Italy (No. 2)*, App. No. 25498/94, 28/12/2000, § 61; *Ouinas v.France,* App. No. 13756/88, 12/3/1990; *Vlasov v. Russia*, App. No: 78146/01, 12/6/2008, § 123; *Kučera v. Slovakia*, App. No: 48666/99, 17/7/2007, § 127). As a matter of fact, also in Recommendation REC (2006) No. 2 of the Council of Ministers of the European Council to Member States Concerning the European Prison Rules, it has been indicated that convicts and detainees should be allowed to communicate as often as possible with their families, with other persons and with the representatives of organizations outside through letters, telephone or using other means of communication as well as that such persons as the latter be allowed to visit convicts and detainees (see § 28)).

89. When Article 41 of the Constitution is taken into consideration with Article 20 thereof, it is obvious that the State is under the obligation to take measures to ensure that the convicts and detainees can meet their families. However, as cautioned above, while the prison management performs these duties, it has to take the inevitable and natural consequences of being kept in the prison into consideration. Within this context, the principle to be considered as essential is to ensure a fair balance between the security and order of the prison, prevention of recidivism and the right to respect to family life. However, within the framework of the relation between freedom and security as a part of such balance, it has to be taken into consideration that the management has a wider discretion margin in terms of intervention in freedom.

90. In the incident which is the subject of the application, although the applicant is *de jure* detained for terrorist crimes, he made no allegations regarding being subjected to practices other than those other convicts and detainees had been subjected to in terms of contacting his family. Within this context, unlike the other convicts, no allegations of prevention regarding the duration, frequency and regarding open or closed visits were made. On the contrary, the applicant claimed that he needed to have wider visitation opportunities than other convicts as per the Law No. 5275 for he was detained.

91. There is no doubt that the restriction of applicant's contact with his family and other affinities via telephone and during visits constitutes an intervention in the right to respect for private and family life within the scope of the allegations of the applicant and on legislative grounds (see Öcalan v. Turkey(No. 2), App. No: 24069/03, 197/04, 6201/06 ve 10464/07, 18/3/2014, § 155; *Messina v. Italy (No. 2)*, § 62).

92. The assessment of whether an intervention in the right to respect for private and family life constitutes a violation or not requires, firstly, to determine whether or not such intervention has been regulated in the law. In other words, the legality of such intervention as per Article 13 of the Constitution has to be evaluated.

93. In Articles 66 and 68 of the Law No. 5275, the formality of face to face and telephone communication with the family and with other

affinities has been described and the main framework of restrictions on this issue has been provided. Yet, in Articles 66, 66/A and 70 of the Regulation, the frequency and formality of such communication have been regulated in detail within the framework of the principles prescribed in the Law No. 5275. By indication of Article 116 of the Law No. 5275, it is obvious that the said provisions shall also be applied for detainees. Thus, there is nothing lacking regarding the legality of the regulations concerning the communication with his family and other affinities of the applicant who is *de jure* detained.

94. The legitimate aim in the event of interventions in the respect to private and family life has to be determined within the framework of Article 20 of the Constitution and Article 8 (2) of the Convention. Accordingly, with a limited count, such legitimate aims have been determined as national security, public order, prevention of committing of crimes, global health, and protection of global morals or the rights and freedoms of others. Within this context and within the framework of the particular conditions of the prison, the legitimate aim in restricting convicts' and detainees' communication with their families shall be considered as to prevent disorder and committal of crimes in prison within the framework of public order and public security.

95. In a democratic society, requirement means that the intervention is of the quality to respond to higher public good and as proportionate as to achieve the legitimate goal (Together with other, see *McLeod v. the United Kingdom*, App. No: 24755/94, 23/9/1998, § 52).

96. The regime concerning convicts' and detainees' contact with their families as the Law No. 5275 and the Regulation agree it is provided that the applicant can meet his family and other affinities under the same conditions applicable for other convicts regardless whether he is detained for terrorist crimes. Within this framework as per Article 66/A of the Regulation, it is agreed that convicts and detainees can make phone calls to their spouses, blood and in-law relatives until the third degree and their custodian under the condition to document. On the other hand, it is also provided in the same Article that convicts and detainees can have an uninterrupted 10 minute-phone call with one or more of their affinities once every week and on a single number.

97. Four visits per month for convicts and detainees have been provided as per Article 70 of the Regulation where visits shall take place once every week whereby one shall be open and the remaining three shall be closed. It is provided, also, that the duration of the visits shall not be less than half an hour and more than one hour during which the relatives and the other three persons identified can be seen.

98. That the convicts and detainees have lost their freedom shall not also mean that they are required to lose their ties with their families and other affinities. On the contrary, the prison management shall endeavor to ensure that such opportunities to enable convicts' and detainees' contact with the outer world are available. As a matter of fact, this issue has also been sounded in the Recommendations of the European Council of Ministers (see § 28), emphasizing that the convicts and detainees should be allowed to be visited and communicate.

99. Also, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has emphasized the utmost importance of the maintenance of convicts' and detainees' contact with the outer world and that convicts and detainees have to be given the opportunity, before anything, to continue their relations with their families or close friends. The basic principle that the CPT agrees in this regard is that such support or restriction of contact with the outer world can only be justified with significant security concerns or limitation of resources (*CPT Standards*, 2002).

100. The report dated 15/1/2015 which was prepared by the CPT in relation to the Committee's visit to Turkey between 9-21/6/2013 mentions in the section on contact with the outer world in prison, the insufficiency of four visits a month (three closed and one open visit). Yet, it is recommended in Paragraph 108 of the Report that, except for security-based concerns, open visits can be essential whereas closed visits the alternative.

101. In the incident which is the subject of the application and concerning the balance between intervening in and restricting the applicant's right to respect private and family life as an inevitable and

natural outcome of imprisonment and the public interest on the basis of prison order and security and prevention of crimes, it cannot be said that the prison management pursued an approach other than ensuring and protecting convicts' and detainees' contact with their families and other affinities within the legislative framework. Nor the applicant had any claims to this effect. On the other hand, the applicant also has the right to have four visits a month and ten minutes of phone call every week. And the applicant being under detention shall not be interpreted as within the legislative scope he shall have more extended opportunity to contact with the outer world than convicts. Within this framework, it is also evident that the phone calls and face-to-face visits with family and other affinities of the applicant are provided as they normally should have been.

102. In the light of the explanations above, the restrictions on the right of the applicant to respect private and family life cannot be considered to be in contrast with the requisites of a democratic society and the principle of proportionality which are required for the preservation of public order and recidivism within the circle of the meaning of Articles 20 and 41 of the Constitution.

103. For reasons explained, it has to be decided in this section of the application that the applicant's right to respect to private and family life which has been secured under Article 20 of the Constitution has not been violated.

3. Article 50 of the Code Numbered 6216

104. The applicant has made a request for pecuniary damages of TRY 75,000.00 and non-pecuniary damages of TRY 100,000.00 for the violation of his Constitutional rights.

105. Article 50(2) of the Law No. 6216 on the Establishment and Trial Procedures of the Constitutional Court with the side heading of *''Judgments''* is as follows:

> *"If the determined violation arises out of a court judgment, 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 indicated. The court, which is responsible for holding the retrial, shall deliver a judgment 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 judgment of violation."

106. Having determined the violation of the applicant's right to communicate as guaranteed by Article 22 of the Constitution, non-pecuniary damages of TRY 5,000.00 has to be awarded to compensate the non-pecuniary damages incurred and which cannot be remedied upon mere determination of violation.

107. Although the applicant made a request regarding pecuniary damages since it is understood that between the violations that have been identified and the pecuniary damages claimed is no link of causality, it has to be decided that the requests of the applicant regarding pecuniary damages be dismissed.

108. It should be decided that the trial expense of TRY 198.35 as incurred by the applicant and determined in accordance with the documents in the file be paid to the applicant.

109. Keeping the violation of the right to communicate within the scope of the application in view, the Ministry of Justice and the Ministry of National Defense shall each be sent a copy of the judgment for purposes of information.

V. JUDGMENT

A. It has been held **UNANIMOUSLY** that the complaints of the applicant regarding Articles 20 and 22 of the Constitution were violated are **ADMISSIBLE**,

B. that the applicant's freedom to communicate under the guarantee of Article 22 of the Constitution was **VIOLATED** regarding his allegations that his '*Phone Call with his Counsel was Prevented*,'

C. that the applicant's freedom to communicate under the guarantee of Article 22 of the Constitution was **NOT VIOLATED** regarding his allegations that his '*Contact with the Outside World Through Phone Calls and Mail was Prevented*,'

D. The right to privacy of private and family life enshrined in Article 20 of the Constitution was **NOT VIOLATED**,

E. The applicant be **PAID** damages of net TRY 5,000.00 for non-pecuniary **DAMAGES** and that other requests of the applicant regarding compensation be **DISMISSED**,

F. that the trial expense of TRY 198.35, which was incurred by the applicant be **PAID** to the applicant,

G. 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 judgment; 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.

H. That a sample of the judgment be sent, as per Article 50 (3) of the Law No. 6216 to the applicant, the Ministry of Justice and the Ministry of National Defense,

on 16/4/2015.

FREEDOM OF RELIGION AND CONSCIENCE (ARTICLE 24)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

ESRA NUR ÖZBEY

(Application no. 2013/7443

SECOND SECTION
JUDGMENT

President	: Alparslan ALTAN
Judges	: Serdar ÖZGÜLDÜR
	Celal Mümtaz AKINCI
	Muammer TOPAL
	M. Emin KUZ
Rapporteur	: Yunus HEPER
Applicant	: Esra Nur ÖZBEY
Counsel	: Att. Bülent AKSU

I. SUBJECT-MATTER OF THE APPLICATION

1. The application concerns the allegations that the freedom of religion and belief of the applicant was violated as she was forced to take off the topcoat she wore as a requisite of her beliefs and that her right to the protection of her honor and reputation was violated as a criminal case was not filed about the suspect despite the fact that she suffered an affront.

II. APPLICATION PROCESS

2. The application was lodged on 23/9/2013 with the 6th Assize Court of Bakırköy. 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 20/11/2013 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 19/12/2013, it was decided that the examination of admissibility and merits be jointly carried out.

5. The facts that are the subject matter of the application were notified to the Ministry of Justice on 23/12/2014. The Ministry of Justice submitted its opinion to the Constitutional Court on 25/2/2014.

6. The opinion submitted by the Ministry of Justice to the Constitutional Court was notified to the applicant on 5/3/2014. The applicant submitted to the Constitutional Court her counter-opinion on 26/3/2014.

III. THE FACTS

A. The Circumstances of the Case

7. As expressed in the application form and the annexes thereof, the incidents are summarized as follows:

8. On 22/1/2013, the applicant entered Bakırköy Courthouse through the public gate of the courthouse, whereupon she was asked by the security officers to take off her topcoat as she walked through the electromagnetic device. The applicant stated that she would not take off her topcoat due to her beliefs but that she could be body-searched by a female security officer. A quarrel erupted between the applicant and the security staff upon when the latter said that as long as the instructions that they were given were concerned, taking off the topcoat was mandatory. The applicant could not enter the building through the gate where the security staff she argued with were positioned and walked out to enter the building from another gate.

9. On the very same day, the applicant filed a criminal complaint pursuant to the claim that she was given a hard time, kept from entering the courthouse and was slandered. The Chief Public Prosecutor's Office of Bakırköy ruled on non-prosecution on 28/1/2013.

10. The applicant has objected to the decision claiming that the decision for non-prosecution was made without responding to her claims concerning that the video recordings overlooking the scene of the incident were not provided, that wrong persons were investigated and that her freedom of

religion and conscience guaranteed in Article 24 of the Constitution was violated. With its judgment on 20/3/2013, the 20th Assize Court of İstanbul has ruled that the decision on non-prosecution be quashed on the ground that the prosecution carried out was deficient.

11. The Public Prosecutor has requested the recordings of the camera overlooking the entrance gate of the Courthouse; however, in the letter of 2/5/2013 by the Directorate of Administrative Affairs of the Chief Public Prosecutor's Office of Bakırköy, it was informed that such '*camera recordings did not exist*.'

12. The Chief Public Prosecutor's Office of Bakırköy ruled on 8/5/2013 that the re-prosecution of the suspects was not necessary. The reasoning by the Chief Public Prosecutor is as follows:

> *"It was found that the complainant arrived at the Bakırköy Courthouse, warned by the security staff to leave her metallic possessions in the basket and to take her topcoat off before proceeding through the sensor gate, that the complainant resisted to take off her topcoat and that the complainant claimed that the suspect Gürkan Sevinç, arriving on the scene, has slandered her by calling her 'impudent,' that the witness Nuray Özbek, who was at the scene of the incident, did not confirm the incident, that although the witness and the suspect have both explained the security procedure, the complainant insisted to enter the courthouse without adherence to the instructions of the chief prosecutor's office leading up to the incident.After the incident, the complainant who stated that she would file a complaint was escorted into the building by a female police officer, that the decision was objected to upon the decision of non-prosecution and that the decision was revoked upon mentioning that audiovisual recordings could not be taken and that upon the reply on 02/05/2013 it was understood that it was known that such visuals were not recorded in the area where the incident occurred; hence a decision (as a requirement of the CCP Art. 172) of no grounds for public prosecution was ruled concerning the suspect due to lack of evidence to suffice for proceeding with the prosecution apart from the abstract claim."*

13. In line with the Law on the Right to Information No. 4982 of 9/10/2003, the applicant has asked whether or not audiovisual recordings were taken

at the public entry points of the Bakırköy Courthouse and for how long these recordings were kept, and the Administrative Affairs Directorate of the Chief Prosecutor's Office of Bakırköy has stated in its letter of response of 2/7/2013 that such audiovisual recordings were made at the points of entry in question and that such recordings were safeguarded for a duration of thirty to forty-five days. The applicant, indicating in the said letter that the investigation which had been carried out was deficient and that her constitutional rights were not defended, has re-objected to the decision of non-prosecution. With its judgment of 22/7/2913, the 4th Assize Court of İstanbul Anadolu has rejected such objection as no legal contradiction was found in the decision of non-prosecution. The judgment concerning the rejection of the objection was notified to the applicant on 22/8/2013.

14. The individual application was submitted to the Constitutional Court on 23/9/2013.

B. Relevant Law

15. Article 120 of the Turkish Criminal Code No. 5237 of 26/9/2004 with the side heading *''Unlawful search''* is as follows:

> *"(1) A prison sentence of three months to one year shall be imposed on a public official who unlawfully searches an individual's person or his/her belongings."*

16. The relevant part of Article 3 of the Regulation on Judicial and Preventive Searches (the Regulation) of 1/6/2005 with the side heading '*Grounds*' is as follows:

> *"This Regulation has been prepared as per the provisions of the Criminal Procedure Law No. 5271 of 4/12/2004, the Law on the Duties and Authorities of the Police No. 2559 of 4/7/1934, the Law on the Organization, Duties and Authorities of the Gendarme No. 2803 of 10/3/1983, the Coast Guard Law No. 2692 of 9/7/1982, the Anti-smuggling Law No. 4926 of 10/7/2003, the Provincial Administration Law No. 5442 of 10/6/1949, the Law Concerning the prevention of Violence and Disorder in Athletic Competitions No. 5149 of 28/4/2004, the Law on Private Security Services No. 5188 of 10/6/2004, Law on*

Associations No. 5253 of 4/11/2004, the State of Emergency Law No. 2935 of 25/10/1983, the Law on Martial Law No. 1402 of 13/5/1971 and the Decree in the Force of Law on the Organization and the Duties of the Undersecretary of Customs No. 485 of 2/7/1993 as well as the relevant provisions of other legislation."

17. The relevant part of Article 25 of the Regulation with the side heading '*Circumstances which do not require a preventive search warrant from the judge*' is as follows:

"In searches to be conducted in the circumstances below, a search warrant or an order is not required:

a) In cases where any and all sorts of ingress to and egress from buildings and all sorts of facilities which have been allocated by the State for public service are subject to certain rules, in the search of the persons and the belongings of people entering such facilities,

...

Controls at the points of entry in public or non-public private establishments, institutions or enterprises shall be subject to the consent of those wishing to enter therein. Those who do not agree with such control cannot enter such places. These controls at such places shall be carried out by private security staff. However, depending on the special circumstances of such places as well as of those involved, preventive search can also be performed by law enforcers."

18. The relevant part of Article 27 of the Regulation with the side heading '*Stop and search*' is as follows:

"…

The following procedures shall be carried out upon stopping someone:

a) A pat-down search shall be carried out without taking off any of the clothing on the person stopped. If at the end of such search, a suspicion enough to deduce that the person is bearing arms is established, the officer can automatically conduct a search for a weapon or any other criminal object.

b) Pat-down search shall be carried out by an officer who is of the same sex as the person searched.

c) The reasons and the subject of such search shall be explained to the subject.

...

e) Pat-down search shall be conducted in a way to least disturb the subject.

...

h) Pat-down search shall be carried out at the first place where the subject or the vehicle is stopped, or nearby and in a way to be away from the sight of others to the extent possible. Search cannot be carried out by taking the subject elsewhere.

i) Nearby closed quarters or the law enforcers' vehicle can be availed of if there is reasonable justification for a more comprehensive search.

j) The minutes of the search shall be immediately drawn up upon request and right on the scene following the search.

19. The relevant part of Article 28 of the Regulation with the side heading '*Search of the person and of the belongings upon a written warrant or order*' is as follows:

"…

Body search shall be carried out by an officer who is of the same sex as the person searched.

During body search and search of personal belongings, the particular belonging which is the subject of such search and the reasons underlying such a search shall be explained to the person concerned.

During body search, goods in the company of the person concerned shall also be scanned with electromagnetic devices if possible and if not, by the five sensory organs. The same provision shall also apply for unattended articles.

In cases where the subject resists, the body search and search of the belongings shall be carried out by use of proportional force.

Body search and search of the belongings shall be carried out at the first place where the subject or the vehicle is stopped, or nearby and in a way to out of the sight of others to the extent possible. Search cannot be carried out by taking the subject elsewhere. Nearby closed quarters or the law enforcers' vehicle can be availed of if there is reasonable justification for a more comprehensive search.

Private papers and envelopes found on the person or among the belongings of the subject during body search shall not be opened apart from the possibility of any goods that are subject to seizure being present within them; nor shall information written thereupon be read even if such papers are open.

In cases where there is reasonable doubt that the person bears something which the laws forbid and where the aim of the search cannot be achieved in any other way, body search can be carried out as follows, by undressing:

a) Before the performance of the search, the senior law enforcement officer tasked in that unit shall inform the person concerned as to why the search has been deemed necessary and how it will be carried out.

b) The search shall be carried out by officers of the same sex as the person searched whereby measures to provide privacy against the eye of others are ensured.

c) The search shall be carried out in a way to violate the person's sense of shame at a minimum; firstly, the clothing of the upper body is removed and those of the lower body shall be removed after those of the upper body are put back on. These clothes must be searched.

d) Care so as not to touch the body during the search shall be taken.

e) The search shall be carried out and completed in as short a time frame as possible.

…"

IV. EXAMINATION AND GROUNDS

20. The individual application of the applicant (App No: 2013/7443 of 23/9/2015) was examined during the session held by the court on 20/5/2013 and the following were ordered and adjudged:

A. The Applicant's Allegations

21. The applicant indicated that;

*i.*The private security officers at the public entrance gate of the Bakırköy Courthouse have asked her to remove her topcoat as she walked past the electromagnetic device and that she has not agreed to do so since her clothing under the topcoat was not appropriate and also as a requirement of her belief; that she stated that she would agree to a body or a detector search by a female officer and that the officers have told her that it was not possible for her to enter the courthouse unless she removed the topcoat and that she was slandered during the quarrel that occurred,

*ii.*she has filed a criminal complaint about the officers, yet a decision favoring no grounds for prosecution was made without a request for the footage of the security cameras and without carrying out any investigation, and that Article 17 of the Constitution was violated since she was not protected from slanders towards herself,

*iii.*Articles 36 and 40 of the Constitution have been violated as a result of deficient investigation and the investigation of a wrong individual,

*iv.*Article 24 of the Constitution has been violated since she was insisted to take her topcoat off although she mentioned she could not take her topcoat off because of her religious belief and due to the fact that she was consequently not allowed in the courthouse.

The applicant has requested that a compensation of TRY 50,000.00 be ruled for pecuniary and non-pecuniary damages upon the establishment of the violation.

B. The Constitutional Court's Assessment

1. Admissibility

22. The applicant has claimed that the right to a fair trial regulated in Article 36 of the Constitution was violated when the perpetrator was not penalized as a result of the investigation and prosecution which has been launched upon the complaint that she had filed regarding the act of slander and the assailants of her honor and reputation. However, the main point of this complaint by the applicant is the state's failure to perform its positive liability to establish effective mechanisms against third-person attacks on the honor and reputation of individuals.

23. 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, it was decided that her complaints that Article 17 of the Constitution was violated as the applicant was not protected against insults directed at her; so were Articles 36 and 40 since a deficient investigation was carried out, are examined as a whole from the perspective of her request concerning her right to request the protection of her honor and reputation.

24. The complaints of the applicant concerning being forced to take off her topcoat which she wore as a requirement of her religious belief while entering the courthouse has to be examined from the perspective of freedom of religion and faith.

a. The Allegation Concerning the Violation of the Right to Request the Protection of One's Honor and Reputation

25. Article 17 (1) of the Constitution is as follows:

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

26. In Article 148 (3) of the Constitution and Article 45 (2) of the Law No. 6216, it is stated that all administrative and judicial application remedies, which are prescribed in the law for the act, action or negligence that forms the basis of the violation claim, need to be exhausted before lodging an

individual application. Exhaustion of legal remedies is mandated by the fact that violations of fundamental rights have to be firstly redressed by the courts of instance (*Necati Gündüz and Recep Gündüz*, B. No: 2012/1027, 12/2/2013, § 19-20; *Güher Ergun and others*, B. No: 2012/13, 2/7/2013, § 26).

27. However, the expression 'ordinary remedies' used in the said provisions has to be understood as effective legal remedies having the quality to offer a chance of reasonable success regarding the complaints of the applicant, of a quality to provide a solution, usable and effective. Furthermore, the rule to exhaust legal remedies is not applicable neither as an absolute or a formal rule whereby checks and balances to ensure conformity with such rule requires taking the circumstances of the application into consideration. Therefore, not just the existence of a number of remedies in the legal system but also the circumstances for the implementation thereof and the individual circumstances of the applicant must be taken into account in a realistic manner. For this reason, it has to be examined with a consideration for the circumstances of the application whether or not the applicant has taken all the steps that s/he would be expected to take in order to exhaust legal remedies (for a similar judgment of the ECtHR, see: İlhan v. Turkey, 22277/93, 27/7/2000, § 56-64).

28. The honor 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 the honor and reputation, which are a part of the spiritual existence of an individual, and to prevent the attacks of third parties. The positive liability of the State within the framework of establishing effective mechanisms against the interventions of third parties in the corporeal and spiritual existence of individuals, however, 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 honor and reputation. Insult is considered as a crime in terms of criminal law, as a wrongful 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 honor and reputation (*Abdullah Doğtaş*, B. No: 2013/1123, 2/10/2013, § 35).

29. In cases where there is more than one effective remediy that can be resorted to concerning a claim regarding a violation, the applicant, as a rule, cannot be expected to exhaust all legal remedies serving the same purpose (see: *S.S.A.*, B. No: 2013/2355, 7/11/2013, § 30). Yet, the legal responsibility which refers to the liability to compensate a damage incurred by someone else as a result of an act which is contrary to law and the convention comprises of a larger group of behaviors which is contrary to law than the human behavior called as an offense in criminal law. In order for an act to constitute an offense, it has to be explicitly defined in the relevant law; however, such a restriction has not been defined for the wrongful act. On the other hand, as objective responsibility is not included in criminal law, in the field of legal responsibility, the principle of objective responsibility is effectively applied. Personal responsibility can be considered by way of implementing a lower standard of proof within the framework of the same material cases in the field of legal responsibility. Furthermore, the possibility to make personal claims in criminal procedures does not exist in our system of law. Considering that the main objective of the liability of compensation in the field of legal responsibility is to remedy the damage of the damaged, regarding especially the disputes concerning the claim of violation which is the subject of the present application it is understood that the legal compensation is a usable and an effective legal remedy which offers a higher chance of success (see: *S.S.A.*, § 31).

30. On the other hand, concerning the remedy of damages arising from slandering rhetoric against individuals' honor and reputation within the framework of the state's positive liabilities, the decision making bodies of the European Council and the United Nations have many recommendations offering the exclusion of slander from being an offense whereby it would be sanctioned within the area of private law (*Abdullah Doğtaş*, § 37-39).

31. In the present case, which is the subject of the application, the applicant claims that the security officer with whom she has quarreled

has slandered her by calling her '*impudent*', and hence lodged a complaint with the Chief Public Prosecutor's Office of Bakırköy with a request for legal action be taken for slander. At the end of the prosecution which has been carried out, it is understood that a decision concerning the absence of any grounds for the prosecution of those concerned due to such offenses was made and also that the applicant has not opted for lodging of a civil case which is a more effective remedy in terms of the present case.

32. Within the framework of the findings provided hereinabove, considering the applicant has only resorted to the remedy of criminal proceedings regarding third-person interventions in honor and reputation, it cannot be said that the condition to exhaust all remedies to be able to address the Constitutional Court have been fulfilled.

33. For the reasons explained, since it is understood that the applicant has resorted only to the remedy of criminal proceedings regarding third-party interventions in honor and reputation without availing of the possibility to lodge a civil case which is a more effective remedy in terms of the present case; it has to be decided without examining from the perspective of other admissibility criteria that this part of the application is inadmissible due to 'non-exhaustion of remedies.'

b. Alleged Violation the Violation of the Freedom of Religion and Conscience

34. The complaint of the applicant that Article 24 of the Constitution has been violated when the security officers at the public entrance gate of the Bakırköy Courthouse have insisted that she removed her topcoat although she had previously informed them that she could not do so because of her religious belief and whereupon she was not allowed in from the gate where this incident took place, is not manifestly ill-founded. In addition, as there is no other reason for inadmissibility, it should be decided that the part of the application as regards this complaint is admissible.

2. Merits

35. The applicant states that she wears her topcoat as a religious duty. On the day of the incident, the security officers at the public entrance of

the Bakırköy Courthouse asked the applicant to remove her topcoat before walking through the electromagnetic device; however, the applicant told them that she wore the topcoat as a religious requirement and hence could not take it off. The applicant said that she could be body searched by a female security officer or as well by a detector, that she was not asked to remove her topcoat not even at the airports where she would be hand-searched or searched with a detector. The security officers informed her that it would not be possible for her to enter the Courthouse building without removing her topcoat in line with the instructions they had. When she was not allowed in the building from this door, the applicant claimed that she had egressed the building and entered therein through another gate of the Courthouse. The applicant filed a criminal complaint about the security officers on the same day.

36. The applicant has alleged that her being forced to remove her topcoat which she wore as a requirement of her religious belief and not being allowed in the courthouse for not complying constitutes an intervention in the freedom of religion and conscience stipulated in Article 24 of the Constitution.

37. In the opinion of the Ministry of Justice;

i. It was stated that it would be suitable to examine the applicant's complaints under this heading within the scope of Article 9 of the Convention (European Convention on Human Rights) and Article 24 of the Constitution and that as per the case law of the European Court of Human Rights (ECtHR), wearing religious attires and bearing caps, veils or symbols are considered as religion-originated behaviors of individuals whereby individuals' covering themselves on their own will thereto and due to their desire to be bound by a religious edict, or their bearing religious symbols should be considered within the scope of freedom of religion and conscience.

ii. Furthermore, the Ministry, in its opinion, reminded that the ECtHR delivered judgments of violation by stating that the states did not secure the freedom of religion and conscience in a sufficient manner 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 wearing religious symbols such as the cross, headscarf, or veil harms the professional image and interests of others.

iii. It was stated that in its established case law the ECtHR considers that the states have a broad scope to exercise the right of discretion on regulations concerning the freedom of religion and conscience, that the state has both positive and negative liabilities within the framework of freedom of religion and belief and that the state must be cautious in its actions regarding ensuring the full balance between individual and public good despite its right of discretion regarding the field of freedom of religion and belief.

iv. It was also stated, with reference to some of the judgments of the ECtHR, that the intervention in the freedom of religion and belief in the present complaint is based on public safety, requiring an assessment as to whether the state has positive liabilities regarding ensuring the balance between individual-based application of general religious acceptances and public good.

38. The applicant, in her counter statement against the opinion of the Ministry, has stated that her being forced to remove her topcoat in an environment where numerous individuals were present was inhuman and that she could have been hand-searched or searched with a detector by a female security officer who was present, but this was not resorted to. The applicant has alleged that in a country like Turkey where the majority of the population is Muslim and where most of the women wear some sort of outer attire as a requirement of their religious beliefs, the state has to take certain precautions in relation thereto and that one should also consider the difference between the European and Turkish value judgments during the examination.

39. Article 24 (1), (2) and (3) 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 beconducted freely, as long as they do not violate the provisions ofArticle 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."

40. Article 18 (1), (2) and (3) of the International Covenant on Civil and Political Rights of the United Nations (ICCPR) 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."

41. 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."*

42. 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.

43. 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 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 acquired over the centuries, depends on it." (Kokkinakis v. Greece, App. No. 14307/88, 25/5/1993, § 31)*

44. That religion is both one of the main sources that individuals, who are devoted to a religion, refer to so as to understand and give meaning

to life and that it has an important function for the shaping of 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 individuals have freedoms of religions and faith within certain measures independently from the positions of religions as regards 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 regarding human rights at a universal and regional level (*Tuğba Arslan*, [GA], App. No: 2014/256, 25/6/2014, § 52).

45. The fact that the right protected by Article 24 of the Constitution is indispensable is due to the reason that 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 (*Tuğba Arslan*, § 53).

46. In the context of the freedom of religion, "*recognition*" requires that the state equally accepts the existence of all religions 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. Pluralism is only possible when everyone takes part in the social and political life through his/her own identity and as himself/herself. Pluralism cannot be mentioned in a place where the differences and those, who are different, are not recognized and protected against the threats. In a pluralistic society, the state shall be obliged to ensure that 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 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 secularism which is the guarantee of the protection of the freedom of religion and conscience of individuals in an equal way (*Tuğba Arslan*, § 54).

47. The freedom of religion and conscience, whose meaning and scope are defined by 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, just as the individuals cannot be forced to manifest their religious or conscientious convictions and worship in any fashion, to practice religion and to participate in rituals, they cannot also be condemned and blamed due to their worship and religious practices (*Tuğba Arslan,*§ 55) and the religious faiths and convictions that they have manifested.

48. The ECtHR also by stating that "*Regardless of the conscientious extent of the freedom of religion, this is at the same time and along with other things, also predicates a person's freedom to reveal his/her religion. Testimony through words and deeds are in connection with the existence of religious beliefs;"* (*Kokkinakis v. Greece,* § 31) indicates that Article 9 of the Convention safeguards two areas concerning 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.

49. In parallel to 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 be coerced due to such beliefs 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 (*Tuğba Arslan*, § 57).

50. 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 coerced due to such religions and beliefs, 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 reasoning 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 such religions, consciences, thoughts and convictions even in times of war, mobilization, martial law or states of emergency *Tuğba Arslan*, 25/6/2014, § 58).

51. 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 Article 24 (5) of the Constitution and under the conditions in Article 13 of the Constitution (*Tuğba Arslan*, 25/6/2014, § 59).

52. The ECtHR has 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 is 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,* § 33).

53. 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. Existence of the Intervention

54. The difficulty of defining the notions of "*conscience*", "*religious faith*"" and "*conviction*" stipulated in Article 24 (1) of the Constitution is clear. 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 circumstances of the case at hand.

55. 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 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, manifestation is 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 manifestation mostly focus on religion-based manifestations such as *"prayer"* and *"ritual"*. However, as the term "*exercise of the faith*" is much more inclusive than other types of manifestation, it requires the handling thereof to be more detailed. As a result of this requirement, for example, the Human Rights Committee of the United Nations, in the General Comment No. 22 on Article 18 of the ICCPR, gave a list of various types of behaviors that evaluate the content of the terms "*teaching, practice, prayer and ritual*" in a broader manner. According to the Committee:

> *"The notion 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 headcoverings, 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."

56. However, it cannot be said that international conventions have put forth which types of faith may be manifested in a complete manner. The first difficulty that emerges in the determination of the scope of the manifestation of a "*faith*" occurs in determining whether the said "*faith*" really exists or not and of what status it is. The second difficulty is the problem of proving that the manifestation occurs in accordance with the principles of the said religion or faith (Tuğba Arslan, § 64).

57. Since preventing an individual from acting in accordance with his/her religion or faith will result in the 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 prayer or should all the behaviors, orders and teachings that are important for the religion or faith be evaluated within this context? For the solution of this problem, in some of its judgments, the ECtHR 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, §§ 3-4; *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 an exemplary judgment, 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 power 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 faiths; that is, in other words, the relation of the behavior that the applicant is forced to or abstains from engaging in with his/her faiths (*Tuğba Arslan*, § 66).

58. 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 asserts the faith as the reason for his/her behavior are the important points to be taken into account while making this determination (*Tuğba Arslan*, § 67).

59. 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 unreasonable (for more detailed explanations, see: *Tuğba Arslan*, § 68-70).

60. 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. 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 power 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 the Supreme Court of the United States of America states in one of its rulings, courts or other organs which use the public power should not dare to decide on the credibility of a religious claim (see: the Supreme Court of the United States of America, *Employment Division, Department of Human Resources of Oregon/Smith*, 494 U.S. 872, 6/11/1989). However, if one must reiterate, 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 (*Tuğba Arslan*, § 71-72).

61. The applicant advocated that her dress style was one of the rules of the religion of Islam to which she belonged, which must be absolutely executed, and that for this reason, being asked by the private security staff at the public entrance gate of the Bakırköy Courthouse during security check to remove her topcoat was an explicit intervention in her right to freely manifest her religion. The applicant, in addition, alleged that the conduct to wear a topcoat as well as to refuse removing it during a security check is a practice that needs to be done in terms of the Islamic faith.

62. Hence, one has to agree that women's wearing of topcoats and similar attires believing that this is an edict of the religion of Islam is a subject which may be considered within the ordinary meaning of Article 24 of the Constitution. From this perspective, acts and actions of the public power imposing restrictions on clothing worn as a requirement of religious beliefs constitute an intervention in the individuals' right to manifest their religion (*Tuğba Arslan*, § 76).

63. In the present case, the applicant believes that she has to cover certain parts of her body due to her faith; and by requesting that she remove her dress, the security forces have forced her to act against this belief. As a result, there is a direct religious link between the applicant being forced to remove her attire and her refraining from compliance therewith. For this reason, it has to be agreed that the applicant's freedom of religion and conscious has been intervened in.

b. Whether the Intervention Constitutes a Violation

64. The said intervention has to be compliant with the constitutional prohibitions which have been prescribed in Article 24 (2) and (4) of the Constitution. Furthermore, this intervention shall also constitute a violation of Articles 13 and 24 of the Constitution as long as it does not meet other conditions specified in Article 13 of the Constitution.

65. 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." The criteria of guarantee stipulated in this article of the Constitution are valid for all the limitations prescribed by law on the rights and freedoms and form the limit of limitation.

66. For this reason, it is necessary to determine whether the intervention in a fundamental right and freedom is in line with the conditions of not infringing upon 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, first, whether the intervention fulfills the condition of lawfulness or not shall be examined. Then a review must be carried out as to the effect whether the intervention was made for the reason prescribed in the Constitution and in terms of other criteria.

i. Legality

67. The applicant has made no claims concerning the existence of any contradiction with the condition that the intervention prescribed in Article 13 of the Constitution has to be done with the '*law*.' As a result of evaluations which have been made, it was concluded that Articles 25, 27 and 28 of the Regulation on Judicial and Preventive Searches of 1/6/2005 which was prepared on the basis of provisions of Articles 116 to 121 in Chapter Four entitled '*search and seizure*' of the Law No. 5271 fulfill the criterion of '*legality*.'

ii. Legitimate Purpose

68. Although in the decision of the Chief Public Prosecutor's Office of Bakırköy ruling on no grounds for prosecution the purpose of the intervention has not been specified, it is obvious that the intervention made at the entrance of the Courthouse is carried out for public safety and so as to prevent crime and protect the rights and freedoms of others.

69. Article 24 (2) of the Constitution which reads 'Acts of worship, religious rites and ceremonies shall be conducted freely, as long as they do not violate the provisions of Article 14.' and the final paragraph

thereof which reads '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.' establish the basis of the regime of restriction on the freedom of religion and conscience in the Constitution. It is seen that with such expressions the boundaries of the normal confines of the freedom of religion and of conscience in the Constitution are defined and constitutional prohibitions are prescribed.

70. On the other hand, Article 14 (2) of the Constitution which reads '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.' to which Article 24 (2) makes a reference to introduces a very important rule of interpretation concerning the handling of fundamental rights within the integrity of the Constitution. The expression 'fundamental rights and freedoms...restricting them more extensively than stated in the Constitution.' gives rise to the obligation which requires that all fundamental rights and freedoms including the freedom of religion and conscience are interpreted together and together also with other constitutional principles and reasoned within the relation of restriction.

71. Such reasoning indicates to a conclusion whereby it is as if rights are restricted by rights. As a matter of fact, in its previous judgments the Constitutional Court indicated that all articles of the Constitution are of the same effect and value and that there is no hierarchy between them, that in practice, it is not possible to prioritize one over the other and that sometimes one of the two Constitutional rules which are applied together by necessity can constitute the border of the other (See: AYM, E.2011/134, K.2012/83, K.T. 24/5/2012). In other words, 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 (See: AYM, E.2010/83, K.2012/169, K.T. 1/11/2012).

72. As a matter of fact, the fact that no restrictions have been prescribed for the freedom of religion and conscience with the exception

of the restriction prescribed in the final paragraph of Article 24 shall not mean that this is a right which is impossible to restrict outside the scope of the said restriction. The borders of the freedom of religion and conscience which has been guaranteed in Article 24 of the Constitution are embedded in the rights of other individuals constituting the society.

73. In the present case, when the applicant is forced to remove her topcoat which she wore as a result of her religious belief for purposes of a security scan, it is obvious that this is a part of the efforts to ensure public safety as well as to prevent crimes. As such, the right to life and the right to protect corporeal and spiritual being which have been regulated in Article 17 of the Constitution compose the natural borders of the freedom of religion and conscience.

74. As a matter of fact, the ECtHR has agreed that in cases where the expression of any religious belief establishes the basis of a different treatment, this can only be accepted as legitimate when such expression of religion is directed towards '*the protection of others' rights and freedoms*' and '*so as to ensure public order*' (for criteria employed within the context of Article 9 of the Convention, see: *Leyla Şahin v. Turkey*, App. No. 44774/98, 29/6/2004, § 108).

75. As a result, it was concluded that the intervention in the freedom of religion and conscience in the case at hand bears the legitimate aims concerning the protection of the life and corporeal and spiritual life of individuals within the scope of Article 17 (1) of the Constitution which regulates the inviolability of the individual and the protection of corporeal and spiritual being thereof.

iii. Necessity in a Democratic Society and Proportionality

76. Finally, the issue whether or not the intervention which is the subject of the application is '*necessary in a democratic society*' has to be reviewed. Organs and judicial offices exercising the public power have a certain margin of discretion in the assessment of the existence of the necessity and proportionality of an intervention. Yet, as with all other freedoms, such margin of discretion shall be subject to the review of the Constitutional Court in a way to cover the legal circumstance and the decisions concerning the application of rules of law in such a way as to

ensure that the freedom of religion and conscience go beyond some shiny rhetoric (for evaluations on the margin of discretion of the states within the context of Article 9 of the Convention, see: *Kokkinakis v. Greece*, § 47).

77. Another guarantee which will come into question in all kinds of limitations to be introduced to rights and freedoms is the *''principle of proportionality''* expressed in Article 13 of the Constitution. 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 there is a reasonable relation and balance between the aim and the means (*Tuğba Arslan*, § 96); in other words whether the reasonings resorted to justify the acts and actions of the public power seem appropriate and sufficient and whether or not they are proportionate with the legitimate aim pursued.

78. According to the judgments of the Constitutional Court, proportionality reflects the relationship between the objectives and means of limiting fundamental rights and freedoms. Review of proportionality is the examination of the means preferred for reaching the aim on the basis of such aim one aspires to achieve (*Sebahat Tuncel*, B. No: 2012/1051, 20/2/2014, § 84; *Tuğba Arslan*, § 97). For this reason, in interventions made in the freedom of religion and conscience, it has to be assessed whether or not the intervention preferred so as to achieve the aspired aim is appropriate, necessary and proportionate. In order to be able to make a decision regarding this last issue, while the necessities to protect the rights and freedoms of others in a democratic society and the intervention in the freedom of religion and belief of the applicant are being assessed, the acts and actions of the public power and the decisions of judicial bodies have to be assessed as a whole together with the background of the incident.

79. The ECtHR, starting from its first rulings on the matter, has clarified what the notion '*necessary*' in Articles 9, 10 and 11 of the Convention stands for. According to the ECtHR, the notion '*necessary*' implies a "*pressing social need*" (*Handyside v. United Kingdom*, App. No: 5493/72, 7/12/1976, § 48). Therefore, in the event that it is acknowledged that the balance between the freedom of religion and belief which has been intervened in when the applicant was forced to remove the topcoat she says she wears as a

requirement of her religious belief and the public good which is aspired for is proportionate, it can be deduced that the grounds concerning such intervention are credible, in other words, relevant and sufficient.

80. First of all, the intervention which is the subject of the case has to be examined in the light of the entirety of the events. In line with the decision concerning no grounds for prosecution of 8/5/2013 of the Chief Public Prosecutor's Office of Bakırköy, before the applicant passed through the public entrance gate of the Bakırköy Courthouse, she was warned by the private security officer to place her metal belongings in the basket and to remove her topcoat and the applicant insisted on not removing her topcoat. According to the Chief Public Prosecutor's Office, the treatment that the applicant was subjected to arose from security reasons, and the applicant, despite the warnings of the security officers, wanted to enter the courthouse in a way which is contradictory with the instructions of the Chief Prosecutor's Office (§ 12). Secondly, in order to resolve the application, the issue arising from the present case has to be focused on to the greatest extent possible. In addition, the legal provisions also have to be reviewed. That is because the act of public power of which the applicant complains has originated from the implementation of the legislation.

81. Regulations concerning human rights, at its very basis, relate to the relations between public bodies and individuals. This is also valid in terms of the Constitutional framework. Most of the rights and freedoms which are present in the Constitution, in effect, aim to protect individuals from the arbitrary actions of public authorities. The principal aim and objective of the Constitution in the field of human rights and freedoms is to guarantee individual rights and freedoms.

82. In return, Article 24 of the Constitution charges the state not only with negative liabilities such as not violating the freedom of religion but at the same time, with positive liabilities such as ensuring the environment where such freedom can be easily enjoyed.

83. The question as to whether the freedom of religion and belief charges the state with a liability to perform positive actions concerns the positive aspect of such freedom. Under certain circumstances the responsibility for the state to safeguard the right of members of a religion

or a belief to peacefully enjoy the right which has been regulated in Article 24 of the Constitution might arise (for explanations concerning the positive liability of the state within the scope of Article 9 of the Convention, see: *Otto Premınger Institute v. Austria,* App. No: 13470/87, 20/9/1994, § 47).

84. The State's positive liability concerning the freedom of religion and belief originates, as a characteristic of the state of the Republic of Turkey, from the Preamble of the Constitution as well as from Articles 2, 13, 14, 68, 81, 103, 136 and 174 thereof. In the aforementioned articles, secularism is regulated as a political principle that determines the position of the state against religious faiths. Secularism does not confine the religion into the inner world of the individual, but 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 religious subjects and the lifestyle that they shape are outside the intervention, but under the protection of the state. In this sense, the principle of secularism is the guarantor of the freedom of religion and conscience. One of the main aims of the democratic and secular state is to establish political orders where the individuals can 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; *Tuğba Arslan*, § 133-135).

85. 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 reasoning of Article 2 of the Constitution, '*Secularism, which never means disbelief, means that every individual can have the faith, sect of his/her choice, make his/her prayer and not being subjected to a different treatment when compared to other citizens due to his/her religious beliefs.*' 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; *Tuğba Arslan*, § 137).

86. In this sense, secularism encumbers the state with negative and positive liabilities. The negative liability requires that the freedom of religion and conscience of individuals are not intervened in unless there are mandatory reasons. 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 therefore. The source of the positive liability that 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 strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence." (*Tuğba Arslan*, § 138).

87. In the societies where the understanding of pluralistic secularism is accepted, there is an opportunity of ensuring peaceful coexistence of people whose faiths, thoughts and lifestyles are in conflict with each other, and of securing a pluralistic environment in the society where all types of faiths can express themselves. This opportunity gives rise to the '*right to respect the religious feelings of the believers*' (for explanations on the right to respect for the religious feelings of the believers, see: *Otto Preminger Institute v. Austria*, § 55).

88. In the present case, the question to resolve concerns the scaling of the weights of the contradicting interests arising between the right to respect the freedom of religion and belief of the applicant, and the act of forcing the applicant to remove her attire during the security check for the '*the protection of others' rights and freedoms*' and '*ensuring public order*'. Taking the effective legislation into consideration, it is seen that some measures have been taken so as to balance these two contradicting interests.

89. As a matter of fact, in Article 120 of the Law No. 5237 a prison sentence of three months to one year has been prescribed for a public official who unlawfully searches an individual's person or belongings. In the provisions of the Law No. 5271 in Articles 116 to 121 under Chapter Four entitled '*search and seizure*' provisions concerning judicial and preventive searches have been prescribed. In Article 25 with the side heading '*Circumstances whereby obtaining a decision of preventive search from a judge is not required'* of the *Regulation on Judicial and Preventive Searches* of 1/6/2005 it has been indicated that a separate search warrant or a decision to such effect is not required for circumstances concerning '*searching the*

body, effects or the vehicles of those entering buildings and facilities which have been appropriated by the state for public use whereby entry and egress to and from such places have been subjected to certain rules.' According, again, to the same Article, '*those who do not agree to be searched cannot enter such places. Controls at such places shall be essentially carried out by private security staff.*' In such cases, the modality to perform the body search has been regulated in detail in Article 27 of the same Regulation with the side heading '*Stop and control actions*' and Article 28 with the side heading '*Performance of body search and searching of belongings upon a decision or a warrant.*' (§ 16-17).

90. According to the rules in question, persons can be searched without removing any of their clothing, as with pat-down searches. Pat-down search shall be carried out by an officer of the same sex as the subject. This kind of search shall be conducted in such a way as to least disturb the subject. Furthermore, such control shall be carried out at the first place where the subject is stopped, or nearby and in a way to be away from the sight of others to the extent possible. The search cannot be carried out by taking the subject elsewhere. Nearby closed quarters or the law enforcers' vehicle can be availed of if there is reasonable justification for a more comprehensive search (§ 18).

91. If the person has to be body-searched, such search has to be carried out by an officer of the same sex as the person. During the body search, belongings on the person concerned shall also be scanned with electromagnetic devices if possible and if not, by the five sensory organs. The body search and the search of belongings shall be carried out at the first place where the subject is stopped, or nearby and in such a way as to be away from the sight of others to the extent possible. The search cannot be carried out by taking the subject elsewhere. Nearby closed quarters or the law enforcers' vehicle can be availed of if there is reasonable justification for a more comprehensive search (§ 19).

92. In cases where there is reasonable doubt that the person bears something which the laws forbid and where the aim of the search cannot be achieved in any other way, the body search can be carried out by undressing. However, in order to carry out this kind of search, the person concerned shall be informed before the search as to why such search was deemed to be necessary and how it shall proceed. The search shall be

carried out by officers of the same sex as the person searched whereby measures to ensure privacy against others are ensured. The search shall be carried out in such a way as to violate the person's sense of shame at a minimum; firstly, the clothing of the upper body is removed and those of the lower body shall be removed after those of the upper body are put back on. These clothes must be searched. Care so as not to touch the body during the search shall be taken. The search shall be carried out and completed in as short a time frame as possible (§ 20).

93. As can be seen, a judge's decision is not required for the body-search and searching of the belongings of persons during entry into public buildings such as courthouses and the search can be carried out roughly in three stages: Pat-down, search and removal of clothing. If electromagnetic devices like in the case at hand have been used whereby the alarm went off, the body-search of the person shall be performed by a same-sex officer. In cases where the person is body-searched with electromagnetic devices or with the five sensory organs but to no avail and where the goal of the search cannot be attained through other means, the body search shall be done by way of undressing. In this case, the search shall be carried out by officers of the same sex as the person searched whereby measures to ensure privacy against the eye of others are ensured.

94. In the case at hand, the security officers asked the applicant to remove her topcoat which she wore as a requirement of her religious belief and which she stated she would not take off at the entrance point, and to place it in the electromagnetic device. A pat-down search of the applicant was not carried out although one of the security staff was a woman and despite the applicant's request to this effect. Furthermore, the precautions '*to ensure privacy against the eye of others*' as mandated by the Regulation were not taken to facilitate the applicant's removal of her attire, and the applicant was forced to remove her attire at the public entrance gate of the courthouse, in an environment where the possibility to be seen by many people prevailed.

95. In a democratic society, in cases of the existence of conflicting interests such as in the present application, interventions for the protection of one of such interests to the detriment of the essence of the other cannot be accepted. One must remember that an unrestricted limitation of a certain

practical religious behavior so as to protect others or the prohibition thereof is the same as mauling plurality and tolerance by the hand of the state.

96. For this reason, in a democratic society, the approaches which forever take the protection of rights as their basis should be embraced, and the questions that might arise from the exercise of a right should be resolved through the measures to ensure the peaceful exercise of the said right instead of the measures which render such right completely non-exercisable. As a matter of fact, the effective legislation has been prepared with an approach which is based on the protection of rights and certain measures have been prescribed so as to ensure the implementation of security measures to the extent and in the way necessitated by the existing conditions, without abolishing entirely the individuals' freedom to practice the requirements of their religions. Yet again, the measures prescribed by the legislation have not been taken in the present case.

97. Despite the explicit provision of the legislation, the applicant was neither body-searched by the female security officer who was present on the scene, nor the measures to ensure the privacy of the applicant when she removed her attire were taken, had the circumstances mandated so. Furthermore, although a criminal complaint has been filed due to the fact that the applicant was forced to remove her attire and this issue has been regulated in the Law No. 5237 as an offense, no investigation has been carried out regarding such complaint.

98. Finally, in the present case, the issue as to how security would have been impaired upon the applicant's refusal to remove the topcoat which she wore as a requirement of her religion in a way to cover her entire body was fully clarified neither by the administration nor by judicial authorities. Avoidance of the danger of intervening in rights and freedoms on the basis of probabilities can only be possible through an analysis of the factual circumstance which is based on an evaluation of the circumstances of the present case (*Tuğba Arslan*, § 130). For this reason, why the requirement for forcing the applicant to remove her topcoat in a way where everyone could see and without ensuring other measures was a pressing public need has not been clarified.

99. Thus, adequate and sufficient reasoning as to the necessity in a democratic society of the intervention in the applicant's freedom of religion and conscience which has been guaranteed under Article 24 of the Constitution so as to protect public order and others' liberties has not been provided. As such, it must be ruled that the freedom of religion and conscience has been violated.

3. Article 50 of the Law No. 6216

100. The applicant requested that non-pecuniary damages of TRY 50,000.00 be adjudged.

101. In the opinion of the Ministry of Justice, no opinion was expressed as regards the request of the applicant for compensation.

102. Article 50 (2) of the Law numbered 6216 with the side heading *''Judgments"* is as follows:

> *"If the determined violation arises out of a court judgment, 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 judgment 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 judgment of violation."*

103. Regarding the application concerning the freedom of religion and conscience of the applicant, in return for the non-pecuniary damages of the applicant which cannot be redressed only with the determination of violation, it should be decided that non-pecuniary damages of TRY 3,000.00 be paid to the applicant *ex gratia*.

104. 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 was held **UNANIMOUSLY** on 20/5/2015 that;

A. The applicant's;

1. Claim to the effect that Article 17 of the Constitution has been violated is **INADMISSIBLE** due to "*non-exhaustion of remedies*",

2. Claim as to the fact that Article 24 of the Constitution was violated is **ADMISSIBLE**,

B. The freedom of religion and conscience guaranteed under Article 24 of the Constitution has been **VIOLATED**,

C. The applicant be paid a net compensation of TRY 3,000.00 for non-pecuniary **DAMAGES** and that other requests 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**,

E. 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 judgment; 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.

FREEDOM OF EXPRESSION (ARTICLE 26 AND OTHERS)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

MEHMET ALİ AYDIN

(Application no. 2013/9343)

PLENARY
JUDGMENT

President	: Zühtü ARSLAN
Vice-President	: Alparslan ALTAN
Vice-President	: Burhan ÜSTÜN
Justices	: Serdar ÖZGÜLDÜR
	Serruh KALELİ
	Osman Alifeyyaz PAKSÜT
	Recep KÖMÜRCÜ
	Engin YILDIRIM
	Nuri NECİPOĞLU
	Hicabi DURSUN
	Celal Mümtaz AKINCI
	Erdal TERCAN
	Muammer TOPAL
	M. Emin KUZ
	Hasan Tahsin GÖKCAN
	Kadir ÖZKAYA
	Rıdvan GÜLEÇ
Rapporteur	: Yunus HEPER
Applicant	: Mehmet Ali AYDIN
Counsel	: Att. Serkan AKBAŞ
	Att. Abdullah ÇAĞER

I. SUBJECT-MATTER OF THE APPLICATION

1. The application pertains to the allegations that the freedom of expression and the right to personal liberty and security of the applicant,

who is a politician, were violated since he was detained and tried due to expressions he used in a press briefing.

