THE CONSTITUTIONAL COURT OF TURKEY

SELECTED JUDGMENTS

2016

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(Individual Application)

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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 2016 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

This book covers selected judgments which are capable of providing an insight into the case-law established in 2016 by the Sections and Plenary of the Turkish Constitutional Court through the individual application mechanism. In the selection of the judgments, several factors such as the contribution by these judgments 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.

As concerns the translation process, it should be noted that the whole text has not been translated. First, an introductory section where the facts of the relevant case are summarized is provided. In this section, the range of paragraph numbers in square brackets are representing the original paragraph numbers of the judgment. Following general information as to the facts of the case, a full translation of the remaining text with the same paragraph numbers of the original judgment is provided. This fully-translated section where the Constitutional Court's assessments and conclusions are laid down begins with the title "Examination and Grounds".

By adopting such method whereby not the full text but mainly the legal limb of the judgment is translated, it is intended to present and introduce the Constitutional Court's case-law and assessments in a much focused and practical manner. The judgments included herein are the ones which particularly embody the unprecedented case-law of the Constitutional Court.

Judgments rendered through individual application mechanism may contain assessments as to complaints raised under several rights and freedoms (assessments, in the same judgment, 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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that it had not been publicly disclosed to any person other than the public authorities and the company; and that having regard to the less severe nature of the effects of the petition of complaint on the employer in comparison with the negative effects on the applicant caused by the sanction in the form of termination of his employment contract under the provisions of justified termination, the necessity of the application of the relevant provisions was not discussed in the reasoning of the inferior courts' decision.

RIGHT TO PROPERTY (ARTICLE 35)

PRINCIPLE OF EQUALITY (PROHIBITION OF DISCRIMINATION) (ARTICLE 10)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

REMEZAN ORAK AND OTHERS

(Application no. 2013/2229)

3 February 2016

On 3 February 2016, the Second Section of the Constitutional Court found a violation of the principle of equality (the principle of discrimination) safeguarded by Article 10 of the Constitution in the individual application lodged by *Remezan ORAK and Others* (no. 2013/2229).

THE FACTS

[8-19] The service contracts of the applicants were suspended by the Municipality, which was the employer, for the applicants' taking part in the management of a trade union while working as a worker. The applicants requested to be re-employed upon termination of their tasks in the trade union. The Municipality decided to terminate the applicants' service contracts by means of paying their severance allowance. The applicants filed a case by maintaining that the termination of their service contract had been unfair; that their service contracts had been terminated for trade-union grounds; and that the other trade-union members in the same status with them had been re-employed. In the letter submitted by the Municipality to the Court, it is noted that there were two persons alleged to be in the same position and re-employed upon the end of their office in the management of the trade union in 2011. The court rejected the requests. The decisions were upheld by the Court of Cassation.

IV. EXAMINATION AND GROUNDS

20. The Constitutional Court, at its session of 3 February 2016, examined the application and decided as follows.

A. The Applicants' Allegations

21. The applicants maintained that their service contracts had been suspended for their having started to serve as professional officers in a trade union called Belediye-İş; and that although they had requested to be reinstated after the termination of their office in the trade union, their contracts had been terminated on trade-union related grounds. They also claimed that in spite of the existence of a letter of termination, their actions had been dismissed by the first instance court on the ground that their service contracts had not been terminated by the employer; and that their

allegations concerning the reinstatement of other persons, who had been members of another trade union called Hizmet-İş and had been in the same position with them, had not been accepted by the inferior courts as a ground for the breach of equality. In this respect, the applicants alleged that their rights to a fair trial and to employment were violated, and therefore, they requested retrial for redress of the violation and its consequences.

B. The Court's Assessment

22. The Constitutional Court is not bound by the legal qualification of the facts by the applicants and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The Court considered that the applicants' allegations that their right to employment was violated due to the Municipality's refusal of their request for reinstatement upon the termination of their professional service in the management of the trade union, unlike the members of another trade union, as well as, due to the inferior courts' rejection, within the scope of an action brought by the applicants, of their request for reinstatement relying on erroneous grounds without taking into consideration the assurance of the trade union management were related to the failure of the relevant authorities to protect their trade union rights. The Court was of the opinion that the application in question must be examined within the scope of the right to trade union, within the specific context of the freedom of association.

23. In addition, the applicants' allegation that while the reinstatement requests made by the members of another trade union had been accepted, their requests for reinstatement was rejected due to their trade union preference, which was in breach of the principle of equality, was examined in conjunction with their right to trade union.

24. In its observations, the Ministry stated that during the proceedings carried out by the first instance court, the now repealed Law no. 2821 had been in force; that Law no. 6356 had entered into force during the appeal proceedings; that however, the decision of the first instance court had been upheld at the end of the appellate review without taking into consideration these facts; and that accordingly, these issues must be taken into consideration in the examination of the applicants' allegations of violation.

1. Admissibility

25. Article 51 §§ 1 and 2 of the Constitution provides as follows:

"Employees and employers have the right to form unions and higher organizations, without prior permission, and they also possess the right to become a member of a union and to freely withdraw from membership, in order to safeguard and develop their economic and social rights and the interests of their members in their labour relations. No one shall be forced to become a member of a union or to withdraw from membership.

The right to form a union shall be solely restricted by law on the grounds of national security, public order, prevention of commission 24 of crime, public health, public morals and protecting the rights and freedoms of others."

26. Article 11 of the European Convention on Human Rights ("the Convention") provides as follows:

"1. 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.

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."

27. The freedom of association stands for the individuals' freedom to come together by forming a collective entity which represents them in order to protect their own interests. The concept of "association" has an autonomous meaning within the framework of the Constitution, and our legal system does not recognize as association the activities carried out by the individuals continuously and coordinately. However, this does not mean that the freedom of association will not necessarily be mentioned within the provisions of the Constitution (see *Tayfun Cengiz*, no. 2013/8463, 18 September 2014, § 30).

28. In democracies, the existence of organizations under which citizens will come together and pursue common goals constitutes an important component of a sound society. In democracies, such an "organization" enjoys fundamental rights which need to be respected and protected by the State. Trade unions, which are the organizations that aim at protecting the interests of their members in the field of employment, constitute an important part of the freedom of association, namely the individuals' freedom to come together by forming collective entities in order to protect their own interests (see *Tayfun Cengiz*, § 31).

29. The freedom of association provides individuals with the opportunity of realizing their political, cultural, social and economic goals in a collective manner. The right to trade union brings about the employees' freedom of association by coming together so as to protect their personal and common interests. From this aspect, it is not an independent right, but a form or a special aspect of the freedom of association (see *National Union of Belgian Police v. Belgium*, no. 4464/70, 27 October 1975, § 38).

30. Trade unions are the establishments formed to protect the financial and social rights of the employees. Conventions of the International Labour Organization (ILO), the European Social Charter and the judgments of the European Court of Human Rights ("the ECHR") must be taken into consideration in the interpretation of the scope of the trade union rights and freedoms enshrined in Articles 51-54 of the Constitution.

31. The State has positive and negative obligations in the enjoyment of trade union rights. Article 51 of the Constitution provides that employees have the right to form unions and higher organizations, without prior permission, and they also possess the right to become a member of a union and to freely withdraw from membership (see *Adalet Mehtap Buluryer*, no. 2013/5447, 16 October 2014, § 75). Despite the existence of judgments where it was found that certain sanctions imposed on the members of trade unions for their trade union activities adversely affected their freedom of assembly and violated their right to trade union, the European Court of Human Rights concluded that the right to reinstatement of the members of trade unions, whose service at the union ended for any reason, cannot be protected under Article 11 of the Convention (see *Ceyhan v. Turkey* (dec.), no. 46330/99, 4 October 2005).

32. In this respect, it has not been exactly shown that unconditional reinstatement of the employees, who are suspended from work on account of being assigned as union officials, as well as protection of their rights acquired by them until the date of their suspension from work are necessary safeguards for the effective enjoyment of the right to trade union. Compulsion, which does not significantly affect the enjoyment of the right to trade union, even if it causes economic damage, cannot give rise to any positive obligation for the State under Article 11 (see *Gustafsson v. Switzerland*, 15573/89, 25 April 1996, § 52).

33. Article 59 of Law no. 2821 envisages criminal penalty in the event that the reinstatement requests of the applicants under Article 29 of the same Law are rejected by the employer for no apparent reason. On the other hand, in such cases, Article 23 of Law no. 6356 provides legal guarantee in the form of "severance allowance". In other words, Article 23 of Law no. 6356 provides two alternative safeguards for the applicants who are assigned to trade union services, which are "reinstatement" and "severance allowance".

34. In the present case, it is understood that the employer who rejected the applicants' request for reinstatement paid their severance allowances in accordance with Article 9 (c) of the Collective Labour Agreement that complies with Article 23 of Article 6356, which entered into force after Law no. 2821, and provides more safeguards than Article 29 thereof. The first instance court dismissed the applicants' request, stressing that the request for reinstatement that was made upon the termination of the trade union service differed from the other requests for reinstatement.

35. Thus, although the applicants sustained partial financial damages as a result of the authorities' failure to meet their requests for "severance allowance" or "trade union compensation" for not being reinstated after the termination of their office in trade unions, there appears no compulsion that significantly restricted the enjoyment of their right to trade union. In addition, the applicants' having been subject to discrimination while the members of other trade unions were reinstated must separately be examined under Article 10 of the Constitution.

36. Pursuant to Article 148 § 3 of the Constitution and Article 45 § 1 of the Code on Establishment and Rules of Procedures of the Constitutional

Court no. 6216, dated 30 March 2011, in order for an examination to be made on the merits of an individual application lodged with the Constitutional Court, the right alleged to be interfered with by the public force must not only be safeguarded by the Constitution but it must also fall under the scope of the Convention and the additional protocols thereto to which Turkey is a party. In other words, applications which contain alleged violations of rights falling outside the common protection area of the Constitution and the Convention cannot be declared admissible (see *Onurhan Solmaz*, no. 2012/1049, 26 March 2013, § 18). Therefore, while determining the content of the rights within the scope of individual application, the provisions of the Constitution and the Convention must be considered together and their common protection area must be determined.

37. Article 10 §§ 1 and 5 of the Constitution, titled "Equality before the law", reads as follows:

> *"Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds.*
>
> *…*
>
> *State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings."*

38. Article 14 of the Convention, titled "Prohibition of discrimination" reads as follows:

> *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

39. Regard being had to the provisions above, the applicants' claim within the scope of the prohibition of discrimination cannot be examined abstractly; it must be examined in conjunction with the other fundamental rights and freedoms enshrined in the Constitution, as well as, in the Convention (see *Onurhan Solmaz*, § 33).

40. The applicants submitted their application based on the principle of equality in conjunction with the right to trade union. In other words, they

alleged to have been subject to discrimination in terms of the protection of the right to trade union. Therefore, their allegation must be examined within the scope of Article 10 of the Constitution, by also relying on Article 14 of the Convention.

41. However, the fact that the prohibition of discrimination lacks an independent protective function in the examination of individual applications does not impede the broad interpretation of this prohibition. When the alleged violation of a constitutional right is examined alone, although no violation is found, it cannot prevent the examination of a discriminatory act conducted with regard to that right. Therefore, even though there is no violation of the relevant fundamental right or freedom, the discriminatory act conducted in this respect may be found to be in breach of Article 10 of the Constitution (see *İhsan Asutay*, no. 2012/606, 20 February 2014, § 48).

42. The applicants' complaints that their requests for reinstatement were rejected due to their trade union preference, which was in breach of the principle of equality, are not manifestly ill-founded. Accordingly, the alleged violations were declared admissible for not being manifestly ill-founded and there being no other grounds for their inadmissibility

2. Merits

43. Although the applicants are required to prove the facts underlying the different treatment in order for the assessment of the alleged discrimination, this rule is not absolute. The applicants allege that while their requests for reinstatement were rejected, the requests submitted to this end by their colleagues who were "in the same position" and "having the same legal status" with them and members of another trade union were accepted, which was in breach of the principle of equality.

44. The concept of "*equality*" solely means the requirement in relation to not performing a different treatment for the individuals in the same situation without any objective and reasonable basis. Grounds of different treatments are embodied in the Constitution as "language, race, colour, sex, political opinion, philosophical belief, religion, sect or similar grounds"; and in the Convention as "sex, race, colour, language, religion,

political or other opinion, national or social origin, association with a national minority, property, birth or other status".

45. The fact that whether the requests for reinstatement submitted by two other persons who had been members of another trade union and had been in the same position with the applicants had been accepted was investigated and established during the proceedings before the first instance courts. Allegation that the Municipality made discrimination in terms of the act of reinstatement to work after the termination of trade union management is based on the fact that the trade union to which the applicants were member was different from the other trade union. Trade unions are not only the organizations established to defend the economic interests of their members, but they also serve as non-governmental organizations that can express their opinions regarding the political and social events in the country. From this aspect, trade union membership may reflect the preferences of persons in regard to "political view" or "philosophical belief".

46. Democracy will be reinforced in a social understanding in which the differences are perceived not as a threat but as a resource for enrichment. The assessment of the request for reinstatement according to the trade union of which the relevant persons are members is not acceptable in contemporary democratic societies. It is possible to accept that after having assessed the requests for reinstatement, the employer may reach a conclusion which does not allow for reinstatement of certain trade-union members for reasons other than being a member of a trade union and that such a conclusion reached may not be regarded as discrimination. However, such assessments must be based on objective criteria and concrete grounds.

47. In the present case, while the service contracts of the applicants who had been members of the trade union called Belediye-İş were terminated, the persons who had been members of the trade union called Hizmet-İş were reinstated. There is no explanation and assessment indicating that such choice of the employer is based on objective criteria and grounds other than the membership of different trade unions. Although the applicants' allegations of discrimination were put forth during the proceedings, the cases were concluded without these allegations being dealt with in the judgments of the first instance courts.

48. Consequently, it has been concluded that subjecting the employees to a different treatment in the absence of "*objective and reasonable grounds*", while making an assessment with respect to their request for reinstatement, by taking into consideration the trade union of which they are members does not pursue "*a legitimate aim*". Therefore, it must be held that there was a breach of the principle of equality (the prohibition of discrimination) guaranteed in Article 10 of the Constitution.

3. Application of Article 50 of Code no. 6216

49. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, reads as follows:

> *"1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled. However, legitimacy review cannot be done, decisions having the quality of administrative acts and transactions cannot be made.*
>
> *(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."*

50. The applicants requested that the violation be found and retrial be conducted.

51. It was concluded that the principle of equality was violated in conjunction with the right to trade union.

52. As there is a legal interest in conducting retrial for redress of the violation of the principle of equality, it must be ordered that a copy of

the judgment be sent to the 12th Chamber of the Istanbul Labour Court in order to conduct retrial.

53. The total court expense of TRY 1,998.35 including the court fee of TRY 198.35 and the counsel fee of TRY 1.800, which is calculated over the documents in the case file, must be reimbursed to the applicants respectively.

V. JUDGMENT

The Constitutional Court UNANIMOUSLY held on 3 February 2016 that

A. The alleged violation of the principle of equality in conjunction with the right to trade union be DECLARED ADMISSIBLE;

B. The principle of equality safeguarded by Article 10 of the Constitution was VIOLATED;

C. A copy of the judgment be SENT to the 12th Chamber of the Istanbul Labour Court to conduct retrial for redress of the consequences of the violation of the principle of equality;

D. The total court expense of TRY 1,998.35 including the court fee of TRY 198.35 and the counsel fee of TRY 1.800 be REIMBURSED TO THE APPLICANTS SEPARATELY;

E. The payment be made within four months as from the date when the applicants apply 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; and

F. A copy of the judgment be SENT to the Ministry of Justice.

RIGHT TO LIFE
(ARTICLE 17 § 1)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

SIDDIKA DÜLEK AND OTHERS

(Application no. 2013/2750)

17 February 2016

On 17 February 2016, the First Section of the Constitutional Court found a violation of the procedural aspect of the right to life safeguarded by Article 17 of the Constitution in the individual application lodged by *Sıddıka Dülek and Othe*rs (no. 2013/2750).

THE FACTS

[7-46] The applicants' brother, Bayram Dülek, was found dead by being hanged in the ward toilet in the course of his military service during which the doctors issued a report indicating that he had been in tendency to commit suicide due to his psychological disorder namely dysthymia. The applicants' request for initiation of an administrative investigation to redress the pecuniary and non-pecuniary damage sustained by them due to the death of Bayram Dülek was dismissed. The action for compensation brought before the Supreme Military Administrative Court ("SMAC") was dismissed on the ground that there was no faulty liability or absolute liability attributable to the administration. In the application lodged with the European Court of Human Rights ("ECHR"), it was held that there had been a breach of the right to life. The applicant's request for a re-trial in line with the ECHR's violation judgment was also dismissed by the SMAC.

IV. EXAMINATION AND GROUND

47. The Constitutional Court, at its session of 17 February 2016, examined the application and decided as follows:

A. The Applicants' Allegations

48. The applicants maintained that their next-of-kin, Bayram Dülek, had been recruited to the military service although he had suffered mental illness to the extent he would end his own life, which had been known to the authorities; that he had committed suicide as the necessary precautions had not been taken during the military service; that the action for compensation brought by them before the SMAC had been dismissed as the administration did not have any fault or no-fault responsibility in the impugned incident; that thereafter they had lodged an application with the ECHR which found a violation of the right to life; and that their

request for a retrial in line with the ECHR's judgment had been once again dismissed by the SMAC upon examination. They further alleged that in the decision whereby their request for a retiral was dismissed, their allegation that Bayram Dülek should have never been recruited to the military service was considered to form an action for compensation resulting from an administrative act and this complaint was found to be filed out of time; whereas as for the alleged non-fulfilment of the duty of care, it was indicated that as the ECHR had found a violation due to the deficiency in the military recruitment system, its judgment was not applicable to this complaint; and that making a reference to merely a certain part of the ECHR's judgment and making an arbitrary interpretation of this part, the SMAC issued a dismissal decision. It was further indicated that the ECHR held the State responsible not only for the deficiency in the recruitment system but also for the consequences thereof; that even if recruitment to the military service was considered as an administrative act, the continued undertaking of the risk as to the right to life during the performance of military service and its possible consequences were also an unjust act; and that the authorities failed to display due diligence in respect of the applicants' next-of-kin during the performance of the military service. They accordingly alleged that their rights safeguarded by Articles 12, 17, 40 and 125 of the Constitution had been violated and claimed pecuniary and non-pecuniary compensation as well as requested reimbursement of the court expenses incurred.

B. The Court's Assessment

49. 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). In consideration of the application form and its annexes as a whole, it appears that the applicants mainly complained of the failure to redress the pecuniary and non-pecuniary damage sustained by them on account of the incident, which was found established by the ECHR's judgments finding a violation of the right to life, as the SMAC failed to conduct a sufficient and effective inquiry. In this respect, the Court considered that all allegations raised by the applicants -in so far as they related to the question whether the steps indicated by the ECHR in its violation judgment had been duly

taken- be examined within the scope of the right to life safeguarded by Article 17 of the Constitution.

1. Admissibility

50. Individual applications must be lodged, either directly or through other courts or representations in foreign countries, with the Constitutional Court within 30 days upon the exhaustion of the available legal remedies or, in cases where no available legal remedy exists, by the date when the violation is become known, pursuant to Article 148 § 13 of the Constitution, Article 47 § 5 of the Code on the Establishment and Rules of Procedures of the Constitutional Court no. 6216 and dated 30 March 2011, as well as Article 64 § 1 of the Internal Regulations of the Court (see *Yasin Yaman,* no. 2012/1075, 12 February 2013, §§ 18-19).

51. The requirement to comply with the relevant time-limit rule, which is one of the admissibility conditions of the individual application mechanism, is a condition to be *ex officio* taken into consideration at every stage of the examination of individual application (see *Taner Kurban*, no. 2013/1582, 7 December 2013, § 19).

52. As per the abovementioned provisions, an individual application must be lodged within 30 days following the date when the legal remedies have been exhausted or, if no legal remedy is available, the date when the violation is become known. In this sense, there is a close correlation between the exhaustion of legal remedies and the time-limit condition set for individual application. Accordingly, the ordinary legal remedy specified in these provisions must be accessible and effective one which is capable of offering a reasonable prospect of success and providing redress (see *Taner Kurban*, § 20). In other words, this limited time cannot be extended by means of making inappropriate applications with organs and bodies which do not have any power and duty to offer redress for a given complaint. It is therefore necessary to separately review whether each legal remedy is effective in respect of the relevant applications, without seeking the condition for exhaustion of an ineffective and inadequate legal remedy, given the particular circumstances of each case (see *Hasip Kaplan*, no. 2013/4681, 30 June 2014, § 23).

53. In the present case, the applicants whose request for rectification of the decision was dismissed on 7 November 2012 by the 2nd Chamber of the SMAC made another request for rectification of the decision of 7 November 2012. It was also dismissed without any examination by the same Chamber on 20 February 2013 on the grounds that such a request may be filed only for once and that rectification of the decision dismissing the request for a retrial cannot be requested. The applicants lodged an individual application within 30 days after taking delivery of the decision dismissing their request for rectification of the decision. Regard being had to the fact that the applicants' request for rectification of the decision was dismissed without any examination, it must be primarily ascertained from the date of which decision the thirty-day time-limit set for lodging an individual application would start to run.

54. Relevant part of Article 66 § 1 of Law no. 1602, titled *"Rectification of decision"*, provides for *"A request for rectification of the decisions rendered by the Chambers and the Board of Chambers may be made for only once (…)"*. In the decision of joinder, which was rendered on 7 February 1977 by the General Assembly of the SMAC concerning the rectification of the decision, it was indicated that in cases where a decision which was rectified upon the request for rectification was deemed to be a fresh decision, it would lead to a vicious circle in terms of the appellate remedy; that broad interpretation of *"decisions rendered by the Chambers and Board of Chambers"* would go beyond the objective pursued by the law-maker; that as it was the same body rendering the decision and dealing with the request for rectification of the decision and the subject-matter of this request was comprised of the decisions of the same nature, which were rendered by the Chamber of the Board of Chambers, the decision rendered following the acceptance of the request for rectification of the decision must be considered not as a fresh decision but as the one replacing the rectified decision; and that accordingly, an individual might file a request for rectification for once.

55. Following the above-mentioned decision of joinder, the SMAC has consistently noted that the remedy of rectification of decision may be resorted to for only once and accordingly dismissed, without any examination, the requests for rectification which were raised for

the second time. The sole exception to that rule, which is accepted by the SMAC, is the cases where the request for rectification of decisions rendered upon the first examination pursuant to Article 45 of Law no. 1602 is accepted and where a different conclusion is reached on the merits. Save for this exception, the SMAC dismisses, without any examination, the request for rectification of decision which is raised twice.

56. Given Article 66 of Law no. 1602 which provides for that rectification of the decisions rendered by the SMAC Chamber and Board of Chambers may be requested for only once, the decision of joinder of 7 February 1977 that was rendered by the SMAC General Assembly as well as the steady practice in this respect, the Court considers that the available remedies have been exhausted upon the decision rendered by the SMAC on the first request for rectification of the decision; and that the thirty-day time-limit for lodging an individual application must start to run as from the notification date of this decision. That is why the SMAC does not make any examination as to the merits of the request for rectification of decision if it has been made for twice and dismisses the request as not being eligible for examination.

57. In spite of the relevant provisions of Law no. 1602 and the relevant practice implemented by the SMAC as mentioned above, particular circumstances of each case must be also taken into consideration in terms of the requirement of exhaustion of legal remedies and thirty-day time-limit rule.

58. In the present case, the action for compensation brought by the applicants was dismissed on the merits by the 2nd Chamber of the SMAC on 12 December 2007. Thereafter, the applicants requested rectification of the decision, which was accepted by the 2nd Chamber of the SMAC on 12 March 2008 but was ultimately dismissed on the merits by the same Chamber on 8 October 2008. The applicants requested rectification of the decision for the second time. Although it was the second time the applicants requested rectification of the decision in the same case, the SMAC dismissed their request by its decision -dated 28 January 2009 and no. E.2009/112 K.2009/88- where it was indicated *"… as the grounds relied on by the complainant's lawyer in the petition whereby the rectification of the*

decision has been requested were found justified, and the decision requested to be rectified was found in accordance with the law and procedure, as well". In other words, the SMAC did not dismiss without any examination the applicants' second request for rectification of the decision in the same case but instead examined their request and accordingly dismissed it for being compatible with the law and procedure.

59. In the light of the ECHR's judgment finding a violation, the applicants filed a request for a retrial. However, their request was rejected. Thereupon, they filed a request for rectification of that decision. However, the SMAC dismissed without any examination the request for rectification on the grounds that a request for rectification of the decision cannot be filed for twice and that upon the dismissal of the request for a retrial, no request for rectification of the dismissal decision can be made either.

60. As is inferred from the explanations above, whereas before the ECHR's violation judgment, the SMAC examined the applicants' request for rectification of the decision, which was also filed for the second time; following the ECHR's violation judgment, it dismissed without any examination the request for rectification of the decision -whereby the request for a retrial had been rejected- on the ground that no request for rectification of the decision could be filed for twice and that rectification of the decision dismissing the request for a retrial could not be requested. Regard being had to the facts that the applicants' second request for rectification of the decision was not dismissed without any examination before the ECHR's violation judgment and that even dismissed, the request was nevertheless examined on its merits, the applicants' request for rectification in the hope that the decision on dismissal of their request for a retrial would be re-examined was found reasonable in the context of the particular circumstances of the case. An interpretation to the contrary may lead to the violation of the applicants' right of access to a court for acting in an extremely formalistic manner. For these reasons, the present application -which was lodged within thirty days as from the notification date of the decision concerning the request for rectification of the decision dismissing the request for a retrial- must be considered to have been lodged in due time.

61. In Article 46 § 1 of Code no. 6216 on the Establishment and Rules of Procedures of the Constitutional Court, it is envisaged that an individual application may be lodged only by those, whose current and personal right is directly affected due to an act, action or negligence allegedly giving rise to a violation. By very nature of the right to life, an application with respect to this right for the persons who have lost their lives may be lodged only by the relatives of the deceased persons (see *Sadık Koçak and Others*, no. 2013/841, 23 January 2014, § 65). In the present case, the deceased person, Bayram Dülek, was the son of the applicants Kazım Dülek and Sıddıka Dülek and brother of the other applicants. It is therefore no deficiency also in respect of the applicants' capacity to lodge an individual application.

62. For these reasons, the Court declared the individual application admissible for not being manifestly ill-founded and there being no other ground to declare it inadmissible.

2. Merits

63. The applicants maintained that their next-of-kin Bayram Dülek, suffering from a psychological disorder, had committed suicide during his military service due to the authorities' negligence; that after their action for compensation had been dismissed by the SMAC, they lodged an application with the ECHR which found a violation of the right to life in their case; that their request for a retrial in the light of the ECHR's judgment had not been examined effectively and sufficiently by the SMAC; and that their losses could not be redressed. They accordingly alleged that their right to life had been violated.

64. In its observations, the Ministry has noted that as the applicants did not raise a complaint as regards the violation of the right to life, no observations would be submitted within the scope of this right; that it would merely submit observations with respect to the right of access to a court; that the right of access to a court, which refers the right to bring an action before tribunals in civil matters, also covers the right to be present before the court; that however, the right of access to a court is not an absolute right but may be subject to certain implicit restrictions; and that in this sense, States have a certain margin of appreciation. It has been

further indicated that any restriction with the right of access to a court may comply with Article 6 § 1 of the Convention only when a legitimate aim is pursued and there is reasonable balance between the aim pursued and the means applied; that in applying the procedural rules, the courts must abstain from acting with excessive formalism which may infringe the right to a fair trial as well as from extreme flexibility which would lead to elimination of the procedural rules; and that setting certain time-limits to have recourse to certain remedies such as to lodge an appeal and to bring an action serves for the principle of legal security.

65. In the Ministry's observations, it has been also indicated that in the present case, on 18 May 2012 when the applicants applied to the SMAC for a retrial upon the ECHR's violation judgment, the finding by the ECHR's final judgment that the impugned decision was in breach of the Convention or its additional protocols was not among the grounds that would require a retrial under Law no. 1602; that the applicants' request was nevertheless dealt with by the SMAC but was considered as an action for compensation resulting from an administrative act; and that as no action was brought in due time against the recruitment of the applicants' next-of-kin to the military, the ECHR's judgment could not be executed; and that these considerations must be taken into account in the assessment to be made.

66. In their petition of 13 April 2015, the applicants noted that although it was indicated in the Ministry's observations that they had not complained of a violation of the right to life, they mentioned, in the application form, the manifest violation of Article 17 § 1 of the Constitution; that as Bayram Dülek was no longer alive, consequences of the violation could be removed only by offering redress for the losses and damages suffered by his relatives due to his death; and that qualification of their action by the SMAC as an action for compensation resulting from an administrative act was in breach of their constitutional rights.

67. Article 17 § 1 of the Constitution, titled *"Personal inviolability, corporeal and spiritual existence of the individual"*, reads as follows:

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

68. The Convention signed on 4 November 1950 for the protection and improvement of fundamental rights and freedoms was ratified by the Grand National Assembly of Turkey by Law no. 6366 and dated 10 March 1954 and took effect in terms of Turkey after the certificate of ratification was deposited to the Secretary General of the Council of Europe on 18 May 1954. By virtue of the resolution of the Council of Ministers dated 22 January 1987 and no. 87/11439, the right to lodge an individual application with the European Commission on Human Rights was adopted, and by virtue of the resolution dated 25 September 1989 and no. 89/14563, Turkey recognized the compulsory jurisdiction of the ECHR. Thereby, Turkey has undertaken the liability to secure the fundamental rights and freedoms enshrined in the Convention and afforded all individuals within its jurisdiction the right to lodge an application with an international tribunal which may render legally binding judgments finding a violation.

69. The fundamental rights and freedoms that are safeguarded under the Convention may be effectively protected only when the violation judgments rendered by the ECHR are duly executed in the domestic law. The failure to duly execute the ECHR's violation judgments in the domestic law means that the fundamental rights and freedoms safeguarded by the Convention could not be effectively protected in practice.

70. It is for the Constitutional Court, which is empowered to examine an alleged violation of any fundamental rights and freedoms under the joint protection realm of both the Constitution and the Convention, to deal with the complaints that the fundamental rights and freedoms enshrined in the Convention have not been afforded effective protection in practice. Any consideration to the contrary would be incompatible with the constitutional objective which provides for the effective protection of the fundamental rights and freedoms under the joint protection realm of the Constitution and the Convention. Therefore, the question whether a violation judgment rendered by the ECHR has been duly executed must be examined by the Court. However, such an examination by the Court will not be the re-examination of the facts from the outset but will be confined to the question whether the violation judgment rendered by the ECHR has been duly executed.

71. With a view to affording protection for the fundamental rights and freedoms not only in theory but also in practice, the ECHR's judgment finding a violation is deemed as a ground for a retrial by Law no. 5271, Law no. 6100 and Law no. 2577. In this scope, a new paragraph was added by Law no. 6459to Article 64 of Law no. 1602, and thereby a violation judgment by the ECHR is considered as a ground for a retrial also in Law no. 1602.

72. The inferior courts must satisfy the requirements of reasonable speediness and due diligence in dealing with cases involving the alleged violation of the right to life. The Court must assess whether the inferior courts dealt with the proceedings conducted into such kinds of incidents in depth and with due diligence as required by Article 17 of the Constitution or to what extent the inferior courts made the examinations. That is because the sensitivity to be shown by inferior courts in this respect would preclude any damage to the important role of the judicial system in preventing similar violations of the right to life that may emerge subsequently (see *Cemil Danışman*, no. 2013/6319, 16 July 2014, § 110; and *Filiz Aka*, no. 2013/8365, 10 June 2015, § 33). The requirements of reasonable speediness and due diligence that the inferior courts must fulfil in cases with respect to the right to life are undoubtedly applicable to the examination of the request for a retrial made on the basis of a violation judgment rendered by the ECHR.

73. In the present case, upon the dismissal of the action for compensation brought against the administration for having fault in the death of Bayram Dülek and finalization of the dismissal decision, the applicants lodged an application with the ECHR, alleging that there had been a violation of the right to life. The ECHR, dealing with the case, unanimously found a violation of the said right. In the light of the ECHR's violation judgment, the applicants filed a request with the SMAC for a retrial and compensation. However, their request was dismissed.

74. The main issue to be discussed in the present case is whether the issues raised by the applicants, who filed a request with the SMAC for a retrial following the ECHR's violation judgment, within the scope of the right to life was examined effectively and sufficiently and whether the violation judgment rendered by the ECHR was duly executed. In

cases involving the complaints of alleged violation of the right to life, the inferior courts must examine the incidents in depth and with due diligence as required by Article 17 of the Constitution, and when the inferior courts find a violation and offer an appropriate and sufficient redress, the victim status might be removed. Therefore, the allegation that no just satisfaction could be afforded within the meaning of the right to life due to the SMAC's failure to make an effective and sufficient examination as to the case, which was found to be in breach of the right to life by the ECHR, would be examined under the procedural aspect of the right to life.

75. Whereas it is in principle the inferior courts' duty to assess the available evidence in a given case and to interpret the provisions of law, it is for the Constitutional Court to assess whether the inferior courts made examinations with due diligence as required by Article 17 of the Constitution or to what extent an examination was made in cases involving the alleged violation of the right to life. Regard being had to this consideration, the Court must examine whether the SMAC's decision on dismissal of the request for a retrial contained a meticulous examination as required by Article 17 of the Constitution and whether the ECHR's violation judgment was duly executed. Such an examination is necessary as required by the duty to examine whether any of the fundamental rights has been violated, which is entrusted to the Constitutional Court by the Constitution.

76. The following phrase was added to Article 64 of Law no. 1602, where the opportunity of retrial is laid down, by Article 2 of Law no. 6459: *"in cases when it is found established by the final judgment of the European Court of Human Rights that the impugned decision has been in breach of the Convention for the Protection of Human Rights and Fundamental Freedoms or its additional protocols"*. A violation judgment rendered by the ECHR is accepted as a ground for a retrial pursuant to Law no. 1602. However, on 18 May 2012 when the applicants requested a retrial, Law no. 1602 did not explicitly accept a violation judgment rendered by the ECHR as a ground for a retrial. However, the applicants' request for a retrial was dismissed not on the ground that Law no. 1602 did not consider the ECHR's violation judgment as a ground for a retrial, but rather on the

ground that the grounds indicated in the ECHR's judgment were not applicable to the present case. In other words, the SMAC acknowledged even implicitly that a violation judgment rendered by the ECHR may require re-opening of the proceedings but dismissed the applicants' request for a retrial as the grounds specified in the ECHR's judgment were not applicable to their case.

77. In the decision of 7 November 2012 whereby the 2nd Chamber of the SMAC dismissed the request for a retrial, it was noted that the applicants complained in their first petition of both Bayram Dülek's recruitment to the military and of the authorities' failure to show due diligence during the military service; that the first complaint as to Bayram Dülek's recruitment to the military was in the form of an action for compensation resulting from an act but could not be examined as the action was not brought within the legal time-limit of 120 days prescribed in Article 35 of Law no. 1602; and that therefore, the SMAC would examine only the question whether due diligence had been displayed in the course of the military service. It was further indicated that as in its judgment, the ECHR found a violation due to the deficiency in the recruitment process, its operative part could not be applied to the present case. Given the SMAC's decision, it appears that there is an assessment that the ECHR found a violation only due to the deficiency in the recruitment process but not in terms of the requirement of due diligence during the military service. Making such an assessment, the SMAC reached the conclusion that the ECHR's violation judgment could not be applied to the applicants' complaint as to the non-fulfilment of the requirement of due diligence during the military service. It also appears that the applicants' complaint that Bayram Dülek should have never been recruited to the military was in the form of an action for compensation resulting from an act but could not be handled for not being brought within the prescribed period pursuant to Article 35 of Law no. 1602.

78. It should be primarily noted that any assessment to be made by considering that the ECHR found a violation only due to the deficiencies in the recruitment process but not in terms of the requirement of due diligence to be displayed during the military service may lead to conclusions which are not compatible with the ECHR's judgment.

79. At this point, in assessing whether the ECHR's violation judgment was duly executed and whether an examination was made in depth as required by Article 17 of the Constitution, the Court must elaborate on the SMAC's consideration that a violation was found not in terms of the requirement of due diligence but only on account of the deficiency in the recruitment process, as well as on the dismissal of the applicants' complaint that Bayram Dülek should have not been recruited to the military for being time-barred.

80. In its judgment, the ECHR has made a reference to the Regulation which was in force at the material time as well as to the List of Diseases and Disorders enclosed therewith and has accordingly noted that in cases where a person suffers from the diseases specified in Parts B-D of the Mental Health and Disorders included in Articles 15 to 18 of this List, a decision on *"non-eligible for the military service"* may be issued, and in cases where a person suffers from the diseases specified in Part C, a decision on *"postponement to the next year"*, *"delayed referral to the medical examination"* and *"sick leave"* may be issued. It has been also indicated that even the competent authorities' finding that a person suffering from a mental disorder namely dysthymia and ultimately committing suicide was eligible for military service (even as a commando) is sufficient to reach the conclusion that the Regulation in force had certain deficiencies. It has been also noted that given the particular circumstances of the present case, the Government's argument that the military officers disclosing their mental problems are subject to a suitable medical examination could not be notably relied on; that the military authorities should have been aware of the fact that Bayram Dülek's recruitment to the military and his continued performance had posed a real risk to his mental and physical integrity; and that it was the Contracting State that must be held responsible for the deficiencies in the military recruitment process as well as for the unfavourable circumstances resulting from these deficiencies (see *Dülek and Others v. Turkey*, §§ 52-55).

81. Regard being had to the violation judgment rendered by the ECHR, it has been observed that there is no finding that the violation resulted merely from the deficiencies in the military recruitment process; that the reasoning *"even the recruitment of the person suffering from dysthymia is*

sufficient to reach the conclusion that the statutory arrangements in force had certain deficiencies" cannot be interpreted to the effect that the violation was found only on the basis of the deficiencies in the recruitment system; that this reasoning was used so as to stress that it would be meaningless to examine the question whether the requirement of due diligence had been fulfilled during the military service in respect of the person who was recruited to the military contrary to the safeguards in the legislation and who subsequently committed suicide; that as a matter of fact, the recruitment of a person suffering from dysthymia, which was also known to the authorities, and his continued performance of military service were found to constitute a violation in the judgment; and that not only his recruitment but also his continued performance were highlighted in the judgment. Given all these considerations as a whole, it would not be compatible with the ECHR's judgment to consider that only the recruitment of a person who should not have been recruited to the military due to his disorder was found to constitute a violation and that the ECHR did not find a violation due to this person's continued performance of military service as well as due to his being deprived of the opportunities to have medically examined during the military service, to have checked by the İzmir Military Hospital and to avail himself of the measures specified in the relevant Regulation, such as sick leave, according to the nature and degree of his disorder. It has been accordingly concluded that the SMAC's decision -whereby the applicants' request for a retrial was dismissed on the basis of the consideration that the ECHR found a violation only due to the deficiencies in the military recruitment system- did not contain an examination made in depth and with due diligence as required by Article 17 of the Constitution; and that the ECHR's judgment finding a violation was not duly executed in the present case.

82. The SMAC also dismissed, without any examination, the applicants' complaint that Bayram Dülek should not have been recruited to the military for being time-barred. Prior to the its decision whereby the applicants' request for a retrial was dismissed, the SMAC had examined for twice this complaint on its merits and, at the end of each examination, dismissed the action on the grounds that the administration

did not have any fault or no-fault responsibility. However, following the ECHR's violation judgment, the SMAC qualified the complaint as an action for compensation resulting from an act and dismissed the action without any examination as it had not been brought within the prescribed period. This interpretation by the SMAC was unforeseeable and extremely severe, which makes it extremely difficult to appropriately and sufficiently redress the violation and renders dysfunctional the consequences of the ECHR's violation judgment.

83. For these reasons, the Court has found a violation of the procedural aspect of the right to life safeguarded by Article 17 of the Constitution.

3. Application of Article 50 of Code no. 6216

84. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, reads as follows:

> *"(1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled...*
>
> *(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."*

85. The applicants claimed 10,000 Turkish Liras ("TRY") and TRY 40,000 as pecuniary and non-pecuniary damage for Sıddıka Dülek; TRY 15,000 and TRY 40,000 as pecuniary and non-pecuniary damage for Kazım Dülek; and TRY 30,000 as non-pecuniary compensation for each of the other applicants. They also claimed TRY 25,000 and TRY 7,000 for reimbursement of the counsel fee and court fee respectively.

86. It has been concluded that the procedural aspect of the right to life was violated as no effective and adequate examination had been conducted as to the applicants' request for a retrial.

87. As there is legal interest in conducting a retrial for redressing the consequences of the violation of the right to life, a copy of the judgment must be sent to the 2nd Chamber of the SMAC to conduct a retrial.

88. The applicants claimed both pecuniary and non-pecuniary compensation. However, as it appears that ordering a retrial has constituted sufficient satisfaction for the applicants' allegation, their claim for compensation must be dismissed.

89. The total court expense of TRY 1,998.35 including the court fee of TRY 198.35 and the counsel fee of TRY 1,800, which is calculated over the documents in the case file, must be reimbursed to the applicant.

V. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 17 February 2016 that

A. The alleged violation of the right to life be DECLARED ADMISSIBLE;

B. The procedural aspect of the right to life safeguarded by Article 17 of the Constitution was VIOLATED;

C. A copy of the judgment be SENT to the 2nd Chamber of the SMAC in order to conduct a retrial with a view to eliminating the consequences of the violation of the right to life;

D. Although the applicants claimed pecuniary and non-pecuniary compensation, their request for compensation be DISMISSED as ordering a retrial would constitute sufficient satisfaction for the applicants' allegation;

E. The total expense of TRY 1.998.35 including the court fee of TRY 198.35 and the counsel fee of TRY 1,800 be REIMBURSED JOINTLY TO THE APPLICANTS;

F. The payments 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 Ministry of Justice.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

HIDIR ÖZTÜRK AND DİLİF ÖZTÜRK

(Application no. 2013/7832)

21 April 2016

On 24 March 2016, the Second Section of the Constitutional Court found a violation of the right to an effective investigation within the scope of the right to life safeguarded by Article 17 of the Constitution in the individual application lodged by *Hıdır Öztürk and Dilif Öztürk* (no. 2013/7832).

THE FACTS

[6-95] While the applicants' daughter A.Ö. was working in a factory belonging to the Private Provincial Administration operating at the Akpınar Town in Mazgirt, Tunceli, any news could not be received from her after the end of shift on 27 June 1992. The applicant, who is the father, Hıdır Öztürk, maintained before the chief public prosecutor's office that his daughter had been taken to a white car by unidentified persons while walking along the Tunceli-Elazığ highway. He noted that he was firstly suspicious of a person wishing to get married with his daughter and subsequently of a person running supermarket where he was shopping. The applicant requested the extension of the investigation against a person whom he alleged to be an accomplice of that person.