II. APPLICATION PROCESS

2. The application was lodged on 18/12/2013 with the 5th Assize Court of Diyarbakır. 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 Third Commission of the First Section on 14/10/2014 that the examination of admissibility be conducted by the Section and the file be sent to the Section.

4. On 10/11/2014, it was decided by the Head of the Section that the examination of admissibility and merits be jointly carried out.

5. The facts which are the subject matter of the application and a copy of the application were sent to the Ministry of Justice on 10/11/2014 for its opinion. The opinion letter by the Ministry of Justice of 9/1/2015 was notified to the applicant on 16/1/2015, the applicant submitted his counter-opinion to the Constitutional Court on 19/1/2015 within due period.

6. In the session of the Section held on 21/5/2015, as it was deemed necessary that the application be concluded by the Grand Chamber due to its nature, it was decided that it be referred to the Grand Chamber in order to be discussed as per Article 28 (3) of the Internal Regulation of the Constitutional Court.

III. THE FACTS

A. The Circumstances of the Case

7. As expressed in the application form and the annexes thereof, the circumstances of the case are summarized as follows:

8. On 15 February 1999, the leader of the PKK/KONGRA-GEL terrorist organization Abdullah Öcalan was apprehended in Kenya and brought to Turkey.

9. The Executive Council of the Peoples' Confederation of Kurdistan, abbreviated as KCK, called for Abdullah Öcalan to be brought to Turkey, which it qualifies as the ''*Conspiracy of February15"*, to be protested in early 2010 and the call in question was broadcast on ROJ TV, which is controlled by the terrorist organization and broadcasts over satellite, as well as on some websites. The call read, ''*We call on the Kurdish people to escalate their actions and pause life to hold an honorary fast on this national dark day*''.

10. Upon this call, the Diyarbakır Provincial Office of the Peace and Democracy Party (BDP) announced on 15/2/2010 that it would hold a press briefing in front of the 5 April Equal Free Citizen Association. On the day of the incident, approximately 5000 people allegedly gathered and speeches were made addressing the crowd from atop the election bus equipped with sound amplifying devices belonging to BDP. The applicant, who is the provincial head of the BDP in Diyarbakır, made a press briefing addressing the crowd that gathered. The press briefing of the applicant is as follows:

> *''... We watch with concern the ostensible initiatives towards the solution of the Kurdish problem that lack constitutional guarantees and does not recognize collective rights. We are no stranger to declarations of government spokespeople stating ''Öcalan cannot be taken as an interlocutor!...'' that aims to deceive the Kurds and the democratic public opinion. Where are those who have made similar declarations now? Today; Mr. Öcalan is an active political agent in the Kurdish problem and possesses the power of solution despite AKP's mule-like stubbornness, meaningless approaches, that is, their unwillingness to see it as it is. No matter how many times you claim that he is no interlocutor, that he cannot be one; whether you like what he says or not, this is the reality of Turkey. ..... Since international and regional powers that wish to shape the Middle East in line with their filthy desires consider the struggle of the Kurds for freedom and democracy as an impediment, they plotted a conspiracy against Mr.Abdullah Öcalan on 9 October 1998. This conspiracy against the Kurdish people in essence and the freedom requests of the peoples of the Middle East in general had the intention of creating strife among different communities and strengthening their grip on power. It is a classical scenario of the*

incumbent dominant system that has been long implemented whereby they create chaos, tailor a role for themselves based on the emerging situation and deepen the deadlock in the name of a solution acting as the savior. In order for the incumbent system in the Middle East to continue, different communities had to play the game of slaughtering each other! Thus, they wanted to achieve their objective by handing over Mr.Öcalan to Turkey. .... However, this process was prevented thanks to the peaceful solution recommendations developed by Mr.Öcalan. Despite all of the negative imprisonment conditions, the conspiracies that are spewed, his quest and efforts for peace have been continuing with a higher vitality than ever. As we complete 11 years of this process, we are now embarking upon the 12th year. The Imralı Prison system, which we define as a pressure apparatus, is an unlawful Guantanamo prison and needs to be immediately shut down, Mr.Abdullah ÖCALAN must immediately be released. .... There is no need to remind the declarations of Mr.Öcalan pertaining to the prison conditions reading ''It is as if I am thrown in a death hole!...'', ''I am like a patient hooked up to a ventilation machine!...'' made via his lawyers. Every responsible person needs to see that this latest situation poses a significant threat towards societal peace and creates great tensions. .... Imralı is no ordinary prison. And Mr. Öcalan is no ordinary captive. The health conditions, life and security of Öcalan has such key importance as to have a deep impact on the developments in Turkey. Acknowledging this reality and abiding by it, this constitutes the most crucial point in the sensitive period that we are currently going through. Mr. Öcalan recommended for a second time the arrival of peace groups in order to decongest the bottleneck in the political process. The fact that the people, who received the dead bodies of their relatives at the Habur border gate, were able to embrace their children for the first time with the arrival of peace groups, thus embracing peace, showed that these hundreds of thousands of people consider Imrali to be the interlocutor for the solution. On the other hand, the government did not consider the arrival of peace groups as a solution, rather they initiated a surrender process from scratch that has nothing to do with the Kurdish initiative once it was revealed that their main intention was a disbanding. The government wants to sideline the Kurds in their Kurdish initiative process. It should make one think and is unacceptable that the conditions

of Mr. Öcalan, who is accepted by three and a half million Kurds as their will, are aggravated, that DTP has been shut down, that political bans are imposed and that operations are opted for so that all venues of democratic politics are closed for the Kurds. ...Why aren't the letters brought by the peace groups for the solution not delivered to their addressees? This is not explained to the public opinion, the prime minister needs to explain this. The objective is not an initiative but rather a disbanding. AKP wants to obtain results until the elections with the Kurds of its own creation. The AKP government is not sincere. The cover of their republican policy based on denial and destruction just like previous governments has been blown. This initiative represents traditional state policies. It is clear that this initiative will not solve the problem. It becomes more and more important with each passing day that Mr. Öcalan's road map be announced and is submitted to his interlocutors. We believe that this will make significant contributions to Turkey's democracy and its peoples for the sake of a solution. The state must end its incessant military operations, the operations against those who have been elected must stop. The free will of the Kurdish people must be taken as the basis against the democratization backdrop of Turkey and negotiations must begin; it is vital that a democratic civilian constitution be drafted. We can arrive at a solution if we discuss the problem with courage. We have full faith that Turkey will bring its own peace for an equal, free and peaceful life. Mr. Öcalan strove incessantly for the establishment of peace in a 6 m^2 space for 11 years. A process whereby Mr. Öcalan is not taken into consideration and disregarded, dialogue channels are blocked will not serve the solution of the Kurdish problem, on the contrary, it will deepen the deadlock. One cannot expect a solution to take place as the Imralı system, which is even more outdated than America's Guantanamo that is based on isolation and destruction, is out there for all to see and as this system is being rendered even harsher.

...As we demand from the public that Mr. Öcalan be released, we call upon all democratic people living in Turkey to be sensitive about this issue.''

11. In the aftermath of the above press briefing, the applicant was detained on 23/2/2010 with the suspicion that he committed a crime and engaged in propaganda on behalf of the illegal organization.

12. With the indictment of the Office of the Chief Public Prosecutor of Diyarbakır of 26/2/2010, a criminal case was filed regarding the applicant for the crimes of ''*engaging in propaganda of an illegal organization*'' and ''*committing a crime on behalf of an organization despite not being a member*''.

13. It was decided by the 5th Assize Court of Diyarbakır on 27/5/2010 that the applicant be sentenced to 6 years and 3 months of imprisonment for the crime of ''*committing a crime on behalf of an organization despite not being a member*'' and to 2 years and 1 month of imprisonment for the crime of ''*engaging in propaganda of an illegal organization*''. The applicant was released on the same date, after 94 days of detention. The relevant section of the reasoning of the Court of First Instance pertaining to its conviction of the applicant for the crime of engaging in the propaganda of the terrorist organization is as follows:

> *''... The PKK (Partiya Karkaren Kürdistan - Kurdistan Workers' Party) is an armed organization that falls within the scope of Article 314 of the TCC no. 5237 and has the objective of establishing a separate Kurdish state by means of separating certain parts of the land under the control of the Republic of Turkey via armed conflict and that has conducted numerous acts such as murder, assault , threatening, kidnapping, bombing and mass killings and still pursues its armed actions within the country. Abdullah Öcalan is a convicted individual who led the PKK armed terrorist organization for several years, was then tried and sentenced.*
>
> *... It has been decided that the accused Mehmet Ali Aydın be sentenced as per Article 7/2 of the Law no. 3713, which was amended with Article 6 of the Law no. 5532, as it has been proven that he committed the crime of engaging in the propaganda of the terrorist organization by means of providing moral support to the terrorist organization by delivering a speech at the press briefing, which is the subject of the crime. By participating in the unauthorized demonstration that turned into the propaganda of the terrorist organization following the press briefing that was held on the date of the incident, the accused considered Abdullah Öcalan as his leader by stating in the speech he delivered that the leader of the PKK illegal armed terrorist organization needed to be considered*

as an interlocutor, that he was an active political agent in the Kurdish problem and that he had the power for a solution, that he was the reality of Turkey, that the peaceful solution recommendations that he had developed were thwarted, that the İmralı Prison, where he imprisoned as a convict, needed to be shut down as it is an unlawful Guantanamo Prison and that he needed to be immediately released, that he was a captive, that he was ''accepted by three and a half million Kurds as their will'', that he indicated that he needed to be considered as an interlocutor with a view to a solution by referring to the messages and instructions of the leader of the organization. He made it clear that he was a supporter of the terrorist organization by delivering a speech in favor of the leader of the terrorist organization amounting to propaganda in line with the activities aimed at conveying to the public the idea that Abdullah Öcalan represented the Kurdish people, that he was the political will of the Kurdish people, that he was the Kurdish People's leader, that the leader of the terrorist organization Abdullah Öcalan had been acknowledged as the ''Leadership'' of Kurdistan Democratic Confederalism following the meeting of the terrorist organization held in Northern Iraq between the dates of 20 February to 7 March 2005 with the participation of (179) delegates, that expressions such as (Leadership, Chief, Kurdish People's leader, etc.) were used to refer to the leader of the PKK/KONGRA-GEL terrorist organization Abdullah Öcalan in order to portray him as the so-called leader and chief of the Kurdish people living in our country. It was claimed that the only interlocutor was the leadership, that these kinds of expressions were also used in press briefings and meetings organized by masses supporting the organization and that they continuously spread this among the people in line with the activities, that this activity of the accused could not be accepted to fall within the scope of the freedom of expression and dissemination of thought and the right to organize meetings and demonstration marches (Articles 26-34 of the Constitution) that are guaranteed by the Constitution and the European Convention on Human Rights, that he engaged in the propaganda of the PKK-KONGRA/GEL terrorist organization, which is an armed organization in the sense of Article 314 of the TCC no. 5237, that he delivered a speech in favor of the jailed leader of the organization Abdullah Öcalan in such a manner as to praise the leader of the armed organization.''

14. Upon appeal, the 9th Criminal Chamber of the Court of Cassation overturned the judgment of the local court with its decree of 5/4/2013. The Court of Cassation relied on the ground that it was compulsory to reassess the legal situation of the applicant in the face of legal amendments introduced after the judgment.

15. The 5th Assize Court of Diyarbakır, which continued the trial, ruled with its judgment of 10/9/2013 with regard to the applicant that the prosecution be postponed with a view on the the crime of organizational propaganda as per the Provisional Article 1 of the Law No. 6352 of 27/7/2012 on the Amendment of Certain Laws With the Aim of Rendering Judicial Services More Effective and Postponement of Cases and Sentences Pertaining to Crimes Committed Via the Media; that there are no grounds to issue a sentence with a view to the crime of committing a crime on behalf of the organization as per Article 8 of the Law No. 6459 of 11/4/2013 and on the Amendment of Certain Laws In Terms of Human Rights and the Freedom of Expression. The relevant part of the reasoning of the Court of First Instance is as follows:

> *''... In the criminal case that has been filed for the crime of Engaging in Propaganda of the Terrorist Organization that is attributed to the accused, it was deemed necessary to decide that the prosecution be postponed as per Provisional Article 1 (b) of the Law numbered 6352 as it has been understood that the action of the accused was undertaken via the method of expression of thought and opinion within the scope of Provisional Article 1 (b) of the Law numbered 6352.*
>
> *Even though a criminal case was filed with regard to the applicant with the request that he be sentenced for the crime of committing a crime on behalf of the organization without being a member and that the attributed crime was proven via the expert report, the Incident Minutes, Apprehension Minutes contained within the file as well as the whole content of the file, it was deemed to be necessary that there were no grounds to sentence the accused for the crime of committing a crime on behalf of the organization due to the provision of Article 8 of the Law no. 6459 to the effect that a separate sentence cannot be imposed on those who have committed the crime of propaganda for the crime defined under Article 220 (6) of the TCC no. 5237.*

16. The objection that the applicant filed with the request of being released was dismissed with the judgment of the 6th Assize Court of Diyarbakır of 14/11/2013. The final judgment was notified to the applicant on 20/11/2013.

17. The applicant lodged an individual application with the Constitutional Court on 18/12/2013.

B. Relevant Law

18. Article 7 (2) of the Law on the Fight Against Terrorism No. 3713 of 12/4/1991 is as follows:

> *"Those that assist members of organizations as established with the above paragraph or those that engage in propaganda in such a way as to encourage resorting to violence or other methods of terrorism shall be separately sentenced to one to five years of imprisonment and five hundred million to one billion liras in judicial fine even though their actions constitute another crime."*

19. Provisional Article 1 (1), (2) of the Law numbered 6352 is as follows:

> *" (1) Following a crime that is committed prior to the date of 31/12/2011 via the media or various methods of declaring thoughts and opinions, which fundamentally requires a judicial fine or a prison sentence the upper limit of which is not more than five years, it shall be decided;*
>
> *a) In the investigation phase, that the filing of a criminal case be postponed without requiring the conditions under Article 171 of the Code of Criminal Procedure No. 5271 of 4/12/2004,*
>
> *b) In the prosecution phase, that the prosecution be postponed,*
>
> *c) That the execution of the finalized judgment of conviction be postponed.*
>
> *(2) In the event that an individual regarding whom a decision of postponing the filing of a criminal case or the prosecution has been*

delivered does not commit a new crime that falls within the scope of paragraph one within three years starting from the date on which the postponement decision is delivered, a judgment of no grounds for prosecution or dismissal shall be delivered. In the event that a new crime that falls within the scope of paragraph one is committed within this period, the postponed investigation or prosecution shall be continued if a judgment of conviction is delivered due to this crime with a finalized judgment."

IV. EXAMINATION AND GROUNDS

20. The individual application of the applicant of 18/12/2013 numbered 2013/9343 was examined during the session held by the court on the date of 4/6/2015 and the following were ordered and adjudged:

A. The Applicant's Allegations

21. The applicant alleged that,

i. the fact that he was detained without resorting to alternative protection measures, despite the fact that the conditions of detention had not been present in the press briefing, which did not contain any violence and simply consisted of the exercise of the right to express opinions and organize a peaceful demonstration, violated the right to personal liberty and security contained under Article 19 of the Constitution,

ii. that his rights defined under Articles 25, 26 and 34 of the Constitution were violated by indicating that there was an interference with his freedom of expression and right to organize a peaceful demonstration even though a decision of postponement of the prosecution was delivered in his regard due to the fact that he had held a press briefing which he did not praise violence;

he requested the determination of the violation as well as a retrial and TRY 20,000.00 for pecuniary damages and TRY 20,000.00 for non-pecuniary damages.

B. The Constitutional Court's Assessment

1.**Admissibility**

a. Personal Liberty and Security

22. Provisional Article 1 (8) of the Law no. 6216 is as follows:

> *"The court shall examine the individual applications to be lodged against the last actions and judgments that were finalized after 23/9/2012."*

23. In accordance with this provision, the Constitutional Court examines individual applications to be lodged against the last actions and judgments that were finalized after 23/9/2012. Therefore, the authority of the court in terms of *ratione temporis* shall only be limited to the individual applications that are lodged against the last actions and judgments that were finalized after this date. In view of this regulation pertaining to the public order, it is not possible to extend the coverage of the authority in a way that will also cover the last actions and judgments that were finalized before the aforementioned date (G.S. No: 2012/832, 12/2/2013).

24. In order for the application to be accepted, it is also necessary that the last actions or judgments that form the basis for the claim of violation be finalized before 23/9/2012. In the event that it is determined that the last actions or judgments were finalized prior to the mentioned date, it needs to be decided that the application is inadmissible with regard to the relevant complaints. It is possible to make this determination as regards to the jurisdiction of the court at every phase of the assessment of the individual application (*Korcan Polatsü*, App. No: 2012/726, 2/7/2013, § 32).

25. In the present case, the applicant was detained on 23/2/2010 due to the charged crimes and was released on 27/5/2010, the date on which the conviction ruling was delivered in the case in which he was tried.

26. For the explained reasons, it should be decided that the part of the application to the effect that "*personal liberty and security"* were violated is inadmissible due to "*lack of jurisdiction ratione temporis* ".

b. Freedom of Expression

27. The applicant alleged the fact that a decision of postponement of prosecution was delivered with regard to him as a result of him having held a press briefing which did not praise violence constituted an interference with his freedom of expression and right to organize a peaceful demonstration. The Ministry did not submit an opinion with regard to admissibility.

28. 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. In the case at hand, the applicant was tried as a result of the expressions he used in a press briefing and a decision of postponement of prosecution was rendered. Even though the applicant complained that his right to meetings and demonstration marches was violated, when the content of the complaints of the applicant is taken into consideration, it has been found to be appropriate under the circumstances of the present case that the complaints of the applicant under this heading be examined in terms of the freedom of expression.

29. The applicant alleged that he was exposed to the threat of prosecution due to the fact that a decision of postponement of prosecution was delivered with regard to him.

30. With the judgment of the 5th Assize Court of Diyarbakır of 27/5/2010, it was decided that the applicant be sentenced to 2 years and 1 month in prison for the crime of "*engaging in propaganda of an illegal organization*". Upon appeal, the 9th Criminal Chamber of the Court of Cassation overturned the judgment of the local court with its decree of 5/4/2013 on the ground that the legal situation of the applicant had to be reassessed due to amendments in laws. The 5th Assize Court of Diyarbakır, which continued the trial, decided with its judgment of 10/9/2013 with regard to the applicant that the prosecution regarding the crime of engaging in propaganda of an organization be postponed.

31. Whether or not the decision of postponement of prosecution that was delivered as per Provisional Article 1 of the Law no. 6352 constitutes an interference in the applicant's freedom of expression according to

Article 26 of the Constitution is inseparably linked to the merits of the case. Therefore, even though there is no finalized judgment of conviction regarding the applicant, this problem needs to be discussed by associating it with the merits within the framework of Article 26 of the Constitution (for a similar evaluation, see *Fatih Taş [GA]*, App. No: 2013/1461, 12/11/2014, § 32).

32. The applicant's complaint regarding the point that his freedom of expression was violated due to the decision of postponement of prosecution that was delivered regarding himself as a result of his expressions during a press briefing is not manifestly ill-founded. Besides, as there is no other reason for inadmissibility, it should be decided that the part of the application as regards this complaint is admissible.

2. Merits

33. The applicant claimed that he was tried as a result of a press briefing that he held, that a conviction judgment was formed regarding him and a decision of postponement of prosecution was delivered in the end, that he was under the threat of a new prosecution as he is a politician, that therefore, his freedom of expression was violated.

34. In the opinion of the Ministry, similar judgments of the Constitutional Court and the European Court of Human Rights (ECtHR) were reminded and it was indicated that the allegations of the applicant needed to be evaluated in line with these judgments. 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 European Convention on Human Rights (ECHR); that the freedom of expression applies not only for information and thoughts which are considered to be in favor, 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 of the applicant should be considered on the basis of whether or not the interference that had taken place was envisaged by the law, whether or not the objective on which the interference relied was legitimate and whether or not the interference was necessary in a democratic societal order.

35. The applicant repeated his statements in the application petition against the opinion of the Ministry on the merits of the application.

36. Article 13 of the Constitution with the side heading of *''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."*

37. Article 25 of the Constitution with the side heading of *''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."*

38. Article 26 of the Constitution with the side heading of *'' 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"

39. 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 (*Emin Aydın*, App. No: 2013/2602, 23/1/2014, §43).

40. There is no doubt that the freedom to deliver speeches or hold press briefings in peaceful demonstrations, as was the case in the incident at hand, is an inseparable part of the freedom of expression.

41. The freedom of expression, which is a right that can be restricted, is subject to the restriction regime of the fundamental rights and freedoms contained within the Constitution. Restriction reasons are included under Article 26 (2), which relates to the freedom of expression. However, it is also clear that there must be a limit to the restrictions aimed at this freedom. 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 freedom of expression should be conducted within the framework of the criteria stipulated in Article 13 of the Constitution and by taking into consideration the other detailed articles pertaining to the freedom of expression within the scope of Article 26 of the Constitution.

42. The freedom of expression refers to a person's ability to have free access to the news and information, other people's opinions, not to be

condemned due to the opinions and convictions they have acquired and to freely express, explain, defend, transmit to others and disseminate these either alone or with others (*Emin Aydın*, §40).

43. The freedom of expression directly impacts a significant part of other rights and freedoms enshrined in the Constitution. 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 the thoughts and efforts aimed at convincing others to fulfill the thoughts are among the requirements of the pluralistic democratic order. Therefore, the freedom to express and disseminate opinions has vital importance for the functioning of a democracy (*Abdullah Öcalan [GA]*, App. No: 2013/409, 25/6/2014, § 74).

44. In the light of the principles explained above, first whether an interference exists or not and then whether the interference relies on valid reasons will be evaluated when assessing whether or not the freedom of expression was violated in the incident which is the subject of the application.

a. Concerning the Existence of the Interference

45. The applicant claimed that a judgment of conviction was previously formed with regard to himself due to the fact that he had held the press briefing that is the subject of the application and that even though a decision of postponement of prosecution was delivered in the end, his freedom of expression was violated as the prosecution that had been initiated directly impacted him. The applicant also alleged that the risk of being exposed to prosecution again and receiving a sentence persisted within the probation period that is applied with regard to himself as a result of the fact that a conviction judgment had been passed in the previous decision, that the present situation created pressure on his freedom of expression.

46. According to the applicant, the fear of being prosecuted under the present circumstances is real and prevents his political activities, moreover, this situation causes stress and anxiety for him and severely restricts his work.

47. The existence of an interference in the applicant's freedom of expression that is alleged by him depends on the determination of whether a measure that would victimize him due to the violation of his right guaranteed under Article 26 of the Constitution was resorted to or not (see *Altuğ Taner Akçam v. Turkey*, App. No: 27520/07, 25/10/2011, § 65). Within this framework, the case law of the ECtHR to the effect that an individual needs have been directly impacted by the measure in question in order to be able to claim that s/he is the victim of a violation (see *Klass and Others v. Germany*, App. No: 5029/71, 6/9/1978, § 33) will provide guidance for the resolution of the matter (for a similar evaluation see *Fatih Taş*, § 72).

48. It needs to be taken into consideration that the applicant was kept in detention for 94 days due to the press briefing he had held despite the absence of a finalized judgment of conviction, that he was directly impacted by the prosecution that lasted approximately 3 years and 9 months starting from 2010 and his allegation that the risk of being exposed to investigations and prosecutions in the future persisted for him as he is a politician. Within this context, the case process that is the subject of the present application needs to be taken into consideration and it needs to be determined whether or not the persisting threat of prosecution vis-a-vis the applicant amounts to an interference.

49. In the case at hand, the applicant was tried by the 5th Assize Court of Diyarbakır on 27/5/2010 for the crime of "*engaging in propaganda of an illegal organization*" and was sentenced to 2 years and 1 month in prison. The 9th Criminal Chamber of the Court of Cassation overturned the judgment of the local court with its decree of 5/4/2013; the 5th Assize Court of Diyarbakır, which continued the trial, decided with its judgment of 10/9/2013 with regard to the applicant that the prosecution regarding the crime of engaging in propaganda of an organization be postponed and this judgment was finalized on 14/11/2013 following the dismissal by the objection instance of the objection that was filed.

50. Provisional Article 1 (1) of the Law no.6352 regulates, in the investigation phase, that the filing of a criminal case be postponed without requiring the conditions under Article 171 of the Code of Criminal

Procedure No. 5271 of 4/12/2004 and , that the prosecution be postponed within the prosecution phase, that the execution of the judgment of conviction be postponed in finalized judgments of conviction following a crime that is committed prior to 31/12/2011 via the media or various methods of declaring thoughts and opinions, which fundamentally requires a judicial fine or a prison sentence the upper limit of which is not more than five years. In the incident that is the subject of the application, the prosecution that was being pursued regarding the applicant was postponed and it was decided that for three years probation provisions be applied to the applicant.

51. According to Provisional Article 1 (2) of the Law no. 6352, in the event that the individual regarding whom a decision of postponement of prosecution has been delivered does not commit a new crime via the media or various methods of declaring thoughts and opinions within three years starting from the date on which the decision of postponement is delivered, a judgment of no grounds for prosecution or dismissal will be delivered, in the event that a similar new crime is committed within this period, the postponed investigation or prosecution will be continued if a judgment of conviction is delivered due to this crime with a finalized judgment.

52. Not only does the applicant run the risk of being exposed to an investigation and prosecution in the future as a result of his declarations of opinion or political activities due to him being a politician who served as the Diyarbakır provincial head of the BDP at the time of the incident and still pursues his political activities, but there is also the possibility that the postponed prosecution that is the subject of the present application is rekindled. In addition, in the event that the prosecution is started again, the threat of receiving a new sentence continues for the applicant bearing in mind the fact that the applicant was previously convicted by the Court of First Instance as a result of his speech in question.

53. The present application relates to the freedom of expression and the knowledge that the applicant is kept under probation creates certain difficulties for the applicant. These difficulties need to be taken into consideration in the determination of the status of victimhood (see

Altuğ Taner Akçam v. Turkey, § 67). The preoccupation of being subject to a sanction has an interrupting effect on individuals and even though the possibility of being acquitted of the charged crimes in the end exists for the individual, the individual runs the risk of refraining from declaring his/her opinions or carrying out press activities in the future as a result of this influence (for similar evaluations, see *Lombardo and Others v. Malta*, App. No: 7333/06, 24/4/2007, § 61. Also see *Fatih Taş*, § 78).

54. As a result, even though the applicant was not convicted due to the press briefing he had held, it can be accepted that the probability of the postponed investigation being restarted in the future causes stress and anxiety of being sentenced. In light of the reality that the applicant was previously tried and convicted and moreover that the judgment of conviction was not overturned by the Court of Cassation on its merits, it has been concluded that the applicant's risk of being subjected to a new prosecution later on and being sentenced is real. Under these circumstances, it needs to be accepted that an interference was made to the freedom of expression of the applicant within the framework of Article 26 of the Constitution.

b. Whether the Interference Constitutes a Violation

55. The above mentioned interferences will constitute a violation of Article 26 of the Constitution unless they rest on one or more of the valid reasons stipulated under Article 26 (2) of the Constitution and 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.

i. Lawfulness of the Intervention

56. No claim has been made as to the point that there was contrariety with the condition of making the interference with *''the law''* contained within Article 13 and Article 26 (5) of the Constitution. As a result of

the evaluations that were made, it has been concluded that it fulfills the criterion of "*lawfulness*" as contained within Article 7 of the Law numbered 3713 and Provisional Article 1 of the Law numbered 6352.

ii. **Legitimate Purpose**

57. In order for an interference made to the freedom of expression 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.

58. The applicant's trial as a result of the press briefing that is the subject of the application is based on the allegations that it contained praise for the PKK illegal armed terrorist organization and Abdullah Öcalan, its founder and leader, that it portrayed and glorified terrorist activities as freedom struggle and thus assisted the organization by means of conducting its propaganda.

59. When the indictment that was prepared with regard to the applicant and the judgments of the courts of instance are evaluated as a whole, it has been concluded that the trial of the applicant qualifies as the extension of the objectives and activities determined by the State within the framework of the fight against the activities of the PKK terrorist organization.

60. 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 of 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 (*Abdullah Öcalan*, § 87).

61. It has been concluded that the applicant's trial as a result of the press briefing that is the subject of the application is part of the efforts aimed at protecting national security, public order and public security, preventing crime and punishing criminals within the framework of the fight against the activities of the PKK terrorist organization, that therefore, it carries a legitimate aim within the scope of Article 26 (2) of the Constitution that relates to the freedom of expression.

iii. Necessity and Proportionality in the Democratic Societal Order

62. The applicant alleged that he did not incite to coercion and violence or other terror methods in the press briefing he held, that the interference with his freedom of expression, in which he was tried as a result of some political assessments pertaining to current events, was in violation of the requirements of a democratic society.

63. It was stated in the Ministry's opinion that in the event that an interference aimed at the freedom of expression existed, whether *''relevant and sufficient grounds''* 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 with a view to the requirements of a democratic society.

64. The freedom of expression may be subject to certain limitations. An evaluation needs to be conducted concerning the matter of whether or not the restrictions listed in Article 26 (2) of the Constitution regarding the freedom of expression are in harmony with the requirements of a democratic societal order and the principle of proportionality guaranteed under Article 13 of the Constitution.

65. The concept of "*requirements of a democratic societal order*" stipulated in the Constitution of 1982 needs to be interpreted with a modern and libertarian understanding. The criterion of *''requirements of a democratic*

societal order'' clearly reflects the parallelism between Article 13 of the Constitution and Articles 9, 10 and 11 of the Convention, which contain the *''requirements of a democratic society''*. Therefore, the criterion of democratic society should be interpreted on the basis of pluralism, tolerance and open mindedness (*Abdullah Öcalan*, § 93).

66. Democracies are regimes in which the fundamental rights and freedoms are ensured and guaranteed in the broadest manner. In a democratic state of law, restrictions that render fundamental rights and freedoms completely impracticable by bearing prejudice to their essence cannot be allowed. Indeed, it is acknowledged under Article 13 of the Constitution that fundamental rights and freedoms can only be restricted for the reasons envisaged in the Constitution and by law without bearing prejudice to their essence. The essence to which no prejudice can be born from a constitutional standpoint varies regarding each fundamental right and freedom. Nevertheless, in order to acknowledge that a limitation introduced by law does not bear prejudice to the essence of the right, it should not render the exercise of fundamental rights significantly harder, prevent them from fulfilling their objective and have a feature that would remove their effect.

67. With regard to limitations that are introduced without bearing prejudice to the essence of fundamental rights and freedoms, it has been indicated that these limitations cannot be in violation of the requirements of the democratic societal order and the principle of proportionality. In other words, as limitations that bear prejudice to essence would be primarily in violation of the principles of "*requirements of a democratic societal order*" and "*proportionality"*, the Constitution maker has not deemed it necessary that a separate examination be conducted with a view to the principles of "*requirements of a democratic societal order*" and "*proportionality"* with regard to limitations that bear prejudice to the essence of fundamental rights and freedoms.

68. The concept of "*requirements of a democratic societal order*" that is envisaged to be observed with regard to interferences that does not violate the prohibition of bearing prejudice to essence 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. Being one of the "*requirements of a democratic societal order*" refers to a limitation being geared towards the fulfillment of a pressing social need in a democratic society. 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 be resorted to, it cannot be considered as a measure which is in conformity with the requirements of the democratic order of the society (For judgments of the ECtHR in this matter, see *Handyside v. United Kingdom*, App. No: 5493/72, 7/12/1976, § 48).

69. It is undoubted that the freedom of expression, which constitutes one of the main pillars of a democratic society, applies not only for thoughts which are accepted to be in favor or considered to be harmless or not worthy of attention, but also for thoughts which are critical of 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, which apply in a democratic societal order (see *Handyside v. United Kingdom*, § 49).

70. 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 close relation between these two criteria. It needs to be examined whether or not any limitation towards fundamental rights and freedoms bears the quality of being necessary for the democratic societal order, in other words, whether or not it has the quality of being a proportionate limitation that allows for the least possible interference in fundamental rights while fulfilling the intended public benefit aim (CC, E.2007/4, K.2007/81, Date of Decision: 18/10/2007).

71. According to the judgments 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, interference in the field of the freedom of expression, whether or not the interference selected in order to achieve the sought objective is suitable, necessary and proportionate needs to be evaluated (*Abdullah Öcalan*, § 97; *Sebahat Tuncel*, App. No: 2012/1051, 20/2/2014, § 84).

72. As a result of their indicated qualities, the concepts of "*essence of fundamental rights and freedoms*", "*requirements of a democratic societal order*" and "*the principle of proportionality*", which are contained within Article 13 of the Constitution and closely linked, are integral parts of the same concept and constitute the fundamental criteria that need to be observed within the regime of freedoms of a "*democratic state of law*".

73. Therefore/In this regard, it will be necessary to see whether or not a judicial or administrative interference with the freedom of expression meets the pressure of a social need. The main axis for the evaluations to be carried out with regard to the facts that 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 grounds they relied on in their judgments are in line with the principles of the *''requirements of a democratic social order''* and *''proportionality''* with a view to restricting the freedom of expression (*Abdullah Öcalan*, § 97).

74. It needs to be taken into consideration in the evaluations to be made that the applicant was the provincial head of the BDP in Diyarbakır and that the matters he referred to in the press briefing pertain to societal issues that concern a portion of the society. Within the scope of Article 26 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 societal problems (for an opinion in the same vein, see *Başkaya and Okçuoğlu v. Turkey*, § 62).

75. On the other hand, even though no content related limitation is brought to the freedom of expression, public authorities have a wider discretionary authority in areas such as racism, hate speech, war

propaganda, encouraging and inciting to violence, calls to riot or justifying terrorist acts, which are the borderlands of these freedoms. For this reason, first it needs to be assessed whether or not the propaganda of the actions of the PKK terrorist organization was made in the press briefing in question as indicated in the indictment and the grounds of the judgments of the courts of instance (*Fatih Taş*, § 98).

76. In individual applications regarding the freedom of expression, examining expressions by tearing them apart from their contexts may lead to erroneous results in the application of the principles contained within Articles 13 and 26 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. For this reason, the entirety of the statements regarding the PKK terrorist organization and Abdullah Öcalan as well as the context in which these were expressed, the identity of the speaker, the timing of and the purpose for which the statements that are the subject of the application were used, the identities of the people it addressed, its potential effects and the remainder of the statements from the press briefing, which are indicated in the judgments of the courts of instance, need to be considered as a whole in the application at hand. Other than this, attention needs to paid to the content and the context in which the opinions that were brought forward in the press briefing in question, it needs to be evaluated whether or not the interference was "*in compliance with the desired objectives*" and whether or not the reasonings that were brought forward by the national authorities were "*relevant and sufficient*" (for similar assessments, *Abdullah Öcalan*, § 100; *Fatih Taş*, § 99).

77. Indeed, the ECtHR has always stressed in its established case law that in order to determine whether expressions or texts regarding expressions of thought encourage 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).

78. The applicant criticizes the government policies in the solution of the "*Kurdish problem"* in the press briefing in question. According to the applicant, Abdullah Öcalan was not desired as an interlocutor in the solution of the Kurdish problem; however, Öcalan became an important actor of the process at this stage despite the negative attitudes of government officials. According to the applicant, Öcalan was handed over to Turkey by international powers and this is a game that is being played on the peoples of the Middle East. As international powers were planning chaos in the Middle East, Öcalan prevented these chaos plans with the solution proposals that he elaborated. Öcalan achieved all this while under negative prison circumstances. According to the applicant, Öcalan is no ordinary convict and it is not possible to pursue the "*sensitive*" process that is currently being experienced in a sound manner without improving the conditions of his detention. The applicant indicated that the government did not evaluate the recommendations of Öcalan, that the real objective of the government was not a solution, that it was rather the disbanding of the Kurds, that there was a desire to perpetuate state policies relying on denial and destruction, that the recommendation of Öcalan needed to be taken into consideration, that the military operations needed to be ceased. According to the applicant, the problem can be solved by ensuring democratization and the problem needs to be discussed with courage in order for that to happen. Finally, the applicant called in his press briefing for the improvement of the prison circumstances of Öcalan and asked all democrat sections of the society to be sensitive towards the matter of ensuring Öcalan's freedom.

79. As a result of the trial that was conducted, the Court of First Instance decided in its judgment of 27/5/2010 that the applicant be sentenced to 2 years and 1 month in prison for the crime of "*engaging in propaganda of the terrorist organization*"; however, following the decision of reversal of the Court of Cassation, it decided with its judgment of 10/9/2013 that the prosecution be postponed and that the applicant be placed under probation for three years as per Provisional Article 1 of the Law numbered 6352. In other words, the interference made to the applicant's freedom of expression consists merely of the filing of a criminal case regarding himself for the crime of "*engaging in propaganda of the terrorist organization*"

due to the statements he made in the press briefing he held, his trial and the postponement of the prosecution with the provision of a 3-year probation period.

80. In its decision pertaining to the postponement of the prosecution, the Court of First Instance did not deliver a judgment of acquittal regarding the applicant and postponed the prosecution despite the request of the applicant that the elements of the crime did not materialize and that a judgment of acquittal needed to be delivered, it only mentioned the relevant provisions of the Law no. 6352 in its reasoning and did not include any other grounds. Therefore, the reason for which a judgment of acquittal was not delivered regarding the applicant and that a decision of the postponement of the prosecution was delivered can be understood by examining the reasonings contained within the judgment of the Court of First Instance of 27/5/2010.

81. In its reasoned judgment, the Court of First Instance referred to the importance of the freedom of expression in a democratic society; reminded that the freedom of expression can be restricted in order to ensure the public security and the territorial integrity of the country as per Article 26 (2) of the Constitution and Article 10 (2) of the Convention and under the circumstances contained within Article 13 of the Constitution. According to the court, the freedom of expression is restricted with Article 7 of the Law numbered 3713, which regulates the crime of "*engaging in propaganda of the terrorist organization*". The court indicated that behaviors that disseminate hate, incite to violence and encourage violence are punished with this rule that regulates the crime of engaging in propaganda of a terrorist organization. The court punished the applicant by accepting that the applicant praised the PKK terrorist organization and Abdullah Öcalan, who is currently convicted in prison, in the press briefing he held during the demonstration in which he participated, that he supported the organization with his statements, that he provided moral support to the organization and that therefore he engaged in propaganda of the terrorist organization.

82. The Court of First Instance did not consider or demonstrate with which of his statements the applicant praised violence, incited and

encouraged individuals to adopt terrorist methods, in other words, resort to violence, hate, revenge or armed resistance; it merely decided that the applicant supported the PKK terrorist organization and Abdullah Öcalan with his statements. Nevertheless, when the speech of the applicant is evaluated as a whole, it cannot be claimed that he praised violence and terrorist acts, that he incited and encouraged individuals and communities to adopt terrorist methods, resort to violence, that his statements contained calls to racism, hate, revenge or armed resistance.

83. The statements that were made the basis of the conviction of the applicant contain an expression of the uneasiness felt as a result of the incarceration of the founder and leader of the PKK terrorist organization in general and it notably contains the call to attributing more importance to the thoughts of Abdullah Öcalan during the "*solution process*" initiated in order to solve the "*Kurdish problem*". The applicant defends the necessity of drafting a democratic civilian constitution at the end of the solution process and that problems need to be discussed and solved within the boundaries of democratic procedures. The applicant opposes the adoption of methods based on violence instead of democratic procedures and demands that political bans be removed, armed clashes be ceased and Öcalan be released.

84. It needs to be pointed out that the instances that exercise public authority in the restriction of statements such as the expressions of the applicant, who is a politician, have a very narrow discretionary window. Thoughts which are not pleasant for the public authorities or a part of the society cannot be restricted unless they encourage violence, justify terrorist acts and support the formation of the feeling of hatred.

85. The applicant was subjected to prosecution for the crime of engaging in propaganda of the terrorist organization and sentenced to 2 years and 1 month in prison as a result of uttering the expressions that are the subject of the application by addressing a crowd during a demonstration and in a press briefing format. Even though a decision of postponement of the prosecution was delivered later on, it has been concluded that the interference in the applicant's freedom of expression was not in line with the desired objectives and that therefore it was not necessary in a

democratic societal order due to the fact that the risk of the applicant being subjected to a prosecution and sentenced again still persists.

86. For this reason, it should be decided that the applicant's freedom of expression guaranteed in Article 26 of the Constitution was violated.

3. Article 50 of the Law Numbered 6216

87. The applicant filed a request for a pecuniary compensation of TRY 20,000.00 and a non-pecuniary compensation of TRY 20,000.00.

88. Paragraph (2) of Article 50 of the Law numbered 6216 with the side heading of *''Judgments"* is as follows:

> *"If the determined violation arises out of a court judgment, 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 judgment 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."*

89. Taking into consideration the fact that the applicant was kept under detention for 94 days as a result of the statements he used during the press briefing he held, that he was tried for approximately 3 years and 9 months and that the threat of prosecution still persists, it should be decided that a net amount of TRY 5,000.00 in non-pecuniary need to be paid *ex gratia* to the applicant in return for his non-pecuniary damage, which cannot be compensated only by the determination of the violation.

90. Although the applicant made a request regarding pecuniary compensation, as it is understood that there is no link of causality between the violation that has been identified and the pecuniary damages that are claimed, it should be decided that the request of the applicant regarding pecuniary compensation be dismissed.

91. 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.

92. Taking into consideration the fact that the applicant is still under the probation measure, that is, the threat of prosecution and punishment, due to the decision of postponement of the prosecution that was delivered with regard to him and that this matter violates his freedom of expression, it should be decided that in the criminal trial regarding the applicant a copy of the decision be sent to the 5th Assize Court of Diyarbakır to hold a retrial in order to remove the violation and the consequences thereof as per Article 50 (2) of the Law numbered 6216.

V. JUDGMENT

In the light of the reasons explained, it was **UNANIMOUSLY** held on 4/6/2014;

A.

1. That the applicant's allegations to the effect that his personal liberty and security were violated are **INADMISSIBLE** due to "*lack of jurisdiction ratione temporis*",

2. That his allegations to the effect that his freedom of expression was violated are **ADMISSIBLE**,

3. That his freedom of expression guaranteed by Article 26 of the Constitution was **VIOLATED**,

B. That the applicant be paid a net amount of TRY 5,000.00 of pecuniary **DAMAGES**, that other requests of the applicant regarding compensation be **REJECTED**,

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 payment be made within four months as of the date of application by the applicant to the Ministry of Finance following the notification of the judgment; 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.

E. That a copy of the judgment be **SENT** to the 5th Assize Court of Diyarbakır **IN ORDER TO HOLD A RETRIAL** so as to remove the violation and the consequences thereof as per Article 50 (1), (2) of the Law no. 6216,

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

BEKİR COŞKUN

(Application no. 2014/12151)

PLENARY ASSEMBLY
JUDGMENT

President		: Zühtü ARSLAN
Vice-President		: Alparslan ALTAN
Vice-President	:	Burhan ÜSTÜN
Justices		: Serdar ÖZGÜLDÜR
		Serruh KALELİ
		Osman Alifeyyaz PAKSÜT
		Recep KÖMÜRCÜ
		Engin YILDIRIM
		Nuri NECİPOĞLU
		Hicabi DURSUN
		Celal Mümtaz AKINCI
		Erdal TERCAN
		Muammer TOPAL
		M. Emin KUZ
		Hasan Tahsin GÖKCAN
		Kadir ÖZKAYA
		Rıdvan GÜLEÇ
Rapporteur		: Yunus HEPER
Applicant		: Bekir COŞKUN
Counsel		: Att. Mustafa Gökhan TEKŞEN
		Att. Özlem GÜNEL TEKŞEN

I. SUBJECT-MATTER OF THE APPLICATION

1. The application concerns the allegations that the penalization of the applicant, a columnist, due to a column he wrote violates the freedom of expression and the freedom of the press.

II. APPLICATION PROCESS

2. The application was directly lodged with the Constitutional Court on 23/7/2014. The deficiencies detected as a result of the preliminary administrative examination of the petitions and their annexes were made to be completed and it was determined that no deficiency preventing their submission to the Commission existed.

3. It was decided by the First Commission of the First Section on 28/11/2014 that the file is sent to the Section in order for the examination of admissibility to be conducted by the Section.

4. On 29/12/2014, the Head of the Section decided that the examination of admissibility and merits be jointly carried out.

5. The facts, which are the subject matter of the application, and a copy of the application was sent to the Ministry of Justice on 29/12/2014 in order for the Ministry to submit its opinion. The opinion letter by the Ministry of Justice of 28/1/2015 was notified to the applicant on 4/2/2015. The applicant submitted his counter-opinion to the Constitutional Court on 11/2/2015 within due time.

6. In the session of the Section held on 21/5/2015, as it was deemed to be necessary that the application be concluded by the Grand Chamber due to its nature, it was decided that it be referred to the Grand Chamber in order to be discussed as per Article 28(3) of the Internal Regulation of the Constitutional Court.

III. THE FACTS

A. The Circumstances of the Case

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

8. In the copy of national daily Cumhuriyet Newspaper of 4/7/2013, the applicant wrote the column titled *"Painted Stairs"* on the protests of painting stairs that started in Istanbul on 31/8/2013 and spread across the entire country. The column reads as follows:

"My stairs are painted…
Red…
Blue…
Yellow…
*
Indeed you need to paint the feet…
Then there will be color wherever you go…
*
This could be the reason for the conflict:
The fight of color versus lack of color…
*
Dancing is pink, for instance…
Raki is white…
Love is red…
Trees are green…
Streams are blue…
Yellow-dark blues, yellow-reds, black-whites…
A giant poster of our lion with blue eyes and golden hair was hanging on the wall…
*
They still say ***"They have 44 percent of the votes"*** *…*
So much of an apocalypse, so much turmoil, so much of a scandal, so much vileness and dishonor…
So is it only 6 percent that understands what Turkey suffers from?
Indeed, they are watching color televisions…
Are you color blind, then?
*
War is black…
Peace is snow-white…
Republic is white and red…
Secularism is a true rainbow…
*
They do not like colors…
They decided that the MPs got angry and fought a lot since they were sitting on orange seats in the parliament…
So they attack when they see red…

The bull-y MPs…
*
Paint…
Take up brushes…
Pavements, roads, walls, stones, the ground, the sky…
Paint wherever you want…
*
This is not the fanatics' bow…
This is the rainbow…
White…
Red…
Blue…
Yellow…"

9. Due to the said column, Mihrimah Belma Satır, Istanbul MP from the Justice and Development Party (AK Party), filed a criminal complaint against the applicant on 1/10/2013 and Metin Külünk, Istanbul MP from AK Party, filed a criminal complaint against the applicant on 10/10/2013, both alleging that the crimes of insult to a public officer and provoking the people to hatred and animosity or denigrating the people had been committed.

10. In relation to the same column, Selçuk Özdağ, Manisa MP from AK Party, also filed a criminal complaint on 30/10/2013 on the allegation that the crime of insult against a public officer had been committed.

11. In its investigation file numbered 2013/136853, the Chief Public Prosecutor's Office of Istanbul lodged a criminal case by the indictment of 21/11/2013 in order for the applicant to be penalized on the allegation that he committed the crime of open insult against public officers -by virtue of their duties- working as a committee.

12. On the other hand, the Chief Public Prosecutor's Office of Istanbul decided (File No:2013/136853 of 21/11/2013) in its investigation that there were no grounds for the prosecution against the applicant since the elements of the crime of provoking the people to hatred and animosity had not been formed.

13. The criminal case lodged by the Chief Public Prosecutor's Office of Istanbul by its indictment dated 21/11/2013 was heard at the 2nd Criminal Court of First Instance of Istanbul.

14. In its judgment of 29/4/2014, the 2nd Criminal Court of First Instance of Istanbul decided that the applicant be given an imprisonment penalty of 1 year 2 months 17 days on the ground that he committed the crime of insult against a public officer through the press by virtue of their duty and the court decided the pronouncement of the judgment on the defendant be postponed. The reasoning of the Court of First Instance is as follows:

"…

When the column, which is the subject matter of the case, is considered as a whole in terms of its subject, the Columnist does not mention at all the acts, statements, disclosure of ideas relevant to the public that are delivered by the complainants, who are politicians, on a political matter or a public matter that interests the public during their political life and their performance of a public duty such as being an MP and does not explore the ideas and attitudes of the claimants; nor does he constitute a new or counter idea against their ideas on such matters. It is a natural consequence of political life and the performance of a public duty that the MPs, who are politicians, are criticized by the press, even in a tough, harsh and offensive manner, more than anyone else in relation to a thought or an act they have displayed positively or negatively on an issue that will interest even some of the members of the society. However, in order for a person to be criticized, there must be a subject for criticism in place.

Statements made by politicians on political or public matters, practices on matters such as health, education, foreign policy, and so on that interest the public or other public practices can be covered and criticized by the Press. In his column, as the Columnist makes a statement and description about the MPs, saying "... So they attack when they see red... The bull-y MPs..." he fails to make it clear regarding which statements or which public acts of the claimants he is stating this about.

It is understood from the defendant's defense, the complaint petition, the copy of the newspaper and the scope of the whole file that it was possible for the defendant, who made statements and comments on the colors of the seats of MPs in the Plenary Hall of the Grand National Assembly of Turkey, to state his thoughts and comments in words that are not humiliating and degrading but still using a humorous language, that the only purpose of making a statement which read "... So they attack when they see red... The bull-y MPs..." without any intellectual bond with the contents of the column and also in a manner that did not bring any public benefit was to degrade the complainants, that the boundaries of lawfulness and criticism were violated when the honor and reputation of the claimants in the public eye and the intrinsic value were attacked and that, due to the fact that a humiliating value judgment was involved, the defendant committed the crime of openly insulting public officers who work as a committee, by virtue of their duties, which was attributed to him."

15. The objection that was lodged by the applicant against this decision was rejected through the judgment of 24/6/2014 by the 2nd Assize Court of Istanbul.

16. In relation to the same column, another investigation was started against the applicant by the Chief Public Prosecutor's Office of Manisa. The Chief Public Prosecutor's Office decided on 30/1/2014 that there were no grounds for prosecution. Upon an objection against the decision, the 7th Assize Court of Izmir assessed the objection and decided on its rejection by its judgment of 10/3/2014.

17. The individual application was lodged with the Constitutional Court on 23/7/2014.

B. Relevant Law

18. Article 125 of the Turkish Criminal Code No. 5237 of 26/9/2004 with the side heading *"Defamation"* is as follows:

"(1) A person who attributes to an individual a concrete act or phenomenon of a quality which can hurt his/her honor and reputability,

... or who attacks the honor and reputability of an individual by way of cursing shall be given an imprisonment penalty of three months to two years or a judicial fine. In order to penalize an insult in absentia against the aggrieved, the act must be committed in the presence of at least three persons.

(2) In the event that the act is committed through an audio, printed or visual message which is addressed to the aggrieved, the penalty set forth in the above clause shall be decreed.

(3) If defamation is committed:

a) Against a public officer by virtue of their duty,

b) Due to the fact that an individual expresses, changes, attempts to spread their religious, political, social, philosophical beliefs, thoughts and convictions, acts in accordance with the commands and restrictions of the religion they belong to,

c) By mention of values deemed sacred by the religion to which an individual belongs to,

the lower limit for the penalty cannot be less than one year."

(4) (Amended paragraph: 29/06/2005 - Law No. 5377/Art. 15) In the event that the insult is committed openly, the penalty shall be increased by one-sixth.

(5) (Amended paragraph: 29/06/2005 - Law No. 5377/Art. 15) In the event of insult against a public officer -by virtue of their duty- working as a committee, the crime shall be considered to have been committed against the members comprising the committee. However, in such cases, the provisions of articles on successive crimes shall be applied."

19. The relevant part of Article 231 of the Law of Criminal Procedure No. 5271 of 4/12/2004 with the side heading *"Pronouncement of the judgment and postponement of the pronouncement of the judgment"* is as follows:

(5) (Additional: 6/12/2006 - 5560/Art. 23) If the penalty adjudged at the end of the trial heard due to the crime the defendant is charged with is

an imprisonment penalty of two years or less or a judicial fine, the court may decide to postpone the pronouncement of the judgment. Provisions pertaining to conciliation shall be reserved. Postponement of the pronouncement of the judgment shall mean that the established judgment causes no legal consequence on the defendant.

(6) (Additional: 6/12/2006 - 5560/Art. 23) In order to decide on the postponement of the pronouncement of the judgment;

a) The defendant must not be previously convicted for an intentional crime,

b) The court must reach a conviction that, considering the characteristics of the defendant and their attitudes and behaviors during the trial, they will not commit a crime again,

c) Damages encountered by the aggrieved or the public as a result of the commission of the crime must be fully compensated by reinstatement or restitution of the conditions prior to the offense or by indemnification.

(Additional sentence: 22/7/2010 - 6008/Art. 7) In the event that the defendant does not accept it, the postponement of the pronouncement of the judgment shall not be decided on.

…

(8) (Additional: 6/12/2006 - 5560/Art. 23) In the event that the postponement of the pronouncement of the judgment is decided on, the defendant shall be subject to a probation period of five years. (Additional sentence: 18/6/2014 - 6545/Art. 72) Within the probation period, the postponement of the pronouncement of the judgment due to an intentional crime cannot be decided on once again in relation to the same person. "

IV. EXAMINATION AND GROUNDS

20. The individual application of the applicant (App. No: 2014/12151 of 23/7/2014) was examined during the session held by the court on 4/6/2015 and the following was ordered and adjudged:

A. The Applicant's Allegations

21. The applicant

i. reminded in relation to the same matter and within the scope of criminal prosecution against himself that the 2nd Criminal Court of First Instance of Istanbul sentenced him although the Chief Public Prosecutor's Office of Manisa decided there were no grounds for prosecution (NGfP) and this judgment was finalized as a result of the assessment of objection. The applicant alleged that the principle of double jeopardy had been breached and the right to a fair trial guaranteed in Article 36 of the Constitution had been violated.

ii. He stated that the opinions of the defense had not been included within the reasoning of the judgment of the Court of First Instance and the basis of the judgment had not been indicated. Thus, he alleged that the right to a judgment with reasoning, an element of the right to a fair trial guaranteed by Article 36 of the Constitution had been violated.

iii. He stated that, in the newspaper column that is the subject of the application, he engaged in a criticism on current and political matters without targeting any specific member of the parliament and that politicians needed to be more flexible and tolerant in terms of their duties and activities. Thus, he alleged that the freedom of expression guaranteed in Articles 26 and 28 of the Constitution and the freedom of the press, an integral part thereof, had been violated.

The applicant requested that the violation is determined and non-pecuniary damages of TRY 50,000.00 be adjudged.

B. The Constitutional Court's Assessment

1. Admissibility

22. The Constitutional Court is not bound by the legal qualification of the incidents made by the applicant but it appraises the legal definition of the facts itself.

23. Although the applicant alleged that it constituted a violation of the right to a fair trial that is guaranteed in Article 36 of the Constitution

that he was convicted by the 2nd Criminal Court of First Instance of Istanbul and the pronouncement of the judgment was postponed even though it was decided by several Public Prosecutor's Offices that there were no grounds for prosecution for the same column, this complaint aims at punishing him for the column he wrote and thus it is deemed appropriate that the said complaint is assessed within the context of Articles 26 and 28 of the Constitution.

24. In the event that there are interventions in the freedom of expression and the freedom of the press in complaints filed within the context of Articles 26 and 28 of the Constitution, it is required to assess in terms of the requirements of the democratic social order whether the judgments of the courts of the first instance involve "*grounds that are sufficient and relevant to the matter*" and whether "*there is a reasonable balance between the purpose and means of restriction*". For this reason, the complaints of the applicant that the ground for the judgment of the Court of First Instance was not sufficient and that it was not indicated on what basis the judgment of conviction relied on needs to be assessed as a whole within the scope of the freedom of expression and the freedom of the press.

25. The applicant's complaints that the punishment restricting the freedom that he was given due to a newspaper column he wrote violates the freedom of expression and the freedom of the press 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

26. The applicant alleged that the fact that he was given a sentence restricting freedom due to a newspaper column he wrote violates the freedom of expression protected in Article 26 of the Constitution and the freedom of the press protected in Article 28 of the Constitution. Against the allegations of the applicant, the Ministry stated that it was necessary to examine the complaints of the applicant within the framework of the freedom of expression and dissemination of thought stipulated in Article 26 of the Constitution. The applicant reiterated his statements in the

application petition against the opinion of the Ministry on the merits of the application.

27. Article 13 of the Constitution with the side heading *''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."*

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 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.*
>
> *…*
>
> *The formalities, conditions, and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law."*

29. The relevant part of Article 28 of the Constitution with the side heading *''Freedom of the press''* is as follows:

"The press is free, and shall not be censored...

…

The State shall take the necessary measures to ensure freedom of the press and information.

In the restriction of freedom of the press, the provisions of articles 26 and 27 of the Constitution shall apply.

…"

30. The means which can be resorted to in the exercise of the freedom of expression 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. (*Emin Aydın* [GK], B. No: 2013/2602, 23/1/2014, § 43). The freedom of expression directly impacts a significant part of the other rights and freedoms enshrined in the Constitution. Indeed, the press, which is the main channel of dissemination of thought through the press and publications in the form of newspapers, journals or books, is one of the ways of exercising the freedom of expression (*Abdullah Öcalan* [GK], B. No: 2013/409, 25/6/2014, § 73).

31. 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 in 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 in Article 31 of the Constitution.

32. It is stated in paragraph one of Article 28 that the press is free and cannot be censored and it is stated in paragraph three that the state has positive liabilities in terms of the freedom of the press and of information. It is stipulated in Article 28(4) of the Constitution that the provisions of Articles 26 and 27 be applied in the restriction of the freedom of the press. Although it is necessary to assess individual

applications on the freedom of the press, which protects a special type of expression of thoughts and opinions, within the scope of Article 28 of the Constitution, which specifically regulates this matter, other articles on the matter should also be considered within the scope of this assessment as per the principle of integrity of the Constitution. In this framework, Article 28 and Article 26 of the Constitution, which is related to the freedom of expression, need to be taken into consideration together in terms of the application at hand. Due to the close relation between the freedom of expression and the freedom of the press, the concept of *"the freedom of expression"*, which also covers the freedom of the press, is taken as basis in the application at hand during the assessment of the allegations of intervention to dissemination of thought through the press and publications.

33. As emphasized in Article 26(1) of the Constitution, the freedom of expression involves everyone's right to express and disseminate their thoughts and opinions by speech, in writing or in pictures or through other media and, in connection, the liberties of receiving or imparting information or ideas. In this framework, the freedom of expression refers to individuals' ability to have free access to the news and information and to other people's opinions, not be condemned due to their thoughts and opinions and to freely express, explain, defend, transmit to others and disseminate these through various means either alone or together with others.

34. Also covering the freedom of the press, the freedom of expression includes the rights to express and interpret thoughts and opinions through means such as newspapers, magazines, and books and to publish and disseminate information, news and criticism. The freedom of expression ensures that the individual and the society are informed by enabling the transmission and circulation of thoughts. The expression of thoughts, including those which oppose the majority, via all sorts of means, garnering supporters to the thoughts which have been explained, fulfilling and efforts aimed at convincing others to fulfill 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 (see *Abdullah Öcalan*, § 74).

35. In this context, establishing social and political pluralism is dependent on the expression of all kinds of thoughts in a peaceful fashion 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. The freedom of expression is a value that we need in defining, understanding and perceiving ourselves and others and, within this framework, in determining our relations with others (*Emin Aydın*, § 41).

36. Articles 26(1) and 28(1) of the Constitution do not impose any restriction on the freedom of expression in terms of content. In other words, applying to both real and legal persons, the freedom of expression includes in its scope all kinds of expressions such as the expression of political, artistic, academic or commercial thoughts and opinions. Categorizing a thought that is expressed and disseminated as *"valuable - valueless"* or *"useful - useless"* for individuals and the society in terms of its contents includes subjective elements. Attempting to determine the sphere of the freedom of expression based on such categorizations may give rise to the consequence that this freedom is restricted arbitrarily. The freedom of expression also includes the freedom to express and disseminate thoughts which are considered as *"valueless"* or *"useless"* for others.

37. In addition to that, the freedom of expression is subject to the restriction regime for the fundamental rights and freedoms contained within the Constitution. Restriction reasons are provided under Article 26(2), which relates to the freedom of expression. In the restriction of the freedom of the press, the provisions of Articles 26 and 27 of the Constitution shall apply as a rule as per Article 28(4). In addition, in the restriction of the freedom of the press, some exclusive reasons for restriction are provided in Article 28(5), (7) and (9). In applications that are similar to the present application, the reasons for restriction provided in Article 26(2) of the Constitution should be taken into consideration.

38. However, it is also clear that there must be a limit to the restrictions to the freedom of expression and the freedom of the press. 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 freedom of expression should be conducted within the framework of the criteria provided in Article 13 of the Constitution and within the scope of Articles 26 and 28 of the Constitution.

39. The application was filed due to the fact that the applicant had been sentenced to a punishment restricting freedom for 1 year and 2 months and 17 days on the ground that the applicant insulted the members of the Grand National Assembly of Turkey in a column. The Court of First Instance also adjudged to postpone the pronouncement of the judgment. The first issue to be resolved in the present case is to determine whether the punishment restricting the freedom that the applicant was given constitutes an intervention in the freedom of expression. In the subsequent stages, it needs to be determined whether the purpose indicated as basis to the intervention, the existence of which was accepted, was legitimate, whether the right in question was restricted in a way which would damage its essence, whether the restriction was necessary for a democratic society and whether the means used were proportionate.

i. **As regards the Existence of the Intervention**

40. It was considered that the words included in a column that the applicant wrote in a newspaper constituted the crime of defamation of members of the parliament and it was adjudged that the applicant is sentenced to a punishment restricting freedom for 1 year and 2 months and 17 days and that the pronouncement of the sentence is postponed. Therefore, an intervention was made in the freedom of expression of the applicant by the court judgment in question.

ii. **As regards whether the Intervention Constitutes a Violation**

41. The aforementioned intervention will constitute a violation of Articles 26 and 28 of the Constitution as long as they do not rest on one

or more of the valid reasons stated in Article 26(2) of the Constitution and do not fulfill the conditions stated in Article 13 of the Constitution. Due to this reason, it needs to be determined whether the restriction is in line with the conditions of bearing no prejudice to the essence, being based on the grounds indicated under the relevant article of the Constitution, being prescribed by laws, not being contrary to the letter and spirit of the Constitution, to the requirements of the democratic social order and of the secular Republic and to the principle of proportionality as prescribed under Article 13 of the Constitution.

1. Restriction by Law

42. The applicant did not make any allegations that there was a contrariety to the provision *"The formalities, conditions, and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law"* in Article 26 5) of the Constitution and the requirement of the rule that fundamental rights and freedoms may only be *"restricted by law"* as stated in Article 13 of the Constitution. As a result of the assessments that were made, it was concluded that Article 125 of the Law No. 5237 fulfilled the criterion of *"restriction by law"*.

2. Legitimate purpose

43. The applicant was sentenced to punishment restricting freedom on the allegation that he defamed the members of parliament. It is concluded that the said judgment on the punishment restricting freedom is a part of the measures to protect *"the reputation or rights of others"* and had a legitimate aim.

3. Necessity and Proportionality in the Democratic Social Order

44. In the judgment with regard to the applicant being sentenced due to the words he wrote in a newspaper column, it should be considered whether a reasonable balance was struck between the freedom of expression of the applicant and the protection of the reputation or rights of others.

45. The personal honor and reputation of an individual are included within the scope of the "*spiritual existence*" of the individual which is

stipulated in Article 17 of the Constitution. The state is obliged not to arbitrarily intervene in honor and reputation which are a part of the spiritual existence of an individual and to prevent the attacks of third parties. The intervention of third parties in honor and reputation can also be made through visual and audio publications as well as a number of other ways. Even if a person is criticized within the framework of a public debate through visual and audio publication or broadcast, the honor and reputation of that person should be considered as a part of his/her spiritual integrity (*Nilgün Halloran*, B. No: 2012/1184, 16/7/2014, § 41; *Adnan Oktar* (*3)*, B. No: 2013/1123, 2/10/2013, § 33).

46. The state has positive and negative liabilities in the field of the freedom of expression and, specifically, in the field of the freedom of the press. Within the scope of negative liability, public authorities should not prohibit and impose sanctions on the expression and dissemination of thought as long as this is not obligatory; and they should take the required measures for actual and efficient protection of the freedom of expression within the scope of positive liability (*Nilgün Halloran*, § 43; for an opinion of the ECtHR in the same vein, see. Özgür Gündem v. Turkey, App. No: 23144/93, 16/3/2000, § 43).

47. Within the framework of its positive liabilities in relation to the protection of the material and spiritual existence of individuals, the state needs to strike a fair balance between the right to protection of honor and reputation and the right of the other party to enjoy the freedom of expression which is guaranteed in the Constitution. In applications such as the one in the present case, the outcome of the application does not change, in principle, according to whether the application is lodged by the owner of the disputed article and words relying on Article 26 of the Constitution or by the person who was the subject of this article or words relying on Article 17(1) of the Constitution. Otherwise, controversial outcomes may arise in similar cases in terms of balancing the rights protected in the said articles of the Constitution. Judicial bodies need to establish a balance between the rights regulated in these two articles which are in compliance with the criteria provided in Article 13 of the Constitution and in the case law of the Constitutional Court regarding the implementation of this article.

48. While establishing this balance, the essence of the right should not be prejudiced within the scope of Article 13 of the Constitution and a proportion should be observed between the requirements of a democratic social order and the purpose and means of restriction (*Nilgün Halloran*, § 43).

49. Democracies are regimes in which the fundamental rights and freedoms are granted and guaranteed in the broadest manner. In a democratic state of law, restrictions that render fundamental rights and freedoms completely unexercisable by bearing prejudice to their essence cannot be allowed. It is also acknowledged in Article 13 of the Constitution regulating the restriction of fundamental rights and freedoms, that fundamental rights and freedoms can only be restricted for the reasons set forth in the Constitution and by law, without bearing prejudice to their essence. The essence to which no prejudice can be born from a constitutional standpoint varies in terms of each fundamental right and freedom. Nevertheless, in order to acknowledge that a restriction introduced by law does not bear prejudice to the essence of the right, it should not render the exercise of fundamental rights significantly difficult, prevent them from fulfilling their objective and have a feature that would remove their effect.

50. With regard to restrictions that are introduced without bearing prejudice to the essence of fundamental rights and freedoms, it has been expressed that these restrictions cannot be in violation of the requirements of the democratic social order and the principle of proportionality. In other words, as restrictions that bear prejudice to the essence would be in violation of the principles of *"requirements of a democratic social order"* and *"proportionality" a fortiori*, it was not deemed necessary that a separate assessment be conducted with a view to the principles of *"requirements of a democratic social order"* and *"proportionality"* with regard to restrictions that bear prejudice to the essence of fundamental rights and freedoms that protect the Constitution.

51. The concept of *"requirements of a democratic social order"* that is prescribed to be observed with regard to interventions that do not violate

the prohibition of bearing prejudice to essence requires that the restrictions on the freedom of expression are primarily in the form of a compulsory or exceptional measure and that they emerge as the last remedy to be resorted to or the last measure to be taken. Being one of the *"requirements of a democratic social order"* refers to a restriction being geared towards the fulfillment of a pressing social need in a democratic society. According to this, if the restrictive measure does not meet a social need or is not in the form of the last remedy to resort to, it cannot be considered as a measure which is in conformity with the requirements of the democratic social order (For a judgment of the ECtHR on this matter, see *Handyside v. United Kingdom*, App. No: 5493/72, 7/12/1976, § 48).

52. According to the outcome therefrom, there is no doubt that the freedom of expression, which constitutes one of the main pillars of a democratic society, applies not only to expressions which are accepted to be in favor or considered to be harmless or not worthy of attention, but also to expressions which are critical of a section of the State or the society, which are striking to them or which disturb them. That is because such expressions are the requirements of pluralism, tolerance, and open-mindedness, which prevail in a democratic social order (see *Handyside v. United Kingdom*, § 49).

53. Another guarantee which will come into play in all kinds of restrictions to be imposed upon 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 restriction of fundamental rights and freedoms. Although the principles of requirements of a democratic social order and of proportionality are regulated as two separate criteria under Article 13 of the Constitution, there is a close relationship between these two criteria. It needs to be examined whether any restriction on fundamental rights and freedoms is necessary for the democratic social order, or in other words, whether it is a proportionate restriction that allows for the least possible intervention in fundamental rights while fulfilling the intended aim of public benefit (CC, E. 2007/4, K. 2007/81, K.T.18/10/2007).

54. According to the judgments of the Constitutional Court, proportionality reflects the relationship between the objectives and the means of restricting fundamental rights and freedoms. Proportionality review is the review of the means selected based on the sought objective in order to reach this objective. For this reason, in interventions imposed in the field of the freedom of expression, whether the intervention selected in order to achieve the sought objective is suitable, necessary and proportionate needs to be assessed (*Abdullah Öcalan*, § 97).

55. Due to their indicated qualities, the concepts of "*essence of fundamental rights and freedoms*", "*requirements of a democratic social order*" and "*the principle of proportionality*", which are contained within Article 13 of the Constitution and are closely linked, are parts of a whole and constitute the fundamental criteria that need to be observed within the regime of freedoms in a "*democratic state of law*".

56. Therefore, it will be necessary to see whether or not a judicial or administrative intervention in the freedom of expression meets the pressure of a social need. The main axis for the assessments to be carried out with regard to the facts in the application will be whether the courts of instance, which caused the intervention, convincingly put forward that the grounds they relied on in their judgments are in line with the principles of the *requirements of a democratic social order''* and *''proportionality''* with respect to restriction the freedom of expression (*Abdullah Öcalan*, § 97).

57. In the light of the assessments above, courts need to indicate the presence of a benefit which outweighs the benefit arising from the exercise of the freedom of expression and which needs to be protected, while they are deciding on damages or a sentence regarding the expression and dissemination of thoughts (*Mustafa Ali Balbay*, App. No: 2012/1272, 4/12/2013, § 114). As a result, while assessing whether the intervention in the applicant's freedom of speech constitutes a violation of Articles 26 and 28 of the Constitution, an abstract evaluation should not be conducted but it should be considered whether the type of statements used by the applicant, their capacity to contribute to public discussions, the quality and scope of restrictions on the statements, the

person who made the statements, the person to whom the statements were addressed and the weight of the rights that the public and other persons have against the statements used are duly assessed.

58. When the press is considered with its public oversight function, which is the obligation to convey information and opinions in a democracy; in order to say that the penal sanctions imposed on the applicant due to the words he uttered as a journalist in his criticism against politicians or government policies are proportionate, the reasons for intervening in the freedom of expression need to be convincing, or in other words, relevant and sufficient.

59. The applicant is a renowned columnist in Turkey. Before the date when the column that is the subject of the application was written, social incidents known as *"Gezi Incidents"* had occurred in June 2013 and acts of painting stairs had then started in various parts of Turkey allegedly to raise environmental awareness. On the dates when the incidents took place, some municipalities opposed to the act of painting stairs also named as "*rainbow protest*", and repainted the stairs, which were previously painted in rainbow colors, gray. The column that is the subject of the application was written as part of discussions ongoing in the press and media organs and in the sphere of politics during the days when the incidents occurred.

60. In the said column, acts of painting stairs were supported through several humorous and indirect statements and those who opposed these acts were criticized. The applicant thinks that the struggle in Turkey is one of those who love and those who do not love colors. The applicant interrelates opposing to the painting of stairs to the aggressiveness and fights of MPs in the Parliament and refers to the press claims that some colors make members of the parliament aggressive. Furthermore, the applicant criticizes the fact that *"the votes of the ruling party is 44 percent"* despite *"all that has happened"* and accuses those who voted for the ruling party of being *"color blind"*.

61. The 2nd Criminal Court of First Instance of Istanbul held that the applicant did not criticize a substantial action or thought of members of the parliament, that no positive or negative assessment on a matter

regarding social issues was included in the column, and that critical statements issued without a subject for criticism were only issued for the purpose of humiliation. The Court of First Instance held that the press may criticize statements of politicians on matters concerning the public and the practices on issues concerning the society such as healthcare, education and foreign policy. On the other hand, the Court held that the applicant did not criticize a substantial statement or action of members of the parliament when he generally wrote *"So they attack when they see red"*, *"The Bull-y MPs"* about the members of the parliament. These words aim to humiliate and degrade. It is possible to comment on the colors of seats at the GNAT Plenary Hall in a humorous language and by using words that are not degrading and humiliating. The Court held that the honor and reputation of the members of the parliament were harmed due to the column the applicant wrote and the criticism exceeded the limits of lawfulness.

62. In individual applications, it cannot be sufficient to handle only the judgments issued by the courts of instance. First of all, it should be considered that the words written by the applicant were not written concretely in criticism of a specific member of the parliament. Secondly, the statements *"So they attack when they see red"*, *"The Bull-y MPs"*, which are the subject of trial proceedings, should be evaluated as a whole together with the column in which they were used and within the entirety of the incident without being separated from the context they were written in (Nilgün Halloran, § 52).

63. The applicant defended the act of painting stairs and used harsh statements against the officials who criticized such acts. The Court of First Instance decided that the words of the applicant meant an insult to all members of the GNAT. On the other hand, it is not evident that the applicant wrote those words directly against any specific member of the parliament. The applicant expresses an abstract criticism against all politicians including the members of the parliament. The acknowledgment of the Court of First Instance that the target for the harsh words the applicant used was the complainant member of the parliament was possible only when it attributed meanings to the words the applicant used other than the meaning the columnist intended. On

the other hand, even though it is accepted that the applicant targeted the members of the parliament individually in his words as the Court of First Instance acknowledged, the statements of the applicant need to be evaluated within the entirety of the column and without being separated from the context they were written in.

64. To a large extent, the freedom of expression aims to guarantee the freedom of criticism. Therefore, the use of harsh statements during the expression and dissemination of thoughts should be considered natural. On the other hand, when it is considered that the freedom of political debate is *"a basic principle of all democratic systems"* (see *Lingens v. Austria*, App. No: 9815/82, 8/7/1986, § 41-42), it is necessary to attach a distinct importance to the freedom of political speech in comparison to other types of expression. In addition, the ECtHR frequently emphasizes in its judgments that defending a political debate is a core element in a democratic society. The ECtHR underlines that political speech should not be restricted in the absence of compelling reasons (for a judgment in the same vein, see *Feldek v. Slovakia*, App. No: 29032/95, 12/7/2001, § 83).

65. Through the words that led to his conviction, the applicant criticized the reaction of some municipality officials and some politicians against the activity of painting urban stairs, which was started by persons in order to draw attention to environmental problems, following the incidents that came to be known as *"Gezi Incidents"* and occupied the agenda in Turkey for a long time. Furthermore, the applicant also makes reference to certain news that previously appeared on the press, suggesting that the colors of the Plenary Hall of the GNAT and specifically the red color of the seats disrupted the moods of the members of the parliament. Using the expressions *"So they attack when they see red"* and *"The Bull-y MPs"*, the applicant uses a metaphor of bulls attacking matadors that carry red cloaks in their hands and criticizes in a humorous manner that a colorful environment is not tolerated by politicians.

66. As the ECtHR indicates in its established case law, governments must be tolerant against even the fiercest criticism directed to them due to the public power they exercise. A healthy democracy requires that

the Government be subject to the scrutiny not only of the legislative and judicial authorities but also of other players from the political sphere such as non-governmental organizations, the press or political parties (for a judgment in the same vein, see *Castells v. Spain*, App. No: 11798/85, 23/4/1992, § 46).

67. In a similar manner, the acceptable limits of criticism against politicians are wider than the limits of criticism against other persons. Unlike other persons, a politician opens all their speeches and acts to the scrutiny of the public and other politicians by choice and is therefore obliged to display a broader tolerance (for a similar approach, see *Lingens v. Austria*, § 42).

68. Nevertheless, the fact that politicians must be more tolerant does not mean that their *"reputation and rights"* specified in Article 26(1) of the Constitution will not be protected. On the contrary, Article 26(2) allows for the protection of the reputations of all individuals. However, in relation to politicians who act outside their personal titles, the requirements of the said protection need to be weighed in connection with the benefit of openly discussing political issues (for the approach of the ECtHR on the same matter, see *Lingens v. Austria*, § 42).

69. It is beyond doubt that the applicant's support of an act that draws attention to environmental problems in Turkey and his criticisms of those who are against this act, from his own perspective in the column that is the subject matter of the case, is a matter that concerns public interest in general. Furthermore, the limits of criticism towards governments and politicians are wider than those towards real persons.

70. The applicant was given an imprisonment sentence of 1 year 2 months and 17 days due to the column he wrote. Although the Court of First Instance decided to postpone the pronouncement of the judgment, the applicant was given a probation measure of 5 years and there is always the risk that the penalty of the applicant, who is a columnist, may be enforced any time during this period. The concern of being sanctioned has a punctuating interrupting impact on persons and, due to this impact, there is the risk that the person may avoid expressing his

thoughts or engaging in press activities in the future even if the person completes the probation period without receiving a new sentence in the end. As a result, it should be admitted that the possibility of enforcement of the penalty on the applicant in the future puts the applicant under stress and a concern of being punished.

71. Due to these reasons, it is concluded that the intervention made on the freedom of expression of the applicant was not an intervention that was necessary to protect *"the reputation and rights of others"* in a democratic social order.

72. It should be decided that the applicant's freedom of expression and freedom of the press guaranteed in Articles 26(1) and 28(1) of the Constitution were violated.

3. Article 50 of the Law No. 6216

73. The applicant requested that non-pecuniary damages of TRY 20,000.00 be adjudged.

74. Article 50(2) of the Law No. 6216 with the side heading *"Judgments"* 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."*

75. In the application, it has been concluded that Article 26(1) and Article 28(1) of the Constitution were violated. It should be decided that a copy of the judgment be sent to the 2nd Criminal Court of First Instance of Istanbul in order for the violation and the consequences thereof to be removed as per Article 50(1) and (2) of the Law No. 6216.

76. In terms of the application regarding the applicant's freedom of expression, it should be decided that non-pecuniary damages of net TRY 5,000.00 be paid to the applicant in return for the non-pecuniary damages of the applicant which cannot be redressed only with the determination of violation.

77. Since the applicant requests the collection of the counsel's fee and trial expenses, it should be decided that the total trial expense of TRY 1,698.35, which is incurred by the applicant and determined as per the documents in the file and consists of TRY 198.35 for application fee and TRY 1,500.00 for counsel's fee, be paid to the applicant.

V. JUDGMENT

In the light of the reasons explained, it is **UNANIMOUSLY** held on 4/6/2015;

A. That the applicant's

1. Allegations to the effect that his freedom of expression and freedom of the press were violated are **ADMISSIBLE**,

2. That the freedom of expression guaranteed in Article 26 (1) of the Constitution and the freedom of the press guaranteed in Article 28 (1) of the Constitution were **VIOLATED**,

3. That the applicant be **PAID** a net amount of TRY 5,000.00 of non-pecuniary **DAMAGES**, that other requests of the applicant regarding damaged be **REJECTED**,

B. 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 incurred by the applicant be **PAID TO THE APPLICANT**,

C. That the payment be made within four months as of the date of application by the applicant to the Ministry of Finance following the notification of the judgment; 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.

D. That a copy of the judgment is **SENT** to the 2nd Criminal Court of First Instance of Istanbul **IN ORDER TO HOLD A RETRIAL** so as to remove the violation and the consequences thereof as per Article 50 (1) and (2) of the Code No. 6216.

RIGHT TO ASSEMBLY AND DEMONSTRATION (ARTICLE 34)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

ALİ RIZA ÖZER AND OTHERS

(Application no. 2013/3924)

GRAND CHAMBER
JUDGMENT

Deputy President	:	Serruh KALELİ
Deputy President	:	Alparslan ALTAN
Justices	:	Serdar ÖZGÜLDÜR
		Osman Alifeyyaz PAKSÜT
		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	:	Murat ŞEN
Applicants	:	1- Ali Rıza ÖZER
		2- Özcan ÇETİN
		3- Orhan BAYRAM
		4- Veli İMRAK
		5- Tunay ÖZAYDIN
		6- Deniz DOĞAN
Counsel	:	Att. Nedim DEĞİRMENCİ

I. SUBJECT-MATTER OF THE APPLICATION

1. The applicants alleged that the police's barring their attendance to the meeting which was to be held in Ankara in order to make a mass press statement against the bill that introduced changes to the education system and the law enforcement's use of disproportionate force and infliction of injuries during the incidents that broke out due to the fact that the law enforcement did not allow them when they started to march in order to make a press statement against that barring at İzmir Konak Square on the very same day and in front of İzmir Metropolitan Municipality the next day violated the prohibition of mal-treatment and the freedom of expression and the right to organize meetings and demonstration marches.

II. APPLICATION PROCESS

2. The application was lodged on 31/5/2013 with the 3rd Assize Court of İzmir. The deficiencies detected as a result of the preliminary administrative examination of the petition and its annexes were made to be completed and it was determined that no deficiency preventing their submission to the Commission existed.

3. It was decided by the Third Commission of the Second Section on 19/12/2013 that the examination of admissibility be conducted by the Section and the file be sent to the Section.

4. The facts, which are the subject matter of the application, were notified to the Ministry of Justice on 13/1/2014. The Ministry of Justice submitted its opinion to the Constitutional Court on 7/3/2014 at the end of the additional time period that was granted.

5. The opinion submitted by the Ministry of Justice to the Constitutional Court was notified to the applicants' counsel on 27/3/2014. The applicants submitted to the Constitutional Court their responses against the opinion of the Ministry of Justice on 9/4/2014.

6. Since it was deemed necessary during the meeting held by the Second Section on 16/10/2014 that the application be decided upon

by the Grand Chamber due to the nature of the application, it was decided that the application be referred to the Grand Chamber in order to be deliberated as per Article 28(3) of the Internal Regulation of the Constitutional Court.

III. THE FACTS

A. The Circumstances of the Case

7. The relevant facts as determined from the application petition and the annexes thereof and the content of the file which is the subject matter of the application are summarized as follows:

8. The Applicants Özcan Çetin, Orhan Bayram, Veli İmrak, Tunay Özaydın and Deniz Doğan are teachers and the applicant Ali Rıza Özer is an education inspector. The applicants are members of İzmir Branch of Education and Science Laborers' Union (Eğitim-Sen) where public employees working in the field of education are organized. Eğitim-Sen is among the components of the Confederation of Public Laborers' Unions (KESK) which the labor unions that are formed by the public employees working in other fields are members of.

9. KESK and Eğitim-Sen announced that they would protest the bill through a mass press statement in Ankara on 28-29 March 2012 in order to make their objection heard upon the start of deliberations at the Grand National Assembly of Turkey (GNAT) on the *"Bill on Amending the Primary Education and Education Law and Certain Laws"* (the bill) which is publicly known as 4+4+4. This announcement was supported by a myriad of political parties, unions, associations and various groups that are called platforms and by student groups.

10. Following this announcement, Ankara Governor's Office, through its letter of 26/3/2012, prohibited all kinds of meetings and demonstration marches and similar protests on 28-29 March 2012 in the province of Ankara in order to prevent the disruption of public security and order, protect the rights and freedoms of others and prevent the commission of crimes after it evaluated that, during the protests to be made, an environment of conflict would be established between security forces

and demonstrators for provocative purposes, that the protests would disrupt the normal flow of life and jeopardize general security and public order and security.

11. As per the said prohibition, the Ministry of Interior wrote letters to the governor's offices in all provinces that the exit, from the provinces, of groups which wanted to attend the press statement and protest not be allowed. Within the scope of the said letter, İzmir Governor's Office informed Eğitim-Sen İzmir Branches on the situation on 27/3/2012 and notified that the departure of groups that wanted to attend the protest desired to be held in Ankara would not be allowed and legal action would be taken in the event that the organizations within this scope were not canceled.

12. Members of unions and other non-governmental organizations who would attend the protest to be held in Ankara came together around 22:00 on 27/3/2012 and wanted to go to Ankara from İzmir by buses. However, the police who took measures in advance restrained the applicants' and other attendees' exit from İzmir, mentioning the lack of documents which are legally required to be kept on buses.

13. The applicants' and other attendees' attempts to go by other buses were also restrained by the police on the same grounds. The applicants and other attendees present at the scene thereupon closed the road where they were to traffic in order to protest the restraint of buses going to Ankara. They stood for some time and then sat down and continued their protests.

14. The police issued warnings by megaphone in order for the road to be re-opened to traffic. Some time later, around 23:15, the demonstrators were convinced and one lane of the road was opened to traffic. The road was closed to traffic for about 20 minutes. Later on, at around 1:30 am, the applicants and other attendees decided to go to Ankara on foot in order to get around the restraint by the security forces and started to march towards Konak Square on the road.

15. According to the incident minutes of 28/3/2012, the security forces repeatedly issued warnings that the march was illegal. Upon the

continuation of the march despite the warnings, the riot police blocked the road and wanted to restrain the march of the demonstrators. Meanwhile, upon the fact that the demonstrators did not stop the march, a short clash took place between the police and the demonstrators and the police responded to the demonstrators with pepper gas and truncheons. The protesters thereupon stopped their march. Meanwhile, a police officer broke his ankle and was injured.

16. Upon the announcement by a union manager that the protest would be prolonged for two more days, the crowd waited for some more time and then gathered before the SSI Provincial Directorate building and continued with their sit-in protest and they broke up at around 4:30 am in order to meet at 12:00 the next day (on 28/3/2012) (the first protest).

17. In relation to the first protest, the statements of the applicants Ali Rıza Özer, Özcan Çetin and Orhan Bayram and some other attendees were taken as the suspects for the crimes of opposition to the Law on Meetings and Demonstration Marches No. 2911 of 6/10/1983 and of resistance to have the officers' duty not fulfilled.

18. On 28/3/2013, the applicants and union members gathered in front of the former Sümerbank building at Konak Square in order to protest both the said bill and the incidents which took place the night before. To attend the same demonstration, another group also met and wanted to walk towards the Governor's Office building from another direction. Security forces which were informed about the protest in advance took the necessary safety measures.

19. A group of about 800 people formed with the participation of various non-governmental organizations assumed marching formation and started to march towards the Governor's Office building with banners in their hands in order to make a press statement.

20. The group continued with its march until the police barriers in front of the Metropolitan Municipality building. There, the police issued warnings that the group would not be allowed to march to the Governor's Office building and that the march should be stopped. According to the incident minutes of 28/3/2012 as issued by the police,

the group ignored the warnings and started to shove the staff on duty and take down the barriers with the sticks they were holding. The riot police first tried to stop the group by forming a barricade using their shields, but when some individuals in the group threw shards of glass, pavement stones and full water bottles at them, they started to respond to the attacking group. The police responded to the demonstrators with pressurized water, painted water, pepper gas and riot response vehicles (TOMA). Meanwhile, a police officer injured his foot.

21. Simultaneously with the group that tried to go beyond the police barricade, another group attempted to reach the Governor's Office building using another route. However, the police took measures against the group's march to the group to the Governor's Office, pointed to an alternative route for them and asked them to go to the SSI building where the other group was. The group thereupon started to march towards the road blocked by the police; meanwhile there was a brief clash between the police and the group and the police prevented the march by using gas. Then the group changed its route and started to march towards the SSI building and joined the other group there.

22. Swelling to two thousand people, the group started a sit-in protest in front of the SSI building. As a result of the negotiations between the union representative who organized the demonstration and the security forces, the police barricade was retracted by 50 meters and the demonstrators were allowed to make a press statement. Those who attended the demonstration broke up at around 16:30.

23. In relation to the demonstration march held on 28/3/2012 (the second protest), the statements of the applicants Ali Rıza Özer, Özcan Çetin and Orhan Bayram and some other attendees were taken as the suspects for the crimes of opposing to the Law No. 2911 and of preventing the officers from fulfilling the duties.

24. During the intervention in the incidents, the applicants were injured or were exposed to pepper gas. The medical reports of the applicants are as follows:

i. In the forensic examination report of 28/3/2012 for Ali Rıza Özer, the applicant, it was stated that there was hyperemia, sensitivity, edema and deformity on the dorsum of the nose, a 2 cm cut on the skin in addition to a fractured bone in the nose, a 2 cm cut in the inner side of the lower lip, ecchymosis on the upper lip, a new rupture on the left tympanic membrane, that there was a loss of hearing ability in the left ear during the audiological examination, that there was no threat to his life and that it would be appropriate for him to undergo a checkup six months later in terms of permanent scars and traces on his face. Furthermore, a temporary incapacity report for a total of nine days was handed over to the applicant.

ii. In the forensic examination report of 28/3/2012 for Özcan Çetin, the applicant, it was stated that pepper gas was sprayed to his eye, that there was burning and stinging in the eye, that there was redness in the eye and that drugs were administered.

iii. The Applicant Orhan Bayram was given a two-day temporary incapacity report on 28/3/2012 upon his complaint of pain in the right shoulder as a result of a fall. In later examinations for the applicant, minimally displaced avulsion fracture was spotted in his right shoulder.

iv. In the temporary forensic examination report of 28/3/2012 for Veli İmrak, the applicant, it was stated that there was a 2-3 cm cut in the area with hair on the left side of his head, that there was no threat to his life, that he was injured in a way that would be cured with a simple medical intervention.

v. In the single physician report of 28/3/2012 for Tunay Özaydın, the applicant, it was stated that there was trauma on his right wrist and it was appropriate for him to have a three-day rest.

vi. In the forensic examination report of 28/3/2012 for Deniz Doğan, the applicant, it was stated that there was a 0.5 cm skin laceration, ecchymosis and soft tissue swelling on the left side of the dorsum of the nose.

25. Through their petitions with the order date of 2/4/2012, the applicants filed their complaints for the crimes of restraining of their democratic rights, misconduct through the exercise of disproportionate force and willful injury for the two separate incidents that took place on 27-28 March 2012.

26. In relation to the applicants' complaint, two separate investigations were conducted by İzmir Chief Public Prosecutor's Office for the crimes of exceeding the limits of authority to exercise force and misconduct.

27. In the investigation file of İzmir Chief Public Prosecutor's Office No. 2012/31529, permission for investigation was requested within the scope of the Law on the Trial of Public Servants and Other Public Officials No. 4483 of 2/12/1999 for the crime of misconduct in relation to the Provincial Security Director of İzmir and other officials of the Provincial Security Directorate due to the barring of the applicants' attempts to go to Ankara and the barring of their march in order to make a press statement against this barring at İzmir Konak Square on the very same day and in front of İzmir Metropolitan Municipality the next day.

28. Through its letter of 4/7/2012, İzmir Governor's Office reminded that a decision was made not to process complaints with the decision of 22/5/2012 of the Chief Public Prosecutor's Office of the Court of Cassation in relation to the complaint lodged regarding the Governor of İzmir, Provincial Security Director of İzmir and other officials of the Provincial Security Directorate and therefore decided in the light of this decision not to grant permission for investigation. It was stated in the reasoning of the decision *"that the allegations were not based on substantial information and documents, that there was no situation which constituted a crime in terms of those concerned nor required the conduct of a preliminary examination"*.

29. The objection that the applicants lodged against the said decision was rejected through the judgment of the Regional Administrative Court of İzmir of 16/10/2012. Thereupon, the Chief Public Prosecutor's Office decided on 26/11/2012 that there were no grounds to make an

examination in relation to those complained about since there was not a due permission for investigation and the condition for investigation had not been realized.

30. In relation to their injuries caused by the disproportionate force exercised by the police (see § 24), the applicants lodged complaints against the officials of the Provincial Security Directorate of İzmir for the crime of inflicting injury by exceeding the limits of the authority to exercise force. In the expert report of 11/12/2012 issued within the scope of the investigation No. 2012/43793 initiated by Chief Public Prosecutor's Office of İzmir, it was acknowledged that the response by the security forces during the march of KESK and Eğitim-Sen managers and members on 27-28/3/2012 remained within the scope of the legal authority to exercise force and it was decided on 1/3/2013 that there were no grounds for prosecution.

31. The expert report of 11/12/2012 is as follows:

> *"(Protest No. 1) It was determined that the camera records started at 22:51, that the group first blocked the bus, the documents of which were taken for examination, from moving, that they hit the road at 23:00 and closed the road to traffic, that they continued their protest by way of sitting on the road at 23:07, that they continued this protest until 23:17, that they then opened the road to traffic and started to wait by the İzmir Metropolitan Municipality until 01:23. It could be seen that the group started to march towards Fevzipaşa Boulevard after M.B., one of the suspects, at 01:23 stated that "If they do not let us go to Ankara by vehicles, we will go to Ankara on foot. We will duly form our cortege and go to Ankara". They arrived at the entrance of Fevzipaşa Boulevard in a way that the road was completely open at first and then only one lane was open, that, at that point, a barricade was formed by the Riot Police teams using shields, that a brief clash (due to poor video recording, no other perception than a clash was formed and it was not possible to identify) took place while the group attempted to go beyond the barricade, that a waiting period took place due to the fact that the security forces did not allow the continuation of the march, that, meanwhile, the group was warned through a sound system frequently in order for them to break up*

but the group did not break up, that at around 02:00 the group returned to the direction where SSI provincial building was at, that, between the start and finish of video images, slogans were shouted as "We will drown fascism in the blood it spilled", "Damn the fascist dictatorship", "Reactionary, fascist, public enemy AKP", "Pressure cannot dismay us", "Everywhere is Ankara, resistance is everywhere", "There is no salvation alone; either all of us or none of us", "Damn the AKP dictatorship", "Rights are not vested but taken, victory is won on the streets", "We will resist, resist and win", "Shoulder to shoulder against fascism", "Our right to travel cannot be barred" and "Long live our organized struggle".

(Protest No. 2) It was determined that speeches were delivered and slogans were shouted through the sound system located on the back of a small truck, that the individuals within the group carried posters that read "Reactionary, fascist, public enemy AKP" and "No to a vindictive youth", that the slogans "Resign Tayyip", "Shoulder to shoulder against fascism", "The day will come, the fate will change and AKP will answer to people", "We will not surrender to darkness", "Long live the solidarity of classes", "Long live the revolutionary solidarity", "Victory will belong to the resisting laborers", "Laborers will ask for an answer from AKP", "There is no salvation alone; either all of us or none of us", "Rights are not vested but taken, victory is won in the streets", "Charge, laborers and remove the barricade", "Let the police terrorism withdraw", "Damn with the AKP dictatorship", "Police, bug off, these streets belong to us", "Here is AKP, here is fascism", "No barricades for educators but for gangs", that the group coming from the direction of Konak Metro and carrying banners of Eğitim-Sen İzmir Branch No. 4 was stopped by the security forces at the entrance of Konak Square, that they were warned they could follow Mustafa Kemal Boulevard on the coast and cross the overpass at the entrance of Cumhuriyet Boulevard to go to İzmir Metropolitan Municipality, that some people in the group said things such as that the destination was closer to the point they were present at, that the group and the security forces forming the barricade had some talks, that the group changed direction and turned towards Konak Pier, that, meanwhile, the group carrying the banner of Eğitim-Sen İzmir Branch No. 2 came to the same point, that they moved towards the point where the barricade was, that there were negotiations between the union

managers and the security forces but they did not yield any results and that the collective charge on the barricade by the group was responded to by the security forces, that some persons in the group hit the security forces with fists and kicks, that the barricade was firstly broken but then recovered and reconstructed, that a response was given using pepper gas in a proportionate manner while the group made another attempt to break the barricade, that the group turned to the indicated route but this time closed two lanes of the four-lane road to traffic as they turned to the indicated direction by moving on the vehicle road, that this action was only taken by those walking at the front of the group, that the group then joined the other groups in front of the SSI provincial building, that, while these incidents took place, some of the barricades formed in front of the SSI provincial building were broken by the groups, that, meanwhile, some persons including the suspects were identified, that security forces tried to make the persons disperse by way of spraying pressurized water from Toma vehicles, that the same action was repeated shortly after and that security forces tried to break up the persons by spraying pressurized water and gas water from Toma vehicles (in line with the information obtained from the contents of the file),

that, after all the groups joined, union representatives would do a sit-in protest in front of İzmir Metropolitan Municipality and thus they requested that the barricade be retracted, that their request was later accepted and the group broke up after they did the sit-in protest."

32. In the expert report, no determination was made regarding the applicants Veli İmrak, Tunay Özaydın and Deniz Doğan. Yet, it was determined that Özcan Çetin caused the traffic to slow down in the first protest and led the group in the second protest, that Ali Rıza Özer caused the traffic to slow down in the first protest and pushed the barricade in the second protest, that Orhan Bayram caused the traffic to slow down in the first protest and hit the riot police officers with the flagpole he had in his hand and then threw the flagpole to the police in the second protest. No evaluation was made in the expert report and the said decision of the Chief Public Prosecutor's Office as to how the applicants' injuries occurred and it was stated in the report and the decision that the police exercised proportionate force.

33. The objection that was lodged against the said decision was rejected with the judgment of the 1st Assize Court of Karşıyaka of 16/4/2013. The applicants were informed about the judgment on 6/5/2013.

34. Within the scope of the summary record issued by the police, a criminal case was lodged at İzmir 7th Criminal Court of First Instance against 68 people including the applicants Ali Rıza Özer, Özcan Çetin and Orhan Bayram through the indictment of 2/4/2013 and No. Investigation 2012/43840 of İzmir Chief Public Prosecutor's Office in order for them to be punished for the crime of *"Attending Illegal Meetings and Marches Unarmed and Not Breaking Up Despite Warnings"* within the scope of the second protest that started on 28/3/2013 around 12:00. The first protest was not mentioned in the indictment.

35. It is understood that the court rendered its decision through its judgment of 9/12/2013 that there were no grounds for imposing punishment as per the last sentence of Article 32(3) of the Law No. 2911, providing the justification that,

> *"… although a criminal case was lodged before our court against the defendants on the request that they be punished due to their engagement in behaviors that were contrary to the Law No. 2911 on Meetings and Demonstration Marches, in accordance with the prosecution being held, the defenses and statements taken and the minutes and documents within the file and particularly the contents of the expert reports on the analysis of crime scene images regarding the incident, there are no grounds to impose punishment on the defendants as per the last sentence of Article 223/4/d of the CCP with reference to the last sentence of Article 32(3) of the Law No. 2911 due to the occurrence of the protests that were partly reflected in the minutes and partly determined through CD analysis after the security officers built a barricade in a way to prevent the passage of the crowd including the defendants, which had gathered in order to make a press statement on the law commonly known as 4+4+4 so as to walk to the area in front of İzmir Metropolitan Municipality where the statement would be made, from the section between İzsu and İzmir Metropolitan Municipality building on the ground that the group would have walked to the Governor's Office building and therefore barred the group's passage from that point".*

36. A criminal case was lodged before İzmir 2nd Criminal Court of First Instance against 35 people including the applicants Orhan Bayram and Ali Rıza Özer through the indictment of 9/8/2012 and Investigation No. 2012/56697 of İzmir Chief Public Prosecutor's Office in order for them to be punished for the crime of resisting to prevent the fulfillment of duty.

37. Through its judgment of 18/7/2013, the court made a decision of acquittal on the ground that *"convincing and conclusive evidence on the fact that the defendants committed the alleged crime could not be obtained"*. The judgment was finalized without being appealed.

B. Relevant Law

1. National Law

38. Article 3(1) of the Law No. 2911 is as follows:

> *"In accordance with the provisions of this Law, everyone has the right to organize meetings and demonstration marches, for specific purposes not considered as an offence by laws, unarmed and free of aggression and without getting prior permission."*

39. The version of Article 6 of the same Law before being amended by the Law No. 6529 of 2/3/2014 is as follows:

> *"Meetings and demonstration marches can be held anywhere within the borders of all provinces and districts on the condition that the following provisions are abided.*
>
> *The squares and open spaces or roads in cities and towns and other places deemed necessary where meetings or marches can be held and the gathering and break out places for such meetings and marches and the roads and directions to be followed shall be decided by the governors and district governors and be announced in advance via the customary tools. The amendments to be done later regarding these places shall be valid fifteen days after the announcement. In determining the meeting places, spaces where meetings are generally held in a way not to hinder arrival and departure, disrupt security and prevent the establishment of markets and where there is power installation shall be preferred."*

40. Article 22 of the same Law is as follows:

"Meetings cannot be held on public roads and in parks, sanctuaries, buildings and facilities where public services are delivered and their annexes and within a distance of one kilometer to the Grand National Assembly of Turkey and demonstration marches cannot be held on intercity roads.

In meetings at public squares, it shall be obligatory to abide by arrangements to be made by the governor's offices and the district governor's offices in order to ensure the passage of people and transportation vehicles."

41. Article 23 of the same Law is as follows:

"Meetings and demonstration marches shall be deemed illegal if they are held; a) Without submitting a notification in a way that conforms to the provisions of Articles 9 and 10 or before and after the day and hour that are specified for the meeting or march;

b) (Amended clause: 30/7/1998 - 4378/1 art.) By attending meetings and demonstration marches carrying firearms or explosive materials or all kinds of cutting, piercing tools or bruising and suffocating tools such as stones, sticks, iron and plastic bars or incendiary, corrosive, injurious drugs or all other kinds of poisons or all kinds of smoke, gas and similar substances and emblems and signs belonging to illegal organizations and groups or by wearing clothes resembling a uniform with such signs and emblems or by covering their faces completely or partially with elements such as cloth and so on in order to conceal their identity and by carrying posters, bills, placards, pictures, boards, tools and materials that have a quality which is considered an offence by laws or by chanting slogans with such a quality or by airing through sound devices,

c) Without observing the provisions of Article 7,

d) Outside the places that are stated as per Articles 6 and 10,

e) Without respecting the methods and conditions in Article 20 and the bans and measures in Article 22,

f) By violating own purposes, rules and limits in subject matters that are left outside the scope of the Law through Article 4,

g) For purposes that are deemed to be a crime by laws,

h) By violating the purpose that is specified in the notification,

i) Before the end of the postponement or prohibition period that is specified in the event that the meeting and march are prohibited or postponed on the basis of Articles 14, 15, 16, 17 and 19,

j) (Amended clause: 2/3/2014 - Law No. 6529 / Art. 9) In the event that the break out of the meeting is decided as per Article 12,

k) In violation of the provision of Article 21,

l) Without observing the provision of Article 3(2)."

42. The version of Article 24 of the same Law before being amended by the Law No. 6529 is as follows:

"If a meeting or demonstration march that starts in compliance with the law but later turns into a meeting or demonstration march which is contrary to Law due to the occurrence of one or some of the conditions that are contrary to law as specified in Article 23:

a) The government commissioner shall announce to the group in person or through the organization committee that the meeting or demonstration march is over and notify the situation to the highest civilian official in the locality through the fastest means.

b) Through a written order or, in urgent cases, a verbal order on the condition that it be confirmed in writing later, the highest civilian official in the locality shall delegate the security officials in the locality or one of them and send them to the scene.

Such developments shall be established by the government commissioner through minutes and be submitted to the highest civilian official in the locality within the shortest time possible."

43. Article 32 of the same Law is as follows:

"(Amended article: 22/7/2010 - C.N. 6008 /Art. 1) If those who attend illegal meetings and demonstration marches insist not to break up despite warning and use of force, they shall be punished with an imprisonment of six months to three years. If those who organize the meetings and demonstration marches commit this crime, the penalty to be imposed as per the provision of this paragraph shall be adjudged to be increased by half.

In the event that the law enforcement is resisted to by force or threats despite warning and use of force, another penalty shall be adjudged due to the offence that is defined in Article 265 of the Turkish Penal Code No. 5237 of 26/9/2004.

In the event that meetings and demonstration marches are broken up by exceeding the authority limit without the occurrence of one of the conditions written in Article 23 or without fulfilling the provision of Article 24, the penalties to be imposed on those who commit the acts written in the above paragraphs may be applied by being reduced down to one quarter or imposing a penalty may be abandoned at all."

44. Article 16 of the Law on the Duties and Responsibilities of the Police No. 2559 of 4/7/1934 is as follows:

"In the event that the police face resistance while fulfilling their duty, they shall be entitled to use force in order to break this resistance and at an extent to break it.

Within the scope of the authority to use force; bodily power, physical force and, if legal conditions are met, guns may be employed gradually and incrementally in a way to subdue the resisters and in accordance with the nature and extent of resistance.

As included in paragraph two;

a) Bodily power shall mean the body power that the police directly exert against the resisters or on things,

b) Physical force shall mean the handcuffs, truncheons, pressurized water, tear gases or powders, physical barriers, police dogs and horses and

other service tools that the police directly exert against the resisters or on things except for the bodily power.

Before use of force, the people concerned shall be given a warning that direct force will be used if they continue to resist. However, considering the nature and extent of the resistance, force may be used without giving a warning.

The police shall appraise and determine the tools and materials they will use and the extent of the force they will use in order to subdue resistance within the scope of the authority to use force. However, in the cases which are intervened in as a collective force, the extent of use of force and the tools and materials to be used shall be determined and set by the head of the intervening force.

In the face of an assault against themselves or against someone else, the police shall defend within the framework of the provisions of the Turkish Penal Code No. 5237 on self-defence without abiding by the conditions on use of force.

The police shall be entitled to use guns;

a) within the scope of the exercising of the right to self-defence,

b) In the face of resistance that they cannot subdue through the use of bodily power and physical force, in order to break this resistance and to an extent to break it,

c) In order to ensure and at an extent to ensure the arrest of persons against whom a decision of detention, custody or bringing by force or a writ of arrest was issued or of the suspect in cases of in flagrante delicto.

Before using their guns within the scope of sub-paragraph (c) of paragraph seven, the police shall issue a warning saying 'stop' in a way that the person can hear. In the event that the person does not comply with this warning and continues to run, it may be possible to fire with the gun in order to issue an advance warning. In the event that his arrest will not be possible due to his insisting on running away despite this, it may be possible to fire with the gun in order to ensure and to an extent to ensure the arrest of the person.

In the event that an armed assault is attempted against the police while they exercise their authority to use force or guns in order to break the resistance or make an arrest, they can fire at the person attempting the armed assault with guns, without hesitation and to an extent to subdue the threat of assault.

45. The plans that need to be prepared in relation to the meetings and demonstration marches, the principles to be taken into consideration in the implementation of these plans, the measures that need to be taken before meetings and demonstration marches, the tactics, formation and general principles to be applied during the intervention in illegal meetings and demonstration marches and the procedures to be fulfilled after the intervention are determined in the *"Directive on Procedures and Principles of Action by the Staff Assigned to Riots"* of 25/8/2011 as published by the Ministry of Interior.

46. How lacrimatory substances shall be used during the interventions in riots is specified in detail in the *"Operating Instructions for Tear Gas Guns and Ammunition"* prepared within the framework of the Circular on *"Tear Gas Guns and Ammunition"* No. 19 of 15/2/2008 by the Turkish National Police.

2. International Documents

47. As per the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction ("CWC") of 13/1/1993, tear gas is not considered to be a chemical weapon and the use of such kinds of gases is allowed for the purpose of establishing public order including the control of civil commotion (Article II § 7, 9 (d)). CWC entered into force in Turkey on 11/6/1997.