While the searching activities for A.Ö. were going on, a dead body of a woman determined to have been killed by means of strangling with a cloth around her neck was found within the boundaries of Elazığ province. The applicants identified that the dead body in question was belonging to their daughter A.Ö.

On 10 August 1992, the Chief Public Prosecutor's Office initiated a criminal case against N.A., E.A. and S.Ç. alleged to be in the same car with the applicant Hıdır Öztürk's daughter on the day of incident for premeditated murder of A.Ö. At the end of the proceedings, it was ordered that the accused persons be acquitted, and that a criminal complaint be filed for the identification of the offenders of the incident. Upon this criminal complaint, the Elazığ Chief Public Prosecutor's Office issued a "permanent arrest warrant" in respect of the offenders.

In the course of the proceedings conducted by the Assize Court, the defence-counsel of Ş.Ç. stated that the incident was published in

a newspaper in this manner: "the organization damned the counter-guerrilla murder".

It was alleged by the Chairperson of the Tunceli Branch of the Human Rights Association and a lawyer that in a news report entitled "Death Squad" published in the relevant issue of a newspaper dated 26 August 1993, a military officer declared that A.Ö. had been killed by M.Y. whose nickname was "the Green", and thereupon, a petition was submitted to the Tunceli Chief Public Prosecutor's Office. The file of investigation initiated upon this allegation was joined with the investigation conducted into the death of A.Ö.

While the investigation was pending, the applicant was invited by the Human Rights Inquiry Committee established in the Grand National Assembly of Turkey and heard on 13 December 2011.

As to the death of his daughter, the applicant maintained that in 1992, the Tunceli Provincial Gendarmerie Commander asked the applicant to visit him; that in the first interview during which he was alone, the commander asked him to bring his daughter, and when he went there together with his daughter, A.Ö., she was caused to meet with a thin and bearded person whose name was "Mr. M....." in a closed room on the ground floor of the command headquarters building; that her daughter was kidnapped two months after this incident; that when he subsequently went to the Elazığ State Hospital together with his family with a view to identifying a dead body belonging to a woman, a police officer in civilian clothes told his wife, Dilif Öztürk, "this is your daughter; she was resembling to you". He accordingly alleged that her daughter had been tortured to death.

The applicant also maintained that he had subsequently seen the person named M.Y. on TV channels; that her daughter had also known that person; that three days after the his daughter's death body had been found, that person was evacuated from the lodging building of the Private Provincial Administration; and that on those days, A.Ö.'s service contract had been terminated.

The Human Rights Inquiry Committee requested information concerning the applicant's allegations from the Tunceli and Elazığ Chief

Public Prosecutor's Office. The Elazığ Public Prosecutor's Office provided information in chronological order in its reply letter dated 28 December 2011.

On 1/2/2012, the applicant filed another petition with the Tunceli Chief Public Prosecutor's Office through his lawyer with the allegation that there had been negligence in arrest of M.Y. whose nickname was "Green" and his team whom the applicant held responsible for her daughter's murder. The Elazığ Chief Public Prosecutor's Office drew up a police report concerning M.Y. and the other persons including certain law-enforcement officers, public officers and the members of the National Intelligence Organization ("the MIT") and sent the investigation file to the Malatya Chief Public Prosecutor's Office.

On 23 February 2012, the Malatya Chief Public Prosecutor's Office requested information from the Undersecretariat of the MIT concerning M.Y.'s duties under the MIT. The Undersecretariat noted in its reply letter dated 15 March 2012 that the MIT had from time to time benefited from M.Y. between September 1994 and 30 November 1996.

On 25 April 2012, the applicant provided the Malatya Chief Public Prosecutor's Office through his lawyer with electronic record (DVD) concerning the video-interview submitted by a person alleged to be a military officer A.A. to a foreign agency. In this interview, A.A. noted that he had seen M.Y. in the Gendarmerie Intelligence and Anti-Terror Unit in Diyarbakır (according to his own declaration) on the dates when the applicant's daughter had been killed; that M.Y. introduced A.Ö. to him "the sister of a person named S.Ç., the person who was a member of the terrorist organization and responsible for the Tunceli region and who was an influential person within the organization"; and that he was of the opinion that A.Ö. had been killed with a view to intimidating S.Ç. and the people around him.

In his statement taken by the Malatya Chief Public Prosecutor's Office, the retired senior colonel M.S.Y. alleged to have the applicant's daughter meet with M.Y. at the commandership denied all allegations of the applicant.

On 8 June 2012, the Malatya Chief Public Prosecutor's Office took the applicant's statement once again. In his statement, the applicant mainly reiterated his previous statement before the Committee. He additionally stated that when he went to the Provincial Gendarmerie Command together with his deceased daughter A.Ö. and his other two daughters in May 1992 upon the call of the Tunceli Provincial Gendarmerie Commander, certain questions were addressed to their daughters by a bearded man in a room on the ground floor of the building, and photos of certain members of the terrorist organization were shown to them; that among these members, there was a photo of his elder daughter A.Ö.; and that his daughters told that their sister participated in the organization after getting married and then started living abroad with his husband S.Ç.; that his daughter A.Ö. was seen while being taken to a white car by three men one of whom was a bearded person. The applicant also maintained that he had talked with the gendarmerie retired non-commissioned officer H.O., whose name was included in the report pertaining to a case known by public as "Susurluk", on the phone and H.O. told the applicant that he had knowledge concerning the murder of the applicant's daughter, A.Ö..

H.O. noted in his statement taken on 13 June 2012 that the captain Z., who was the section commander at the JITEM in Elazığ (according to his own declaration), had explained him in July 1993 that M.Y. whose nickname was "Green" had kidnapped a woman named A. in Mazgirt as that woman's brother-in-law had been the head of a terrorist organization in Tunceli region; that M.M. who was known to be confessor of the organization also accompanied him; that after kidnapping her, they had taken her to the JITEM in Diyarbakır and she was brought before A.K. who was the commander of the JITEM; and that M.M., M.Y., A.K. and A.A., who subsequently started living in Sweden, had tortured that woman for three days; however, captain Z. had not provided any information as to how the woman named A. had been killed.

H.O. also noted in the same statement that those who had been tortured in this region were killed in regions where the Gendarmerie Commands were authorized; that thereby, the duly investigation of the incident had been prevented; that the Mazgirt District Gendarmerie

Station Commander and M.B., who was the commanding officer in 1994, were also aware of the incident; and that the records concerning the incident leading to the death of A.Ö. were saved in the Mazgirt District Gendarmerie Command.

Upon the instruction of the Malatya Chief Public Prosecutor's Office, the persons whose names were mentioned in the applicant's allegations noted in their statements that they had not known A.Ö., H.O. and M.Y.; and that they had not had any knowledge concerning the incident. The director of the Tunceli Private Provincial Directorate, K.K., noted in his statement dated 23 October 2012 that he could not remember who were the applicant and A.Ö.; and that the impugned evacuation of the lodging building was of a routine procedure.

The Malatya Chief Public Prosecutor's Office did not take any further action until 13 March 2014 and once again sent the file to the Elazığ Chief Public Prosecutor's Office which issued a new arrest warrant in respect of the suspect M.Y. on 29 September 2014.

On 25 May 2005, the applicants applied to the Damage Determination Committee of the Tunceli Governorship through their lawyers, and this request was dismissed by the Committee's decision dated 10 October 2006.

The applicants brought an action for annulment of the dismissal decision in question, and the relevant court dismissed the action brought by its decision dated 3 June 2010. The decision was upheld by the judgment of the Supreme Administrative Court. The applicants' request for rectification of the judgment was also dismissed by the Supreme Administrative Court.

IV. EXAMINATION AND GROUNDS

96. The Constitutional Court, at its session of 21 April 2016, examined the application and decided as follows.

A. The Applicants' Allegations

97. The applicants maintained that their daughter had been tortured and killed after being a victim of forced disappearance by the security

forces along with a person called M.Y. who was serving for the National Intelligence Agency; that an effective criminal investigation had not been conducted into this incident; that moreover, the action for compensation brought by them despite the arrest warrant issued against the suspect M.Y., who was mentioned within the criminal investigation, in his absence had been dismissed on the ground that the incident was not a terrorist act or an incident derived from terrorism. In this respect, the applicants alleged that the right to life safeguarded by Article 17 of the Constitution had been violated. They also claimed pecuniary and non-pecuniary compensation.

B. The Court's Assessment

98. The Constitutional Court is not bound by the legal qualification of the facts by the applicants and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16).

99. In addition to their allegations that the State had acted in breach of its positive obligations within the scope of the right to life, the right to personal liberty and security as well as the prohibition of torture and ill-treatment by failing to conduct an effective investigation into the incident where their daughter had been killed by torture, the applicants further claimed that the State had also acted in breach of its negative obligations, maintaining that their daughter had been tortured and killed after being a victim of forced disappearance by certain public officials and persons serving for the security forces.

100. First, it should be noted that as stated in many judgments of the European Court of Human Rights ("the ECHR"), the prohibition of torture is a kind of regulation relating to the basic values of a democratic society. Unlike most of the substantive clauses of the European Convention on Human Rights ("the Convention"), Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (see *Selmouni v. France* [GC], nos. 25803/94, 28/7/1999, § 95; and *Labita v. Italy* [GC], no. 26772/95, 6 April 2000, § 119). The ECHR has verified that even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits

in absolute terms torture and inhuman or degrading treatment or punishment (see *Cezmi Demir and Others*, no. 2013/293, 17 July 2014, § 93; *Labita v. Italy*, § 119; and *Chahal v. the United Kingdom*, no. 22414/93, 15 November 1996, § 79).

101. The Court reiterates that the national authorities are responsible for the well-being of persons in custody and that respondent States bear the burden of providing a plausible explanation for any injuries, deaths and disappearances which occur in custody (see *Er and Others v. Turkey*, no. 23016/04, 31 December 2012, § 66; and *Tanış and Others v. Turkey*, no. 65899/01, § 160).

102. The ECHR also considers that is cases where it has been proven that a person was officially summoned by the military or the police, entered a place under their control and has not been seen since then, it is necessary to provide an explanation on the life and physical integrity of her/him. In such circumstances, the onus is on the Government to provide a plausible explanation as to what happened on the premises and to show that the person concerned was not detained by the authorities, but left the premises without subsequently being deprived of his or her liberty (see *Tanış and Others v. Turkey*, § 160). The authorities' obligation to account for the fate of a detained individual continues until they have shown that the person has been released (see *Er and Others v. Turkey*, § 71).

103. The ECHR elaborated on the accountability in one of its judgments where it examined the unlawful killing of the husband of the applicant after being released from the police custody and stated that the absence of an official release document pointed out the authorities' failure to discharge their burden of proving that the applicant's husband was indeed released. It therefore concluded that the State had been responsible for the alleged killing (see *Süheyle Aydın v. Turkey*, no. 25660/94, 24 May 2005, § 154).

104. In the relevant judgment, the ECHR paid regard to Article 11 of the Declaration on the Protection of all Persons from Enforced Disappearance (United Nations General Assembly resolution 47/133 of 18 December 1992). The said Article provides that "*[a]ll persons deprived of liberty must be released in a manner permitting reliable verification that*

they have actually been released and, further, have been released in conditions in which their physical integrity and ability fully to exercise their rights are assured" (for a judgment of the ECHR, in the same vein, see *Meryem Çelik and Others*, no. 3598/03, 16 April 2013, § 51).

105. In addition, alleged violations of the prohibition of ill-treatment must be substantiated with appropriate evidence (see *Hamdiye Aslan*, no. 2013/2015, 4/11/2015, § 92; for a judgment of the ECHR, in the same vein, see *Klaas v. Germany*, no. 15473/89, 22 September 1993, § 30). In order to prove the reality of the alleged facts, reasonable proof beyond any doubt is required. Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Hamdiye Aslan*, § 92; for the judgments of the ECHR, in the same vein, see *Ireland v. the United Kingdom*, no. 5310/71, 18 January 1978, § 161; and *Labita v. Italy*, § 121). In this context, the conduct of the Parties when evidence is being obtained has to be taken into account (see *Tanlı v. Turkey*, no. 26129/95, 10 April 2001, § 109). Where these conditions have been established, then ill-treatment may be deemed to have existed (see *Cuma Doygun*, no. 2013/394, 6 March 2014, § 28).

106. In the examination of the complaints under Article 17 of the Constitution, when there are alleged violations of the right to life and prohibition of ill-treatment safeguarded therein, the Constitutional Court should conduct a full examination on this issue (see *Hamdiye Aslan*, § 93; for a judgment of the ECHR, in the same vein, see *Ribitsch v. Austria*, no. 18896/91, 4 December 1995, § 32).

107. In order to establish the authenticity of the alleged facts by carrying out a full examination of the complaints filed under Article 17 of the Constitution, reasonable proof, beyond any doubt, is required. Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. However, in cases where the State is under an obligation to account for the fate of the disappeared persons and does not fulfil this obligation, it must be determined precisely -beyond reasonable doubt- that the person who has been lost has been under the control of the State in order to say that it is responsible for the impugned death.

108. In the present case, the application form and the documents annexed thereof as well as the information and documents included in the files pertaining to the criminal investigation and the administrative case do not include any evidence, beyond reasonable doubt, allowing for an assessment as to whether there have been violations of the substantive aspects of the right to life and the prohibition of torture and ill-treatment, safeguarded by Article 17 of the Constitution, as well as of the right to personal liberty and security, safeguarded by Article 19 of the Constitution. The circumstances of the incident, that is to say, whether the deceased had been killed by the public officials and those acting on their behalf after having been taken into the custody of the State arbitrarily where he had been tortured, or whether he had been deprived of his liberty by the third parties and then killed by them could not be established in order to be able to make an assessment in this respect.

109. Under these circumstances, it has been considered that the allegation that the applicants' daughter A.Ö. had been tortured after being a victim of forced disappearance falls under the scope of the prohibition of torture and ill-treatment safeguarded by Article 17 § 3 of the Constitution, and the allegation that she had subsequently been killed falls under the scope of the right to life safeguarded by Article 17 § 1 therein. Therefore, it is considered necessary as well as sufficient that the examination on the admissibility and merits of the case be carried out only from the standpoint of the procedural aspect of Article 17 of the Constitution concerning the obligation to conduct an effective investigation.

110. In addition, the applicants' allegation that the action for compensation they had brought, maintaining that their daughter had been killed within the scope of the fight against terrorism, had been dismissed due to the misevaluation of the evidence on the ground that the incident was not a terrorist act or an incident derived from terrorism has been considered to fall under the scope of the right to a fair trial safeguarded by Article 36 of the Constitution and the examination of the said allegation has been carried out under this Article.

1. Admissibility

a. Alleged Violation of the Right to a Fair Trial

111. The applicants maintained that their right to a fair hearing within the scope of the right to a fair trial had been violated due to the rejection of their requests as a result of an erroneous assessment of evidence in the administrative case.

112. The relevant part of Article 48 § 2 of the Code no. 6216 on the Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, reads as follows:

> *"The Court … may declare the applications inadmissible as being manifestly ill-founded."*

113. As a rule, the proof of material facts argued before the inferior courts, evaluation of evidence, interpretation and implementation of legal rules as well as whether the conclusion of the inferior courts regarding the dispute was fair in terms of the merits cannot be the subject matter of individual application. The only exception to this is that the findings and conclusions of the inferior courts are manifestly erroneous, disregarding the justice and common sense, and that this situation automatically violates the fundamental rights and freedoms within the scope of individual application. In this context, the merits of appellate requests cannot be examined by the Constitutional Court, unless the decisions of inferior courts contain a manifest error or explicit arbitrariness (see *Necati Gündüz and Recep Gündüz*, no. 2012/1027, 12 February 2013, § 26).

114. It is clearly provided in Article 2 of Law no. 5233 that the losses incurred due to economic and social reasons other than terrorism shall be out of scope.

115. The discretion as to whether the requests submitted in accordance with Law no. 5233 will be evaluated within the scope of the specified Law; the interpretation of the legal provisions in terms of determination of the scope of the Law; the establishment of a case-law criterion in this respect; and whether the present case will be assessed in accordance with this criteria, in principle, belongs to the inferior courts. As regards the

requests raised previously as a subject matter of individual application in terms of the application of Law no. 5233; the Constitutional Court concluded that the allegations on the relevant matters were manifestly ill-founded, stating that they had to be examined by the appeal courts in the context of the interpretation of the facts of the case as well as interpretation and implementation of legal rules (see *Sabri Çetin*, no. 2013/3007, 6 February 2014, §§ 45-50; and for a judgment of the ECHR, in the same vein, see *Akbayır v. Turkey*, no. 30415/08, 28 June 2011, § 88). The discretion in this respect, in principle, belongs to the inferior courts. However, in cases where the judgments of the inferior courts contain manifest errors and explicit arbitrariness, a different assessment as to the determination of whether a constitutional right or freedom has been violated may be needed (see *Mesude Yaşar*, no. 2013/2738, 16 July 2014, § 93; and *Cahit Tekin*, no. 2013/2744, 16 July 2014, § 88).

116. In the present case, the applicants argued that their daughter had been tortured and killed after being a victim of forced disappearance by some groups allegedly structured within the State and acted on behalf of the security forces and that the losses incurred in this respect should be considered within the scope of Law no. 5233. They also maintained that the administrative action brought by them upon the dismissal of their request by the Damage Determination Committee was rejected by the authorities having disregarded the arrest warrant issued in respect of the suspect M.Y., in his absence, whom they alleged, within the scope of the ongoing criminal investigation into the incident, to have acted on behalf of the security forces. In this regard, the applicants maintained that their constitutional rights had been violated.

117. The first instance court and the Council of State specified in the reasoning of their dismissal of the case that on the basis of the information and documents included in the investigation file, it could not be established whether the incident had been a terrorist incident or had resulted from terrorism and thus there was no responsibility attributable to the administration.

118. In view of above and as it will separately be discussed below under the heading related to the obligation to conduct an effective

investigation into the incident, given the fact that the individual application form and the documents annexed thereto as well as the information and documents included in the criminal investigation and case files pertaining to the incident failed to allow for the determination of the circumstances of the incident, the decisions of the first instance court cannot be said to have included erroneous assessment or manifest arbitrariness.

119. Consequently, as it has been understood that the allegations raised by the applicants are of a nature required to be subject to appellate review and that the judgments of the inferior courts contained neither erroneous assessment nor manifest arbitrariness, this part of the application has been declared inadmissible for being manifestly ill-founded and there being no further requirement for its examination under the other admissibility criteria.

b. Alleged Ineffectiveness of the Criminal Investigation

120. The applicants claimed that no effective investigation had been conducted into the incident where their daughter had been tortured and killed after being a victim of forced disappearance.

121. Article 17 §§ 1 and 3 of the Constitution, titled "*Personal inviolability, corporeal and spiritual existence of the individual*", provides as follows:

> *"(1) 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."*

122. It is stipulated in Article 46 § 1 of Law no. 6216 that an individual application may only be lodged by those, whose current and personal right is directly affected due to the act, action or negligence that is claimed to result in the violation. By the very nature of the right to life, any application regarding this right with respect to a person who has lost his life can only be made by the relatives of the deceased, who have the

victim status (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, § 41). In the present case, the applicants are the parents of the deceased. Therefore, there is no deficiency in terms of the eligibility for an application.

123. The criminal investigation into the incident is still pending in the present case. Thus, an assessment should be made in terms of the exhaustion of legal remedies.

124. Article 148 § 3 of the Constitution reads as follows:

"… In order to make an application, ordinary legal remedies must be exhausted."

125. Article 45 § 2 of Law no. 6216 provides as follows:

"… All of the administrative and judicial application remedies that have been prescribed in the code regarding the transaction, the act or the negligence that is alleged to have caused the violation must have been exhausted before making an individual application."

126. The requirement of the exhaustion of legal remedies, as stipulated by the constitutional and legal provisions cited above, is a natural consequence of the fact that the remedy of individual application is to be used as a last and extraordinary resort for the prevention of human rights violations. In other words, the fact that administrative authorities and inferior courts are primarily responsible for remedying the violations of fundamental rights renders it mandatory to exhaust the ordinary legal remedies (see *Necati Gündüz and Recep Gündüz*, no. 2012/1027, 12 February 2013, § 20).

127. To respect fundamental rights and freedoms is the constitutional duty of all State bodies, and to remedy violations arising due to neglect of this duty is the task of administrative and judicial authorities. Therefore, it is essential that alleged violations of fundamental rights and freedoms first be raised before inferior courts for the latter to examine and resolve them (see *Ayşe Ziraman and Cennet Yeşilyurt*, no. 2012/403, 26 March 2013, § 16).

128. First of all, although the exhaustion of legal remedies is not absolutely necessary for making an assessment as to the effectiveness

of the investigation, waiting for the conclusion of the incumbent public authorities on the condition that the ongoing investigation does not exceed the reasonable period in the particular circumstances of the case will be in compliance with the secondary nature of the protection mechanism introduced by the individual application.

129. However, as soon as the applicants realise or should realise the fact that no investigation will be launched, that there has been no progress in the investigation and that there is not the slightest chance of conducting such an investigation in the future, then the applications to be lodged by the applicants should be accepted. In such cases related to the right to life, the applicants should act in due diligence, be able to take the initiatives and submit their complaints to the Constitutional Court without too much time elapsing. In addition, in case of an application made before the investigation process has been completed, due to the excessive length of the investigation in the particular circumstances of the case, an assessment should be made without taking a very strict attitude towards the relatives of the deceased. However, such a situation will naturally be evaluated depending on the circumstances of each case (see *Rahil Dink and Others*, no. 2012/848, 17 July 2014, § 77; and *Hüseyin Caruş*, no. 2013/7812, 6 October 2015).

130. Accordingly, in terms of the assessment of admissibility of the applicants' complaints under Article 17 of the Constitution, in order to be able to make a decision on the exhaustion of legal remedies, the framework of the State's positive obligation "to conduct an effective investigation" within the scope of Article 17 as well as the manner in which this obligation has been fulfilled in the present case should be determined. It has been concluded that the examination on admissibility should be carried out along with the examination on the merits, as they are intertwined.

2. Merits

i. General Principles

131. Within the scope of the right specified in Article 17 of the Constitution, the State has the positive obligation to protect the corporeal

and spiritual existence of all individuals who are within its jurisdiction against all risks which may arise out of the actions of public authorities, of other individuals or of the individual himself. The State is obliged to protect the individual's corporeal and spiritual existence from all kinds of dangers, threats and violence (see *Cezmi Demir and Others*, § 105; and *Serpil Kerimoğlu and Others*, § 51).

132. The positive liabilities of the State within the scope of the prohibition of ill-treatment also have a procedural aspect. Within the framework of this procedural liability, the State is obliged to conduct an effective investigation capable of identifying and punishing, if any, those responsible for any physical and psychological ill-treatment. The main aim of such an investigation is to ensure the effective implementation of law that protects human dignity and to hold the public officials or other individuals accountable for their actions constituting ill-treatment (see *Cezmi Demir and Others*, § 110).

133. Accordingly, where an individual has an arguable claim that he had unlawfully been subject to a treatment violating Article 17 of the Constitution by a state official or a third person, Article 17 of the Constitution, taken in conjunction with Article 5 titled "Fundamental aims and duties of the State", requires an effective official investigation.

134. In case of a failure to fulfil properly such a procedural guarantee, whether the State has really fulfilled its negative and positive obligations cannot be established. Therefore, the obligation to conduct an investigation constitutes the guarantee of the State's negative and positive obligations falling under the relevant article (see *Salih Akkuş*, no. 2012/1017, 18 September 2013, § 29).

135. The type of investigation entailed by the procedural obligation should be determined depending on whether the obligations under the substantive aspect of the right to protection of individual's corporeal and spiritual existence have required a criminal sentence. In cases pertaining to the incidents of death occurring as a result of intention or assault or ill-treatment, the State has an obligation, by virtue of Article 17 of the Constitution, to conduct criminal investigations capable of leading to the identification and punishment of those responsible for the case of assault

involving death or bodily harm. In such incidents, the mere payment of compensation as a result of administrative and civil investigations and proceedings is not sufficient to redress the violation of the right to life and to remove the victim status (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, § 55).

136. The aim of the criminal investigation carried out within the scope of the rights safeguarded by Article 17 of the Constitution is to ensure the effective enforcement of the legislation provisions protecting the corporeal and spiritual existence of an individual and to hold those responsible accountable. This is not an obligation of result, but of means. In addition, the assessments included herein do not mean, under any circumstances, that Article 17 of the Constitution grants the applicants the right to have third parties tried or punished for a criminal offence or imposes an obligation to conclude all proceedings in a verdict of conviction or a specific penalty (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, § 56).

137. The criminal investigations to be carried out must be effective and sufficient to enable the identification and punishment of those responsible. In order for a criminal investigation to be effective, it is required that the investigation authorities act *ex officio* and gather all the evidence capable of clarifying the incident and identifying those responsible. Accordingly, an investigation into the allegations of killing and ill-treatment must be conducted independently, speedily and thoroughly. In other words, the investigation authorities should investigate the facts seriously and should not rely on quick and ill-founded findings to conclude the investigation or to find a basis for their decisions (see *Cezmi Demir and Others*, §§ 114). A deficiency in the investigation that would reduce the likelihood of discovering the cause of the incident of death or those who are responsible bears the risk of clashing with the obligation of conducting an effective investigation (see *Serpil Kerimoğlu and Others*, § 57).

138. In order for an investigation into the allegations of torture and ill-treatment inflicted by the public officials to be "effective", those who are responsible for the investigation and conduct it must be independent

from the individuals involved in the incident. The independence of the investigation requires not only no hierarchical or institutional connection, but it also requires a concrete independence. Therefore, in order for an investigation to be effective, it must first be conducted independently (see *Cezmi Demir and Others*, § 117).

139. In addition, it is implicitly required that investigations be conducted at a reasonable speed and with due diligence. Of course, there may be difficulties which hinder progress of the investigation in certain specific circumstances. However, speedy actions taken by the authorities even in those circumstances is of critical importance for clarification of the events in a sounder manner, maintenance of the individuals' commitment to the rule of law and hindering the impression that authorities tolerate and remain indifferent to unlawful acts (see *Deniz Yazıcı*, no. 2013/6359, 10 December 2014, § 96).

140. Moreover, lack of an investigation or failure to conduct a sufficient and effective investigation, within the scope of the State's positive obligation, may per se constitute ill-treatment. Accordingly, in any circumstances, the authorities are expected to take an action as soon as an official complaint is made. Even if there is no complaint, an investigation must be launched in the presence of indications of torture or ill-treatment. In this scope, the investigation must be launched immediately; it must be conducted independently, rigorously and speedily, and be subject to public scrutiny; as well as it must be effective as a whole (see *Tahir Canan*, § 25; and *Cezmi Demir and Others*, § 116).

141. Lastly, one of the aspects ensuring the effectiveness of criminal investigations is the fact that the investigation or its results is open to public scrutiny to ensure accountability not only in theory but also in practice. In addition, it must be ensured that the relatives of the deceased can effectively participate in the investigation to the extent necessary for protecting their legal interests (see *Serpil Kerimoğlu and Others*, § 58).

ii. Application of Principles to the Present Case

142. The applicants claimed that no effective investigation had been conducted into the incident where their daughter had been tortured

and killed after being a victim of forced disappearance by certain public officials and persons serving for the security forces.

143. It has been concluded that the present case should be subject to a two-stage examination by its particular circumstances. The first is the disappearance of the applicants' daughter after she had left the factory where she had been working, and the second is the initial investigation phase that was initiated after the applicants had applied to the chief public prosecutor's office regarding their daughter's disappearance, as well as the subsequent prosecution phase.

144. As soon as the applicants notified that their daughter was lost, the chief public prosecutor's office launched an investigation whereby the witnesses produced by the applicants were heard and the investigation was then extended to cover the third persons mentioned by the witnesses.

145. After the dead body of the applicants' daughter had been found, a criminal case was opened against these persons. However, at the end of the proceedings, they were acquitted for lack of sufficient evidence for their conviction.

146. At this stage of the investigation, two men's handkerchiefs were found near the dead body of the applicants' daughter, on which there was blood stain. Among the certified copies of the investigation documents, there was no information or document indicating that an investigation had been conducted into the matter as to whether the blood stain found on one of the handkerchiefs had belonged to the suspects against whom a criminal case had been filed or to the deceased or to a third person.

147. The Constitutional Court will not make a definitive comment on whether the science of criminology at the material time allowed for a biological comparison and the acquisition of biological data through the blood stain, since there is no information in this respect in the investigation file.

148. In addition, the report issued by the Forensic Medicine Institution Biological Specialization Department on 30 September 1992 stated that in order for a proper examination to be carried out on the blood-stained trousers of a woman named H.B. who was killed by a sharp object in

the Karakoçan District of Elazığ on 11 August 1992 and on the blood-stained rag belonging to the person named N.B., with a view to finding the owner of the blood stains, it was requested from the Karakoçan Chief Public Prosecutor's Office that the blood group of N.B. be notified. This incident did not relate to the present case, but the relevant documents had been included in the investigation file erroneously.

149. Thus, also with reference the above-mentioned document, it was possible to carry out a scientific examination on the handkerchief found near the dead body of A.Ö. to find out whether it had really been a blood stain and if so, whose blood it had been, as in the mentioned incident.

150. It has been observed that there was no information or document indicating that an examination had been carried out on the handkerchief found in the scene, as well as that no autopsy had been performed on the deceased on the ground that her exact cause of heath had already been established and that only a post-mortem examination had been conducted on the dead body.

151. First of all, it should be noted that the nature and degree of scrutiny which satisfies the minimum threshold of an investigation's effectiveness depends on the circumstances of each particular case. It must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work. Therefore, for the effectiveness of the investigation, it is not possible to determine a simple list of investigative acts or other simplified criteria applicable to any case (see *Fahriye Erkek and Others*, no. 2013/4668, 16 September 2015, § 68; and for a judgment of the ECHR in the same vein, see *Velcea and Mazare v. Romania*, no. 64301/01, 1 December 2009 § 105).

152. In accordance with the obligation to conduct an effective investigation under Article 17 of the Constitution, even though it is not possible to create a list of minimum procedures applicable to each case, the authorities are expected to take all reasonable measures –with a view to ensuring the effectiveness of the investigation– to collect the evidence concerning the impugned incident, along with the other evidence, including the conduct of a criminalistic expert examination as well as the performance of an autopsy allowing for the preparation of a

complete and detailed report, where necessary (see *Hüseyin Caruş*, § 64; for the judgments of the ECHR, in the same vein, see *Tanrıkulu v. Turkey* [GC], no. 23763/94, 8 July 1999, § 104; and *Gül v. Turkey*, no. 22676/93, 14 December 2000, § 89).

153. In the present case, it can be easily said that the material evidence found at the incident scene is of critical importance in the clarification of the incident where there was no eyewitnesses and in the identification of those responsible. The Constitutional Court, considered the failure to investigate this issue, regardless of whether it was capable of leading to a conclusion in terms of the identification of the perpetrator(s), as a deficiency that weakened the effectiveness of the investigation from the very beginning in terms of the obligation to conduct an effective investigation that is not an obligation of result, but of means.

154. In addition, in the present case, the failure to perform a classic autopsy capable of revealing all findings on the body beyond any doubt –regardless of the difficulties in identifying externally all findings on the body due to certain deformations on it– and the conduct of only an external examination caused another deficiency in terms of the circumstances of the incident where the perpetrator(s) could not be identified and there have existed various doubts about its causes.

155. The criminal case initiated after this stage was concluded with an acquittal decision. Following a subsequent criminal complaint with the chief public prosecutor's office, the second stage of the proceedings were started, and the investigation was continued over the same file, this time with a view to identifying the perpetrator(s). At this stage, the fact that the applicant and the President of the Human Rights Association and a lawyer, acting on behalf of the applicant, applied to the Tunceli Chief Public Prosecutor's Office and claimed that the deceased had been had been tortured and killed after being a victim of forced disappearance by certain persons serving for the security forces gave a different dimension to the incident.

156. As a matter of fact, similar allegations were raised by the lawyer of an accused during the proceedings carried out by the Elazığ Assize Court, where the lawyer also put forth news published in a newspaper

on the matter to substantiate his defence; however, the incumbent court specified that the relevant defence submission did not relate to the subject matter of the case. In addition, during the relevant proceedings, the applicants' lawyer opposed the extension of the investigation in line with the impugned defence, claiming that the lawyer of the accused attempted to distort the facts.

157. Pursuant to Article 17 of the Constitution, the investigation authorities are not obliged to meet all claims and demands of the relatives of the deceased regarding the course of the incident and collection of evidence within the scope of the investigation (see *Yavuz Durmuş and Others*, no. 2013/6574, 16 December 2015, § 62; and for a judgment of the ECHR, in the same vein, see *Sultan Dölek and Others v. Turkey*, no. 34902/10, 28 April 2015, § 81). The investigation procedures to be carried out within the scope of the investigation shall be determined by the investigation authorities. The investigation authorities will determine a reasonable method by separately evaluating the circumstances of each incident.

158. In addition, while it is incumbent on the administrative and judicial authorities to evaluate the evidence related to a death incident, the Constitutional Court may be required to examine how the incident had occurred in order that it can understand the course of the incident and make an objective assessment of the steps to be taken by the investigation authorities as well as the inferior courts in order to clarify all aspects of the death of the applicants' relative (see *Rıfat Bakır and Others*, no. 2013/2782, 11 March 2015, § 68).

159. In the present case, regard being had to the fact that at the first stage of the investigation, the applicant did not state during the proceedings before the court that his daughter and he had been summoned by the Tunceli Provincial Gendarmerie Commander to the premises of the gendarmerie command and had been asked some questions there as well as to the fact that his lawyer stated that the argument to the effect that the persons serving for the security forces had been involved in the incident aimed at distorting the truth, the investigation authorities did not have any negligence or fault in the non-expansion of the investigation at the

first stage to cover the allegations that the act had been committed by the security forces and some persons acting on their behalf.

160. However, these allegations, which were raised by the applicant and the President of the Elazığ Branch of the Human Rights Association and a lawyer acting on behalf of the applicant on 1993 after the acquittal of the those accused of killing A.Ö. intentionally and when the perpetrator(s) were still being searched for, can be said to make a sense taken together with the above-mentioned defence of the accused before the assize court, and they are arguable in terms of the requirement for the extension of the investigation in the same respect.

161. In addition, the applicant stated that the reason why he had not related the killing of his daughter to the incident that had allegedly occurred prior to her disappearance was the fact that he had not considered it possible that the public officials could have been involved in such incidents.

162. Accordingly, it would not be appropriate for the ordinary course of life to expect the applicant to establish a quick relation between the disappearance and the subsequent finding of his daughter's body buried in a land and the impugned incidents which he would later notify to the investigation authorities, as well as to immediately bring his allegations in this respect before the authorities.

163. As explained above, although the applicant and those acting on his behalf applied to the investigation authorities in 1993, claiming that his daughter had been killed after being tortured, the relevant authorities failed to take an action to examine the applicant's allegations for a very long period, namely until 2012. The reason that forced the investigation authorities to take a step in this regard many years later was that the Grand National Assembly of Turkey Human Rights Investigation Commission asked the authorities about the outcome of the investigation after hearing the applicant, and also sent the Commission reports containing the applicant's statements to the authorities and that the applicant filed an application again on the same matter on 1 February 2012.

164. Although it is of greater importance in cases where there is no concrete information obtained from the incident scene or from the corpse about how the incident occurred and whom the perpetrators were, as in the present case, the failure to interrogate the people who are likely to have seen or heard something suspicious about the incident or a considerable delay in their interrogation appears to be a major deficiency in the investigation, weakening the possibility of determining the cause of death as well as identifying those responsible (see *Yavuz Durmuş and Others*, § 61; and for a judgment of the ECHR, in the same vein, see *Sultan Dölek and Others v. Turkey*, § 72).

165. In this scope, an immediate investigation to be launched, especially at the time and in the place of incident, is of great importance. It is clear that in the course of time, it will be increasingly difficult to collect evidence and determine how the incident took place due to the inevitable disappearance of evidence, displacement of witnesses and difficulty in remembering what happened (see *Yavuz Durmuş and Others*, § 62; and for a judgment of the ECHR, in the same vein, see *Saygı v. Turkey*, no. 37715/11, 27 January 2015, § 48).

166. In the impugned investigation, the fact that the investigation into the allegation that the impugned acts had been carried out by some public officials and some persons acting on behalf of the security forces had been initiated a long time after the incident and that in the absence of any type of investigation, the perpetrators had only been continuously sought in an indefinite manner made it difficult to collect evidence and reach a conclusion in terms of the clarification of the incident.

167. The present application includes the allegations that, as explained in the above-mentioned part of the facts, certain groups alleged to have been affiliated to the security forces had been involved in unidentified incidents on a certain date and in a certain region of the country and that this incident was one of them. In the present case, prior to the steps taken by the abovementioned Investigation Commissions and the publication of certain reports in this respect and discussion of these reports by the public, the investigation authorities' failure to take a step beforehand to investigate the existence of such groups, whether they had been involved

in the acts such as forced disappearance, torture and illegal killing, as alleged, and if so, the degree of their involvement was the most significant element undermining the effectiveness of the investigation.

168. Upon the letter of the Grand National Assembly of Turkey Human Rights Investigation Commission and the application subsequently lodged by the applicant, Hıdır Öztürk, through his lawyer, the competent authorities partially deepened the investigation to cover the allegation that some persons allegedly acting on behalf of the security forces as well as some public officials had been involved in the incident, and took statements of the applicant, some witnesses and some of the suspects in this respect.

169. However, it has been observed that although there were some difficulties in the collection of evidence as mentioned above, certain steps capable of clarifying the incident and identifying those responsible were not taken at this stage, either.

170. One of these steps the authorities failed to take was the failure to deepen the investigation to investigate the time and place of the incident which were reported by certain witnesses and substantiated the allegations that A.Ö. had been forcibly disappeared by official authorities. H.O. who was heard as a witness during the investigation and was serving as the gendarmerie intelligence non-commissioned officer at the material time, maintained that the records pertaining to the disappearance of A.Ö. had been issued and saved by the Mazgirt District Gendarmerie Command and himself.

171. As it was alleged that those who had committed the imputed acts were the third persons who had acted on behalf of the security forces and got their assistance to facilitate their acts and that the organization formed by these persons was illegal, even if A.Ö. had been abducted by force and captured for a long time, this situation may have been concealed by not keeping official records related to it. However, the witness taking office in the intelligence unit stated that the impugned incident had been recorded, and he provided some information concerning the said records.

172. In spite of the time having elapsed and the allegations that the public officials had also been involved in the incident; in the present application, where it was claimed that serious human rights violations such as forced disappear and torturing someone to death, the existence of such a record was not searched. However, all kinds of probabilities should have been taken into account for the identification of the perpetrators of the incident, as well as it should have been taken into consideration that the person providing the relevant information, who was a public officer, was likely to have knowledge about the incident.

173. In such cases of a missing person, where it can be established that the applicant's relatives had been taken by the security forces to their superiors, the failure to keep a record of their custody and subsequent release helps those who had been involved in the incident of deprivation of liberty to conceal their involvement, to cover up their tracks and to avoid accountability for the fate of the persons concerned (for a judgment of the ECHR, in the same vein, see *Er and Others*, § 104).

174. As specified in the judgment of *Süheyle Aydın*, mentioned above, the absence of an official release document included in the file after a person was taken into custody may point to the fact that the State is unable to fulfil its obligation to prove that the relevant persons were released without any harm to their lives and physical integrities and thus the State may be held responsible for the death that occurred after custody.

175. In the present case, as also stated above, although it is not possible at this stage to make an assessment regarding the State's substantial obligation, since there is not sufficient evidence beyond reasonable doubt that the deceased had been taken into custody, as regards the applicants' allegation that their daughter had been tortured and killed after being a victim of forced disappearance, if it can be proven with a document that A.Ö. had been held in custody as alleged, this document will undoubtedly have a key role in the identification of those responsible for the subsequent death incident.

176. Along with the failure to search for the existence of such a record, it has also been observed that although the above-mentioned witness had stated that certain security officers had had knowledge about the

impugned incident and he had provided identifying information about them, no step was taken to take the statements of these officers during the investigation. Likewise, it has been observed that any step was not taken by the authorities for taking the statement of A.A., who is alleged to be an eye-witness of the incident and who has been residing abroad and gave statement about the impugned incident, as appeared from other documents.

177. Moreover, in spite of existence of clear and certain statements by some witnesses concerning the place and the date where and when A.Ö. was taken to Diyarbakır, it has been observed that the competent authorities failed to try clarifying the incident in this aspect by not attempting to identify persons likely to have had information about the incident or had witnessed it by their position and status.

178. The same situation also applies to the allegation that before the incident, the applicant Hıdır Öztürk and his daughter had been summoned to the Tunceli Provincial Gendarmerie Command where they first interviewed with the regimental commander and subsequently with M.Y. As regards the relevant allegation, the statement of the regimental commander was taken whereby he denied the accusations. However, the accuracy of the said allegation and the regimental commander's statement was not evaluated by means of identifying the personnel serving in the Command at the relevant time and likely to have knowledge thereof.

179. Nor were the statements of the applicant's daughter who had been alive taken, as well as the possibility that applicant might have given different and detailed statements for clarification of the incident was not considered.

180. Another deficiency in the investigation was related to the process carried out to investigate the allegations that A.Ö. had been tortured to death. Firstly, according to the post-mortem examination report, dead body of the deceased had been photographed. If so, it could not be understood why such evidence had not been examined to make it clear whether the deformations on the deceased's face and body had occurred during the time having elapsed after being killed or the deceased had been subject to a treatment as maintained in the allegations.

181. In the present case where there have existed various suspicions as to the causes and circumstances of the impugned incident, the fact that only a post-mortem examination had been performed instead of a classical autopsy does not make it possible to say that all the findings on the deceased's body, as stated above, could have been identified in such a way enabling the preparation of a complete and detailed report when necessary; therefore, it is beyond any doubt that the relevant photographs had been of critical importance to illuminate the incident in this respect.

182. It should not be inferred from these considerations that the duty of the Constitutional Court is to decide whether an expert report or opinion is required during any investigation or prosecution. It is at the discretion of the investigation authorities to decide on the admissibility of and evaluate the expert reports and similar evidence (see *Ahmet Gökhan Rahtuvan*, no. 2014/4991, 20 June 2014, §§ 59, 60).

183. Moreover, it is not also for the Constitutional Court to scrutinize the conclusions of the experts and to speculate on the basis of the medical information at its disposal, on the accuracy of the scientific views of these experts (for a judgment of the ECHR, in the same vein, see *Yardımcı v. Turkey*, no. 25266/05, 5 January 2010, § 59).

184. In cases where it has to review such problems, the Court does not deal with how the relevant cases or investigations would be concluded as well, since it is not its duty. The duty of the Constitutional Court is to determine objectively whether or to what extent the procedural obligation incumbent on the investigation authorities under Article 17 of the Constitution has been fulfilled in the instant case (see *Cemil Danışman*, § 110).

185. As a matter of fact, it is the duty of administrative and judicial authorities to evaluate the evidence related to how the incident occurred (see *Murat Atılgan*, no. 2013/9047, 7 May 2015, § 44). In terms of pending proceedings or ongoing investigations, it is not for the Constitutional Court to substitute its own assessment of the facts for that of the inferior courts and, as a general rule, it is for these courts to assess the evidence before them (for the judgments of the ECHR, in the same vein, see *Klaas v. Germany*, § 29; and *Jasar v. the Former Yugoslav Republic of Macedonia*, no. 69908/01, 15 February 2007, § 49).

186. For this reason, such determinations regarding the impugned facts of the case within the scope of the obligation to conduct an effective investigation should in no way be considered as an indication that the Constitutional Court has made a comment regarding the innocence or guilt of the individuals. As stated in the general principles, the obligation to conduct an effective investigation is not an obligation of result, but of means. In this regard, while the Constitutional Court makes an assessment regarding all evidence collected or not collected in terms of the obligation to conduct an effective investigation, it makes no comment on the possible positive or negative consequences of this evidence on the clarification of the incident and the identification of those responsible. As a matter of fact, such assessments of the Court relating to the obligation to conduct an effective investigation only include the determination of whether the investigations into the incident had been conducted by collecting the evidence that may be capable of clarifying the incident as a whole or leading to the identification of those responsible, if any, and whether the investigation authorities had taken all reasonable measures to collect this evidence.

187. Besides, the conduct of an investigation *solely with a view to establishing or ruling out the involvement of other persons in a suspicious death, instead of revealing how the incident had occurred*, is not sufficient to satisfy the procedural obligation (see *Turan Uytun and Kevzer Uytun*, no. 2013/9461, 15 December 2015, § 89; for a judgment of the ECHR, in the same vein, see *Sultan Dölek and Others*, § 69). As stated above (see *Serpil Kerimoğlu and Others*, § 57), the investigation authorities' obligation also extends to establishing the cause of the death.

188. In this respect, the considerations above as regards the collection of evidence within the scope of the impugned investigation did not concern the determination of the fact that certain persons had been involved or not involved in the incident, but the objective determination of whether or to what extent the investigation authorities fulfilled their obligation, under Article 17 of the Constitution, to conduct an effective investigation that was capable of revealing the cause of the incident and leading to the identification of those responsible.

189. In this context, the Constitutional Court acknowledged that as a rule, in cases where a criminal investigation was launched *ex officio* on the day when the applicants' relative died, where there is no doubt in the light of the evidence obtained as a result of a rigorous and speedy action that the investigation authorities as well as the first instance judicial authorities endeavoured to clarify the incident, and where the investigations were capable of revealing the exact cause of the death and leading to the identification and punishment of those responsible, then the investigations and decisions taken cannot be claimed to be insufficient or contradictory, on the condition that there was no deficiency to affect the depth and seriousness of the investigations and prosecutions (see *Sadık Koçak and Others*, no. 2013/841, 23 January 2014, § 95).

190. In addition, the determination as to whether the investigation was conducted with due diligence at a reasonable speed may vary according to the particular circumstances of the case, the number of the suspects and accused under investigation, the gravity of charges, the complexity of the facts and the existence of elements or difficulties hindering the progress of the investigation (see *Fahriye Erkek and Others*, § 91).

191. The important point here is to reveal, considering the applicants' interest in the conclusion of the investigation quickly and rigorously, whether the investigation was conducted at a reasonable speed and with due diligence with a view to maintaining the commitment of the applicants and other individuals in the society to the rule of law and preventing any appearance that the unlawful acts are tolerated or disregarded (see *Fahriye Erkek and Others*, § 91).

192. In view of the considerations above, it has been understood that the investigation authorities failed to take all reasonable measures expected of them to obtain evidence likely to be collected at the place and time where and when the incident took place. Nor did they subsequently take a concrete step with a view to clarifying the cause of the incident. It has been also observed that the single step taken by these authorities for ensuring the effectiveness of the investigation was to appoint a senior law enforcement officer 18 years later, namely on 16 February 2010, and to expect that the investigation be conducted in a more rigorous and comprehensive manner by this officer.

193. It is seen that the investigation, as a whole, remained insufficient for clarification of the cause of incident leading to the intentional violation of the right to life and for the identification of those who were responsible, even regardless of the applicants' allegations and the deficiencies of the investigation in this regard.

194. Although the investigation authorities do not have to meet all claims and requests of the applicants regarding the course of the events and collection of the evidence, these authorities cannot be said to have assessed the circumstances of the incident independently of such allegations, to have *ex officio* determined the investigation procedure and to have subsequently applied a reasonable method in this respect.

195. Besides, although it could not be also found established that the investigation authorities, after determining the investigation procedure *ex officio*, applied this procedure in a manner undoubtedly leading to the clarification of the incident, to finding the exact cause of the death and to the punishment of those responsible, it has not been observed that they acted rigorously and speedily in order to investigate the applicants' allegations.

196. Accordingly, the necessary steps for revealing the cause of the impugned death were not taken in a timely manner and sufficiently within the scope of the investigation. It has therefore been concluded that the investigation was not conducted at a reasonable speed and with due diligence, as required by Article 17 of the Constitution, for the collection of all evidence capable of leading to the identification of those responsible and for the prevention of creating an impression that illegal actions were tolerated or no action were taken against them; and that thereby the investigation was procrastinated for a long time without taking any step which might conclude the investigation.

197. Therefore, considering that the impugned investigation where no progress had been made for its not being conducted in an effective manner had no prospect of effectiveness if continued, the applicants lodged an individual application against the relevant investigation process, having realized the situation.

198. Consequently, the Constitutional Court has found a violation of the procedural aspect of Article 17 of the Constitution.

3. Application of Article 50 of Code no. 6216

199. Article 50 §§ 1 and 2 of Law no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, reads as follows:

> *"1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled…*
>
> *(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."*

200. The applicants claimed 150,000 Turkish liras (TRY) and TRY 250,000 for respectively pecuniary and non-pecuniary damages, which is TRY 400,000 in total.

201. It has been concluded that the procedural aspect of Article 17 of the Constitution has been violated.

202. In this respect, a copy of the judgment should be sent to the Elazığ Chief Public Prosecutor's Office to redress the consequences of the violation.

203. It has been concluded that in order to redress the applicants' non-pecuniary damages that would not be redressed with the sole finding of a violation, as there has been a violation of the procedural aspect of Article 17 of the Constitution, the applicants will be awarded jointly TRY

50,000 in respect of non-pecuniary damages. In this sense, it has also been taken into consideration that a copy of the judgment will be sent to the Elazığ Chief Public Prosecutor's Office to redress the consequences of the violation.

204. As a result of the examination of the present application, no violation of the substantial aspect of Article 17 of the Constitution, but only a violation of its procedural aspect was found. The applicants have not submitted any document to the Constitutional Court, substantiating their alleged pecuniary damage. In order for the Constitutional Court to be able to award pecuniary compensation, there must be a causal link between the pecuniary damage alleged to have been sustained by the applicants and their claim for compensation. Since the applicants have failed to submit any document in this respect, their request for pecuniary compensation must be rejected.

205. The total court expense of TRY 1,998.35, including the court fee of TRY 198.35 and the counsel fee of TRY 1,800, which is calculated over the documents in the case file, must be reimbursed to the applicants jointly.

V. JUDGMENT

The Constitutional Court UNANIMOUSLY held on 21 April 2016 that

A. 1. Alleged violation of the right to a fair hearing within the scope of the right to a fair trial safeguarded by Article 36 of the Constitution be DECLARED INADMISSIBLE as being *manifestly ill-founded*;

2. Alleged violation of the procedural aspect of Article 17 of the Constitution be DECLARED ADMISSIBLE;

B. The procedural aspect of Article 17 of the Constitution was VIOLATED;

C. A copy of the judgment be SENT to the Elazığ Chief Public Prosecutor's Office to redress the consequences of the violation of the procedural aspect of Article 17 of the Constitution;

D. The applicants be AWARDED, in respect of non-pecuniary damages, TRY 50,000 jointly for the violation of the procedural aspect of

Article 17 of the Constitution; and their other claims for compensation be REJECTED;

E. The total court expense of TRY 1,998.35, including the court fee of TRY 198.35 and the counsel fee of TRY 1,800, be REIMBURSED to the applicants;

F. The payment be made within four months as from the date when the applicants apply 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; and

G. A copy of the judgment be SENT to the Ministry of Justice.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

İPEK DENİZ AND OTHERS

(Application no. 2013/1595)

21 April 2016

On 21 April 2016, the Second Section of the Constitutional Court found a violation of the right to life safeguarded by Article 17 of the Constitution in the individual application of *İpek Deniz and Others* (no. 2013/1595).

THE FACTS

[7-81] The applicants were born in 1998, 1999 and 2001 and are the children of Mehmet Deniz (M.D.) who was born in 1950 and lost his life on 5 March 2008 and his wife who was born in 1963.

An activity which was organized by the district branch of a political party by means of obtaining authorization from the relevant District Governorship turned into a protest in favour of a terror organization and its leader, and the demonstrators blocking the roads during the protest were dispersed by the police. Quarrels took place between the citizens whose buildings and workplaces were damaged on account of the uproars created by the demonstrators by means of removing paving stones and the groups making protests, and the quarrel was terminated through the police intervention. In the course of the incidents taking place, 14 police officers were injured, and a large number of police vehicles, two vehicles belonging to the public banks and workplaces of the citizens were damaged. The police reported the incidents taking place to the chief public prosecutor's office.

Upon the instruction of the chief public prosecutor's office, 108 persons identified to get involved in the incidents were arrested until 04:30 p.m. on the incident day. Name of M.D., the next-of-kin of the applicants, was also included in this arrest warrant. After having been arrested by the law enforcement officers on the incident day, M.D. was directly taken to the Security Directorate without a forensic report drawn up in respect of him. M.D., who was held in the Security Directorate for a while (there is no record concerning the custodial cell), was subsequently taken to a State Hospital at 06:10 p.m. by a police vehicle upon deterioration of his state of health. The doctor performing his first medical examination issued a report in which it was specified that he was exposed to a risk of death on account of blows he had received on his head.

M.D. was urgently referred to the Van State Hospital and lost his life in this hospital on the same day. At the end of the post-mortem examination and autopsy carried out by the Van Chief Public Prosecutor's Office, M.D.'s definitive cause of death was determined to be "respiratory and cardiac insufficiency resulting from cerebral haemorrhage suffered due to blunt trauma to his head".

An ex-officio investigation was initiated into the incident on 6/3/2008 by the chief public prosecutor's office. Within the scope of the investigation, the applicant İpek Deniz, who is M.D.'s wife, maintained that her husband had been beaten and killed by the police officers while returning from a condolence visit on the day of incident; and that she would subsequently report the name of the eye-witnesses in a petition. Upon the applicant's request, M.D.'s grave was opened, and his death body was sent to the İstanbul Forensic Medicine Institute for being subject to an autopsy once again. As a result of the autopsy performed by the Morgue Specialization Board of the İstanbul Forensic Medicine Institute, the definitive cause of death of the person on whose body there were wide traumatic lesions and rib fractures was determined to be "brain tissue destruction and brain haemorrhage resulting from blunt head trauma.

A large number of witnesses were heard by the chief public prosecutor's office concerning the incident. A large majority of the witnesses stated that they had not directly seen the incident. In this respect, only M.S.K., M.E.M., F.C. and S.S. stated that they had witnessed the incident. In their statements, the witnesses noted that the police officers had hit M.D. with pickaxe handles and truncheons, and one of the witnesses, S.S., identified one police officer.

Statements of other police officers whose names were included in the arrest warrant by the chief public prosecutor's office were not taken. The authorities only examined the statements taken within the scope of administrative investigation conducted by the police inspectors into the incident. The investigation was completed within one year, and a criminal case was brought against the police officer in question for the offence of "causing death as a result of aggravated intentional wounding by exceeding the limit of the right to use force".

The Erciş Assize Court decided to return the bill of indictment on the ground that "any police officer taking office on 5 March 2008 was not heard as a witness". The objection raised against the decision by the chief public prosecutor's office was accepted by the 1st Chamber of the Van Assize Court.

The proceeding starting with the hearing of 16 July 2009 lasted for twelve hearings and was completed on 2 June 2011. The police officers noted in their statements that they did not know who was the police officer taking M.D. under custody. The witnesses, M.S.K., M.E.M., F.C. and S.S. whose statements had been taken during the investigation were questioned by the court. They emphasized that they could not exactly remember the details as the incident took place approximately two years ago and gave statements partially contradicting with their previous statements before the prosecutor's office. At the end of the proceedings, it was decided that the accused police officer be acquitted.

The court also decided that when the decision became final, a criminal complaint would be filed before the chief public prosecutor's office for the necessary action to be taken for the identification of the police officers causing the death of M.D. and subsequently opening a criminal case against them. The appeal lodged by the applicant against this decision was dismissed by the Court of Cassation.

"A special report concerning the disproportionate use of force in the demonstrations taking place in Erciş and the death of Mehmet Deniz" was drawn up by a panel of five persons consisting of the Van Bar Association, the Van Branch of the Human Rights Association and the Van Branch of the Association of Human Rights and Solidarity for Oppressed People ("Mazlumder") and submitted to the chief public prosecutor's office on 14 March 2008.

This report included the interviews made with the persons named S.S., İ.M., F.C., M.P., M.T., M.S.K., S.K. and H.S., the observations and findings made and reached by the panel, the issues clarification of which was found necessary and the opinions and conclusions. In the report drawn up, it was concluded that the police had used disproportionate force to

disperse the demonstrators; and that it must be clarified where M.D. had been placed between the hour when he had been battered (01:30 p.m.) and the hour when he had been taken to hospital (07:30 p.m.), and the doctors examining M.D. in accompany with the police officers must be identified.

IV. EXAMINATION AND GROUNDS

82. The Constitutional Court, at its session of 21 April 2016, examined the application no. 2013/1595 lodged by the applicants on 18 February 2013 and decided as follows:

A. The Applicants' Allegations

83. The applicants maintained that their relative had been arrested although he did not participate in the social incident that took place in Erciş on 5 March 2008, that he lost his life as a result of the use of force by law enforcement officers during his placement into custody, and that an effective investigation was not conducted into the case. Relying on Article 17 of the Constitution which defines the right to life, the applicants requested finding of a violation, an effective investigation, and awarding of pecuniary and non-pecuniary compensation.

B. The Court's Assessment

84. In the present case, the applicants' relative (M.D.) was taken into custody during the social incidents taking place at the material time and he lost his life after being hospitalised. The applicants allege that their relative was killed due to the battery administered by law enforcement officers. They further complain of the lack of an effective investigation to shed light on the death. Therefore, separate assessments should be made as to whether the death occurred as a result of the use of force by law enforcement officers and whether the consecutive investigation was effective.

85. For that reason, based on the particular circumstances of the subject matter of the present application, the assessment on the present case will be conducted under two separate heads: whether there has been a violation of (i) the State's negative obligation under Article 17 § 1 of the Constitution and (ii) its positive obligation to conduct an effective investigation.

1. Admissibility

86. The Ministry indicates that, where the complaints raised before the European Court of Human Rights ("the ECHR") relying on the (negative) obligation to prevent violations of the right to life guaranteed under Article 2 of the European Convention on Human Rights ("the Convention") had taken place before the date on which the State Party recognised the Convention, the ECHR shall declare the application inadmissible for incompatibility *ratione temporis*.

87. The Ministry further adds that the Constitutional Court's competence *ratione temporis* begins on 23 September 2012 and that the remedy of individual application before the Court shall only be used for acts and decisions that became final after the said date.

88. Moreover, the Ministry stresses that the procedural obligation to conduct and effective investigation into the death under Article 2 of the Convention is considered by the ECHR separately and independently from the material obligation. In this connection, the Ministry underlines that a separate and independent finding of an interference is possible with regard to events taking place before the effective date of the Convention in so far as it is limited to the procedural obligation.

89. In this scope, the Ministry points out that the aforementioned points should be taken into account when examining the admissibility of the case giving rise to the application. Thus, before deliberating upon the other admissibility criteria, the Court shall examine whether the present application is admissible in regard to the requirement of compatibility *ratione temporis*.

90. Provisional Article 1 § 8 under "Transitional Provisions" of Code no. 6216 on the Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, reads as follows:

> *"The court shall examine the individual applications to be lodged against the last actions and decisions that were finalized after 23 September 2012."*

91. Pursuant to this legal provision, the Constitutional Court's competence *ratione temporis* runs from 23 September 2012, which means

that it is authorised to examine only the individual applications lodged against the acts and decisions that became final after the said date.

92. The fact that a definite date is determined for the Constitutional Court's temporal jurisdiction and that it is not applied retrospectively is a requirement of the principle of legal certainty (see *Zafer Öztürk*, no. 2012/51, 25 December 2012, § 18).

93. On the other hand, the ECHR takes account of the date of the event giving rise to the application when determining the compatibility *ratione temporis*. In other words, in the examination of the compatibility *ratione temporis*, the ECHR relies on the date on which the interference took place instead of the finalisation date of the impugned act or decision which gave rise to the alleged interference while the Constitutional Court takes account of the latter (see *Blečić v. Croatia* [GC], no. 59532/00, 8 March 2006, § 70; *Šilih v. Slovenia* [GC], no. 71463/01, 9 April 2009, § 140).

94. It is observed that there is a clear difference between the Constitutional Court and the ECHR in terms of the rules governing temporal jurisdiction and that the Ministry's objection stems from this difference.

95. In the present case, the death occurred on 5 March 2008, which is incompatible *ratione temporis* for the Court. However, the decision of acquittal, which gave rise to the individual application, became final on 11 October 2012 which is after the start date of the Court's temporal jurisdiction. Therefore, the application has been found to be within the Constitutional Court's competence *ratione temporis*.

96. On the other hand, it is noted that the compensation proceedings brought by the applicants before the Administrative Court against the Ministry of Interior has not been concluded yet. Thus, there is a need for conducting a separate assessment as to whether the available legal remedies have been exhausted in the present case.

97. Article 148 § 3 of the Constitution reads as follows:

"... In order to make an application, ordinary legal remedies must be exhausted."

98. Article 45 § 2 of Code no. 6216 provides as follows:

"All of the administrative and judicial application remedies that have been prescribed in the code regarding the transaction, the act or the negligence that is alleged to have caused the violation must have been exhausted before making an individual application."

99. The requirement of exhausting legal remedies, as stipulated by the constitutional and legal provisions cited above, is a natural consequence of the fact that the remedy of individual application is to be used as a last and extraordinary resort for the prevention of human rights violations. In other words, the fact that administrative authorities and inferior courts are primarily responsible for remedying the violations of fundamental rights renders it mandatory to exhaust the ordinary legal remedies (see *Necati Gündüz and Recep Gündüz*, no. 2012/1027, 12 February 2013, § 20).

100. To respect fundamental rights and freedoms is the constitutional duty of all State bodies, and to remedy violations arising due to neglect of this duty is the task of administrative and judicial authorities. Therefore, it is essential that alleged violations of fundamental rights and freedoms first be raised before inferior courts for the latter to examine and resolve (see *Ayşe Ziraman and Cennet Yeşilyurt*, no. 2012/403, 26 March 2013, § 16).

101. That said, to be considered effective, a remedy must not only be legally available but also be effective in practice while the authority receiving the application must be empowered to deal with the substance of an alleged violation. A remedy is "effective" if it can prevent an alleged violation from occurring, end it if it is continuing, or establish a resolution and afford the applicant appropriate redress (compensation) for any violation that has already occurred. Furthermore, in cases where an alleged violation has occurred, adequate procedural safeguards must be ensured for the revelation of liabilities, along with the payment of compensation for damages (see *S.S.A.*, no. 2013/2355, 7 November 2013, § 28; for a similar judgment of the ECHR, see *Ramirez Sanchez v. France*, no. 59450/00, 4 July 2006, §§ 157-160).

102. In this scope, the effective legal remedy to be sought should be determined at the outset in cases of death as a result of the use of force by public officers.

103. In cases pertaining to incidents of death occurring as a result of intention or assault or ill-treatment, the State has an obligation, by virtue of Article 17 of the Constitution, to conduct criminal investigations of the nature to allow for the identification and punishment of those responsible for the case of assault involving death or bodily harm. In these kinds of incidents, the mere payment of compensation as a result of the administrative and civil investigations and proceedings that are conducted is not sufficient to eliminate the violation of the right to life and to remove the victim status (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, § 55).

104. Where a public officer is accused of attacking a person's life or the corporeal or spiritual integrity of a person by means of abusing the authority vested in them by their duty, those attacks must not be let unpunished. In such cases, the proceedings or the conviction must not be rendered null and void by a prescription and the application of protective measures such as amnesty or pardon must not be authorized (see *Zeycan Yedigöl* [Plenary], no. 2013/1566, 10 December 2015, § 33; for a similar judgment of the ECHR, see *Tuna v. Turkey*, no. 22339/03, 19 January 2010, § 71).

105. As it can be understood from the principles laid down above, the State has an obligation to conduct an effective criminal investigation into the incidents of death occurring as a result of the use of force by public officers. In the present case, an investigation was carried out concerning the death of the applicants' relative and a criminal case was filed against a police officer. Consequently, the police officer was acquitted and this decision became final. Moreover, there are no other on-going criminal investigations into the incident. Accordingly, regardless of the outcome of the compensation proceedings being held under the administrative jurisdiction, that set of proceedings shall not be sufficient for depriving the applicants of victim status, which confirms that the ordinary remedies have been exhausted.

106. In conclusion, on the grounds that the applicants' relative lost his life due to the use of force by the law enforcement officers who had intervened in the social incidents and that an effective investigation has not

been conducted into the case, the Court observes that the alleged violations of both the substantive and the procedural aspects of the right to life protected under Article 17 § 1 of the Constitution are not manifestly ill-founded within the meaning of Article 48 of Code no. 6216. As there are no other reasons for inadmissibility, the application must be declared admissible.

2. Merits

a. Alleged Violation of the Right to Life under its Substantive Aspect

i. The Applicants' Allegations and the Ministry's Observations

107. The applicants complain of an alleged violation of the right to life under its substantive aspect by claiming that their relative, who had no involvement in the social incidents taking place in Erciş at the material time, was killed due to the battery administered by law enforcement officers; that the State has to make a reasonable explanation regarding what happened to a person in custody; that they do not accept the Van Security Directorate's press statement; and that there were many contusions and bruises on the victim's body.

108. In its observations, the Ministry indicates that Article 2 of the Convention, which guarantees the right to life and sets out the conditions where the death may be justified on certain grounds, also includes the situations where intentional deprivation of life may be allowed. Nevertheless, although it is possible under Article 2 to use force in a manner which may lead to unintentional death, the use of force must be absolutely necessary.

109. According to the information in the Ministry's observations, at the material time, the district branch office of a political party organised an activity in Erciş. When the activity was over, the crowd started marching towards the city centre, chanted illegal slogans, refused to disperse despite the warnings of the officials who announced that the demonstration was unlawful, scattered around various parts of the city in small groups, attacked with stones, and damaged public property.

110. The Ministry reports that 108 individuals that were identified to have been involved in the incidents were arrested and placed into

custody upon the instructions of the public prosecutor's office and that the deceased M.D. was one of them. The Ministry adds that there is no pre-custody report in his respect and that he died around 6 p.m. on the same day following his hospitalisation due to his worsening condition.

111. The Ministry indicates that a fight broke out between business owners and demonstrators since the latter threw stones at certain places of business and subsequently the two groups threw stones at each other. Accordingly, M.D. was one of the arrested demonstrators. He was initially brought to the Security Directorate with an injury and later sent to hospital for treatment.

112. Lastly, the Ministry's observations point out that it was not possible to reach a definitive conclusion concerning the incident due to the contradictory nature of witness testimonies and that the accused S.B. was therefore acquitted. In this scope, decisions of the trial court or the public prosecutor's office did not contain any assessment on the question whether the limits of the power to use force had been exceeded. The Ministry concluded its observations by affirming that it was at the Constitutional Court's discretion to examine whether the substance of the right to life had been violated.

ii. General Principles

113. Article 17 §§ 1 and 4 of the Constitution, titled "*Personal inviolability, corporeal and spiritual existence of the individual*", provides as follows:

> *"Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence.*
>
> *The act of killing in case of self-defence and, when permitted by law as a compelling measure to use a weapon, during the execution of warrants of capture and arrest, the prevention of the escape of lawfully arrested or convicted persons, the quelling of riot or insurrection, or carrying out the orders of authorised bodies during state of emergency, do not fall within the scope of the provision of the first paragraph."*

114. The right to life enshrined in Article 17 of the Constitution is an inalienable and indispensable fundamental right and, when read together

with Article 5 of the Constitution, it imposes positive and negative obligations on the State (see *Serpil Kerimoğlu and Others*, § 50). As a negative obligation, the State has a liability not to end the life of any individual who is within its jurisdiction in an intentional and illegal way. Furthermore, as a positive obligation, the State has the liability to protect the right to life of all individuals who are within its jurisdiction against the risks which may arise from the actions of public authorities, other individuals, or the individual himself/herself (see *Serpil Kerimoğlu and Others*, §§ 50 and 51).

115. Cases of death occurring as a result of the use of force by public officers must be considered within the scope of the State's negative obligation under the right to life. This obligation concerns both deliberate killing and the use of force that ends in death without premeditation (see *Cemil Danışman*, no. 2013/6319, 16 July 2014, § 44). Within the scope of the negative obligation concerning the right to life, the officers who use force with a public authority bear the liability not to end the life of any individual in an intentional and unlawful way (see *Serpil Kerimoğlu and Others*, § 51).

116. The last paragraph of Article 17 of the Constitution provides that an interference with the right to life shall be lawful in the following cases: (i) for self-defence; and, when permitted by law as a compelling measure to use a weapon, (ii) during the execution of warrants of capture and arrest, (iii) the prevention of the escape of lawfully arrested or convicted persons, (iv) the quelling of riot or insurrection, or (v) carrying out the orders of authorised bodies during state of emergency.

117. In the above-mentioned situations, it must be absolutely necessary to use lethal force as a last resort when there is no other possibility of intervention left. For this reason, bearing in mind the inviolable nature of the right to life, there is a need for a strict review on the requirements of necessity and proportionality in cases involving such use of force that might result in death.

118. In making an assessment on this aspect of the use of force by public officers, the Court must subject deprivations of life to the most careful scrutiny by taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding

circumstances including such matters as the planning and control of the actions under examination (for a similar judgment of the ECHR, see *McCann v. the United Kingdom* [GC], no. 18984/91, 27 September 1995, § 150). Also, in the evaluation which will be made about this subject, regard must be had, as a whole, to the conditions under which the incident occurred and the course over which it developed as a whole (see *Cemil Danışman*, § 57; for a similar judgment of the ECHR, see also *Andronicou and Constantinou v. Cyprus*, no. 25052/94, 9 October 1997, § 182).

119. Lastly, the conditions of the incident of death have to be elaborately examined and the nature of the danger of previous actions and the self of the person who lost his life have to be evaluated (see *Cemil Danışman*, § 63).

iii. Application of the Principles to the Present Case

120. In the present case, the applicants allege that the death of their relative was caused by the use of force by the law enforcement officers who conducted the custody procedure.

121. For the State to be held responsible for an individual's death, it must first be proven beyond any reasonable doubt that the individual was killed by agents of the State. Where it has been proven that the State is responsible for the death, in that case, the burden of proof shall be borne by the State to demonstrate that the killing fell within the exceptional circumstances where it may be permissible under Article 17 § 4 of the Constitution (see *McCann v. the United Kingdom*, § 172).

122. After the social activity held on the incident date by the district representation of a political party on the occasion of the forthcoming International Women's Day, a group of thousand people gathered together by blocking the traffic on roads and began chanting slogans in favour of a terrorist organisation.

123. The crowd refused to disperse although the police warned that the demonstration was illegal. Subsequently, the police intervened and took 108 demonstrators into custody. One of those placed into custody was the applicants' relative, M.D., who lost his life at the hospital he had later been taken to.

124. The arrest report drawn up regarding the incident indicated that M.D. had been injured during the incidents. The press statement released by the Van Security Directorate explained that he had lost his life due to a stone which had hit his head. However, the initial autopsy report as well as the second autopsy report issued after the exhumation found that the death had been caused by blows to the head and that there were many fractures and lesions on the body. Following the autopsy reports, the claims of a stone hitting M.D. in the head were never voiced again.

125. At the end of the proceedings held before the Assize Court, it was established that M.D.'s head injury causing his death had been inflicted by the police officers on duty; nonetheless, they were acquitted on the ground that the police officer who had carried out the intervention was not conclusively identified. The said decision was upheld by the Court of Cassation and became final.

126. The Court notes that judicial authorities acknowledge the fact that M.D.'s death occurred as a result of the intervention performed by police officers. The Ministry's observations do not contain any consideration to the contrary, either. Indeed, the applicants' allegations are also in the same vein. Therefore, in view of the information and documents in the file, there is no reason to depart from the acknowledgment that M.D.'s death was caused by the use of force by law enforcement officers.

127. Having established that the applicants' relative had died as a result of the use of force by public officers, the Court must now make an assessment as to whether the killing fell within the exceptional circumstances defined in Article 17 § 4 of the Constitution.

128. According to the conclusion reached by the public prosecutor's office, the police officers, who intervened in the incidents which had turned into a terrorist propaganda, caused the death of M.D. as a result of the act of "aggravated injury on account of its consequence" as they exceeded the limits of the power to use force when conducting arrest and custody procedures within the scope of a judicial investigation. Accordingly, it was acknowledged that the law enforcement officers had used force when they were lawfully conducting an arrest upon the instructions received from the public prosecutor's office during an illegal demonstration and

that their acts had been oriented at inflicting injury within the meaning of their power to use force.

129. In applications involving deaths resulting from the use of force by public officers, the ECHR recalls that the exceptions set out in Article 2 § 2 of the Convention concern intentional killing but the text of Article 2, read as a whole, extends to the cases of use of force which may result, as an unintended outcome, in the deprivation of life. According to the ECHR, the use of force must be "absolutely necessary" for the achievement of one of the purposes set out in the second paragraph (see *McCann v. the United Kingdom*, § 148).

130. The Constitutional Court stresses that, in cases where the such force which may result in death had to be used, there is a need for conducting a strict review as to whether it was necessary and proportionate. In fact, the ECHR emphasises that the use of the term "absolutely necessary" with respect to interference with the right to life indicates that a stricter and more compelling criterion of necessity must be applied than is normally used to determine whether State interference is "necessary in a democratic society" in relation to the right to private life or freedom of assembly (see *Aydan v. Turkey*, no. 16281/10, 12 March 2013, § 65).

131. Eyewitnesses state that M.D. resisted against the uniformed police officers who were trying to get him inside the taxi with a view to taking him into custody during the demonstrations taking place on the incident date; that the police officers hit M.D. with their arms; and that a police officer in plain clothes also became involved and hit M.D. with a stick. While it had been understood that the events of the case took place in the way explained by the witnesses, there is still uncertainty regarding the identities and descriptions of the police officers who performed the intervention and about what happened during the time period between M.D.'s arrival at the Security Directorate and his hospitalisation.

132. The public authorities did not explain under which conditions the lethal blow to the head, rib fractures, and disseminated lesions on the body contained in M.D.'s autopsy report had occurred. In this regard, the only information included in the file is comprised of the witness statements indicating that M.D. had resisted getting in the vehicle. However, this piece

of information was not confirmed by public authorities. Furthermore, neither does the file contain any allegations or findings nor has the Court reached a conclusion that M.D. was armed at the time of his arrest or that he showed such behaviour that could endanger the lives or physical integrities of the law enforcement officers.

133. Although the onus of proving that the use of lethal force had been "absolutely necessary" was placed on the public authorities since it was acknowledged in the instant case that the death occurred as a result of the use of force by law enforcement officers, there has been no explanation made in this regard. Therefore, it cannot be said that the law enforcement officers were faced with a situation which would render it absolutely necessary to use such a degree of force that may result in death during the arrest procedure they conducted upon the public prosecutor's office's instructions.

134. On the other hand, a separate assessment was not made as to whether the impugned intervention had sufficient legal and administrative framework, as the public authorities did not offer any explanation regarding the use of force and its justification.

135. The reasoned judgment indicated that it was not definitively established whether the lethal blow to M.D.'s head had been sustained as he was being forced by the law enforcement officers to get into the taxi or after he had already been placed in the taxi. M.T., a witness who had been taken to the police station along with M.D. in the same vehicle, stated that the physical intervention towards them had continued at the Security Directorate, as well.

136. The information related to how incidents of injury or death take place over the course of the State's control (e.g. administrative detention, custody or detention on remand) are, in large part, accessible by the authorities. Thus, strong presumptions of fact will arise in respect of injuries and death occurring during such detention. For this reason, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation concerning the death at issue (for a similar judgment of the ECHR, see *Salman v. Turkey*, no. 21986/93, 27 June 2000, § 100).

137. In the present case, M.D. was arrested by law enforcement officers around 1 p.m. and he was taken directly to the Erciş Security Directorate. Around 6 p.m., he was brought to the Erciş State Hospital on account of his deteriorating state of health. The first medical report in respect of M.D. was drawn up at that stage.

138. No official record was kept of M.D. being brought to the Security Directorate, he was not recorded in the custody suite logbook, nor even was his state of health established with a report despite the legal obligation.

139. As can be understood from the principles and assessment above, the burden rests with the State to prove that there was no interference with M.D.'s life or physical integrity over the course of five hours he spent under the protection of the State. Noting that the applicants can only be able to submit indirect evidence in such cases, the Court observes that they already did what can be expected of them by providing names of witnesses.

140. The Court further observes in the instant case that the Security units failed to share with judicial authorities the information related to how M.D.'s death had occurred, which procedures had been conducted during the period of time from the moment of his arrest until his transfer to the hospital, or who were the law enforcement officers that had conducted those procedures. In the absence of such information, it has not been possible to understand the circumstances surrounding the interference with the life of the applicants' relative. Therefore, the Court considers that the public authorities refrained from collaborating with the judicial authorities on shedding light on the case.

141. Having regard to the applicants' allegations, the proceedings held before the Erciş Assize Court, and the documents and information contained in the file as a whole, the Court concludes that the death was caused by the use of force by law enforcement officers, while it does not find any reasons that would justify the use of such force that resulted in death within the meaning of Article 17 of the Constitution.

142. For these reasons, it must be held that there has been a violation of the right to life protected under Article 17 of the Constitution under its substantive aspect.

b. Alleged Violation of the Right to Life under its Procedural Aspect

i. The Applicants' Allegations and the Ministry's Observations

143. The applicants complain of the lack of an effective investigation by claiming that their relative, who had no involvement in the social incidents taking place in Erciş, was killed due to the battery administered by law enforcement officers; that no evidence was collected other than those submitted into the file by themselves; and that criminal proceedings were brought against only one police officer although the arrest had been carried out by several law enforcement officers.

144. In its observations, the Ministry reports that M.D. was severely injured during the incidents taking place in Erciş on 5 March 2008; that he lost his life at the hospital to which he had been taken on the same day; that the public prosecutor's office initiated an *ex officio* investigation and gave the relevant law enforcement officers a list of the pieces of evidence that needed to be collected; and that, upon the applicants' request for an additional autopsy, the body was exhumed and sent to the Istanbul Forensic Medicine Institute for a new autopsy.

145. The Ministry adds that the public prosecutor conducting the investigation took the eyewitness' statements in person; that the police officers and supervising officers who had signed the arrest report gave their statements to the inspectors within the scope of disciplinary investigations; that no camera records were found at the end of an enquiry conducted around the scene of the incident; that he investigation was completed in approximately a year, as a result of which criminal proceedings were filed against one police officer.

146. The Ministry follows that all witnesses, including the police officers and supervising officers whose names were on the arrest report, gave their statements once again over the course of the trial stage; that the applicants had access to legal assistance, did not face restrictions regarding their right to examine and obtain a copy of the file, and enjoyed their right to appeal.

147. Lastly, the Ministry's observations indicate that the accused police officer was acquitted on account of insufficient evidence for conviction and

that the said decision was upheld by the Court of Cassation. The Ministry concludes its observations by affirming that it is at the Constitutional Court's discretion to examine whether the procedural aspect of the right to life has been violated.

ii. General Principles

148. The right to life enshrined in Article 17 of the Constitution is an inalienable and indispensable fundamental right and, when read together with Article 5 of the Constitution, it imposes positive and negative obligations on the State (see *Serpil Kerimoğlu and Others*, § 50).

149. Within the scope of the negative obligation concerning the right to life, the officers who use force with a public authority bear the liability not to end the life of any individual in an intentional and unlawful way. Under the positive obligations, on the other hand, the State has a liability to protect the right to life of every person within its jurisdiction against risks which may arise out of the actions of public authorities, other individuals or the individual himself/herself. First and foremost, the State should introduce deterrent and protective legal regulations and take administrative measures against such risks to the right to life. This liability also includes the obligation to protect the life of an individual from all kinds of dangers, threats and violence (see *Serpil Kerimoğlu and Others*, § 51).

150. The positive obligations that the State has within the right to life have also a procedural aspect. Within the framework of this procedural obligation, the State is required to carry out an effective official investigation which can ensure that those who are responsible for each incident of death which is not natural are determined and punished, if necessary. The main aim of this type of investigation is to guarantee the effective implementation of the law that protects the right to life and, in the incidents in which public officials or institutions are involved, to ensure that they are accountable against the deaths which occur due to their interference or under their responsibility or by the actions of other individuals (see *Serpil Kerimoğlu and Others*, § 54).

151. The procedural obligation concerning the right to life can be fulfilled via criminal, civil or administrative investigations, depending on

the nature of the case. In cases pertaining to incidents of death occurring as a result of intention or ill-treatment perpetrated by public officers, the State has an obligation, by virtue of Article 17 of the Constitution, to conduct criminal investigations capable of leading to the identification and punishment of those responsible.

152. In order to be able to say that an investigation is effective and sufficient, investigation authorities need to act *ex officio* and collect all evidence which can shed light on the death and can be suitable for the identification of those who are responsible. A deficiency in the investigation that would reduce the likelihood of discovering the cause of the incident of death or those who are responsible bears the risk of clashing with the obligation of conducting an effective investigation (see *Serpil Kerimoğlu and Others*, § 57).

153. In this respect, the authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, *inter alia*, witness testimonies, expert examinations and, where appropriate, an autopsy which provides a complete and detailed report and an objective analysis of the cause of death (see *Turan Uytun and Kevzer Uytun*, no. 2013/9461, 15 December 2015, § 73; for similar judgments of the ECHR, see also *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, 24 March 2011, § 301; *Tanrıkulu v. Turkey* [GC], no. 23763/94, 8 July 1999, § 109; and *Gül v. Turkey*, no. 22676/93, 14 December 2000, § 89).

154. On the other hand, the nature and degree of the review meeting the minimum standard of effectiveness of the investigation depends on the particular circumstances of the case. The question of effectiveness in this scope should be assessed on the basis of all relevant facts and the practical realities of the investigation. Therefore, it is not possible to reduce the variety of situations that can occur to a simple list of investigative acts or other minimum criteria (see *Fahriye Erkek and Others*, no. 2013/4668, 16 September 2015, § 68; for a similar judgment of the ECHR, see also *Velcea and Mazare v. Romania*, no. 64301/01, 1 December 2009, § 105).

155. The decision which has been taken at the end of the investigation should be based on a comprehensive, objective and an impartial analysis of all findings and, in addition, the decision concerned should also

include an assessment of whether the interference with the right to life was proportionate and arose from an exigent circumstance sought by the Constitution (see *Cemil Danışman*, § 99; for a similar judgment of the ECHR, see also *Nachova and Others v. Bulgaria* [GC] nos. 43577/98 and 43579/98, 6 July 2005, § 113).

156. One of the matters which ensures the effectiveness of the criminal investigations to be conducted is the fact that the investigation process is open to public review in order to ensure accountability in practice. In addition, in each incident, it should be ensured that the relatives of the deceased person are involved in this process to the extent that it is necessary so as to protect their legitimate interests (see *Serpil Kerimoğlu and Others*, § 58).

157. To ensure the effectiveness of investigations concerning cases of deaths arising from the use of force by public officers, the investigative authorities must be independent from those persons who might have been involved in the case. This requirement not only defines hierarchical and institutional independence but also necessitates that the investigation is actually (also in practice) carried out independently (see *Cemil Danışman*, § 96; for a similar judgment of the ECHR, see also *Hugh Jordan v. the United Kingdom*, no. 24746/94, 4 May 2001, § 106).

158. The investigations must be conducted at a reasonable speed and diligence. Of course, there may be difficulties which hinder progress of the investigation in certain specific circumstances. However, speedy actions taken by the authorities even in those circumstances is of critical importance for clarification of the events in a sounder manner, maintenance of the individuals' commitment to the rule of law and hindering the impression that authorities tolerate and remain indifferent to unlawful acts (see *Deniz Yazıcı*, no. 2013/6359, 10 December 2014, § 96).

159. On the condition that the circumstances of each given case are assessed separately, the acts that expressly jeopardise life and grave attacks towards material and spiritual existence must not be allowed to go unpunished (see *Filiz Aka*, no. 2013/8365, 10 June 2015, § 32).

160. The carrying out of an investigation solely with a view to establishing or ruling out the involvement of other persons in a suspicious

death by unknown perpetrators is not sufficient to satisfy the procedural obligation; the national authorities' obligation also extends to establishing how exactly the incident took place (see *Turan Uytun and Kevzer Uytun*, § 89; for a similar judgment of the ECHR, see also *Sultan Dölek and Others v. Turkey*, no. 34902/10, 28 April 2015, § 69). In this scope, there is a need for an effective official investigation capable of establishing all circumstances of the case and ensuring that those who are responsible for the incident of death are identified and punished, if necessary (see *Serpil Kerimoğlu and Others*, § 54).

iii. Application of the Principles to the Present Case

161. The application concerns an alleged lack of effective investigation conducted into the death incident resulting from the use of force by public officers. The applicants reach at this conclusion by relying on two main points of complaint. Firstly, the applicants complain that the evidence related to the incident were not sufficiently collected and that the investigation was conducted merely on the basis of the evidence submitted by the applicants. Secondly, they complain that, although the impugned intervention was carried out by several law enforcement officers, criminal proceedings were brought only against one officer. The Court will examine the applicants' complaints in the light of the aforementioned principles to assess whether the investigation and prosecution authorities conducted an effective investigation capable of ensuring the identification and punishment (if necessary) of those responsible by virtue of Article 17 of the Constitution.

162. For a criminal investigation to be effective, the investigative authorities should act *ex officio* and collect evidence; the investigation process should be open to public review; the relatives of the deceased should be involved in the investigation process; the investigative authorities should be independent from those who might be involved in the incident; the investigation should be conducted at a reasonable speed and diligence; and the interferences with life should not be left unpunished.