48. The relevant parts of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (The Eighth United Nations (UN) Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27/8/1990 - 7/9/1990, UN, A/CONF.144/28/Rev.1, 1990, p. 112-115) are as follows:

"3. The development and deployment of non-lethal incapacitating weapons should be carefully evaluated in order to minimize the risk of endangering uninvolved persons, and the use of such weapons should be carefully controlled.

(...)

5. Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:

(a) Exercise restraint in use of such tools and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;

(b) Minimize damage and injury, and respect and preserve human life;

(c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;

(d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.

(...)

9. Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms should only be made when strictly unavoidable in order to protect life.

(...)

12. As everyone is allowed to participate in lawful and peaceful assemblies, in accordance with the principles embodied in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, Governments and law enforcement agencies and officials shall recognize that force and firearms may be used only in accordance with the provisions of principles 13 and 14.

13. In the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.

14. Law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary. Law enforcement officials shall not use firearms in such cases, except under the conditions stipulated in principle 9."

49. Article 35 of the Report prepared by the UN Special Rapporteur on the Right to Freedom of Peaceful Assembly and Association (UN Human Rights Council A/HRC/20/27, 21/5/2012) is as follows:

"35. With regard to the use of tear gas, the Special Rapporteur recalls that gas does not discriminate between demonstrators and non-demonstrators, healthy people and people with health conditions. He also warns against any modification of the chemical composition of the gas for the sole purpose of inflicting severe pain on protestors and, indirectly, bystanders."

50. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") stated its concerns on the use of such gases in law enforcement. The opinion of CPT is as follows:

"(…) Pepper spray is a potentially dangerous substance and should not be used in confined spaces. Even when used in open spaces the CPT has serious reservations; if exceptionally it needs to be used, there should be clearly defined safeguards in place. For example, persons exposed to pepper spray should be granted immediate access to a medical doctor and be offered an antidote. Pepper spray should never be deployed against a prisoner who has already been brought under control." (CPT/Inf (2009) 25).

51. CPT made the following recommendations in its reports regarding the visits paid to some Member States of the European Council:

"(…) [A] A clear directive drawn up for governing the use of pepper spray should include, as a minimum:

- clear instructions as to when pepper spray may be used, which should state explicitly that pepper spray should not be used in a confined area;

- the right of prisoners exposed to pepper spray to be granted immediate access to a doctor and to be offered measures of relief;

- information regarding the qualifications, training and skills of staff members authorized to use pepper spray;

- an adequate reporting and inspection mechanism with respect to the use of pepper spray (...)" (see CPT/Inf (2009) 8.)

IV. EXAMINATIONAND GROUNDS

52. The individual application of the applicants (App. No: 2013/3924 of 31/5/2013) was examined during the session held by the court on 6/1/2015 and the following were ordered and adjudged:

A. The Applicants' Allegations

53. The applicants stated that, upon the start of deliberations at the GNAT on the "*Bill on the Amendments to the Law of Primary Education and Education and Certain Laws*", they wanted to collectively travel to Ankara from Izmir in order to make a mass press statement in Ankara on March 28-29, 2012, however, that the law enforcement officers in Izmir did not allow the departure of buses after Ankara Governor's Office banned the holding of a mass press statement and demonstration march, that the group which started a march in protest of this was dispersed through the use of disproportionate force.

54. On the other hand, the applicants stated that they met the next day in order to protest their departure to Ankara and the said deliberations on the bill, however, that the group was disproportionately intervened by the law enforcement which had been prepared in advance and, as a result, that applicants Ali Rıza Özer, Özcan Çetin and Veli İmrak were injured during the intervention.

55. The applicants alleged that the rights to the protection of the corporeal and spiritual integrity of the person, the freedom of thought and conviction and the right to organize meetings and demonstration

marches as defined in Articles 17, 25, 26 and 34 of the Constitution were violated due to the prevention of demonstrations in both protests and the use of disproportionate force by the police during the demonstrations held and the failure to run an efficient investigation against the responsible people.

B. The Constitutional Court's Assessment

56. The applicants alleged that the police's barring their attendance to the meeting which was to be held in Ankara in order to make a mass press statement against the bill that introduced changes to the education system, and the police intervention as they started to march in order to make a press statement against that barring at İzmir Konak Square on the very same day and in front of İzmir Metropolitan Municipality the next day violated the freedom of thought and conviction and the right to organize meetings and demonstration marches as defined in Articles 25, 26 and 34 of the Constitution. Furthermore, they alleged that their injuries due to the disproportionate nature of the physical intervention by the police was considered mal-treatment as per Article 17(3) of the Constitution.

57. The applicants' claims that the freedom of thought and conviction as defined in Articles 25 and 26 of the Constitution were also violated were examined in consideration of the nature of the application whereas their claims on the right to organize meetings and demonstration marches as regulated in Article 34 of the Constitution and their injuries by police intervention were examined within the framework of the prohibition of mal-treatment as per Article 17(3) of the Constitution.

1. Admissibility

58. No assessment was made in the Ministry's opinion as to the admissibility of the individual application.

59. Article 47(5) of the Law on the Establishment and Rules of Procedures of the Constitutional Court No. 6216 of 30/3/2011 with the side heading *''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…"

60. In relation to the first and second protests that are the subject matters of individual application, the applicants filed a complaint to Izmir Chief Public Prosecutor's Office on 2/4/2012 against the Provincial Police Director of Izmir and the relevant department heads and police officers as a whole without separating the protests for the crimes of *"preventing the exercise of their democratic rights, malpractice through the use of disproportionate force collectively, willful injury by a public officer through the misuse of influence"*. In their complaint petition, the applicants mentioned the prevention of their departure for Ankara and the following physical intervention by the police in relation to the first protest whereas they mentioned the harsh intervention by the police during the demonstration march in relation to the second protest.

61. Indicating the complaints of the applicants in relation to the first and second protests, evaluating both protests as a whole and since the investigation procedure for the crime of misconduct is different, the Chief Public Prosecutor's Office decided in its decision (File No:No. K.2012/848 of 9/5/2012) upon the said complaint petition on the separation of the case in terms of the exceeding of the limit regarding the authority to use force. No distinction was made in terms of acts in the decision and the crime of misconduct was evaluated as a whole. As a matter of fact, in the decision of the Public Prosecutor's Office of 26/11/2012 indicating that there are no grounds for examination in relation to the crime of misconduct (see §§ 27- 29), both protests are evaluated as a whole and it was stated that an authority for investigation was not granted for the crime of misconduct regarding all incidents that took place within the two days.

62. On the other hand, during the investigation in relation to the crime of exceeding limits of the authority to use force, the Public Prosecutor's Office decided that there were no grounds for prosecution as a result of investigation, pointing out the interventions taking place during both protests as a whole (see § 29). The objection that was lodged

against the decision was rejected by the 1st Assize Court of Karşıyaka on 16/4/2013. The applicants were informed on the judgment on 6/5/2013 and filed an individual application on 31/5/2013. Therefore, the first and second protests were accepted as a whole by the applicants and Izmir Chief Public Prosecutor's Office. In this case, it should be accepted that a healthy evaluation of the individual application depends on accepting the first and second protests as a whole. Nevertheless, it is evaluated that the legal remedies were exhausted following the said decision by the Chief Public Prosecutor's Office, accepting the complaints to be lodged before judicial bodies in relation to the interventions that took place during the meetings and demonstration march and the resulting injuries as a whole as an application regarding the right to meetings and demonstration marches and the prohibition of mal-treatment (for similar ECtHR judgments, see *Pekaslan v. Turkey*, App.No. 4572/06 and 5684/06, 20/3/2012; Özalp Ulusoy v. Turkey, App.No: 9049/06, 4/6/2013; *Oya Ataman v. Turkey*, App.No: 74552/01, 5/12/2006, *Gazioğlu and others v. Turkey*, App.No: 29835/05, 17/5/2011; *Biçici v. Turkey*, App.No: 30357/05, 27/5/2010; *Balçık and others v. Turkey*, App.No: 25/02, 29/11/2007). In this scope, in the present case, the application was filed in due time after the remedies were exhausted.

63. Although the applicants Tunay Özaydın and Deniz Doğan filed complaints before Izmir Chief Public Prosecutor's Office in relation to the injuries they incurred during the intervention (see § 24), since there are no allegations regarding the injury of the applicants Tunay Özaydın and Deniz Doğan in the response to the application form and the subsequent deficiency notification, a separate examination regarding the incidents that caused the injury of these persons was not conducted in terms of the prohibition of mal-treatment.

64. It needs to be decided that the applicants' application concerning that the prohibition of mal-treatment defined in Article 17(3) of the Constitution and the right to meetings and demonstration marches regulated in Article 34 of the Constitution were violated is admissible as it is not manifestly ill-founded and there is no other reason to require a decision that it is inadmissible be delivered. Judge Serdar ÖZGÜLDÜR did not agree with this opinion in terms of Article 34 of the Constitution.

2. Merits

a. The Allegation of Violation of Prohibition of ill treatment

65. Article 17(1) and (3) of the Constitution is 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.*

66. Article 3 of the European Convention on Human Rights (Convention) with the side heading "*Prohibition of Torture*" is as follows:

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

67. The applicants alleged that during the second protest they held on 28/3/2012, they wanted to democratically exercise their rights to expression and reaction against the bill and the prevention of their departure to Ankara, but they were injured during the harsh intervention by security forces which had been prepared in advance (see 24) and, in their complaint in relation to this, that a judgment of non-prosecution was rendered by Izmir Chief Public Prosecutor's Office without conducting an effective investigation, without even identifying the perpetrators.

68. In the Ministry's opinion, two separate evaluations in terms of merits and procedures were made in relation to the applicants' injuries. In the evaluation in terms of merits, it was stated that a healthier evaluation on whether the intervention was proportionate or not could be made when the images and the expert report in relation to the incident were examined. In the evaluation in terms of procedures, it was stated that the required investigations were conducted against the security forces that intervened with the applicants and that, as a result, it was decided that there were no grounds for prosecution.

69. In their counter-opinions with the order date of 9/4/2014 that they submitted against the Ministry opinion, the applicants stated that the protest held aimed at peacefully attracting the attention of the public to the bill, that, therefore, it was not possible to accept the use of excessive force. Furthermore, it was stated that the Ministry opinions that an investigation was held regarding the claims of mal-treatment were not convincing.

70. The examination of complaints in relation to the prohibition of mal-treatment needs to be handled separately for material and procedural dimensions in connection with the negative and positive responsibilities of the state. Therefore, the complaints of the applicants in the present case 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.

i. The Allegation that the Material Dimension of Article 17 of the Constitution was Violated

71. The applicants stated that the demonstration march held against the bill and against the prevention of their departure to Ankara had a peaceful nature and that the intervention made by security forces was groundless, harsh and disproportionate.

72. 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 aimed at 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"*. (B. No: 2013/293, 17/7/2014, § 80).

73. 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 the negative duty of the state, arising from the protection of bodily and mental health (B. No: 2013/293, 17/7/2014, § 81).

74. Article 17(3) of the Constitution and Article 3 of the Convention do not set forth any limitation and state the absolute nature of prohibiting torture, inhuman and degrading treatment or punishments. The absolute nature of the prohibition of mal-treatment does not set forth an exception even in the event of a war or another general threat threatening the existence of a nation as stated within the scope of Article 15 of the Constitution. In the same manner, no exception is set forth in relation to the prohibition of mal-treatment through a similar regulation within the scope of Article 15 of the Convention (see *Selmouni v. France* [BD], App. No 25803/94, 28/7/1999, § 95; *Assenov and others v. Bulgaria,* App. No: 24760/94, 28/10/1998, § 93).

75. 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 circumstances of the present case. 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 the treatment and the reason behind may also be added to these elements that will be taken into consideration (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). Further*more, the determination of whether mal-treatment occurred within a context where excitement and feelings were elevated* (see *Eğmez v. Cyprus*, § 53; *Selmouni v. France,* § 104) is also another factor that needs to be taken into consideration.

76. Mal-treatment is graded and described in different concepts by the Constitution and the Convention 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 qualified 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 distinction 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 Law No. 5237 (B. No: 2013/293, 17/7/2014, § 84).

77. 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).

78. 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 corporeal or spiritual suffering can be defined as *"torment"* (App. No: 2012/969, 18/9/2013, § 22). In such cases, the pain that occurs must go beyond the pain that is inherent as an inevitable element in a legitimate treatment or punishment. Unlike torture, the intention of inflicting 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; *Eğmez v. Cyprus*, § 78). The ECtHR considers treatment such as physical attack, battery, psychological interrogation techniques, keeping someone in bad conditions, deporting or extraditing the person to a place where he will suffer from mal-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 Ireland v. United Kingdom*; App. No: 5310/71, 18/1/1978; *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). The treatment with such nature can be qualified as *"torment"* within the context of Article 17(3) of the Constitution.

79. 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 them 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"* (For a similar judgment, see App. No: 2012/969, 18/9/2013, § 22). In this definition, unlike *"torment"*, the treatment the person receives has a humiliating or degrading effect rather than physical or mental pain (B. No: 2013/293, 17/7/2014, § 89).

80. In order to identify which of these concepts a specific treatment constitutes, each case needs to be evaluated within its own special circumstances. Although the fact that the treatment was perpetrated publicly plays a role in whether it is of a degrading aspect and is in conflict with human dignity or not, in some cases it may suffice for mal-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 mal-treatment. (For a similar ECtHR judgment, see *V v. United Kingdom,* [BD], App. No: 24888/94, 16/12/1999, § 71). A treatment can be both inhuman/torment and degrading/incompatible with human dignity (For a similar ECtHR judgment, see *Ireland v. United Kingdom*). Every degrading treatment which is incompatible with human dignity may not have the characteristic of being inhuman/torment whereas every kind of torture constitutes an inhuman or degrading treatment. The conditions of detention, the practices against the detainees, the discriminatory behaviors, the insulting statements uttered by the public officials, certain negative circumstances faced by the handicapped people, the degrading treatment such as making the person eat or drink certain things that are not normal may prove to be a kind of treatment that is "*incompatible with human dignity*" (B. No: 2013/293, 17/7/2014, § 90).

81. On the other hand, Article 17 of the Constitution and Article 3 of the Convention do not prohibit the use of force in order to make

an arrest. However, such force can only be used on the condition that it is inevitable and never excessive (see *Ivan Vasilev v. Bulgaria*, App. No. 48130/99, 12/4/2007, § 63). Furthermore, such acts will violate the ban stated in Article 3 of the Convention as long as it is not absolutely compulsory to resort to physical force due to the behaviour or attitude of the person himself. In this context, the ECtHR states that the undeniable difficulties peculiar to the fight against crime cannot justify placing limits on the protection to be afforded in terms of the bodily integrity of individuals (see *Ribitsch v. Austria*, App. No: 18896/91, 4/12/1995, § 38).

82. Only under certain conditions the limits of which are certain can it be accepted that the security forces' resorting to physical force is not mal-treatment. In this scope, it is possible to resort to physical force in cases which require arrest in meetings and demonstration marches and due to the respective attitudes of those who attend the demonstration. However, even in this situation, such kind of a force can only be resorted to in inevitable cases and on the condition that it is proportionate.

83. The claims of mal-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 alleged incidents occurred, the existence of evidence that is far from all kinds of reasonable doubts is needed (see *Tepe v. Turkey*, App. No: 31247/96, 21 December 2004, § 48). Evidence having such characteristic 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*, § 161; *Labita v. Italy*, App. No: 26772/95, 6 April 2000, § 121).

84. In the present case, the applicants were subject to some injuries that were determined through a doctor's report (see § 24) and due to the intervention of security forces which was the subject of the investigation conducted by Izmir Chief Public Prosecutor's Office (see § 30). As a result of investigation, Izmir Chief Public Prosecutor's Office accepted that the intervention of security forces remained within the scope of the exercise of the legal authority of use of force and rendered a judgment of non-prosecution (see § 30). In the said decision, any allegation regarding the

fact that the injury to the applicants arose from another incident than the intervention was not evaluated. Therefore, it was accepted that the injury to the applicants occurred through the intervention of security forces.

85. In terms of the second protest, although a notification was not duly made within the scope of the Law No. 2911 regarding whether the intervention by the security forces was inevitable and excessive or not, it is apparent that the police took the necessary precautions. The roads leading to the zone where a press statement was planned were secured by many policemen. Consequently, it is not possible to say that the security forces intervened without being prepared given the specific circumstances of the case which is the subject matter of the application (see *Rehbock v. Slovenia*, App. No: 29462/95, 28/11/2000, § 72). In other words, no finding was encountered regarding the necessity of a sudden intervention by the security forces in order to take the required safety measures when a demonstration march held in an unexpected manner jeopardized the public order. It is understood that the security forces had sufficient time to plan the required measures that could be taken against potential risks.

86. Two separate groups that wanted to go to the Governor's Office building in order to make a press statement were stopped at the place where there were two separate police barricades. The request of the groups to make a press statement in front of the Governor's Office building was not accepted by the police. Some of the people within the first group thereupon attempted to destroy the barriers and go beyond the safety measures (see § 20). In the same manner, the other group wanted to go beyond the safety measures as well. (see § 21). In relation to both incidents, it is monitored from camera recordings that only the applicant Orhan Bayram attempted to destroy the police barriers and assaulted the police. It is observed that the applicant Ali Rıza Özer also attempted to destroy the barriers but retreated, did not attack the police and did not receive any blows after the police intervention. It could not be determined from camera recordings and the expert report that the other applicants actively attempted to go beyond the police barricade or the safety measures.

87. On the other hand, a judgment of acquittal was delivered by the 2nd Criminal Court of First Instance of Izmir in the court case lodged against the persons among whom were applicants Orhan Bayram and Ali Rıza Özer and who wanted to continue with the march for the crime of resisting an officer on duty in order to prevent the fulfillment of duty (see §§ 37-38). Moreover, it could not be determined in the expert report ordered by Izmir Chief Public Prosecutor's Office that the applicants other than Orhan Bayram engaged in an act which required intervention. The arrest or being taken into custody of the applicants is not the case, either.

88. It is determined from the expert report (see § 31) and the camera recordings watched that the applicant Orhan Bayram hit the riot police on duty with the flag pole he was holding and then threw the flag pole to the police in order to go beyond the police barricade in the second protest. In this case, the police intervention against the persons who exert violence is acceptable. However, in any case, the intervention needs to be proportionate and not excessive.

89. A two-day temporary incapacity report was issued with the report of 28/3/2012 in relation to the injury of the applicant Orhan Bayram upon his complaint of pain in his right shoulder as a result of a fall. In later examinations of the applicant, minimally displaced avulsion fracture was determined in his right shoulder. However, it was not clearly stated in the application form and during the investigation conducted by the Public Prosecutor's Office where the police intervention that caused the injury of Orhan Bayram took place, just like it is the case in terms of other applicants. It is determined in the camera recordings watched that the police intervention against Orhan Bayram might have occurred as a result of the pressurized water sprayed from TOMA vehicles. In this scope, it cannot be said that the intervention which led to the injury of the applicant Orhan Bayram, who attempted to go beyond the barriers and attacked the police with a pole, was disproportionate.

90. In the forensic examination report of 28/3/2012 for Özcan Çetin, the applicant, it was stated that pepper gas was sprayed in his eye,

that there was burning and stinging in the eye, that there was redness in the eye and that drugs were administered. It is not specified in the application form nor the investigation documents where and how the injuries of the applicant which were the subject of the doctor's report occurred. On the other hand, it is not determined from the camera recordings and expert reports that the applicant engaged in any attack against the police. Therefore, it should be accepted that the applicant was affected by the pepper gas during the police intervention against the group which attempted to go beyond the safety measures.

91. It is apparent that the use of pepper gas may cause some health problems. In the "*Information Note on Chemical Weapons Employed ın Riots*" published by the Turkish Medical Association, it is stated that the gas employed in Turkey could lead to consequences such as shortness of breath, nausea, vomiting, irritation, and bear graver consequences leading to even death in small children, the elderly, the pregnant and those who have chronic diseases (http://www.ttb.org.tr/index.php/Haberler/kimyasal-3838.html).

92. It needs to be checked whether the criteria set forth in the procedures for the use of pepper gas, which is regarded as a tool in police intervention in riots and the use of which is not prohibited by national and international legislation, reached the minimum threshold of severity within the scope of Article 17(3) of the Constitution. In the incident that is the subject matter of the application, when the camera recordings were watched and in the application form no direct intervention to demonstrators except for the group that attempted to go beyond the safety measures was determined. Furthermore, the applicant did not suffer any injuries other than the natural effect of tear gas and no doctor's report or camera recording regarding the fact that gas was used excessively was determined. Therefore, it cannot be said that the applicant's being affected by pepper gas exceeded the minimum threshold of severity within the scope of Article 17(3) of the Constitution (for a similar judgment, *Oya Ataman v. Turkey*, § 25-26).

93. In the temporary forensic examination report of 28/3/2012 for Veli İmrak, the applicant, it was stated that there was a 2-3 cm cut in

the area with hair to the left of his head, that there was no threat to his life, that he was injured in a way what would be cured with a simple medical intervention. It is not specified in the application form or the investigation documents where and how the injuries of the applicant which were the subject of the doctor's report occurred. On the other hand, it is apparent from the camera recordings and expert reports that the applicant did not engage in any attack against the police. Therefore, it should be accepted that the applicant was injured during the police intervention against the group which attempted to go beyond the safety measures.

94. In meetings and demonstration marches, it is possible that the persons who attend the demonstration but do not need to be intervened are affected by the intervention during the panic and turmoil that take place during the intervention of the police. In such a case, it is expected that the police act controllably and take required measures to make sure those persons apart from the persons who cause the situation requiring intervention are not affected by the intervention. However, it is necessary to accept the difficulty of the absolute implementation of these measures by the police within the turmoil and panic environment caused by the intervention. When it is considered that the police only intervened with the persons who attempted to go beyond the barricades in the demonstration to which the applicant attended (see §§ 141-145), that the applicant could be injured then and the injury was of a nature which could be remedied with a simple medical intervention, it cannot be said that the injury of the applicant exceeded the minimum threshold of severity within the scope of Article 17(3) of the Constitution.

95. When the report regarding the injury of Ali Rıza Özer, the other applicant, is evaluated, considering that it could not be determined that the applicant attacked the police, that arrest and custody procedures were not conducted against him and his injuries was of a severe nature such as a broken nose and loss of hearing, it is understood that the minimum threshold of severity was exceeded. Following this determination, the extent to which the act conducted by the police had reached needs to be evaluated. In this scope, when the present case is evaluated, considering the points indicated in the report regarding the

applicant, of whom no attempt of going beyond safety measures was determined, and who peacefully exercised his freedom of assembly, and considering that the police intervention took place in the form of physical assault and battery against the applicant, it is considered possible that this be regarded as "*torment*" (see § 79-81).

96. Due to the reasons explained, it is concluded that the prohibition of mal-treatment which is guaranteed in Article 17(3) of the Constitution was not violated in terms of merits since the intervention against the applicant Orhan Bayram was proportionate and the injuries suffered by the applicants Özcan Çetin and Veli İmrak did not exceed the minimum threshold of severity.

97. On the other hand, it is concluded that the prohibition of mal-treatment which is guaranteed in Article 17(3) of the Constitution was violated in terms of the material dimension thereof due to the action that the applicant Ali Rıza Özer was subject to through the intervention of security forces. Judge Serdar ÖZGÜLDÜR has disagreed with this opinion.

ii. The Allegation that the Procedural Dimension of Article 17 of the Constitution was Violated

98. The applicants alleged that Izmir Chief Public Prosecutor's Office decided that there were no grounds for prosecution without conducting an effective investigation, without even identifying the perpetrators after the complaint they filed due to the fact they were injured as a result of unfair intervention by the security forces and were therefore subject to mal-treatment.

99. Within the scope of the right regulated in Article 17 of the Constitution, as a positive liability, the state has the liability to protect the right of all individuals within its jurisdiction to protect their corporeal and spiritual existence against the risks that can stem from the actions of both public instances, other individuals and the individual themselves. 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).

100. This liability of the state is not only relevant to the merits but also covers the procedural dimension. Procedural liabilities are compulsory consequences of the fact that the rights regulated under the Constitution are not theoretical or hypothetical but effective and practicable. Otherwise, the investigation of the claims on the violation of Article 17 of the Constitution allegedly perpetrated by the police or other public officials would remain ineffective in practice despite the basic and absolute nature of the prohibition of mal-treatment and, in some cases, lead to the fact that some public officials go unpunished (see *Assenov and others v. Bulgaria*, App. No: 24760/94, 28/10/1998, § 102; *Labita v. Italy*, App. No: 26772/95, 6/4/2000, §§ 131-136). Within this framework, the state is obliged to carry out an effective official investigation which can ensure that those who are responsible for all sorts of incidents of physical and spiritual assault that are not natural are determined and punished, if necessary. The main aim of this kind 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).

101. 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 to violate 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 bears and, in some cases, it will be possible for public officials to take advantage of actual immunity and abuse the rights of the persons who are under their control (B. No: 2012/969, 18/9/2013, § 25; for a similar ECtHR judgment see *Corsacov v. Moldova*, App. No: 18944/02, 4/4/2006, § 68).

102. Within the scope of the positive liability of the State, the mere fact that no investigation has been conducted or that an insufficient investigation has been conducted can sometimes constitute mal-treatment. Therefore, no matter what the circumstances are, officials need to take action 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 mal-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 *Batı and others v. Turkey*, 33097/96 - 57834/00, 3/6/2004, §§ 133, 134).

103. 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 that can enlighten the incident and serve the determination of those who are responsible. Therefore, an investigation required by allegations of mal-treatment needs to be conducted independently, swiftly and in an in-depth fashion. In other words, officials seriously need to try to learn about facts and not rely on hasty and unfounded outcomes for the sake of concluding the investigation or justifying their decisions (see B. No: 2013/293, 17/7/2014, § 113; *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). In this scope, officials should take all reasonable measures they can take in order to collect evidence in relation to the incident in question including the statements of eye witnesses and the criminalistic expert examinations in addition to other evidence (see B. No: 2013/293, 17/7/2014, § 113; *Tanrıkulu v. Turkey* [BD], App. No: 23763/94, 8/7/1999, § 104; *Gül v. Turkey*, App. No: 22676/93, 14/12/2000, § 89).

104. In the incident that is the subject matter of the application, the applicant Ali Rıza Özer applied to a relevant healthcare institution regarding his injury that took place after the intervention of the police

and complained before the Izmir Chief Public Prosecutor's Office with this report alleging that the police intervened unfairly and excessively. In relation to the complaints, the Chief Public Prosecutor's Office rendered a judgment of non-prosecution only by making a proportionality examination based on the file without doing any work on the identification of perpetrators, looking into whether the intervention made was inevitable or not and whether the applicant engaged in any action to require police intervention and without having a determination in the expert report that the applicants attacked the police, therefore, without finding out how the injury took place in addition to not taking the detailed statement of the applicant. Therefore, it was decided without conducting an effective investigation in terms of the mal-treatment claims of Ali Rıza Özer, the applicant, that there were no grounds for prosecution on the reasoning that convincing evidence and signs regarding the fact that the police exceeded their authority to use force could not be obtained.

105. Regarding the allegations of Özcan Çetin and Veli İmrak, the other applicants, it was accepted that the intervention by the police did not directly target them but took place as undesired results of a necessary intervention and, in this scope, did not exceed the required minimum threshold within the scope of Article 17(3) of the Constitution (see §§ 91-95). In this case, it should be evaluated whether the applicants' complaints will remain within the scope Article 17(1) of the Constitution or Article 8 of the Convention in relation to the individual's right to protect his corporeal and spiritual existence (B. No: 2012/969, 18/9/2013, § 24). In this scope, regarding being affected by the gas which was exposed to during the exercise of the right to assembly and did not exceed the minimum threshold, no subject that requires an evaluation within the framework of corporeal and spiritual integrity of the person has been encountered. Therefore, it is concluded that the claims of the applicants Özcan Çetin and Veli İmrak were not violated in terms of the procedural dimension of Article 17(1) and (3) of the Constitution.

106. In relation to the claims of the applicant Orhan Bayram, it is evaluated that the applicant's attack towards the police was clearly reflected in camera recordings and was determined through the expert

report, furthermore, that the results of the intervention made against the applicant could be spotted through a doctor's report, that the investigation held within this scope was sufficient for the allegations of the applicant Orhan Bayram.

107. Due to the reasons explained, it is concluded that the prohibition of mal-treatment which is guaranteed in Article 17(3) of the Constitution was not violated in terms of the procedural dimension thereof since the investigation regarding the claims of the applicant Orhan Bayram was effective.

108. It is concluded that Article 17(1) and (3) of the Constitution was not violated in terms of the procedural dimension thereof since the injuries of the applicants Özcan Çetin and Veli İmrak did not exceed the minimum threshold.

109. On the other hand, it is concluded that the prohibition of mal-treatment which is guaranteed in Article 17(3) of the Constitution was violated in terms of the procedural dimension thereof due to the action that the applicant Ali Rıza Özer was subject to through the intervention of security forces. Judge Serdar ÖZGÜLDÜR has disagreed with this opinion.

b. The Allegation that the Right to Organise Meetings and Demonstration Marches was Violated

110. Article 34 of the Constitution is as follows:

> *"Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission.*
>
> *The right to hold meetings and demonstration marches shall be restricted only by law on the grounds of national security, public order, prevention of commission of crime, protection of public health and public morals or the rights and freedoms of others.*
>
> *The formalities, conditions, and procedures to be applied in the exercise of the right to hold meetings and demonstration marches shall be prescribed by law.."*

111. Article 11 of Convention is as follows:

"1. Everyone has the right to freedom of peaceful assembly andto freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. 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 publicsafety, 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. 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."

112. The applicants claimed that their rights to organise meetings and demonstration marches were violated by the prevention of their collective departure to Ankara from Izmir in order to attend the press statement to be made in Ankara to protest the bill which introduced new arrangements regarding the education applied in primary education and the use of disproportionate force by the police when they started to march to protest this (the first protest), on the other hand, by the disproportionate intervention by the police when they assembled the next day to protest the incidents which took place (the second protest).

113. The Ministry made a reference to the case law of the ECtHR within the scope of Article 11 of the Convention and stated that such case law needed to be considered in the evaluation on whether the police's intervention through the use of force was proportionate or not.

114. In their statements with the order date of 9/4/2014 that they submitted against the Ministry opinion, the applicants stated that the protest held aimed at peacefully attracting the attention of the public to the bill, that, therefore, it was not possible to accept the use of excessive force.

i. General Principles

115. The right to organise meetings and demonstration marches as regulated in Article 34 of the Constitution aims at protecting the

opportunity for individuals to come together in order to defend their common ideas together and announce them to others. Therefore, this right is a special form of the freedom of expression that is regulated in Articles 25 and 26 of the Constitution. The importance of the freedom of expression in a democratic and pluralistic society also applies to the right to organise meetings and demonstration marches. The right to organise meetings and demonstration marches guarantees the emergence, safeguarding and dissemination of different thoughts which are essential for the development of pluralistic democracies. In this scope, despite its unique autonomous function and field of exercise, the right to organise meetings and demonstration marches should be evaluated within the scope of the freedom of expression and therefore the restriction of the freedom of expression in the subjects regarding political and public interests needs to be considered to be in a narrower scope and this quality needs to be considered in the exercise of the right to organise meetings and demonstration marches (see Öllinger v. Austria, App. No: 76900/01, 29/6/2006, § 38; *Ezelin v. France*, App. No: 11800/85, 26/4/1991, § 37). Therefore, this right, which is one of the fundamental rights in a democratic society, should not be interpreted narrowly (See *G. v. Federal Republic of Germany*, App. No: 13079/87, 6/3/1989, § 256; *Rassemblement Jurassien Unité v. Switzerland*, App. No: 8191/78, 10/10/1979, § 93).

116. On the other hand, pluralism, tolerance and respecting others' thoughts and beliefs are indispensable qualities of a democratic society. In pluralistic societies, the fact that the idea of the majority has superiority in all cases cannot be alleged and the guarantee for the protection of minority or opposing ideas and the expression thereof are indicators of respect to democratic principles. The protection and guarantee of opposing and minority ideas even in the situation that they are provocative or disturbing in comparison to the ideas of the majority are requirements of pluralism, broadmindedness, tolerance and a democratic society (see *Handyside v. United Kingdom,* App. No: 5493/72, 24/9/1976, § 49).

117. The right to organise meetings and demonstration marches and the freedom of expression are among the most fundamental values of

a democratic society. In the essence of democracy is the power to solve problems through an open discussion environment. Radical measures of preventive quality towards restricting the freedom of assembly and expression except for the cases when they encourage violence and removing the principles of democracy cause harm to democracy even in cases where officials evaluate the expressions and perspectives used in protests as surprising and unacceptable or where protests are illegal. In a democratic society based on the rule of law, the political ideas which oppose the existing order and are defended to be realized through peaceful methods should be given the opportunity to express themselves through the freedom of assembly and other legal means (see *Gün and others v. Turkey*, App. No: 8029/07, 18/6/2013, § 70; *Güneri and others v. Turkey*, App. No: 42853/98, 43609/98 and 44291/98, 12/7/2005, § 76).

118. Article 34 of the Constitution guarantees the right to organise meetings and demonstration marches in order to express ideas without guns and without attacks, in other words, peacefully. Exercised collectively, this right gives the persons who want to express their thoughts the opportunity to express their thoughts through methods that exclude violence. Demonstrations attended or organized by persons who intend to use violence are not within the scope of the notion of peaceful assembly (see *Stankov and the United Macedonian Organization Ilinden v. Bulgaria*, App. No: 29221/95 and 29225/95, 2/10/2001, § 77; *the United Macedonian Organization Ilinden and Ivanov v. Bulgaria*, App. No: 44079/98, 20/10/2005, § 99). In this scope, the aim of the right to assembly is to protect the rights of those individuals who do not take part in violence and express their ideas forward peacefully. Apart from that, the purpose of the meeting or demonstration march held has no importance. On the other hand, the arrangement does not remain limited to the protection of the right to peaceful assembly and at the same time it specifies the obligation to refrain from introducing undue restraints to this right indirectly. The objective of protecting the individual against arbitrary intervention of public authorities during the exercise of the right to assembly guaranteed may also give rise to positive obligations in order to secure the effective enjoyment of this right (see *Djavit An v. Turkey*, App. No: 20652/92, 20/2/2003, § 57). Specifically, the state has the

duty to take appropriate measures in order to ensure the peaceful and safe conduct of meetings and demonstration marches (see *Oya Ataman v. Turkey*, § 35).

119. The peaceful nature of the right to assembly should be put forth by being evaluated as a whole in general. Except for this, the fact that some of those who attend a meeting or demonstration march resort to violence does not legitimise intervention to this right in terms of others (see *Ezelin v. France*, § 41). The fact that a meetings and demonstration march is illegal or is held contrary to law does not remove the peaceful nature of the meeting or march per se (see *Oya Ataman v. Turkey*, § 39). Therefore, it is apparent that all kinds of demonstrations held in public places may cause a certain disruption in the flow of daily life and lead to hostile reactions. The existence of these cases does not justify the violation of the right to assembly (see *Achouguian v. Armenia*, App. No. 33268/03, 7/7/2008, § 90; *Berladir and others v. Russia,* App. No. 34202/06, 10/7/2012, §§ 38-43; *Disk and Kesk v. Turkey*, App. No. 38676/08, , 27/11/2012, § 29).

120. Article 34(2) of the Constitution accepts that the right to assembly may be restricted in some cases. In the same manner, the reasons for such restriction are set forth in Article 11(2) of the Convention. In this scope, the regulation of all kinds of restrictions to be introduced on the right to assembly through law as per Article 13 of the Constitution is a prerequisite. Even in situations set forth by law, intervention in this right needs to be within the framework of legitimate purposes. In Article 34, legitimate purposes are stated as "*national security, public order, the prevention of offending, the protection of public health and public morality or of the rights and freedoms of others*". A similar regulation has been made in the Convention. Even the restraints to be introduced by law within the framework of legitimate purposes cannot be contrary to "*the letter and spirit of the Constitution, the requirements of a democratic social order and of the secular Republic and the principle of proportionality*". Therefore, intervention on the right to assembly should be required for a democratic society. Last but not the least, the intervention must be proportionate in order to fulfill legitimate purposes.

121. In Article 34(3) of the Constitution, it is regulated that the forms, conditions and procedures to be applied in exercising the right to organise meetings and demonstration marches will be specified by law. In Article 3 of the Law No. 2911, although it is accepted that the right to assembly can be exercised without permission, a procedure of notification to the civilian official forty eight hours in advance in order for the meeting to take place is prescribed in Article 10 of the same Law.

122. The subjection of meetings and demonstration marches to a procedure of permission or notification does not generally infringe the essence of the right as long as the purpose of these procedures is to provide officials with an opportunity to take reasonable and appropriate measures in order to guarantee the orderly conduct of all kinds of meetings, marches or other demonstrations (*see Bukta and others v. Hungary,* App. No: 25691/04, 17/10/2007, § 35; *Oya Ataman v. Turkey*, § 39; *Rassemblement Jurassien Unité v. Switzerland*, § 119; *Platform* "Ärzte für das Leben" *v. Austria,* App. No: 10126/82, 21/6/1988, §§ 32-34). In this scope, the application of permission and notification procedures is only to ensure that the right to assembly is used effectively. In special cases when immediate reaction is justified and when the protest is made through peaceful methods, the breaking up of such kind of a protest solely on the ground that the obligation of notification is not fulfilled should be considered as an extreme restriction on the right to peaceful assembly (see *Bukta and others v. Hungary*, § 36; *Oya Ataman*, §§ 38-39, *Balçık and others v. Turkey,* App. No: 25/02, 26/2/2008, § 49, *Samüt Karabulut v. Turkey*, App. No: 16999/01, 27/1/2009, §§ 34-35).

123. On the other hand, the term "*restriction*" regarding meetings includes not only some preventive measures before the enjoyment of the right as it is the case in the freedom of expression but also the treatments displayed during or after the enjoyment of the right (see *Ezelin v. France*, § 39). Therefore, what is done during a peaceful demonstration or investigations and punishments towards the attendees after the demonstration may also be accepted as behaviours restricting the enjoyment of the right to assembly.

124. The state's displaying patience and tolerance towards the behaviours of crowds which have assembled for peaceful purposes that do not pose a threat in terms of public order and do not include violence as they enjoy their right to assembly is a requisite of pluralistic democracy.

ii. Application of General Principles

125. The applicants wanted to depart from Izmir for Ankara collectively in order to attend the press statement to be made in Ankara to protest the bill which introduced new arrangements regarding the education in primary education. However, Ankara Governor's Office evaluated that, during the protests to be made, an environment of conflict would be established between security forces and demonstrators for provocative purposes and that the protests would disrupt the normal flow of life and jeopardize general security and public order and security and prohibited all kinds of meetings and demonstration marches and similar protests in Ankara in order to prevent the disruption of public security and order, protect the rights and freedoms of others and prevent the committal of crimes. Following the said prohibition, the Ministry of Interior wrote an official letter to the governor's offices in all provinces and instructed that the groups that would attend the meeting be prevented from exiting the province. Following that, the officials at Izmir Security Directorate used the lack of documents in buses as an excuse for preventing the departure of the applicants for Ankara. Against the prevention, the applicants protested the situation by conducting a sit-in protest and a march at night. During the march, the riot police established a barricade and at that moment a short clash took place between the demonstrators and the police and then the police intervened in the group with truncheons and pepper gas. After the union manager convinced the group, the group went to the union building and then broke up (the first protest).

126. On the other hand, the applicants assembled once again the next day in order to protest both the said bill and the incidents which took place the night before. The police which were informed about the protest in advance took the necessary safety measures. The group

which the applicants were involved in formed a march cortege and started to march towards the Governor's Office building with placards in their hands in order to make a press statement and continued their march until the police barriers. There, the police stated that the group would not be allowed to march to the Governor's Office building and issued warnings that the march be stopped. After the group continued the march and strained the barriers, the demonstrators were intervened in with pressurized water, painted water, pepper gas and riot response vehicles (TOMA). Not being able to go beyond the police, the group then started a sit-in protest. As a result of the negotiations between the organizers of the demonstration and the security forces, the police barricade was retracted and the demonstrators were allowed to make a press statement (the second protest).

ii. 1. Concerning the Existence of the Intervention

127. In relation to the first protest, it is apparent that the prevention of the applicants from departing for Ankara on the basis of the decision of Ankara Governor's Office but via various legal justifications constitutes an intervention in the right to assembly. On the other hand, the police dispersing the sit-in protest and demonstration march of the applicants after they closed the road to traffic in order to protest the situation when they were unexpectedly prevented is also an intervention in the right to peaceful assembly. In relation to the second protest, the prevention of the group which the applicants were involved in from making a press statement in front of the Governor's Office building should also be considered as an intervention in the right to assembly.

ii. 2. Concerning the Intervention on Justified Ground

128. As per Article 34(2) of the Constitution, the right to assembly cannot be intervened in "*as long as not prescribed by law*" and except for the legitimate purposes specified in the text of the Article. At the same time, whether or not a restriction towards the right to assembly 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 law, not being contrary to the letter and spirit of the Constitution, the

requirements of a 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.

ii. 2. a. Lawfulness of the Intervention

129. In both protests that are the subject matter of application, the legal basis of the intervention is Article 16 of the Law No. 2559 and Articles 7, 22 and 24 of the Law No. 2911. In Article 16 of the Law No. 2559, the situations in which the police can use force and guns and to what extent they can do this are specified. In this context, in the event that the police face resistance while on duty, they shall be entitled to use force proportionately and in order to break this resistance. This authority includes not only the police's use of bodily power against persons who resist but also the use of some tools such as handcuffs, truncheons, pressurized water, tear gases or powders, physical barriers, police dogs and horses within the scope of physical force. On the other hand, the points to be observed during interventions to riots are regulated in detail in the circular and instructions published by the Turkish National Police (see §§ 46-47). Therefore, the necessary legal arrangements are made on the points to be followed in the restriction of the right to assembly and the procedure of intervention within the scope of Article 34(2) of the Constitution. Due to this reason, intervention in the right to assembly in terms of the first protest and the second protest has the "*lawfulness*" element.

ii. 2. b. Legitimate Purpose

130. In terms of both protests, the applicants alleged that the purpose of the intervention made by the police was to prevent the enjoyment of the right to assembly and demonstration marches.

131. In order for an intervention made in the right to assembly and demonstration marches to be legitimate, it needs to be towards the purposes of "*national security, public order, the prevention of offending, the protection of public health and public morality or of the rights and freedoms of others*" as stipulated in Article 34(2) of the Constitution.

132. When the announcements in the camera recording and the minutes issued by the police are examined towards what purpose the interventions in both protests were made, it is understood that the purpose was towards preventing the disruption of public order. Due to this reason, it should be accepted that the intervention that the police made as per Article 34 of the Constitution in terms of both protests had a legitimate aim.

ii. 2. c. Necessity and Proportionality in a Democratic Society

133. In terms of the first protest, what needs to be stated in priority regarding whether intervening the applicants' exercise of their right to assembly is *"necessary in a democratic society"* or not is that the organized structures', such as non-governmental organizations and trade unions, and persons' displaying their reaction through peaceful means in relation to any subject which is deliberated on in the legislative assembly is a characteristic aspect of pluralistic democracies (see §§ 116-118). In this scope, allowing minority or opposing thoughts to express themselves during differences of opinion on political subject matters is a positive obligation of states (see § 119). The state needs to not only protect the freedom to organize meetings and attend meetings that are held for peaceful purposes but also not to introduce any unreasonable, indirect restrictions preventing the enjoyment of this right.

134. In the first protest, the effort of the applicants to collectively express their concerns or opposing ideas towards a bill that would be deliberated on at the GNAT should be met with respect in a democratic society. Therefore, the state should be expected to adopt a more patient and tolerant attitude in such cases. The barring of persons from attending the protests to be held in Ankara through various methods cannot be accepted as reasonable in a pluralistic democratic society.

135. On the other hand, Ankara Governor's Office prohibited all kinds of meetings and demonstration marches and similar protests on a specific date in Ankara due to security reasons (see § 10). The evaluation of whether there are security risks in the organization of protest demonstrations rests with the state officials specified in the Law

No. 2911. Nevertheless, the organization of a meeting or demonstration march against a bill on the date when deliberations will be held at the Assembly should be protected in a democratic society. Specifically considering that the protests to be held after the arrangement is enacted may not bring forth the expected impact at National Assembly level, the making of a total decision of prohibition instead of showing the groups to hold a demonstration in a suitable place by evaluating security risks and the indirect implementation of this decision due to other legal justifications should not be excused in a democratic society.

136. Although the applicants' stopping the traffic by holding a sit-in protest at night in order to protest their barring from departing for Ankara and their not making a notification in terms of the demonstration march they held in places which are considered to be prohibited within the scope of the Law No. 2911 turn the protest into an illegal one, the intervention in the protest which was held for peaceful purposes in the face of suddenly developing incidents should not be considered as proportionate due to this reason (see § 120). Specifically the group's opening some part of the road after a traffic jam occurred during the sit-in protest, then their not acting rampantly while starting the march, their not adopting an aggressive attitude during the police intervention are indicators of the fact that the protest was held for peaceful purposes. In such a case, the police are expected to be more patient and tolerant in terms of breaking up the group in a protest which is held for peaceful purposes even if it is illegal (see § 34).

137. The fact that Izmir Chief Public Prosecutor's Office did not file any criminal case in relation to the first protest (see § 34) also indicates that the right to assembly and demonstration march was exercised in a peaceful manner. Therefore, in terms of the first protest, the barring of applicants from going to Ankara in order to make a mass press statement and then the breaking up of those who protested this situation cannot be evaluated as a rightful intervention in terms of the requirements of a democratic public order.

138. In the second protest, the applicants and trade union members gathered in front of the former Sümerbank building at Konak Square,

where the police had taken the necessary safety measures, in order to protest both the said bill and the incidents which took place the night before. The police intervened with the demonstrators at two locations in order to prevent passage to the square where they evaluated that the locations constituted a security risk during the assembly and protest demonstrations or where the rights of others would be intervened in.

139. The group formed a march cortege and started to march towards the Governor's Office building with placards in their hands in order to make a press statement. When the group arrived at the Metropolitan Municipality building, the police issued warnings that the group would not be allowed to march to the Governor's Office building and the march should be stopped. A small group which included Orhan Bayram, one of the applicants, ignored the warnings, pushed the staff on duty, started to bring down the barriers with the poles in their hands and the police intervened with the demonstrators with pressurized water, painted water, pepper gas and TOMA. At that moment, not all of the demonstrators but just the group that attempted to go beyond the barriers was intervened with. Then, the group that was not able to go beyond the police started a sit-in protest. As a result of the negotiations between the union representatives who organized the demonstration and the police, the barricade was retracted, the demonstrators were allowed to make a press statement in front of Izmir Metropolitan Municipality and those who attended the demonstration broke up by themselves following the end of the statement. Therefore, those who attended the demonstration except for those who attempted to go beyond the barriers and those who constituted the majority exercised their right to assembly in a peaceful manner.

140. In terms of the second protest, whether the intervention was necessary within the democratic public order and if necessary, its proportionality need to be evaluated. In the second protest, the applicants and the other demonstrators came together in order to protest the bill and the barring of their departure to Ankara. Before this protest, no notification was made within the scope of the Law No. 2911. However, cognizant of the demonstration to be organized, the police

took the necessary safety measures in order to prevent passage to roads and squares where it was determined that it would set a risk in terms of public order to hold a demonstration march.

141. In the first intervention, the police prevented the passage of the group that wanted to go to the Governor's Office building by way of spraying pepper gas that is called model-5 on the demonstrators (see § 21). Furthermore, no intervention towards completely breaking up the group was made and the group was shown an alternative route and it was ensured that it continued with its protest. In the second intervention, intervention was made with truncheons and then TOMA respectively in order to prevent the passage of the group which was more crowded in number and was determined to go beyond the barriers. It is determined from the camera recording which was watched that in this intervention, it was not the whole group but only the group which tried to go beyond the safety measures that was intervened with.

142. In the camera recording, no image regarding the fact that the police acted in order to break up the whole group in general was spotted during the intervention against the demonstrators. Furthermore, it is evaluated that the police did not attempt to prevent the protest demonstration as a whole by presenting some legal obligations such as notification as a justification during the gathering of the group and their starting to march as a march cortege. During the protest, the police closed some roads where it took safety measures, prevented passage from these roads and showed alternative routes to the demonstrators. After the intervention of the group that tried to go beyond the police barriers in order to go to the Governor's Office building was suppressed, the demonstrators were given the opportunity to make a press statement. The demonstrators made the press statement in front of Izmir Metropolitan Municipality building, which is very close to the Governor's Office building, could be accepted to be at the center of the city and is not evaluated to nullify the purpose of assembly. Therefore, it cannot be said that the group which included the applicants was not able to exercise their right to organize meetings and demonstration marches as regulated in Article 34 of the Constitution or that they were restricted in a way to be ineffective through the intervention made.

143. Regarding those who attended the demonstration, a criminal case was filed against some people including the applicants Orhan Bayram and Ali Rıza Özer in order for them to be penalized for not breaking up despite warning within the scope of Article 32(1) of the Law No. 2911 (see § 34). The court held that there were no grounds to adjudge penalties about all defendants. Therefore, it cannot be said that the right to assembly was restricted this way since no penalties were adjudged regarding the applicants in the criminal case which was filed due to their attendance in the meeting that they organized in a peaceful manner and way (see § 124). Thus, the intervention made by the police was an intervention that could be excused in terms of the requirements of the democratic society.

144. On the other hand, the proportionality of the intervention the police made against the reactions of the demonstrators towards safety measures should be evaluated. It is understood from the camera recording that a group among the demonstrators attempted to bring down the barriers and open the road. As a result of this, the riot police located behind the barriers intervened in order to prevent those who attempted to bring down the barriers. It is observed that the police made the intervention for defensive purposes. Then the police withdrew and intervened with the group which walked towards themselves with pressurized water from TOMA. At that moment, the large part of the demonstrators shouted slogans and continued their protests in a peaceful manner. Intervention was made with gas and painted water against the demonstrators who did not break up with pressurized water. In the camera recording, no image regarding the fact that the police intervened in other demonstrators who sustained their protests peacefully during the intervention or that they acted in order to break up the whole group. Moreover, it is observed that the harshness of the intervention was gradually increased and the police made efforts not to allow the demonstrators to pass from the square where safety measures were taken in general. Then an agreement was reached with the demonstrators and they were allowed to make a press statement after the barriers had been retracted.

145. Although the intervention of the police is accepted to be proportionate in general, when the peculiarities of the present incident are considered, the right to assembly, which is exercised collectively but is an individual right, and the proportionality of the police intervention within the framework of the attitudes of the applicants in the protest should be evaluated separately.

146. The intervention made by the police after the applicant Orhan Bayram had brought down the barriers and attempted to go beyond the safety measures should be accepted as proportionate. Indeed, the applicant attacked the police with the pole in his hand and the police tried to parry the attack of the applicant with pressurized water. The right to organize meetings and demonstration marches guarantees protests that are done with peaceful purposes and ways. This right does not protect activities that involve violence and require penal sanctions, such as assault. Therefore, it cannot be said that the intervention made against the violent behaviour of the applicant Orhan Bayram was disproportionate in a way to violate the right to assembly, also considering the doctor's report.

147. On the other hand, despite the fact that no signs were determined within the scope of camera recording and expert report that the applicants Ali Rıza Özer, Veli İmrak, Tunay Özaydın and Deniz Doğan attempted to go beyond the police barricade and engaged in any action requiring intervention, it is evaluated that the intervention was not proportionate when the facts that there were injuries in their bodies and the acceptance in the decisions of the Public prosecutor's office that these injuries occurred as a result of police intervention were considered. Therefore, the rights of these applicants to attend meetings and demonstration marches in a peaceful manner and with peaceful purposes were violated.

148. Another matter which needs to be evaluated in terms of the allegation of the applicant Özcan Çetin is the issue of the use of "*pepper gas*" by the police during intervention in riots. The gas which is used by the member states of the European Council in order to control and disperse riots is not included in the list of poisonous gases (see § 48).

Therefore, intervention in riots with pepper gas should not be evaluated as the violation of the right to assembly per se. On the other hand, it is important to determine in legislation under what circumstances pepper gas, which is proved to cause some health issues, needs to be used.

149. Within the scope of the Circular No. 19 of 15/2/2008 by the Turkish National Police, the instructions on the use of tear gas guns and ammunition, the physiological effects of pepper gas are stated and the principles of first aid to be applied in relation to this are revealed. On the other hand, under the heading of the tactics for the use of tear gases, it is set forth that the necessary medical measures be taken and warnings be made in a way to be audible by the crowd that gas will be used and they should disperse. Furthermore, it is stated that the dose of lachrymatory substances will also be gradually increased.

150. It is important that the persons who can be affected more than expected due to age, pregnancy or chronic disorders are warned before the use of gas. Considering that loss of lives can be the case in interventions made with pepper gas in some riots taking place in our country, the implementation of the instructions of the Turkish National Police is especially important.

151. In the present case, it could not be determined from the expert and camera recordings that the demonstrators were notified in advance that gas water would be used or pepper gas would be used. Warnings should be issued in advance in the use of gas water and pepper gas which could have grave consequences in a way to extend to death due to the special circumstances of persons. Although the applicant did not suffer from serious health problems due to the pepper gas which he was exposed to and could be accepted as proportionate, the use of gas without issuing a warning violated the right to assembly of the applicant who attended the meeting with peaceful purposes and in a peaceful way.

152. Due to the reasons explained, in terms of the first protest, it is concluded that the right to organize meetings and demonstration marches that was guaranteed in Article 34 of the Constitution was violated in respect of all applicants due to their being barred through a prohibitory order from attending the press statement to be made in

Ankara and the demonstration march which they organized against this attitude. Judge Serdar ÖZGÜLDÜR has disagreed with this opinion.

153. On the other hand, in terms of the second protest, it is concluded that the right of the applicant Orhan Bayram to organize meetings and demonstration marches which is guaranteed in Article 34 of the Constitution was not violated.

154. In respect of the other applicants, it is concluded that the right to organize meetings and demonstration marches which is guaranteed in Article 34 of the Constitution was violated. Judge Serdar ÖZGÜLDÜR has disagreed with this opinion.

3. Article 50 of the Law No. 6216

155. The applicants did not file a request for compensation.

156. Article 50(2) of the Law on the Establishment and Trial Procedures of the Constitutional Court No. 6216 with the side heading of *''Judgments''* is as follows:

> *"If the determined violation arises out of a court judgment, 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 judgment 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 judgment of violation."*

157. It needs to be 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 applicants, be jointly paid to the applicants.

158. In relation to the allegations that are the subject matter of the application, considering that the "prohibition of mal-treatment" regulated in Article 17(3) of the Constitution was violated in material

and procedural terms in respect of the applicant Ali Rıza Özer, it needs to be decided that a copy of the judgment be sent to the Chief Public Prosecutor's Office in order to prevent the continuance of the violation in a prosecution file where it is apparent that a constitutional right is violated.

V. JUDGMENT

In the light of the reasons explained, it is held;

A.

1. UNANIMOUSLY that the complaints that were filed by the applicants Ali Rıza Özer, Özcan Çetin, Veli İmrak and Orhan Bayram in relation to the violation of Article 17(3) of the Constitution are **ADMISSIBLE,**

2. by the dissenting vote of judge Serdar ÖZGÜLDÜR and **BY MAJORITY OF VOTES** that the complaints which were filed by the applicants Ali Rıza Özer, Özcan Çetin, Veli İmrak, Orhan Bayram, Tunay Özaydın and Deniz Doğan in relation to the violation of Article 34 of the Constitution **are ADMISSIBLE,**

B.

1. by the dissenting vote of judge Serdar ÖZGÜLDÜR and **BY MAJORITY OF VOTES** that the prohibition of mal-treatment which is guaranteed in Article 17(3) of the Constitution was **VIOLATED** in material and procedural terms in respect of the applicant Ali Rıza Özer,

2. UNANIMOUSLY that the prohibition of mal-treatment which is guaranteed in Article 17(3) of the Constitution was **NOT VIOLATED** in material and procedural terms in respect of the applicants Orhan Bayram, Veli İmrak and Özcan Çetin,

3. by the dissenting vote of judge Serdar ÖZGÜLDÜR and **BY MAJORITY OF VOTES** that the right to organize meetings and demonstration marches which is guaranteed in Article 34 of the Constitution was **VIOLATED** in respect of all applicants in terms of the first protest that the applicants attended,

4. In terms of the second protest that the applicants attended;

a. UNANIMOUSLY that the right to organize meetings and demonstration marches which is guaranteed in Article 34 of the Constitution was **NOT VIOLATED** in respect of Orhan Bayram,

b. by the dissenting vote of judge Serdar ÖZGÜLDÜR and **BY MAJORITY OF VOTES** that the right to organize meetings and demonstration marches which is guaranteed in Article 34 of the Constitution was **VIOLATED** in respect of Ali Rıza Özer, Özcan Çetin, Veli İmrak, Tunay Özaydın and Deniz Doğan,

C. UNANIMOUSLY that the trial expenses of TRY1,698.35 in total composed of the fee of TRY198.35 and the counsel's fee of TRY1,500.00 which were made by the applicants be JOINTLY **PAID TO THE APPLICANTS**,

D. UNANIMOUSLY 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 judgment; 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,

E. UNANIMOUSLY that a copy of the judgment be sent to İzmir Chief Public Prosecutor's Office, the Ministry of Justice and the Ministry of Interior as per Article 50(3) of the Law No. 6216

on 6/1/2015.

DISSENTING OPINION

1. In the application form that was recorded on 31.5.2015, it is seen that a general explanation of the incident was present and a claim of violation towards the right to life (Constitution Art. 17) was substantially made, that a claim of violation towards the right to organize meetings and demonstration marches (Constitution Art. 34) was not made.

Although it is understood from the "Additional declaration petition" which was recorded on 3.7.2013 that a request was filed on this matter, since there is no possibility in lieu of the clear provision of Article 47/3 of the Law No. 6216 to consummate a claim of the violation of a right, which was not declared in the application form, with an additional declaration by qualifying it as "deficit in application documents" within the scope of Article 47/6, it is not possible to examine this new claim of violation. In this sense, a decision of inadmissibility needs to be made regarding the claims in relation to Article 34 of the Constitution.

In terms of the essence of the claim of violation on this matter; the conclusion reached was that Articles 34/2 of the Constitution and Article 11/2 of the ECHR regulated the matter of introducing restrictions regarding the exercise of this right, that, in the substance of the case, the intervention made to the right to assembly and demonstration march carried the element of "lawfulness" as adopted in the majority judgment, that there is no doubt the intervention was made "for a legitimate purpose", that, in the evaluation made in terms of the element of "necessity and proportionality in a democratic society", there is no reason for violation for this element, either and the dismissal of the application is necessary as concluded from the examination of the evidence present in the file such as expert reports and image CDs together.

2. In the evaluation which was made in terms of Article 17 of the Constitution, it is concluded that it needs to be decided that there is no violation due to the following reasons:

In Article 16 of the Law on the Duties and Responsibilities of the Police No. 2559 of 4.7.1934, the authority of the police to use force is regulated and it is provided that this authority can be used in the form of bodily and physical force (including the cases of using pressurized water and tear gas), that, before using force, the persons concerned be given a warning that force will be used directly if they continue to resist, that force may also be used without issuing a warning by considering the nature and degree of resistance. In the examination of the expert reports present in the file and of the Decision of the Public Prosecutor's Office

that There Were No Grounds for Prosecution, the conclusion reached was that the intervention of security forces towards demonstrators remained within the scope of the legal authority to use force, that there are no substantial findings and evidence to support the abstract claim that the right to life was violated by means of exceeding this authority in a disproportionate manner, that there is no substantial indication except for a declaration regarding the fact that the disorder and battery marks substantiated in the existing health reports was brought about by the security forces through the disproportionate exercise of the authority to use force, that there is no significant data (substantiated claim, image recording and so on) in relation to directly attributing them to security forces although it is definite that they occurred during a state of turmoil and in the crowd, that, in the preparatory investigation conducted upon the complaint filed on this matter, there is no deficit from a procedural dimension, that, therefore, when the incident is considered as a whole, it would be based on a hypothetical acceptance to arrive at a conclusion that Article 17 of the Constitution was violated in material and procedural dimensions.

Due to the reasons explained; since I evaluate that a decision that "there is no violation" in terms of the two claims of allegation should be rendered; I was not able to agree with the decision of the majority to the opposite.

Justice
Serdar ÖZGÜLDÜR

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

OSMAN ERBİL

(Application no. 2013/2394)

SECOND SECTION
JUDGMENT

President	:	Alparslan ALTAN
Justices	:	Osman Alifeyyaz PAKSÜT
		Recep KÖMÜRCÜ
		Engin YILDIRIM
		Celal Mümtaz AKINCI
Rapporteur	:	Murat ŞEN
Applicant	:	Osman Erbil
Counsel	:	Att. Asuman Esin ÖZBEY

I. SUBJECT-MATTER OF THE APPLICATION

1. The applicant alleged that his right to personal liberty and security and right to hold meetings and demonstration marches were violated as he was taken into custody together with his friends and was prevented from making a press statement in front of the Embassy of the USA in order to protest some of the directors of Aydınlık Newspaper and of İşçi Party (Labour Party in Turkey) being taken into custody, of which he was a member of, and as he was sentenced due to the offense of participating in an illegal demonstration. There the applicant filed a request for retrial and compensation.

II. APPLICATION PROCESS

2. The application was lodged on 4/4/2013 with the 23rd Civil Court of First Instance of Ankara. As a result of the preliminary administrative examination of the petition and its annexes, it was determined that there was no deficiency which would prevent its submission to the Commission.

3. It was decided on 30/9/2014 by the Second 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. It was decided on 30/10/2014 by the Head of the Section that the examination of admissibility and merits of the application be carried out jointly and that a copy be sent to the Ministry of Justice for its opinion.

5. The facts, which are the subject matter of the application, were notified to the Ministry of Justice (Ministry) on 31/10/2014. The Ministry of Justice submitted its opinion to the Constitutional Court on 27/11/2014.

6. The opinion submitted by the Ministry of Justice to the Constitutional Court was notified to the applicant on 11/12/2014. The applicant submitted a counter-opinion on 26/12/2014.

III. THE FACTS

A. The Circumstances of the Case

7. As expressed in the application form and the annexes thereof and within the framework of the information and documents that are accessed through UYAP, the relevant incidents are summarized as follows:

8. The applicant who is the member of İşçi Party went with a group of 24 people in front of the Embassy of the United States of America (USA) on 24/8/2011 in order to protest the taking into custody of some directors of İşçi Party and Aydınlık Newspaper on 23/8/2011. The group aimed to draw attention of the public to pro-USA policies by making a press statement in front of the Embassy of the USA noting that practices, oppressions towards Aydınlık Newspaper and İşçi Party and custody procedures within this scope resulted from the policies originating from the USA.

9. While the group was about to make a press statement, the police arrived at the place of protest at 3:35 p.m.

10. Within the scope of the Minutes of Incident, Arrest and Custody dated 24/8/2011, when the police arrived at the crime scene, they

determined that the group including the applicant chanted the slogans "*Freedom for Aydınlık, Down with the Fascist Dictatorship, Aydınlık will not Keep Silent, Down with the USA co-conspirator AKP, No Pasaran for Fascism - Aydınlık (Enlightened) Turkey, İşçi Party - the Fortress of Patriotism, Down with the AKP Dictatorship*" and one person from the group wrote with red spray paint on the wall of the embassy "*Ergenek, Bastard America, We Will Bring You to Book, İşçi Party will not Keep Silent*".

11. The police warned the group that what they did was an illegal demonstration, that they needed to disperse and that otherwise, a legal action would be taken about them. The warning was repeated at 3:38 p.m. Thereupon, two persons from the group indoctrinated the group not to disperse by saying "*We make our protest anywhere we like. The law grants us with the right to make a protest anywhere without receiving permission in advance, therefore we will continue to make our protest here*".

12. According to the claim of the applicant, the police intervened in the group at 3:45 p.m. and 23 protesters were taken into custody according to the aforementioned minutes. As one protester was found to be an attorney at law, s/he was released following identification.

13. Within the scope of the minutes of incident, arrest and custody, during the procedure of custody, the persons within the group interlocked with each other by their arms, threw themselves on the ground and attempted to kick and push the police officers who were performing the procedure of arrest.

14. The applicant was kept under custody until 11:25 a.m. on 25/8/2011 which was the next day. Then, the applicant was taken to the Courthouse of Ankara and released by the office of the Public Prosecutor.

15. A public case was lodged with the 23rd Criminal Court of First Instance of Ankara through the indictment of the Office of the Chief Public Prosecutor of Ankara No. E.2011/578 of 22/9/2011 with a request for the punishment of the applicant and other persons who participated in the press statement in accordance with Article 28 of the Law on Meeting and Demonstration Marches No. 2911 of 6/10/1983.

16. At the hearing of the court on 3/4/2012, the statement of the police chief who told those that made a press statement to disperse was taken as a witness statement. In his/her statement, the police chief stated that the accused who participated in the press statement did not show any resistance and use force in any way during the incident and that they only prevented the procedure by making a chain together while the arrest was being performed and that s/he did not see any attack thereof towards the riot police.

17. Through its judgment No. E.2011/656, K.2012/1211 of 11/1/2012, the court eventually ruled on the punishment of the applicant with an imprisonment of five months in accordance with Article 32(1) of the Law No. 2911 that corresponded to the actions of the applicant and the other accused and decided on the postponement of the pronouncement of judgment by considering that he was not previously convicted due to an intentional offense according to his criminal record, that no concrete damage materialized due to the protest, personal characteristics of the applicant, his attitude and behavior at the hearing.

18. The justification of the court is as follows:

> *"Our court considers proven that the accused made a demonstration in front of the Embassy of the USA which is on Atatürk Boulevard and close to the Grand National Assembly of Turkey on the date of offense, that although the Governor's Office needed to be notified of the meeting at least 48 hours in advance as per Article 10 of the Law No. 2911, such notification was not made, that besides, as per Article 22(1) of the same Law, the meeting and demonstration march was made in places which were closer than 1 km to the Grand National Assembly of Turkey, that although the police units warned the accused to terminate the meeting and disperse, the accused did not terminate the meeting by themselves, that the Riot Police dispersed the demonstration by using force, that the accused made a chain in order not to disperse, that thus, all the accused committed the crime attributed to them and the following judgment has been established."*

19. The applicant's objection against the aforementioned judgment was rejected with the judgment No. 2012/1037 Misc. Works of 26/11/2012

of the 8th Assize Court of Ankara. The judgment was notified to the applicant on 5/3/2013.

20. The applicant lodged an individual application on 4/4/2013.

B. Relevant Law

21. Article 3(1) of the Law No. 2911 is as follows:

"In accordance with the provisions of this Law, everyone has the right to hold meetings and demonstration marches, for specific purposes not considered as crime by laws, unarmed and free of aggression and without getting prior permission."

22. Article 10(1) of the same Law is as follows:

"(Amended paragraph: Art. 5 of the Law No. 4771 of 3/8/2002) In order for a meeting to be held, a notification to be signed by all members of the organizing committee shall be submitted to the governor's or district governor's office to which the place of meeting is affiliated at least forty eight hours before the meeting and within the working hours."

23. Article 22 of the same Law is as follows:

"Meetings cannot be held on public roads and in parks, sanctuaries, buildings and facilities where public services are delivered and their appurtenances and within a distance of one kilometer to the Grand National Assembly of Turkey and demonstration marches cannot be held on intercity roads.

In meetings at public squares, it shall be obligatory to abide by arrangements to be made by governor's offices and district governor's offices in order to ensure the passage of people and transportation vehicles."

24. Article 23 of the same Law is as follows:

"The meetings and demonstration marches shall be deemed illegal if they are held; a) Without submitting a notification in a way that conforms to the provisions of Articles 9 and 10 or before and after the day and hour that are specified for the meeting or march;

…

e) Without respecting the methods and conditions in Article 20 and the bans and measures in Article 22,

…. "

25. Article 32 of the same Law is as follows:

"(Amended article: Art. 1 of the Law No. 6008 of 22/7/2010.) If those who attend illegal meetings and demonstration marches insist on not to disperse despite warning and use of force, they shall be punished with an imprisonment of six months to three years. If those who hold the meeting and demonstration march commit this offense, the penalty to be imposed as per the provision of this paragraph shall be adjudged by being increased by half.

In the event that the law enforcement is resisted to by force or threats despite warning and use of force, another penalty shall be adjudged due to the offense that is defined in Article 265 of the Turkish Penal Code No. 5237 of 26/9/2004.

In the event that meeting and demonstration marches are dispersed by exceeding the authority limit without the occurrence of one of the conditions stipulated in Article 23 or without fulfilling the provision of Article 24, the penalties to be imposed on those who commit the acts stipulated in the above paragraphs can be applied by being reduced down to one quarter or imposing a penalty can be abandoned at all."

26. Article 231 of the Code of Criminal Procedure No. 5271 of 4/12/2004 is as follows:

"…

(5) (Additional paragraph: Art. 23 of the Law No. 5560 of 6/12/2006) If the penalty adjudged at the end of the trial carried out due to the offense the accused is charged with is an imprisonment of two years or less or a judicial fine, suspension of the pronouncement of the judgment can be decided upon. Provisions pertaining to conciliation shall be reserved.

Suspension of the pronouncement of the judgment shall mean that the established judgment causes no legal consequence on the accused.

(6) (Additional paragraph: Art. 23 of the Law No. 5560 of 6/12/2006) In order for suspension of the pronouncement of the judgment to be decided on;

a) The accused not having previously been convicted due to an intentional offense,

b) The court reaching a conviction that, considering the characteristics of the accused and his/her attitude and behavior during the trial, s/he will not commit an offense again ,

c) Full compensation of damages encountered by the victim or the public by reinstatement or restitution of the conditions prior to the offense or indemnification ,

shall be required. (Additional sentence: Art. 7 of the Law No. 6008 of 22/7/2010) In the event that the accused does not accept, suspension of the pronouncement of the judgment shall not be decided on.

(7) (Additional paragraph: Art. 23 of the Law No. 5560 of 06/12/2006) In the judgment whose suspension of pronouncement is decided on, the imposed sentence of imprisonment cannot be suspended and cannot be converted into alternative sanctions in the event that it has a short duration.

(8) (Additional paragraph: Art. 23 of the Law No. 5560 of 6/12/2006) In the event that suspension of the pronouncement of the judgment is decided on, the accused shall be subjected to a probation period of five years. (Additional sentence: Art. 72 of the Law No. 6545 of 18/06/2014) Within the probation period, suspension of the pronouncement of the judgment cannot be decided on again on the person due to an intentional offense.

…

(10) (Additional paragraph: Art. 23 of the Law No. 5560 of 6/12/2006) In the event that a new intentional offense is not committed

and the liabilities pertaining to the probation measure are complied with, it shall be decided that the judgment whose pronouncement is suspended be revoked and discontinuation of action be ruled.

(11) (Additional paragraph: Art. 23 of the Law No. 5560 of 6/12/2006) In the event that s/he commits a new intentional offense or does not act in accordance with the liabilities pertaining to the probation measure, the court shall pronounce the judgment. However, the court can establish a new judgment of conviction by deciding on the non-execution of a part of the penalty to be determined by itself up to the half of it or, in the presence of the relevant conditions, the suspension of the imprisonment in the judgment or the conversion thereof into alternative sanctions by considering the conditions of the accused who fails to fulfill the liabilities imposed on him/her."

IV. EXAMINATION AND GROUNDS

27. The individual application lodged by the applicant No. 2013/2394 of 4/4/2013 was examined during the session held by the court on 25/3/2015 and the following were ordered and adjudged:

A. The Applicant's Allegations

28. The applicant stated that they assembled in front of the Embassy of the USA in order to protest the taking into custody of some directors of Aydınlık Newspaper and İşçi Party of which he was a member, that the police arrived at the crime scene with a higher number than the group while a press statement was about to be made and that the police intervened, dispersed the group and took everyone into custody within a short period of time. He expressed that he was kept under custody for 13 hours in an unjust way with no legal basis, that he was sentenced to imprisonment at the end of the public case filed against him and that however, it was decided to suspend the pronouncement of the judgment. He indicated that the group assembled for peaceful purposes, that there was no attack against the police, that in this way, they were prevented from holding a peaceful meeting and that the acceptance of the system of notification before the meeting constituted a concealed obstacle against the exercise of his rights. He alleged that his rights defined in Articles 11,

12, 13, 25, 26, 34, 36, 38 and 90 of the Constitution were violated and filed a request for retrial and compensation.

B. The Constitutional Court's Assessment

29. The Constitutional Court is not bound by the legal characterization of the facts made by the applicant and it appraises the legal definition of the facts and cases itself. Although it was alleged in the application petition that his rights defined in Articles 11, 12, 13, 25, 26, 34, 36, 38 and 90 of the Constitution were violated, the applicant's claims are related to his being taken into custody in an arbitrary way without any legal basis and his being prevented from making a press statement and being sentenced to imprisonment as a result of the public case filed against him.

30. The applicant's claims as regards the custody were assessed within the framework of the right to personal liberty and security as defined in Article 19 of the Constitution.

31. The applicant's claims as to the effect that the freedom of expression and the right to hold meetings and demonstration marches defined in Articles 25, 26 and 34 were violated as he and his friends were not allowed to make a press statement and thus were sentenced as per the Law No. 2911 have been assessed within the scope of the right to hold meetings and demonstration marches regulated in Article 34 of the Constitution in accordance with the applicant's freedom of expression by considering the autonomous situation of the right to hold meetings and demonstration marches and the fact that one of the aims thereof is to protect the freedom of expression, that the claims as regards the freedom of expression in the incident which is the subject matter of the application cannot be fully separated from the right to hold meetings and demonstration marches, and the exclusive scope of the application.

1. Admissibility

a. Alleged Violation of the Right to Personal Liberty and Security

32. The applicant alleged that Article 19 of the Constitution was violated by stating that he was taken into custody in an arbitrary

way and without any legal basis and kept under custody for 13 hours between 24/8/2011 and 25/8/2011.

33. The Ministry did not make any statement as to the admissibility of the application. On the other hand, it was stated that the measure of custody imposed on the applicant could be legally imposed in the case at hand and that legal conditions and duration were complied with in the process of custody.

34. Provisional Article 1(8) of the Law on the Establishment and Trial Procedures of the Constitutional Court No. 6216 of 30/3/2011 is as follows:

> *"The court shall examine the individual applications to be lodged against the final actions and judgments that were finalized after 23/9/2012."*

35. In accordance with this provision, the Constitutional Court examines the individual applications to be lodged against the final actions and judgments that were finalized after 23/9/2012. Therefore, the venue of the court in terms of *ratione temporis* shall only be limited to the individual applications that are lodged against the final actions and judgments that were finalized after this date. In the face of this regulation pertaining to public order, it is not possible to expand the scope of the venue in such a way as to also cover the final actions and judgments that had been finalized prior to the mentioned date (App. No: 2012/832, 12/2/2013, § 14).

36. In the case at hand, the applicant was taken into custody on 24/8/2011 within the scope of the attributed offenses and released on 25/8/2011. The process of custody which is the basis of the claim of violation alleged by the applicant separately from the complaint as regards the judgment of conviction ruled on him came to an end with the judgment of release on 25/8/2011.

37. Due to the reasons explained, as it is understood that the applicant's complaint as to the effect that he was taken into custody in an arbitrary way and with no legal basis and that he was deprived of

his personal liberty for a period of 13 hours materialized and came to an end prior to the initiation of the venue of the Constitutional Court, it is necessary to decide on the inadmissibility of this part of the application due to "*the lack of venue in terms of ratione temporis*".

b. Alleged Violation of the Right to Hold Meetings and Demonstration Marches

38. No assessment was made as to the admissibility of the individual application in the opinion of the Ministry.

39. It needs to be decided that the application of the applicant as to the effect that the right to hold meetings and demonstration marches regulated in Article 34 of the Constitution was violated is admissible as it is not manifestly ill-founded and there is no other reason to require a decision that it is inadmissible.

2. Merits

40. Article 34 of the Constitution is as follows:

> *"Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission.*
>
> *The right to hold meetings and demonstration marches can be restricted only by law and for the purposes of national security, public order, preventing the commission of crime, protecting public health and public morals or the rights and freedoms of others.*
>
> *The formalities, conditions, and procedures to be applied in the exercise of the right to hold meetings and demonstration marches shall be prescribed by law."*

41. Article 11 of the European Convention on Human Rights (Convention) is as follows:

> *"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, …*
>
> *2. 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. 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."

42. The applicant stated that they assembled in front of the Embassy of the USA in order to protest the taking into custody of some directors of Aydınlık Newspaper and İşçi Party of which he was a member, that the police arrived at the crime scene with a higher number than the group while a press statement was about to be made and that the police intervened, dispersed and took into custody the group within a short period of time. He expressed that he was sentenced to imprisonment because of the offense of contravening the Law No. 2911 at the end of the public case filed against him and that however, it was decided to suspend the pronouncement of the judgment. He indicated that the group assembled for peaceful purposes, that there was no attack against the police, that in this way, they were prevented from holding a peaceful meeting and that the acceptance of the system of notification before the meeting constituted an implicit obstacle against the exercise of his rights. He alleged that his right to hold meetings and demonstration marches was violated.

43. The Ministry referred to the case-law of the European Court of Human Rights (ECtHR) within the scope of Article 11 of the Convention and stated that it was determined by the court that the demonstration in which the applicant was also involved was an illegal demonstration as per the Law No. 2911, that in this case, the intervention of the law enforcement officers was based on a legal ground and that the aim of the intervention was to protect public order and national security and to prevent the commission of crime.

44. The applicant stated against the opinion of the Ministry that the ECtHR judgments specified in the mentioned opinion had the characteristic of supporting his own claims, that their assembly for a press statement was peaceful, that the police needed to behave in a more

tolerant way and that his sentencing to imprisonment of five months violated Article 11 of the Convention.

a. General Principles

45. The right to hold meetings and demonstration marches regulated in Article 34 of the Constitution aims at protecting the opportunity for individuals to come together in order to defend their common ideas together and announce them to others. Therefore, this right is a special form of the freedom of expression that is regulated in Articles 25 and 26 of the Constitution. The importance of the freedom of expression in a democratic and pluralistic society also applies to the right to hold meetings and demonstration marches. The right to hold meetings and demonstration marches guarantees the emergence, safeguarding and dissemination of different thoughts which are essential for the development of pluralistic democracies. In this scope, despite its unique autonomous function and field of exercise, the right to hold meetings and demonstration marches should be assessed within the scope of the freedom of expression and thus, the narrower scope of the restriction of the freedom of expression in the subject matters regarding political and public interests should also be considered in the exercise of the right to hold meetings and demonstration marches (see Öllinger v. Austria, App. No: 76900/01, 29/6/2006, § 38; *Ezelin v. France*, App. No: 11800/85, 26/4/1991, § 37). Therefore, this right, which is one of the fundamental rights in a democratic society, should not be interpreted narrowly (See *G. v. Federal Republic of Germany*, App. No: 13079/87, 6/3/1989, § 256; *Rassemblement Jurassien Unité v. Switzerland*, App. No: 8191/78, 10/10/1979, § 93).

46. On the other hand, pluralism, tolerance and respecting others' thoughts and beliefs are the indispensable characteristics of a democratic society. In pluralistic democracies, it cannot be alleged that the idea of the majority is superior in all cases and the guarantee for the protection of minority or opposing ideas and the expression thereof are the indicators of respect for democratic principles. The protection and guarantee of opposing and minority ideas even in cases where they are provocative or disturbing in comparison to the ideas of the majority

are the requirements of pluralism, broadmindedness, tolerance and a democratic society (see *Handyside v. United Kingdom*, App. No: 5493/72, 24/9/1976, § 49).

47. The right to hold meetings and demonstration marches and the freedom of expression are among the most fundamental values of a democratic society. In the essence of democracy is the power to solve problems through an open discussion environment. Radical preventive measures towards removing the freedom of assembly and expression except for the cases of encouraging violence and removing the principles of democracy cause harm to democracy even in cases where officials appraise the expressions and perspectives used in protests as surprising and unacceptable or where protests are illegal. In a democratic society based on the rule of law, the political ideas which oppose the existing order and are defended to be realized through peaceful methods should be given the opportunity to be expressed through the freedom of assembly and other legal means (see *Gün and Others v. Turkey*, App. No: 8029/07, 18/6/2013, § 70; *Güneri and others v. Turkey*, App. No: 42853/98, 43609/98 and 44291/98, 12/7/2005, § 76).

48. Article 34 of the Constitution guarantees the right to hold meetings and demonstration marches in order to express ideas without guns and without assaults, in other words, peacefully. Exercised collectively, this right gives the persons who want to express their thoughts the opportunity to express their thoughts through methods that exclude violence. Demonstrations attended to or organized by persons who intend to use violence remain out of the concept of peaceful assembly (see *Stankov and the United Macedonian Organization Ilinden v. Bulgaria*, App. No: 29221/95 and 29225/95, 2/10/2001, § 77; *the United Macedonian Organization Ilinden and Ivanov v. Bulgaria*, App. No: 44079/98, 20/10/2005, § 99). In this scope, the aim of the right to assembly is to protect the rights of those individuals who do not take part in violence and put their ideas forward peacefully. Apart from that, for what purpose the meeting or demonstration march is held has no importance.

49. The illegality of a meeting and demonstration march or the holding thereof contrary to laws does not remove the peaceful nature

of the meeting or march *per se* (see *Oya Ataman v. Turkey*, § App. No: 74552/01, 5/12/2006 § 39). Therefore, it is apparent that all kinds of demonstrations held in public places may cause a certain disruption in the flow of daily life and lead to negative reactions. The existence of these circumstances does not justify the violation of the right to assembly (see *Achouguian v. Armenia*, App. No. 33268/03, 7/7/2008, § 90; *Berladir and others v. Russia,* App. No. 34202/06, 10/7/2012, §§ 38-43; *Disk and Kesk v. Turkey*, App. No. 38676/08, 27/11/2012, § 29).

50. Article 34(2) of the Constitution accepts that the right to assembly may be restricted in some cases. In the same manner, the reasons for such restriction are set forth in Article 11(2) of the Convention. In this scope, the regulation of all kinds of restrictions to be introduced on the right to assembly through law as per Article 13 of the Constitution is a prerequisite. Even in the situations envisaged by law, the intervention in this right needs to be within the framework of legitimate aims. In Article 34, the legitimate aims are stated as "*national security, public order, the prevention of the commission of crime, the protection of public health and public morals or the rights and freedoms of others*". A similar regulation is introduced in the Convention. Even the restrictions to be introduced by law within the framework of legitimate aims 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*". Therefore, the intervention in the right to assembly should be required for a democratic society. Lastly, the intervention must be proportionate in order to fulfill the legitimate aims.

51. The criterion of proportionality is used in order to determine whether or not a balance has been struck between the measures deemed to be necessary so as to achieve the legitimate aims specified in Article 34 of the Constitution and the right to peaceful assembly. A conviction ruled because of a demonstration involving violence can be considered as an appropriate measure under certain conditions (*Osmani and others v. the Republic of Macedonia* (summary judgment), App. No: 50841/99, 11/10/2001). However, the imposition of a sanction because of an illegal demonstration can also comply with the guarantees of the right to

peaceful assembly (*Ziliberberg v. Moldova* (summary judgment), App. No: 61821/00, 4/5/2004). On the other hand, this right which involves attending a peaceful demonstration guarantees the non-imposition of even a disciplinary penalty which can be accepted as the lightest one on the people who make unprohibited contributions to a demonstration as long as they are not involved in any reprehensible incident (*Ezelin v. France*, § 53). This situation should be assessed by considering the conditions of each concrete incident.

52. Everyone's right to hold peaceful meetings and demonstration marches "*without prior permission*" is guaranteed in Article 34 of the Constitution. Within this framework, the procedure of notification is adopted for meetings and demonstration marches in Article 10 of the Law No. 2911. The subjection of meetings and demonstration marches to a procedure of permission or notification does not generally harm the essence of the right as long as the purpose of these procedures is to provide officials with an opportunity to take reasonable and appropriate measures in order to guarantee the orderly conduct of all kinds of meetings, marches or other demonstrations (*see Bukta and others v. Hungary,* App. No: 25691/04, 17/10/2007, § 35; *Oya Ataman v. Turkey,* § 39; *Rassemblement Jurassien Unité v. Switzerland*, § 119; *Platform* "Ärzte für das Leben" *v. Austria,* App. No: 10126/82, 21/6/1988, §§ 32-34). In this scope, the application of permission and notification procedures is for ensuring the opportunity that the right to assembly is exercised effectively. In special cases when immediate reaction is justified and when the protest is made through peaceful methods, the dispersion of such kind of a protest solely on the justification that the obligation of notification is not fulfilled should be considered as an extreme restriction on the right to peaceful assembly (see *Bukta and others v. Hungary*, § 36; *Oya Ataman*, §§ 38-39, *Balçık and others v. Turkey,* App. No: 25/02, 26/2/2008, § 49, *Samüt Karabulut v. Turkey,* App. No: 16999/01, 27/1/2009, §§ 34-35).

53. On the other hand, the term "*restriction*" within the framework of the right to assembly includes not only some preventive measures before the enjoyment of the right as it is the case in the freedom of expression but also the treatments during or after the enjoyment of the right (see

Ezelin v. France, § 39; *Gün and Others v. Turkey*, §§ 77-85; *Yılmaz Yıldız and others v. Turkey*, App. No: 4524/06, 14/10/2014, §§ 43-48). Therefore, what is done during a peaceful demonstration or investigations and punishments towards the attendees after the demonstration may also be accepted as behaviors restricting the enjoyment of the right to assembly.

54. The state's displaying patience and tolerance towards the behavior of crowds which have assembled for peaceful purposes that do not pose a threat in terms of public order and do not include violence as they enjoy their right to assembly is a requisite of pluralistic democracy.

b. Application of General Principles

i. Concerning the Existence of the Intervention

55. It is obvious that the taking into custody of the applicant together with the group that made a press statement for the purposes of protest and the dispersion of the meeting constitute an intervention in the right to assembly. However, given the "*restrictive*" impact on the right to assembly not only during the enjoyment of the right, but also as regards the treatments following the enjoyment thereof (see § 55), the ruling on imprisonment of five months as an eventual result of the public case filed against the applicant should be accepted as an intervention in the right to assembly even if it was ruled to suspend the pronouncement of the judgment.

ii. Concerning the Intervention on Justified Grounds

56. As per Article 34(2) of the Constitution and Article 13 of the Constitution, the right to assembly cannot be intervened in "*unless prescribed by law*" and except for the legitimate aims specified in the text of Article 34. At the same time, it needs to be determined whether or not a restriction to the right to assembly is in line with the conditions of bearing no prejudice to the essence, 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 specified in Article 13 of the Constitution.

ii. 1. Lawfulness of the Intervention

57. In the incident that is the subject matter of the application, the legal basis of the intervention is composed of Articles 10, 22 and 24 of the Law No. 2911. On the other hand, Article 32 of the Law No. 2911 constitutes the legal basis of the judgment of conviction regarding the applicant. Therefore, there are legal regulations required for the restriction of the right to assembly in accordance with Article 34(2) of the Constitution. For this reason, the intervention in the right to assembly has the element of "*lawfulness*".

ii. 2. Legitimate Purpose

58. The applicant alleged that the intervention made by the police did not have any legitimate aim considering that the group that assembled for a press statement did not obstruct the traffic and threaten the public order.

59. In order for an intervention made in the assembly and demonstration march to be legitimate, it needs to be towards the aims of "*national security, public order, the prevention of commission of crime, the protection of public health and public morals and the rights and freedoms of others*" as stipulated in Article 34(2) of the Constitution.

60. When the minutes kept by the police are examined, it is understood that the aim of the intervention towards the group in which the applicant was involved was to prevent the disruption of public order and to ensure public security. For this reason, it should be accepted that the intervention that the police made had a legitimate aim as per Article 34 of the Constitution.

ii.3. Necessity and Proportionality in a Democratic Society

61. The applicant and the group in which he was involved assembled in front of the Embassy of the USA in order to make a press statement so as to protest the taking into custody of some directors of Aydınlık Newspaper and İşçi Party. The main aim of the protest is to draw attention of the public to the custody action in question. Within the

scope of the minutes of incident, the arrest and custody dated 24/8/2011 and the statement of the police chief who intervened in the group, delivered as a witness statement, the applicant and the participants did not conduct any action involving violence. In addition, the participants assembled on the pavement according to the aforementioned minutes. No matter was mentioned as to the effect that they hindered the traffic or disrupted the daily flow of life.

62. The police who were informed that an illegal demonstration would be held arrived at the crime scene at 15:35. The police made a warning for the dispersal of the group at around 15:38. Also within the scope of the claim of the applicant, 23 people including the applicant were taken into custody at around 15:45 without being given the opportunity to make a press statement. There was no claim as to the effect that the participants put up an active resistance during the actions of arrest aimed at custody (see § 13, 17). Therefore, the applicant and other participants were taken into custody without allowing them to make a press statement during a demonstration which cannot be considered not to be peaceful. In the subsequent process, a public case was filed against the applicant and he was sentenced to imprisonment of five months for holding an illegal demonstration without prior notification and in an area that is one kilometer away from the Grand National Assembly of Turkey (GNAT). Thus, there were two separate interventions in the applicant's right to hold meetings and demonstration marches; as the protest demonstration was broken up, he was taken into custody and he was sentenced to imprisonment because of this.

63. It is obvious that public authorities have a certain margin of discretion in the restriction of the right to hold meetings and demonstration marches within the scope of Article 34(2) of the Constitution. However, this margin of discretion should not be used 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 per Article 13 of the Constitution. In this respect, the duty of the Constitutional Court while examining the claims as regards

the right to hold meetings and demonstration marches is to evaluate whether or not the relevant public authorities have made use of the margin of discretion in a reasonable, cautious manner and within the framework of good will. Moreover, it is also to examine the intervention that is the subject matter of the complaint as a whole and to determine, with regard to the achievement of the legitimate aim, whether or not the intervention is proportionate for achieving the aim and the justifications of the intervention are "*relevant and sufficient*". Thus, it can be determined whether or not the decisions taken by the public authorities comply with Article 34 of the Constitution.

64. In the incident that is the subject matter of the application, the group in which the applicant was involved assembled in front of the Embassy of the USA without giving notification forty eight hours in advance as per Article 10 of the Law No. 2911 and within an area that is located one kilometer away from the GNAT contrary to Article 22 of the same Law. As a rule, it cannot be said that the subjection of meetings and demonstration marches to the procedure of permission or notification violates the right to assembly by itself. Otherwise, a wrong conclusion can be reached as to the effect that the right to hold meetings and demonstration marches prohibits the imposition of sanction due to the failure to fulfill obligations such as permission and notification (for the judgments in the same vein, see *Ziliberberg v. Moldova* (summary judgment); *Rai and Evans v. the United Kingdom* (summary judgment), App. No: 26258/07 and 26255/07, 17/11/2009).

65. Participants need to act in accordance with the legislation in force while exercising the right to hold meetings and demonstration marches (*Oya Ataman v. Turkey*, §§ 38, 39; *Balçık and others v. Turkey*, § 49). It cannot be said that the dispersion of a meeting or demonstration march which is held contrary to legal regulations, even if it is peaceful, violates the right to hold meetings and demonstration marches as a rule. However, it is necessary that the police terminates an illegal meeting or demonstration march through reasonable and temperate behavior and the intervention in an illegal peaceful demonstration should not be excessive and disproportionate. However, in special cases when immediate reaction

is justified with regard to the participants and when the protest is made through peaceful methods, the breaking up of such kind of a protest solely on the justification that the obligation of notification is not fulfilled can be considered as a disproportionate restriction on the right to peaceful assembly (see § 54).

66. In the incident that is the subject matter of the application, there is no hesitation on the fact that the intervention towards the group in which the protesting applicant was involved resulted not only from the obligation of notification, but also from the occurrence of the demonstration within an area that is located one kilometer away from the GNAT contrary to Article 22 of the Law No. 2911. It cannot be said that it is not reasonable to take legal and actual measures aimed at ensuring the security of the GNAT in which the national will becomes concrete within a certain area of security while it fulfills its duty. However, it is necessary to evaluate whether or not the practice of such an area of security is proportionate in terms of each case in order to achieve the aim of ensuring the security of the GNAT. In this sense, the determination by the public authorities intervening in a meeting and demonstration march that the meeting was contrary to law by considering the limit of distance from a formal point of view and accordingly, the intervention thereof in those who organize the meeting and demonstration march do not justify the intervention by themselves. The justifications of intervention should be "*relevant and sufficient*" within the framework of the existing conditions.

67. In the case at hand, it is obvious that the applicant and other participants who assembled for protest in front of the Embassy of the USA in order to draw the attention of the public to pro-USA policies did not aim at the GNAT. It cannot be said that expecting from the participants to make a notification in accordance with the Law No. 2911 so as to protest the taking into custody of some newspaper and party directors is reasonable due to the short period of custody and the fact that it resulted from a sudden incident, either. On the other hand, given the number of participants and their non-violent behavior, there is no hesitation as regards the peaceful quality of the demonstration.

Moreover, there is no situation reflected in the minutes and statements as to the effect that the holding of the demonstration affected the social life and disrupted the public order. Therefore, while the place of demonstration does not constitute any threat to the security and working order of the GNAT, it does not have the impact and proximity that will intervene in the daily ordinary work thereof, either. In this case, it cannot be stated that the taking into custody of the applicant and other participants by the police within a very short period of time such as nearly 15 minutes without allowing them to make a press statement instead of the termination of this demonstration with its reasonable and temperate behavior by taking necessary security measures is necessary and proportionate in a democratic society.

68. On the other hand, the applicant was sentenced to imprisonment of five months on the ground that the peaceful demonstration in which he participated constituted the offense of contravention to the Law No. 2911 and it was decided to suspend the pronouncement of judgment by considering that he was not previously convicted due to an intentional offense according to his criminal record, that no concrete damage materialized due to the demonstration, personal characteristics of the applicant, his attitude and behavior at the hearing.

69. It cannot be said that being under the threat of a criminal sanction because of a peaceful demonstration has, as a rule, struck the balance between the measures deemed necessary so as to achieve the legitimate aims and the right to peaceful assembly (see § 53) (*Akgöl and Göl v. Turkey*, App. No: 28495/06, 28516/06, 17/5/2011, § 43). The applicant participated in the demonstration held within an area that was located one kilometer away from the GNAT without making any notification in contravention of the Law No. 2911 and continued to hold the demonstration by not acting in accordance with the warning of the police for the dispersal of participants. On the other hand, the 23rd Criminal Court of First Instance of Ankara has only specified the actions that were contrary to the Law No. 2911 in the justification of the judgment of conviction. The matters of whether or not the action of protest was peaceful, the social life was affected, the public order

was disrupted because of the demonstration and whether or not the place of demonstration had the impact and proximity that would intervene in the daily ordinary work of the GNAT such as whether or not it constituted any threat to the security and working order of the GNAT were not assessed. In this context, the Court ruled a judgment of conviction such as imprisonment of five months which cannot be considered to be proportionate without striking the balance between the measures deemed necessary to achieve the legitimate aims and the right to peaceful assembly.

70. It should also be evaluated whether or not the judgment on the suspension of the pronouncement of the imprisonment to which the applicant was sentenced constituted a disproportionate intervention in the right. According to the judgment of the suspension of the pronouncement of the judgment as regulated in Article 231 of the Law No. 5271, the convict shall be subjected to a probation period of five years; as per paragraphs (10) and (11) of the same article, it shall be ruled to eliminate the judgment whose pronouncement is suspended and to discontinue the case in the event that the convict does not commit a new offense intentionally and acts in accordance with the obligations as regards the measure of probation within the period of probation and it shall be ruled to pronounce the judgment in the event that the convict commits an intentional and new offense or fails to act in accordance with the obligations as regards the measure of probation within the period of probation.

71. There is a possibility where the judgment on suspension regarding the applicant is pronounced and, accordingly, the imprisonment of five months is executed in the event that the applicant participates in another press statement or meeting and demonstration march and is convicted. Therefore, the applicant will be subject to a threat of penalty for five years because of a peaceful demonstration in which he had participated and the judgment on suspension will have a dissuasive impact on whether or not to participate in any meeting and demonstration march from now on (for a judgment in the same vein, see App. No: 2013/1461, 12/11/2014, §§ 72-76).

72. In the case at hand, while it cannot be stated that the sentencing of the applicant to imprisonment of five months on the ground that the demonstration was illegal, although it was a peaceful one, is proportionate as it continued to keep the applicant under the threat of penalty even if it was ruled to suspend the pronouncement of the judgment and because of the dissuasive impact of the judgment, it cannot be said that it was necessary in order to ensure the public order and national security specified in Article 34(2) of the Constitution, either (*Gün and Others v. Turkey*, §§ 77-85; *Yılmaz Yıldız and others v. Turkey*, App. No: 4524/06, 14/10/2014, §§ 43-48).

73. In the evidence of the above-mentioned matters, it cannot be stated that the intervention in the form of the termination of the action of press statement in which the applicant participated on the ground that it was contrary to Articles 10 and 22 of the Law No. 2911 and his being sentenced to an imprisonment of five months because of such action in accordance with Article 32 of the same Law is "*necessary in a democratic society*" and "*proportionate*" within the scope of Article 34 of the Constitution, even if it was ruled to suspend the pronouncement of the judgment. In this context, it was determined that the balance was not struck between the applicant's right to hold meetings and demonstration marches and the protection of public order and security.

74. Due to the reasons explained, it is concluded that the applicant's right to hold meetings and demonstration marches which is guaranteed in Article 34 of the Constitution was violated.

3. **Article 50 of the Law No. 6216**

75. The applicant filed a request for a non-pecuniary compensation of TRY 50,000.00 and for a retrial as his right to hold meetings and demonstration marches was violated.

76. Article 50(2) of the Law No. 6216 with the side heading of "*Judgments*" is as follows:

> *"If the determined violation arises out of a court judgment, the file shall be sent to the relevant court for a retrial be held 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 judgment 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 judgment of violation."

77. Within the scope of the applicant's right to hold meetings and demonstration marches, it is necessary to rule on the dismissal of the applicant's request for compensation as it is considered that the determination of violation has provided sufficient satisfaction in terms of the violation related to the intervention in the form of the dispersal of the demonstration and his being taken into custody.

78. It should be ruled that the trial expenses of TRY 1,698.35 composed of the fee of 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.

79. It is necessary to rule upon sending the judgment to the 23rd Criminal Court of First Instance of Ankara for the retrial be held in order to remove the violation and the consequences thereof and to the Ministry of Justice and the Ministry of Interior for information as regards the determination of violation made by considering that the applicant is still under the measure of probation and, accordingly, the threat of penalty because of the judgment of the suspension of the judgment ruled on him and that this matter violated his right to hold meetings and demonstration marches.

V. JUDGMENT

In the light of the reasons explained, it was **UNANIMOUSLY** held on 25/3/2015

A. That the applicant's complaints in relation to the violation of Article 19 of the Constitution are INADMISSIBLE due to "lack of jurisdiction *ratione temporis*",

B. That the applicant's complaints with regard to the violation of Article 34 of the Constitution are ADMISSIBLE,

C. That the applicant's right to hold meetings and demonstration marches which is guaranteed in Article 34 of the Constitution was VIOLATED,

D. That the judgment be SENT to the 23rd Criminal Court of First Instance of Ankara for retrial in order to remove the violation and the consequences thereof,

E. That the applicant's request for compensation be DISMISSED,

F. 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,

G. That a copy of the judgment be SENT to the Ministry of Justice and the Ministry of Interior for information.

H. That the payment be made within four months as of the date of application by the applicant to the Ministry of Finance following the notification of the judgment; 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 A FAIR TRIAL (ARTICLE 36)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

YANKI BAĞCIOĞLU AND OTHERS

(Application no. 2014/253)

PLENARY
JUDGMENT

Vice-President	: Serruh KALELİ
Vice-President	: Alparslan ALTAN
Justices	: Serdar ÖZGÜLDÜR
	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	: Hüseyin TURAN
1st Applicant	**:** Yankı BAĞCIOĞLU
Counsel	: Att. Yavuz KATI
2nd Applicant	**:** Hatice Senay GÜNAYDIN
Counsel	: Att. Mehmet Ali ÇERKEZ
3rd Applicant	**:** Fahri Yavuz URAS
4th Applicant	**:** Metin ÖLMEZ
Counsel	: Att. Erol MEMİŞ
5th Applicant	**:** Murat ÖNDER
Counsel	: Att. Murat ÖZKAN
6th Applicant	**:** Zeki MESTEN

Counsel : Att. Kasım KUTBOĞA

7th Applicant **:** Hakan ÖZERGÜN

Counsel : Att. Selçuk ÇELİK

8th Applicant : Mehmet Emrah KÜÇÜKAKÇA

Counsel : Att. Murat ERGÜN**9th**

Applicant **:** Erkan DEMİR

Counsel : Att. Celal ÜLGEN

10th Applicant **:** Tuna EROL

Counsel : Att. Celal ÜLGEN

11th Applicant **:** Deniz Mehmet IRAK

Counsel : Att. Celal ÜLGEN

12th Applicant **:** Burak ÇETİN

Counsel : Att. Celal ÜLGEN

13th Applicant **:** Mehmet AYGÜN

Counsel : Att. Mete KUBİLAY

14th Applicant **:** Şafak YÜREKLİ

Counsel : Att. İbrahim ŞAHİNKAYA

15th Applicant **:** Esin Tolga UÇAR

Counsel : Att. Hüseyin ERSÖZ

16th Applicant **:** Hüseyin AKIN

Counsels **:** Att. Şeref DEDE

Att. İbrahim ŞAHİNKAYA

17th Applicant **:** Tamer ÇETİN

Counsel : Att. Cenk TÜRKER

18th Applicant **:** Kubilay Şükrü ÖZDEMİR

19th Applicant **:** Bahattin ŞEN

20th Applicant **:** Mehmet Koray ERYAŞA

Counsel	: Att. Murat ERGÜN
21st Applicant	**:** Yiğit Ali ADLIĞ
Counsel	: Att. Kemal Yener SARAĞOĞLU
22nd Applicant	**:** Hakan ÇETİNKAYA
Counsel	: Att. Kemal Yener SARAĞOĞLU
23rd Applicant	**:** Engin TURAN
Counsel	: Att. Kemal Yener SARAĞOĞLU
24th Applicant	**:** Ekrem Saltuk BAYSAL
Counsel	: Att. Hüseyin ERSÖZ
25th Applicant	**:** Necmi YILDIRIM
26th Applicant	**:** Tamer KARSLIOĞLU
Counsel	: Att. Orhan ÖNDER
27th Applicant	**:** Ali Haydar ESER
Counsel	: Att. Orhan ÖNDER
28th Applicant	**:** Ahmet Yasin ERDOĞAN
Counsel	: Att. Vehbi KAHVECİ

I. SUBJECT-MATTER OF THE APPLICATON

1. The applicants alleged that Articles 36, 37, 38, 138, 139, 140 and 141 of the Constitution were violated by indicating that a judgment of conviction had been delivered in the case in which they were tried for the crimes of being a member of the criminal organization that had conducted activities of prostitution, blackmail, intimidation and espionage within the Naval Forces within the scope of the investigation named as the Istanbul Military Espionage Case. The applicants requested retrial and compensation.

II. APPLICATION PROCESS

2. As a result of the preliminary examination of the application petitions and annexes thereof conducted in terms of administrative

aspects, it was found that there was no deficiency that would prevent referral thereof to the Commissions.

3. It was decided by the Commissions that the examination of admissibility be carried out by the Sections and that the files be sent to the Section. As regards the first application numbered 2014/253 of 8/1/2014, the First Section decided in the session held on 31/10/2014 that the examination of admissibility and merits be carried out together. The Second Section decided in the session held on 17/9/2014 with regard to the application numbered 2014/1052, in the session held on 12/9/2014 with regard to the application numbered 2014/2184 and in the session held on 18/9/2014 with regard to the application numbered 2014/2188 that the examination of admissibility and merits be carried out together.

4. The facts that are the subject of the applications numbered 2014/253, 2014/1052, 2014/2184 and 2014/2188 as well as a copy of the application were sent to the Ministry of Justice for its opinion. In the letter of the Ministry of Justice dated 31/10/2014, it was indicated that no opinion would be submitted with regard to the application by referring to previous judgments of the Constitutional Court and the opinions it has already submitted within this framework.

5. In the session held on 30/12/2014, as it was deemed to be necessary that the application be concluded by the General Assembly due to its nature, it was decided that the applications be referred to the General Assembly in order to be discussed as per Article 28 (3) of the Internal Regulation of the Constitutional Court.

6. In the examination that was carried out, it was decided that the applications numbered 2014/11112, 2014/5645, 2014/3778, 2014/2981, 2014/2722, 2014/2253, 2014/1968, 2014/1956, 2014/1710, 2014/1709, 2014/1707, 2014/1697, 2014/1727, 2014/2179, 2014/2178, 2014/1760, 2014/864, 2014/566, 2014/519, 2014/454, 2014/1052, 2014/2184, 2014/2188, 2014/10897 and 2014/305 be joined with the application numbered 2014/253 as they have the same nature with regard to their subjects and that the examination be carried out on this file.

III. FACTS

A. The Circumstances of the Case

7. As expressed in the application forms and the annexes thereof, the circumstances of the case are summarized as follows:

8. The investigation regarding the applicants was initiated with a denunciation e-mail sent to police units on 24/4/2010. It was alleged in the e-mail in question that "*A prostitution gang led by the individuals named Vika, Dilara and Gül brings women from abroad and forces them to prostitution, this gang also includes girls who are underage and the women who are forced to prostitution are abused by making them drug addicts*"

9. Upon this denunciation, an investigation was launched by the Office of the Public Prosecutor of Istanbul with the suspicion that "İ.S. and Z.M., whose connection with the criminal organization was determined via eavesdropping and interception within the framework of the investigation regarding the organization, are members of the TAF. That İ.S. frequently procures women from this prostitution gang for prostitution purposes and that he allows the use of his residence located in Kadıköy for prostitution. Z.M. had connections with another prostitution organization and that women who were forced into prostitution were examined and treated by Z.M. and those who got pregnant were made to undergo abortions".

10. It was alleged in denunciation calls made to the 155 police hotline on 2/8/2010 and 4/8/2010 that; "*there is a prostitution gang within the TAF, they enable high level commanders, officers and students to take part in prostitution with women they procure in apartments they rent specially for this purpose*"

11. Upon these denunciations made on 2/8/2010 and 4/8/2010, searches were conducted by the Public Prosecutor's Office of Istanbul in houses and workplaces of the applicants and as a result of the searches ample digital data (such as CDs, DVDs, flash disks and hard disks) were found and seized.

12. A criminal case was filed with regard to the applicants with the indictment of the Public Prosecutor's Office of Istanbul (Invs. No: 2010/1003 and E.2011/123 of 28/11/2011).