163. In the present case, the Van Public Prosecutor's Office was informed upon M.D.'s death at the hospital and the public prosecutor on duty conducted the post-mortem examination and autopsy procedures

in a few hours despite the fact that it was in the night. In the following morning, the Erciş Public Prosecutor's Office initiated an investigation. It is observed that the investigative authorities were promptly aware of the death and took action *ex officio* without waiting for a complaint to be filed by the applicants.

164. Though it is important for the public prosecutor's office to act *ex officio*, it does not *per se* ensure the effectiveness of the investigation. Within the scope of the investigation, there is a need for collecting all evidence that may shed light on the death and ensure the identification of those who are responsible. Thus, it must first be determined what was established and what could not be established, with regard to the incident resulting in M.D.'s death, by the authorities conducting investigation and prosecution.

165. The following are the facts that were established within the investigation, were not disputed by the applicants, and were accepted by the court at the end of the trial: 1) Around 1 p.m., M.D. was arrested by law enforcement officers near the Çapa Medical Centre and he was taken to the Erciş District Security Directorate in a civilian non-commercial automobile. 2) After M.D. was arrested, a medical report was not obtained in respect of him. 3) Until 6 p.m., M.D. was held at the Security Directorate but he was not recorded in any custody form or the custody suite logbook. 4) Once his health condition deteriorated, at 6.10 p.m. law enforcement officers took M.D. to the Erciş State Hospital. 5) Around 11 p.m., M.D. lost his life at the Van State Hospital, to which he had been urgently transferred in a "life-critical" condition. 6) M.D. died of brain damage and brain haemorrhage linked to blunt head trauma. There were also rib fractures and disseminated traumatic lesions on his body.

166. In observing the facts that were not established during the investigation stage despite their importance for understanding how the death had occurred, there is a need for differentiating between those that could not be established despite enquiries and those that were never enquired.

167. On the basis of the information and documents contained in the file, the following questions were enquired by the investigative authorities

but could not be established: 1) The identity of the plain-clothed police officer who had allegedly struck the lethal blow to M.D.'s head during the arrest procedure was enquired but it could not be determined precisely. 2) The Çapa Medical Centre's footages showing the moment of arrest were sought but they could not be secured as the security cameras had been broken on the date of the incident. 3) Custody forms and custody suite entry-exit forms were sought but it was found out that they had not been issued. 4) Witnesses were questioned about the alleged use of sticks resembling pickaxe handles by some of the law enforcement officers during their intervention in the incidents on account of inadequate number of batons; however, this allegation could not be confirmed.

168. According to the information and documents in the file, the following points are considered to have never been enquired by investigation and prosecution authorities: 1) whether M.D. participated in the illegal demonstrations; 2) whether M.D. showed such resistance against law enforcement officers during the arrest and custody procedures that would call for an absolutely necessary use of force which may result in death; 3) who were the uniformed law enforcement officers beside the plain-clothed police officer who allegedly struck the lethal blow to M.D.'s head; 4) the vehicle, and the driver thereof, which was used to take M.D. to the Security Directorate following his arrest; 5) the footages showing the interior, entries/exits, and custodial suites of the building for the period between 1 p.m. and 6 p.m., during which M.D. was held at the Security Directorate; 6) statements of the officers and supervising officers stationed at the Security Directorate on the day of the incident, as well as those of the law enforcement officers who signed the arrest report; 7) the identities of the law enforcement officers who considered that M.D.'s health condition was deteriorating and those who brought him the hospital; 8) statements of certain individuals who told to have witnessed the incident in the report prepared by the Van Bar Association, the Van Branch Office of the Human Rights Association (IHD), and the Association for Human Rights and Solidarity for the Oppressed (MAZLUMDER).

169. As it can be observed, even though certain pieces of evidence were collected by the investigative authorities, no enquiries were made into

many pertinent questions that are considered to be capable of shedding light on the case. As it is not its duty, the Court is not concerned with what the outcome of the impugned proceedings would have been if the above-mentioned points had been enquired. The Court's duty is limited to ascertaining whether, or to what extent, the investigative authorities fulfilled their obligation to conduct an in-depth and diligent investigation as stipulated by the Constitution.

170. In this regard, the Court concludes that there has been a violation of the obligation to collect evidence, in the context of obligation to conduct an effective investigation, on the grounds that the investigation had a set of deficiencies, which would reduce the likelihood of discovering those who are responsible for the death and prejudiced the dedication and seriousness of the investigation, and a disregard for seeking certain pieces of evidence and enquiring questions that should have absolutely been collected and answered.

171. There is a further need for an examination on the independence of the investigative authorities since the law enforcement officers who were assigned with collecting the evidence that is considered to be important for shedding light on the case were also the officers who were accused of having perpetrated the incident of death.

172. In order to be able to speak of the independence of investigative authorities, the investigations into the deaths resulting from the use of force by public officers must be conducted independently from those who might be involved in the incident. In the instant case, an investigation was launched *ex officio* by the public prosecutor's office on the ground that an incident of death had taken place as a result of the use of force by law enforcement officers; nonetheless, although the perpetrator was unknown but probably stationed at the Erciş Security Directorate, it was also the latter that was assigned with the collection of evidence and identification of the perpetrator.

173. Since the Security units performed an intervention in the illegal demonstrations taking place on the incident date, it is a natural requirement of investigation to request the information and documents under the

responsibility of the public authority from the Security Directorate. Apart from those requests for information and documents, however, the Court notes that the Security Directorate was left with the discretion in terms of conducting the procedures that are critical for shedding light on the case, including the enquiry/examination of video recordings related to the incident, identification and questioning of witnesses, identification of the perpetrators and questioning them in their capacities as suspects, and obtaining an expert report. As a result, the Erciş Security Directorate failed to identify the perpetrator, disclose the names of the police officers who had arrested M.D., or submit any other evidence that may help shed light on the incident. Even though this does not necessarily mean that certain pieces of evidence were intentionally left out or hidden by the Security Directorate, it entails serious doubts as to the independence of investigating authorities in a case where there is an alleged use of lethal force by law enforcement officers.

174. Therefore, the Court concludes that there has been a violation of the principle of independence of the investigative authority, in the context of the obligation to conduct an effective investigation, on the ground that the investigative procedures (e.g. evidence collection, questioning, identification) concerning an incident of death, which had allegedly resulted from the use of force by law enforcement officers and of which the perpetrator was still unknown, were carried out with the help of the law enforcement officers involved in the incident.

175. One of the main grounds on which the applicants base their allegation concerning the lack of an effective investigation is the fact that only one police officer faced criminal proceedings although several officers were involved in the battery inflicted on M.D.

176. In the present case, the authorities conducting the investigation and prosecution turned their focus on the question whether it was the police officer named S.B. who had struck the lethal blow to M.D.'s head during his arrest. Thus, all the deliberations at the trial stage were held within that framework and, consequently, it was concluded that there was not sufficient evidence to prove that S.B. had committed the impugned offence.

177. The autopsy report issued in respect of M.D. contained findings related not only to the blow to his head but also to the rib fractures and disseminated traumatic lesions throughout his body. In their statements, eyewitnesses told that the uniformed police officers who had been trying to get M.D. inside the vehicle had used force and that the physical intervention had continued after his arrival at the police station. Although it was clear that there might have been other law enforcement officers who had administered physical intervention on M.D. in addition to the plain-clothed police officer allegedly involved in the incident, the public prosecutor's office only filed proceedings against one suspect and did not consider it necessary to conduct investigation against other suspects.

178. After the trial court also concluded that there was more than one perpetrator, a complaint was filed for the identification of and criminal prosecution against those officers. This time issuing a decision of non-prosecution on account of insufficient evidence, the public prosecutor's office once again disregarded a strong suspicion pointing at the involvement of multiple perpetrators. Consequently, even though a death had taken place as a result of the use of force by public officers and the perpetrators had not yet been identified, there were no longer an on-going investigation or prosecution.

179. A decision taken at the end of an investigation must cover all the findings contained in the case file and must be based on objective and impartial analyses. In the instant case, the investigation was conducted and completed in the limited scope of determining whether a certain individual had been involved in the incident. Furthermore, no assessment was made on the justification of the interference with the life or whether it fell within the exceptions provided in Article 17 § 4 of the Constitution. Therefore, taking account of the circumstances of the present case together with the impugned investigation and the collected/non-collected pieces of evidence, the Court concludes that the decision issued at the end of the investigation did not meet the requirements of the obligation to conduct an effective investigation.

180. In order for the effectiveness to be determined, there is also a need for an assessment as to whether the investigation was conducted at a

reasonable speed and diligence and whether the applicants' participation in the investigation process was ensured.

181. In the instant case, the investigation that was launched ex officio on 6 March 2008 was completed in approximately one year and criminal proceedings were filed on 25 March 2009. The trial was completed on 2 June 2011 and the decision became final once the Court of Cassation completed the appellate review on 11 October 2012. A set of proceedings in which the deliberations concerned an incident of death occurring as a result of the use of force by public officers, and which could be regarded as a difficult case, was completed in a reasonable amount of time, i.e. nearly four years including the appellate review.

182. Nonetheless, having found a violation as a result of the examination on the collection of evidence, the Court has not held a separate assessment on the question whether the investigation was conducted with reasonable diligence.

183. The Court further observes that the applicants were legally represented at the investigation and prosecution stages; that their statements were taken in person by the public prosecutor conducting the investigation; that the applicants' requests for enquiries were met; that a second autopsy was performed on the body upon their request for exhumation; that they were admitted to the proceedings as intervening party; and that they were able to appeal the judgment delivered at the end of trial. Therefore, the applicants were allowed to effectively take part in the investigation process.

184. For these reasons, the Court must hold that there has been a violation of the right to life enshrined in Article 17 of the Constitution under its procedural aspect (collection of evidence, independence of the investigative authority) for the failure to conduct an effective investigation into the incident of death.

3. Application of Article 50 of Code no. 6216

185. Article 50 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, reads as follows:

"(1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled. However, legitimacy review cannot be done, decisions having the quality of administrative acts and transactions cannot be made.

(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."

186. In the present application, since the Court has found a violation of the substantive aspect of the right to life and a violation of the procedural obligation to conduct an effective investigation, a copy of the judgment must be sent to the relevant chief public prosecutor's office for further action to redress the violation and its consequences.

187. The applicants claimed to be awarded a total sum of 650,000 Turkish liras (TRY), of which TRY 250,000 as pecuniary and TRY 400,000 as non-pecuniary compensation.

188. As a result of the examination of the application, it was held that the substantive aspect of Article 17 of the Constitution, as well as the obligation to conduct an effective investigation were violated. The applicants have not submitted any documents to the Court concerning the pecuniary damages they claim to have sustained. In order for the Court to award pecuniary compensation, a causal link must be established between the pecuniary damages allegedly sustained by the applicants and the claim for compensation. The compensation claim which has not been supported with any documents must be rejected.

189. The Court held that the substantive aspect of Article 17 of the Constitution, as well as the obligation to conduct an effective investigation were violated. In this connection, the Court considers that the finding of a

violation of the obligation to conduct an effective investigation and sending the judgment to the relevant chief public prosecutor's office for further action shall offer adequate redress for the removal of the negligence in this respect. On the other hand, having also found a violation of the right to life under its substantive aspect, the Court must award TRY 80,000 as non-pecuniary compensation in favour of the applicants.

190. The total court expense of TRY 1,998.35 including the court fee of TRY 198.35 and counsel fee of TRY 1,800, which is calculated over the documents in the case file, must be reimbursed to the applicants.

I. JUDGMENT

The Constitutional Court UNANIMOUSLY held on 21 April 2016 that

A. The alleged violation of the right to life be DECLARED ADMISSIBLE;

B. 1. The substantive aspect of the right to life safeguarded by Article 17 of the Constitution was VIOLATED;

2. The procedural aspect of the right to life safeguarded by Article 17 of the Constitution was VIOLATED;

C. A net amount of TRY 80,000 be JOINTLY PAID to the applicants in respect of non-pecuniary damage, and other compensation claims be REJECTED;

D. A copy of the judgment be SENT to the Erciş Chief Public Prosecutor's Office for further action to redress the consequences of the violation of the right to life under its procedural aspect;

E. The total court expense of TRY 1,998.35 including the court fee of TRY 198.35 and counsel fee of TRY 1,800 be JOINTLY REIMBURSED TO THE APPLICANTS;

F. The payments be made within four months as from the date when the applicants apply 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; and

G. A copy of the judgment be SENT to the Ministry of Justice.

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

MEHMET KURT

(Application no. 2013/2552)

25 February 2016

On 25 February 2016, the Second Section of the Constitutional Court found a violation of the right to protect and improve corporeal and spiritual existence safeguarded by Article 17 of the Constitution in the individual application lodged by *Mehmet Kurt* (no. 2013/2552).

THE FACTS

[7-31] The applicant is owner of a four-storey building located in Soğuksu Village in Kalkandere/Rize. A favourable decision of the environmental impact assessment (EIA) was rendered by the Ministry of Environment and Forestry for the Cevizlik Hydroelectric Plant planned to be constructed by A. Enerji Üretimi San. ve Tic. A.Ş. ("the Company") at the İkizdere basin in the province of Rize, and accordingly a forested land of 69.881 m² was allocated to the Company. At the end of the case brought before the Rize Administrative Court for the revocation of the EIA favourable decision, the act at stake was revoked on the ground that the environmental impacts of the EIA favourable decision were at the acceptable levels except for the calculation of aqua vitae to be left for the continuation of the aquaculture. Thereupon, after the Company had undertaken to release water at the amount of 2800 l/sec, which was specified in the court's decision, to the stream, a new EIA favourable decision was taken. The action brought before the Rize Administrative Court for revocation of this decision was dismissed.

After the Directorate General of Forestry had allocated the forested land of 69.881 m² as a switchyard for the Cevizlik Hydroelectric Plant, the authorization was revoked as this land was not found appropriate by the Directorate General of the Turkish Electricity Transmission Company ("the TEİAŞ"). It was requested that an additional authorization be granted for the new appointed forested land of 16.638 m². The Cadastral and Property Department at the Directorate General of Forestry of the Ministry of Environment and Forestry granted additional authorization for the Company concerned until 27 October 2055 for establishing a switchyard on this area. A case was filed by the applicant and another person before the Rize Administrative Court for revocation of the act in question.

The case filed by the applicant for the protection of the natural environment and environmental health was dismissed by the Rize Administrative Court on the grounds that the environmental impact values were within the acceptable limits and that there was no ground which would require making another assessment different than the previously-taken EIA report. The first instance decision was quashed by specifying that the legal procedure pertaining to the site for which additional authorization had been granted was not fulfilled. Upon the request of the defendant administration for the rectification of the judgment before the Supreme Administrative Court, the previous judgment rendered by the Chamber of the Supreme Administrative Court was revoked, and the first instance decision was upheld.

Along with the administrative proceedings cited-above, in the expropriation action brought by the TEİAŞ against the applicant and another third person, it was held that the easement of the part which was indicated on the expert report and on which the switchyard and the transmission lines were built be registered in the name of the TEİAŞ; that the easement value of the immovable property be paid to the third party specified to be the owner of the immovable property while the easement value of the building be paid to the applicant who was the owner of the building.

IV. EXAMINATION AND GROUNDS

32. The Constitutional Court, at its session of 25 February 2016, examined the application and decided as follows.

A. The Applicant's Allegations

33. The applicant maintained that although an EIA favourable decision was also required to be obtained in respect of the switchyard built, upon the interlocutory decision of the Directorate General of Forestry, at the Soğuksu Village in the Kalkandere district of the Rize province, where many people were living and he also had a four-storey building, within the scope of the "Cevizlik Regulator and Hydroelectric Power Plants Project", this decision was not taken. He also stated that high-voltage transmission lines were installed just over his building due to the switchyard built by his immovable; and that according to scientific research results, these

transmission lines emitting radiation through a surface of 600 m led to several diseases including cancer; that the level of noise caused by the plant while operating was far above the tolerable limits, which hindered the residents from maintaining their daily lives and from sleeping at nights; and that he could not obtain a result from the action he brought due to non-existence of an EIA report with respect to this facility. The applicant accordingly claimed that his rights safeguarded by Articles 17 and 56 of the Constitution were violated.

B. The Court's Assessment

34. 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, 18/9/2013, § 16). Although the applicant maintained that his rights enshrined in Articles 17 and 56 of the Constitution were violated, the Court found it appropriate to examine the application under Article 17 of the Constitution by the very nature of the alleged violations.

1. Admissibility

35. As it has been revealed that the application is not manifestly ill-founded and there is no other ground to require the application to be declared inadmissible, it was found admissible.

2. Merits

36. The applicant maintained that an EIA favourable decision was not obtained in respect of the switchyard built, upon the interlocutory decision of the Directorate General of Forestry, at the Soğuksu Village in the Kalkandere district of the Rize province within the scope of the "Cevizlik Regulator and Hydroelectric Power Plants Project"; and that the action brought by him in respect thereof was rejected. He accordingly alleged that his rights safeguarded by Articles 17 and 56 of the Constitution were violated.

37. In its observations, the Ministry of Justice indicates that the constitutional provisions with respect to the right to a healthy environment must be interpreted in light of Article 8 of the European Convention on Human Rights ("the Convention") as well as the case-law of the European Court of Human Rights ("the ECHR") on this matter. The Ministry further states that in the applications where the State acts having an impact on

the environmental issues are discussed, the ECHR's assessments have two aspects: the decision-making process is also taken into consideration for determining whether the persons' interests have been considered, alongside the review of the substance of the decisions. In these applications, it is primarily noted that the impact on and risk to -likely to be caused by the relevant incident- life style, health and property must be proven by the applicant, and precedent cases which are referred to in the ECHR's case-law within the scope of the right to a healthy environment are also stated.

38. In his counter-statements against the Ministry's observations, the applicant asserted that the expert examination ordered by the first instance court was not directed at the impugned incident; the expert report was executed on the basis of incomplete examination; that factors having an impact on the value of immovables such as transportation, topography and arable nature of the lands were mentioned in the expert report; however, the fact that his right to life was violated due to installation of electricity transmission line just over his house was ignored; and that the expert failed to make any risk assessment in respect thereof. He further indicated that possible impacts of this transmission line on the residents' health were not taken into consideration; that it had an impact over the area of about 600 m^2 including his home and the other immovables as well; that due to this plant, the tea gardens that were source of income for the villagers were destroyed; the transmission lines installed at the residential areas constituted a high cancer risk, which was proven by the scientific studies; and that the installation of these transmission lines just over his building rendered it unusable. He also stated that in the civil action brought for the plant in question, right of easement was constituted, in favour of the administration, over a certain part of the immovable, the value required to be taken into consideration was not of the area due to installation of lines; that the electrical equipment rendered the building unusable; and that due to climatic conditions of the region which was rainy during the large part of the year, thirty percent of leakage of energy was transmitted to the building from electric wires during every rainy weather. Besides, he indicated that the noise caused by the plant when operating was beyond the tolerable limits; that due to noise emitted by operation of the plant, which was established very close to his building, the residents could not maintain their daily lives; nor could they fall asleep during nights; that in

this respect, the experts evaluated the impugned plant only in economic terms but failed to discuss its possible damages to environment and human health; and that the court decision rendered on the basis of this report was unlawful and in breach of his fundamental rights.

a. General Principles

39. Pursuant to Article 148 § 3 of the Constitution and Article 45 § 1 of the Code on the Establishment and Rules of Procedures of the Constitutional Court, which is dated 30 October 2011 and numbered 6216, the Constitutional Court may carry out an individual examination on the merits only when the right alleged to be violated by a public authority is safeguarded by the Constitution as well as it falls into the scope of the Convention and its additional protocols to which Turkey is a party. In other words, it is not possible for an application with an alleged violation of a right which is outside the common protection area of the Constitution and Convention to be declared admissible (*Onurhan Solmaz*, no. 2012/1049, 26 March 2013, § 18).

40. Article 17 § 1 of the Constitution, titled "*personal inviolability, corporeal and spiritual existence of the individual*", reads as follows:

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

41. Article 56 § 1 and 2 of the Constitution, titled *"health services and protection of the environment"*, reads as follows:

> *"Everyone has the right to live in a healthy and balanced environment.*
>
> *It is the duty of the State and citizens to improve the natural environment, to protect the environmental health and to prevent environmental pollution."*

42. Article 48 § 2 of the Constitutional, titled "*personal inviolability, corporeal and spiritual existence of the individual*", reads as follows:

> *"The State shall take measures to ensure that private enterprises operate in accordance with national economic requirements and social objectives and in security and stability."*

43. Article 8 of the Convention, titled *"right to respect for private and family life"*, reads 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."

44. All legal interests included within the realm of the private life are safeguarded under Article 8 of the Convention. However, it appears that these legal interests fall into the scope of various provisions of the Constitution. In this context, Article 17 § 1 of the Constitution sets out that everyone has the right to protect and improve his/her corporeal and spiritual existence. The right to protect and improve corporeal and spiritual existence corresponds to the right to respect for physical and mental integrity and right to self-fulfilment and to make decisions regarding himself, which are safeguarded under the right to respect for private live within the framework of Article 8 of the Convention. Apart from that, certain legal values inherent in the notion of private life are enshrined in Article 20 of the Constitution, and the other sub-categories of the private life –namely, confidentiality of communication and right to respect for domicile– are safeguarded under Articles 21 and 22 of the Constitution. It is accordingly seen that the rights enshrined in Article 8 of the Convention are basically set out in Articles 17, 20, 21 and 22 of the Constitution.

45. Within the scope of the protection of private life, several legal interests that are compatible for freely developing one's personality are included within the scope of this right. In this respect, legal interest of a person with respect to his physical and mental integrity is also safeguarded within the scope of the right to respect for private life. One of the legal interests guaranteed under the right to physical and mental integrity is the right to a healthy environment (see the Court's judgment no. E.2013/89 K.2014/116, 3 July 2014).

46. The normative basis of the right to a healthy environment, in constitutional context, is the regulation that everyone has the right to

live in a healthy and balanced environment, which is set forth in Article 56. However, this provision is enshrined within the section "social and economic rights and duties" of the Constitution. In Article 148 § 3 of the Constitution where right to an individual application is regulated, it is set out *"Everyone may apply to the Constitutional Court on the ground 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"*. It is thereby indicated that an individual application cannot be lodged due to an alleged violation of the second and third generations of rights enshrined in the Constitution. However, the right to a healthy environment must be assessed in conjunction with Article 17 of the Constitution embodying the legal interests with respect to physical and mental integrity, and Articles 20 and 21 thereof, which respectively safeguards the right to respect for private and family life and the inviolability of domicile, and by also taking into account its impact on the legal interests inherent in these provisions.

47. The notion of private life is a broad concept having no exhaustive definition. The obligation imposed on the State by virtue of this right is not limited only to the avoidance of arbitrary interference with the right. It also embodies positive obligations for ensuring an effective respect for private life, in addition to the above-cited negative obligation which is of priority. These positive obligations entail taking of measures for ensuring respect for private life even if in the realm of interpersonal relations (see *Sevim Akat Eşki*, no. 2013/2187, 19 December 2013, § 26). The State's positive obligations need to be mainly assessed also within the scope of the alleged violations with respect to environmental nuisance.

48. The right to respect for private life, to family life and home, in the context of the right to environment, is protected not only from interferences by public authorities but also, as required by the doctrine of positive obligations, from interferences caused by private persons.

49. The Constitution embodies several provisions which refer to the positive obligations as well as application of fundamental rights to horizontal relations. In this respect, in the seventh paragraph of the

Preamble incorporated into the text pursuant to Article 176 of the Constitution, it is set forth that *"All Turkish citizens […] absolute respect for one another's rights and freedoms […]"*. Article 5 of the Constitution defining fundamental aims and duties of the State sets out *"The fundamental aims and duties of the State are to […] ensure the welfare, peace, and happiness of the individual and society; 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"*. Besides, pursuant to Article 11 of the Constitution regarding the binding nature and superiority of the Constitution, the provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals. All rights and freedoms enshrined in the Constitution are under guarantee in respect of all individuals. Pursuant to Articles 12 of the Constitution, titled nature of fundamental rights and freedoms, *"(…) the fundamental rights and freedoms also comprise the duties and responsibilities of the individual to the society, his/her family and other individuals"*. Article 14 § 2 of the Constitution regarding the *"abuse of fundamental rights and freedoms"* indicates that 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. This provision accordingly addresses to both individuals and the State and constitutes one of the normative grounds of positive obligations on the part of the public authorities in the effective enjoyment of fundamental rights and application of fundamental rights to horizontal relations.

50. In addition to the above-cited general regulations and notably in the context of environmental issues, it is explicit that Article 56 § 2 of the Constitution, which sets forth that it is the State's duty to improve the environment, to protect the environmental health and to protect environmental pollution, must also be taken into consideration in determination and assessment of the public authorities' positive obligations within the context of environmental issues. In the legislative intention of Article 56 of the Constitution, environmental pollution is generally

mentioned of, and it is also indicated that it is the State's duty to ensure citizens to maintain their lives in physical and mental integrity under the protected environmental conditions; and that State's supervision and actual measures and activities protecting environment are as necessary as the legislation on the protection of environment. It is accordingly emphasized that the State is liable to take measures in order for both the prevention of pollution as well as the protection and improvement of natural environment, whereby the State's positive obligations are pointed out in respect of the environmental issues.

51. Given the fact that complaints regarding the environmental pollution are raised within the framework of activities performed by private enterprises, it is observed that Article 48 § 2 of the Constitution, which sets forth *"The State shall take measures to ensure that private enterprises operate in accordance with national economic requirements and social objectives and in security and stability"*, also constitutes one of the normative grounds of the public authorities' positive obligations within the context of environmental issues. This provision also puts emphasis on the balance required to be observed between public interest in respect of the relevant activity and the interest in the protection and improvement of corporeal and spiritual existence of the individual.

52. The right to environment has today become much more important as it is of particular concern to present generation and even to the next generations due to its close relation with the rights to life and to health. As it is very difficult and troublesome, and even it is sometimes impossible, to reinstate the environment after being polluted and destroyed, it is required that investments and activities to be performed for development and economic progress be carried out without destroying the nature and polluting the environment; and that antipollution and preservative measures be given weight instead of cleaning polluted environment or restoration of disrupted environment (see the Court's judgment no. E.2013/89 K.2014/116, 3 July 2014; no. E.2006/99 K.2009/9, 15 January 2009). The right to a healthy and balanced environment is not one of the rights that would be renounced on the grounds that the rule to be introduced would lead to economic, bureaucratic and actual obligations and that the productive activities would be affected (see the Court's judgment no. E.2011/110 K.2012/79, 24 May 2012).

53. In spite of not having an agreed definition, the notion of environment is stated to comprise, in general, natural resources such as air, water, land, flora and fauna as well as their mutual interaction. Besides, in Law no. 2872, this notion is defined as biological, physical, social, economic and cultural environment where all living creatures maintain their relations during their lives and are involved in mutual interaction.

54. Accordingly, these definitions leave an impression that the environment per se is protected as a value. However, it appears that the ecological approach, which may be also called as environment-centred approach and which points out the necessity of protecting the environment as a value per se, was replaced with the consideration that there is an explicit link between the human rights and the protection of environment. In this scope, it is comprehended that the environment is approached with a human-centred understanding; that a link is established between environment and qualified life as well as health; and that several international instruments which may considered in the context of environmental human rights have been also formed by way of establishing a link between environmental protection and human health and welfare. The Recommendations, by the Parliamentary Assembly of the Council of Europe, on the issuance of an additional protocol regarding the right to a healthy environment are also among the significant instruments concerning environmental human rights.

55. Any certain right in the form of the right to a healthy environment is not also set out, in a normative manner, in the Convention (see *Bor v. Hungary*, no. 50474/08, 18 June 2013, § 24). However, environmental issues are discussed by the ECHR within the framework of Articles 2, 3, 6 and 8 of the Convention and Article 1 of the Additional Protocol no. 1 (see *Brincat and Others v. Malta*, no. 60908/11, 24 July 2014, §§ 103-117).

56. It is observed that environmental issues are frequently brought before the ECHR within the context of environmental pollution; and that the ECHR examines such issues by establishing a link with legal interests guaranteed under Article 8 of the Convention and without taking into consideration whether the impugned environmental nuisance has been caused due to an activity of the State or private persons (see *Bor v. Hungary*, § 25). Regard being had to these considerations, it is seen that

the ECHR establishes a link between the right to respect for private life, family life and home -which are sub-categories of the notion of private life- and the right to a healthy environment, by means of determining that the impugned environmental pollution has an adverse impact on the essence and quality of private life and family life as well as on the legal interest of utilizing domicile with pleasure (see *Powell and Rayner v. the United Kingdom*, no. 9310/81, 21 February 1990; *Hatton and others v. the United Kingdom,* no. 36022/97, 2 July 2003; and *Lopez Ostra v. Spain*, no. 16798/90, 9 December 1994).

57. The notion of "private life" inherent in the sub-category of the right to respect for private life is interpreted by the ECHR in a very broadly manner, and the ECHR particularly abstains from making an exhaustive definition of the notion. However, it is observed that, in the case-law of the supervisory organs of the Convention, the phrase "the individual's improving his personality and self-fulfilment is taken as a basis in determining the scope of the right to respect for private life (see *Koch v. Germany*, no. 497/09, 19 July 2012, § 51).

58. Nevertheless, in order for environmental issues to be assessed within the scope of Article 8 of the Convention, certain conditions are sought. In this respect, it is required that the impugned environmental nuisance has a direct impact on the applicant's right to respect for his private life, family life and his home; and that the impact of the impugned environmental pollution on the specified values has attained a minimum level of severity. Accordingly, it is required that the impugned pollution has attained a serious extent. It is seen that the threshold of minimum severity is assessed in order not to determine whether the relevant legal values have been violated but to find out whether it has per se caused an examinable issue on the relevant matter. The assessment of that minimum is relative and necessitates an independent examination in every concrete case within the scope of criteria such as the intensity and duration of the nuisance, and its physical or mental effects as well as general environmental context (see *Fadeyeva v. Russia*, no. 55723/00, 9 June 2005, § 69). The most important element in the assessments made is undoubtedly the proximity of the applicant to the source of environmental pollution. Accordingly, environmental problems that are insignificant compared

to the environmental hazards inherent in each modern city life are not deemed sufficient for triggering the application of safeguards under Article 8 of the Convention (see *Mileva and Others v. Bulgaria*, no. 43449/02, 25 November 2010, § 88).

59. As any right to live in a clean and silent environment is not safeguarded under the Convention, the environmental rights such as the right to scenery and the right to live in a pleasant environment, which have no direct and serious impact on legal interests protected within the scope of the private life, can in no way be considered under Article 8 of the Convention (see *Krytatos v. Greece*, no. 41666/98, 22 May 2003, § 52 and 53; and *Ali Rıza Aydın v. Turkey*, no. 40806/07, 15 May 2012, §§ 27 and 29). As a matter of fact, the factor engaging Article 8 is not the full deterioration of environment, but existence of a detrimental effect to the individuals' private and family lives and their homes.

60. In the ECHR's case-law, it is frequently emphasized that whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of Article 8 or in terms of an interference by a public authority to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention (see *Bor v. Hungary*, § 24).

61. Regard being had to the arrangements enshrined in the Constitution and forming normative basis of the applicability of positive obligations and fundamental rights to horizontal relations, it appears that providing those concerned with the opportunity to have recourse to administrative and judicial remedies, if they consider, in accordance with the data and documents made available to them, that their legal interests are not sufficiently taken into consideration, is one of the obligations of the public authorities within the context of environmental issues.

62. Due to wide margin of appreciation enjoyed by the public authorities in respect of environmental issues, many international conventions embody separate and explicit procedural obligations within the context of

the right to environment. Notably, in Principle 10 of the Rio Declaration, which comes to the forefront for laying emphasis on the relation between development and the environmental protection, it is indicated that environmental issues are best handled with the participation of all concerned citizens, at the relevant level; and that each individual shall have appropriate access to information concerning the environment that is held by public authorities, they shall be provided with the opportunity to participate in decision-making processes, as well as, they shall be provided with the right to effective access to judicial and administrative proceedings. Besides, in Articles 4 and 5 of the Aarhus Convention, which was adopted by the United Nations Economic Commission for Europe on 25 June 1998 and which is the second supranational instrument whereby environmental procedural rights are vested, the right to access to environmental information held by public authorities; in Articles 6, 7 and 8, the right to participate in decision making processes relating to the environment; and in Article 9, the right to accesses to justice in terms of environmental issues are clearly introduced.

63. It has been observed that the ECHR also deals with a case regarding environmental issues in two aspects. The ECHR assesses both the compatibility, under substantive aspect, of the impugned interferences with Article 8 and also the decision-making process. As to procedural aspect of the environmental issues, the procedural safeguards such as the right to access to information, the right to participate in environmental decision-making processes and the right to have recourse to judicial remedies are underlined (see *Taşkın and Others v. Turkey*, no. 46117/99, 10 November 2004, §§ 115 et seq.).

64. The basic question required to be assessed within the context of the environmental issues is whether the public authorities put forward arguments capable of justifying the burden imposed on the applicant for public interest, in the light of the above-mentioned basic principles. Incorporation of procedural obligations into the assessment process has ensured formation of a more secured basis for the right to a healthy environment *vis-à-vis* the generally positive nature the State's obligation and its wide margin of appreciation in this field.

65. The relevant administrations have positive obligation to inform the public about the environmental rights, as required by the procedural rights at stake. It must be particularly stressed that the right to information requires public access to information not only in possession of the public authorities but also held by the private persons conducting the relevant activity. The fact that environmental pollution is caused mostly due to activities performed by private persons requires public access to information held by these persons. That is because the responsibility, on the part of public authorities, in the environmental pollution issues is generally resulted from horizontal implementation of fundamental rights.

66. Another procedural obligation is to provide individuals, who must be ensured to participate in environmental decision-making processes, in cases where they consider in light of the provided information that their legal interests are not sufficiently paid regard to during this process, with the opportunity to have recourse to judicial remedies whereby their allegations are meticulously assessed by the judicial authorities. It is thereby ensured that a fair balance be struck between individual and public interests; and that necessary inquiries and assessment which would enable expression of opposing views be carried out.

67. The first point to be assessed within the scope of the above-mentioned findings is whether the relevant environmental impact attains the minimum level of severity required to engage the safeguards under Article 17 of the Constitution. This severity must be assessed by considering all circumstances of the incident. In such an assessment, density of the impact in question, its duration, the physical and mental impact must be considered, and its gravity compared to impacts and nuisance which are inherent in, tolerable and probably seen in city life must be taken into consideration.

68. It is revealed that also in the ECHR's case-law, in determining the level of gravity sought in order for the environmental impact, which is being examined, to trigger the safeguards set out in Article 8, the applicant is expected to provide concrete data revealing the level of impact. Accordingly, data such as public measurements and expert reports revealing the level of impact at stake as well as public decisions which, for instance, indicate that the relevant field was found to be an area

which is open to noise are taken into consideration in the assessments made. However, there are cases in which the ECHR concluded according to the data obtained from the application form and documents relating to relevant administrative and judicial procedure as well as the ordinary course of life that the impugned environmental nuisance went beyond the threshold of a minimum level of severity (see *Moreno Gomez v. Spain*, no. 4143/02, 16 November 2004, §§ 59 and 60; *Ruano Morcuende v. Spain*, no. 75287/01, 6 September 2005; *Fagerskiöld v. Switzerland*, no. 37994/04, 26 February 2008; *Oluic v. Croatia*, no. 61260/08, 20 May 2010, §§ 52, 62; and *Milena and Others v. Bulgaria*, §§ 93 and 95).

69. In this respect, existence of an adequately close link between environmental impact caused by the relevant plant, facility or activity and enjoyment of the applicant's right to respect for his private life, family life and his home is sufficient.

b. Application of Principles to the Present Case

70. In the present incident, it has been observed that the plant, which is complained of for causing environmental nuisance, is a switchyard called as outdoor substations where necessary arrangements were performed for transmission of generated electricity to distribution network; that the switchyard and transmission lines in question are covering a total surface of 76.887 m^2; that the plant have equipment and tools required for accumulation and transmission of electricity (separators, breakers, buses, transformers and ancillary equipment); and that 154 kV transmission line with 5 km length was installed for this power plant. According to the expert reports included in the case-file of the Kalkandere Civil Court of First Instance, which is dated 20 May 2013 and no. E.2010/426, K.2013/198, the plant complies with the Regulation on High- Current Electricity Facilities, and it is explicit that factors such as disconnection of line, overturning of poles, noise and etc. would cause people to feel that they are in danger and to worry in terms of safety of their life and property. Besides, as seen from photographs submitted by the applicant in company with the application form, the impugned switchyard is located in close proximity to the applicant's immovable.

71. The trial documents do not contain an exact measurement as to the distance between the plant and the applicant's immovable and the noise caused due to operation of the plant. Regard being had to the close proximity of the plant to the applicant's building, its continuous operation, level of noise likely to be caused by the continuously operating switchyard and the impact thereof on the applicant's right to protect and improve his corporeal and spiritual existence, it has been concluded that the environmental nuisance in the present case constitutes an interference with the right enshrined in Article 17 of the Constitution. Therefore, the impugned environmental nuisance is of the gravity that would require an examination under Article 17 of the Constitution.

72. Following the determination that interferences occurring in the context of environmental issues have a direct impact on the right to protect and improve corporeal and spiritual existence, the question required to be discussed is whether the public authorities have taken necessary steps to ensure effective protection of this right. In this respect, it must be found out whether a fair balance has been struck between the interests conflicting due to the impugned environmental impact.

73. The EIA procedure -which is defined as the activities to be maintained in determining probable favourable and unfavourable impacts of the projects planned to be carried out on the environment, in defining and assessing measures to be taken for preventing unfavourable impacts or minimizing these impacts to the extent that would not damage the environment as well as alternatives of the place and technology chosen, and in monitoring and controlling the implementation of projects- means a process which aims at protecting environmental assets, is implemented for activities in the form of project, assesses probable unfavourable impacts and during which the holder of activity, public authority and the public are confronted with one another.

74. In this respect, the EIA is regarded as a method which is utilized for materialization of investments and activities carried out for development and economic improvement without destroying the nature and polluting the environment, has an impact on the decision-making process, thereby offers an alternative for the decision-makers in order to enable them to

take their decisions properly and reveals the favourable and unfavourable aspects of these alternatives. The fundamental element tried to be protected through the EIA process is the environment and environmental assets (see the Court's judgments no. E.2013/89 K.2014/116, 3 July 2014; and no. E.2006/99 K. 2009/9, 15 January 2009).

75. It is explicit that the public authorities have a wide margin of appreciation due to complex nature of the environmental decision-making processes. In this regard, it is not the Constitutional Court's duty to examine the appropriateness of a decision taken by public authorities on the establishment and operation of a hydroelectric power plant at the relevant place. However, it is of importance to determine whether there are safeguards which would serve for striking the necessary balance between the individual's fundamental rights and the public interest at stake, and in determining whether this obligation has been fulfilled, it must be ascertained whether the procedural safeguards at stake have been taken into consideration.

76. The applicant did not assert an allegation that he was denied of access to information regarding the environmental process and was not enabled to participate in the decision-making process but claimed that the incumbent court failed to duly assess the deficiencies occurring in the planning process and requested to be examined.

77. One of the most significant elements of the procedural safeguards in an environmental issue which has a bearing on the right to respect for private life, family life and home is the applicant's opportunity to bring acts or negligence of public authorities before, and to have them duly examined by, an independent judicial authority.

78. Given the wide margin of appreciation held by the public authorities in this respect, the Constitutional Court's duty is not, within the context of environmental issues, to determine how the environmental nuisance would be terminated or how its impacts would be reduced. Nevertheless, the Court is to assess whether the public authorities notably the judicial authorities have handled the issue with due diligence and have taken into consideration all relevant interests (see, for the ECHR's approach in this respect, *Mileva and Others v. Bulgaria*, § 96).

79. In the complaint petition, the objection to the expert report and the rejoinder submitted by the applicant during the trial process, these considerations are put forth: the EIA report does not include any information concerning the establishment of the impugned switchyard at the Soğuksu Village. Any change that has been made is subject to the EIA report. As the switchyard, which is the project unit, is a substantial element of the hydroelectric power plant, the plant cannot be excluded from the scope of the EIA report, pursuant to Article 25 of the Environmental Impact Assessment Regulation. However, there is no assessment, in the EAI report that was previously obtained, concerning the switchyard and its environmental impacts. Therefore, the switchyard was not subject to any assessment in terms of geology, flora and fauna, in sociological terms for being located at a residential area, in agricultural terms for being located at an agricultural land, and in terms of forestry for being in forest. It must be explicitly revealed whether the previous EIR report covers the switchyard, and the relation of the switchyard with the main plant must be established so that the legal status of the plant within the current EIA Regulation would be revealed. The place where the plant was established is a residential area where the applicant's building is just nearby the plant. The high voltage transmission lines would be installed in a close proximity to his building. As these lines emit radiation over the surface of 600 m, they cause certain diseases including cancer. In this respect, a more comprehensive assessment must be made as the plant has impacts on both health and quality of life.

80. Besides, it has been observed that the first instance court ordered an on-site examination and expert examination at the disputed area for which an additional permission was granted in order to determine whether a separate and new EIA favourable decision was required to be taken for the area. According to the expert report, the forestland allocated for establishment of the switchyard is not an agricultural land which is covered by typical flora of the Black Sea Region and which does not have a variety of endemic plants. There are tea farms in the region but the facility to be established for hydroelectric power plant would not destroy the natural environment as long as necessary protection plans are implemented. Transmission line installed for the plant is 154 kV and 5 km in length and is therefore subject to selection criteria due to the provision

specified in the point 32 of Annex-II of the Environmental Impact Assessment Regulation. Accordingly, the area where the switchyard is located has not a natural specificity, and given the location and size of the plant, it is was found to be in compliance with the applicable EIA Regulation. The applicant raised an objection to the expert report on the ground that it did not include any assessment as to the impacts of the plant on his and residents' health and quality of life. However, the court did not order a new expert examination; nor did it explain the justification in respect thereof. Although the quashing judgment of the Supreme Administrative Court also pointed out the deficiencies in the assessment made during the trial process, especially those within the expert report, this consideration was not paid regard to. Accordingly, the quashing judgment was put aside and the first instance decision was upheld.

81. One of the most important elements of the procedural safeguards required to be afforded to individuals who are involved in the environmental decision-making processes is to bring public authorities' acts or negligence before, and to have them duly examined, by an independent judicial body. It is essential not to merely provide an opportunity to have recourse to these bodies but to ensure that the relevant public authorities meticulously deal with the issue, strike a balance by considering all interests and also enable individuals to participate in the process effectively, to submit their objections and evidence, to have them examined and to be provided with a justification concerning their material allegations.