13. In the indictment, it was alleged, in brief, that some of the applicants served as heads of the criminal organization whose aim consists of prostitution, blackmail and coercion based on the information obtained from the digital data. It was also alleged that the other applicants were members of this organization, that they had recorded personal data pertaining to numerous personnel of the Turkish Armed Forces in an unlawful manner and handed these over to the organization and they had obtained confidential documents pertaining to the security of the state and conveyed these into the archives of the organization. They engaged in espionage, c violated the confidentiality of private life, the confidentiality of communications and by secretly recording the voices of individuals. It was requested that the applicants be sentenced due to these offenses.

14. It was alleged in the indictment that; "*this criminal organization had organized itself within the most strategic institutions of the State such as the TAF, TÜBİTAK, HAVELSAN and GES Command and formed a separate cell structure, that all kinds of information, documents and material were sent to İ.S. who kept the organization's archive, that they specially tried to stop, slow down and prevent projects that were run for the country's benefit by TÜBİTAK for the TAF, that they were planning to market some documents and projects that they had acquired within the framework of their espionage activities to foreign countries*".

15. With the petition dated 10/11/2010, the applicants requested from the Chief Public Prosecutor's Office of Istanbul the submission of all copies of the expert examination minutes regarding digital evidence that had been sent by institutions such as TÜBİTAK and the Turkish General Staff, drafted by the law enforcement within the framework of the investigation that led to their detention. Upon the objection lodged with the 9th Assize Court of Istanbul on 22/11/2010 following the rejection of the Prosecutor's Office, the Public Prosecutor's Office in it's opinion requested that; "*the defense counsels' requests be rejected as they did not*

fall within the scope of Article 153 of the CCP since the reports that had come from the Turkish General Staff and other institutions as well as the examination minutes drafted by the national police did not amount to being expert reports. Especially given the fact that there is the likelihood of documents pertaining to the security of the State falling into the hands of individuals who lack the authority to examine these in the event that the reports coming from the relevant institutions were submitted to the defense counsels of the accused".

16. The Judge on Duty of the 9th Assize Court of Istanbul rejected the request in line with this opinion with its judgment of 28/11/2010 (Misc. Action 2010/1332). The expression contained within the grounds for the judgment is as follows:

> *"The requests regarding this matter be rejected given that the requested reports do not amount to being expert reports within the scope of the CCP…"*

17. Upon the objection of some applicants to this judgment, the 9th Assize Court of Istanbul decided as a bench on the rejection of the request in final fashion with its judgment of 27/12/2010 (Misc. Works. 2010/1378). The expressions contained in the reasoning of the judgment are as follows:

> *"The defense counsels objections be rejected by taking into consideration the fact that they do not fall within the scope of Article 153 of the CCP, as there is no contrariety with the procedure or the code in the decision delivered by the Office of the Judge on Duty of the Court ..."*

18. The applicants requested this time during prosecution, all the copies of the expert examination minutes sent by TÜBİTAK, the Turkish General Staff and other institutions and drafted by law enforcement be given to them, an expert examination be conducted on the CDs, flash drives, DVDs and hard drives and their images be submitted. It was decided during the 1st hearing of the 11th Assize Court of Istanbul of 20/4/2011 with regard to this request of the applicants that "*...it was indicated in the indictment pertaining to the digital materials and other documents that are located in judicial safe custody that these documents were within the framework of state secret and similarly, it was also indicated in*

the response letter sent by the Turkish General Staff during the investigation phase pertaining to military documents that these documents were classified documents with the quality of being state secrets, that however, bearing in mind that these documents number in the tens of thousands, the matter regarding whether or not the digital data seized from the accused and located in the judicial safe custody and all the other documents should be handed over to the accused and their defense counsels be ruled upon after having conducted an assessment as to whether these amount to state secrets as confidential documents that should not be made public, that all requests to this end be REJECTED at this stage".

19. The request of the applicants pertaining to the submission of the images of the digital data was rejected during the 5th hearing of the 11th Assize Court of Istanbul of 1/7/2011 with the justification that, "*an expert examination will be commissioned with regard to the digital data seized from the accused*".

20. The request of the applicants regarding the matter of the submission of the digital materials was also rejected during the 9.hearing of the 11th Assize Court of Istanbul of 16/12/2011 with a similar justification.

21. During the hearing of 16/12/2011, some of the applicants requested that M.T. be heard in his capacity as the expert individual with regard to the digital data, which formed the basis for the accusations, and upon the acceptance of this request by the Court, M.T. stated in his opinion delivered in his capacity as the expert individual that; "*...metadata (information such as the file name, by whom it was created, when it was created and the date of the last modification)is not a reliable type of information as it does not contain any security information per se. ...These data can be changed by anyone who uses the computer...*" (*reasoned judgment* p.308 and onwards).

22. With regard to the applicants' request that the assigned police officers who had prepared the examination reports with regard to the digital data be heard before the court and their other requests, it was held by the 11th Assize Court in the 14th hearing dated 29/6/2012 that;

"…Given that some of the requests were previously rejected in line with the interim judgments that have already been delivered and that no new assessment is required at this stage,

And that in terms of some other requests, the examination of digital documents for evidentiary purposes is within the court's discretion, that the matter regarding the hearing of a witness would not make a substantial contribution to the essence in terms of digital documents,

And that it has been understood that the fulfillment of some other requests would not bring anything new to the file,

That they be REJECTED also taking into account the various other reasons outlined in previous interim judgments,"

….

"... as it has been concluded that in terms of the legislation that is in force, considerations such as being accepted as a secret, classified, top secret and restricted belong to the concerned institutions that are the owners of the document as it is also understood from the content of the legislation submitted in the annex of the response letter of the Legal Service of the Turkish General Staff of 28 May 2012, which was provided upon the letter of our court, that no other institution that would conduct the classification assessment of the document in question existed, that if the requests of the defense counsels of the accused were to be accepted and an expert delegation formed, in the event that this expert delegation consists of independent individuals, a security gap could appear given the nature of the documents, that in the event that the other option is chosen and that an expert delegation is constituted by means of incorporating one representative from each of the institutions that are the owners of the documents, it would not amount to adopting a separate practice than the one currently in use, that therefore, the decision needs to be delivered by taking into account the assessment reports that are already present in the file, that the requests to this end be REJECTED,"

23. The request of the applicants that an expert examination be commissioned as per its due procedure on the digital records, which

caused the applicants to be accused and sentenced, was rejected by the Court of First Instance with the justification that;

> *"When it is taken into consideration that the digital evidence was seized as a result of searches that were conducted as per its due procedure at the homes or workplaces of the accused and were also supported with video footage, since there is no finding supporting the allegations to the point that subsequent additions were made to the evidence or that they had been previously planted at the scene of the incident, it has been concluded that these theories are ill-founded. In a criminal trial, the judge (the court) wields free discretion with regard to the evidence that is brought to his/her/its attention. In terms of the Code of Criminal Procedure, an expert is not considered as conclusive evidence either. For this reason, the outcome achieved by police officers, who are members of the National Police that is considered as Judicial Law Enforcement in the sense of Article 161 of CCP, after having conducted analyses and reporting on the digital evidence that had been seized by making use of the software referred to in the theoretical explanation with regard to the digital evidence above through the Informatics Unit during the investigation phase was taken into consideration by our court in conjunction with the entirety of the evidence within the scope of the file and the chain of digital evidence was also taken into consideration. It was considered to be sufficient by taking into regard the assessment of the 10th Assize Court of İzmir with regard to the digital evidence obtained from the accused, who are members of the organization, in connection with the conviction, which was the subject of the judgment of approval of the 9th Criminal Chamber of the Court of Cassation with the merits number of 2012/1750 dated 20/06/2012, therefore, even though M.T., who was made to be present and requested to be heard as an expert by the counsel of some of the accused during the hearing on 16/12/2011, stated in general in his statement during the hearing that the metadata and sub data paths of word documents created on computers could easily be intervened to, that the means to preventing this from happening was to monitor the premises where the computers are present via suitable control tools, this was not considered to have an impact on the judgment given the fact that it did not introduce a new element other than the*

acknowledgment of the general criminal law provision to the effect that our court has free discretion of the above mentioned evidence, and resorting to a new expert examination was not considered to be necessary again for the same reasons" (see reasoned judgment p.396).

24. With the judgment of the 11th Assize Court of Istanbul of 2/8/2012 numbered E.2012/37, K.2012/166, it was decided that the applicants be sentenced for crimes such as membership to an organization, unlawfully providing or obtaining personal data, procuring confidential documents pertaining to the security of the State, that they be acquitted of the crimes of "*establishing and managing an organization*", "*conducting political or military espionage*" and "*inciting to or serving as auxiliary to prostitution*".

25. The court demonstrated "*documents determined to fall within the scope of Articles 334/1, 327/1, 326/1 of the TCC in such a way as to highlight their connection with the organization based on the parts of the digital documents seized within the framework of the file understood to have been drafted by themselves*" as the justification to the point that the applicants had committed the crime of "*Being a member to an organization established for the purpose of committing crime*" regulated under Article 220 of the TCC (*reasoned judgment p. 412-421*). The Court demonstrated the information and documents contained within the CDs, flash disks, DVDs and hard disks that had been seized on the accused İ.S. and the houses of the accused as the justification to the point that the applicants had also committed the crimes of "*unlawfully providing or obtaining personal data*" regulated under Article 136 of the TCC, "*violating the confidentiality of private life*" regulated under Article 134 of the TCC, "*procuring prohibited information*" regulated under Article 334 of the TCC, "*procuring confidential documents pertaining to the security of the State*" regulated under Article 327 of the TCC (*reasoned* judgment p. 427 and onwards).

26. In the appeal petition, the applicants reiterated the matters they had brought forward at the Court of First Instance; the 9th Criminal Chamber of the Court of Cassation dismissed the appeal objections pertaining to the Court of First Instance's rejection of the request to commission an expert examination on the grounds that, "*as it is also pointed out in the judgment of the Military Court of Cassation (File No:*

2007/1-1 of 10.01.2007) , taking into consideration the fact that the opinions that were provided by the individuals assigned by these institutions, which determine the nature of the information in connection with Article 326 and onwards of the TCC in terms of the information that was seized from the accused belonging to the Turkish Armed Forces and the Scientific and Technological Research Council were prepared in line with the conditions pertaining to documents, information and confidentiality mentioned in the referred articles as well as the criteria pertaining to the distinction between these and the scope of the file and when the number, content and the purpose of obtaining as determined based on the scope of the file of the information seized from the accused are taken into consideration; as it is understood that no special or technical information is required in order to determine their qualities, that indeed the same conclusion was also reached by the 1st Chamber of the Military Court of Cassation in an examination into the same crime type with its judgment of 18.06.2008 numbered 2008/1890-1886, the appeal objections pertaining to the point that the determination with regard to the nature of some of the information that is the subject of the case needs to be commissioned to experts have not been deemed to be appropriate", it upheld the judgment of conviction that had been delivered with regard to the applicants with its judgment (File No:E.2013/8851, K.2013/14876 of 5/12/2013).

B. Relevant Law

27. Article 220 (1) of the Code of 26/9/2004 No.5237 with the side heading *''Forming an organized group with intent to commit crime''* is as follows:

> *"(1) Those who form or manage an organized group with the purpose of committing acts deemed as crimes by the law shall, in the event that the organization is favorable to the commission of the intended crimes on the basis of the organization's structure, its number of members and tools and equipment, be penalized with a prison sentence of two to six years. However, for presence of an organized group the number of its members should be at least three persons."*

28. Article 135 (1), (2) of the Code No.5237 with the side heading *''Recording of personal data''* is as follows:

"(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."

29. Article 136 of the Code No.5237 with the side heading "*Unlawful delivery or acquisition of data*"is as follows:

"(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.

30. Article 327 (1) of the Code No. 5237 with the side heading of *''Acquiring documents pertaining to the security of the State"* is as follows:

"(1) A prison sentence of three to eight years shall be imposed on the person who acquires the information with regards to the security of the State or domestic or external political benefits thereof which, due to its quality, needs to remain confidential."

31. Article 334 (1) of the Code numbered 5237 with the side heading of *''Acquiring prohibited information"* is as follows:

"(1) A prison sentence of one to three years shall be imposed on the person who acquires the information the disclosure of which have been prohibited by competent authorities as per law and regulations and which, due to their nature, need to remain confidential."

IV. EXAMINATION AND GROUNDS

141. The application (File No: 2014/253) was examined during the session of the court held on 9/1/2015 and the following were ordered and adjudged:

A. The Applicants' Allegations

142. The applicants indicated that,

i. During the investigation and the prosecution they were kept in detention in an unjust and unlawful manner,

ii. No expert examination was conducted into the soundness of the digital evidence and that their requests pertaining to this were dismissed, that the judgment was delivered based on the technical reports prepared by law enforcement, that the copies of the digital evidence were requested, that, however; these were not submitted,

iii. Their requests to have witnesses heard were dismissed, that the statements of the witnesses who were heard were not relied upon,

iv. The phase of the presentation and discussion of the evidence was not duly conducted,

v. A judgment of conviction was delivered with regard to them even though the legal elements of the crime that was attributed to them did not materialize,

vi. They were convicted based on unrealistic evidence, which was obtained in contrary to the law,

vii. The Court of First Instance did not have venue or competence, that the natural judge guarantee was violated,

viii. They were convicted by relying on collective justifications without the presence of sufficient concrete evidence regarding themselves, that their relationship of causality with the digital data could not be proven,

ix. The judgment of the Court of Instance and the decision of approval delivered by the Court of Cassation as a result of the appeal examination were not valid, sufficient and legal,

x. The fact that the judgment of acquittal that was delivered with regard to some of the accused who were in the same situation as themselves was approved by the Court of Cassation demonstrated that the judgment of the local Court was approved without examining the evidence,

xi. News articles were published and various allegations were made during the investigation and prosecution phase in order to humiliate the applicants, tarnish their honor and reputation, that however; no effective remedy existed with regard to preventing these,

xii. No decision of adjournment or postponement of the pronouncement of the judgment was delivered with regard to themselves even though the required circumstances were present, that no justification that is objective, authentic and in line with the file was demonstrated,

xiii. Their request pertaining to the examination of the evidence that is the subject of the accusation during the investigation phase was blocked under the pretext of the decision of confidentiality,

and alleged that the principle of equality enshrined in Article 10 of the Constitution, the right to individual freedom and security enshrined in article 19 of the Constitution, private life enshrined in article 20 of the Constitution, the right to a fair trial enshrined in Article 36 of the Constitution and the presumption of innocence enshrined in Article 38 of the Constitution were violated.

B. The Constitutional Court's Assessment

1. Admissibility

a. ***Complaints About Detention***

i. Complaints With Regard to Detention During the Investigation and Prosecution Phase

34. The applicants Ali Haydar ESER, Tamer KARSLIOĞLU, Hatice Senay GÜNAYDIN, Tamer ÇETİN, Mehmet Koray ERYAŞA and Mehmet Emrah KÜÇÜKAKÇA alleged that they were kept in detention during the investigation and the prosecution, that their requests for judicial control were dismissed with cliché justifications and that Article 19 of the Constitution was violated for this reason.

35. Provisional Article 1 (8) of the Code on the Establishment and

Trial Procedures of the Constitutional Court of 30/3/2011 no 6216 is as follows:

> *"The court shall examine the individual applications to be lodged against the last actions and judgments that were finalized after 23/9/2012."*

36. In accordance with this provision, the Constitutional Court shall examine the individual applications to be lodged against the last actions and judgments that were finalized after 23/9/2012. Therefore, the authority of the court in terms of *ratione temporis* shall only be limited to the individual applications that are lodged against the last actions and judgments that were finalized after this date. In view of this regulation pertaining to the public order, it is not possible to extend the coverage of the authority in a way that will also cover the last actions and judgments that were finalized before the aforementioned date (App. No: 2012/832, § 14, 12/2/2013).

37. 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 determine that the detention is contrary to the law 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 state of 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 over the objection remedy in accordance with the principles such as the adversarial trial and/or the equality of arms. Therefore, it is possible to lodge the individual applications to be lodged due to the aforementioned reasons and for the issuance of a judgment that will ensure the release as long as the state of detention continues on the condition that the ordinary legal remedies are exhausted (App. No: 2012/726, 2/7/2013, § 30).

38. However, in order for the application to be considered as admissible, it is also necessary that the last actions or judgments that

form the basis for the claim of violation be finalized before 23/9/2012. It is possible to make this determination as regards the jurisdiction of the court at every phase of the examination of the individual application.

39. In the case at hand, the detention of the applicants came to an end on 2/8/2012, on which the judgment of conviction of some of the applicants was announced. According to this, it is obvious that the complaints as regards the detention as a whole are related to the judgments that were finalized within the period before a verdict was issued about the applicants.

40. Therefore, as it is understood that the judgments and actions that are subject to the complaints of the applicants as regards the detention were finalized before the date of 23/9/2012 on which the authority of the Constitutional Court commenced, it should be decided that this part of the applications is inadmissible due to *"the rejection of authority in terms of ratione temporis"*.

ii. Complaints With Regard to the Judgment of Apprehension Based on the Conviction Judgment

41. The applicants Hatice Senay GÜNAYDIN, Tamer ÇETİN, Mehmet Koray ERYAŞA and Burak ÇETİN alleged that Article 19 of the Constitution was violated as a result of the judgment of apprehension that was issued with the approval of the judgment of conviction.

42. Article 48 (2) of the Code numbered 6216 with the side heading of *''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."*

43. Paragraph one of Article 19 of the Constitution contains the rule that everyone has the right to individual liberty and security whereas paragraphs two and three contain the rule that individuals can be deprived of this right under certain exceptional circumstances the form and conditions of which are demonstrated in the code (App. No: 2012/338, 2/7/2013, § 38). According to this, deprivation of liberty can

only be the case in the event that one of the cases which are specified within the scope of the mentioned article of the Constitution exists. (App. No: 2012/348, 4/12/2013, § 39). Depriving individuals of their liberty for the purpose of "*Fulfilling liberty depriving punishments delivered by Courts*"is one of the situations listed in paragraph two of the Article.

44. In the case at hand, it was decided that the applicants be sentenced to imprisonment with the judgment of the 11th Assize Court of Istanbul that was announced on 2/8/2012 and the liberty restricting punishment that was delivered with regard to them was approved by the 9th Criminal Chamber of the Court of Cassation on 5/12/2013. The cases of deprivation of liberty following judgments of conviction delivered by the Court are within the framework of "*fulfilling liberty depriving punishments delivered by Courts*" in Article 19 (2) of the Constitution.

45. Due to the explained reasons, it should be decided that the application is inadmissible due to the fact that these allegations brought forward by the applicants are "manifestly ill-founded".

b. ***Allegations That The Right To A Fair Trial Was Violated***

46. Article 47 (5) of the Code numbered 6216 with the side heading *''Procedure of individual application"* is as follows:

> *"(5) 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."*

47. Article 64 (1) of the Internal Regulation of the Constitutional Court with the side heading of "*The application period and excuse*" is as follows:

> *"(1) The individual application must be made within thirty days starting from the exhaustion of legal remedies and the finalization of the judgment pertaining to this, from the date when the violation is known if no remedies are envisaged."*

48. The application period is one of the preconditions of the individual application. The period is a procedural provision that needs to be taken into consideration at any stage of the application.

49. Article 47 (5) of the Code numbered 6216 and Article 64 (1) of the Internal Regulation, individual applications need to be lodged directly to the Constitutional Court or via other courts or representations abroad within thirty days starting from the date when legal remedies are exhausted and the judgments pertaining to this are finalized, or the date when the violation is learned if no remedy is set forth.

50. In a criminal trial, the final remedy that needs to be exhausted is the appeal phase, the objection remedy with regard to judgments that go through appeal examination is granted to the Chief Public Prosecutor of the Court of Cassation as per Article 308 of the Code numbered 5271. Therefore, the applicant's request to the effect that the objection remedy be seized is a request that is solely aimed at mobilizing the discretion of the Chief Public Prosecutor of the Court of Cassation. Since applications lodged within this scope are not considered as a remedy that needs to be exhausted prior to the individual application, this remedy being seized will not have an impact on the individual application period (App. No: 2013/2001, § 18, 16/5/2013).

51. In the case at hand, the remedies were exhausted with the 9th Chamber of the Court of Cassation approving the judgment of the 11th Assize Court of Istanbul on 5/12/2013. Even though the date of notification of this judgment to the applicants is not understood from the contents of the file, it needs to be acknowledged that the applicant Metin ÖLMEZ learned about it on 23/12/2013, when he lodged an application for the objection remedy to the Office of the Chief Public Prosecutor of the Court of Cassation, the applicant Hakan ÖZERGÜN on 23/12/2013, the applicant Ekrem Saltuk BAYSAL on 7/1/2014, the applicant Deniz Mehmet IRAK on 7/1/2014, the applicant Ahmet Yasin ERDOĞAN on 20/12/2013 and that the applicant Zeki MESTEN at the latest on 7/2/2013, when he made a request to the Ministry of Justice to the effect that the trial be renewed. In this case, the individual application needs to be lodged to the Constitutional Court against the judgment in question within thirty days starting from the date of acknowledgment.

52. Due to the fact that the applicant Metin ÖLMEZ lodged an individual application on 24/2/2014, the applicant Hakan ÖZERGÜN

on 14/2/2014, the applicant Ekrem Saltuk BAYSAL on 11/2/2014, the applicant Deniz Mehmet IRAK on 10/2/2014, the applicant Ahmet Yasin ERDOĞAN on 4/7/2014 and the applicant Zeki MESTEN on 9/7/2014, it has been concluded that these applications were made out of time.

53. For the explained reasons, it must be decided that the individual applications that were not filed within the thirty days starting from the date on which the remedies were exhausted with regard to the above mentioned applicants are inadmissible due to "being made out of time" without being examined in terms of other admissibility conditions.

54. With regard to the other applicants, it should be decided that their applications, which are not manifestly ill-founded and where no other reason that will require a decision of inadmissibility is found, pertaining to the exercise of the right to a fair trial is admissible.

2. Merits

a. The Allegation That The Principle of the Equality of Arms Was Violated

55. The complaints of the applicants under this heading are summarized as follows:

i. It was alleged that the fact that merely the technical determinations made by law enforcement with regard to the digital records that had been taken as the basis for the case and the merits for the judgment were deemed to be sufficient and that the request to the effect that these examination minutes be submitted to themselves was dismissed by the Office of the Chief Public Prosecutor of Istanbul, that their objection filed against the decision of dismissal of the Office of the Prosecutor was also dismissed, that their request to the effect that the images of the digital data alleged to belong to themselves be submitted was not accepted, that no expert examination was conducted as regards the soundness of the digital data amounted to restriction of the right to defense,

ii. That their request to the effect that a comprehensive expert examination be commissioned with regard to the entirety of digital

materials that had been brought forward as evidence was dismissed on grounds of state secret was in violation of the principle of the equality of arms,

iii. That the unsigned digital data contained within the CDs, Flash Disks and Hard Disks that had been seized were accepted as lawfully obtained evidence regarding the individuals or the accused whose names were written in the data whereas it was accepted and stated in the reasoned judgment that the court acknowledged that the user file paths, creation dates and last saved dates of digital data can be easily changed or manipulated or edited to be saved on a former date later on amounted to violation of the right to a fair trial,

iv. That there was no justification with regard to why the opinion of the Turkish Naval Forces Command of 6/4/2011 numbered LEGDEP.:2011/2016 (50984) pertaining to the digital records that were taken as the basis for the judgment was not respected by the Court.

56. Article 36 (1) with the side heading *"Freedom to claim rights"* of the Constitution 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."*

57. Article 6 (1) of the European Convention on Human Rights (ECHR) with the side heading *"Right to a fair trial"* is as follows:

> *"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law..."*

58. In order to protect the rights in the Constitution in an effective way, the Courts that try the case must be *"tasked with examining the bases, claims and evidence of the parties in an effective way"* according to Article 36 of the Constitution (for a judgment of the ECtHR in the same vein, see Dulaurans v. France, App. No: 34553/97, 21/3/2000, § 33). No: 34553/97, 21/3/2000, § 33). According to the case law of the European Court of Human Rights (ECtHR), if the approach of a court towards the

case results in the fact that they avoid responding to the claims of the applicants and examining the main complaints of the applicants, Article 6 of the Contract is violated in terms of the due examination of the case (see *Kuznetsov v. Russia*, App. No: 184/02, 11/4/2007, §§ 84-85).

59. That the documents contained within the digital evidence in question were found to be in connection with the security of the state and that a security vulnerability would ensue in the event that an expert examination was conducted on these documents was provided by the Court of First Instance as the justification for the lack of expert examination on the digital evidence as requested by the applicants or the refusal to submit the images belonging to this evidence (see §§ 18-22). In its judgment highlighting that an expert report does not constitute definitive evidence, the Court also provided the explanations that "*In a criminal trial, the judge (the court) wields free discretion with regard to the evidence that is brought to his/her/its attention. In terms of the Code of Criminal Procedure, an expert is not considered as definitive evidence either. For this reason, the outcome achieved by police officers, who are members of the National Police that is considered as Judicial Law Enforcement in the sense of Article 161 of CCP, after having conducted analyses and reporting on the digital evidence that had been seized by making use of the software referred to in the theoretical explanation with regard to the digital evidence above through the Informatics Unit during the investigation phase was... considered to be sufficient, therefore... resorting to a new expert examination was not considered to be necessary again for the same reasons*" *(reasoned judgment p.396).*

60. As indicated above, the Court of First Instance dismissed the request of the applicants to the effect that an expert examination be commissioned or that images be provided. As set forth in the ECtHR case law, the principle of *"equality of arms"*, one of the main elements of the right to a fair trial, requires equal treatment of the witnesses or experts of the prosecution and the witnesses and experts of the accused (see *Bönisch v. A*ustria, App. No: 8658/79, 6/5/1985, §§ 32-33).

61. The principle of equality of arms applied in both criminal cases and non-criminal cases requires the parties to be given a reasonable opportunity to present their requests and statements under conditions

that do not place them at a disadvantage vis-à-vis their opponents (*Kress v. France*, App. No: 39594/98, 7/6/2001, § 72). As a result of this requirement, although there is no special provision in the ECHR as regards the hearing of the experts before the court, the ECtHR evaluated the entity of expert by relating it to the "*principle of equality of arms*" considering the right of having witness heard as stipulated in Article 6 (3) (d) of the Convention (see *Bönisch v. Austria*, App. No: 8658/79, 6/5/1985, § 32; *Brandstetter v. Austria*, App. No: 11170/84, 12876/87, 13468/87, 28/8/1991, § 42).

62. The main purpose of a criminal trial is to unearth the material truth in compliance with the procedure that is envisaged by the fundamental rights and freedoms as well as the law. In compliance with this purpose, the evidence that is brought before the trial instance and the indictment that relies on it need to be discussed as per the principle of adversarial trial.

63. The principle of the equality of arms, which is a fundamental element of a fair trial in criminal cases, refers to the prosecution and the accused having equal opportunities. As the prosecution has the full backing of the entire state mechanism in criminal cases, the equality of arms serves as a fundamental guarantee of the right to defense of the accused. As per the principle, the defense and the prosecution must have the same opportunities in terms of preparing and presenting their case under equal circumstances. The principle of the equality of arms requires as a minimum in a criminal trial that the material information demonstrated and acquired by the prosecution be explained, that no difference be observed between the prosecution and the defense in terms of examining the case file.

64. Within the scope of the principle of the equality of arms, a complete equality in terms of rights and responsibilities that are possessed needs to be established between the parties of the case during the trial that takes place before the court and this equality needs to be maintained all along the trial. All kinds of procedural actions that are fulfilled during the trial process as well as matters such as submitting evidence and counter evidence, bringing forward claims and counter

claims need to be conducted in compliance with the principle of the equality of arms. The principle of the equality of arms also encompasses a legal situation to the detriment of the accused not being created in the criminal trial.

65. It is a requirement of the principle of the equality of arms that the documents presented to the case file be examined and that copies be taken from these documents, that the expert reports utilized by the court as the grounds for its judgment be accessed and that the opportunity of acquiring these be granted, that, similarly, the opposing party be granted the right to object, explain an opinion and refute evidence, as well as bring forward counter evidence against the evidence and documents brought forward by the other party to the trial.

66. What is of essence in the inspection of the equality of arms is the importance of the action that is the subject of the equality inspection in the trial. When the ECtHR inspects whether or not the principle of the equality of arms has been abided by, it considers whether or not the inequality that is the subject of the complaint in the case at hand renders the trial actually and genuinely unjust (see *Kremzov v. Austria* App. No: 12350/86, 21/9/1993, § 75). If, in the face of an allegation of one of the parties to the case, the other party is not granted the opportunity to present the evidence that is the main pillar of its defense against this allegation, a violation could occur in terms of the equality of arms (see *De Haes and Gijsels Belgium* App. No: 19983/92, 24/2/1997, § 58).

67. In the incident that is the subject of the application, the Court of First Instance did not respect the opinion of the expert who was made to be present by the applicants and was heard, however; it delivered its judgment by means of respecting all of the examination reports commissioned to members of law enforcement by the Office of the Chief Public Prosecutor during the investigation (*reasoned judgment*, p.400 and onwards). The applicants requested from the Court that an expert report be obtained with regard to the digital evidence, which constituted the foundation for the trial and resulted in them being sentenced, by alleging that the investigations and examinations pertaining to the digital evidence during the investigation phase were deficient and not adequate

to elucidate the incident, that the requests and statements brought forward by themselves were never respected. The Court of First Instance dismissed this request with the justification that "*given that the CCP does not explicitly accept expert opinion as evidence, despite the opinion of the expert, determining whether or not the information amounts to state secret is a matter that can be potentially solved with the general and judicial information of the profession of being a judge, albeit after having learned about the content of these via the opinion of an expert. However, the final judgment as to whether the information, document or item amounts to a state secret or not is to be delivered by the judge or the court, as per the essence of the arrangement under the article derived from its expression, according to the definition of a state secret.* " (*reasoned judgment*, p.405*).*

68. The duty of the Constitutional Court is not to decide whether an expert report is necessary in a given case. The issues of the necessity of the request of the defense for having witnesses heard or admissibility or evaluation of evidence such as an expert report shall fall within the authority of the courts of instance (for a judgment of the ECtHR in the same vein *S.N. v. Sweden*, App. No: 34209/96, 2/7/2002, § 44).

69. However, the Constitutional Court has the authority to examine whether the decision of dismissal of the request within the framework of the defense that the images of the digital evidence that is the subject of the accusation be provided or that an expert report be obtained with a view to these documents was delivered within a procedure that contains sufficient guarantees aimed at protecting the rights of the accused.

70. The applicants requested that the Court commission an expert report pertaining to the soundness of the digital evidence that constituted the grounds for the trial by alleging that the examinations commissioned by the Public Prosecutor to members of law enforcement were deficient and not adequate to elucidate the incident, that the expert report that was made to be heard by themselves during the hearing was not respected either. The Court of First Instance held that it was not necessary to commission an expert report with the justification that, "*When it is taken into consideration that the digital evidence was seized as a result of searches that were conducted as per its due procedure at the homes*

or workplaces of the accused and were also supported with video footage, since there is no finding supporting the allegations to the point that subsequent additions were made to the evidence or that they had been previously planted at the scene of the incident, it has been concluded that these theories are ill-founded." (reasoned judgment, p. 396*).*

71. It cannot be claimed that the fact that the actions attributed to the accused rely on documents created with computer programs (such as CDs, DVDs, flash memories, external disks etc.), that it was accepted by the Court that the contents of these documents reflected material incidents and facts and that they were authentic, that it was indicated in the statement of the expert who was heard during the hearing dated 16/12/2011 that these data had the quality of being open to intervention, (*reasoned judgment*, p. 396), that resorting to an expert and reports to be issued by a board are insignificant in arriving at the material reality.

72. It is clear that the technical examination to be conducted on the digital evidence can be determinant in terms of proving the crimes and establishing the relation of the accused to these crimes. Faced with the allegation of the applicant that the documents contained within the digital evidence had not been created and procured by himself, it is necessary that an access that would allow an effective defense to be made pertaining to these allegations be provided or that an examination fitting this purpose be conducted by the trial instance.

73. Article 6 of the Convention requires the prosecution to explain all material evidence in addition to the principles of adversarial trial and the equality of arms. However, the right to access to evidence that is the subject of the accusation is not an absolute right. The right the defense can be restricted with measures such as national security, the protection of witnesses etc. and only to the extent this is compulsory. For these reason, it may be necessary that some evidence be kept confidential from the defense. However, this remedy, which restricts the right to defense, can only be resorted to in the event that this is absolutely necessary. In the presence of this kind of a situation, the difficulties stemming from this restriction must absolutely be balanced out by judicial instances via other procedures. These procedures must be in compliance with the

requirements of the principle of the equality of arms and also contain the necessary guarantees. (*Jasper v. United Kingdom* BD, App.No:27052/95, 16 February 2000, § 52). In circumstances where these means cannot be assured and the evidence that is kept confidential constitute determining proof, the principle of the equality of arms may be violated.

74. The failure to grant the opportunity of access and examination in such a manner as to result in the defense pertaining to the evidence constituting the basis for the accusations becoming ineffective causes the main function of the criminal trial not to be fulfilled. The failure to have the evidence that constitute the basis for the accusations examined through measures that are appropriate in terms of proving the crime and by expert individuals may result in the defense becoming useless and unnecessary.

75. As a rule, while the reports and opinions presented by the expert are not binding for the courts of instance, the examinations commissioned by the Public Prosecutor had a decisive effect when the evaluation on the merits was carried out by the Court of First Instance. In other words, in the present case the Court of First Instance only took into account the analyses and examinations commissioned by the Public Prosecutor on the digital evidence and the general charts submitted by the institutions. It dismissed the requests of the applicants against these reports that the court appoint a board of experts and commission a report in order to evaluate the allegations that the digital data constituting the grounds for the judgment of conviction did not reflect the reality and their request that the images of these documents be submitted. In the present case, the applicants were sentenced by relying on the information and documents contained within the digital evidence. The fact that the request of the applicants that an expert examination be commissioned on these evidence in order to investigate their allegations that the digital data did not reflect the reality or that their images be submitted was dismissed with a reference to the point that the contents of the digital documents qualified as state secret and that the digital evidence had been seized as a result of searches that had been conducted as per the due procedure has the effect of violating the right to a fair trial with a view to the entirety of the trial.

76. The fact that the evidence was thus kept confidential by the Court, especially that the evidence was not made available to and examined by the defense due to the pretext of state secret made it impossible for the applicants to fully bring forward their allegations as to the soundness of the digital evidence. However, the Court delivered its judgment of conviction by making an assessment based on this digital evidence and the judgment was upheld by the Court of Cassation for the same reasons (see §§ 25-26). It is clear that the procedure and method pursued by the Court under these kinds of circumstances are not in compliance with the principle of the equality of arms and do not contain a guaranty that sufficiently protects the applicant's interests.

77. In this manner, the opportunity of the applicants to make a defense against the evidence, which formed the basis of the accusations leveled at them, and their right to claim the extension of the prosecution were restricted, the principle of the "*equality of arms*" of the criminal trial aimed at ascertaining the material fact was violated.

78. In light of the above explanations, it should be decided that the applicants' right to a fair trial guaranteed in Article 36 of the Constitution was violated.

b. Other Complaints

79. Since it has been adjudged with regard to the application that the right to a fair trial guaranteed in Article 36 of the Constitution was violated due to a contradiction with the principle of the "*equality of arms*", it was not deemed necessary to conduct a separate examination with regard to the other complaints (see § 33) within the scope of the right to a fair trial in terms of admissibility and the merits.

3. Application of Article 50 of the Law No. 6216

80. The applicants requested that it be determined that the right to a fair trial was violated, that the judgment of the Court of Instance be removed and that compensation be paid.

81. Article 50 of the Code numbered 6216 with the side heading *"Judgments"* 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 judgment 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 judgment with the quality of an administrative act and action cannot be delivered.

(2) If the determined violation arises out of a court judgment, 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 judgment 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 judgment of violation."

82. As the violation determined in the case which is the subject matter of the application arises out of the violation of the principle of the equality of arms that is one of the elements of the right to a fair trial and there is legal interest in the removal of the violation by carrying out a retrial, it should be decided that a copy of the judgment be sent to the relevant court in order to carry out a retrial for the removal of the violation and its consequences in accordance with paragraphs (1) and (2) of the Code numbered 6216.

83. Even though the applicants requested compensation, given that it has been decided in the present application that Article 36 of the Constitution was violated, that a copy of the judgment be sent to the relevant court in order to carry out a retrial for the removal of the violation and its consequences, it should be decided that the compensation request be dismissed.

84. It should be decided that the trial expenses outlined below made by the applicants whose applications were found to be admissible be paid to the applicants.

V. JUDGMENT

In the light of the reasons explained, it is **UNANIMOUSLY** held on 9/1/2015;

A.

1. That the allegations of the applicants Ali Haydar ESER, Tamer KARSLIOĞLU, Hatice Senay GÜNAYDIN, Tamer ÇETİN, Mehmet Koray ERYAŞA and Mehmet Emrah KÜÇÜKAKÇA pertaining to the right to liberty and security are INADMISSIBLE due to *''lack of jurisdiction ratione temporis''*,

2. That the complaints of the applicants Hatice Senay GÜNAYDIN, Tamer ÇETİN, Mehmet Koray ERYAŞA and Burak ÇETİN pertaining to the right to liberty and security that falls within the scope of the fulfillment of liberty depriving punishments delivered by courts are INADMISSIBLE due to *''being manifestly ill-founded''*,

3. That the complaints of the applicants Metin ÖLMEZ, Zeki MESTEN, Hakan ÖZERGÜN, Ekrem Saltuk BAYSAL, Deniz Mehmet IRAK and Ahmet Yasin ERDOĞAN with a view to the right to a fair trial are INADMISSIBLE due to *''being made out of time''*,

4. That the allegations of the applicants Necmi YILDIRIM, Ali Haydar ESER, Tamer KARSLIOĞLU, Yankı BAĞCIOĞLU, Mehmet AYGÜN, Fahri Yavuz URAS, Tuna EROL, Burak ÇETİN, Kubilay Şükrü ÖZDEMİR, Erkan DEMİR, Murat ÖNDER, Mehmet Koray ERYAŞA, Tamer ÇETİN, Hatice Senay GÜNAYDIN, Engin TURAN, Yiğit Ali ADLIĞ, Hakan ÇETİNKAYA, Mehmet Emrah KÜÇÜKAKÇA, Esin Tolga UÇAR, Şafak YÜREKLİ, Hüseyin AKIN and Bahattin ŞEN that the right to a fair trial was violated in terms of the principle of the equality of arms ARE ADMISSIBLE,

B. That the right to a fair trial enshrined in Article 36 of the Constitution of the applicants whose applications have been found to be admissible WAS VIOLATED**,**

C. That the request of the applicants for compensation BE DISMISSED,

D. That a copy of the judgment be SENT to the related Court for retrial in order for the violation and the consequences thereof to be removed,

E. That the trial expenses made by the applicants Metin ÖLMEZ, Zeki MESTEN, Hakan ÖZERGÜN, Ekrem Saltuk BAYSAL, Deniz Mehmet IRAK and Ahmet Yasin ERDOĞAN be charged on the applicants,

F. 1. That the fee of TRY 206.10 paid separately by the applicants Engin TURAN, Yiğit Ali ADLIĞ and Hakan ÇETİNKAYA for the file no 2014/1760 be PAID separately; that the counsel's fee of TRY 1,500.00 be PAID jointly,

2. That the fee of TRY 206.10 paid separately by the applicants Necmi YILDIRIM for the file no 2014/1052, Fahri Yavuz URAS for the file no 2014/2981, Bahattin ŞEN for the file no 2014/519 and Kubilay Şükrü ÖZDEMİR for the file no 2014/454 be PAID separately,

3. 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 paid by the applicant Yankı BAĞCIOĞLU for the file numbered 2014/253, Mehmet AYGÜN for the file numbered 2014/864, Murat ÖNDER for the file numbered 2014/2253, Tamer ÇETİN for the file numbered 2014/305, Hatice Senay GÜNAYDIN for the file numbered 2014/3778 and Esin Tolga UÇAR for the file numbered 2014/566 be PAID separately,

4. That the fee of TRY 206.10 paid separately by the applicants Ali Haydar ESER for the file numbered 2014/2184 and Tamer KARSLIOĞLU for the file numbered 2014/2188 be PAID separately; that the counsel's fee of TRY 1,500.00 be PAID jointly,

5. That the fee of TRY 206.10 paid separately by the applicants Tuna EROL for the file numbered 2014/1709, Burak ÇETİN for the file numbered 2014/1697 and Erkan DEMİR for the file numbered 2014/1710 be PAID separately; that the counsel's fee of TRY 1,500.00 be PAID jointly,

6. That the fee of TRY 206.10 paid separately by the applicants Mehmet Koray ERYAŞA for the file numbered 2014/5645 and Mehmet

Emrah KÜÇÜKAKÇA for the file numbered 2014/1956 be PAID separately; that the counsel's fee of TRY 1,500.00 be PAID jointly,

7. That the fee of TRY 206.10 paid separately by the applicants Şafak YÜREKLİ for the file numbered 2014/2179 and Hüseyin AKIN for the file numbered 2014/2178 be PAID separately; that the counsel's fee of TRY 1,500.00 be PAID jointly,

G- 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 judgment; 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,

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

BARAN KARADAĞ

(Application no. 2014/12906)

SECOND SECTION
JUDGMENT

President	: Alparslan ALTAN
Justices	: Serdar ÖZGÜLDÜR
	Celal Mümtaz AKINCI
	Muammer TOPAL
	M. Emin KUZ
Rapporteur	: Akif YILDIRIM
Applicant	: Baran KARADAĞ
Counsel	: Att. Baran BİLİCİ

I. SUBJECT-MATTER OF THE APPLICATION

1. The applicant has stated that in the criminal case that he was tried, an interpreter was not assigned to him although he had informed the Court that he wanted to make his defense in Kurdish; that the sole evidence concerning the crimes with which he is being charged with are the mere statements of anonymous witnesses and claimed that his right to a fair trial which has been defined in Article 36 of the Constitution has been violated and requested pecuniary and non-pecuniary damages and that such violation be established.

II. APPLICATION PROCESS

2. The application was lodged on 17/7/2014 via the 1st Assize Court of Van. 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 Third Commission of the Second Section on 16/12/2014 that the examination of admissibility of the application be conducted by the Section and the file be sent to the Section.

4. It was decided by the President of the Section on the date of 5/1/2015 that the examinations for admissibility and merits of the application be conducted jointly and a copy be sent to the Ministry of Justice (the Ministry) for its opinion.

5. The facts, 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 letter of opinion of the Ministry of 6/2/2015 was notified to the applicant on the date of 13/2/2015; the applicant has not made any counter statements against the opinion of the Ministry.

III. THE FACTS

A. The Circumstances of the Case

6. As expressed in the application form and the annexes thereof and the opinion of the Ministry, the relevant incidents are summarized as follows:

7. The applicant was taken under custody on 2/6/2011 and arrested upon the judgment of the 4th Assize Court of Van with query no. 2011/82 for the crimes of *"Committing crimes in the name of the terrorist organization despite not being a member of the terrorist organization PKK KONGRA GEL, active resistance to the duty official within the framework of the terrorist organization activity and making the propaganda of the terrorist organization."*

8. The statements of the anonymous witness HX922Q was called upon by Office of the Chief Prosecutor of Van, within the scope of the investigation. No justification was shown by the Office of the Chief Prosecutor regarding the concealment of the identity of the witness and the legal and actual reasons on which the judgment could be based were not provided. The related portion of the minutes covering the statement of the witness of 30/3/2011 is as follows:

> *"...The witness was asked about the person or the persons, involved in the youth structure, who have carried out the four individual explosions including the one which took place in the Erciş district on the date of 13/10/2010 at 22.00 hrs at the transformer center named TEİAŞ; the*

one which took place at 23.50 hrs on the very same day at the place of work called the Yunus Emre Tea House on the Ağrı-Van highway, which belonged to an individual by the name of M.G.; the one which again took place on the date of 14/10/2010 at 02.30 hrs at the municipal parking lot which is located in Kışla Neighbourhood and the one that took place on the date of 02/10/2011 at 21.50 hrs in front of Halk Bank; and head shot pictures which were numbered from 1 to 30 that were obtained from the security directorate were shown. In his/her declaration;

Those who have thrown molotovs to the transformer and the Yunus Emre Tea House are Baran KARADAĞ [the Applicant] and persons in the head shots no. 2 and 4 which you have shown me and are in the file. I know the person no. 4 but I do not know the name. ***I overheard what they did as they were speaking among themselves at the BDP building in Erciş, at the youth hall, but I could not ask how it was carried out in order not to raise suspicion."***

9. Because of the crimes of *"Making the propaganda of the terrorist organization PKK/KONGRA-GEL, possession or exchange of dangerous substances without permission, use of explosives in a way to cause fear, anxiety or panic, resistance in a way to hamper service, damage on public property, being a member of the armed terrorist organization, making the propaganda of the terrorist organization, incurring damage on property, unarmed participation in illegal meetings and assemblies and not dispersing on its own motion despite the warning, armed participation in meetings and assemblies"* a criminal case was filed regarding the applicant with the indictment No. E.2011/516 of 10/10/2011 of the Office of the Chief Prosecutor of Van (tasked through the Code of Criminal Procedure Art. 250) at the 3rd Assize Court in Van (tasked through the Code of Criminal Procedure Art. 250).

10. The relevant part of the indictment is as follows:

"It was understood ... that in his/her statement the anonymous witness HX922Q has expressed that one of the perpetrators of the bombed assaults which took place at the municipal parking lot in the District of Erciş, the transformer which belongs to TEİAŞ and the Yunus Emre Tea House on the dates of 13.10.2010 and 14.10.2010 was the suspect Baran

KARADAĞ [the Applicant], upon which the documents concerning the acts mentioned in the statement of the anonymous witness were obtained and incorporated into the file, that in the investigation which was carried out it was understood that an explosion has taken place at the transformer center named TEİAŞ but caused no damage, that during the explosion at the Yunus Emre Tea House some material damage was inflicted on the wall and as a result of the bombed assault at the municipal parking lot the windows of a car which belonged to the municipality was shattered and material damage was inflicted and considering that such acts of bombed assaults have been carried out ***with the same type of bombs using the very same methods, it was understood that all three acts were carried out by the same person or persons and according to the statement of the anonymous witness which complies with the occurrence of such events whereby the suspect is one of the perpetrators,*** *that the suspect has committed the crimes of possession and use of explosives; incurring damage on the property of A.G., the complainant; deliberately endangering the general security through his act at the transformer center named TEİAŞ; and damaging public property through his act at the municipal parking lot and that he has to be penalized in compliance with Article 174/1,2 of the Turkish Criminal Code, Article 5 of the Law No. 3713, Article 55 of the Turkish Criminal Code (three times), Article 151/1 of the Turkish Criminal Code, Article 5 of the Law No. 3713, Article 53 of the Turkish Criminal Code, Article 152/2-a of the Turkish Criminal Code, Article 5 of the Law No. 3713, Article 53 of the Turkish Criminal Code, Article 170/1-z of the Turkish Criminal Code, Article 5 of the Law No. 3713, and Article 53 of the Turkish Criminal Code."*

11. The Applicant has made his defense in Turkish during his statement at the Office of the Chief Prosecutor, the interrogation and in the first two hearings of the trial.

12. The Court of First Instance has established the declarations of the anonymous witness who was heard during the investigation phase in an environment where the accused and his counsel were were not present and on a date the day and hour of which was not notified to the defense (in between sessions). No justification has been found in the minutes

as to why the witness had to be heard in such fashion. However, in the 3rd hearing of the trial the applicant and his counsel were granted seven days so that they could notify the particulars which they wished to ask the anonymous witness. No information concerning the fact that the counsel of the accused has submitted a petition was included in the minutes of the hearing.

13. The statements of the anonymous witness were taken by the Court on the date of 20/6/2012. No justification have been shown regarding the concealment of the identity of the witness and the legal and actual reasons on which the judgment could have been based have not been provided. In the hearing where the statements of the anonymous witness was taken the Chief Prosecutor was also present. The anonymous witness has made statements as given below:

> *"...I have given my statement regarding this matter at the Office of the Chief Prosecutor. I know B.K. B.K. distributes newspapers in Erciş in the name of the party, and I have seen him many times throwing stones at the police during the illegal incidents that he has participated in as well. I have overheard at the party building that one of those who have thrown molotovs to the transformer in Erciş and the Yunus Emre Tea House in the month of October in the year 2010 was B.K.* ***and I know that B.K. himself was talking about having thrown a molotov at the center of the district, for I have been told so by persons who have heard that..."***

14. During the 5th hearing of the trial of 3/7/2012 anonymous witness statements which have been established by the court were read between hearings and the counsel of the applicant notified that he did not accept the statements of the anonymous witness. And the statements made by the applicant were recorded in the minutes as follows: *"It was seen that he spoke in Kurdish; was not understood."*

15. With the judgment no. E.2011/390, K.2012/491 of 18/9/2012 of the court, it was decided that the applicant be convicted for some crimes.

16. Upon the appeal of the said judgment, the judgment of the Court of First Instance was overturned with the writ no. E.2013/3821

K.2013/8365 of 4/6/2013 of the 9th Criminal Chamber of the Supreme Court of Appeals. The justification for reversal is as follows:

> *"Regarding the cases that have been lodged for the alleged offenses by the accused Baran Karadağ [Applicant] concerning causing damage on the property of A.G. and deliberately endangering general security by way of throwing explosives to the transformer center that belonged to TEİAŞ, it was decided that delivering a judgment was always possible.*
>
> *...*
>
> *A- Since the judgments concerning the postponement of the pronouncement of the judgment and the judgments concerning the postponement of prosecution which were taken as per Article 231/12 of the Code of Criminal Procedure and Paragraph 1 of the Provisional Article 1 of the Law No. 6352 have the quality of standing against the provision of Paragraph 4 of the said Article and the 2nd sentence of Paragraph 8 of Article 223 of the Code of Criminal Procedure and are not among the judgments which are of the quality of convictions specified in Article 223/1 of the Code of Criminal Procedure, that due action be taken by the office of objection,*
>
> *...*
>
> *C- As for the appeals concerning the convictions which have been established on Baran Karadağ, the accused, for the crimes of being a member of the armed terrorist organization and possession of explosives;*
>
> *that other objections of the accused and his counsel for appeals be rejected, however that;*
>
> *1- Since; despite the lack of sufficient evidence for conviction for the crime of being a member of the armed terrorist organization concerning his involvement in the hierarchical structure within the organization, considering that the act of the accused who, on the date of 13.10.2010, thrown explosives to the Yunus Emre Tea House and the transformer that belongs to TEİAŞ in the name of the organization could be assessed to constitute the crime of committing crimes in the name of the organization without being a member of the armed terrorist organization and also*

taking into consideration the date of the crime that was committed in the name of the terrorist organization, whereby a difficulty was found in the establishment and determination of the legal status of the accused as per the amendment which has been made in article 85 of the Law No. 6352 which was enacted upon its publication in the Official Gazette of 05/07/2012 and in Article 220/6 of the Turkish Criminal Code,

And since, as a result of the explosives that the accused has thrown within the very same day at close intervals to the Yunus Emre Tea House and the transformer that belonged to TEİAŞ, the punishment of the accused as per article 174/1 of the Turkish Criminal Code would have been considered as sufficient, the establishment of a double conviction due to posesion of explosives, ... since the objections of Baran Karadağ, the accused, and the counsel of the accused have been considered to be admissible, hence the convictions be OVERTURNED, ... and it was decided as such.

17. As a result of the retrial which was carried out after the judgment of reversal, the defense of the applicant was obtained in company with an interpreter in the hearing of 25/9/2013.

18. As a result of the assessment that it has carried out within the scope of *"...the indictment, witness statements, minutes pertaining to the incident, criminal reports, search and confiscation minutes, instruments of the crime which are recorded under the item no. 2011/271, 272 at the judicial property and evidence unit, footage and photographic recordings of the incidents in which the suspects were involved, the expert report, the statement of the anonymous witness HX922Q, civil and judicial registry records and the entire file"*, the 3rd Assize Court of Van has decided that the applicant be sentenced to 3 years, 1 month and 15 days of imprisonment for committing crimes in the name of the terrorist organization without being a member of the terrorist organization,; to 4 years and 2 months of imprisonment and an administrative fine of TRY 100 for the crime of possession of explosives without permission; and to 7 months and 15 days for the crime of deliberately endangering the general security and 15 months of imprisonment for the crime of incurring damages on property.

19. The court has decided that the pronouncement of its judgments on co nviction for the crimes other than *"committing crimes in the name of the terrorist organization without being a member of the armed terrorist organization and possession of explosives"* be postponed.

20. Upon the applicant's appeal of the judgment concerning the crimes for which the pronouncement of the judgment was not postponed, the 9th Criminal Chamber of the Supreme Court of Appeals has approved the judgment of the Court of First Instance with its writ no. E.2014/1315, K.2014/2545 of 5/3/2014.

21. The said judgment was notified by hand to the attorney of the applicant on 17/7/2014.

22. The individual application was submitted on the date of 17/7/2014.

B. Relevant Law

23. Article 202 with the side heading "*Circumstances whereby an interpreter shall be provided*" of the Code of Criminal Procedure No. 5271 of 4/12/2014 is as follows:

> *"(1) If the accused or aggrieved does not speak Turkish to the extent where s/he is able to express himself/herself; the essential points pertaining to the allegation and defense in the trial shall be interpreted through an interpreter appointed by the court.*
>
> *(2) The essential points pertaining to the allegation and defense shall be explained to the accused or aggrieved, who is handicapped, in a manner which they can understand.*
>
> *(3) Provisions of paragraph one and two shall also apply for the suspect, aggrieved or witnesses heard at the investigation stage. At this stage the interpreter shall be appointed by the judge or the Public prosecutor.*
>
> *"(4) (Additional clause: Law No. 6411 of 24/01/2013 / Art. 1.) Moreover, the accused can;*
>
> *a) Upon reading of the indictment,*

b) Upon rendering of opinion as to the accusations,

present his/her verbal defense in another language in which s/he has declared that s/he is able to express himself/herself better. In this case, the interpretation services shall be fulfilled by an interpreter of the accused's choosing from a list created as per paragraph five. Expenses of said interpreter shall not be met by the State Treasury. These means cannot be abused towards the purpose of procrastinating adjudication.