82. In the present case, the applicant alleged that operation of the plant led to environmental nuisance, which had an adverse impact on his health and quality of life, and that the environmental assessment made by the relevant administration was insufficient. These main allegations are the most important elements in determining whether the public authorities struck a fair balance between the applicant's interest and public interest. However, it has been observed that the applicant's requests and objections were not assessed by the inferior courts. It has been further observed that the incumbent court's examination and reasoning whereby an EIA report was not obtained for the plant was quite limited. It has been accordingly concluded that the applicant's main allegations were not directly addressed; and that the applicant did not have the opportunity to have his

allegations as to environmental nuisance duly examined by the judicial bodies.

83. In light of these findings, the Court concluded that the public authorities failed to fulfil their positive obligations to ensure the protection and effective enjoyment of the applicant's right to protect and improve his corporeal and spiritual existence.

84. For the reasons explained above, the Court held that the applicant's right to protect and improve his corporeal and spiritual existence, which is safeguarded by Article 17 of the Constitution, was violated.

3. Application of Article 50 of Code no. 6216

85. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, reads as follows:

> *"1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled. However, legitimacy review cannot be done, decisions having the quality of administrative acts and transactions cannot be made.*
>
> *(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."*

86. The applicant requested that the violation be found and retrial be conducted.

87. It was concluded that Article 17 of the Constitution was violated.

88. As there is a legal interest in conducting retrial for redress of the consequences of the violation of the right to protect and improve corporeal and spiritual existence, it must be ordered that a copy of the judgment be sent to the Rize Administrative Court for a retrial.

89. The total court expense of TRY 1,998.35 including the court fee of TRY 198.35 and the counsel fee of TRY 1,800, which is calculated over the documents in the case file, must be reimbursed to the applicant.

V. JUDGMENT

For the reasons explained above, the Constitutional Court UNANIMOUSLY held on 25 February 2016 that

A. The alleged violation of the right to protect and improve corporeal and spiritual existence be DECLARED ADMISSIBLE;

B. The right to protect and improve corporeal and spiritual existence safeguarded by Article 17 of the Constitution was VIOLATED;

C. A copy of the judgment be SENT to the Rize Administrative Court to conduct retrial for redress of the consequences of violation of the right to protect and improve corporeal and spiritual existence;

D. The total court expense of TRY 1,998.35, which includes the court fee of TRY 198.35 and the counsel fee of TRY 1,800, be REIMBURSED TO THE APPLICANT;

E. The payment be made within four months as from the date when the applicants apply 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.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

N.B.B

(Application no. 2013/5653)

3 March 2016

On 3 March 2016, the Plenary of the Constitutional Court found a violation of the right to honour and reputation safeguarded by Article 51 of the Constitution in the individual application lodged by *N.B.B.* (no. 2013/5653).

THE FACTS

[8-19] Three news reports indicating that the applicant had been sentenced to a judicial fine for using drugs were published in the web-site archive of a national newspaper in 1998 and 1999. On 2/4/2013, the applicant sent a written warning to the relevant media outlet for banning the publication of these three news reports. As the contents of these news reports were not made unavailable within two days, the applicant applied to the 36th Chamber of the İstanbul Magistrate's Court (which was closed) on 18/4/2013 against the relevant media outlet and requested publication of the impugned contents be discontinued. On 22/4/2013, the Magistrate's Court decided to accept the applicant's request on the grounds that the news report subject-matter of the request was not up-to-date and newsworthy anymore; that there was no public interest for its remaining on the agenda; and that it included offending and destructive information concerning the relevant person's private life.

Upon the objection, it was held by the decision dated 28/5/2013 of the 2nd Chamber of the İstanbul Criminal Court of General Jurisdiction that the above-mentioned decision of the Magistrate's Court be revoked. This decision was notified to the applicant's representative on 21/6/2013.

IV. EXAMINATION AND GROUNDS

20. The Constitutional Court, at its session of 3 March 2016, examined the application and decided as follows:

A.The Applicant's Allegations

21. The applicant maintained that the website of the relevant media outlet published news and articles in 1998 and 1999 concerning the incident where s/he was sentenced to pay a judicial fine as a result of the criminal proceedings against him/her, that the news and articles in question had

still been kept in the archive sections in the relevant website, that despite his/her request for the removal of the articles, the appellate authority decided to revoke the decision accepting the request for the removal of the article from the website and that his/her rights safeguarded by Articles 12, 17, 20, 25, 26, 27 and 32 of the Constitution were violated on the ground that the judicial authorities dismissed his/her requests for the removal of the news which still had been kept on the websites in question.

B. **The Courts' Assessment**

1. Admissibility

22. Even though the applicant alleged that his/her rights safeguarded by Articles 12, 17, 20, 25, 26, 27 and 32 of the Constitution were violated, it has been decided that in consideration of their nature, the applicant's allegations shall be examined within the scope of Article 17 § 1 of the Constitution in conjunction with Article 20 § 3 of the Constitution on account of the reasons explained under the heading of "Merits".

23. In the present case, the applicant had recourse to only the magistrate's court for the alleged interference with his/her honour and reputation, requesting the removal of the content published in the web site but did not exhaust any other remedy.

24. Article 148 § 4 of the Constitution and Article 45 § 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Court, dated 30 March 2011, stipulate that before lodging an individual application, all the administrative and judicial remedies prescribed by the law in respect of the act, action or negligence which constitutes the basis of the alleged violation must be exhausted. The obligation of the instance courts to primarily redress the violations of fundamental rights necessitates the exhaustion of remedies (see *Necati Gündüz and Recep Gündüz*, no. 2012/1027, 12 February 2013, §§ 19, 20).

25. However, the term "remedies" specified in the provisions in question must be understood as available and effective domestic remedies capable of offering a reasonable prospect of success and providing a resolution in respect of applicants' complaints. In addition, the rule of exhaustion of

domestic remedies is neither absolute nor applicable in terms of procedures, and in the inspection of compliance with this rule the circumstances of the relevant application shall be taken into consideration. In that connection, in the legal system, not only the availability of several remedies but also the conditions for their implementation and the individual circumstances of the applicants shall be taken into consideration in a realistic manner. For that reason, while examining whether the applicants have taken all the steps expected from them for exhausting the legal remedies, the circumstances of the application should be taken into consideration (see *S.S.A.*, no. 2013/2355, 7 November 2013, § 28).

26. Accordingly, in the present case it should be assessed whether the positive obligation of the State necessitates the removal of the web content which falls within the jurisdiction of the magistrate judge. In other words, it shall be examined whether the remedy of removal of the content and blocking of access, which falls within the jurisdiction of the magistrate judge, is an available and effective remedy that is capable of offering a reasonable prospect of success and providing a solution in respect of the applicant's complaint that his/her right to honour and reputation was not protected due to the news archive, which was the subject matter of the case.

27. In our legal system, the removal of the web site content is possible via lodging an application with the magistrate judge, as is the case in the present application, or bringing an action before civil courts (see *Ahmet Oğuz Çinko and Erkan Çelik* [Plenary], no. 2013/6237, 2 July 2015). However, in the present application, in consideration of the facts that the news which were requested to be removed had been on the internet for a long period of time, that they had been easily accessible via the news archive on the web site, that the interference with the applicant's honour and reputation had continued for a long time and that the immediate removal of these contents would provide protection for the applicant's right to honour and reputation as well as for his/her personal data; it should be accepted that lodging an application with the magistrate judge was an effective remedy in the circumstances of the present case. Indeed, it cannot be said that the remedy of adversarial hearing before civil courts could have met the requirement where long lasting interference with the right to protection

of honour and reputation in the present case should be redressed without delay (see *Türkiye İş Adamları ve Sanayiciler Konfederasyonu*, no. 2014/8691, 6 October 2015, § 22).

28. The applicant's complaint that his/her personal rights had been impaired and Article 17 of the Constitution was violated on the grounds that the news about him/her had still been easily accessible in the website of a gazette via the news archive and that the request for the removal of this archived news had been rejected, was not manifestly ill-founded. This part of the application must be declared admissible as there is no ground for inadmissibility.

2. Merits

29. The applicant maintained that his/her private and business life was affected negatively and his/her reputation was impaired on the grounds that the news, which s/he had not claimed to be fake or made-up and which had concerned the investigations carried out against him/her in 1998 and 1999, were still in the archives and that they were easily accessible.

30. In its observations, the Ministry stated that the principles adopted in the relevant case-law of the European Court of Human Rights ("the ECHR") on the right to respect for private life should be taken into consideration.

a. General Principles

i. Right to protect and improve one's spiritual existence

31. The applicant complains that the news about him/her, which was published in 1998-1999 and was still available on internet, impaired his/her honour and reputation. In that connection, the applicant requested the removal of the news published about him/her in the past from the website, which was subsequently rejected.

32. Article 17 § 1 of the Constitution provides as follows:

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

33. The personal honour and reputation of individuals falls within the scope of the "spiritual existence" provided for in Article 17 of the Constitution. The State is obliged not to interfere arbitrarily with honour and reputation, which form part of an individual's spiritual existence, and to prevent thirds persons' attacks on them (see *Adnan Oktar (2)*, no. 2013/1123, 2 October 2013, § 33). In other words, the right to protection of personal reputation falls under the protection of Article 17 § 1 of the Constitution (see *Kadir Sağdıç* [Plenary], no. 2013/6617, 8 April 2015, § 36; and *İlhan Cihaner (2)*, no. 2013/5574, 30 June 2014, § 42).

34. The ECHR examines the interferences with personal honour and reputation under Article 8, titled "*Right to respect for private and family life*", of the European Convention on Human Rights (Convention). According to the ECHR, the right to protection of personal reputation is a part of the right to respect for private life safeguarded by Article 8 of the Convention (see *Pfeifer v. Austria*, no. 12556/03, 15 November 2007 § 35; and *Axel Springer AG v. Germany*, no. 39954/08, 7 February 2012, § 83). In that direction, the right to protection of personal reputation in the face of statements alleged to contain defamation in a newspaper article (see *White v. Sweden*, no. 42435/02, 19 December 2006, § 19) and an individual's allegation that s/he was not protected against a critical newspaper article (see *Minelli v. Switzerland* (dec.), no. 14991/02, 14 June 2005) fall within the scope of the private life.

35. Even though an individual is criticised via published articles in the context of a public dispute, his/her reputation is a part of his/her identity and spiritual integrity (see *Pfeifer v. Austria*, § 35) and it is under protection of Article 17 of the Constitution (see *Kadir Sağdıç*, § 38; and *İlhan Cihaner (2)*, § 44).

36. On the other hand, in order for the applicability of Article 17 § 1 of the Constitution, the attack on an individual's reputation must attain a certain level of severity and it must hinder the applicant's personal enjoyment of his/her right to respect for reputation. In addition, in the event that an individual impairs his/her own honour and reputation due to his/her own actions in a foreseeable way, s/he cannot benefit from the protection provided for by Article 17 of the Constitution (see *Kadir Sağdıç*,

§ 39; and *İlhan Cihaner (2),* §§ 45, 46; for a judgment of the ECHR, in the same vein, see *Mater v. Turkey*, no. 54997/08, 16 July 2013, § 52).

37. As stated above, the preconditions for an interference with honour and reputation to be examined within the scope of Article 17 § 1 of the Constitution, namely that the attack on an individual's reputation must reach to a certain level of gravity and that the interference must not be caused by one's own action in a foreseeable way, should be taken into consideration differently in respect of internet articles which have been on the Internet for a long period of time. Having regard to the accessibility, widespread use and convenience in the storage and protection of news and ideas thanks to the internet, the news which did not attain a certain level of gravity on the date of publication or which concerned an individual's own actions, may impair his/her honour and reputation if they stay accessible on the internet for a long period of time.

38. Publication of news on the internet has a relation with the right to protection of personal data. Indeed, while imparting news on the internet and establishing a connection between the individual and the news, personal data of the relevant individual must technically be processed on the internet. Within the scope of the Code no. 5651, processing of personal data is carried out by content providers which are real or legal persons, who create, modify and provide all types of information or data offered to the users on the internet. In that connection, content providers are the entities which publish personal data on the internet and thus they ensure that the news about individuals are accessible via newspaper archives. The connection between the right to protection of honour and reputation and personal data necessitates that attacks on honour and reputation on the internet must be taken into consideration in connection with the right to protection of personal data.

39. Article 20 §§ 1 and 3 of the Constitution, titled "*Privacy of private life*", provides 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. 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."

40. The right to respect for private life is prescribed by Article 20 of the Constitution. Private life is a comprehensive term which is quite difficult to describe (see *Serap Tortuk,* no. 2013/9660, 21 January 2015, § 31). The right to respect for private life protects matters such as corporeal and spiritual integrity, physical and social identity, the name of an individual, her/his sexual orientation and sexual life (see *Ahmet Acartürk,* no: 2013/2084, 15 October 2015, § 46). Subjects such as personal information and data, personal development, family life etc. are covered by this right.

41. On the other hand, it is prescribed in Article 20 § 3 of the Constitution that everyone has the right to request the protection of his/her personal data and that 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. The relevant article also provides that personal data can be processed only in cases envisaged by law or by the person's explicit consent and that the principles and procedures regarding the protection of personal data shall be laid down in law. The term of personal data means all of the information concerning a certain or identifiable individual. The right to protection of personal data aims to protect rights and freedoms of an individual during processing of personal data as a special form of the right to protection of honour and the right to improve one's own personality freely (see the Court's judgment no. E.2013/122, K.2014/74, 9 April 2014). In addition, the right to protection of personal data is not only effective during the processing of personal data but it also covers the right to request the correction or deletion after the processing of these data. This right covers not only the personal data processed via public authority but also the personal data processed via real and legal persons.

42. Accordingly, within the scope of freedoms of expression and the press (see §§ 56-64), the fact that a news published on the internet is

accepted to fall within the scope of "right to protect and improve one's spiritual existence" prescribed by Article 17 § 1 of the Constitution, and the publication of personal data (see *Sevim Akat Eşki*, no. 2013/2187, 19 December 2013, §§ 30, 3; the Court's judgment no. E.2011/34, K.2012/48, 30 March 2012; and the Court's judgment no. E.2009/85, K.2011/49, 10 March 2011) via establishing a connection between the news and the relevant person's identity necessitate that Article 20 of the Constitution must be taken into consideration. In that connection, it should be borne in mind that the provision in question binds not only the public authorities but also the real and legal persons. The publication, storage, conservation and usage of the identity information qualified as personal data on the internet by real and legal persons outside the public authorities, as is the case in the present application, should be taken into consideration within the scope of the relevant provisions.

43. It is stipulated in Article 20 § 3 of the Constitution that personal data can be processed only in cases envisaged by law or by the person's explicit consent. Processing of personal data includes, in a very broad framework, all types of actions on the data such as declaration, recording, transfer, storage and conservation of personal data and providing easy access for it. Thus, all types of processing of personal data which make the news published on the internet accessible should be considered in this context. Even though it was stated that personal data can be processed only in cases envisaged by law or by the person's explicit consent, it is clear that news which is made within the scope of the freedoms of expression and the press described by the Constitution will constitute an exception in respect of the limitations in question. In that connection, the main issue is to prevent others from remembering the acts of an individual, which were not alleged to be fake and published in the news in the past. Indeed, news and ideas uploaded on the internet within the scope of the freedoms of expression and the press bring about the usage and processing of personal data most of the time. In other words, prevention of access to personal data or news in the news archives on the internet aims to ensure that the acts of individuals are forgotten.

44. In consideration of the speed of imparting news and ideas and duration and capacity of storage, the internet is an untraditional communication

tool which provides global access to knowledge. This electronic communication network providing service to millions of worldwide users without a centre has introduced a new dimension in respect of enjoyment of fundamental rights and freedoms. The opportunities provided for by the internet for the enjoyment of fundamental rights and freedoms also lead to different means of interference with them. Especially, serious domains of interference have emerged regarding the private lives of individuals and their spiritual integrity. For that reason, unlike traditional media, the internet should be evaluated from a different perspective in terms of the risks entailed. A different approach, that will take into consideration the technological developments, must be determined inevitably in order to provide protection and improvement in terms of relevant rights and freedoms.

45. Prior to the spread of the internet, individuals' personal lives concerning their past disappeared over time. In addition, even if there were records concerning the pasts of individuals, the difficulty in reaching to these records allowed individuals to live independently of any mistakes made in their past. Today, however, a simple research on the internet easily reveals the mistakes that individuals have made in the past and do not want to be reminded of and/or remember. In that respect, the internet made the archived news, which only researchers or enthusiasts could find through special efforts, easily accessible. The easy access to news archives created a virtual environment which did not allow the news about individuals to be forgotten. Having regard to the widespread usage of internet, this situation increased the chances of individual's running into the things which they did in the past and don't want them to be remembered.

46. This situation caused by the widespread use of the internet, together with the active use of the internet by the press, disrupted the balance between the freedoms of expression and the press and the protection of honour and reputation in favour of the former. Both freedoms of expression and the press and the protection of honour and reputation are fundamental rights and freedoms which require equal protection. For that reason, the disrupted balance between these two fundamental rights must be stricken again. In our days when it is hard to be forgotten due to the internet journalism, the balance in question may only be struck by

acknowledging the right to be forgotten in terms of honour and reputation. In that connection, the right to be forgotten is indispensable to strike the fair balance (see the judgment of the Court of Justice of the European Union, *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja Gonzales,* C-131/12, 13 May 2014).

47. The right to be forgotten is not manifestly regulated by the Constitution. However, in Article 5, titled "*Fundamental aims and duties of the State*", of the Constitution, a positive obligation is imposed on the State through the expression "*to provide the conditions required for the improvement of the individual's corporeal and spiritual existence*". Within the scope of this obligation, when the right to protection of honour and reputation in terms of spiritual integrity safeguarded by Article 17 of the Constitution and the right to request the protection of personal data safeguarded by Article 20 § 3 of the Constitution are taken into consideration as a whole, it is clear that the State has an obligation to provide a chance to individuals "to make a fresh start" by preventing others from learning their past. Especially, the right to request the deletion of personal data within the scope of the right to protection of personal data involves providing opportunities so that the unfavourable events in the past of the individuals are forgotten. Accordingly, the right to be forgotten, which is not manifestly prescribed by the Constitution, appears as a natural result of Articles 5, 17 and 20 of the Constitution with a view to blocking access to digitally stored news which are easy to access through the internet. In addition, denial of the right to be forgotten makes the interference with maintaining an honourable life and spiritual independence, both required for the improvement of spiritual existence of individuals, permanent on the ground that due to personal data which can easily be accessed via the internet and can be stored for long periods of time, others might be biased against them.

48. In consideration of the fact that in its decisions concerning the balance between the freedoms of expression and the press and the right to protection of honour and reputation, the Court has made its examinations on the basis of Article 17 § 1 of the Constitution, the claims concerning the right to be forgotten should be examined within the scope of Article 17 § 1 of the Constitution having regard to the relation between the news published on the internet and the personal data.

49. On the other hand, in cases similar to the present case, where the State does not play a role, it is alleged that the protection provided by the judicial authorities for the applicants' personal reputation was not enough. Even though Article 17 of the Constitution, in principle, aims to protect individuals against arbitrary interferences of public officials, the article in question does not only ensure that the state avoids these types of interferences. The positive obligations required for providing an efficient respect for corporeal and spiritual existence of an individual in the light of Article 5 of the Constitution can be combined with the negative obligations stipulated in Article 17 of the Constitution. These obligations might necessitate taking some measures with a view to guaranteeing the right to demand the protection of personal reputation in a way that it covers the relationship between the individuals (see *Ahmet Çinko and Erkan Çelik* [Plenary], no. 2013/6237, 3 July 2015, § 39). These measures might be applied in the protection of personal reputation against the interferences of third parties (see *Kadir Sağdıç*, § 40; and *İlhan Cihaner (2)*, § 47). Thus, the right to be forgotten is a result of the State's positive obligation in terms of providing opportunity to individuals to improve their spiritual existence.

50. It is not possible to expect that the right to be forgotten shall be applied in respect of every type of news in the newspaper archives on the internet. Indeed, it is clear that newspaper archives are important for the researchers, legal experts or historians within the meaning of freedom of the press. In that case, in order to remove a news article from the internet within the scope of the right to be forgotten, following matters should be examined in terms of specific circumstances of every case; the content of the news, duration of publication, whether it is up-to-date, whether it can be regarded as a historical data, public interest (the value of the news in terms of the society, features of the news that shed light on the future), whether the person who is the subject matter of the news is a politician or celebrity, its subject, whether it involves facts or value judgments, and the interest of the community towards the relevant data.

51. After the examination, various methods can be adopted, facilitating the process of being forgotten. It is laid down in Article 9 of the Code no. 5651, which was amended by the Code no. 6518, that the access to the relevant publication, part and section (URL etc.) shall be blocked and that

if it is not obligatory, the access to the whole publication on the internet shall not be blocked.

52. In that connection, the above-mentioned measures can be taken pursuant to Code no. 5651 with a view to striking the balance between the freedoms of expression and the press and the right to protection of honour and reputation in terms of the right to be forgotten (see § 51). However, these measures must be taken on the basis of the principle of proportionality pursuant to Article 13 of the Constitution. Indeed, several methods can be applied in order to prevent the interferences with honour and reputation pursuant to right to be forgotten such as the removal of personal data that creates connection between the relevant person and the news and which allows research in the archive, anonymization of the news and blocking access to a part of the content of the news. In that connection, it should be taken into consideration that the duty of the judiciary is not to cause the past events to be reported in the news again after complete removal of the news constituting interference with reputation in time by virtue of the conveniences provided by the internet. It should not be forgotten that the news archives on the internet, as a whole, are under the protection of the freedom of the press.

ii. Freedom of Expression and Dissemination of Thought and Freedom of the Press

53. The present case concerns the dismissal of the applicant's request in which s/he demanded that the parts of the news archive on the Internet regarding the applicant removed.

54. Article 26 of the Constitution, titled "*Freedom of expression and dissemination of thought*", reads 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 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."

55. Article 28 of the Constitution, titled "*Freedom of the press*", reads as follows:

"The press is free, and shall not be censored. The establishment of a printing house shall not be subject to prior permission or the deposit of a financial guarantee.

…

The State shall take the necessary measures to ensure freedom of the press and information.

…

In the limitation of freedom of the press, the provisions of articles 26 and 27 of the Constitution shall apply.

…"

56. The internet, which plays an important role in imparting and receiving news and thoughts, is under the protection of freedom of expression safeguarded by Article 26 of the Constitution. Indeed, the Court has accepted that an interference with access to internet should be examined under the freedom of expression (see *Yaman Akdeniz and Others*,

no. 2014/3986, 2 April 2014; and *Youtube Llc Corporation Service Company and Others* [Plenary], no. 2014/4705, 29 May 2014). In addition, it is not possible to accept that imparting all kinds of news and ideas through the internet is within the scope of the freedom of the press safeguarded by Articles 28 and 32 of the Constitution.

57. Having regard to the accessibility, the duration and capacity of storage of news and thoughts and the opportunity of imparting news and thoughts of large volumes, internet plays an important role in the development of imparting news and information to public. The internet provides an opportunity of great importance for everyone to reach news and ideas or disseminate thoughts without any limitations. This situation creates a vast domain in terms of freedom of expression (see *Medya Gündem Dijital Yayıncılık Ticaret A.Ş.* [Plenary], no. 2013/2623, 11 November 2015, § 34).

58. Whether news and thoughts disseminated within the scope of this vast domain can be considered within the scope of the freedom of the press safeguarded by Article 28 of the Constitution, should be examined in accordance with the specific circumstances of each case. In that connection, even though the freedom of the press laid down by Article 28 et seq. of the Constitution is described primarily within the scope of printed mass media, it is possible that the internet journalism, which constitutes a significant part of the internet, can be considered within the scope of the freedom of the press as long as it performs the role of "public watchdog" which is the fundamental function of the press (see *Medya Gündem Dijital Yayıncılık Ticaret A.Ş.*, § 36).

59. In the present application, having regard to the fact that the company, which published the news about the applicant on the internet, is a nationally known newspaper published in our country, it can be considered that it performed the role of "public watchdog" due to its familiarity with traditional journalism. Thus, it is possible to consider the news archive web sites in question within the scope of the freedom of the press.

60. In addition, another matter to be settled is whether the news archive can benefit from the protection provided for by the freedom of the press.

61. In its judgments, the Court stressed for several times that the freedom of expression covers not only the freedom of dissemination of thoughts and ideas but also the freedom of access to news and thoughts (see *Emin Aydın,* no. 2013/2602, 23 January 2014, § 40; and *Kamuran Reşit Bekir* [Plenary]**,** no. 2013/3614, 8 April 2015, § 34). In that respect, the role of the internet in the society, which facilitates the dissemination of news and thoughts and the public access to them, cannot be ignored. Creating archives serves for the storage and accessibility of the actuality and news to a great extent. Archives of such nature provide sources for history education and research activities due to their direct public access without any cost. Moreover, public access to these archives is a result of the "observer" role which is the primary function of the press in a society (see *Wegrzynowski and Smolczewski v. Poland,* no. 33846/07, 16 July 2013, § 59; and *Times Newspapers Ltd v. United Kingdom (no. 1 and 2),* nos. 3002/03, 23676/03, 10 March 2009, §§ 27, 45). For that reason, it is clear that archives on the Internet are within the scope of freedoms of expression and the press. Accordingly, removal of a news archive which is published on the internet and considered to be within the scope of journalism, constitutes an interference with the freedom of the press.

62. In democracies, the activities and actions of a State should be under the inspection of not only the administrative and judicial authorities but also the public. Printed, audio and visual media guarantees that the democracy functions properly and individuals can realize themselves, by closely inspecting the political decisions, actions and negligence of the bodies with public authority, and facilitating the process of decision making of citizens (see *Kadir Sağdıç, § 50).* For that reason, the freedom of the press is a freedom which is available for everyone and carries a critical importance (*see* the Court's judgment no. E.1997/19, K.1997/66, 23 October 1997).

63. The ECHR many times underlined the main role played by the press in a democratic society. Although the press must not overstep certain bounds regarding the protection of the reputation and rights of others, its duty is nevertheless to impart information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were

it otherwise, the press would be unable to play its vital role of "public watchdog" (see *Bladet Tromso and Stensaas v. Norway* [GC], no. 21980/93, 20 May 1999, §§ 59, 62; and *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, 17 December 2004, § 71).

64. The freedom of expression and, as its auxiliary, the freedom of the press, which facilitates the enjoyment of the freedom of expression, may be subject to limitations within the scope of the fundamental rights and freedoms laid down by the Constitution. It is stated in Article 28 § 4 of the Constitution that in the limitation of freedom of the press, the provisions of Articles 26 and 27 of the Constitution shall apply. Accordingly, the freedom of the press may be subject to limitations set out by Article 26 which sets out the general provisions concerning the freedom of expression and Article 27 which concerns artistic and academical expressions. Other limitations on the freedom of the press are laid down by Article 28 § 5 and the following sub-paragraphs. The press must comply with the limitations which are set out for "protecting the reputation or rights and private and family life of others" among the limitations laid down by Articles 26, 27 and 28 of the Constitution (see *Kadir Sağdıç,* § 55; and *İlhan Cihaner (2),* § 62). In that connection, within the scope of "protecting the reputation or rights and private and family life of others" it should be borne in mind that expanding the scope of the right to protection of honour and reputation may result in a violation of freedoms of expression and the press.

65. It should be remembered that although the press must not overstep certain bounds regarding protection of the reputation and rights of others, its duty is nevertheless to impart information and ideas on all matters of public interest and that not only does the press have the task of imparting such information and ideas; the public also has a right to receive them (see *Kadir Sağdıç,* § 51).

66. For that reason, a balance must be struck between the right to protection of honour and reputation safeguarded by Article 17 § 1 of the Constitution and the freedom of the press safeguarded by Article 28 of the Constitution and the associated freedom of expression safeguarded by Article 26 of the Constitution in respect of the news archive on the internet which was the subject matter of the application, in line with the criteria set out by the case-law of the Court. However, in cases where the

past events have been archived, it should be considered reasonable that the balance between two conflicting rights is interpreted in a different manner compared to news concerning recent events. In that connection, the requirement of the press to act with a sense of responsibility in terms of authenticity of the published news (see *Kadir Sağdıç*, §§ 53, 54; *İlhan Cihaner (2),* §§ 60, 61) is more strict for old news which concern past events, which don't require haste and are not obligatory to publish, when compared to recent news. However, when striking a balance, the fact that the news archive is under the protection of Articles 26 and 28 of the Constitution should be taken into consideration.

b. Application of Principles to the Present Case

67. In the present case, the news, which was complained of, concerned the criminal proceedings carried out against the applicant in 1998 and 1999. The applicant did not claim that this news was fake or made-up. The applicant maintained that his/her private and business life was affected negatively and his/her reputation was impaired on the grounds that the news was still in the archives and that they were easily accessible through the internet. Even though the 36th Chamber of the Istanbul Magistrate's Court (abolished) accepted the applicant's complaint, after its examination, the 2nd Chamber of the Istanbul Criminal Court of General Jurisdiction accepted the objection and rejected the removal of the news from the internet.

68. The 36th Chamber of the Istanbul Magistrate's Court decided to remove the news from the internet on the grounds that the news had been made in respect of the applicant about an event in 1998, however, the news had lost its value and actuality, that there had been no use in keeping the news on the agenda, and that in its current situation the news had been impairing the private life of the applicant. The 2nd Chamber of the Istanbul Criminal Court of General Jurisdiction accepted the objection against the decision on the grounds that the archived news in question had not included any content violating the honour and reputation of the applicant, that it was in accordance with the apparent truth and that no expression or sentence attacking the personal rights of the applicant had been used.

69. In the present case, a fair balance must be struck between the right to honour and reputation which was interfered due to the fact that the news was still on the internet, and the freedoms of expression and the press which will be violated in case of the removal of the relevant content. While striking a balance in the present case, an important matter which should be taken into consideration is that on one side there are the right to protection of honour and reputation and the right to be forgotten and on the other, there is not only the freedoms of expression and the press but also the freedom of access to news and thoughts. The Court bases its examination concerning whether the balance between the rights and freedoms in question is struck, on the reasoning provided by the competent judicial authorities.

70. As stated above, the right to be forgotten comes into play when the news on the internet impairs the honour and reputation of individuals due to the fact that it has been easily accessible for a long period of time. This right aims to ensure that the necessary delicate balance between the freedoms of expression and the press and the right to improve one's spiritual existence in consideration of the accessibility of the internet and the opportunities provided by it. Accordingly, this remedy should be employed in a way not impairing the essence of the freedom of the press and the freedom of access to news and thoughts, which protects the news archive on the internet, as well as protecting the interests of the right holder at the same time.

71. In the present case, the impugned news was published in 1998 and 1999 and was archived. It is clear that the news in the form of newspaper archive are not only digitally archived and they can be kept by the content provider. Having regard to these methods, which allows the news to be accessible on the internet, such as blocking access by deleting personal data by means of an evaluation based on especially the principle of proportionality, it is possible to reach success without completely deleting the archived news on the internet. In that connection, serious interferences with the freedom of the press, that may result in the re-making of the news concerning the past events for the purpose of scientific researches in case of the complete deletion of the digitally archived news, could be prevented.

72. The news, which was archived on the internet and made easily accessible, concerned criminal proceedings carried out against the applicant in 1998 and 1999. It was not claimed that the news was not true. The news concerned the arrest of the applicant while s/he was using drugs and the subsequent criminal proceedings. In this context, it cannot be said that the subject of the news sustained its newsworthiness, which is required for archived news to be easily accessible, and that it will shed light on the future.

73. The news in question concerned an event which took place 14 years ago as of the date of the application, and thus it is clear that it lost its actuality. It cannot also be said that easy access to the news concerning drug use on the internet for historic, statistical and scientific researches is obligatory. In that respect, it is clear that the easy access to the news on the internet about the applicant who was not a politician or famous person in view of the public interest impairs the applicant's reputation.

74. In conclusion, the news in respect of the applicant should be taken into consideration within the scope of the right to be forgotten. Having regard to the opportunities provided by the internet, access to the news in question should be blocked in order to protect the applicant's honour and reputation. In that respect, it cannot be said that the dismissal of the request for blocking access struck a balance between the freedoms of expression and the press and the right to protection of spiritual integrity.

75. Consequently, the Court has found a violation of the applicant's right to protection of honour and reputation.

3. Application of Article 50 of Code no. 6216

76. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, reads as follows:

> *"1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled.*

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."

77. The applicant did not claim compensation but requested the redress of the violation.

78. The Court has found that the applicant's right to protection of honour and reputation was violated.

79. A copy of the judgment must be sent to the Istanbul Chief Public Prosecutor's Office so as to be sent to the magistrate judge who was appointed in place of the 36th Chamber of the Istanbul Magistrate's Court (abolished) to redress the violation.

80. The court fee of 198.35 Turkish liras (TRY) and the counsel fee of TRY 1,800, which are calculated over the documents in the case file, must be reimbursed to the applicant.

V. JUDGMENT

The Constitutional Court UNANIMOUSLY held on 3 March 2016 that

A. The applicant's request for confidentiality as to his/her identity in the documents accessible to the public be ACCEPTED;

B. The alleged violation of the right to protection of honour and reputation be DECLARED ADMISSIBLE;

C. The right to protection of honour and reputation safeguarded by Article 17 § 1 of the Constitution was VIOLATED;

D. Since there is legal interest in holding a retrial to remove the consequences of the violation of the applicant's right to protection of honour and reputation, a copy of the judgment be SENT to the Istanbul

Chief Public Prosecutor's Office so as to be sent to the magistrate judge who was appointed in place of the 36th Chamber of the Istanbul Magistrate's Court (abolished) to redress the consequences of the violation;

E. The total court expense of TRY 1,998.35 including the court fee of TRY 198.35 and the counsel fee of TRY 1,800 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; and

G. A copy of the judgment be SENT to the Ministry of Justice.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

D.Ö.

(Application no. 2014/1291)

13 October 2016

On 13 October 2016, the Plenary of the Constitutional Court found no violation of the right to protect and improve the corporeal and spiritual existence safeguarded by Article 17 of the Constitution in the individual application lodged by *D.Ö.* (no. 2014/1291).

THE FACTS

[8-31] Upon the denunciation that the applicant's residence posed a risk to public health for being in the nature of a garbage house, the police and municipal police entered into the yard of the applicant's residence by virtue of the District Governor's approval of 21 May 2003. The police took paper, plastic, glass materials out of his residence, which was recorded by reporters of two press agencies. On 22 May 2003 and 15 June 2003, the news concerning the applicant and his family was broadcasted through a national TV channel. The applicant brought an action for non-pecuniary compensation before the incumbent court, maintaining that the broadcast of 22 May 2003 constituted an attack against his personal rights as it contained false information such as that he had collected garbage in his house and had had psychological problems. The incumbent court partially accepted the applicant's action. However, the Court of Cassation quashed the first instance decision as the action should have been dismissed. Complying with the quashing judgment, the first instance court dismissed it. The decision, which was upheld by the Court of Cassation, thereby became final. The final decision was served on the applicant on 25 December 2013.

On 24 January 2014, the applicant lodged an individual application with the Constitutional Court.

IV. **EXAMINATION AND GROUNDS**

32. The Constitutional Court, at its session of 13 October 2016, examined the application and decided as follows:

A. The Applicant's Allegations

33. The applicant maintained that municipal police officers and news agency employees had entered his residence without his consent; that

the footage obtained there were used twice by the respondent media alongside inaccurate information; that these broadcasts had been made respectively on 22 May 2003 and 15 June 2003; that the content of the said news broadcasts impaired his personal rights as they contained false information such as that he had collected garbage in his house and had had psychological problems; that the action for compensation in respect of non-pecuniary damages that he filed in relation to the broadcast dated 22 May 2003 was rejected; that however, the action filed by his parents on the same date as well as the other actions filed on 15 June 2003 in relation to broadcasts with a similar content were accepted; and that his rectification request was rejected on the ground that the amount of the compensation claim was below the minimum limit for filing rectification requests. He accordingly alleged that his rights under Articles 20, 21 and 36 of the Constitution had been violated.

B. The Court's Assessment

34. 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).

35. Although the applicant alleged that his rights under Articles 20, 21 and 36 of the Constitution were violated, it has been established that the effective remedy in respect of the alleged criminal trespass into residence by public officials and private persons was essentially criminal proceedings; and that subsequent to the investigation initiated upon the applicant's complaint, the judgment rendered at the end of the criminal proceedings with regard to the applicant became final as of 12 June 2010. Moreover, it has been observed that even though the applicant mentioned two different broadcasts made on different dates (22 May 2003 and 15 June 2003), the application concerned the proceedings under the case file no. E.2013/153, K.2013/216 before the 4th Chamber of the İzmir Civil Court where the applicant had claimed non-pecuniary compensation in respect of the broadcast dated 22 May 2003. Even though the applicant alleged that his right to privacy was violated as a result of the broadcast of the footage obtained by entering his residence, the examination of the footage contained in the broadcast of 22 May 2003 and the expert report drawn up on the footage indicated that the broadcast in question did not contain any

footage taken inside the applicant's residence but footage of the debates between the applicant and his family and public officials in front of the residence, as well as footage of loading of certain materials taken out of the residence onto a truck. Within the scope of these findings, it has been deemed appropriate to examine the application within the scope of the right to protect and improve the corporeal and spiritual existence and the right to a fair trial, as required by the applicant's claims and the nature thereof.

1. Admissibility

a. Alleged Violation of the Right to a Fair Trial

36. The applicant alleged that his right of access to a court under the relevant Article of the Constitution had been violated, stating that his request for rectification of the judgment had been rejected on account of the fact that amount of the compensation claim had been below the minimum limit for filing rectification requests.

37. In order for the Constitutional Court to examine an individual application lodged with it on the merits , the right allegedly interfered by the public authority must both be secured by the Constitution and fall within the scope of the European Convention on Human Rights ("the Convention") and its additional protocols to which Turkey is a party. In other words, it is not possible to declare an application concerning an alleged violation of a right falling outside the scope of the both the Constitution and the Convention admissible (see *Onurhan Solmaz,* no. 2012/1049, 26 March 2013, § 18).

38. Even though the right to legal remedy is laid down under Article 36 of the Constitution where no reason for imposing a restriction is provided for with respect to the right to legal remedy, it is clear that Article 142 of the Constitution, which stipulates that the establishment, duties and powers of the courts, the functioning and trial procedures of the courts shall be regulated by law, as well as Article 141, which entails the conclusion of the cases as quickly as possible, must be taken into account in determining the scope of the right to legal remedies.

39. Accordingly, the legislator enjoys the margin of appreciation in regulating the procedural laws on condition of being in conformity with the Constitution. The Constitution does not embody a provision recognizing the right to file a request for rectification against all court decisions (see *Tufan Şahin,* no: 2012/799, 26 March 2013, § 19; and *Erendiz Önal,* no. 2014/1133). 30 June 2014, §§ 35-47).

40. The right to file rectification requests against the decisions issued at the end of the appellate review, mentioned in the applicant's application form, is not one of the fundamental rights and freedoms guaranteed by the Constitution; nor does it fall within the scope of the Convention and its protocols of which Turkey is a party.

41. For these reasons, the application must be declared inadmissible for *lack of competence ratione materiae* without conducting an examination as to the other admissibility requirements on the grounds that the alleged violation, which is the subject matter of the application, falls outside the common protection realm of the Constitution and the Convention.

b. Alleged Violation of the Right to Protect and Improve the Corporeal and Spiritual Existence

42. As a result of the examination of the application, the application must be declared admissible as it was not manifestly ill-founded and there was no other ground requiring it to be declared inadmissible.

2. Merits

43. The applicant alleged that his right to protect and improve his corporeal and spiritual existence was violated due to the use of the footage obtained by means of entering his residence without his consent alongside incorrect information by a media corporation.

44. In its observations, the Ministry has noted that the issue of the protection of personal reputation is assessed within the meaning of Article 8 of the Convention by the European Court of Human Rights ("the ECHR"), stating that in cases where the personal reputation and freedom of the press are at stake, an assessment should be made by the judicial authorities taking into account all circumstances of the incident, as well as

the content and presentation style of the news. In this respect, the Ministry made a reference to certain cases and judgments of the ECHR involving similar alleged violations.

45. In order for an individual application to be examined on its merits by the Court, the right alleged to be interfered by the public authority must be secured both in the Constitution and the Convention as well as the protocols thereto to which Turkey is a party. Accordingly, it is not possible to declare admissible an application on the basis of an alleged violation of any right outside the common protection realm of the Constitution and the Convention (see *Onurhan Solmaz*, § 18).

46. Article 17 § 1 of the Constitution, entitled "Personal inviolability, corporeal and spiritual existence of the individual", reads as follows:

> *"17. Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence."*

47. Although all legal interests within the private sphere of life are guaranteed under Article 8 of the Convention, it has been observed that these legal interests fall under the protection of different articles of the Constitution. In this context, certain legal values included in the notion of private life are regulated in Article 20 of the Constitution, and the right to honour and reputation safeguarded by Article 8 of the Convention is guaranteed within the scope of the right to protect and improve the corporeal and spiritual existence set forth in Article 17 § 1 of the Constitution.

48. The honour and reputation of the individual fall within the scope of the "*spiritual existence*" set out in Article 17 of the Constitution (see *S.S.A.*, no. 2013/2355, 7 November 2013, § 29). The State is obliged not to interfere arbitrarily with honour and reputation, which form part of an individual's spiritual existence, and to prevent third persons' attacks on them.

49. In this context the obligation incumbent on the State within the scope of the right to protect and improve the corporeal and spiritual existence is not limited to avoiding arbitrary interference with the mentioned rights, but also includes, in addition to this prioritised negative obligation, positive obligations for ensuring that this right is respected in an effective

fashion. The said positive obligations require that measures be taken to ensure respect for the right even in the field of interpersonal relations.

50. Although Article 17 of the Constitution does not stipulate any restriction grounds in terms of the right to protect and improve spiritual existence, even the rights in respect of which no specific restrictions are provided for are subject to certain limitations arising from the nature of the rights. Moreover, it is also possible to restrict these rights on the basis of the other rules set out in the other articles of the Constitution. In such a context, the safeguard criteria set forth in Article 13 of the Constitution are functional.

51. In particular, where there is a need to protect more than one fundamental right within the scope of an alleged interference, a balance must be struck between these fundamental rights. In the event that the right to honour and reputation has been interfered with through written or audio-visual communication tools, as is the case in the present application, there is a need to strike a balance between the freedoms of expression and the press and the individual interests of protecting the honour and reputation.

52. Article 26 of the Constitution, entitled "Freedom of expression and dissemination of thought", reads 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."

53. Freedom of expression means that persons has free access to news and information, the ideas of others, that they cannot be condemned because of their thoughts and convictions, and that they can express, convey, defend and share them freely, alone or together with others in various ways. The freedom of expression which encompasses the freedom of the press includes the rights to express/interpret opinions and convictions and to publish and circulate information, news and criticisms. Freedom of expression informs the individual and society by ensuring the transmission and circulation of thought (see *Medya Gündem Dijital Yayıncılık Ticaret A.Ş.,* [Plenary], no. 2013/2623, 11 November 2015, § 27).