(5) (Additional paragraph: Law No. 6411 of 24/01/2013 / Art. 1) The interpreters shall be chosen from among persons included in the list prepared annually by the provincial judiciary justice commissions. Public prosecutors and judges may select an interpreter not only from the lists prepared for the province they are in but also from lists prepared in other provinces. The procedures and principles pertaining to the preparation of said lists shall be established through a regulation."

24. Paragraphs (2) and (3) of Article 58 of the same Law are as follows:

"(2) If the revelation of the identity of persons to be heard as witness is to cause grave danger to them or their relatives, the necessary measures to keep their identities secret shall be taken. The witness whose identity is kept secret is obliged to disclose how and why s/he got to know the events s/he is testifying about. In order for the identity to be kept secret, personal information about the witness shall be kept by the Public prosecutor, judge or the court.

(3) Should the hearing of the witness before those present pose a grave threat to the witness and if this danger cannot be prevented otherwise or endangers the revelation of the material fact, the judge may also hear the witness without the presence of those who hold the right to be present. Audio - visual transmission shall be used during the hearing of the witness. ***The right to ask questions shall be reserved."***

25. Relevant parts of Article 9 with the side heading "*Procedures to be applied in the hearing of witnesses regarding whom a judgment for protective measure has been taken"* of the Law on Witness Protection No. 5276 of 27/12/2007 is as follows:

"(1) According to the provisions of this Law, the second and third paragraphs of Article 58 of the Code of Criminal Procedure shall be applied during the hearing of witnesses regarding whom a cautionary judgment is delivered.

(2) In the event it is adjudged by the court to apply the third paragraph of Article 58 of the Code of Criminal Procedure, the recognition of the witness during the hearing can be prevented by modifying his/her voice and image.

(3) It can also be decided that the witness be heard as per a procedure to be established and determined by the court whereby his/her physical appearance is obstructed in the hall.

(4) In the event that the witness is heard, as per the provisions of Paragraphs one and two, without the presence of those who have the right to be present at the hearing, the statements made by the witness shall be disclosed by the judge to those who have the right to be present at the hearing under the condition that the restrictions specified in Article 58 of the Code of Criminal Procedure are observed.

(5) In the event that the witness is heard as per the provision of paragraph three, in the application of Article 201 of the Code of Criminal Procedure, the questions which are to be asked to the witness must be in line with the objective and proportional to the measures that are being applied as regards the witness within the scope of this Law. To this end, the judge can decide that the questions that are being asked are not addressed to the witness or shall not allow the questions that can reveal the identity of the witness during the hearing of the witness, even if indirectly.

(6) A decision pertaining to the application of the provisions of this article through a delegated judge or through rogation can be taken by the competent court or by the court of venue.

(7) The witness statements taken as per the provision of this Article shall have the consequence of a statement which has been made before those present during the hearing, as per the provisions of the Code of

Criminal Procedure.

(8) In line with the sub-paragraphs (a) and (b) of Paragraph one of Article 5 of this Law, ***the statement of the witness regarding whom a caution is being applied shall not constitute the basis of conviction by itself.***

(9) The provisions of this Article shall be applied during the hearing of the witnesses at the reconnaissance, regarding whom a cautionary judgment has been delivered.

(10) ***The provisions of this article cannot be applied in a way to limit the right to defense."***

26. Article 4 of the same Law is as follows:

"(1) Persons regarding whom the witness protection measure can be applied as per the provisions of this Code are as follows:

a) Those who are heard as witnesses during the criminal procedure and victims of crimes who are heard as witnesses as per Article 236 of the Code of Criminal Procedure No. 5271 of 4/12/2004.

b) The fiancées, spouses even though the bond of marriage no longer persists, antecedents or descendants of blood kins or in-law kins, blood kins or in-law kins including those of the second degree of those who have been heard as per the provisions of the sub-paragraph (a) and those with whom there is filial bond and persons with whom they are in a close relationship.

(2) The witness protection measures can be applied in cases where the lives, bodily integrity or property of those listed in paragraph one or those of their relatives that have been specified in this Law are under grave and serious danger and the protection thereof is compulsory."

27. Article 5 of the same Law is as follows:

(1) Witness protection measures that can be implemented regarding those who are within the scope of this Law are as follows:

a) Recording information on the identity and address thereof and

keeing it confidential and determining a new address for the notifications that will be made to him/her.

b) Hearing him/her without the presence of those who have the right to be present at the hearing or hearing him/her in a special environment where his/her voice or appearance has been altered.

c) Placement of those who are detained or convicted in penal institutions and detention homes which befit their situation.

ç) Ensuring physical protection.

d) Alteration and edit of identification and other related information and documents.

1) Alteration and edit of judicial records, military, tax, civil registry, social security and similar information and records.

2) Alteration and edit of official documents such as national identification card, driver's license, passport, marriage certificate, diplomas and all sorts of licenses.

3) Performance of transactions concerning his/her exercise of his/her rights regarding his/her movable and immovable properties.

e) Provision of financial assistance with the aim of securing his/her livelihood temporarily.

f) Changing the job or the working field of a working person or changing all sorts of establishments of education and training where s/he pursues education and training.

g) Ensuring that s/he lives in another settlement within the country.

ğ) Ensuring that s/he is settled in another country in compliance with the international agreements and the principle of reciprocity.

h) Changing of his/her physical appearance through plastic surgery or without requiring plastic surgery and re-arrangement of identification information in compliance therewith.

(2) One or several of the measures which are written in this article can be applied simultaneously. However, if the same outcome is achievable with a lighter measure, this circumstance shall also be taken into consideration."

28. Paragraph (4) of Article 6 of the same Law is as follows:

"According to the provisions of this Article;

a) In delivering the witness protection judgment; the severity and the gravity of the danger that the person who is protected or his/her relations are faced with, the importance of the offense which is the subject of the investigation and prosecution, the explanations that will be made by the witness, the approximative cost of the measure to be employed, the psychological status of the witness and other particulars of similar status shall be taken into consideration.

b) In the requests to be made a justification must definitely be given and the legal and actual reasons on which the judgment could be based upon shall be provided.

IV. EXAMINATION AND GROUNDS

29. The individual application of the applicant of 17/7/2014 numbered 2014/12906 was examined during the session held by the court on 7/5/2015 and the following were ordered and adjudged:

A. The Applicant's Allegations

30. The applicant has alleged that in the criminal case that he is being tried for, a judgment for conviction has been made regarding him with reliance upon the statements of the anonymous witness which were not reflective of the truth, that he could not make a defense at the Court in his mother tongue, that an interpreter was not assigned to him despite he had notified the Court that he wished to make his defense in Kurdish, that he was not granted the right to defend himself following the recitation of the opinion regarding the merits, that he was out of town on the date when the acts which are attributed to him have taken place, that his request for an expert on the incidents at hand was dismissed by the

Court, that the only evidence concerning the crimes that are attributed to him are the anonymous witness statements and that he was not given the chance to ask questions to this witness and claimed that his right to a fair trial defined in Article 36 of the Constitution has been violated, requesting that the violation be established and pecuniary and non-pecuniary damages be paid.

B. The Constitutional Court's Assessment

1. Admissibility

a. **Alleged Violation of the Right to the Free Assistance of an Interpreter**

31. The applicant has claimed that his right to defense has been violated when he was not allowed to defend himself in his mother tongue despite he had wanted to do so.

32. Paragraph one of Article 36 of the Constitution 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."*

33. The arrangement in Sub-paragraph (e) of Paragraph (3) under Article 6 of the European Convention on Human Rights (the Convention) with regard to the issue is as follows:

> *"3. Everyone charged with a criminal offense has the following minimum rights:*
>
> *...*
>
> *e) Availing of the help of an interpreter free of charge in cases where s/he does not understand nor speak the language which is spoken at Court."*

34. Sub-paragraph (e) of Paragraph (3) under Article 6 of the Convention secures the right to the free assistance of an interpreter when the person to whom a crime has been attributed cannot understand or speak the language that is spoken at the Court. Such right is granted only

to those to whom a crime has been attributed and in order to be able to benefit from such a right whether the accused has the ability to pay or not has no significance (*Ali İlhan Bayar*, App. No: 2013/725, 19/11/2014, § 48).

35. The right to the free assistance of an interpreter shall be applied both to the translation of documents and to oral statements; in both cases, the translation which is needed for the performance of a fair trial has to be done. This right does not necessitate the translation of all words which have been uttered in a hearing or of all of the documents; what needs to be considered is whether the accused is at a level to fully understand and respond to the accusations about him/her (see. *Kamasinski v. Austria*, App. No: 9783/82, 19/12/1989, §§ 74, 83).

36. However, the real issue that needs to be resolved regarding the application at hand is whether or not the liability of the state is valid for all of those accused who want an interpreter. At this point it has to be accepted that the right to the free assistance of an interpreter is a limited right. In other words, the mandate is not to assign an interpreter for all of those who request it but to assign one so as to reap the benefit expected from a fair trial and only for those who do not know, understand and speak the language used during the proceedings. When persons who do not know, understand and speak the language that is being used during the proceedings require the assistance of an interpreter, then the liability of the state to provide translation becomes evident.

37. To determine whether or not such persons have any such needs is the duty of the judge presiding the case. The judge, after interviewing the defendant, should make sure that the defendant would not be harmed as a result of the absence of an interpreter during the proceedings (*Cuscani v. United Kingdom*, App. No: 32771/96, 24/9/2002, § 38)

38. The ECtHR (European Court of Human Rights) indicates that the Article 6 (3) (e) of the Convention introduces a right which can be exercised only by those who do not know the language employed at the court and that a defendant who '*understands*' and '*speaks*' the language of the court cannot insist on his/her request to avail of an interpreter to make a defense by using another, for example, using the ethnic language

to which s/he belongs (*Lagerblom v. Sweden*, App. No: 26891/95, 14/1/2003, §§ 61-64).

39. As per Article 202 of Law No. 5271 if the accused or aggrieved does not speak Turkish to the extent that s/he can express him/herself; the essential points pertaining to the allegation and defense in the trial shall be interpreted through an interpreter appointed by the court. The suspects, aggrieved or witnesses who are heard during the investigation phase shall also benefit from such right. With Article 202 of the Law No. 5271, the suspects/accused who cannot speak Turkish to the extent of not being able to explain their intent are given the opportunity to make their defense in a language other than Turkish. Accordingly, it is provided that persons who in no way can speak or understand Turkish can relay their grievances and make their defense in their mother language or a language which they know.

40. On the other hand, with Paragraph (4) added to Article 202 of the Law No. 5271 on 24/1/2013, the right to the free assistance of an interpreter has been expanded by transcending the criteria which have been laid down in the Convention and the case law of the ECtHR. According to the new rule, a provision was introduced to the effect that the accused can '*upon the recital of the indictment and the delivery of the opinion as to the merits, deliver his/her oral defense in another language which s/he has declared that s/he could better express him/herself in*.' Thus, the accused who '*knows Turkish to the extent of explaining his/her intent*' was given the opportunity to make his/her defense in another language.

41. In the incident at hand, the applicant was taken under custody on 2/6/2011 and from that date on gave his statements in Turkish at the Office of the Chief Public Prosecutor and during questioning throughout the investigation process. During the prosecution phase (i.e. prior to quashing) on the other hand, has he defended himself in Turkish during the first two sessions, and requested to defend himself in Kurdish in the subsequent sessions; yet his request to use an interpreter was not accepted. Following the decision of reversal and the legal amendment, his statements were obtained in the company of an interpreter. In this case, it was concluded that the dismissal of the request of the applicant

who '*understands*' and '*speaks*' the language of the court to avail of an interpreter in order to make defense in the ethnic language to which he belongs is not a restriction of his right to defense, hence not a violation of his right to a fair trial.

42. Due to the reasons explained, it should be decided that the application is inadmissible for being *'manifestly ill-founded*' as it is understood that there is no violation of his right to the free assistance of an interpreter.

b. Alleged Violation of the Right to Defense and the Request for an Expert

43. Indicating that he was not given the right to defend himself after the recital of the opinion concerning the merits and that the request for an expert concerning the circumstances at hand was dismissed by the Court, the Applicant has claimed that his right to a fair trial provided in Article 36 of the Constitution was violated.

44. Article 48 (2) of the Law No. 6216 on the Establishment and Trial Procedures of the Constitutional Court of 30/3/2011 with the side heading '*The conditions for and evaluation of admissibility of individual applications*' is as follows:

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

45. As per Articles 47 (3) and 48(1) and (2) of the Law No. 6216 and respective paragraphs of Article 59 of the Internal Regulation, it is under the responsibility of the Applicant to prove his/her claims on the facts that are the subject matter of the application by way of submitting evidence in relation to such facts and to prove his/her legal allegations by way of making explanations concerning the violation of the provision of the Constitution which has been relied upon (*Veli Özdemir,* App. No: 2013/276, 9/1/2014, 19).

46. The applicant must attach to the application petition the rights and liberties and the provisions of the Constitution which have been relied upon that are claimed to have been violated by the transactions, actions

or negligence of the public power as well as the justifications for the violation, the relied evidence and either the original or a sample of the transactions or decisions that are claimed to have led to such violation. A chronological summary of the transactions, actions or negligence of the public power that are claimed to have led to the violation should be provided within the application petition, and which right within the scope of the individual application and why such right was violated should be explained together with the justifications and evidence thereto (*Veli Özdemir,* App. No: 2013/276, 9/1/2014, 20).

47. Although it is under the responsibility of the Applicant to prove his/her claims on the facts concerning the case by way of submitting evidence in relation to the claim of violation that is the subject matter of the application and to prove his/her legal allegations by way of making explanations about which provision of the Constitution that has been relied upon was violated, the applicant has abstractly claimed that the Court has dismissed his request for an expert concerning the matters at hand, not providing the Constitutional Court with any information or evidence as to in which session, for what reasons and concerning which matters an expert was requested. On the other hand, as the applicant claimed that he was not given the right to defense following the recital of the opinion concerning the merits, it was understood that he was with his counsel during the recital of the opinion concerning the merits that he has mentioned and that his counsel has stated his objections to such opinion concerning the merits in the subsequent sessions.

48. For the reasons explained, since the claims of violation as alleged by the applicant have not been proved by the applicant and as the absence of a violation is evident, it has to be decided that this portion of the application is inadmissible for being '*manifestly ill-founded,*' without any further examination as to other admissibility criteria.

c. Alleged Violation of the Right to Question a Witness

49. The applicant's complaint concerning the violation of the right to question a witness is neither manifestly ill-founded, nor other inadmissibility criteria for this complaint are present. For this reason, it

is necessary to deliver a judgment of admissibility as regards this part of the application.

2. Merits

50. The applicant claims that the sole evidence concerning the crimes of '*possession of explosives and damage to property*' attributed to him are mere anonymous witness statements and that he was not given the opportunity to question this anonymous witness.

51. In order to be able to conduct a trial which is equitable in general terms, it is obligatory to provide the parties with the appropriate opportunities to present their claims under the light of the principles of *"equality of arms"* and *"adversarial trial"*. It is necessary to provide the parties with the appropriate opportunities as regards presenting their evidence and having them examined, including the witness evidence. In this sense, claims of imbalance and unfairness concerning the evidence have to be evaluated under the light of the entirety of the trial (*Muhittin Kaya and Muhittin Kaya İnşaat Taahhüt Madencilik Gıda Turizm Pazarlama Sanayi ve Ticaret Limited Şirketi*, App. No: 2013/1213, 4/12/2013, § 27).

52. In a criminal procedure, the right of the accused to interrogate the witnesses against him/her or to have them interrogated and to request the assurance that witnesses in favour of the accused are also summoned and heard under the same conditions as those against him/her has been regulated in Article 6 (3) (d) of the Convention. For this reason, the applicant's claim that a witness has not been heard has to be considered within the scope of Article 36 of the Constitution and Article 6 (3) (d) of the Convention.

53. Article 6 (3) (d) of the Convention is as follows:

> *"(3) Everyone charged with an offense has the following minimum rights:*
>
> *...*
>
> *d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;"*

54. Article 6 (3) (d) of the Convention provides the criminally charged person with two rights: The first of these rights is the right to cross-examine the witnesses against him/her, in other words the right to adversely question them in the public trial and the second is the right to ensure that his/her witnesses are summoned and heard under the same conditions as those of the claimant so as to ensure the equality of arms (*Ali İlhan Bayar*, App. No: 2013/725, 19/11/2014, § 36).

55. In order for all the evidence to be discussed during the prosecution, as a rule, such evidence has to be produced in a public hearing and before the accused. While this rule is not without exceptions, if a conviction is, merely or to a certain extent, based on the statements given by a person whom the accused could not have the opportunity of examining or having examined during the phase of investigation or trial, the rights of the accused shall be restricted in a way that does not comply with the guarantees in Article 6 of the Convention. If there is a single witness to the incident and if the judgment is to be established only with reliance upon the statement of this witness, the witness must be heard at the trial and questioned by the accused. A judgment of conviction cannot be established with reliance upon the statement given by such witness at a time when the accused had not been interrogated (*Atila Oğuz Boyalı*, App. No: 2013/99, 20/3/2014, § 46; for a resolution of the ECtHR to a similar effect, see. *Delta v. France*, App. No: 11444/85, 19/12/1990, § 36-37).

56. The ECtHR, in addition to the principles mentioned above, agrees that Article 6 (1) and (3) (d) of the Convention have to give the accused the opportunity to object the statements made by the witness declaring against thim/her during the taking of the witness statement or at later stages of the proceedings (see. *Van Mechelen and Others v. The Netherlands*, App. No: 21363/93, 21364/93, 21427/93 and 22056/93, 23/4/1997, § 51 and *Lüdi v. Switzerland*, App. No: 12433/86, 15/6/1992, § 49; *Hümmer v. Germany*, App. No: 26171/07, 19/07/2012, § 38).

57. In some cases where the accused have the knowledge of the identity of the witness, this may pose a danger for the witness or for his/her affinities. Those who are to service as witnesses might have rightful reasons to fear for retaliation. Furthermore, in the fight against organized

crime, keeping the identity of the witness confidential must not be underestimated. The increase in organized crime might require that certain measures are taken. For this reason, if the identity of a witness is kept confidential, it has to be considered as well that the defense can face with hardships which do not exist under normal conditions during criminal proceedings.

58. In such cases, it is also probable that the defense might be bereaved of the opportunity to try whether the person whose identity is kept confidential is prejudiced, untrustworthy or someone who acts with enmity or to cast suspicion over the credibility of what s/he will say. On the other hand, nonattendance to the trial of persons the identity of whom are kept confidential also hamper the trying judges' observation of the conduct and behavior of such persons and as such, their construct of their own impressions regarding the credibility of such persons. Regarding this issue, the ECtHR underscores that adequate balancing factors including procedural measures to allow for a fair and appropriate evaluation of the credibility of the statement to be obtained must be present (see. *Al-Khawaja and Tahery v. United Kingdom* [BD], App. No: 26766/05 and 22228/06, 15/12/2011, § 147; *Ellis, Simms and Martin v. United Kingdom*, App. No: 46099/06 and 46699/06, § 78, *Pesukic v. Switzerland*, App. No: 25088/07, 6/12/2012, § 45).

59. According to the ECtHR, the fact that the recount of anonymous witnesses have been taken as the basis for the judgment is not, under all circumstances, incongruous with the Convention. Although Article 6 of the Convention does not explicitly require that the interests of the witnesses and of the victims who have been summoned as special witnesses are taken into consideration, the interests of such persons which are generally covered under Article 8 of the Convention such as their lives, freedoms and safety can also be endangered. Such interests of witnesses and victims are under the protection of the material provisions of the Convention. In such cases, by way of handling Article 6 (3) (d) and Article 6 (1) of the Convention jointly, the interests of the accused and the interests of the witnesses have to be adequately balanced through procedures implemented by judicial authorities *(Doorson v. The Netherlands*, App. No: 20524/92, 26/03/1996, §§ 69-70, 72).

60. Indeed, the witness, due to the information that s/he has provided by performing his/her public duty, has the right to request that him/herself and his/her affinities or property are protected by reason of his/her being a witness. For it can very well be possible that a witness, unprotected and concerned about his/her safety or about that of his/her affinities, will not provide an account of what s/he knows, even pending punishment. Accordingly, taking precautions required to ensure that the witness performing his/her public duty is not harmed as a result of the information s/he has provided is the responsibility of the State (AYM, E. 2008/12, K.2011/104, Date of Judgment: 16/6/2011).

61. Within this context, in Article 58 of the Law No. 5271, two types of witness protection measures have been prescribed. The first of these concerns holding the witness' identity confidential while the second is the hearing of the witness by the judge without the presence of the persons who have the right to be present. Then, in Article 5 of the Law No. 5726, measures such as recording and holding the witness' identity and address information confidential and designating another address for notifications to be made to him/her, hearing of the witness without the presence of those who have the right to be present or hearing the witness in a special environment by altering his/her voice or appearance etc. have been regulated (§§ 26-27).

62. In order to be able to resort to witness protection measures in compliance with the Law No. 5726, there has to be an investigation or a prosecution concerning one of the offenses identified in the Law, the person on whom the precaution would be applied has to be a witness or an affinity to the witness, the life, bodily integrity and property of such person has to be under grave and serious danger, the measure has to be proportionate, and there has to be a decision by competent authorities (§§ 26-27).

63. ECtHR agrees that the status of the witnesses not present at the hearing room is similar to that of anonymous witnesses (see. *Ellis, Simms and* Martin/*United Kingdom*, § 78). For this reason, while assessing the fairness of a trial where anonymous witnesses who have been summoned to render a verbal statement before the bench, the ECtHR

examines first of all whether there are reasonable justifications to conceal the identity of the witness or not. Secondly, it evaluates whether or not the witness' statement is the sole or definitive basis on which the judgment to be made relies on. Thirdly, in cases where the judgment relies to a greater extent or solely on the anonymous witness' statement, it subjects the trials to detailed scrutiny (*Al-Khawaja and Tahery v. United Kingdom,* §§ 119 and 147*; Pesukic v. Switzerland*, § 45).

64. In cases where anonymous witnesses are involved, the ECtHR has accepted the witnesses' fear that the accused will seek revenge from them as the reason for their unwillingness to reveal their identity to be a valid reason in the case of *Al-Khawaja and Tahery v. United Kingdom*. However, for the ECtHR, a subjective fear is not sufficient and the trying court has to look into whether such fear has objective grounds or not (see. *Marcus Ellis, Rodrigo Simms and Nathan Antonio Martin v. United Kingdom,* App. No: 46099/06 and 46699/06, 10/4/2012, § 76).

65. According to the ECtHR, '*uniqueness of evidence*' shall construe as the presence of a single evidence against the accused and the '*decisiveness of the evidence*' shall construe as the fact that it is one decisive evidence which tends to seriously effect the outcome of the case. Within this context, the stronger the other evidence, the lesser the possibility of the decisiveness of the statement of the anonymous witness (see. *Marcus Ellis, Rodrigo Simms and Nathan Antonio Martin v. United Kingdom,* § 77). In this sense, in cases where the statement provided by the anonymous witness is the sole reason or the decisive aspect of the judgment of conviction, procedural transactions must be scrutinized in as much detail as possible. In order for the credibility of the statement given to be appropriately evaluated, one must be sure of the presence of balancing aspects between the parties, including strong guarantees concerning the procedure (see. *Al-Khawaja and Tahery v. United Kingdom,* § 147).

66. In one of its judgments it has made in the context of concrete norm control also by referencing the decisions of the ECtHR, the Constitutional Court has stated that; it would be possible to keep the identity of the witness confidential as long as a reason enough to justify his/her protection against an unfair intervention from the accused

party is present under the condition that the trial as a whole is fair, that neither the decision of conviction can be solely based on the statement of the witness the identity of whom is not revealed, nor such a decision can be held as a substantial evidence, that against such statements given outside of the open session, remedial measures to guarantee the opportunity to question the witness' and his/her statement's credibility must be provided only for the defense, that restrictions on the right to defense must be kept at a minimum and that such restrictions have to be requisite to ensure the protection of the accused and that the interests of the accused must be counterbalanced with those of the witness making statements against him/her (Constitutional Court, E. 2008/12, K.2011/104, Date of Decision: 16/6/2011).

67. Hence, the following rules in respective Articles have been set out: in Article 9 (4) of the Law No. 5726, that the statements made by the witness whose identity is concealed shall be imparted by the judge to those who have the right to be present at the trial under the condition that the restrictions specified in Article 58 of the Law No. 5271 are adhered to; in paragraph (8), as per Article 5 (1) (a) and (b) of the same Law, that the statement of the cautioned witness *per se* shall not provide the basis for judgment; in paragraph (10), that the provisions of the Article cannot be applied in a way to impose restrictions on the right to defense; in Article 58 (2) of the Law No. 5271, that the witness whose identity is concealed is liable to explain why and how s/he has acknowledged the incidents s/he is a witness to; and in paragraph (3), that the right of the accused and of his/her counsel to ask questions shall be reserved. Thus, in line with the provisions of the Law No. 5271, witness statements obtained in compliance with the stated rules shall have the force of statements made before those present at the trial. Accordingly, considering the said guarantees which have been agreed upon in favor of the accused, it is seen that the witness' right to request protection for him/herself or for his/her affinities and property as a result of his/her being witness and the rights of the accused within the scope of the criteria for a fair trial are fairly balanced (Constitutional Court, E. 2008/12, K.2011/104, Date of Decision: 16/6/2011).

68. In this case, it has to be considered, firstly, whether or not reasonable justifications for the concealment of the identity of the witness are present and secondly, whether the statement of the anonymous witness is the only or the decisive grounds for the judgment to be made. Thirdly, in cases where the judgment is to a great extent or solely based on the statement of the anonymous witness, the judgment has to be subjected to detailed scrutiny. If the witness evidence which has not been questioned by the accused or his/her counsel so as to ascertain the accuracy and credibility thereof is the main or the decisive evidence on which the judgment of the court is based upon and if a procedure providing balancing guarantees has not been prescribed, hence the probability that the right to a fair trial is violated.

69. It is understood from the application form and the documents attached that no justification was provided as to why the identity of the witness was concealed. Information pertaining to the reputation, criminal record and credibility of the witness are also not available in the file.

70. In the case at hand, the statements of the anonymous witness were taken by the Public Prosecutor and the court during the process of investigation and prosecution, respectively. The anonymous witness was heard by the court in between the sessions and without notifying the applicant. However, in session 3 of the trial on 5/4/2012 at a stage before the hearing, the Court of First Instance gave the applicant and his counsel seven days to submit the matters which they would like to ask to the anonymous witness. Furthermore, in session 5 on 3/7/2012, the anonymous witness statements as established by the court were recited. The counsel of the applicant has reported his refusal of the statements of the anonymous witness whereas the applicant's statements have been annotated in the minutes as: *"It was seen that he spoke in Kurdish; which was not understood."*

71. In the application, concerning the explosions which took place in the TEİAŞ transformer center and in the Yunus Emre Tea House and the incident where the windows of a municipality vehicle were blown as a result of a bomb attack, it was observed that the minutes of incident and the statements of the anonymous witness were considered as basis for

the conviction where the judgment essentially relied on the recital of the anonymous witness. In other words, it is understood that the statement of the anonymous witness is a decisive evidence for the incidents concerned. That is because no charges were made on anyoneup until the statement of the anonymous witness. The link between the material incidents that happened and the applicant has been established by taking the statement of the anonymous witness into consideration.

72. Once it is established that the statement of the anonymous witness is the decisive evidence upon which the decision of the court relies, it has to be also ascertained, then, whether a procedure providing balancing guarantees has been pursued or not. Upon the scrutiny of whether or not adequate balancing factors were present in the case at hand it was seen that so as to protect the rights of the defense the trying court has given seven days to the accused and his counsel to submit the issues they would like to ask to the anonymous witness and that in session 5 on 3/7/2012 the statements of the anonymous witness were recited before the parties. Since the witness was heard by the bench, all the members thereof were able to directly observe the witness' reactions.

73. However, since the applicant and the counsel were not present during the establishment of the statements of the anonymous witness, they did not have the chance to have personal impressions of his/her responses to the questions asked. For this reason, the court's attention could not be drawn on the conflicts between the witness' statements. In other words, the defense, as such, could not test the anonymous witness' credibility through interrogation. The statements of the witness concerned were later recited at the Court of First Instance before the accused (the applicant) and his counsel and although the applicant was asked about what he would say against the witness statements, this circumstance cannot be considered as an adequate opportunity to object to witness statements.

74. Although the witness has declared during the investigation phase that s/he overheard that the incidents concerned were perpetrated by the applicant as they were speaking amongst them, during the prosecution phase s/he has declared that s/he had heard those from someone else.

In other words, come the prosecution phase, the anonymous witness' statements have changed. The court failed to remedy the conflicts between the altered statements. Since the statements of the witness cannot be known beforehand, it shall not suffice to remedy such concerns when the defense is asked to notify the court beforehand of its questions to test the credibility of the witness.

75. As a result, it was seen that no justification as to why the identity of the witness was concealed was provided, that the judgment decisively relied on the statement of the anonymous witness and that the interests of the witness and the rights of the accused within the scope of criteria for a fair trial were not fairly balanced considering the guarantees taken in favor of the accused (the applicant).

76. For these reasons, it should be decided that the applicant's right to interrogate the witness giving statements against him which is guaranteed in Article 36 of the Constitution was violated.

3. Article 50 of the Law 6216

77. Article 50 (2) of the Law numbered 6216 with the side heading *''Decisions"* is as follows:

> *"If the determined violation arises out of a court judgment, 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 judgment 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 judgment of violation."*

78. The applicant has requested that the judgment be sent to the court concerned so as to remedy the violation and the outcomes thereof which arose from a court decision.

79. The identified violation arises from a court decision and since there is legal benefit in the remedy of the violations and the outcomes

thereof, it has to be decided that the file be sent to the court concerned for a retrial.

80. In the examination of the application, it was concluded that Article 36 of the Constitution was violated. The applicant has made a request for TRY 50,000.00 in pecuniary and TRY 50,000.00 in non-pecuniary damages.

81. Although a request for pecuniary damages has been made by the applicant, since it is understood that there is no link of causality between the violation that has been identified and the material damage claimed, it has to be decided that the requests of the applicant regarding pecuniary damages be dismissed.

82. Since it was considered that the establishment of the violation of the applicant's right to a fair trial regarding the application and the making of a decision concerning retrial are sufficiently satisfactory, it has to be decided that the request for non-pecuniary damages as a result of the intervention of the right to a fair trial be dismissed.

83. It should be decided that the trial expenses of TRY 1,706.10 composed of the fee of TRY 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 **UNANIMOUSLY** held on 7/5/2015;

A. That;

1. The claim that the right to the free assistance of an interpreter has been violated,

2. The claims that the right to defense has been restricted and the request for an expert has been dismissed,

are **INADMISSIBLE** on grounds of being 'manifestly ill-founded'

3. The claim that the right to interrogate the witness testifying against as safeguarded under Article 36 of the Constitution is violated is **ADMISSIBLE**,

4. The right to interrogate the witness testifying against as safeguarded under Article 36 of the Constitution has been **VIOLATED**

B. The judgment be **SENT** to the relevant Court for a retrial in order for the violation and the consequences thereof to be removed,

C. The requests of the applicant for compensation be **DISMISSED**,

D. The trial expenses of TRY 1,706.10 TL 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**,

E. That the payment be made within four months as of the date of application by the applicant to the Ministry of Finance following the notification of the judgment; 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.

RIGHTS TO ELECT, STAND FOR ELECTION AND ENGAGE IN POLITICAL ACTIVITIES (ARTICLE 64)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

GRAND UNITY PARTY AND FECICITY PARTY

(Application no. 2014/8843)

PLENARY
JUDGMENT

President	**:** Zühtü ARSLAN
Vice President	: Burhan ÜSTÜN
Vice President	: Engin YILDIRIM
Justices	**:** Serdar ÖZGÜLDÜR
	Serruh KALELİ
	Osman Alifeyyaz PAKSÜT
	Recep KÖMÜRCÜ
	Hicabi DURSUN
	Celal Mümtaz AKINCI
	Erdal TERCAN
	Muammer TOPAL
	M. Emin KUZ
	Hasan Tahsin GÖKCAN
	Kadir ÖZKAYA
	Rıdvan GÜLEÇ
Rapporteur	**:** Murat ŞEN
Applicant 1	**:** Grand Unity Party **(***Büyük Birlik Partisi*)
Representative	: Mustafa DESTİCİ
Applicant 2	**:** Felicity Party **(***Saadet Partisi*)
Representative	**:** Mustafa KAMALAK

I. SUBJECT-MATTER OF THE APPLICATION

1. The application concerns the alleged violation of the right of election on account of the condition of receiving 3% votes at the general

parliamentary elections which is sought for the political parties' entitlement to be granted state aid.

II. APPLICATION PROCESS

2. An application was directly lodged with the Constitutional Court by the Grand Unity Party (*"BBP"*) and the Felicity Party (*"SP"*) on 12 June 2014 and 24 June 2014, respectively. Following the preliminary examination of the petition and annexes thereto in administrative terms, no deficiency which would preclude the referral of the application to the Commission was found.

3. It was decided –by the First Commission of the Second Section, on 30 June 2014, as regards the applicant Grand Unity Party's application no. 2014/8843 and by the Second Commission of the Second Section, on 30 September 2014, as regards the other applicant Felicity Party's application no. 2014/10107– that the admissibility examinations be conducted by the Section.

4. It was subsequently decided that these two applications (nos. 2014/10107 and 2014/8843) lodged by the SP and the BBP be joined having regard to the same subject-matter of the applications; and that the examination be made over the joined case-file.

5. On 5 September 2014 the Section Head decided to send a copy of the application documents to the Ministry of Justice ("the Ministry") for its observations.

6. The impugned facts were notified to the Ministry on 5 September 2014, and the Ministry submitted its observations to the Court on 10 November 2014 following an extension of the time-limit fixed for that response.

7. On 13 November 2014 the Ministry's observations were notified to the applicant BBP, which submitted its counter-statements to the Court on 27 November 2014.

8. At the end of the session held by the Second Section on 1 December 2015, the application was referred to the Plenary, pursuant to Article 28

§ 3 of the Internal Regulations of the Court, as its examination was to be made by the Plenary in consideration of its nature.

III. THE FACTS

A. The Circumstances of the Case

9. As stated in the application form and annexes thereto, the impugned facts may be summarized as follows:

10. The Supreme Election Board's decision, dated 22 June 2011 and no. K.1070, which demonstrated that at the end of the 24th Period General Parliamentary Election of 12 June 2011, the applicant BBP and the other applicant SP received votes at the rates of 0,75% and 1,26% respectively, was promulgated on the Official Gazette dated 23 June 2011 and no. 27973.

11. As the applicants failed to pass the election threshold of 10% stated in Article 33 § 1 of the Law on Election of Deputies, dated 10 June 1983 and no. 2839, at the 24th Period General Parliamentarian Election, they could not obtain any seat in the National Assembly. They were also deprived of the state aid granted to political parties as they did not receive votes over the threshold of 7% provided for in Additional Article 1 § 5 of the Political Parties Law dated 22 April 1983 and no. 2820.

12. Following the amendment by Law dated 2 March 2014 and no. 6529 to Additional Article 1 of Law no. 2820, the condition set for the political parties' entitlement to state aid, which was to obtain over the threshold of 7% out of the total valid votes of the parliamentary elections, was reduced to 3%.

13. The applicants lodged an individual application, maintaining that if they received -in the parliamentary election to be held in 2015- votes of the same rate with that of the 24th Period General Parliamentary Election, the disputed provisions would apply; and that if they were deprived of state aid for that reason, this would constitute a violation.

14. At the end of the 25th Period General Parliamentary Election held on 7 July 2015 before the examination of this application, the applicants

engaged in electoral alliance under the roof of the SP and received vote at the rate of 2,06%. Rates of votes received by the BBP and the SP in the 26th Period General Parliamentary Election were 0,53% and 0,68% respectively.

B. Relevant Law

15. Article 33 § 1 of Law no. 2839 reads as follows:

"No candidates of a political party which has not obtained more than 10% of all of the valid votes throughout the country in general elections or, in the case of by-elections, in all of the by-elections districts, shall enter the parliament. The election of an independent candidate who has stood for elections in the list of candidates of a political party shall also depend on that political party's exceeding this 10% threshold throughout the country during general election or in all of the by-elections districts during by-elections".

16. Article 61 of Law no. 2820 reads as follows:

"(Added by Article 6 of Law no. 4445 and dated 12 August 1999) Revenues of the political parties shall not be contrary to their purposes.

Political parties may obtain revenues stated below:

a) Entrance fee and subscription fee taken from the party members,

b) Deputy fees taken from the party deputies,

c) (Amended by Article 6 of the Law no. 3420, dated 31/3/1988) Special fees taken from the deputyship, mayoralty, membership of the city council, membership of the provincial council (such fees shall be determined and collected by the competent central decision-making organs according to the principles of Article 64),

d) Revenues obtained through the sale of party flag, pennant, badge or any other insignias,

e) Sale values of party publications,

f) Money received in return for providing membership cards and party notebooks, receipts and papers,

g) Revenues obtained from social activities such as balls, entertainments and concerts organised by the party,

h) Revenues obtained from party property,

i) Donations,

j) (Added by Article 1 of the Law no. 3032, dated 27/6/1984) State aids.

Tax, levy and legal fee shall, in any condition, be imposed in relation to the incomes of the written sources in the subparagraphs, excluding the revenues obtained from party properties stated in the subparagraph (h)."

17. Additional Article 1 § 1 of Law no. 2820 reads as follows:

"Political parties, which have been granted by the Supreme Board of Elections with the right to attend the latest general parliamentary elections and which have exceeded the general threshold indicated in Article 33 of Law no. 2839 on the Parliamentarian Elections, shall -every year- be allocated an appropriation to be paid by the Treasury the amount of which shall be equal to the 2/5000 of the amount set out under "Table (B)" of the current year's general budget revenues.

(First sentence of this paragraph has been amended by Article 21 of Law no. 4445 and dated 12/8/1999) Every year, this appropriation shall be distributed amongst the political parties qualified for State aid in accordance with the above-cited paragraph in proportion to the number of total valid votes received by the parties announced by the Supreme Board of Elections after the general elections. Such payments must be made within ten days following the enforcement of that year's general budget law.

(Third paragraph has been repealed by Article 21 of Law no. 4445 and dated 12/8/1999)

(Amended by Article 4 of Law no. 6529 and dated 2/3/2014) This aid shall be used solely for the needs or activities of the political party.

(Amended by Article 4 of Law no. 6529 and dated 2/3/2014) Political parties, which have received more than 3% of the total valid votes at the

general elections, shall as well be provided with State aid. The amount of the aid to be provided shall be determined in proportion to the amount paid -in line with paragraph two- to the least-paid-political party and to the valid votes received in the last general elections. However, this amount cannot be less than 1 million Turkish liras. In order to meet this expense, every year an appropriation shall be put into the budget of the Ministry of Finance.

(Added by Article 1 of Law no. 3420 and dated 7/8/1988) The amount of aid stipulated in the paragraphs above shall be paid to the eligible political parties as three folds in the year of the general elections, and as two folds in the year of local elections. Where these two elections are held in the same year, the amount of the payment cannot exceed three-folds. The folded payments that will be made in line with this paragraph shall be made within ten days following the announcement of the decision of the Supreme Board of Elections concerning the elections calendar.

((Added by Article 21 of Law no. 4445 and dated 12/8/1999) The amount corresponding to two folds of the total value of the proceeds registered as revenue and of the immovable the title deeds of which have been registered with the Treasury shall be subtracted from the amount of the State aid that will be provided in line with this article to the political parties, whose proceeds have been registered with the Treasury as revenue and whose immovable properties have been registered with the Treasury at the land registry log under the scope of the provision enshrined in Article 76 of this Law herewith."

IV. EXAMINATION AND GROUNDS

18. The Constitutional Court, at its session of 10 December 2015, examined the application and decided as follows:

A. The Applicants' Allegations

19. The applicants maintained that Article 68 of the Constitution set forth that political parties shall be provided with adequate financial means in an equitable manner; that the inability of the political parties -which could not exceed the election threshold- to receive state aid was

contrary to the principles of justice and equality and caused inequality of opportunity amongst political parties; and that as the impugned provisions would be most probably applied in terms of the elections to be held in 2015, they were potential victims of this amendment. They accordingly alleged that their rights enshrined in Articles 2, 5, 10, 13, 68, 69 and 90 of the Constitution had been violated.

20. The applicants also requested the Court to refer the application to the Plenary of the Court in order for the annulment of the impugned provision on the state aid. One of the applicant, namely the SP, also requested to be retroactively paid the relevant amount of state aid.

B. The Court's Assessment

21. In its observations, the Ministry of Justice ("the Ministry") primarily made assessments on the basis of the notion "potential victim". In this sense, making a reference to the case-law of the European Court of Human Rights ("the ECHR"), the Ministry indicated that the ECHR interpreted the notion of victim autonomously and irrespective of domestic rules and that it thereby recognized the potential victim status. The Ministry however reminded that, pursuant to Article 46 § 1 of the Code on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011 and no. 6216, an individual application may be lodged only by those whose current and personal right had been directly affected on account of an act, action or negligence allegedly giving rise to a violation.

22. In its observations as to the merits, the Ministry noted that the ECHR had already rendered a decision in a case against Turkey where the latter examined the complaints concerning the rights to elect and stand for elections as well as the prohibition of discrimination as the political parties receiving under 7% of the valid votes at the general elections could not be granted state aid (see Özgürlük ve Dayanışma Partisi v. Turkey, no. 7819/03, 10 May 2012). The Ministry stressed that in this decision, the ECHR found no violation of the prohibition of discrimination enshrined in Article 14 of the European Convention on Human Rights ("the Convention") in conjunction with Article 3 of the Additional Protocol no. 1, concluding that the threshold which triggered

eligibility for state aid in Turkey at the relevant time (7%) was the highest among the member states of the Council of Europe; however, this high threshold did not provide a monopoly to one political party for the allocation of the aid, and several political parties were entitled to this aid; and that the rates of the applicant party's votes in the preceding elections were substantially below the minimum level of electoral support and would also have been deemed insufficient for the purposes of obtaining such funding in several other European countries.

23. In its counter-statements against the Ministry's observations, the applicant BBP noted in short that the application was admissible; and that the ECHR made a limited examination on the basis of discrimination. It accordingly emphasized the importance of financial support given to political parties for democracy.

24. Maintaining that Article 68 of the Constitution set forth that political parties shall be provided with adequate financial means in an equitable manner; that the inability of the political parties -which could not exceed the election threshold- to receive state aid was contrary to the principles of justice and equality and caused inequality of opportunity amongst political parties, the applicants alleged that their rights set out in Articles 2, 5, 10, 13, 68, 69 and 90 of the Constitution had been violated. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). It has been therefore concluded that the applicants' complaints mainly concern the rights to stand for election and engage in political activities and must be accordingly examined under Article 67 of the Constitution.

25. Besides, the question whether the applicants, who lodged an individual application on account of a legislative act likely to be applied in respect of them in the future –regard being had to the application date–, have victim status must be discussed at the outset.

1. Admissibility

26. Given the rate of votes they received at the 24th General Parliamentary Election, which was held in 2011, the applicants alleged

that their probable inability to be entitled to state aid, pursuant to Additional Article 1 of Law no. 2820, if they received the same rate of votes also during the general elections of 2015 was contrary to the rights to stand for elections and engage in political activities enshrined in Article 67 of the Constitution. They accordingly requested annulment of the impugned provision of law.

27. Article 148 § 3 of the Constitution reads 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. …"*

28. Article 45 § 1, titled *"Right to individual application"*, of the Code no. 6216 reads as follows:

> *"Everyone can apply to the Constitutional Court based on the claim that any 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."*

29. Article 46 § 1, titled *"Persons who have the right to individual application"*, of the Code no. 6216 reads 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 allegedly resulting in the violation."*

30. In Article 46, titled *"Persons who have the right to individual application"*, of the Code no. 6216, those who are entitled to lodge an individual application are enumerated. As per subparagraph 1 thereof, an individual may lodge an individual application with the Court on condition of co-existence of three basic pre-requisites, namely "violation of one of the applicant's current rights" due to any impugned public act, action or negligence allegedly giving rise to a violation; "personal" and "direct" effect of this violation on the applicant; and the applicant's claim to have victim status as a result thereof (see *Fethi Ahmet Özer*, no. 2013/6179, 20 March 2014, § 24).

31. In the present case, in view of the results of the general parliamentary election of 2011, the applicant political parties lodged an individual application based on their probable inability to be entitled to the state aid of 3% as they will not probably receive the necessary rate of votes in 2015 general elections. In this sense, they alleged that the impugned legislative act likely to be applied in respect of them would lead to a violation. Therefore, the application is based on the probable outcome of the general parliamentary elections to be held in 2015. Under these circumstances, it is not possible to say that Additional Article 1 of Law no. 2820 will certainly apply to the applicants as of the application date. Consequently, it cannot be said that the applicants have "victim" status at the date of application.

32. On the other hand, as of the date when the applicants' application has been under examination, two separate general parliamentary elections were held in 2015, at the end of which the applicant political parties failed to receive 3% of valid votes. If the present case is examined in this respect, it is explicit that the impugned provision of law has borne unfavourable consequences for the applicants and they cannot be therefore entitled to state aid. Accordingly, given the date when the case is under discussion, the applicants should be considered to have "victim" status.

33. Article 45 § 3, titled *"Right to individual application"*, of Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, reads as follows:

> *"Individual applications cannot be made directly against legislative transactions and regulatory administrative transactions and similarly, the rulings of the Constitutional Court and transactions that have been excluded from judicial review by the Constitution cannot be the subject of individual application."*

34. It is accordingly set forth that an individual application cannot be lodged against the impugned provision of law and legislative acts.

35. Individual application is a constitutional safeguard whereby violations of fundamental rights sustained by individuals are found

and which involves effective means for redress of the violation found. However, individual application to the Constitutional Court has not been introduced as a remedy whereby an alleged unconstitutionality of a public arrangement could be raised in an abstract manner. In case of violation of any fundamental rights and freedoms due to a legislative act or regulatory administrative action, an individual application cannot be lodged directly against such actions but against an act, action and negligence resulting from the implementation of this legislative or regulatory administrative action (see *Süleyman Erte*, no. 2013/469, 16 April 2013, §§ 15, 17; and *Serkan Acar*, no. 2013/1613, 2 October 2013, § 37).

36. It appears that allegations raised by the applicants, which could not receive the state aid for failing to exceed the electoral threshold of 3% at the 24th General Parliamentary Elections, are not –as of the date when the application was adjudicated– directly against the legislative act but against the implicit action resulting from the implementation of this legislative act. It must be therefore accepted that the applicants have victim status within the meaning of individual application.

37. The application was declared admissible for not being manifestly ill-founded and there being no ground declaring it inadmissible. However, Justice Mr. Hicabi Dursun did not agree with this conclusion.

2. Merits

38. As stated in Additional Article 1 § 1 of Law no. 2820, in order for a political party to be entitled to state aid, it must be granted by the Supreme Board of Elections with the right to attend the latest general parliamentary elections and it must exceed the general threshold of 10% indicated in Article 33 of Law no. 2839. However, according to the first sentence of Article 1 § 4, if a political party has received over 3% of the valid votes, it is entitled to state aid even if it has not exceeded the general threshold stated in Article 33 of Law no. 2839. As a result, the pre-requisite for a political party to be granted state aid is to attend the general parliamentary elections and to receive over 3% of valid votes at these elections.

39. Article 67 § 1, titled *"Rights to elect, to stand for elections and to engage in political activities"*, of the Constitution reads as follows:

> *"In conformity with the conditions set forth in the law, citizens have the rights to elect, to stand for elections, to engage in political activities independently or in a political party, and to take part in a referendum."*

40. The last paragraph of Article 68 of the Constitution reads as follows:

> *"The State shall provide the political parties with adequate financial means in an equitable manner. The principles regarding aid to political parties, as well as collection of dues and donations are regulated by law."*

41. Article 3 of the Protocol no. 1 to the Convention reads 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."*

42. In Article 67 of the Constitution, the rights to elect, to stand for election as well as to engage in political activities either independently or within a political party are enshrined. Political parties regarded as indispensable elements of pluralist democratic regimes are institutions which play a decisive role in the formation of national will, sound functioning of constitutional regime and existence of political order (see *Şeyhmus Turan*, no. 2014/9894, 22 June 2015, § 66). Therefore, political parties are described as indispensable elements of the democratic political life by Article 68 of the Constitution in the last paragraph of which it is set out that they shall be granted state aid in an adequate and equitable manner.

43. Similarly, the ECHR recognises the "right of free election" as one of the most significant principles of the democracy, which is the primary element of the European public order. The ECHR has noted that the rights safeguarded under Article 3 of the Additional Protocol no.1 to the Convention are of vital importance for the establishment and maintenance of foundations of an effective and sound democracy based

on rule of law. It is explicitly stated in the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights. Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it (see *United Communist Party of Turkey and Others v. Turkey*; no. 19392/92, 30 January 1998, § 45; *Mathieu-Mohin and Clerfayt v. Belgium*, no. 9267/81, 2 March 1987, § 47; *Ždanoka v. Latvia*, no. 58278/22, 16 March 2006, §§ 98 and 103; and *Yumak and Sadak v. Turkey* [GC], no. 10226/03, 8 July 2008, § 105).

44. In order for the improvement and maintenance of pluralist democracies, it is essential that the rights to elect, stand for elections as well as engage in political activities exist and are also ensured to be enjoyed during the elections along with the safeguards provided by contemporary democracies. Therefore, these rights must be not only theoretical or illusory but also practical and effective (see *United Communist Party of Turkey and Others v. Turkey*, § 33).

45. With respect to individual applications lodged under the rights to elect, stand for elections as well as engage in political activities enshrined in Article 67 of the Constitution, the Constitutional Court's duty is, due to the subsidiarity nature of individual application mechanism as an extraordinary remedy, to examine and ascertain whether there is any interference with the rights in question; if any, whether the impugned interference has impaired the essence of that right; whether any legitimate aim has been pursued; whether the right has been restricted to the extent that it would undermine its efficiency; and whether the means applied have been proportionate.

46. Political parties are to have adequate financial means, either non-cash or in cash, which are necessary for the fulfilment of their above-mentioned roles. In cases where political parties ensuring manifestation of "national will" by way of attending parliamentary and local elections are not adequately supported by the public, depriving them of the

opportunity to receive state aid to the extent required by the multi-party democratic order may cause them to face the threat of being under influence and pressure of financially-strong individuals and institutions. Such a threat impairing the necessity that intra-party activities must comply with the principles of democracy may be eliminated only through state aid (see the Court's judgment no. E.1988/39 K.1989/29, 6 July 1989).

47. Providing political parties with adequate financial means in an equitable manner by the State is also introduced as an obligation by the last paragraph of Article 68 of the Constitution. In this sense, it is explicit that setting a threshold of 3%, by virtue of Additional Article 1 of Law no. 2820, for the political parties' entitlement to state aid constitutes an interference with the rights to stand for election and engage in political activities. Another issue required to be also discussed is whether introducing certain criteria for being entitled to state aid had infringed the essence of the right to stand for election to the extent that would undermine its efficiency and whether the means applied have been proportionate.

48. In the Recommendation of the Parliamentary Assembly of the Council of Europe, no. 1516 and dated 22 May 2001, on the financing of political parties, it is stressed that political parties need funding in order to get a possibility to appear on the political scene as well as to get political support for its ideas, and it is thereby recalled that arrangements as to political parties should be made in consideration of these facts. Besides, the European Commission for Democracy through Law (Venice Commission) adopted, at its 46th Plenary Meeting on 9-10 March 2001, "the Guidelines on the Financing of Political Parties". According to the Guidelines, public funding should cover each party represented in the parliamentary. However, in order to ensure equality of opportunity among different political parties, public funding may also cover the parties representing a significant part of the voters and nominating a candidate in the elections. Level of public financial assistance shall be determined periodically by the legislator and by taking into consideration objective criteria.

49. The European Commission of Human Rights and the ECHR also examined several applications concerning state aid to political parties. In the case of *New Horizons v. Southern Cyprus* (no. 40436/98, 10 September 1998) lodged against the Southern Cyprus concerning the law which set the condition of receiving at least 3% of the valid votes for receiving state aid, the Commission recalls that neither the Convention nor its Protocols guarantee a right for political parties to receive financial assistance from the State and that Article 3 of the Additional Protocol no. 1 to the Convention is interpreted in a way that would afford the right to stand for election to candidates and political parties. Moreover, according to the Convention organs' case-law, the phrase "under the *conditions which will ensure the free expression of the opinion of the people in the choice of the legislature*" in Article 3 of Protocol No. 1 implies essentially the right of equality of treatment of all citizens in the exercise of their rights to elect and their right to stand for election (see *Mathieu-Mohin and Clerfaty v. Belgium*, § 54).

50. It is explicit that the political parties hardly maintain its activities merely through funding obtained from party membership or ordinary financial sources without receiving state aid. It becomes even more apparent notably today when political competition has increased and means of sophisticated and expensive means of communication have been continuously improved. State aid intends to prevent political parties from being involved in any corruption and facing the risk of being under impression and pressure of any economically-strong figures and institutions. In this sense, providing state aid intends to reinforce political pluralism as well as to ensure fulfilment of the duties expected from democratic institutions (see *Freedom and Solidarity Party v. Turkey*, § 37).

51. However, it is necessary to set a minimum limit for the state aid. Otherwise, a system with no minimum limit may cause adverse effect and thereby lead to an increase in the number of political parties expecting to benefit from aid. That is because each vote received may be considered as an income channel in consideration of the state aid. Therefore, envisaging a limit through Additional Article 1 of Law no. 2820 in order for political parties to get state aid cannot be considered to

undermine the efficiency of the right to stand for election. In this sense, there are no uniform rules in this sphere in the majority of European countries (see *Freedom and Solidarity Party v. Turkey*, § 38).

52. Besides, it is expected through a legal arrangement concerning state aid that an excessive and ineffective inflation of candidates will be balanced by the political parties' function to reinforce democratic pluralism. In other words, setting a proportionate limit is necessary for ensuring efficiency of the right to stand for elections.

53. In the present case, the applicants failed to exceed the threshold of 3% at the 24th General Parliamentary Elections of 2011 as well as at the 25th and 26th General Parliamentary Elections of 2015. This margin is far below the ten percent (10%) threshold for political parties to enter parliament. Therefore, political parties failing to receive the required rate of votes for having a seat in the parliament are also entitled to the state aid. Accordingly, it cannot be said that only political parties exceeding 10% threshold could receive the state aid.

54. Besides, the mere source of income of political parties is not the state aid directly provided. Other incomes of political parties are set forth in Article 61 of Law no. 2820. It is acknowledged that incomes obtained through the sources of incomes specified in the Article, other than *"incomes to be obtained from the party's assets"*, may in no way be subject to taxes, duties and charges.

55. Consequently, it cannot be concluded that in the present case, the applicants' inability to get state aid for failing to receive 3% of the valid votes has restricted the right to stand for elections to the extent that would undermine its efficiency and that the methods applied were disproportionate.

56. For these reasons, the Court found no violation of the rights to stand for elections and engage in political activities which are enshrined in Article 67 of the Constitution. Mr. Hicabi DURSUN followed the majority but on a different grounds.

JUDGMENT

For these reasons, the Court held on 10 December 2015 that

A. By majority and by dissenting vote of Mr. Hicabi DURSUN, the complaints as to the alleged violation of Article 67 of the Constitution be DECLARED ADMISSIBLE;

B. By majority, there was NO VIOLATION of the rights to stand for elections and engage in political activities safeguarded by Article 67 of the Constitution;

C. The court expenses be COVERED by the applicants.

DISSENTING OPINION OF JUSTICE HİCABI DURSUN AND DIFFERENT GROUND

1. The applicants maintained that as set out Additional Article 1 § 4 of the Law no. 2820, political parties were to receive 3% of valid votes at the general parliamentary elections in order to get the state aid, which was in breach of the principles of justice and equality as well as led to inequality of opportunity among political parties; that it was set forth in Article 68 of the Constitution that political parties would be provided with adequate financial means in an equitable manner; that the inability of the political parties -which could not exceed the election threshold- to receive state aid was not equitable; and that as the impugned provisions would be most probably applied to the elections to be held in 2015, they were potential victims of this legislative act. They accordingly alleged that their rights enshrined in Articles 2, 10, 13 and 68 of the Constitution had been violated. They also requested the Court to refer the application to the Plenary of the Court in order for the annulment of the impugned provision.

2. Additional Article 1 § 4 of the Political Parties Law no. 2820 and dated 22 April 1983 reads as follows:

> *"Political parties, which have received more than 3% of the total valid votes at the general elections, shall as well be provided with State aid. The*

amount of the aid to be provided shall be determined in proportion to the amount paid -in line with paragraph two- to the least-paid-political party and to the valid votes received in the last general elections. However, this amount cannot be less than 1 million Turkish liras. In order to meet this expense, every year an appropriation shall be put into the budget of the Ministry of Finance."

3. The majority of the Plenary of the Court proceeded with the examination of the merits of the application and consequently found no violation of the rights to election and engage in political activities enshrined in Article 67 of the Constitution. However, I do not agree with the majority's conclusion for the following reasons.

4. Article 45 § 3, titled *"Right to individual application"*, of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, reads as follows:

"Individual applications cannot be made directly against legislative transactions and regulatory administrative transactions and similarly, the rulings of the Constitutional Court and transactions that have been excluded from judicial review by the Constitution cannot be the subject of individual application."

5. It is explicitly set out in Article 45 § 3 of Code no. 6216 that individual applications cannot be lodged directly against legislative acts and regulatory administrative actions.

6. The individual application remedy is a constitutional safeguard whereby alleged violations of the fundamental rights sustained by individuals are found and which offers effective means for redress of the violation found. Within the scope of this safeguard, individuals are not entitled to directly request annulment of the legislative act. Therefore, the individual application before the Constitutional Court cannot be regarded as a remedy whereby an alleged unconstitutionality of a public arrangement may be brought in an abstract manner before the Court (see the Court's decision no. 2012/30, 5 March 2013, §§ 16-17).

7. In the present case giving rise to the individual application, the applicants requested the annulment of Additional Article 1 § 4 of the

Political Parties Law no. 2820, *"Political parties, which have received more than 3% of the total valid votes at the general elections, shall as well be provided with State aid"*, for being unconstitutional.

8. An individual application can be lodged against directly against the legislative act itself but against an act, action or negligence committed in the context of its implementation. In other words, an alleged unconstitutionality of a legislative act cannot be brought, directly and abstractly, before the Constitutional Court (see the Court's judgment no. 2014/8842, 6 January 2015, § 26).

9. It has been observed that the applicants alleged that the legislative act probably applicable to them was in breach of their rights, relying on the probable outcome of the 2015 General Parliamentary Elections. In the judgment, the majority of the Court decided that the applicants lacked victim status by the date when their application was lodged. However, given the fact that 2015 general elections had been held by the date when their application was under examination, the majority reached the conclusion that the applicant had victim status, which was inconsistent according to me. Accordingly, making a distinction as pre-election and post-election period would lead to two different conclusions: *"lack of competence ratione materiae"* when the applications were examined before the elections; and *"potential victim"* when examined after the elections. Such a situation would trigger an inequality between the applicants on the same matter as well as a controversial judgment.

10. The applicant political parties previously lodged an individual application alleging that the election threshold of 10% was in breach of their constitutional rights. By its decision no. 2014/8842 and dated 6 January 2015, the Court declared the applicants' allegations inadmissible for lack of competence *ratione materiae* as *"…an individual application cannot be lodged against directly against the legislative act itself but against an act, action or negligence committed in the context of its implementation. In other words, an alleged unconstitutionality of a legislative act cannot be brought, directly and abstractly, before the Constitutional Court"*. The subject-matter of the present application did not differ from that of their previous application regarding the election threshold of 10%.

11. For these reasons, as it has been revealed that a legislative act was directly made subject to the individual application, I consider that the application should have been declared inadmissible for *"lack of competence ratione materiae"* without any further examination as to the other admissibility criteria. I do not therefore agree with the majority.

12. However, the majority of the Court proceeded with the merits of the case as the applicants' allegations that they had victim status due to the implementation of the impugned provision of the Political Party Law during the 2015 General Parliamentary Elections and that they lodged an individual application not against the legislative act but against *the act, action or negligence committed in the context of its implementation* were found justified.

13. Article 148 § 3 of the Constitution reads 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****."*

14. Article 45 § 2, titled *"Right to individual application"*, of the Code no. 6216 reads as follows:

> ***"All of the administrative and judicial remedies that have been prescribed in the code regarding the action, the act or the negligence allegedly having caused the violation must have been exhausted before making an individual application."***

15. According to the cited provisions of the Constitution and the Law, an individual application may be lodged before the Constitutional Court only after the ordinary legal remedies are exhausted. In its several judgments, the Court has explained the objective of the principle of exhaustion of available remedies. The raison d'être of this principle is to enable the first-instance courts, regional courts as well as appeal courts to prevent and redress the violation of the constitutional rights before an individual application being lodged. This requirement points

out that the primary guardian of the fundamental rights and freedoms is administrative authorities and inferior courts, whereas the individual application to the Constitutional Court is the secondary/subsidiary protective mechanism.

16. As noted in the previous judgments of the Constitutional Court, respect for fundamental rights and freedoms is a constitutional duty incumbent on all organs of the State. The liability to redress the right violations taking place due to the ignorance of this duty is incumbent on administrative and judicial authorities. Therefore, it essential that the alleged violations of the fundamental rights and freedoms be primarily asserted before, as well as dealt with and adjudicated by, the inferior courts. Pursuant to this principle, the applicant should have duly brought his complaint in question primarily before the competent administrative and judicial authorities on time, to submit the relevant information and evidence to these authorities in due time as well as to also display due diligence in order to pursue his case and application (see, among many other authorities, the Court's judgments no. 2012/403, 26 March 2013, §§ 16 and 17; no. 2013/850, 19 December 2013, § 19; no. 2013/5028, 14 January 2014, §§ 23 and 24; and no. 2012/254, 6 February 2014, § 31).

17. In the individual application (no. 2013/3389, 16 September 2015) lodged on the allegation that the applicant's rights to property, to a fair trial as well as to an effective remedy had been violated due to non-imbursement of the application fees received from the applicant, who filed a complaint with the Public Procurement Authority ("PPA") as regards the tenders made by different institutions, despite the outcome in his favour, the Court, relying on Articles 11 and 12 of the Code of Administrative Procedure no. 2577, declared the application inadmissible for *"non-exhaustion of available remedies"* on the grounds that the applicant should have filed a request with the PPA for reimbursement of the fees previously collected from him and if rejected by the PPA, he should have then brought an action before the administrative courts.

18. This situation is applicable also to the applicants. Accordingly, they should have filed their requests with the relevant institution(s) and subsequently brought an action if their requests were rejected. If the relevant provision on the political parties' entitlement to state aid is considered to be unconstitutional, it is possible, pursuant to Article 152 of the Constitution, to file a request with the Constitutional Court for its annulment through the substantive constitutionality review process.

19. For these reasons, I do not concur with the majority's judgment on the merits on the grounds that it has been observed that the applicants lodged an individual application with the Constitutional Court without bringing an action and using the opportunity of substantive constitutionality review to be made by the Court which constitute effective remedies for the alleged violation,; and that their application should have been therefore declared inadmissible for *"non-exhaustion of available remedies"*.

RIGHT TO FORM POLITICAL PARTIES (ARTICLE 68)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

METİN BAYAR AND HALKIN KURTULUŞU PARTİSİ (PEOPLE'S LIBERATION PARTY)

(Application no. 2014/15220)

PLENARY
JUDGMENT

President	: Zühtü ARSLAN
Deputy President	: Alparslan ALTAN
Deputy President	: Burhan ÜSTÜN
Justices	: Serdar ÖZGÜLDÜR
	Serruh KALELİ
	Osman Alifeyyaz PAKSÜT
	Recep KÖMÜRCÜ
	Engin YILDIRIM
	Nuri NECİPOĞLU
	Hicabi DURSUN
	Celal Mümtaz AKINCI
	Erdal TERCAN
	Muammer TOPAL
	M. Emin KUZ
	Hasan Tahsin GÖKCAN
	Kadir ÖZKAYA
	Rıdvan GÜLEÇ
Assistant Rapporteur	: Ceren Sedef EREN
Applicants	: 1. Metin BAYYAR
	2. People's Liberation Party
Representative	: Nurullah ANKUT (In terms of the second applicant)
Counsel	: Att. Sait KIRAN

I. SUBJECT-MATTER OF THE APPLICATION

1. The application is relevant to the allegations as to the effect that the freedom of expression and the freedom of association were violated in terms of both applicants as an administrative fine was ruled on the first applicant who is the chairman of the board of the provincial organization of the applicant party which failed to organize its provincial congress within three years following the date of establishment; that the principle of legality of crimes and penalties was violated in terms of the first applicant as an administrative fine was imposed without any legal basis; that the right to a fair trial was violated in terms of the first applicant as a fine was imposed without his defense statement being taken by the administration.

II. APPLICATION PROCESS

2. The application was directly lodged with the Constitutional Court on 19/9/2014. 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 on 5/1/2015 by the Head of the Section that the examination of admissibility and merits of the application be carried out together and that a copy be sent to the Ministry of Justice (Ministry) for its opinion.

4. The facts, which are the subject matter of the application, were notified to the Ministry on 5/1/2015. The Ministry submitted its opinion to the Constitutional Court on 5/2/2015.

5. The opinion submitted by the Ministry to the Constitutional Court was notified to the applicant on 11/2/2015. The applicant submitted his counter-opinion to the Constitutional Court on 20/2/2015.

6. Since it was deemed necessary during the meeting held by the Second Section on 7/5/2015 that the application be ruled upon by the Grand Chamber due to the nature of the application, it was ruled that it be referred to the Grand Chamber in order to be deliberated on as per Article 28(3) of the Internal Regulation of the Constitutional Court.

III. THE FACTS

A. The Circumstances of the Case

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

8. The second applicant, the People's Liberation Party, is a party that was legally established and continues to perform its activities. Upon the approval of the Governor's Office of Bartın No. 2174 of 17/4/2014, an administrative fine of TRY 759 was imposed on the first applicant, Metin Bayyar, because of his capacity as the chairman of the board of the provincial organization of the party. The relevant part of the reasoning of the judgment is as follows:

> *"In the examination made based on the file of "Bartın Provincial Organization of the People's Liberation Party" whose headquarters is located in Ankara and which performs activities in our province, it has been determined that they completed their establishment in our province on 26.11.2010 and continued to perform their activities, but they did not organize their provincial congress although 3 (three) years have passed since the date of establishment,*
>
> *With regard to the matter, "an administrative fine of TRY 759 be imposed on the Chairman of the Board of Bartın Provincial Organization of the People's Liberation Party in accordance with Article 32/b of the Law of Associations No. 5253 as the Provincial Organization did not organize the provincial congress in due time ..."*

9. The relevant part of the notice of administrative fine imposed by the Bartın Provincial Directorate of Associations on the first applicant based on the aforementioned decision is as follows:

> *"As it was determined that you established the Provincial Organization of the People's Liberation Party in the provincial center of Bartın on 26.11.2010, but you failed to organize the provincial congress in due time although 3 (three) years have passed since the date of establishment, an administrative fine of TRY Seven Hundred Fifty Nine (759) was imposed on you through the Approval of the Governor's Office specified in the reference."*

10. The objection filed by the first applicant against the aforementioned action was rejected with prejudice in respect of the amount of the administrative fine in the judgment of the Office of the Criminal Judge of Peace of Bartın No. 2014/50 Misc. Works of 11/8/2014. The relevant parts of the reasoning of the judgment are as follows:

> *"ADMISSION, GROUNDS AND ASSESSSMENT; When the application petition, the response letter of the Bartın Provincial Directorate of Associations of 13/06/2014 and all contents of the file are taken into consideration together;*
>
> *In Articles 14/6, 19/3 and 20/7 of the Law of Political Parties No. 2820, an imperative provision has been regulated as to the effect that the congresses of political parties at every level (grand congress, provincial congress, district congress) shall be organized within the periods to be determined by the bylaw of the party on the condition that it is not less than two years and more than 3 years.*
>
> *Although the failure of the provincial and district organizations of political parties to organize their ordinary congresses in due time or the failure to organize them more than once does not directly bear the consequence of the automatic dissolution of the organization in that province or district, the duties and titles of the party organs in the relevant province and district will come to an end following the expiry of the congress period.*
>
> *As is known, in Article 29/1 of the Law of Political Parties No. 2820 with the side heading "general provisions regarding congresses", it is provided that "the provisions of the Law of Associations No. 1630 of 22 November 1972 which are not contrary to this law shall also apply for the congresses of political parties at every level".*
>
> *In Article 118 of the same law with the side heading "General Penal Provisions", it is provided that "the penal sanctions which are included in the Law of Associations No. 1630 of 22 November 1972 as regards the references made to this law in the relevant law and which are not found to be contrary to the provisions of this law shall also apply for political parties and their officials".*

As mentioned above, it is understood that, according to Articles 19/3 and 20/7 of the Law of Political Parties No. 2820, it is regulated that the district congress shall be organized within the periods to be shown in the bylaw of the party in a way which will not prevent the organization of the provincial congress and the provincial congress shall be organized within the periods to be shown in the bylaw of the party in a way which will not prevent the organization of the grand congress and that political parties are granted discretionary power on the condition that they do not exceed the legal period, and that if the mentioned imperative provision is not complied with, the provision of the Law of Associations shall apply through Articles 29/1 and 118 of the same law.

In Article 32/b of the Law of Associations with the side heading "General Penal Provisions", it is provided that an administrative fine shall be imposed on the directors of associations who fail to call the general assembly for meeting in due time, organize the general assembly meetings in contravention of the provisions of the law and bylaw or outside the place where the headquarters of the association is located or which is stipulated in its bylaw.

In the evaluation made within the framework of all information and documents within the scope of the file and the legislation explained above; although the counsel of the complainant stated in his petition of objection that they could not organize the first general assembly meeting as they could not enroll any new member since the establishment of the party, that therefore, it was an uncommitable crime, that the provision "... However, the number of members attending this meeting cannot be less than twice the total number of members of the board and the supervisory board" was stipulated in Article 78 of the Civil Code, as it is concluded that as specified above in the provisions of the relevant articles of the Law No. 2820, it is provided that the provincial and district congress shall be organized within the periods to be shown in the bylaw of the party in a way which will not prevent the organization of the grand congress and that the general assembly meeting will be organized within a period which shall not be less than two years and more than 3 years. Although no regulation has been made on how the meeting will be organized if the quorum cannot be reached in the general assembly meeting of the district

board of election, a regulation has been made with regard to the quorum of the grand congress and according to such regulation, it is provided that if the quorum cannot be reached in the first call, the quorum shall not be sought as regards the meeting to be organized upon the second call, that with regard to the matters which are not regulated in the Law No. 2820, only the provisions of the Civil Code which are not contrary to this law shall apply, that it is not possible to apply Article 78 of the Civil Code which regulates the quorum for the meeting as it constitutes a contrariety to the imperative provisions regulated in Articles 14/6 and 14/9 of the Law No. 2820 which has the quality of a special law, it is ruled that the objection against the administrative fine imposed as per the relevant legislation be dismissed and the following judgment has been established."

11. This judgment was notified to the applicant on 22/8/2014 and the individual application was lodged on 19/9/2014.

B. Relevant Law

12. Article 19(3) of the Law of Political Parties No. 2820 of 22/4/1983 with the heading "*Provincial organization*" is as follows:

"The provincial congress shall be organized within the periods shown in the bylaw of the party in a way which will not prevent the organization of the grand congress."

13. Article 7(c) of the Bylaw of the People's Liberation Party with the heading of "*Local organizations and congresses*" is as follows:

"LOCAL CONGRESSES: They shall be convened every three years in an order which will complement each other."

14. Article 29(1) of the Law No. 2820 with the heading "*General provisions regarding congresses*" is as follows:

"The provisions of the Law of Associations No. 1630 of 22 November 1972 which are not contrary to this law shall also apply for the congresses of political parties at every level."

15. Article 118 of the Law No. 2820 with the heading "*General penal provisions*" is as follows:

> "Through this Law, *the penal sanctions which are included in the Law of Associations No. 1630 of 20 November 1972 as regards the references made to this law in the relevant law and are not found to be contrary to the provisions of this law shall also apply for political parties and their officials."*

16. Article 104(1, 2) of the Law No. 2820 with the heading "*Application due to miscellaneous reasons*" are as follows:

> *"In the event that a political party acts contrary to the imperative provisions of this Law except for Article 101 thereof and to the imperative provisions of other laws that are relevant to political parties, an application against that party shall be made ex officio by the Office of the Chief Public Prosecutor to the Constitutional Court through a letter.*
>
> *If the Constitutional Court finds out contrariety with the relevant provisions, it shall issue a judgment of warning on the relevant party in order for the contrariety to be removed."*

17. Article 66(2) of the abolished Law of Associations No. 1630 of 22/11/1972 listed in its 10th chapter titled "*Penal provisions*" is as follows:

> *"A heavy fine of up to two thousand liras shall be imposed on the directors of associations who organize their general assembly meetings contrary to laws and their bylaws unless their acts require a heavier penalty. If necessary, it can be ruled by the court that the general assembly meetings organized contrary to the law and bylaw be canceled."*

18. Article 34 of the Law of Associations No. 5253 of 4/11/2004 with the heading "*References made to the laws of Societies and Associations*" is as follows:

> *"The references made to the Law of Societies No. 3512, the Law of Associations No. 1630 and the Law of Associations No. 2908 and their annexes and amendments or certain articles thereof shall be considered to be made to this Law and the article or articles of this Law in which the*

same matters are regulated. In cases where there is no provision in this Law, the relevant provisions of the Turkish Civil Code No. 4721 in which the same matters are regulated shall be considered to be referred to."

19. Article 32(1)(b) of the Law No. 5253 with the heading "*Penal provisions*" is as follows:

"An administrative fine of five hundred Turkish Liras shall be imposed on the directors of associations who fail to call the general assembly for meeting in due time, organize the general assembly meetings in contravention of the provisions of the law and the bylaw or outside the place where the headquarters of the association is located or which is stipulated in its bylaw. It can be ruled by the court that the general assembly meetings organized in contravention of the provisions of the law and bylaw be canceled."

20. Article 33(2) of the Law No. 5253 with the heading "*Imposition of penalties*" is as follows:

"The local civilian authority shall be authorized to decide on the administrative sanctions stipulated in this Law."

IV. EXAMINATION AND GROUNDS

21. The individual application of the applicant (App. No: 2014/15220 of 19/9/2014) was examined during the session held by the court on 4/6/2015 and the following were ordered and adjudged:

A. The Applicants' Allegations

22. The applicants stated that an administrative fine was imposed on the chairman of the board of the provincial organization, Metin Bayyar, on the ground that the provincial congress was not organized within three years although there was no provision in the relevant legislation as to the effect that an administrative fine would be imposed in the event that the provincial congress was not organized. They alleged that the reason why the provincial congress could not be organized was that the quorum prescribed in the law could not be reached yet. They also stated that the imposition of an administrative fine on the directors

of the political party which failed to reach the number of members that was sufficient for organizing a general assembly was contrary to the procedure and law as it would make it financially impossible for them to perform their activities and expose the provincial organization to the danger of closure given the fact that most of the directors of the organization of the People's Liberation Party were workers, unemployed, students and from the poor segments of the society, and would prevent the first applicant from engaging in the activity of organization and association and they alleged that their freedoms of expression and association were violated. They also alleged that the principle of the legality of crimes and penalties was violated regarding the first applicant as an administrative fine was imposed without any legal basis.

23. Furthermore, the applicants also alleged that the right to a fair trial of the first applicant was violated as his defense was not taken by the administration which imposed the administrative fine in contravention of the relevant legislation.

B. The Constitutional Court's Assessment

24. Even though the applicants alleged their freedom of expression and, in terms of the first applicant, the principle of the legality of crimes and penalties were violated since an administrative fine was imposed on the director of the political party which failed to reach the number of members that was sufficient for organizing a general assembly although no such fine was prescribed by law and since the objection filed thereagainst was rejected by the court, the essence of the said claims were found to be relevant to the freedom of political association and therefore, the examination and evaluation were carried out under this title.

1. Admissibility

a. Applicability

25. According to Article 148(3) of the Constitution and Article 45(1) of the Law on the Establishment and Trial Procedures of the Constitutional Court No. 6216 with the heading "*Right to individual application*", in order for the merits of an individual application lodged with the Constitutional

Court to be examined, the right which is claimed to have been violated 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, in addition to it being guaranteed in the Constitution. In other words, it is not possible to rule that the application which contains an allegation of violation of a right that is outside the common field of protection of the Constitution and the Convention is admissible (*Adnan Oktar*, B. No. 2012/917, 16/4/2013, § 16).

26. In the examination of admissibility of an application, first of all, it should be evaluated whether or not the freedom of political association is within the common field of protection of the Constitution and the Convention.

27. Article 68 of the Constitution with the heading "*Forming parties, membership and withdrawal from membership in a party*" is as follows:

> *"Citizens have the right to form political parties and duly join and withdraw from them. One must be over eighteen years of age to become a member of a party.*
>
> *Political parties are indispensable elements of democratic political life.*
>
> *Political parties shall be formed without prior permission, and shall pursue their activities in accordance with the provisions set forth in the Constitution and laws.*
>
> *The statutes and programs, as well as the activities of political parties shall not be contrary to the independence of the State, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law, sovereignty of the nation, the principles of the democratic and secular republic; they shall not aim to promote or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime.*
>
> *…"*

28. Article 11 of the Convention with the heading of "*Freedom of assembly and association*" is as follows:

"Everyone has the right to freedom of peaceful assembly and to freedom of association with others including the right to form and to join trade unions for the protection of his interests.

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. 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."

29. The freedom of political association which covers the freedoms of forming a political party, being a member of, withdrawal from and engaging in activities in a political party is regulated in Article 68 of the Constitution separately from the general freedom of association stipulated in Article 33 of the Constitution. The freedom of association is prescribed as a whole in Article 11 of the Convention and no separate regulation with regard to the freedom of political association is stipulated. In practice, it is accepted through the case-law of the European Court of Human Rights (ECtHR) that political parties will also make use of the protection prescribed in Article 11 of the Convention (*Türkiye Birleşik Komünist Partisi* (*The United Communist Party of Turkey) v. Turkey* [BD], App. No: 19392/92, 30/1/1998, § § 24, 25; *Refah Partisi (The Welfare Party) v. Turkey*, [BD], App. No: 41340/98, 41342/98, 41343/98 and 41344/98, 13/2/12003, § 50).

30. Although Article 11 of the Convention stipulates that this right includes the right to form trade unions with others, the ECtHR, in its case-law related to the subject, concluded that trade unions were only one of the forms of association that were to be taken under protection as obviously understood from the phrase "*including*" specified in the article and that, for this reason, it could not be stated that those who drafted the Convention had an objective of not granting political parties the protection of the right prescribed in the article. Following this interpretation with regard to the wording of the aforementioned article,

the ECtHR stated that political parties were necessary for the proper functioning of democracy and concluded that there was no doubt as to the effect that political parties made use of the protection prescribed in Article 11 of the Convention by considering the importance that political parties held for democracy (*Türkiye Birleşik Komünist Partisi* (*The United Communist Party of Turkey) v. Turkey*, §§ 24, 25).

31. The Constitutional Court stated that political parties were not only institutions which gave voice to societal requests towards the state power, but also vital institutions which concretized, interpreted and directed social directives to the state, and that therefore, political parties were under the protection of the relevant rules of the Constitution and of Articles 10 and 11 of the Convention which regulate the freedom of "*association*" and of "*opinion and expression*" (AYM, E.2008/1 [Closure of a Political Party], K.2008/2, K.T. 30/7/2008).

32. Due to the reasons explained, it is obvious that the freedom of political association is within the common field of protection of the Constitution and the Convention and is within the competence of the remedy of individual application to the Constitutional Court *ratione materiae*.

b. Existence of the Victim Status

33. Article 46(1) of the Law No. 6216 with the heading "*Those who have the right to individual application"* is as follows:

> *"The individual application can only be lodged by those a current and personal right of whom is directly affected due to the act, action or negligence that is claimed to result in a violation."*

34. In Article 46 of the Law No. 6216, the persons who can lodge an individual application are listed and according to paragraph (1) of the aforementioned article; two main prerequisites are present in order for a person to be able to lodge an individual application with the Constitutional Court. The first of these is that "a *current right of the applicant is violated"* due to the act or action or omission of the public power that is made the subject matter of the application and alleged to

have resulted in the violation and that the applicant alleges that s/he has been "*aggrieved*" as a result of this and the second of these is that the person is "*personally and directly*" affected by this violation (*Onur Doğanay*, B. No: 2013/1977, 9/1/2014, § 42).

35. The ECtHR states that the word "*victim*" stipulated in Article 34 of the Convention denotes the person directly affected by the act or omission in issue (*Brumarescu v. Romania* [BD], App. No: 28342/95, 28/10/1999, § 50).

36. Within this scope, it is necessary to determine whether or not the applicants' freedom of political association was directly affected by the administrative fine which is the subject matter of the application.

i. The First Applicant

37. In the present case, the administrative fine which is the subject matter of the application was imposed on the first applicant on the ground that he failed to fulfill his obligation prescribed in the law with regard to the political party of which he was the director of the provincial organization thereof. Therefore, it is obvious that a current right of the first applicant was personally and directly affected. As it is understood that there is no other reason for inadmissibility, it needs to be ruled that the application is admissible in respect of the first applicant.

ii. The Second Applicant

38. The applicants alleged that the freedom of political association of the legal personality of the party was also violated as the relevant administrative fine would make it financially impossible for the People's Liberation Party to perform activities and expose the provincial organization to the danger of closure given the fact that most of the directors of the organization of the Party were workers, unemployed, students and from the poor segments of the society.

39. The Constitutional Court delivered judgments of inadmissibility due to "*the lack of jurisdiction ratione personae*" on the ground that no intervention was made in any right of the legal personality of

the community and the condition of being directly affected was not fulfilled in the applications lodged by the organization of which they were members on behalf of them because of the interventions that only affected the rights of their members (*Turkish Association of Pediatric Oncology Group*, B. No: 2012/95, 25/12/2012, § 23; *The Society for the Improvement, Sustenance of Yusufeli District and the Protection of Its Cultural Heritage*, B. No: 2013/1212, 12/9/2013, §§ 22, 23). The ECtHR accepts that organizations cannot claim that they become victim because of the acts that only affect the rights of their members as the condition of being directly affected is not fulfilled (*Maupas and Others v. France,* App. No: 13844/02, 19/9/2006, § 14; *Norris, National Gay Federation v. Ireland,* [the Commission], App. No: 10581/83, 16/5/1985, p. 135).

40. The principle as to the effect that no individual application can be lodged by organizations on behalf of their members because of the acts that only affect the rights of them is accepted by the Constitutional Court and the ECtHR. In the present case, it is necessary to determine whether or not the freedom of political association of the legal personality of the party was directly affected due to the administrative fine imposed on the first applicant who is the member of the party and the director of the provincial organization.

41. In the application lodged by the association established by a group of people who were against the construction of a dam in the region where their houses were located for the sole purpose of stopping the dam construction and of ensuring their representation by it in the legal process together with the other real person applicants as to the effect that their right to a fair trial was violated, the ECtHR accepted the status of victim by stating that the association was a party to the lawsuit in domestic law (*Gorraiz Lizarraga and Others v. Spain*, App. No: 62543/00, 10/11/2004, § 36).

42. Moreover, in cases where a member was prevented from being a candidate from the party list in the elections due to the interventions which arose from the legislation or were made by national authorities, the ECtHR accepted that it could also be alleged by the legal personality of a political party that a right, such as the freedom of free election,

which had a limited area of implementation with real persons in the previous case-law and that the legal personality of a party had the status of victim independently from its members (*Russian Conservative Party of Entrepreneurs v. Russia*, App. No: 55066/00 and 55638/00, 11/1/2007, §§ 53-67).

43. Although political parties have a legal personality independent from their members, the bodies that execute their activities are formed by their members. In the present case, the administrative fine was imposed on the first applicant in his capacity as the director of the provincial organization with regard to the failure of the assembly of a body of the provincial organization of the party. According to Article 19 of the Law No. 2820, provincial chairmen are one of the bodies that form the provincial organization of political parties. In this case, there is a close relation between the administrative fine and the bodies and activities of the second applicant. Therefore, it is necessary to accept that a current and personal right of the second applicant was directly affected by the relevant fine. As it is understood that there is no other reason for inadmissibility, it needs to be ruled that the application is admissible also in respect of the second applicant.

2. Merits

44. In its letter of opinion, the Ministry, in summary, asserted that according to the ECtHR although states were free to implement their own penal policies, they needed to fulfill the requirements of Article 7 of the Convention and that this guarantee needed to be interpreted and implemented in a way that would provide effective safeguards against arbitrary prosecution, conviction or penalization in line with its purpose and objective. It also specified that the principle of certainty which is one of the fundamental principles of a state of law was related to legal security according to the Constitutional Court and that the legislative, executive and judicial powers which represented the public authority needed to act in respect for this principle. It stated that the boundaries of legal regulations as regards crimes and penalties needed to be explicitly drawn by the legislative body, that the executive body must not create any crime and penalty through its regulatory actions without being

based on any authority whose boundaries were determined by law and that the judicial body which is tasked with implementing criminal law must not extend the scope of crimes and penalties stipulated in laws by way of interpretation. It alleged that the relevant principles needed to be taken into consideration during the phase of merits examination.

45. In their counter-opinions which they submitted against the opinion letter of the Ministry, the applicants reiterated their allegations included in their application petitions.

a. General Principles

46. The ECtHR emphasized that notwithstanding its autonomous role and particular sphere of application, Article 11 of the Convention needed to be evaluated together with Article 10, that opinions and the freedom to express them was one of the objectives of the freedom of association and that this situation further increased the importance of political parties in ensuring pluralism and the proper functioning of democracy (*Türkiye Birleşik Komünist Partisi (The United Communist Party of Turkey) v. Turkey*, §§ 42, 43).

47. The ECtHR also stated that the freedom of expression of opinions regarding the choice of the legislature was inconceivable without the participation of a plurality of political parties representing the different shades of opinion to be found within a country's population and that accordingly, political parties made an irreplaceable contribution to political debate, which was at the very core of the notion of a democratic society (*Türkiye Birleşik Komünist Partisi (The United Communist Party of Turkey) v. Turkey*, § 44).

48. Regulations on political parties vary depending on the legal systems and traditions of states. While special regulations with regard to political parties are in place in some states, general regulations about organizations also apply for political parties in some of them. According to the Venice Commission (Commission), special regulations for political parties are not a requirement for a functioning democracy. However, where special regulations are in place, they should be in the form of a legislative action rather than an executive action and should not restrict

the activities and rights of political parties in a disproportionate manner. These regulations should focus on ensuring that political parties have an efficiency in proportion to their importance for a democratic society and guaranteeing the protection of their rights in order for them to properly perform their activities. Moreover, political parties must at a minimum exercise all rights afforded to other associations as well as the rights to nominate candidates and participate in elections (*Guidelines on Political Party Regulation,* [Commission], 25/10/2010, § § 28, 29).

49. As regards the rules on the internal functioning of a party, the Commission stated that they could be best regulated through the party bylaw or the principles elaborated and agreed to by the party itself and that the matters related to the internal functioning of the party must generally be free from state interference. According to the Commission, even though some states have prescribed some obligations in certain matters so as to ensure democracy within the party in line with the importance of political parties in a democratic society, the basis and applicability of such regulations must be carefully considered and moreover, such regulations must also be restricted so as not to unduly interfere with the activities of political parties as regards their own internal functioning (*Guidelines on Political Party Regulation,* § § 62, 97). While the Commission emphasized that public authorities must refrain from bearing any excessive control and inspection function over political parties, it exemplified the broad authority of inspection as the regulations to be made in matters such as membership, number and frequency of party congresses and meetings or the activities of local organizations (*Compilation of Venice Commission on Opinions and Reports Concerning Political Parties,* [Commission], 16/10/2013, p. 21).

50. With regard to the authorities which will implement the regulations related to political parties, the Commission stated that the impartiality of authorized bodies must be guaranteed both in law and in practice, that the scope and boundaries of the authority granted must be explicitly determined in the regulations and that it was necessary to ensure that authorized bodies apply the rules in an unbiased and non-arbitrary manner (*Guidelines on Political Party Regulation,* § 10). In this

context, the Commission also stated that the supervisory power over political parties should be vested in an independent authority not part of the executive in order to reduce bureaucratic control over political parties, ensure transparency and build institutional trust (*Compilation of Venice Commission on Opinions and Reports Concerning Political Parties,* p. 21).

51. In the light of the principles explained above, first of all, it will be determined whether or not an intervention exists and then whether or not the intervention is based on valid grounds in assessing whether or not the freedom of political association was violated in the incident which is the subject matter of the application.

b. Concerning the Existence of the Intervention

52. It should be admitted that the administrative fine imposed on the first applicant in his capacity as the director of the provincial organization of the political party on the ground that he failed to fulfill his obligation with regard to the assembly of the provincial organization constitutes an intervention in the applicants' freedom of political association.

c. Whether the Intervention Constitutes a Violation

53. Unless the intervention mentioned above fulfills the conditions stipulated in Article 13 of the Constitution and rests on one or more of the valid grounds prescribed in Article 68(4) of the Constitution, there will be a violation of the mentioned articles of the Constitution. For this reason, it is necessary to determine whether or not the intervention is in line with the conditions of being based on one of the reasons stipulated in the relevant article of the Constitution, not infringing its essence, 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.

54. First of all, the applicants allege that the intervention does not have any legal basis.

55. The administrative authorities and the court of instance referred to Article 32(1)(b) of the Law No. 5253 as the legal basis of the intervention.

56. It is not sufficient to be based on an article of law in form in order to achieve the condition of lawfulness. It is also necessary that the relevant article of law is certain and foreseeable by individuals. As a matter of fact, as specified in many judgments of the Constitutional Court, one of the fundamental principles of "*the state of law*" stipulated in Article 2 of the Constitution is "*certainty*". According to this principle, it is necessary that legal regulations be clear, explicit, understandable and implementable in a way that will not give rise to any hesitation and doubt in terms of both individuals and the administration, and that moreover they include some protective guarantees against the arbitrary practices of public authorities. The principle of certainty is associated with legal security; an individual should have an opportunity of learning from the law in a certain accuracy which legal sanction or consequence is attributed to which concrete action and case, and which authority of intervention they grant to the administration. Only in this case can an individual foresee the liabilities which are incumbent upon him/her and regulate his/her behaviors accordingly. Legal security requires that rules be foreseeable, that individuals can have confidence in the state in all its actions and procedures, and that the state abstains from methods that may damage this feeling of confidence in its legal regulations (AYM, E.2009/51, K.2010/73, K.T. 20/5/2010; AYM, E.2009/21, K.2011/16, K.T. 13/1/2011; AYM, E.2010/69, K.2011/116, K.T. 7/7/2011; AYM, E.2011/18, K.2012/53, K.T. 11/4/2012).

57. While the ECtHR expresses that compliance with domestic law is a prerequisite for fulfilling the criterion of "*lawfulness*", it also states that the relevant regulation should be accessible by individuals to the extent that it will give them the opportunity of having sufficient information on the details of legal rules to be applied in a case and also be clear and certain in such a way as to ensure that they will regulate their conducts in order for it to be considered that the condition of being prescribed by law stipulated in Article 11(2) of the Convention is fulfilled (*Sunday Times v. the United Kingdom*, [BD], App.No: 6538/74, 26/4/1979, § 49).

58. The administrative fine which is the subject matter of the application was imposed based on Article 32(1)(b) of the Law No. 5253 by reference to Article 118 of the Law No. 2820. The relevant fine was imposed by the governor's office based on Article 33 of the Law No. 5253.

59. In Article 118 of the Law No. 2820, it is prescribed that the penal sanctions which are included in the Law of Associations No. 1630 and are not considered to be contrary to the provisions of the Law No. 2820 shall also apply for "*the references made to the Law No. 1630*" with regard to political parties and their officials. Accordingly, in the mentioned Article reference was not made to all penal sanctions stipulated in the abolished Law No. 1630; the imposition of the penal sanctions in the relevant Law on political parties and their officials was restricted to the references made to the Law No. 1630 with the Law No. 2820. Therefore, first of all, it needs to be determined whether or not such reference was made in terms of the administrative fine in the present case.

60. In Article 29 of the Law No. 2820, it is stipulated that the provisions of the abolished Law No. 1630 will also apply for "*the congresses of political parties at every level*". Accordingly, it is understood that the relevant provisions of the Law No. 1630 are referred to in the Law No. 2820 in terms of the congresses of political parties at every level and that it is prescribed that these provisions shall apply. On the other hand, it is provided in Article 34 of the Law No. 5253 that the references made to the Law No. 1630 in other laws will be considered to be made to this Law.

61. Given the aforementioned matters, it is possible to apply Article 32 (1)(b) of the Law No. 5253, which prescribes a penal sanction on the directors that fail to call the general assembly for meeting or to organize the meeting in accordance with the legislation, also on the officials of political parties who fail to call to the meeting the congresses of political parties at every level or to organize the congresses in accordance with the legislation, as per Article 118 of the Law No. 2820.

62. Yet, the administrative fine on the first applicant who is the official of the political party in the case at hand was imposed by the governor's

office as per the provision of Article 33(2) of the Law No. 5253 with the heading "*Imposition of Penalties*" that reads "*the local civilian authority shall be authorized to decide on the administrative sanctions stipulated in this Law*". However, the provisions related to associations only in terms of "*penal sanctions*" are referred to in Article 118 of the Law No. 2820, but no reference is made in terms of the procedure of imposition of penal sanctions and the authority that will impose these sanctions.

63. On the other hand, it is prescribed in Article 118 of the Law No. 2820 that the penal sanctions as regards associations will apply not only on the officials of political parties, but also on "*political parties*". However, the Constitutional Court is granted the venue of ruling on the closure of a political party or deprivation thereof from State aid in cases listed in the Law No. 2820 as per Article 101 of the Law No. 2820 and on the warning of a political party as per Article 104 of the Law No. 2820 in case of contrariety with the imperative provisions which are listed outside Article 101 of this Law and with the imperative rules of other laws with regard to political parties.

64. Therefore, it cannot be considered that the legislator refers through Article 118 of the Law No. 2820 to the provisions with regard to associations in terms of "*the authority which will impose the penal sanctions*" regulated in Article 33 of the Law No. 5253 apart from "*the penal sanctions*" regulated in Article 32 of the same Law.

65. Accordingly, it is not possible to say that civilian authorities have legal authority in terms of imposing sanctions on the officials of political parties. However, in Articles 101 and 104 of the Law No. 2820, the Constitutional Court is granted with the venue of imposing sanctions only in terms of political parties themselves and no such clear venue is granted in terms of the officials of political parties.

66. According to Article 68 of the Constitution, political parties are one of the indispensable elements of democratic political life. One of the requirements of materializing this constitutional principle is, as also specified in the aforementioned reports by the Venice Commission, is to clearly define the boundaries and scope of the authorities granted

to public authorities with regard to the regulations on political parties and, therefore, to prevent political parties and the officials thereof from encountering arbitrary practices.

67. Given the aforementioned matters, although it is possible to impose the penal sanction prescribed in Article 32(1)(b) of the Law No. 5253 regarding the officials of political parties who fail to call to the meeting the congresses of political parties at every level or to organize the congresses in accordance with the legislation, it is concluded that the authority which will impose this penal sanction is not defined by law in a certainty that needs to be present in a state of law.

68. Due to the reasons explained, it is necessary to rule that the administrative fine which is the subject matter of the application did not fulfill the condition of "*lawfulness*" and that the applicants' freedom of political association was violated.

Serruh KALELİ did not agree with this conclusion.

69. As it is necessary to send the file to the relevant court in order to hold a retrial for the removal of the violation and the consequences thereof, it is not deemed necessary to make an examination over the allegation of the first applicant as to the effect that his right to a fair trial was violated as his defense was not taken by the administration that imposed the administrative fine in a way that was contrary to the relevant legislation.

3. Article 50 of the Law No. 6216

70. The applicants filed a request for the lifting of the judgment of the Office of the Criminal Judge of Peace of Bartın No. 2014/50 Misc. Works of 11/8/2014 through which the objection filed against the administrative fine was rejected.

71. Article 50(2) of the Law No. 6216 with the heading of *"Judgments"* is as follows:

> *"If the determined violation arises out of a court judgment, the file shall be sent to the relevant court for holding a 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, a compensation can be adjudged in favor of the applicant or the remedy of filing a case before general courts can be shown. The court which is responsible for holding the retrial shall deliver a judgment based on the file, if possible, in a way that will remove the violation that the Constitutional Court has explained in its judgment of violation and the consequences thereof."

72. By considering that the administrative fine which is the subject matter of the application violated the applicants' freedom of political association, a legal benefit is deemed to be present in the holding of a retrial in the case with regard to the objection against the relevant administrative fine. It is necessary to rule that the file be sent to the relevant Court to hold a retrial in order to remove the violation and the consequences thereof.

73. It is necessary to rule that the trial expenses of TRY 1,713.70 in total composed of the fee of TRY 213.70 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 jointly paid to the applicants.

V. JUDGMENT

In the light of the reasons explained, it is held on 4/6/2015

A. **UNANIMOUSLY** that the applicants' allegation as to the effect that their freedom of political association guaranteed in Article 68 of the Constitution was violated is **ADMISSIBLE,**

B. **BY MAJORITY OF VOTES** and with the dissenting opinion of Serruh KALELİ that the applicants' freedom of political association guaranteed in Article 68 of the Constitution **WAS VIOLATED,**

C. **UNANIMOUSLY** that a copy of the judgment be **SENT** to the relevant Court to hold a retrial in order for the violation and the consequences thereof to be removed,

D. **UNANIMOUSLY** that it is not necessary to make an examination in terms of the first applicant's allegation as to the effect that his right to a fair trial was violated,

E. **UNANIMOUSLY** that the trial expenses of TRY 1,713.70 in total composed of the fee of TRY 213.70 and the counsel's fee of TRY 1,500.00 be **JOINTLY PAID TO THE APPLICANTS,**

F. **UNANIMOUSLY** that the payment be made within four months as of the date of application by the applicants to the Ministry of Finance following the notification of the judgment; 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. **UNANIMOUSLY** that a copy of the judgment be sent to the applicants and the Ministry of Justice in accordance with Article 50(3) of the Law No. 6216.

DISSENTING OPINION

An administrative fine was imposed on Metin BAYYAR, one of the applicants, in his capacity as the Chairman of the Board of the Provincial Organization of Bartın based on Article 32/b of the Law of Associations No. 5253 upon the approval of the Governor's Office of Bartın on the ground that he did not organize the provincial congress within three years following the date of establishment of his party.

The objection filed against the mentioned action was finally rejected by the Office of the Criminal Judge of Peace of Bartın through a judgment in which the following reasonings were given:

That the congress of the party at every level would be organized within due period as per Articles 14/6, 19/3, 20/7 of the Law of Political Parties No. 2820, that its provisions that are not contrary to the Law of Associations would apply for the congresses of Political Parties at every level and the penal sanctions would also apply for Political Parties and

their officials as per Articles 29/1 and 118 of the Law of Political Parties and that a fine would be imposed on the directors who failed to call the General Assembly to the meeting within due period as per Article 32/b of the Law of Associations No. 1630.

The applicant alleged that a fine was imposed based on the provision as regards the failure to call the General Assembly although there was no provision in the legislation as to the effect that an administrative fine would be imposed in the event that the Provincial Congress was not organized, that the organization of the party which did not have a sufficient number of members to organize the General Assembly and whose members were unemployed, workers, students and from the poor segment was in financial difficulty and the provincial organization would face the danger of closure because of the fine imposed (TRY 759), that its activity of association would be prevented and that his right to a fair trial was violated as the fine was contrary to the legislation.

Moreover, in the application lodged on behalf of the legal personality of the party because of the fine imposed, it was seen that it was alleged that the principle of legality of crimes and penalties was violated because of the same reasonings and that the mentioned fine posed a threat on the poor party's freedom of association, assembly and of the dissemination of thoughts.

In its reasoning, regarding the application lodged on behalf of the Political Party, the Grand Chamber of our Court for individual applications stated that the party was an indispensable element of association of the democratic political life, that these needed to be respected, that these institutions which directed social directives to the state were under the protection of Articles 10 and 11 of the ECHR (the freedom of thought and expression) and, in this sense, found solely being a political party sufficient for admitting that the legal personality of the People's Liberation Party was affected by the freedom of association.

First of all, it is necessary to evaluate this matter in terms of my dissenting opinion.

There is no hesitation as to the effect that political parties are bodies which are indispensable and need to be protected within the scope of democratic plurality and the order of organization and their duty of reflecting social reflexes on political life and order. It is also true that the legal regulations to be made by the state on political parties should not prevent and disproportionately restrict their efficiency in the democratic order and that measures need to be taken for the protection and functionality of their rights.

Although democracy within the party and the internal functioning of political parties can be ensured by leaving them to the party bylaw and principles outside the area of intervention of the state, it is compulsory for the public authority to control and supervise political parties against the harm they can inflict on both the society and itself in proportion to their importance in terms of the public interest that it will bring given the contribution of the reason of existence of political parties to the democratic order in the common ground beyond serving only to its principal values.

As a matter of fact, it is compulsory to protect the directors of Political Parties against the dangers of making the freedom of association non-exercisable in terms of the activities of parties which are unarguably compulsory in the democratic order and are performed through their directors. It should be beyond argument that the supervision and control of the obligation of directors to act in line with the provisions of laws and regulations on behalf of the public and the prevention of misuse of their authorities are indispensable for the freedom of association, expression and thought and of democracy within a party.

This being the case, it was not stated in the file at hand how and why the fine imposed on the director who was found to have failed to fulfill the duty incumbent on him in the file at hand impaired the freedom of association of the political party. Expressing with a perception of the dimension of threat an abstract and presumptive case such as the party being composed of poor people and the unemployed and thus may become unfunctional as specified in the allegations of the

application and the admission thereof by our court are away from being a convincing truth.

In the aforementioned circumstances, it will be inevitable to match the legal personality of the political party with the fines to be imposed on the directors of the party for their personal negligence, fault or crimes and personal responsibilities and the responsibilities of the legal person will become inseparable. When the importance attached to a political party in accordance with the current understanding of democracy as to the effect that a Political Party should not be closed because of the fault of its director is not ignored, the necessity of the independence of responsibilities and the importance attached to the freedom of association will be kept under protection. In the evidence of all these matters, the approach of assuming that the relevant administrative fine was also imposed on the Political Party and that therefore, the party was a victim and the relevant victim affected by the violation of right does not accord with the actual and legal reality in the case at hand.

The Political Party has to convincingly express how it faces a difficulty in fulfilling the freedom of association, thought and expression as a vital institution which has political objectives that will guide the society because of an administrative fine of TRY 759. In its financial audits of political parties, the Constitutional Court questions how a political party which does not have any financial revenue and expense within a year meets its rental expenses and communication fees or, in other words, that it should have a vital minimum income; otherwise, it may not find the balance sheets that it submits and the audit of accounts to be lawful.

The fine imposed on the Political Party is not disproportionate so as to prejudice the principles stipulated in Article 68 of the Constitution and Articles 10 and 11 of the ECHR and it does not have the quality and range that will create victimhood on the legal personality of the party. I did not agree with the majority opinion as regards the admission of the fact that the freedom of association of the legal personality was affected through abstract qualification while it was necessary not to admit the application lodged on behalf of the legal personality.

Although there is no problem in the admission of the application in respect of the real person, our Court, in its evaluation in terms of the Merits, evaluated the claims within the scope of the intervention in the freedom of association by accepting that the applicant Metin BAYYAR, being the Chairman of the Board of the Provincial Organization of the Party, also carried the title of the body of the party.

It is necessary to draw attention to the fact that our Constitutional Court, in the application No. 2012/95, delivered a judgment of "Inadmissibility" due to the "Lack of jurisdiction *Ratione Personae*" on the ground that no application was lodged with regard to any right of the legal personality of the community in the applications lodged by the organization (in our case, the legal personality of the Political Party) of which they were members on behalf of them due to the interventions which affected the rights of their members (in our case, the fact that the Political Party would have difficulty in engaging in political activities due to financial difficulty) and that the condition of being directly affected was not fulfilled.

The ECtHR also accepts that organizations cannot claim that they are victimized by the actions which affect the rights of their members.

In the case at hand, although it was accepted that the freedom of association which is considered to be the right of the legal personality of the party was directly affected by the administrative fine of TRY 759 imposed on the director of the party.

No explanation was made by our court as to how a (disproportionate) intervention which would eliminate all fields of activity of the organizational personality was admitted to have been made through a fine which had to be imposed on the director who failed to fulfill a small-scale liability that was assigned to him by law in order to protect the party.

Moreover, if a political party organization which is among the indispensable elements of a democratic order through its corporate identity can be dissolved and fail to fulfill its targeted activities and functionality because of a petty fine, assuming that such a weak structure

will fulfill the superior objectives that are assigned to it and are expected from it constitutes a disproportionate contradiction.

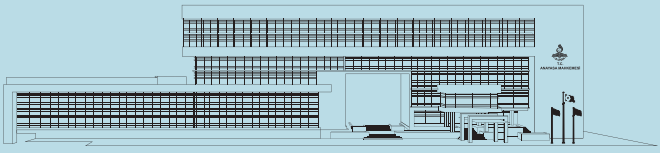
In the judgment, the characteristic of the fine imposed was not discussed, what would cause the party to be directly affected by the fine was not explained and the causality was established at an abstract level rather than a concrete one.

Moreover, the reason why the fine imposed remained outside the scope of duty of the director of the party was not explained, either.

It is not possible to agree with the statements regarding uncertainty in the legislation as specified in the judgment. The intervention relies on a legitimate basis and takes its power from the Law of Political Parties No. 2820 and other laws.

Due to the reasons explained, I do not agree with the reasoning of the majority as to the existence of the violation of right as the intervention which cannot be considered to be disproportionate and has a legitimate basis remains outside the scope of the freedom of association of the Political Party on the ground that there is no finding as to the existence of violation in the intervention and that moreover, the responsibility that caused the imposition of the fine results from Article 2 of the Law of Political Parties that is specifically towards the aim of protecting the party and cannot be associated with the bodies of a Political Party.

Justice
Serruh KALELİ



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