54. It is a necessity of the pluralist democratic to explain the ideas, including those who are opposites, through by all means, to provide stakeholder to the thought, to realize the thought and to try to convince others about it. In this respect, freedom of expression and dissemination of thought and freedom of the press are vital for the functioning of democracy (see *Bekir Coşkun,* § 34). In this context, ensuring social and political pluralism depends on the peaceful and free expression of any thought (see *Emin Aydın* [Plenary], no: 2013/2602, 23 January 2014, § 41).

55. In Article 26 of the Constitution, the means to be used in the exercise of freedom of expression are defined as "*speech, writing, pictures or other media*", and with the use of the expression *"other media"*, it is indicated that all means of expression are under the constitutional protection. Freedom of expression directly affects a significant portion of the other rights and freedoms in the Constitution. The press, which is the main means of disseminating thought through press, in the form of newspapers, magazines or books, is one of the ways in which freedom of expression is exercised (see *Bekir Coşkun,* § 30).

56. Freedom of the press is not protected under a separate article but safeguarded within the scope of Article 10 of the Convention on the freedom of expression. Article 10 of the Convention protects not only the content of thoughts and convictions but also the manner in which they are communicated (see *Observer and Guardian v. The United Kingdom*, no. 13585/88, 26 November 1991, § 59). As frequently emphasized in the ECHR's case-law, the freedom of expression constitutes one of the main foundations of a democratic society and one of the fundamental conditions for its progress and each individual's self-fulfilment. The ECHR has reiterated in many judgments that, without prejudice to the second paragraph of Article 10 of the Convention, freedom of expression applies not only to news and opinions that are accepted or considered harmless or irrelevant by the society, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no "democratic society". This right safeguarded by Article 10 of the Convention is subject to exceptions, which must, however, be construed strictly (see *Handyside v. the United Kingdom* no. 5493/72, 7 December 1976, § 49).

57. In a free political system, the acts and procedures carried out by the State should be supervised by not only judicial and administrative authorities but also by the press and the public. Written, audio-visual or visual means of public control tightly control the political decisions, actions and negligence of public bodies and facilitate citizens' participation in decision-making processes. In this way, a healthy functioning of democracy and the self-actualization are guaranteed (see *Medya Gündem Dijital Yayıncılık Ticaret A.Ş.*, § 39).

58. It is not for the judicial authorities to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. Moreover, it is also as necessary as being free for the press to act with a sense of responsibility in order to fulfil its public duties. Even though recourse may be had to a degree of exaggeration or even provocation in the exercise of freedom of press, this freedom also obliges those concerned to act in good faith in a way that reports accurate and reliable information while respecting the professional ethics (see *Kadir Sağdıç*, § 53).

59. Distortion of truth in bad faith can go beyond the limits of acceptable criticism. A truthful statement may be accompanied by emphases, value judgments, assumptions and even implications that may create a false image in the eyes of the public. Therefore, the duty of informing the public necessarily includes duties and responsibilities and limits that the media must comply with on its own motion. These especially apply if the persons whose names are included in expressions in the press are faced seriously accused (see *Kadir Sağdıç*, § 54).

60. Similarly, freedom of the press is guaranteed not under a separate article in the Convention but within the scope of Article 10 where freedom of expression is enshrined. Furthermore, it is observed that Article 10 of the Convention protects both the content of the thoughts and convictions as well as the manner in which they are communicated, and these manners include both written and audio-visual means. Even though Article 28 of the Constitution sets out special provisions for the protection of a number of written media means, it is evident that the principles set out in both the Constitutional Court and the ECHR to the effect that the expressions presented by written means should benefit from a wider protection than other forms of expression must also apply for to ideas and opinions presented by means of audio-visual communication. In this context, there is no doubt that the expressions transmitted by written or audio-visual means of communication for the purpose of receiving or reporting news or ideas fall within the protection area of Article 26.

61. In the present case, it is clear that the footage and comments published on the relevant television channel about the applicant constituted an interference with the applicant's right to honour and reputation. However, it has been observed that the said footage and comments were the subject matter of a TV news, and as regards the present application, it must be assessed whether a reasonable balance has been struck between the applicant's right to honour and reputation and the freedom of expression and dissemination of thought of the broadcaster as well as the freedom of the press in this context.

62. The applications of a similar nature have been examined by the Court which has noted that failure to protect the individual against verbal attacks or publications affecting honour and reputation may have resulted

in a violation of Article 17 § 1 of the Constitution (see *Kadir Sağdıç,* § 36; *İlhan Cihaner* (2), no.2013/5574, 30/6/2014, § 42); and that in order for the first paragraph of Article 17 of the Constitution to be applied, the question as to whether the attack on the applicant's reputation has been carried out in a way that would detriment the applicant's personal enjoyment of the right to respect for reputation must be assessed in view of the particular circumstances of the case (see *Kadir Sağdıç,*§ 39; and *İlhan Cihaner* (2), § 45).

63. The criteria to be taken into consideration in the striking of this balance have already been established in detail. In this context, whether the relevant news or publication contributes to a discussion of general interest, the position of the person being targeted (such as whether he is a politician, public official or an ordinary individual, and his/her degree of famousness), the subject matter of the news, publication, column or article, previous conduct of the person concerned, the content, form and outcomes of the publication and the circumstances in which the news article is published should be considered as a whole (see *İlhan Cihaner* (2), §§ 66-73; *Kadir Sağdıç*, §§ 58-66; *Nihat Özdemir*, no. 2013/1997, 8 April 2015, §§ 54-61; and *Ali Suat Ertosun*, no. 2013/1047, 15 April 2015, §§ 44-520).

64. The most important element in this context is the contribution of publishing the news, articles or photographs to a discussion of public interest. The role and position of the targeted person and the nature of the activity which is the subject matter of the news, article, interview and/or photograph should also be assessed in accordance with these criteria. A person who is not recognized by the public should be able to seek more sophisticated protection in terms of the right to respect for his personal reputation. The manner in which the relevant news, interview, photograph or article is published and the manner in which the targeted person is presented through the publication is another point to take into account.

65. In this context, it is important to explain the material facts behind the expressions which are the subject matter of the case or characterize them as value judgments. At this point, a careful distinction should be made between material facts and value judgments. Whereas material facts can be proved, it must be noted that it is not possible to prove the veracity of value judgments (see *Kadir Sağdıç*, § 57; *İlhan Cihaner* (2), § 64; and for

the ECHR's judgment in the same vein, see *Lingens v. Austria*, no. 9815/82, 8 July 1986, § 46).

66. In order to acknowledge that the balance between the right to honour and reputation and freedom of the press has been struck, the existence of an interest that outweighs the individual's right to honour and dignity must be brought forward on the basis of concrete facts in accordance with the above criteria.

67. The applicant alleged that the broadcasting of footage of his house in the relevant TV news, alongside the false statements, built the impression among the public that he and his family had collected garbage; that there was a false statement that he received psychological treatment; that the broadcast was far from objective; that the limits of publishing/broadcasting news were exceeded; that assumptions and false comments were made; and that he was humiliated as a result of the usage of a language that has created hostility in society.

68. Even though the public authorities did not carry out an interference in the incident giving rise to the present application, the positive obligation incumbent on the public authorities regarding this issue includes the establishment of a legal framework that includes adequate and effective legal mechanisms for the alleged infringements of the fundamental rights stemming from the relations between private law persons, and the balancing of the relevant interests in the course of a trial procedure affording the necessary procedural safeguards.

69. It is clearly stated in Law no. 6098 that any person who sustains damage as a result of an attack on his or her personal rights may claim non-pecuniary compensation in respect of the non-pecuniary damages sustained. Furthermore, it is observed that there is a legal infrastructure whereby the individuals claiming that their personal rights have been violated through the press may obtain the finding of a violation as well as, if any, redress. However, the judicial authorities, in deciding on these claims, must strike a fair balance between the interests of the individual who claims that his right to honour and reputation have been violated and the freedom of the press within the context of the relevant broadcast. It is thus possible to assess whether the public authorities fall short of its

obligation to protect individuals from interferences that exceed the limits of criticism.

70. The incumbent first instance court has stated that the aim of the safeguard provided to the press regarding the freedom of the press is to ensure that the public is healthy, happy and secure; and that this is possible only if the public is informed about the events taking place in the world and especially in their society and the issues which are of interest to the society. In addition, the first instance court has established that the press is authorized and at the same time responsible for monitoring, inspecting, assessing, disseminating and thus informing, teaching, enlightening and steering of the individuals, and enjoys a distinct position in this respect. However, it has also added that freedom of the press is not unlimited; and that it is a legal obligation not to attack the personal rights guaranteed by the Constitution in the broadcasts. The first instance court has also noted in the decision that in cases where there is a conflict between the freedom of press and personal values, one of these two values must prevail since the legal order cannot be considered to protect two conflicting values at the same time. Putting an emphasis on the necessity of the press to broadcast within the objective limits, the Court has stated that the press should not be held responsible for publishing/broadcasting facts and events which apparently existed at that moment but later turned out to be false. Moreover, it has stressed that even though a public action had been filed against the employees of the defendant company for insulting through the press a result of the complainant's complaint regarding the impugned news, it later was decided that the public action be discontinued due to the statutory time limitation; that the security forces had entered the applicant's house on the basis of the written permission of the District Governorship; and that the masked municipal police officers had found full bags at, and taken them out of, the house and the garden; that the broadcast in question was considered within the scope of the journalism on account of the manner in which it had been reported and was in accordance with the rules of the right to freedom of press as well as reality, public interest, social interest, actuality and intellectual connection between the matter and the expression; that there had been no attack on the complainant's personal rights; that the balance of substance and form

had not deteriorated against the applicant; and that it was understood that there had been no unlawful elements in the impugned article.

71. In the present case, it has been revealed at the end of the examination of the contents of the relevant broadcast that a broadcast similar to that of the cases of garbage houses, which is reported from time to time, was reported with the footage where some bags were removed from the applicant's house; that a truck was loaded with wood, plastic, cardboard, paper, etc.; and that the applicant and his family were taken into custody by the security forces. It has been established that alongside the footage, the report contained the comments that "a truck full of garbage had come out of a retired teacher's house, however that it had not been easy to evacuate the garbage accumulated for years as the police and the municipal police had been attempted to be impeded by the older woman with a broom in her hand and her husband as well as the engineer son who had held them accountable according to European Union norms, that the retired teacher and his family had resisted with their utmost strength not to give away the garbage, that the police and the municipal police had acted together for the evacuation of the house complained of spreading bad smells, that the security forces had encountered the engineer son of the Ö. family (D.Ö.) when they had jumped off the wall as the outer door could not be not opened, that the discussion regarding the court decision became increasingly more tense, that the retired teacher M.Ö. and the retired midwife G.Ö., who had been 70 years old, had supported their son, and that the municipal police and police officers had been determined to follow the orders, that the landlords had been decided to be taken to the police station because they had resisted, but that this had not been easy as G.Ö. had taken a broom in her hand while the father and son had been dragged to the police vehicle, that finally the old woman had been forcibly placed into the police vehicle, that in the meantime cleaning officers had entered the house and started cleaning the garbage inside, that a truck had come out of the house where the Ö. Family had lived for 20 years, and that G. and M. Ö. Couple had received psychological treatment after losing their son H. Ö. in a traffic accident 33 years ago".

72. In this context, it must be answered whether the information transmitted during the news broadcast of a news channel contributed

to the discussion developed on the basis of the facts and if the content exceeded the desire to satisfy the curiosity of the public. In this connection, the greater the information value for the general public is, the more the person has to tolerate the publication of a news, or article, and conversely, where the interest in informing the public decreases, the importance of protecting the personal honour and reputation carries correspondingly greater weight.

73. It is observed that the said news broadcast's subject matter was a phenomenon which is called garbage house cases among the public and it was related to environment and human health. In this context, it must be remembered that the right of the public to receive such information and ideas is added to the function of the press to disseminate information and ideas about the issues of public interest.

74. In the examination of the broadcast within the meaning of the footage analysis and the expert report, it has been understood that some information about the applicant's mother and father in particular could be considered as value judgment, but the broadcast in question is essentially based on material facts.

75. The applicant asserted that the security forces entered his residence without a court decision; that he had been awarded compensation for non-pecuniary damages in accordance with the decision of the 2nd Chamber of the İzmir Administrative Court dated 30 December 2005 at the end of the action for compensation brought against the İzmir Governorship; that in this decision, it was clearly noted that the procedure carried out by the administration had been illegal and the public service had been malfunctioning; that the immunity of his home had been breached; that he had suffered severe grief and sadness; that the grievance and grief had increased due to his presence in the media, as well as that it was concluded that his spiritual integrity had been adversely affected and that the grief caused by the relevant procedure had amounted to compensation for non-pecuniary damage. However, it is evident that the procedure had been carried out by public officials and that footage had been recorded by the press while the full bags had been taken out from the applicant's house and placed in the garbage truck; that within this scope, the broadcast

had been based on the facts apparently existed at that moment; and that finding that the procedure in question was unlawful would not lead to a different conclusion regarding the broadcast which is understood to be based on the apparent truth.

76. In the broadcast in question, it has been observed that the expression, "*the engineer son who had held the security forces accountable according to European Union norms*" had been used in respect of the applicant alongside the relevant footage. Taking into account that recourse may be had to a degree of exaggeration or even provocation in the exercise of freedom of the press, it cannot be said that the statement in question exceeded the scope and limit of the freedom of the press in such a way that has an effect on the personal values of the applicant.

77. Moreover, the applicant alleged that that his personal rights had been damaged by the content of the news containing false information that he had collected garbage at home and had psychological problems; that the action for compensation in respect of non-pecuniary damages filed by his parents had been accepted; and that the courts issued different judicial decisions on the same legal matter. It has been established that the compensation claim brought forward by the parents of the applicant had been accepted with the decision of the 11th Chamber of the İzmir Magistrates' Court dated 28 June 2011; however by the quashing judgment of the Court of Cassation, the case was discontinued due to the expiry of the statutory limitation period; that the action for compensation in question was filed by the applicant's parents; and that apart from the action which is the subject matter of the case, the applicant and his parents also filed actions against different persons and broadcasting organizations about the broadcast in question and some of these actions have been concluded in favour of the applicant and his family. Moreover, it is possible for the courts to render different judgments with different assessments and in different contexts, particularly in respect of the claims where claimants and defendants are different (see *Türkan Bal* [Plenary], no. 2013/6932, 6 January 2015, § 57). Within this framework, it is also evident that the expression in the relevant news broadcast that "*G. and M. Ö. couple received psychological treatment after losing their son H. Ö. in a traffic accident 33 years ago*" did not target the applicant but his parents. Moreover, it has been observed

that the broadcast dated 15 June 2003 which was alleged to have the same contents with the broadcast, the subject matter of the present application, and in respect of which judgments had been rendered in favour of the applicant and his family in the relevant actions for compensation differed from the broadcast of 22 May 2003 in terms of text and presentation of the news broadcast.

78. In the light of the foregoing, it has been established that the news, which is understood to be based on material facts and in compliance with the relevant truth, was about an incident which concerns the environment and human health and thus contributes to a public debate and has the value of informing the public. Moreover, it has been understood that having regard to the manner in which the relevant news was broadcasted and the manner in which the intended person is presented in the content of said the broadcast, the news contained a number of exaggerated statements, but did not contain any statements exceeding the scope and limits of the freedom of the press so as to have an impact on the applicant's personal values; that the courts have also struck a balance between the obligation to protect honour and reputation of the applicant and freedom of the press by addressing these elements; and that judicial authorities provided detailed reasons for their appreciation and there was no finding to the effect that the limits of the margin of appreciation afforded to the judicial authorities had been exceeded due to the findings and provisions contained in the judgment.

79. Consequently, the Court has found no violation of the right to protect and improve the corporeal and spiritual existence safeguarded by Article 17 of the Constitution.

V. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 13 October 2016 that

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

B. 1. The alleged violation of the right to a fair trial be declared INADMISSIBLE for *lack of competence ratione materiae*;

2. The alleged violation of the right to protect and improve the corporeal and spiritual existence be declared ADMISSIBLE;

C. The right to protect and improve the corporeal and spiritual existence safeguarded by Article 17 of the Constitution was NOT VIOLATED;

D. As the conditions for total exemption have not been satisfied in accordance with Article 434 § 3 of the Code of Civil Procedure no. 6100 dated 12 January 2011, the total court expenses of TRY 206.10 which was not temporarily collected from the applicant due to the grant of the request for legal aid, BE COLLECTED FROM THE APPLICANT;

E. A copy of the judgment be SENT to the Ministry of Justice.

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

SİNAN IŞIK

(Application no. 2013/2482)

13 April 2016

On 13 April 2016, the First Section of the Constitutional Court found a violation of the obligation to conduct an effective investigation safeguarded by Article 17 § 3 of the Constitution in the individual application lodged by *Sinan Işık* (no. 2013/2482).

THE FACTS

[8-39] While the applicant was performing his compulsory military service at the Security Service Unit Command of the İstanbul Kasımpaşa Military Hospital, he was examined at the emergency service of the Hospital where he was in charge after having become ill in the course of the training. He was then referred to the Gülhane Military Medical Academy (the GATA) Haydarpaşa Training Hospital because of severe abdominal pain. The applicant was taken under operation during which it was determined that his spleen had disintegrated, and therefore his spleen was extracted. After being discharged from the hospital, he was discharged from the military for being unfit for the military service. Although the applicant noted in his first statement that he had not been exposed to any strike, when he learned that he would be discharged from the military service upon extraction of his spleen, he stated that the sergeant H. had handcuffed him to the radiator pipe and beaten him for joking with for approximately twenty days before his illness. The applicant's father filed a criminal complaint before the Public Prosecutor's Office. Thereupon, an investigation was initiated by the Military Prosecutor's Office, and statements of those who were concerned were taken, and the expert reports were received.

The applicant's father maintained that his son had been taken by the section sergeant to the basement of the hospital where he had been in charge for three times within a week and beaten by means of being handcuffed to the radiator pipe; and that his son had been threatened not to make a complaint.

The applicant noted in his statement that in the first week of February 2012, H., who previously had a firm stand towards him, imposed a penalty on him in the mess for being late and subsequently handcuffed him to the radiator with his right hand which was close to the television and beat him

by saying that H. would joke with him; that H. firstly hit on his shoulders and subsequently started to hit on his stomach as he lowered his guard for being tired; and that several days after the incident, he became ill during the training and his spleen was therefore extracted. It has been observed that the suspect and the witnesses stated that the impugned act of handcuffing actually took place; but it was only a joke; that the applicant being exposed to non-severe strikes on his shoulders for 5-6 times was aware of the fact that it was only a joke and got involved in this joke; that there was no hostility between the applicant and H.; and that the applicant became ill just after the training.

The doctors examining and operating the applicant stated that any sign of strike and physical coercion were not found in the course of his examination; however, as his spleen was in normal sizes and any finding indicating that the applicant suffered from another disease was not detected, it was concluded that the applicant's illness occurred as a result of a trauma. They also noted that after the applicant had learned that he would receive a report indicating that he was unfit for military service, he maintained that he had been beaten by the section sergeant; that he did not explain how the incident had taken place; that if the illness had occurred as a result of a trauma, its symptoms would appear in a few hours and may be extended for, at the most, twelve hours; and that as it was asked, it was not possible for the illness to appear within the period of twenty days.

In the expert report caused to be drawn up by the relevant Command, it was set out that out of the spleen injuries occurring subsequent to blunt abdominal trauma, in 85% cases spleen was burst at an early stage and required medical intervention within 24-48 hours while 15% of cases gave rise to spleen laceration; and that 97% out of the delayed spleen injuries at the rate of 15% appeared within the period of the first month. It was also specified that the delayed spleen injuries occurred at a time when there was an increase in daily activities of the relevant person; and that this explanation was compatible with the present incident in which the applicant became ill in the course of the military training.

The Military prosecutor's office rendered a decision of non-prosecution on the grounds that there were discrepancies among different statements

of the applicant concerning the dates alleged to be battered; that it was stated that the act of handcuffing had been a joke; that he had received the strikes on his shoulders; and that the impugned incident could not lead to spleen disintegration. The objection to this decision was dismissed by the military court.

The applicant also brought a full remedy action against the Ministry of National Defence. It was decided by virtue of the judgment of the Supreme Military Administrative Court that the case be dismissed as in the impugned incident, there was no reason which would lead to the obligation to redress on the part of the defendant administration; and that the applicant would pay the attorney's fees. The applicant's request for rectification of the judgment was rejected.

IV. EXAMINATION AND GROUNDS

40. The Constitutional Court, at its session of 13 April 2016, examined the application and decided as follows:

A. The Applicant's Allegations

41. The applicant maintained that

i. The prohibition of torture and ill-treatment was violated on the grounds that he had been subject to violence and ill-treatment by his military superiors while performing his compulsory military service; that on the day when he had suffered splenic disruption, he had been also battered by H.İ.D.Ü; and that an effective investigation had not been conducted into his allegations;

ii. The rights to a fair trial and to an effective remedy were violated on the grounds that the investigation had been conducted by the military authorities lacking impartiality and independence; that his effective participation in the investigation had not been ensured; that he had been provided with the opportunity to examine the witnesses neither during the investigation nor during the examination of the challenge in the absence of a hearing; that the prosecution's opinion requested by the military court during the examination of the challenge against the decision of non-prosecution had not been notified to him; and that they could not submit

a comprehensive petition to raise his challenge as the decision of non-prosecution had been served on the principal not on his representative.

iii. The right to a trial before two levels of jurisdiction in criminal matters was violated on the ground that his challenge against the decision of non-prosecution had been examined over the case-file without holding a hearing. He also claimed compensation for his pecuniary and non-pecuniary damages.

42. In his counter-statements against the Ministry's observations, the applicant also complained of the counsel fee of 5,100 Turkish liras (TRY) awarded by the Supreme Military Administrative Court against him.

B. The Court's Assessment

43. 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 accordingly decided that the applicant's allegations that his rights to a fair trial and to an effective remedy had been violated must be examined within the scope of the State's obligation to conduct an effective investigation with regard to the prohibition of torture and ill-treatment. The alleged violation of the right to a trial before two levels of jurisdiction in criminal matters would be separately examined.

44. It appears that the applicant also complained, in his counter-statements against the Ministry's observations, that the Supreme Military Administrative Court had awarded a counsel fee of TRY 5,100 against him. It has been considered that the said complaint might be examined within the scope of the right of access to a court. However, as it was of a nature independent of the complaints specified in the application petition and raised without lodging a further application, its examination cannot be considered possible. Otherwise, it would become inevitable for any kind of claims to be included in the application file at any time after an individual application has been lodged, and thereby the rules of procedure envisaged for the individual application system would become futile (see *Ümit Demir*, no. 2012/1000, 18 September 2014, § 31).

1. Admissibility

a. Alleged Violation of the Right to a Trial before Two Levels of Jurisdiction

45. The applicant maintained that as his challenge against the decision of non-prosecution issued by the military prosecutor's office had been examined without a hearing, the set of criminal proceedings was not carried out at two levels, which was in breach of Article 2 of the Additional Protocol no. 7 to the European Convention on Human Rights ("the Convention").

46. Pursuant to the Constitution and relevant legal provisions, in order for an individual application lodged with the Court to be examined on the merits, the right alleged to have been violated by a public authority must be not only safeguarded by the Constitution but also embodied by the Convention and its additional protocols to which Turkey is a party. In other words, it is not possible for the Court to declare admissible any application with an alleged violation of any right which is not under the joint protection of the Constitution and the Convention (see *Onurhan Solmaz*, no. 2012/1049, 26 March 2013, § 18).

47. The right of appeal set forth in Article 2 of the Additional Protocol no. 7 to the Convention is applicable to persons convicted of a criminal offence. Therefore, persons having the capacity of intervening party/victim -like the applicant in the present case- fall outside the scope of such protection.

48. For these reasons, the Court declared this part of the application inadmissible for lack of competence *ratione materiae* without any further examination as to the other admissibility criteria.

b. Alleged Violation of the Prohibition of Torture and Ill-treatment

49. The Court declared the alleged violation of the prohibition of torture and ill-treatment admissible for not being manifestly ill-founded and there being no other ground to declare it inadmissible.

2. Merits

50. Article 17 §§ 1 and 3 of the Constitution reads 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."

51. The applicant maintained that he had been subject to violence and ill-treatment during his compulsory military service as a result of which he had suffered splenic disruption and undergone an operation; that the investigation initiated upon his complaint had been conducted by military authorities, and all evidence had been collected by military officers; that the investigation authorities had not been impartial and independent; and hat his effective participation in the investigation had not been ensured, and nor had an effective investigation been conducted into his case.

52. In its observations, the Ministry indicated that an investigation had been promptly initiated upon the applicant's and his father's complaint; that within the scope of the investigation, all persons that the applicant had requested to be heard as a witness had been heard; that statements of the doctors undertaking the applicant's medical treatment had been taken; that an expert report had been examined so as to reveal the possibility of the applicant's suffering from splenic disruption if the impugned incident had taken place in the manner as alleged by him; and regard being had to both the discrepancies in the applicant's statements of different dates and to the witnesses' statements, it was concluded that the applicant had failed to support his allegation by appropriate evidence.

53. The applicant stated in his counter-statements against the Ministry's observations that as H.İ.D. was his military superior, it had been therefore impossible for them to joke with one another; that he had been exposed to ill-treatment several times by H.İ.D.; that as he had been afraid, he could not report the incident of battery until he became aware that a report whereby he would be declared unfit for military service would be issued; that the suspect had battered him every day; that although he had been complained of having been battered by the suspect on the day of incident, a decision of non-prosecution was rendered due to the inconsistency as to the date of the impugned incident; and that no inquiry had been

conducted in order to identify those responsible for his suffering from splenic disruption while performing his compulsory military service during which the soldiers were under custody for 24 hours.

54. It has been revealed that an assessment as to whether there was any responsibility attributable to the public authorities in the present case could be made only through conducting an effective investigation. Therefore, the Court's examination as to the present case would be limited to the State's procedural obligation to conduct an effective investigation that is set forth in Article 17 § 3 of the Constitution.

a. General Principles

55. The positive obligation incumbent on the State within the scope of the right to protect one's corporeal and spiritual existence also has a procedural dimension which requires the State to conduct an effective official investigation capable of identifying and -if appropriate- punishing those responsible for any kind of unnatural physical and psychological assaults. The primary aim of such investigation is to guarantee effective implementation of law preventing these attacks and to ensure public officials or institutions -having involved in such assaults- to account for the incidents taking place under their supervision (see *Cezmi Demir and Others*, no. 2013/293, 17 July 2014, § 110).

56. Accordingly, in case where an individual has an arguable claim of having been exposed, by a State officer, to an unlawful treatment in breach of Article 17 of the Constitution, this constitutional provision, interpreted in conjunction with the general obligation of Article 5 of the Constitution titled *"Fundamental aims and duties of the State*, requires an effective official investigation to be conducted. This investigation must be capable of leading to identification and punishment of those responsible. Otherwise, this provision would, despite its importance, become ineffective in practice and would in some circumstances lead State officers to abuse the rights of individuals under their supervision by way of being covered by a *de facto* immunity (see *Tahir Canan*, § 25).

57. The type of investigation to be conducted into a case, as required by the procedural liability, is to be determined based on whether the

obligations as to the substantive aspect of the right to protect one's corporeal and spiritual existence require any criminal sanction. In cases of deaths and injuries caused intentionally or resulting from an assault or ill-treatment, the State is liable by virtue of Article 17 of the Constitution to conduct criminal investigations that are capable of identifying and punishing those responsible. In such cases, awarding compensation at the end of the administrative and civil proceedings does not suffice to redress the impugned violation and to remove the victim status (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, § 55).

58. The aim of the criminal investigation is to ensure the effective enforcement of the legislation provisions protecting the corporeal and spiritual existence of a person and to hold those responsible accountable. This is not an obligation of result but of appropriate means (see *Serpil Kerimoğlu and Others*, § 56).

59. The criminal investigations to be conducted must be effective and sufficient to the extent that would allow the identification and punishment of those responsible. An effective and sufficient investigation requires that the investigation authorities act *ex officio* and gather all the evidence capable of clarifying the incident and identifying those responsible. Hence, an investigation into the allegations of ill-treatment must be conducted independently, promptly and in an in-depth manner (see *Cezmi Demir and Others*, § 114).

60. One of the factors ensuring effectiveness of criminal investigations into these incidents is to make the investigation or its consequences open to public scrutiny in order to ensure accountability not only in theory but also in practice. In addition, in each incident, victims are ensured to effectively participate in this process for the protection of their legitimate interests (see *Cezmi Demir and Others*, § 115).

61. The officials must act immediately after an official complaint is filed. Even if there is no complaint but are sufficiently certain indications of torture or ill-treatment, an investigation is ensured to be initiated. In this context, the investigation is to be initiated promptly, conducted being subject to public scrutiny and in an independent, meticulous and speedy manner as well as be effective as a whole (see *Tahir Canan*, § 25).

62. In order for the investigation conducted into the alleged torture and ill-treatment by public officers to be effective, the individuals responsible for the investigation and those carrying out the inquiries must be independent from those involved in the incident, which presupposes not only a lack of hierarchical or institutional connection but also existence of a practical independence (see *Cezmi Demir and Others*, § 117).

63. It is essential for authorities to act promptly in the investigation into the complaints of ill-treatment. Nevertheless, it must be acknowledged that there may be obstacles or complications hindering the progress of an investigation in any given situation. However, in case of an investigation into ill-treatment, it is required for authorities to conduct the investigation at a maximum speed and with utmost diligence so as to ensure adherence to the state of law, to avoid impressions of tolerance or encouragement towards unlawful acts, to prevent any possibility of deception or unlawful acts as well as to maintain confidence of the public (see *Cezmi Demir and Others*, § 119).

64. Article 17 of the Constitution is intended for the effective implementation of the legislation provisions concerning one's corporeal and spiritual existence in case of a death or injury as well as for ensuring identification of those responsible and their accountability. This is not an obligation of result but of means. Therefore, it is not necessary to conclude all cases filed in this regard with conviction or a decision imposing a certain penalty (see *Cezmi Demir and Others*, § 127). However, those responsible for these acts must be sentenced with commensurate penalties, and the victim must be afforded appropriate redress.

b. Application of the Principles to the Present Case

65. The applicant alleged that no independent and impartial investigation had been conducted into his case as it had been conducted by the military prosecutor's office and all evidence had been collected by military officers.

66. The prosecution, which may also undertake certain administrative acts, is indeed a judicial organ and is to provide sufficient assurance with regard to independence and impartiality principles while performing its judicial acts.

67. Within the military justice system, the distinction between judges and prosecutors is not definite, and the role of military prosecution is undertaken by military judges.

68. Article 145 of the Constitution sets forth that the relation between the military judges acting as a military prosecutor and the command where they take office shall be regulated by law on the basis of the principles of independent court and tenure of judges.

69. The military prosecutors are in principle provided with tenure of judges. However, in Law no. 353, it is set forth that they shall be under the supervision of the commander of the troop for which the military tribunal is established or the chief of the military institution; and that all acts and actions performed by military prosecutors shall be subject to the supervision of the Minister of National Defence.

70. The troop commander or chief of the military institution also has certain powers during the stages when the investigation is initiated and a request for pre-trial detention is made. He may also demand information from the military prosecution concerning the investigation stage.

71. As this commander or chief is superior in rank to the military prosecutor, it must be considered that these provisions may have a bearing on the independence of the investigation.

72. The requirements of impartiality and independence examined within the scope of the obligation to conduct an effective investigation call for a concrete examination as to whether the investigation is in its entirety impartial and independent, rather than an abstract assessment of the statutory or institutional independence (see, the ECHR's judgment in the same vein, *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, 14 April 2015, § 222).

73. Where the statutory or institutional independence is open to question, such a situation, although not decisive, will call for a stricter scrutiny to determine as to whether the investigation has been carried out in an independent manner (see *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], § 224).

74. In its several assessments, the European Court of Human Rights ("the ECHR") examined the prosecutors' conducts and accordingly concluded that the investigations conducted by them, in spite of the statutory arrangements not affording sufficient independence to them, had been independent (see *Stefan v. Romania*, no. 5650/04, 29 November 2011, § 48; and *Mantog v. Romania*, no. 2893/02, 11 October 2007, § 70 et seq.).

75. In the present case, it has been revealed that the evidence collected within the scope of the investigation was mainly comprised of witnesses' statements and an expert report; and that these statements were all taken by the military prosecutor's office. The sole suspect of the investigation was not a high-ranking military officer but a person performing his compulsory military service.

76. Certain questions as to statutory and institutional independence cannot be per se construed as the failure of the military prosecutor's office to conduct an independent and impartial investigation. Besides, in the present case, there is no indication which was in breach of this principle.

77. The applicant also alleged that the military courts, the authority to examine the challenges against the criminal investigations, had not been independent and impartial.

78. The formation, status and duties of the military courts are enshrined in Article 145 of the Constitution and Law no. 353. In consideration of these provisions, it appears that independence of the military judges appointed to military courts is guaranteed by the provisions of the Constitution and the relevant Law; that there is no issue as to their appointment and working procedures which would impair their impartiality; and that they are not accountable to the administration for their decisions (see *Rıfat Bakır and Others*, no. 2013/2782, 11 March 2015, § 80).

79. In its judgments, the ECHR also examined the complaints about the military courts' independence and impartiality. Considering the particular circumstances of the relevant cases, it found that these courts had sufficient independence and impartiality (see *Hakan Önen v. Turkey*, no. 32860/96, 10 February 2004). However, at a subsequent date, making

a reference to the Court's judgment where certain provisions of Law no. 353 and Law no. 357 on Military Judges, dated 26 October 1963, were examined, the ECHR concluded that the applicants had not been tried by an independent and impartial court owing to the presence of a military officer on the bench of the military criminal courts (see *İbrahim Gürkan v. Turkey*, no. 10987/10, 3 July 2012, §§ 16-20).

80. In line with the Court's judgment, Law no. 353 was amended by Article 1 of Law no. 6000 and dated 19 June 2010. It is accordingly set forth that a military officer would no longer sit at the bench of the military courts which would be accordingly composed of three military judges. Thereby, the contradictions as to the independence and impartiality of the courts, which were indicated in the Court's judgments, have been eliminated. As a matter of fact, the ECHR took into consideration these developments and rejected, in its subsequent decisions, the complaints as to independence and impartiality of the military criminal courts for being manifestly ill-founded (see *Hayri Kamalak and Others v. Turkey*, no. 2251/11, 8 October 2013, § 31).

81. It must be separately examined whether the investigation was in general effective.

82. In the incident giving rise to the present application, upon the letter of denunciation and at the end of the administrative inquiry conducted by the applicant's commanders, an investigation was conducted against H.İ.D. on charge of assault and battery against his inferior. However, a decision of non-prosecution was issued on the grounds that there were discrepancies among the applicant's statements of different dates; that his handcuffing was stated to be only a joke; and that as he sustained the blows to his shoulder, the impugned incident could not lead to splenic damage.

83. Nevertheless, it appears that the doctors undertaking the applicant's treatment and operation considered the probability that the splenic disruption might be caused due to the trauma.

84. In the expert report included in the investigation file, it is indicated that 15% of splenic damages caused by a trauma might lead to splenic

disruption at a later date (generally within the first month) due to intensive physical activity, which is compatible with the applicant's case history.

85. It has been observed that the decision of non-prosecution issued at the end of the investigation did not contain any assessment as to the findings on splenic disruption stated in the expert report.

86. Primary aim of the State's obligation to conduct an effective investigation is to elucidate the impugned incident and to determine the responsibility on parts of the individuals involved in the incident as well as of the State (see Article 1 (a) of Annex 1 to the İstanbul Protocol). Only after the clarification of the incident and identification of those responsible, the other aims of the investigation process, namely punishment of those responsible and affording redress for the victims, may be at stake. As a matter of fact, an effective investigation requires, in the strict sense, conducting an investigation for elucidating the material facts and collection of all evidence.

87. It must be acknowledged that the applicant was mainly under the State's control in performing his compulsory military service. In cases where an individual sustains injury while being under the State's control, it is incumbent on the State to make a reasonable explanation as to how such injury has taken place. In the present case, this principle, which cannot be applied strictly to the same extent as in case of a custody under which the individual is completely under the State's control, calls for the clarification of the manner in which the injury took place in consideration of the material fact that the applicant sustained splenic disruption probably on account of the trauma.

88. Regard being had to the fact that the expert report consistent with the applicant's allegation was not taken into consideration, it has been concluded that due diligence had not been demonstrated in order to elucidate the material fact and to identify the possible responsibility.

89. For these reasons, the Court found a violation of the State's procedural obligation to conduct an effective investigation laid down in Article 17 § 3 of the Constitution.

90. As regards the applicant's allegations that he was not provided with the opportunity to examine the witnesses; that the prosecutor's opinion requested by the military court during the examination of challenge against the decision of non-prosecution was not notified to him; that as the decision of non-prosecution issued by the prosecutor's office had been served on the principal not on his representative, they could not submit a detailed letter of challenge, the Court found them to be related to the requirement of ensuring effective participation in the investigation that is among the principles of an effective investigation. It has been accordingly concluded that there was a breach of the procedural obligation. Therefore, the Court did not find it necessary to make a separate examination as to the applicant's allegation that his effective participation in the investigation had not been ensured.

3. Application of Article 50 of Code no. 6216

91. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, reads as follows:

"1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled…

(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."

92. The applicant claimed pecuniary and non-pecuniary damage due to the violation of Article 17 of the Constitution.

93. In the present case, it has been concluded that the State's procedural obligation to conduct an effective investigation laid down in Article 17 § 3 of the Constitution was violated. The Court has accordingly found it necessary to order re-opening of the proceedings (investigation) in order to redress the violation and its consequences.

94. The applicant must be awarded a net amount of TRY 7,500 for his non-pecuniary damage which could not be redressed by merely finding a violation.

95. The applicant also claimed pecuniary compensation. The Court awards pecuniary compensation only when there is a casual link between the pecuniary damage allegedly sustained by the applicant and the violation found. Accordingly, his claim for pecuniary compensation was rejected for lack of any causal link between the violation found and his claim.

96. Besides, the counsel of TRY 1,800 covered by the applicant and calculated over the case-file must be reimbursed to him.

V. JUDGMENT

The Constitutional Court UNANIMOUSLY held on 13 April 2016 that

A. 1. The alleged violation of the right to a trial before two levels of jurisdiction be DECLARED INADMISSIBLE for lack of competence *ratione materiae*;

2. The alleged violation of Article 17 § 3 of the Constitution be DECLARED ADMISSIBLE;

B. The procedural obligation to conduct an effective investigation laid down in Article 17 § 3 of the Constitution was VIOLATED;

C. A copy of the judgment be SENT to the Military Prosecutor's Office of the Northern Sea Area Command for a retrial (investigation) in order to redress the consequences of the violation of the procedural obligation to conduct an effective investigation as required by Article 17 § 3;

D. A net amount of TRY 7,500 be PAID to the applicant in respect of non-pecuniary damage, and his other compensation claims be REJECTED;

E. The counsel of TRY 1,800 be REIMBURSED TO THE APPLICANT;

F. The payment be made within four months as from the date when the applicants apply 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; and

G. A copy of the judgment be SENT to the Ministry of Justice.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

Z. C.

(Application no. 2013/3262)

11 May 2016

On 11 May 2016, the Plenary of the Constitutional Court found a violation of the prohibition of torture and ill-treatment safeguarded by Article 17 § 3 of the Constitution under its procedural aspect in the individual application lodged by *Z.C.* (no. 2013/3262).

THE FACTS

[7-43] While the applicant Z.C. was sixteen years old, she started to live together with the suspect A.L., who was twenty four years old, without an official marriage only by holding a wedding ceremony on 15-16 October 2011. On 4 June 2012, they actually ended their relationship. On 21 June 2012, the applicant filed a criminal complaint before the Kayseri Chief Public Prosecutor's Office against the suspect A.L. for the acts of aggravated sexual abuse of a child, depriving an individual of her liberty for sexual purpose, insult, threat and intentional wounding committed by him. Thereupon, the chief public prosecutor's office initiated an investigation against A.L.

Z.C. and her father A.C. declared that A.L. started to live together and have a sexual intercourse with Z.C. through oppression, harassment and threat; that he had several times resorted to verbal and physical violence; that when the applicant's father had become aware of the incident taking place, the applicant was given shelter by her family; and that they had thereupon filed a criminal complaint against A.L.. It was stated in the assessment report as to the forensic evaluation of 6 July 2012 prepared by the social service specialist that Z.C.'s psychological state was not good and therefore it would be appropriate for her to receive treatment in a juvenile psychiatric clinic. The suspect A.L. noted in his defence submissions before the public prosecutor's office that he and Z.C. held a wedding ceremony upon free will of their families; that as they were minors at the relevant time, they could not make an official marriage; that upon their marriage, they had voluntarily engaged in sexual intercourse; and that he accordingly denied the accusations against him. He also maintained that he himself had made Z.C. return her family's home for having committed adultery. He submitted their photos taken at their wedding ceremony

and messages in his mobile phone as evidence indicating that Z.C. had committed adultery. It was specified in the report dated 4 July 2012 and drawn up by the Presidency of the Forensic Medicine Department of the Erciyes University that there were signs on the applicant's body matching with the violence and sexual intercourse alleged to be exposed by her; and that an examination to be made by child psychiatry would be appropriate for determination of the effects of such incidents on her mental health.

As a result of the investigation conducted, the Kayseri Chief Public Prosecutor's Office rendered a decision of non-prosecution on 26 July 2012 indicating that as specified by the victim in her own defence submissions, she had engaged in sexual intercourse of her own free will; that the offence of having sexual intercourse with a minor is subject to a criminal complaint; that although the right to raise a complaint was to be enjoyed within 6 months as per Article 73/1 of the Turkish Criminal Code ("TCC"), the victim had lodged a criminal complaint more than one year after the incident; and that there was no sufficient and plausible evidence with regard to the intangible allegations that the offences of threat and insult had been committed. The objection made to this decision was dismissed by the Boğazlıyan Assize Court with its decision of 7 March 2012. The dismissal decision was notified to the applicant on 17 April 2013.

IV. EXAMINATION AND GROUNDS

44. The Constitutional Court, at its session of 11 May 2016, examined the application and decided as follows.

A. The Applicant's Allegations

45. The applicant maintained that a wedding ceremony was held on 15-16 October 2011 as the suspect A.L. had threatened her and her family; that thereafter she had to live together with A.L.; that she had to drop out of school and quit her job due to his oppression; and that the suspect raped her for five or six times during this period and continuously insulted her; that the investigation, initiated by Kayseri Chief Public Prosecutor's Office upon the complaint filed against the suspect for the acts of insult, threat, depriving an individual of her liberty for sexual purposes, aggravated sexual abuse of a child and intentional wounding, was not carried out

in an effective manner and concluded by a decision of non-prosecution; that even though she challenged this decision, she could not obtain any result; that the considerations, stating that "the victim consented to" the intercourse and "the victim sent affectionate text messages to the suspect", which were taken as a basis for the decision rendered at the end of the investigation do not reflect the truth; that messages sent to the suspect had been sent from a mobile phone not belonging to her, however this situation had not been investigated and they were deemed to be sent by her; and that with regard to the allegation that "the complaint had not been filed within the prescribed time" taken as a basis for the decision, the chief public prosecutor's office did not take into consideration the determination specified in the report drawn up following the examination by the Presidency of the Forensic Medicine Department of the Erciyes University indicating that "there had been vaginal sexual intercourse at least 7-10 days before the medical examination". The applicant accordingly maintained that there had been a violation of the prohibition of torture and ill-treatment and of the legal provisions concerning the child rights guaranteed in Articles 17 and 41 of the Constitution and requested the initiation of prosecution.

46. The applicant requested the Court not to disclose her identity in public documents for being a minor.

47. 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). Although the complaints about the offences in the present application, by their nature, fall within the scope of the prohibition of torture and ill-treatment along with the protection of private life guaranteed in Articles 17 and 20 of the Constitution (for similar judgements of the ECHR, see *M.C. v. Bulgaria*, no. 39272/98, 4 March 2004 § 148; *Dordevic v. Croatia*, no. 41526/10, 24 July 2012, §§ 92,93), a certain treatment must reach a minimum threshold to be included within the scope of the prohibition of torture and ill-treatment. If it remains below this threshold, the examination must be carried out within the scope of protection of private life. However, as serious acts such as the sexual abuse of a child are required, by their very nature, to be assessed within the scope of the prohibition of torture and ill-treatment,

no separate examination was carried out with regard to the protection of private life.

B. The Court's Assessment

1. Admissibility

48. The alleged violation of the prohibition of torture and ill-treatment was declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

49. The applicant maintained that the prohibition of torture and ill-treatment was violated by indicating that the suspect, with whom she had to unofficially live together due to the threats directed towards her and her family, raped her five or six times, constantly insulted and threatened her.

50. In the observations of the Ministry, it is set forth that ill-treatment must reach a minimum level of severity to be included in the scope of Article 3 pursuant to the jurisprudence of the European Court of Human Rights (the ECHR); that within the context of Article 3 of the Convention, the contracting states still have certain obligations in cases where ill-treatment is carried out by third parties; that the contracting states are to establish efficient mechanisms and conduct investigations as a deterrent effect against acts committed especially against children and other vulnerable and defenceless individuals; that judicial authorities must never allow the pecuniary and non-pecuniary damages that have been caused to remain unpunished; and that the application must be examined by taking the above-principles into account.

51. The applicant did not submit any counter-statement against the observations of the Ministry.

a. Alleged Violation of the Prohibition of Torture and Ill-treatment under Its Substantive Aspect

52. Article 17 of the Constitution, titled "*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.

…

No one shall be subjected to torture or mal-treatment; no one shall be subjected to penalties or treatment incompatible with human dignity."

53. Article 3 of the European Convention on Human Rights (the Convention), titled "*Prohibition of torture*", is as follows:

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

54. Article 41 of the Constitution, titled "*Protection of the family, and children's rights*", is as follows:

"(Amended on 3 October 3 2001 by Act no. 4709) 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 peace and welfare of the family, especially mother and children, and to ensure the instruction of family planning and its practice.

(Paragraph added on 12 September 2010 by Act no. 5982) Every child has the right to protection and care and the right to have and maintain a personal and direct relation with his/her mother and father unless it is contrary to his/her high interests.

(Paragraph added on 12 September 2010 by Act no. 5982) The State shall take measures for the protection of the children against all kinds of abuse and violence."

55. The right to protect and improve the corporeal and spiritual existence of the individual is guaranteed in Article 17 of the Constitution. Paragraph 1 of the aforementioned article aims to protect human dignity. Article 17 § 3 of the Constitution prescribes that no one shall be subjected to "torture" and "mal-treatment", that no one shall be subjected to penalties or treatment "incompatible with human dignity."

i. Obligation to Create Legal Statute for the Protection of Children

56. Within the scope of the right specified in Article 17 of the Constitution, the State has the positive obligation to protect the corporeal and spiritual existence of all individuals who are within its jurisdiction against all risks which may arise out of the actions of public authorities, of other individuals or of the individual himself (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, § 51; and *Cezmi Demir and Others*, no. 2013/293, 17 July 2014, § 105). Legal arrangements prohibiting the ill-treatment by third parties must first be available in order to mention of such protection.

57. Children must be protected against all acts that may have a negative impact on their physical and psychosocial development since they sustain greater damages compared to adults as a result of being exposed to violence and abuse. Article 5 of the Constitution specifying the fundamental aims and duties of the State prescribes that the State shall take the necessary measures to ensure that its citizens can live in compliance with human dignity and provide the conditions required for the development of the individual's material and spiritual existence.

58. In the legislative intention of Article 41 of the Constitution, it is indicated that the State is assigned the duty of taking the necessary measures for the protection of children against all kinds of abuse and violence following the incorporation into the Constitution of well-accepted universal principles on children's rights based on the Convention on the Rights of the Child and the European Convention on the Exercise of Children's Rights. As required by this obligation, the State must formulate the pertinent statute for the protection of children.

59. In accordance with Article 3 of the Convention on the Rights of the Child, in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. The State may ensure the protection of children by means of the regulations and measures to be taken in the field of both private and public law. The right to marry, set forth in Article 16 of the Universal Declaration of Human Rights, in Article 12 of the European Convention on Human Rights, in Article 10 of the International Covenant

on Economic, Social and Cultural Rights, in Article 23 of the International Covenant on Civil and Political rights, and in Article 16 of the Convention on the Elimination of all Forms of Discrimination Against Women, allows individuals the freedom to decide whether or not they wish to get married, and if so, to choose the person to marry. The person who wishes to contract marriage should be able to choose his/her permanent life partner with his/her free will without any pressure or coercion. If the person is forced to contract marriage through pressure, threats or violence, it cannot be said that the decision to marry has been taken with free will.

60. The issue of forced and early marriages is not only a matter of human rights violations but it is also a matter of children's rights since the victims are mostly children. Hence, in the above-mentioned international conventions, it is pointed out that child marriages and engagements must not be considered legal; and that a minimum age limit must be established to contract marriage. In applying these measures, States have discretionary power within the boundaries of the international conventions by taking into account their own social and cultural differences. As a matter of fact, in the international conventions to which Turkey is a party, while persons under the age of eighteen years are defined as children, no explicit minimum age limit is set for the marriage of children. However, the conventions do include fundamental principles on the prevention of early child marriages. While there is no regulation in the international conventions, to which Turkey is a party, prohibiting the marriage of children under the age of eighteen years, this issue has been addressed in the survey reports and recommendations of international organizations.

61. In the Resolution 1468 (2005) of the Parliamentary Assembly of the Council of Europe, Article 7 defines child marriage as the union of two persons at least one of whom is under 18 years of age, and Article 12 stresses the need to take the requisite legislative measures to prevent child marriage by setting the minimum marriage as 18. Article 13 § 1 thereof recommends member states of the Council of Europe to ratify the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages dated 7 November 1962, if they have not yet done so. In Article 14 § 2 (1) encourages the member states to adapt their domestic legislation so as to raise the minimum statutory age of marriage

for women and men to the age of 18, and Article 14 § 3 encourages member states to regard the victims of forced marriage and child marriage as the victims of rape and to define acts pertaining to such marriages, including to aid and abet in such acts, as an independent criminal offence.

62. Paragraphs 13 and 20 of the general comments of the UN Committee, in the years of 2001-2006, on the Rights of the Child concerning the Convention on the Rights of the Child are as follows:

"13. Children have the right not to have their lives arbitrarily taken, as well as to benefit from economic and social policies that will allow them to survive into adulthood and develop in the broadest sense of the word. State's obligation to materialize the right to life, survival and development also highlights the need to give careful attention to sexuality as well as to the behaviours and lifestyles of children, even if they do not conform to what society determines to be acceptable under prevailing cultural norms for a particular age group. In this regard, the girl-child is often subject to harmful traditional practices, such as early and/or forced marriage, which violate her rights and make her more vulnerable to HIV infection, because such practices for posing an obstacle before education and information. Effective prevention programmes are only those that acknowledge the realities of the lives of adolescents, while addressing sexuality by ensuring equal access to appropriate information, life skills, and to preventive measures.

20. The Committee is concerned that early marriage and pregnancy are significant factors in health problems related to sexual and reproductive health, including HIV/AIDS. Both the legal minimum age and actual age of marriage, particularly for girls, are still very low in several States parties. There are also non-health-related concerns: children who marry, especially girls, are often obliged to leave the education system and are excluded from social activities. Further, in some State Parties, married children are legally considered adults, even if they are under 18, depriving them of all the special protection measures they are entitled to under the Convention. The Committee strongly recommends that State Parties review and, where necessary, reform their legislation and practice to increase the minimum age for marriage with and without parental consent to 18 years, for both girls and boys."

63. In Paragraph 74 of the general comments of the UN Committee on the Rights of the Child concerning the Convention on the Rights of the

Child in the years of 2008-2011, early-married children (not exclusively forced marriage) are listed within the category of "children in particularly vulnerable situations".

64. In Paragraphs 26 and 27 of the Concluding Observations on Turkey dated 15 June 2012 of the UN Committee on the Rights of the Child, it is noted that in Turkey, the minimum age for marriage is 17 for both boys and girls, and marriage at the age of 16 is permitted in special circumstances with the approval of a judge; that there is a concern that the minimum age for marriage may be not observed, particularly in rural and remote areas; and it is recommended that Turkey consider raising the minimum age of marriage to 18 years and ensure full compliance with this minimum age throughout the country, including in rural and remote areas.

65. According to the report prepared by UNICEF, between 2005 and 2012, while 11% of total marriages in the world were contracted by children under the age of fifteen, 34% of them were contracted by children under the age of eighteen. In the case of Turkey, these rates are 3% and 14% respectively [see UNICEF (2014), t*he State of the World's Children 2014 In Numbers*, p. 82, 83].

66. In the Strategy Paper and Plan of Action on the Rights of Children (2013-2017) prepared by the Ministry of Family and Social Policies (see p. 12), it is indicated that in 2011, 210,740 girls between the ages of 15 to 19 were married, and that the ratio of married girls to the total number of girls in this age group was about 7%.

67. In accordance with the Law no. 4721, legal capacity means a person's capacity to acquire any right by his/her own acts and actions and undertake any obligation thereof. Acquiring legal capacity requires that the person reach the age of majority set by law. Persons with legal capacity also have the capacity of marriage. Pursuant to Article 11 of Law no. 4721, a person becomes mature when he/she reaches the age of 18 years. Article 124 of the aforementioned Law sets forth that minors over the age of seventeen may contract marriage with the permission of their legal representative; and that a man or a woman over the age of sixteen may be permitted to contract marriage, in special circumstances and for a significant reason with the approval of a judge. Consequently, the provisions on the age

of marriage in Law no. 4721 are not inconsistent with the international conventions.

68. The difficulty of ensuring self-defence for children and the ability of perpetrators to commit these offences without facing great obstacles render committing sexual abuse on children relatively easier than committing them on adults; and children sustain greater psychological and physiological damages compared to adults as a result of these offences. In this context, one of the most significant positive obligations of the State is to take preventive and deterrent measures against the aforementioned offences. That is because it is particularly underlined in the Constitution, in the international conventions on the protection of children to which Turkey is a party as well as in all international texts that the States must take the necessary measures including enacting effective and deterrent penalties against sexual abuse of children and sexual exploitation (see the judgement of the Court, no. E.2015/42 K.2015/101, 12 November 2015 § 16).

69. Articles 2 and 4 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 9 of the Declaration of the Rights of the Child and Article 34 of the Convention on the Rights of the Child stress that each State Party shall ensure the punishment of those who commit torture or involve in torture by appropriate penalties by taking into account the gravity of their actions and that each State Party shall take the necessary legislative, administrative and judicial measures to prevent acts of torture. Article 18 of the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention) introduces an obligation that each State Party shall criminalize engaging in sexual activities with a child who, according to the relevant provisions of national law, has not reached the legal age of majority for sexual activities.

70. Article 8 of the European Convention on the Exercise of Children's Rights and Article 32 of the Lanzarote Convention indicate that investigations and prosecution of acts of sexual abuse against children which put the welfare of a child in serious danger shall not be dependent upon the report or accusation by a victim.

71. While the choice of the means to secure compliance with Article 3 of the ECHR in the sphere of protection of children is in principle within the State's margin of appreciation, the judgements of the ECHR also set forth the requirement of efficient criminal-law provisions to ensure effective deterrence against grave acts such as sexual abuse, where fundamental values of private life and persons' corporeal and spiritual integrity are at stake. In the provision of protection, States are vested a wide margin of appreciation by taking into account differences in the perceptions of a cultural nature, local circumstances and traditional approaches. The limits of the national authorities' margin of appreciation are nonetheless set by the Convention provisions (see *M.C. v. Bulgaria*, §§ 150, 154, 155; and *X and Y v. the Netherlands*, no. 8978/80, 26 March 1985, §§ 23, 24).

72. In accordance with the aforementioned international conventions and the judgements of the ECHR, necessary legislative arrangements have been introduced so as to ensure that children are protected from abuse of any nature. In line with Article 1 of the Convention on the Rights of the Child and Article 3 of the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse as well as other international conventions, each individual under the age of 18 is recognized as a child in Article 6 § 1 (b) of Law no. 5237 and Article 3 § 1 (a) of Law no. 5395.

73. Law no. 5237 repealing the Turkish Criminal Law no. 765 and dated 1 March 1926 embodies provisions different from those in Law no. 765 with regard to offences against sexual inviolability. Sex offences included in Section 8, titled "Offences against Public Decency and Order of Family", of Volume II, titled "Offences", of Law no. 765 are laid down in Part 6, titled "Offences against Sexual Inviolability", of Chapter II, titled "Offences against the Person", of Volume II, titled "Special Provisions", of Law no. 5237. In regulating these offences within the scope of Law no. 5237, the legislator replaced the concepts of "rape, statutory rape, catcalling and molestation" set forth in Law no. 765 with concepts of "sexual assault" for adults and "sexual abuse" for children based on the age of the victim, and criminalized "sexual assault" in Article 102 and "sexual abuse of children" in Article 103 (see the judgement of the Court, no. E.2015/43 K.2015/101, 12 November 2015 § 15).

74. As set forth in the aforementioned judgement of the General Assembly of Criminal Chambers of the Court of Cassation, upon examining the offences against sexual inviolability set out in Law no. 5237, it is seen that the material element of sexual assault against adults prescribed in Article 102 is based upon lack of consent. In other words, the consensual acts of sexual assault against persons over the age of 18 are not considered as an offence. However, with regard to the acts of sexual abuse of children set forth in Article 103, the question whether the child has consented to his abuse is of no importance. On the other hand, in all non-consensual sexual acts against victims under the age of 18, children are divided into two groups based on age in determination of their victim status.

75. With regard to children under the age of fifteen which constitute the first group, not only whether they give consent to acts of offence is of no consequence, but use of force, threat, fraud or another reason affecting the will is not also sought in establishing the material element of the offence. In other words, for all sexual acts against children in this age group, declaration of consent by the child does not decriminalize the act. Acts, committed against the second group of children who are over the age of fifteen and who have the ability to understand the legal consequences of such an act, constitute a crime only when the acts are committed by force, threat, fraud or another reason affecting the will.

76. In this categorization formulated by taking into account the impact of the offence on the victim, the legislator acknowledged that it is not possible for the first group of children under the age of fifteen to comprehend the significance and severity of the sexual act committed against them since as they lack the adequate physiological and physical maturity and that their consent to sexual acts is thus null and void. Hence, the legislator places children under the age of fifteen under absolute protection (see the judgement of the Court, no. E.2014/43 K.2015/101, 12 November 2015, § 18). Children over the age of fifteen are also put under absolute protection against acts of sexual abuse committed by force, threat, fraud or another reason affecting the willpower.

77. The present arrangement in Article 103 of Law no. 5237 is in compliance with the obligation to set a minimum age limit to criminalize

engaging in sexual activities with a child who has not reached the legal age of majority for sexual activities, which is set forth in Article 34 of the Convention on the Rights of the Child and Article 18 of the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse. This arrangement is also in compliance with the international provisions, set forth in Article 8 of the European Convention on the Exercise of Children's Rights and Article 32 of the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse, which set forth that the investigation and prosecution of non-consensual acts of sexual abuse against all children under the age of 18 and of acts of sexual abuse which put the welfare of a child in serious danger shall not be dependent on the report or accusation by a victim.

78. Sexual intercourse (consensual) with the second group of children, who are over the age of fifteen and who have the ability to understand the legal significance and consequences of such an offence, without using force, threat and fraud is prescribed as the offence of "sexual intercourse with a minor" in Article 104 § 1 of Turkish Criminal Code no. 5237. For this act to constitute a crime, the victim who is over the age of fifteen must not "consent" to sexual intercourse on the date of the offence. Furthermore, the victim must file a criminal complaint against the perpetrator of sexual intercourse after the offence is committed.

79. As is seen, the Turkish Criminal Code no. 5237 does not grant children over the age of fifteen full sexual freedom. Having regard to the possibility that these children may not foresee the legal and actual consequences of consensual sexual intercourse even if they have the capacity to act, the legislator demanded their protection against premature sexual experiences. For the purpose of ensuring effective protection of children against acts of sexual abuse, the Turkish Criminal Code no. 5237 prescribes the "age of consent to sexual intercourse", in other words "age of puberty for sexual activities" as eighteen years. Having regard to the fact that the present age limit is the highest among the member states of the Council of Europe [see Council of Europe [2014], *Handbook for the Members of the Parliament, Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse [Lanzarote Convention]*, p. 22] and that the investigation and prosecution of all acts of sexual abuse

against children under the age of fifteen and of non-consensual acts of sexual abuse against children over the age of fifteen shall not be dependent on the report or accusation by a victim, it is understood that the State has introduced the appropriate and sufficient legal arrangements in terms of its positive obligations for the protection of children against sexual abuse.

80. Moreover, in terms of protecting the child victims of crime, the facts that these children are included among the group of children in need of protection in Article 3 of Law no. 5295 and that when necessary, Article 5 of the aforementioned Law creates the possibility of enforcing protective and supportive measures such as counselling, education, care, health and shelter; that administrative and judicial authorities, law-enforcement officers, persons and institutions are liable to notify the Social Services and Child Protection Agency of children in need of protection; that children's bureaus and specialized child units have been established within the body of public prosecutor's offices and law enforcement offices respectively; that child victims are required to be represented by an attorney so that they have access to legal assistance pursuant to Articles 234 and 236 of Law no. 5271; and that a specialist in psychology, psychiatry, medicine or education must be present during their interrogation are the other manifestations of the obligation to make appropriate legal arrangements in the legislation.

81. The 2009 Report on Reviewing Early Marriages of the Committee on Equality of Opportunity for Women and Men of the Grand National Assembly of Turkey (pp. 8 and 9) has voiced the following considerations:

> *"In our society, families may marry off their daughters under the age of fifteen. If this situation becomes known, a legal action is taken against the suspect along with his mother and father and against the victim's mother and father for complicity in this offence. Even if the victim officially contracts marriage with the suspect when she reaches seventeen years of age, it is not possible to evade penalty through marriage since an arrangement similar to Article 434 of the abolished Turkish Criminal Law no. 765 does not exist within the new Turkish Criminal Code. Therefore, the husband of the victim [the person with whom she unofficially lives together], her parents and her parents-in-law stand trial and are punished for this offence. According to Article 104 of the*

Turkish Criminal Code, titled "Sexual intercourse with a minor", any person who engages in sexual intercourse with a child over the age of fifteen without using force, threat and fraud, is sentenced to imprisonment from six months to two years upon complaint. Even though engaging in sexual intercourse with a minor is defined as a substantive felony in the aforementioned article, when a child who is over the age of fifteen is unofficially married off, the spouse who engages in sexual intercourse with this child is not punished unless a criminal complaint is filed. In this context, only the victim is accorded the right to raise a complaint. Unless the victim files a criminal complaint, the person shall not be punished. Since persons under the age of 18 are still children even if they are recognized an adult through a court decision, it is disputable to which extent they would have a sound understanding of the concept of complaint for being a minor. It is highly difficult for a girl of fifteen years old to file a criminal complaint against the person who is chosen as her husband at the expense of his imprisonment, which would in return cause harm mostly to the girl in question. In terms of the Turkish Criminal Law, in general terms, the male perpetrator who unofficially marries the girl must receive a punishment within the scope of Articles 103 and 104 of the aforementioned law. Moreover, Article 38 [or 39] of the Turkish Criminal Code prescribes a penalty for the legal representative, guardian or trustee as the abettor [or accessory before the act] allowing this marriage.

82. The offences of sexual abuse of a child and sexual intercourse with a minor, set forth in Articles 103 and 104 of the Turkish Criminal Code no. 5237, are a penal sanction of the prohibition of marriage imposed upon children under the age of seventeen as prescribed in Law no. 4721. Accordingly, in all acts of sexual abuse against children under the age of fifteen, in all non-consensual acts of sexual abuse against children over the age of fifteen and in all offences of sexual intercourse with a minor committed with the consent of a child over the age of fifteen, each of the actors committing the act set forth in the statutory definition of the offence and other persons who aid and abet – even if they are the parents of the victim – have liability respectively as principal offenders and abettors or accessories of the criminal act. The parents, who marry off their child who is either under or over the age of fifteen, have criminal liability pursuant to the provisions on complicity.

ii. Obligation of Prevention

83. In accordance with the fundamental approach adopted by the Constitutional Court with regard to the positive obligations of the State within the scope of the prohibition of torture and ill-treatment, in cases occurring under the conditions which may call for the liabilities of the State, Article 17 of the Constitution assigns the State the duty of duly enforcing the legal and administrative framework created on the present matter by making use of all available facilities so as to protect persons whose corporeal and spiritual existence is at risk and of taking effective administrative and judicial measures to eliminate and penalize the violations of the prohibition of torture and ill-treatment (see *Serpil Kerimoğlu and Others*, § 52).

84. As is seen, the obligation to protect arising from the State's position as the guarantor of the prohibition of torture and ill-treatment requires the State to take both legal and actual measures on the present matter (for a similar judgement of the ECHR, see *A. v. United Kingdom*, no. 25599/94, 23 September 1998, § 24). Furthermore, these measures should provide effective protection, in particular, for children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have been aware (see *Z. and Others v. United Kingdom*, no. 29392/95, 10 May 2001, § 73).

85. Regard being had to the unpredictability of human conduct and the preference of the step to be taken by investigative authorities according to the existing priorities and resources, the obligation of prevention incumbent on the investigation authorities for the purpose of preventing or deterring offences must be interpreted in a way which does not overburden the authorities. For the obligation of prevention to arise, it must be established that the public authorities knew or ought to have known at the time of existence of a real and immediate risk to the corporeal and spiritual existence of a given individual and that they failed to take measures within the scope of their powers which might have been reasonably expected to avoid that risk. However, this fact must be evaluated within the specific circumstances of each case (see *Serpil Kerimoğlu and Others*, § 53).

86. According to the information and documents within the application file and the decision of non-prosecution, it has been revealed that in the period lasting over seven months during which the applicant, who had been friends with the suspect for a while before starting unofficially living together and who was then engaged to the suspect through a religious marriage ceremony (the date of engagement could not be specified based on the statements included in the application file) unofficially lived with him, the applicant did not exercise her right to raise a complaint to prompt the initiation of an official investigation and therefore it was not possible for the authorities to have known or estimated the existence of a real and immediate risk to the applicant in terms of the imputed acts (for a similar judgement of the ECHR, see *Opuz v. Turkey*, no. 33401/02, 9 June 2009, § 153). It is therefore understood that the State's the obligation of prevention was not violated.

87. Consequently, the Constitutional Court held that the prohibition of torture and ill-treatment guaranteed in Article 17 § 3 of the Constitution was not violated under its substantive aspect.

b. Alleged Violation of the Prohibition of Torture and Ill-Treatment under its Procedural Aspect

88. It is elaborated in the above-section that in the present case, the State does not bear a liability within the scope of the obligation to protect individuals from torture and ill-treatment. The positive liabilities of the State within the scope of the prohibition of ill-treatment also have a procedural aspect. Within the framework of this procedural liability, the State is obliged to conduct an effective investigation to ensure that those responsible for each case of ill-treatment are identified and punished. The main aim of this investigation is to ensure the effective implementation of law that protects human dignity and to hold the public officials or other individuals accountable for their actions constituting ill-treatment (see *Cezmi Demir and Others*, § 110).

89. Article 17 § 3 of the Constitution and Article 3 of the Convention specify the absolute nature of the prohibition of torture and inhuman or degrading treatments or punishments without foreseeing any limitation. The absolute nature of the prohibition of ill-treatment does not foresee an

exception, even in times of war or another general emergency threatening the life of the nation as specified in Article 15 of the Constitution. With a similar provision, Article 15 of the Convention also does not foresee any exception to the prohibition of ill-treatment (see *Turan Günana*, no. 2013/3550, 19 November 2014, § 33).

90. The aim of the criminal investigation is to ensure the effective enforcement of the legislation provisions protecting the corporeal and spiritual existence of a person and to hold those responsible accountable. This is not an obligation of result but of means. In addition, the assessments included herein do not mean, under any circumstances, that Article 17 of the Constitution grants the applicants the right to have third parties prosecuted or sentenced for a criminal offence or imposes an obligation to conclude all proceedings in a verdict of conviction or a specific penalty (see *Serpil Kerimoğlu and Others*, § 56).

91. Allegations of torture and ill-treatment must be substantiated by proper evidence. Reasonable evidence beyond reasonable doubt must exist in order to verify the authenticity of the alleged events. Any evidence of this nature may consist of serious, clear and consistent indications or of certain unrebuttable presumptions. It is possible to establish the existence of ill-treatment solely through the determination of these conditions (see *Cuma Doygun*, no. 2013/394, 6 March 2014, § 28).

92. The criminal investigations to be conducted must be effective and sufficient to the extent that would allow the identification and punishment of those responsible. An effective and sufficient investigation requires that the investigative authorities act *ex officio* and gather all the evidence capable of clarifying the incident and identifying those responsible. Hence, the investigation required by the allegations of ill-treatment must be conducted independently, promptly and in an in-depth manner. In other words, the authorities must solemnly attempt to learn the facts and events and avoid relying on rapid, unfounded conclusions in order to conclude the investigation or justify their decisions. Within this context, the authorities must take all reasonable measures so as to gather the evidence relevant to the present case including eyewitness statements and criminalist expert examinations along with other evidence (see *Cezmi Demir and Others*, § 114).

93. It is essential for authorities to act promptly in the investigation into the complaints of ill-treatment. Nevertheless, it must be acknowledged that there may be obstacles or complications hindering the progress of an investigation in any given situation. However, in investigations of ill-treatment, it is required for authorities to conduct the investigation at a maximum speed and with utmost diligence so as to ensure adherence to the state of law, avoid impressions of tolerance or encouragement towards unlawful acts, prevent any possibility of deception or unlawful acts and maintain confidence in the public (see *Cezmi Demir and Others*, § 117).

94. The applicant, who was sixteen years old at the relevant time when the impugned acts took place and who, for a while, had previously been friends with the suspect A.L. who was twenty-four years old, maintained that she had to drop out of school and quit her job due to the oppression, threats and coercion by the suspect; that they held a religious marriage ceremony; that the suspect threatened her mother, B.C. who was accompanying the applicant's grandmother at the hospital; that they started to live together following the wedding ceremony held on 15-16 October 2011; that they had sexual intercourse one day after the wedding and engaged in sexual intercourse a total of five or six times during the period they lived together; that the suspect committed acts of threat, insult and injury on different dates; and that she broke up with him on 4 June 2012.

95. Within the scope of the investigation, the law enforcement officers took the statements of the applicant, the applicant's father and the suspect A.L. The suspect noted in his defence submissions that they held a wedding ceremony on 15 October 2011 upon the free will of the applicant and both of their families; that they could not contract an official marriage since the applicant was a minor; that they had consensual sexual intercourse after holding the wedding ceremony; that they were separated as the applicant cheated on him. He submitted text messages alleged to be sent to the applicant's mobile phone by other men, their wedding invitation and photos taken at their wedding ceremony for being included in the file as evidence. There is any explanation in the statements of neither the suspect nor the applicant as to the date when the last sexual intercourse took place.

96. The chief public prosecutor's office acknowledged that the sexual intercourse took place on a consensual basis given the statements of the applicant's family assenting to the marriage, the photos taken at the wedding ceremony, the wedding invitation, the defence submissions of the suspect indicating that the family filed a complaint against him for making the applicant return to her family upon cheating on him and the content of the text messages sent by the applicant to the suspect. Accordingly, a decision was non-prosecution was rendered on the grounds that the complaint was lodged more than one year after the incident.

97. A decision of non-prosecution had been rendered on the grounds that the elements of crime were not established with regard to the offense of depriving an individual of her liberty for sexual purposes as the applicant had consented to sexual intercourse; and that with regard to the offences of threat and insult, there was no plausible evidence beyond the intangible allegations of the applicant sufficient enough to initiate a prosecution. In the decision, there was no assessment as to the allegations of intentional wounding.

98. Within the framework of the procedural liability, the State is obligated to conduct an effective official investigation to ensure that those responsible for all acts of physical and psychological assault are identified and punished when required. The main aim of such an investigation is to ensure the effective implementation of law that prevents the aforementioned assaults and to hold the public officials or institutions accountable for these assaults. Moreover, the outcome of the conducted investigation must not create an impression of tolerance towards acts of torture and ill-treatment.

99. Paragraphs 234 and 236 of the Istanbul Protocol and Articles 2 and 6 of the Annex I to the Istanbul Protocol indicate that the acts of torture and ill-treatment imposed upon the victims would have psychological effects such as PTSD (Post-Traumatic Stress Disorder) and major depression in the context of personality development and socio-cultural factors; and that the forensic examination reports to be prepared must evaluate the link between physical and psychological findings and torture and ill-treatment. It is understood that even though the forensic examination report of the applicant stated that an examination by child psychiatry

would be appropriate for determination of the effects of the imposed acts on her mental health and in spite of the assessment report as to the forensic evaluation prepared by a social service specialist indicating that the applicant's right leg was shaking intensely throughout the session, that she cried as she talked about the events, that she constantly fidgeted her hands, that they had to take two breaks from the session, that the applicant's psychological state was not good and that it would be, therefore, appropriate for her to receive treatment in a juvenile psychiatric clinic (see § 14), no psychological/psychiatric examination was conducted.

100. As set forth in the general principles section, it is essential for authorities to act promptly in the investigations into the complaints of torture and ill-treatment. In the present case, the fact that the genital examination was conducted and the battery report was drawn up fourteen days after the applicant's attorney had personally filed a complaint before the chief public prosecutor's office is considered as a delay that may have caused certain evidences to disappear.

101. Even though the investigative authorities are not obligated to consider all allegations and to meet all demands regarding the progress of the case and the gathering of evidence in investigations to be conducted in accordance with Article 17 of the Constitution, the fact that witnesses who may potentially have information on the case were not interrogated at all stands as a significant deficiency (see *Yavuz Durmuş and Others*, no. 2013/6574, 16 December 2015, §§ 61, 62). The fact that the statements of the applicant's mother and grandmother were not taken despite the allegations of threat alleged to have taken place at the hospital and that neither the applicant nor the suspect was asked to clarify the date of the last sexual intercourse even though the act is alleged to have taken place in a successive manner demonstrates that due diligence was not exercised in the investigation for the identification and punishment of those responsible.

102. In cases concerning the prohibition of torture and ill-treatment, specified in Articles 15 and 17 of the Constitution in absolute terms with no grounds for limitation and with no foreseen exceptions even in times of war or another general emergency threatening the life of the nation, the investigations must be conducted with maximum diligence. The fact that

in the decision of non-prosecution rendered at the end of the investigation initiated and maintained by the public prosecutor on the assumption that the applicant consented to the sexual intercourse, there was no discussion on the allegations maintaining that the sexual intercourse took place by force, that the text messages sent by third parties to the applicant's mobile phone were considered to be sent by the applicant to the suspect and were taken as the basis for the existence of consent indicate that due diligence was not exercised in the collection and assessment of evidence.

103. Although, with regard to the acts considered to fall into the scope of "sexual intercourse with a minor" and alleged to be performed in a successive manner, the date of offence and thereby the starting date of the six-month period during which the complaint petition would be submitted are the date when the last sexual intercourse took place and although the applicant maintained that they had engaged in sexual intercourse for five or six times during the period they had lived together, any step was not taken during the investigation stage for determination of the date of offence, and it was accepted contrary to the ordinary flow of life that such act had been performed voluntarily only on 15-16 October, the date of wedding ceremony. It was accordingly acknowledged that such kind of subsequent acts had been also performed voluntarily, and consequently held that the criminal complaint had not been filed within the prescribed period. All of these facts reflect the opinion that the investigative authorities failed to struggle for revealing the allegations of ill-treatment in a serious manner and reached unfounded conclusions.

104. In the allegations of torture and ill-treatment, public prosecutors have an obligation to investigate the facts of an incident and to initiate an investigation in order to determine whether there is enough room to start a prosecution as soon as they are notified of a potential criminal act either by report or by any other means. In her complaint petition and statement, the applicant alleged that the suspect had battered her on various dates. However, any assessment was not made with regard to such allegations in the decision of non-prosecution. It has been concluded that there was a breach of Article 17 § 3 of the Constitution under its procedural aspect on the grounds that although the applicant asserted an arguable allegation of torture and ill-treatment in conjunction with the other evidence in the

investigation, in the present case, these allegations had not been subject to investigation.

105. It has been consequently held by the Constitutional Court that there was a breach of the prohibition of torture and ill-treatment, guaranteed in Article 17 § 3 of the Constitution, under its procedural aspect.

3. Application of Article 50 of Code no. 6216

106. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, reads as follows:

"(1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled…

(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."

107. The applicant requested re-opening of the investigation against the suspect. She did not claim any compensation.

108. It has been concluded that there was a breach of the prohibition of torture and ill-treatment under its procedural aspect in the present case.

109. As there exists legal interest in re-opening of the investigation to redress the consequences of the violation of the prohibition of torture and ill-treatment, it has been concluded that a copy of the judgement must be sent to the Kayseri Chief Public Prosecutor's Office.

110. The total court expense of 1,998.35 Turkish liras ("TRY") including the court fee of TRY 198.35 and counsel fee of TRY 1,800, which is calculated over the document in the case file, must be reimbursed to the applicant.

V. JUDGMENT

The Constitutional Court UNANIMOUSLY held on 11 May 2016 that

A. The applicant's request for non-disclosure of her identity in public documents be ACCEPTED;

B. The alleged violation of the prohibition of torture and ill-treatment be DECLARED ADMISSIBLE;

C. 1. The prohibition of torture and ill-treatment, guaranteed in Article 17 § 3 of the Constitution, was NOT VIOLATED under its substantive aspect;

2. The prohibition of torture and ill-treatment, guaranteed in Article 17 § 3 of the Constitution, was VIOLATED under its procedural aspect;

D. A copy of the judgment be SENT to the Kayseri Chief Public Prosecutor's Office for redress of the consequences of the violation of the prohibition of torture and ill-treatment;

E. As the applicant did not demand compensation, there would be NO GROUND to render a decision on this matter;

F. The total court expense of TRY 1,998.35 including the court fee of TRY 198.35 and counsel fee of TRY 1,800 be REIMBURSED TO THE APPLICANT;

G. The payment be made within four months as from the date when the applicants apply 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; and

H. A copy of the judgment be SENT to the Ministry of Justice.

RIGHT TO PERSONAL LIBERTY AND SECURITY (ARTICLE 19)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

ERDEM GÜL AND CAN DÜNDAR

(Application no. 2015/18567)

25 February 2016

On 25 February 2016, the Plenary of the Constitutional Court found violations of the applicants' right to personal liberty and security safeguarded by Article 19 of the Constitution as well as freedoms of expression and the press respectively safeguarded by Articles 26 and 28 of the Constitution in the individual application lodged by *Erdem Gül and Can Dündar* (no. 2015/18567).

THE FACTS

[9-39] Some trucks, alleged to have been loaded with weapons, were stopped and searched in Hatay and Adana on 1 January 2014 and 19 January 2014 respectively. The issues related to stopping and search of these trucks, the materials in these trucks and where they were being taken had been a matter of public debate for a long period of time. In this context, a daily newspaper, Aydınlık, in its issue of 21 January 2014, published news alleging that these trucks were carrying weapons and ammunition and a photo related to such allegations.

Approximately sixteen months after this publication, Can Dündar, one of the applicants, published in the 29 May 2015 issue of the Cumhuriyet daily newspaper the photographs and information related to the weapons and ammunitions alleged to have been found on the trucks. In the 12 June 2015 issue of the same newspaper, another news on the same incident was published by Erdem Gül, the other applicant.

After the publication of the news by Can Dündar, the chief public prosecutor's office made a press statement on 29 May 2015 and announced that an investigation was launched on the charges of "obtaining information related to the security of the State, conducting political and military espionage, disclosing information that must be kept confidential and making propaganda of a terrorist organization". Approximately six months after this announcement, the applicants were summoned by phone on 26 November 2015 to have their statements taken, and they were detained on charges of "aiding the FETÖ/PDY (Parallel State Structure) armed terrorist organisation without being a member of it and obtaining

and disclosing information that, due to its nature, must be kept confidential for reasons related to the security or domestic or foreign political interests of the State, for the purpose of political or military espionage". The applicants challenged the detention order against them; however, their challenge was rejected. Thereupon, the applicants lodged an individual application with the Constitutional Court.

IV. EXAMINATION AND GROUNDS

40. The Constitutional Court, at its session of 25 February 2016, examined the application and decided as follows.

A. The Applicants' Allegations

41. The applicants maintained that they had been engaging in journalism for many years; that they had never been found guilty for their news, documentaries or articles during the period they worked as journalists; that the incident related to the stopping of trucks had been an issue on the public agenda; that this issue had also been mentioned in many television news and other newspapers and that even many politicians had made statements on this issue; that the news they had made concerned an incident having an important place on the public agenda and aimed at enlightening the public; that an investigation had been launched against them upon the publication of the news, and six months later they were detained on remand after their statements were taken; that there was no strong indication of guilt which justified the detention order against them; that they had never fled nor destroyed or tampered with evidence; and that although it had been stated that the chief public prosecutor's office had launched an investigation against them following the impugned news they had made, they could not effectively apply to a judicial authority due to a restriction order that had been issued within the scope of the investigation. In this regard, the applicants alleged that their right to personal liberty and security enshrined in Article 19 of the Constitution, as well as, their freedoms of expression and the press stipulated in Articles 26 and 28 of the Constitution were violated, and they requested that the consequences of the alleged violations be redressed.

B. The Court's Assessment

1. Admissibility

a. Alleged Denial of Access to the Investigation File

42. The applicants claimed that they could not effectively challenge the detention order before a judicial authority due to a restriction order that had been issued within the scope of the investigation.

43. The Ministry, in its observations, stated that the İstanbul Magistrate Judge's Office no. 1 had issued a restriction order; that the applicants' challenge to this order had been dismissed by the İstanbul Magistrate Judge's Office no. 2; that the applicants had been informed of the offences they were charged with in the records of statement; that they had been asked questions about the imputed offences; and that during the interrogation, the document ordering their arrest which included the charges against them had been read to the applicants. Within this context, it was stated that the applicants had been able to give statements in the presence of their counsels, to effectively defend themselves against the questions addressed to them and to submit their complaints as to the procedure and the merits in detail at all stages. Given all these points, it was recalled that the applicants had been informed of the offences they had been charged with during the interrogation; that they had been provided with opportunities to refute the claims against them; that they had had information about the primary facts included in the file; that among the evidence forming a basis for the offences they had been charged with, they had learned about those which had been of special importance in terms of examining the lawfulness of their detention; and that they had effectively been able to challenge them.

44. In their counter-statements against the Ministry's observations, the applicants, referred, apart from their claims stated in the application form, to certain judgments of the Constitutional Court ("the Court") and the European Court of Human Rights ("the ECHR") and maintained that the restriction of their access to the investigation file revealed that there was no evidence against them, but the content of the impugned news.

45. Article 19 § 8 of the Constitution provides 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."

46. Pursuant to the aforementioned provision of the Constitution, persons whose liberties are restricted 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. During the judicial process to be carried out under this provision, although it is not possible to provide all safeguards of the right to a fair trial, the concrete safeguards complying with the nature of detention must be set forth in a judicial decision (see *Mehmet Haberal*, no. 2012/849, 4 December 2013, §§122-123).

47. The principles of "equality of arms" and "adversarial proceedings" must be respected in the review of the continuation of detention or the requests for release (see *Hikmet Yayğın*, no. 2013/1279, 30 December 2014, § 30). The principle of equality of arms means that parties of a case shall be subject to the same conditions in terms of procedural rights and that both parties shall be afforded equal opportunities to submit their allegations and arguments before the courts without any favour to any party (see *Bülent Karataş*, no. 2013/6428, 26 June 2014, § 70).

48. In cases where an arrested person is detained on remand, if he has been informed of the main evidence forming a basis for his detention during his statement before the prosecutor or the investigating judge and if this evidence has been referred to in an appeal against detention, the mere existence of a confidentiality order in the file does not lead to a violation of the safeguards needed to be ensured within the scope of the right to request release due to the alleged unlawfulness of detention (for a similar judgment of the ECHR, see *Ceviz v. Turkey*, no. 8140/08, 17 July 2012, § 43). In such cases, it shall be accepted that the relevant person has adequate information on the content of the documents forming a basis for his detention.

49. In the present case, when the applicants' statements taken by the İstanbul Chief Public Prosecutor's Office were examined, it was observed that the grounds for the investigation had been explained to them and that they were asked questions about the news subject of the investigation. They had also made defence submissions in company with their defence counsels by being aware of the documents and information forming a basis for the accusations against them. It was further understood that while appealing against their detention on remand, the applicants were again able to make detailed explanations on the issues that formed a basis for the accusations against them.

50. For these reasons, the applicants' allegation that they could not effectively challenge the lawfulness of the detention order against them due to the restriction of their access to the investigation file must be declared inadmissible for *being manifestly ill-founded*.

b. Alleged Unlawfulness of Detention on Remand and Alleged Violations of the Freedoms of Expression and the Press

51. The applicants claimed that they were deprived of their liberties unlawfully, arbitrarily and disproportionately; that there was no justification for their detention, that the only ground for the detention order was the news that they had published; and that no evidence except for the published news was adduced against them. Accordingly, they alleged that their right to personal liberty and security and their freedoms of expression and the press were violated.

52. Given the circumstances of the present case, it has been considered that the alleged violation of the applicants' right to personal liberty and security must be examined in conjunction with the alleged violations of their freedoms of expression and the press.

53. Regarding the alleged unlawfulness of the applicants' detention on remand, it was stated in the Ministry's observations, with reference to certain judgments of the ECHR and the Constitutional Court, that in order for a person to be charged with an offence, it was not absolutely necessary to collect sufficient evidence in the course of arrest or detention; that as a matter of fact, the purpose of detention was to conduct the judicial process more properly by substantiating the suspicions forming a

basis for detention during the investigation and/or prosecution; and that accordingly, the facts giving rise to suspicions underlying the accusation must not be assessed at the same level with the facts that would be discussed at later stages of the criminal proceedings and would lead to conviction.

54. In their counter-statements against the Ministry's observations, the applicants stated that the subject-matter of the news they published had previously been discussed in many news. They claimed that the published documents had already been included and needed to have been included in the file of the ongoing criminal investigations against the police officers and the members of the judiciary concerning the stopping of the trucks, and that the public prosecutor's office would not be able to conceal these documents from the defence. In this connection, the applicants maintained that the published photos and documents could not constitute a basis for the offences attributed to them in the detention order; that the acts attributed to them were of an abstract nature; and that at the utmost, the offence of "violation of the confidentiality of the investigation" under Article 285 of Law no. 5237 might have been committed. The applicants alleged that the judge, who ordered their detention within the scope of the questions he addressed to them, relied on the offence of espionage, although he did not know where the documents had been obtained from. The applicants further alleged that the assessment of evidence had explicitly been arbitrary.

55. Regarding the alleged violations of the freedoms of expression and the press, it was stated in the Ministry's observations that the investigation against the applicants was still pending; that the legal remedies needed to be exhausted in order for them to be able to lodge an individual application; that on the other hand, the ECHR also delivered some judgments where it dismissed the Government's allegation concerning non-exhaustion of domestic remedies in certain cases where criminal proceedings were still continuing and decided to join its examination to the merits; and that accordingly, "it is at the discretion of the Constitutional Court to decide whether the ordinary remedies were exhausted or not". The Ministry's assessment on the merits referred to the judgments of the ECHR. It was stated that an assessment was to be made as to whether the detention order

that allegedly constituted an interference with the applicants' freedoms of expression and the press had stemmed from a pressing social need in a democratic society and as to whether a reasonable balance had been struck between the means of interference and the aim pursued.

56. In their counter-statements against the Ministry's observations, the applicants argued, similar to their assertions in the application form, that the impugned news and photos complied with the vital role of the press in a democratic society and that although the interference with the freedom of expression aimed at fulfilling one of the legitimate purposes stipulated in Articles 26 and 28 of the Constitution, it failed to satisfy the requirements of necessity in a democratic society and of proportionality enshrined in Article 13 of the Constitution.

57. In order for an assessment to be able to be made as to whether the legal remedies were exhausted within the scope of the alleged violations of the freedoms of expression and the press, the subject-matter of the application must be determined within the scope of the allegation in question. The subject-matter of the application before the Constitutional Court is the alleged violations of the applicants' freedoms of expression and the press on account of their "detention on remand" on the basis of the news which they had published, and it is not related to the merits of the case or to the probable outcome of the proceedings.

58. In order for an examination as to the alleged violations of the freedoms of expression and the press due to detention, the continuing judicial process does not need to be completed. It is clear that the applicants have exhausted the legal remedies by appealing against their detention on remand which gave rise to their allegations. As a matter of fact, in the application of *Hidayet Karaca* [Plenary] (no. 2015/144, 14 July 2015, §§ 115 and 116), the Constitutional Court reviewed the effects of detention on the freedom of expression prior to the finalization of the investigation and prosecution processes. However, having regard to the facts, the nature of the evidence and the grounds which were relied on in the detention order, the Court found no problem as to the lawfulness of detention, and therefore declared the relevant complaint inadmissible for being manifestly ill-founded.

59. As also stated in the observations of the Ministry of Justice, the ECHR examined the allegations as to the effects of the detention on the freedoms of expression and the press without requiring the finalization of the investigation and prosecution phases and dismissed the Government's objection as to non-exhaustion of domestic remedies (see *Nedim Şener v. Turkey*, no. 38270/11, 8 July 2014, §§ 88-90, 96; and *Şık v. Turkey*, no. 53413/11, 8 July 2014, §§ 77-79, 85).

60. Consequently, the alleged unlawfulness of the applicants' detention on remand and alleged violations of their freedoms of expression and the press must be declared admissible for not being manifestly ill-founded and there being no other grounds to declare them inadmissible.

2. Merits

61. The Constitutional Court's review in the instant case is limited to the lawfulness of the applicants' detention on remand and to the effects of the detention on their freedoms of expression and the press, independently of the investigation and prosecution conducted against the applicants and of the probable outcome of the proceedings. This review will not be conducted into the merits of the applicants' case pending before the court of first instance, and therefore, it does not cover the issue as to whether the publication of the impugned news constituted a crime.

a. Alleged Unlawfulness of the Applicants' Detention on Remand

i. General Principles

62. Right to personal liberty and security is a fundamental right that ensures the prevention of arbitrary interference by the State with the freedoms of individuals (for similar judgments of the ECHR, see *Medvedyev and Others v. France,* no. 3394/03, 29 March 2010, §§ 76-79; *Lütfiye Zengin and Others v. Turkey,* no. 36443/06, 14 April 2015, § 74; and *Assanidze v. Georgia* [GC], no. 71503/01, 8 April 2004, §§ 169, 170).

63. In Article 19 § 1 of the Constitution, it is set out in principle that everyone has the right to personal liberty and security. Certain circumstances under which individuals may be deprived of their freedoms, provided that the procedure and conditions of detention are prescribed by

law, are listed in Article 19 §§ 2 and 3 thereof. Therefore, the freedom of a person may be restricted only in cases where one of the circumstances specified in this article exists (see *Ramazan Aras*, no. 2012/239, 2 July 2013, § 43).

64. Article 19 § 3 of the Constitution reads as follows:

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

65. The relevant provision stipulates that individuals against whom there is strong evidence of having committed an offence may be arrested by decision of a judge solely for the purposes of preventing escape, or preventing the destruction or alteration of evidence, as well as in other circumstances prescribed by law and necessitating detention.

66. In this context, the prerequisite for detention is the existence of a strong indication that the individual has committed an offence. This is a condition *sine qua non* for having recourse to the detention measure. Therefore, the accusation must be supported with plausible evidence likely to be considered strong. Nature of the facts and information which may be considered as plausible evidence is mainly based on the particular circumstances of each case (see *Hanefi Avcı*, no. 2013/2814, 18 June 2014, § 46). However, for accusing a person, it is not absolutely necessary that adequate evidence be available at the stage of his arrest or detention on remand. In fact, the aim of detention is to conduct the judicial process in a more reliable manner by means of substantiating or eliminating the suspicions forming a basis for detention on remand. Accordingly, the facts forming a basis for the suspicions on which the accusation is based and the facts which would be discussed at the subsequent stages of the criminal proceedings and which would be a basis for conviction must not be considered at the same level (see *Mustafa Ali Balbay*, no. 2012/1272, 4 December 2013, § 73).

67. Pursuant to Article 19 § 3 of the Constitution, for a detention order to be given, in addition to the existence of a strong suspicion of guilt, there must also be "a ground for detention". In the relevant provision, grounds for detention are defined as "the prevention of fleeing of individuals against whom there exists a strong indication of guilt, prevention of the destruction and tampering of evidence" and as "the other circumstances prescribed by law and necessitating detention". The grounds for detention are listed in Article 100 of Law no. 5271, where detention is regulated. According to this Article, a "ground for arrest" may be deemed as existing; a) if the suspect or accused had fled, eluded or if there are specific facts which justify the suspicion that he is going to flee; b) if the conduct of the suspect or the accused tend to show the existence of a strong suspicion that he is going to attempt to destroy, hide or tamper with the evidence and to put an unlawful pressure on witnesses, the victims or other individuals. The same article also provides a list of the offences for which a ground for detention may be deemed as existing, in the event that there is a strong suspicion of their having been committed (see *Ramazan Aras,* § 46). Even where a presumption is stipulated in the law, the existence of concrete facts that require an interference with an individual's freedom must be put forth in a way satisfying an objective observer (see *Engin Demir* [Plenary], no. 2013/2947, 17 December 2015, § 66).

68. In addition, detention that is a severe and harsh measure may be deemed reasonable only if it is proven that another less severe measure would not be sufficient for protecting individual's interest and public interest. In this respect, existence of strong indication of guilt for deprivation of liberty is not sufficient for applying detention measure. This measure must also be "necessary" under the specific circumstances of the present case (for a similar judgment of the ECHR, see *Lütfiye Zengin and Others v. Turkey,* § 81). This is also required by the element of "necessity", one of the components of the "proportionality" principle that is among the criteria sought for restricting fundamental rights and freedoms set out in Article 13 of the Constitution (see the Court's judgment no. E.2015/40 K.2016/5, 28 January 2016). In order for a balance required to be respected between the aim pursued and the interference made, measures of conditional bail must be primarily assessed and the question as to why conditional bail

would remain insufficient must be justified in detention orders (see *Engin Demir* [Plenary], § 69).

69. Besides, issues as to the interpretation of law or as to factual or legal errors, which are included in the inferior courts' decisions, cannot be dealt with during the individual application process unless fundamental rights and freedoms enshrined in the Constitution are violated. It is also within the inferior courts' discretionary power to interpret legal provisions on detention and apply them to the present case (see *Ramazan Aras*, § 49). However, it is the Constitutional Court's duty to examine whether the conditions set out in Article 19 § 3 of the Constitution are indicated in the grounds of detention orders which are subject-matter of the individual application and whether the proportionality principle, one of the criteria sought for restriction of fundamental rights and freedoms and set out in Article 13 of the Constitution, has been observed in applying detention measure under the specific circumstances of the present case.

ii. Application of Principles to the Present Case

70. The Cumhuriyet daily newspaper, in its issue of 29 May 2015, contained the news titled "*Here are the weapons Mr. Erdoğan says do not exist* (*İşte Erdoğan'ın yok dediği silahlar*)" and its issue of 12 June 2015 contained the news titled "*The weapons in the MIT trucks Erdoğan says "exist or not" are confirmed by the Gendarmerie to exist – Gendarmerie says they "exist"* (*Erdoğan'ın 'Var ya da Yok' Dediği MİT TIR'larındaki Silahlar Jandarmada Tescillendi-Jandarma 'Var' Dedi*)" concerning the trucks which had been stopped and searched. In the present case, it was claimed that, by publishing these news, the applicants served the organizational purposes of the FETÖ/PDY, an armed terrorist organization, and that they had obtained, for purposes of espionage, the information needed to remain confidential for the security of the State and for its domestic and foreign political interests and disclosed these information. In this connection, the applicants were detained on remand for "aiding and abetting an armed terrorist organisation knowingly and willingly, without being a member of it" under Article 314 § 2 of Law no. 5237 with reference to Article 220 § 7 thereof, for "obtaining information that, by its nature, must be kept confidential for reasons relating to the security or domestic or foreign

political interests of the State, for the purpose of political or military espionage" under Article 328 thereof, and for "disclosing, for the purpose of political or military espionage, the information that, by its nature, must be kept confidential for reasons relating to the security of the State" under Article 330 thereof, respectively.

71. The constitutional review as to whether the right to personal liberty and security has been violated must be primarily conducted concerning the question as to whether there was a "strong indication" of guilt, which is one of the compulsory conditions enumerated in Article 19 § 3 of the Constitution for applying detention measure. Regard being had to the facts that the subject-matter of the application was the detention measure and that there were ongoing proceedings against the applicants, the Constitutional Court restricted this review with the question as to whether reasoning of the detention order issued by the magistrate judge's office and the request letter for detention had indicated the concrete facts revealing the strong suspicion of guilt.

72. During the statement taking process of the applicants before the chief public prosecutor's office, no question was addressed to them as to any fact which might be related to the offences attributed to them, other than the news subject-matter of the application.

73. In the reasoning of the detention order issued against the applicants for "aiding and abetting an armed terrorist organisation knowingly and willingly, without being a member of it", it was stated that by virtue of their profession, the applicants were expected to have known that the news they had published had been related to a terrorist organization against which there had been an ongoing investigation. However, the applicants had published the documents that needed to have been kept confidential for reasons relating to the security of the State, which revealed the existence of a strong suspicion of guilt. In addition, it was pointed out that the imputed offence was among the offences listed in Article 100 § 3 (a)(11) of Law no. 5271. In addition, given the upper limit of the sentence to be imposed due to the imputed offence, it was concluded that application of the provisions related to conditional bail would be insufficient.

74. In the reasoning of the detention order issued against the applicants for "obtaining information in possession of the State that must be kept confidential for the purpose of political or military espionage", it was pointed out that although the applicants had stated that "the facts which were the subject-matter of the documents disclosed in the impugned news had already been discussed by the public previously and they were not a secret", the published documents had in fact been obtained and disclosed for the first time by the applicants, which constituted a strong suspicion of guilt. In addition, given the lower and upper limits of the sentence to be imposed due to the imputed offence, it was concluded that application of the provisions related to conditional bail would be insufficient.

75. The judge's office that examined the applicants' appeal against the detention order dismissed their appeal. In the reasoning of its decision, the judge's office stated that it had been announced to the public that the investigation into the trucks in question had been kept confidential for reasons relating to the security or domestic or foreign political interests of the State. It therefore concluded that the publication of the news by the applicants amounted to the act of aiding and abetting the FETÖ/PDY armed terrorist organization knowingly and willingly.

76. Accordingly, the main fact underlying the decision ordering detention of the applicants was that two news on stopping and searching of the trucks had been published in the Cumhuriyet newspaper. Although the decision ordering the applicants' detention read that "the state of evidence" with regards to the charged crimes was sufficient for their detention, such decision mentioned no evidence other than the said news. The applicants were detained on the charges of publishing the information and photos in the said news for the purposes of "aiding and abetting an armed terrorist organisation knowingly and willingly, without being a member of it" and obtaining and disclosing such information and photos for "political and military espionage purposes". However, the reasoning of the detention order did not sufficiently explain which concrete facts attributable to the applicants led to strong suspicion of guilt that the said news had been published for "political and military espionage purposes". With regards to strong suspicion of guilt concerning "aiding and abetting an armed terrorist organisation knowingly and willingly, without being

a member of it", the reasoning of detention order did not provide any concrete facts other than the opinion that "by virtue of their profession, the applicants were expected to have known that the news they had published had been related to a terrorist organization against which there had been an ongoing investigation".

77. In addition, the news published in another newspaper on 21 January 2014, two days after the stopping and search of the trucks, included a photo and some information pertaining to the materials alleged to be carried by the trucks. In addition to the abstract discussions by the public on what was in the trucks, the facts that similar photos and information had been published approximately sixteen months before the imputed news and that even on the date of examination of the application file they were easily accessible on the internet must be taken into consideration in the determination of the existence of a strong suspicion of guilt.

78. In this context, whether the publication of the news similar to a previously published one continued to pose a threat against national security must be specified in the grounds of the measures to be applied with respect to the impugned news (for a judgment of the ECHR concerning the publication of the previously published confidential information pertaining to national security, see *Observer and Guardian v. the United Kingdom*, no. 13585/88, 26 November 1991, §§ 66-74).

79. On the other hand, it must be assessed whether the detention measure was "necessary" within the scope of the proportionality principle, which is one of the criteria set out in Article 13 of the Constitution. Taking into account the proceedings pending against the applicants, the Court would conduct the constitutional review in respect thereof on the basis of only the detention process and the reasons for the applicant's detention.

80. Can Dündar, one of the applicants, published on 29 May 2015 the first impugned news. On the same day, the İstanbul Chief Public Prosecutor's Office announced to the public that an investigation was launched into the news and requested blocking of access to the content of the said news on the internet, which was considered to be related to national security and to serve for supporting an armed terrorist organization. The incumbent judge's office accepted the request. Later on, the news prepared by Erdem

Gül, the other applicant, was published in the same newspaper on 12 June 2015. The applicants were summoned by phone on 26 December 2015 to have their statements taken and were detained on the same day. During approximately six-month period from the first announcement of the investigation until the date when the applicants were summoned to have their statements taken, the İstanbul Chief Prosecutor's Office did not take the applicants' statements, and no measure was taken against the applicants such as custody or detention on remand. The questions addressed to the applicants and the grounds for their detention did not reveal any evidence –apart from the news published– collected throughout the said period substantiating the allegation that they had committed the crimes they were charged with.

81. In this context, the circumstances of the case and the grounds of the detention order did not sufficiently put forth why it was "necessary" to place the applicants in detention on remand approximately six months after an investigation into the said news had been launched and without considering that similar news concerning an incident giving rise to intense public discussions had been published several months before.

82. Consequently, the Constitutional Court found a violation of the applicants' right to personal liberty and security safeguarded by Article 19 of the Constitution

Mr. Hicabi DURSUN, Mr. Kadir ÖZKAYA and Mr. Rıdvan GÜLEÇ did not agree with this conclusion.

b. Alleged Violations of the Freedoms of Expression and the Press

i. General Principles

83. Relevant part of Article 26, titled *"Freedom of expression and dissemination of thought"*, of the Constitution reads as follows:

> *"Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities…*

The exercise of these freedoms may be restricted for the purposes of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.

(…)

The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law."

84. Relevant part of Article 28, titled *"Freedom of the press"*, of the Constitution reads 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 limitation of freedom of the press, the provisions of articles 26 and 27 of the Constitution shall apply.

Anyone who writes any news or articles which threaten the internal or external security of the State or the indivisible integrity of the State with its territory and nation, which tend to incite offence, riot or insurrection, or which refer to classified state secrets or has them printed, and anyone who prints or transmits such news or articles to others for the purposes above, shall be held responsible under the law relevant to these offences. Distribution may be prevented as a precautionary measure by the decision of a judge, or in case delay is deemed prejudicial, by the competent authority explicitly designated by law. The authority preventing the distribution shall notify a competent judge of its decision within twenty-four hours at the latest. The order preventing distribution shall become null and void unless upheld by a competent judge within forty-eight hours at the latest.

(…)".

85. In several judgments of the Court, basic principles concerning the freedoms of expression and the press are mentioned in detail (see *Fatih Taş* [Plenary], no. 2013/1461, 12 November 2014, §§ 57-67; *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, §§ 30-38; *Ali Rıza Üçer (2)* [Plenary], no. 2013/8598, 2 July 2015, §§ 30-33; *Ergün Poyraz (2)* [Plenary], no. 2013/8503, 27 October 2015, §§ 33-39; and *Medya Gündem Dijital Yayıncılık Ticaret A.Ş.* [Plenary], no. 2013/2623, 11 November 2015, §§ 44).

86. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. It is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see *Handyside v. the United Kingdom*, no. 5493/72, 24 September 1976, § 49). Existence of social and political pluralism depends on the ability to express any kind of opinion freely and in a peaceful manner (see *Emin Aydın*, no. 2013/2602, 23 January 2014, § 41).

87. Freedom of the press, which is a specific aspect of the freedom of expression, is not a safeguard protecting merely the right of the press to impart and disseminate news. It is also directly related to the public's right to receive news and ideas for ensuring democratic pluralism. In particular, it is indispensable in order to ensure the democratic pluralism that the news and ideas within the scope of the debates concerning the public are made accessible to the people and the people are allowed to participate in such debates. In this context, the fact that the press is able to impart news and ideas –within the boundaries of journalism ethics- by fulfilling its tasks as "a public watchdog" also contributes to ensuring transparency and accountability in a democratic society (for similar judgments of the ECHR, see *Von Hannover v. Germany (No. 2)* [GC], nos. 40660/08 and 60641/08, 7 February 2012, § 102; *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, 20 May 1999, §§ 59, 62; and *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, 17 December 2004, § 71). A

healthy democracy requires that the public institutions be supervised not only by the legislative or judicial authorities, but also by other actors such as non-governmental organizations and the press or the political parties that perform activities in the political sphere (see *Ali Rıza Üçer (2)*, § 55).

88. In addition, the freedoms of expression and the press are not absolute rights which may be subject to restrictions. As a matter of fact, the grounds for such restriction are set out in Article 26 § 2 of the Constitution, which concerns the right to expression. In restricting the freedom of the press, Articles 26 and 27 of the Constitution will in principle apply pursuant to Article 28 § 4 thereof. Besides, exceptional circumstances whereby the freedom of the press may be restricted are indicated in Article 28 §§ 5, 7 and 9 of the Constitution (see *Bekir Coşkun*, § 37).

89. Accordingly, the freedoms of expression and the press may be restricted for the purposes of "maintaining national security", "preventing offences", "punishing offenders", "preventing disclosure of information duly classified as State secret" and "prevention of disclosure of confidential information of the State", pursuant to Articles 26 § 2 and 28 § 5 of the Constitution. To that end, it is possible to criminalize, and impose punishment for, the act of disclosing confidential information of the State through press. Nor is there a constitutional obstacle before applying detention measure, during the investigation and prosecution to be carried out, in respect of press members alleged to have performed such acts. As a matter of fact, the ECHR considers that the press must perform its duties within the boundaries of the journalism ethics. The State may impose restrictions on the news to be published by the journalists regarding a very delicate matter such as national security, as well as the public authorities may prevent the publication of certain news on such matters (see *Observer and Guardian v. the United Kingdom*, §§ 61-65).

90. However, the restriction to be imposed on the freedoms of expression and the press must be in conformity with the principles of "being necessary in a democratic society" and "being proportionate", which are among the general restriction criterion stipulated in Article 13 of the Constitution. The principle of being necessary in a democratic society must be interpreted based on pluralism, tolerance and open-mindedness.

The principle of proportionality reflects the relationship between the aim of restriction and the means used to achieve this aim. Inspection of proportionality is the inspection of the means chosen to achieve the aim sought. Therefore, as regards the interferences with the freedoms of expression and the press, it must be assessed whether the means chosen to achieve the aim sought is "appropriate", "necessary" and "proportionate" (see *Fatih Taş*, §§ 90, 92, 96).

91. In this sense, in the assessment of whether a judicial or administrative interference with the freedoms of expression and the press has been "necessary", the Constitutional Court takes into consideration whether it has served "a pressing social need" (see *Bejdar Ro Amed*, no. 2013/7363, 16 April 2015, § 68; for a similar judgment of the ECHR, see *Handyside v. the United Kingdom*, § 48). An assessment to this end shall be made based on the grounds adduced by the public authorities.

ii. Application of Principles to the Present Case

92. Considering the questions addressed to the applicants by the chief public prosecutor's office and the reasoning of the detention order issued against the applicants, no facts were mentioned– except for publishing news in the newspaper– that might constitute a basis for the charges against them. In this context, the applicants' detention on remand, irrespective of the contents of the news, constituted an interference with their freedoms of expression and the press (for the judgments of the ECHR, where detention constituted an interference with the freedom of expression, see *Nedim Şener v. Turkey*, § 98; and *Şık v. Turkey*, § 85).

93. On the other hand, not every interference with the fundamental rights and freedoms leads, per se, to a violation of the right or freedom in question. In order to determine whether an interference violates the freedoms of expression and the press, it must also be examined whether such an interference meets the criteria of being prescribed by law, having legitimate aim, being necessary in a democratic society and being proportionate.

94. There is no doubt that the said interference has a legal basis in the relevant articles of Law no. 5271 and Law no. 5237.

95. Pursuant to Articles 26 § 2 and 28 § 5 of the Constitution, freedoms of expression and the press may be restricted for the purposes of "national security", "preventing crime", "punishing offenders", "withholding information duly classified as a state secret" and "preventing the disclosure of the State's confidential information". Considering the grounds for the detention order and the nature of the crimes charged against the applicants, it is seen that the aim pursued with the detention of the applicants was compatible with the aforementioned purposes of restriction set forth in the Constitution.

96. The fact that the interference had a legal basis and pursued a legitimate aim is not sufficient alone to justify that the interference did not lead to a violation. For an assessment as to whether the applicants' detention on remand violated their freedoms of expression and the press, the facts of the case must also be reviewed in terms of "being necessary in a democratic society" and "being proportionate". The Constitutional Court shall carry out such a review having regard to the detention process and to the reasoning of the detention order.

97. Regard being had to the foregoing assessments on the lawfulness of the applicants' detention on remand and considering that the only fact taken as a basis for the accusations against the applicants was the publication of the relevant news, a severe measure such as detention, which did not meet the criteria of lawfulness, cannot be considered proportionate and necessary in a democratic society.

98. Furthermore, the applicants were detained approximately six months after an investigation into the impugned news had been launched and without considering that similar news had been published sixteen months before in another newspaper, which constituted an interference with their freedoms of expression and the press. The circumstances of the present case and the reasoning of the detention order did not put forth any "pressing social need" that gave rise to such an interference and its necessity in a democratic society to ensure the national security.

99. In addition, in the assessment of the necessity in a democratic society and of the proportionality, the potential "deterrent effect" of the interferences with the freedoms of expression and the press on the

applicants and in general the press must be taken into account (see *Ergün Poyraz (2)*, § 79; for similar judgments of the ECHR, see *Nedim Şener v. Turkey*, § 122; and *Şık v. Turkey*, § 111). In the present case, it is also clear that the applicants' detention on remand in the absence of concrete facts, apart from the news published by them, and there being no grounds substantiating their detention, may have a deterrent effect on their freedoms of expression and the press.

100. Consequently, the Constitutional Court found violations of the applicants' freedoms of expression and the press, respectively safeguarded by Articles 26 and 28 of the Constitution, in conjunction with their right to personal liberty and security safeguarded by Article 19 of the Constitution, which was also found to have been violated.

Mr. Hicabi DURSUN, Mr. Kadir ÖZKAYA and Mr. Rıdvan GÜLEÇ did not agree with this conclusion.

3. Application of Article 50 of Code no. 6216

101. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, reads as follows:

> *"1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled. However, legitimacy review cannot be done, decisions having the quality of administrative acts and transactions cannot be made.*
>
> *(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."*

102. The applicants did not seek compensation. They requested that the violation be redressed.

103. It was concluded that the applicants' right to personal liberty and security, as well as their freedoms of expression and the press were violated.

104. It must be ordered that a copy of the judgment be sent to the 14th Chamber of the İstanbul Assize Court in order to redress the violation.

105. The court fee of 226.90 Turkish liras (TRY), which is calculated over the documents in the case file, must be reimbursed to the applicants respectively; and the counsel fee of TRY 1,800, which is calculated over the documents in the case file, must be reimbursed to the applicants jointly.

V. JUDGMENT

For the reasons explained above, the Constitutional Court held on 25 February 2016:

A. 1. UNANIMOUSLY that the alleged denial of access to the investigation file within the scope of the right to personal liberty and security be DECLARED INADMISSIBLE for being *manifestly-ill founded*;

2. UNANIMOUSLY that the alleged unlawfulness of detention on remand within the scope of the personal liberty and security be DECLARED ADMISSIBLE;

3. UNANIMOUSLY that the alleged violations of the freedoms of expression and the press be DECLARED ADMISSIBLE;

B. By MAJORITY and by dissenting opinion of Mr. Hicabi DURSUN, Mr. Kadir ÖZKAYA and Mr. Rıdvan GÜLEÇ, that the right to personal liberty and security safeguarded by Article 19 of the Constitution was VIOLATED;

C. By MAJORITY and by dissenting opinion of Mr. Hicabi DURSUN, Mr. Kadir ÖZKAYA and Mr. Rıdvan GÜLEÇ, that the freedoms of expression and the press safeguarded respectively by Articles 26 and 28 of the Constitution was VIOLATED;

D. That a copy of the judgment be SENT to the 14th Chamber of the İstanbul Assize Court in order to redress the consequences of the violation;

E. That the court fee of TRY 226.90 be REIMBURSED to the applicants respectively; and the counsel fee of TRY 1,800 be REIMBURSED to the applicants jointly;

F. That the payment be made within four months as from the date when the applicants apply 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; and

G. That a copy of the judgment be SENT to the Ministry of Justice.

DISSENTING OPINION OF JUSTICE HİCABİ DURSUN

1. The applicants request that the Constitutional Court finds a violation as regards the alleged unlawfulness of their pre-trial detention and alleged violation of their freedoms of expression and the press.

2. Can DÜNDAR, one of the applicants, reported news in the 29 May 2015 issue of the Cumhuriyet newspaper of which he was the editor-in-chief, titled "*Here are the weapons Mr. Erdoğan says do not exist* (*İşte Erdoğan'ın yok dediği silahlar*)". Erdem GÜL, the other applicant, who was the Ankara Representative of the Cumhuriyet, published news in the 12 June 2015 issue of the same newspaper, titled "*Gendarmerie says they exist (Jandarma var dedi)*".

3. On 29 May 2015 the İstanbul Chief Public Prosecutor's Office announced to the public that the contents of these news were considered within the scope of Articles 327, 328 and 330 of the Turkish Criminal Code no. 5237 ("the TCC") as well as Articles 6 and 7 of the Anti-Terror Law no. 3713. Therefore, an investigation was launched against the applicants for the offences such as "obtaining information related to the security of the State, conducting political and military espionage, disclosing information that must be kept confidential and making propaganda of a terrorist organization".

4. The chief public prosecutor's office also requested from the incumbent court that pursuant to Article 8 (a) of Law no. 5651, access to the contents of the news be blocked and that in the event that the contents in question were not removed, access to the relevant websites be completely blocked. The İstanbul Magistrate Judge's Office no. 8 ordered the blocking of access to the news contents in question, on the ground that they might lead to an inconvenient situation as regards the national and international interests, as well as, national security of the Republic of Turkey. The chief public prosecutor's office, relying on the legal qualification of the charges and the evidence available in the file, requested the restriction of access to the investigation file. The İstanbul Magistrate Judge's Office no. 1 issued a restriction order on the investigation file, under Article 153 of the Code of Criminal Procedure ("the CCP"), with a view to ensuring the proper conduct of the investigation.

5. After this decision, the applicant Can DÜNDAR applied to the chief public prosecutor's office and requested to review the investigation file and take a copy of it. The chief public prosecutor's office, pointing out the court's restriction order on the investigation file, dismissed the applicant's request. On 8 June 2015 the applicant filed a challenge with the court requesting that the restriction order be lifted. On 12 June 2015 the İstanbul Magistrate Judge's Office no. 2 dismissed the applicant's challenge.

6. Within the scope of the relevant investigation, the İstanbul Chief Public Prosecutor's Office summoned the applicants on 26 November 2015 and took their statements based on the charges of "*aiding an armed terrorist organisation knowingly, without being a member of it, and obtaining information that, by its nature, must be kept confidential as being related to the security or domestic or foreign political interests of the State, for the purpose of political or military espionage, and disclosing them*". The applicants denied the accusations against them. On 26 November 2015 the İstanbul Magistrate Judge's Office no. 7, relying on the abovementioned charges against the applicants, ordered their detention on remand.

7. The applicants' challenge to the detention order was dismissed by the İstanbul Magistrate Judge's Office no. 8 on 1 December 2015.

After this decision, the applicants lodged an individual application on 4 December 2015. The applicants' subsequent requests for release were also rejected by the magistrate judge's offices.

8. The subject matter of both news published by the applicants related to what was in the trucks that were stopped and searched by the gendarmerie officers in Hatay on 1 January 2014 and in Adana on 19 January 2014 and to where they were going. It was officially stated that the trucks allegedly loaded with weapons and stopped at the Sirkeli Tool Booths in Adana on 19 January 2014 belonged to the National Intelligence Organization ("the MIT") and they were carrying aid to Turkmens in Syria.

9. The 21 January 2014 issue of the Aydınlık newspaper contained the news titled "*Aydınlık reaches the photo of the ammunition, that is no small matter, but cannon ball (Aydınlık mühimmatın fotoğrafına ulaştı, boru değil top mermisi)*". According to the content of the news: a report was received by the Adana Provincial Gendarmerie Command stating that three "TRUCKS" were carrying weapons and ammunition to Syria; upon this report, the Adana Public Prosecutor issued a search warrant; in the meantime, it was officially stated the trucks belonged to the MIT; the Governor and senior bureaucrats negotiated in order to cease the search and to persuade the public prosecutor, but they obtained no result; thereupon, the Governor's Office sent a warning letter to the Gendarmerie Command; in the letter it was reminded that the action in question was contrary to Law no. 2937 and would lead to a criminal action; thereafter, the public prosecutor's office made some determinations and released the members of the MIT and the TRUCKS; and a confidentiality order was issued with respect to the qualification of the materials found. The information included in the news was supported with a photo. No investigation was launched into this news during the time elapsed.

10. The operations carried out on the TRUCKS gave rise to intense public debates in Turkey. Investigations were launched, and actions were brought, against some public officials that had planned, carried out and participated in these operations. In this respect, a case with 13 accused before the 7th Chamber of the Adana Assize Court, another case before

the 16th Criminal Chamber of the Court of Cassation in the capacity of the first instance court, and another case with 122 accused lodged with the 14th Chamber of the İstanbul Assize Court, which has a direct or indirect relation with the issue, are still pending. About half of these accused are detained on remand, and almost all of them being tried are members of the judiciary or police officers.

11. According to the bill of indictment dated 7 May 2014 and numbered 2014/1969, which was accepted by the 7th Chamber of the Adana Assize Court and prepared by the Adana Chief Public Prosecutor's Office, the facts that occurred before, during and after the "operation on the TRUCKS" can be summarized as follows:

12. The followings were reached, regard being had to the scope of all file, statements of suspects and witnesses, reports of historical traffic search, signalling information, footages and voice records pertaining to the date in question obtained through the Gendarmerie Emergency Number 156:

Two non-commissioned officers taking office in the Intelligence Bureau of the Ankara Provincial Gendarmerie Command ("the Gendarmerie Intelligence Unit") received information on clear identities, addresses and mobile phone numbers of 7 officials of the MIT from an anonymous person. Despite the questions asked by the public prosecutor's office in its instruction letters of different dates, the two non-commissioned officers did not tell from whom they had received the information about 7 members of the MIT. They identified the anonymous person in question as "report officer" and insisted on not disclosing his identity. They included the names of these 7 officials of the MIT among 29 persons in respect of whom a request for wiretapping of their communication via 42 phone numbers was filed for the purpose of prevention within the scope of fight against drug traffic and smuggling, and thereby they made a "wiretapping decision" taken in respect of the MIT officers by the 13th Chamber of the Ankara Assize Court. They started to wiretap 7 officials of the MIT following the decision taken on the basis of a fabricated criminal charge. 9 persons in total including commissioned officers, non-commissioned officers and specialized

sergeants taking office in the Ankara Gendarmerie Intelligence Unit and whose names were stated in the bill of indictment got involved in this request for preventive wiretapping. In this way, the persons who would take part in the relevant activity of the MIT and their duties were learned in detail. As they were aware through the "preventive wiretapping" that on 18 February 2014 at around 10.00 p.m. the TRUCKS would depart from Ankara Esenboğa, they initiated a physical surveillance that would be carried out by a non-commissioned officer and a specialized sergeant. They followed the TRUCKS, the plate numbers of which they had taken, towards Gölbaşı. Thereafter, they continued the surveillance through the cell tracking system of the Ankara Gendarmerie Intelligence Unit, as well as through other electronic systems. That night at around 4.00 a.m. a non-commissioned officer taking office in the Ankara Gendarmerie Intelligence Unit called a lieutenant taking office in the Adana Gendarmerie Intelligence Unit and gave detailed information to him, and they made plans about the actions to be taken collaboratively. On 19 January 2014 a non-commissioned officer and a commissioned officer taking office in the Ankara Gendarmerie Intelligence Unit had phone conversations with three commissioned officers taking office in the Adana Gendarmerie Intelligence Unit and gave information on the fact that the TRUCKS had departed. On 19 January 2013, although it was weekend, after 6.00 a.m. the officers working in all units of the Adana Gendarmerie Intelligence Unit were urgently called to the Command. One of the non-commissioned officers carrying out the physical surveillance of the TRUCKS in Ankara returned to the Intelligence Unit and met a lieutenant working there. After some time, they went in front of a dried fruits shop in Demetevler District by car. The non-commissioned officer –unconventionally- waited in the car. The lieutenant got off the car by wearing his beret and parka as camouflage. He swiftly entered the dried fruits shop and bought a telephone card and gave it to the non-commissioned officer. Although there were two telephone boxes near the dried fruits shop, they did not use the telephone there for fear of being recorded by the security cameras in the shops and the city surveillance cameras around. In order not to be recorded by the city surveillance cameras, they went through the side streets and went to a street in Etlik District. They stopped near a telephone box. The lieutenant got off the car

and looked around. Afterwards, the non-commissioned officer got off the car, and at 7.27 a.m. he called the Adana Gendarmerie Intelligence Unit by dialling many numbers instead of 156, which could only be known by a professional. After saying that he did not want to disclose his name, he told that he wanted to make a denunciation. Although the denunciator stated "*a truck loaded with ammunition*", the phrase "*explosive ammunition and weapons*" was written in the denunciation record. The phrase in question was then noted as "*these vehicles are carrying weapons and materials to the foreign-based terrorist organizations, namely Al-Qaeda, through Hatay Province, therefore a search is recommended to be made at the Sirkeli Tool Booths in Ceyhan District*" in the letter of the lieutenant in charge who requested a search to be conducted. This additional phrase was a sign of the fact that the incident was part of a scenario. On 19 January 2014 after this denunciation was received at 7.27 a.m. strict measures were taken during 5 hours until 12.00 a.m. at the Sirkeli Tool Booths to stop the TRUCKS. An officer was assigned to shadow the TRUCKS and give information about them. The TRUCKS were subject to physical surveillance from Pozantı District. The officers carrying out the surveillance were instructed that "*the TRUCKS will never be stopped, they will only be followed, and the Security Directorate will definitely not been informed of this matter*". During the operation at the Sirkeli Tool Booths in Ceyhan District, although the persons in the TRUCKS many times told that they were members of the MIT and were performing the duty assigned to them by the MIT and although the officers of the Gendarmerie Intelligence Unit carrying out the operation had known this very well since the date on which a decision on preventive wiretapping was given, they pretended not to know. Therefore, a fight broke out between the MIT officers and the Gendarmerie Intelligence Unit officers. The MIT officers were subject to battery, coercion and violence. Many public officers arrived at the scene at different stages of the search process. The public prosecutor made some observations at the scene and handed over the TRUCKS. In this sense, the officers taking part in this operation performed the acts in question as part of a plan aimed at disclosing the activities of the MIT as well as the activities carried out as a state secret and spying, contrary to the imperative provisions of the National Intelligence Agency Act no. 2937. The officers taking part in this operation acted cooperatively;

however, they made it appear to the public as if it had been a normal denunciation and a subsequent procedural process.

13. Within the scope of the investigation, the chief public prosecutor's office addressed questions to the accused, such as: Why were the TRUCKS, which were started to be followed in Ankara, not stopped there? Why was any police or gendarmerie unit located in the provinces or districts between Ankara and Adana through which the TRUCKS went not informed of? Why were any measures not taken from Ankara to Adana about the TRUCKS alleged to have been loaded with explosive materials and carrying weapons to the Al-Qaeda terrorist organization? Why was an instruction given during the operations into the TRUCKS in Adana in order not to inform the Security Directorate of the matter? While the total of 81 speculations or denunciations have been received until now to the effect that the terrorist organizations of Isis and Al-Qaeda would carry out bombings in various provinces of Turkey and they have been notified to all security units as public notices, why was this denunciation wanted to be kept secret from all security units? The chief public prosecutor's office stated that the accused failed to give consistent and convincing answers to these questions.

14. Having made these determinations, the chief public prosecutor's office concluded as follows:

> *"It appears that why the suspects consciously and meticulously concealed the identity of the person who had provided them with the relevant information was due to their efforts to ensure that their espionage activities against the MIT would never be revealed.*
>
> *Regard being had to the denunciation and all developments subsequent to it, to the manner in which the denunciation was made, to the fact that the denunciation gradually included the news pertaining to Al-Qaeda and to the fact that afterwards such news were frequently on the agenda at national and international levels, it has clearly been understood that the suspects, by having the trucks belonging to the MIT stopped in this manner and uncovering this situation to the world, aimed at putting the Government and State of the Republic of Turkey in a difficult situation in the international sphere and creating an image that the Government and State of the Republic*

of Turkey provided aid to the Al-Qaeda terrorist organization in Syria and the ISIS terrorist organization. It has also been understood that the purpose of the scenario and the operation in question was to carry out espionage activities against the State of the Republic of Turkey and to reveal the secrets of the State.

As a matter of fact, the reason why the operation was preferred to be carried out in Adana on 19 January 2014 was due to the fact that the espionage activity in question would have a great effect. On 19 January 2014 the 6th Annual Ambassadors Conference of the Ministry of Foreign Affairs was held in Adana. On the same day, the meeting where the Minister of Foreign Affairs delivered a closing speech was attended by 142 ambassadors and many official guests from all around the world. The date and the city of such an international meeting were chosen to carry out the operation.

Besides, the MIT trucks, which were considered to have been carrying aid to the Al-Qaeda terrorist organization or to have belonged to the Al-Qaeda, were allowed to go from Ankara to Adana for hours and to the east of Adana and then to the Sirkeli Tool Booths in Ceyhan District that was 60 km away from Adana. The trucks were only stopped there. Many press members were informed of this operation at the same time and only one or two minutes later the news concerning the trucks were reported to the agencies. The fact that the operation was carried out on the same date and in the same city with a meeting where ambassadors from all around the world came together is another indication that the suspects carried out the operation for the purpose of espionage.

Although the telephones of the members of the MIT had been wiretapped for some time and the MIT had other legal activities on different dates, the date in question was preferred. This operation, which was carried out on the date and in the city when and where ambassadors all around the world came together and in a very close place which was nearly before their eyes, was an important stage of an espionage activity which aimed at causing the Government and State of the Republic of Turkey to appear before the International Criminal Court and the International Court of Justice by means of creating an image that it was aiding the Al-Qaeda.

As a matter of fact, given that shortly after this incident it frequently

appeared in national and international press that Syria complained about Turkey before the international organizations and the United Nations, alleging that the Republic of Turkey aided terrorist organizations such as Al-Qaeda and Al-Nusra and supplied lethal weapons to them, it can clearly be seen that the espionage activities of the suspects resulted in Syria's favour and that Syria submitted these to the international organizations as evidence.

In addition, on 19 January 2014 at a hotel in Adana where 142 ambassadors and many official guests from all around the world gathered, while the Minister of Foreign Affairs stated -in order to ensure that the State of the Republic of Turkey would powerfully be able to participate to the Geneva II Conference on Syria to be held soon after that date- that "There is a secret cooperation between the regime (the Assad Regime of Syria) and the Al-Qaeda and the Isis. First, the regime strikes, and once the opposition gets weak, the Isis steps in. Geneva will eliminate these situations", the suspects carried out the action in question by a denunciation that "MIT trucks are carrying weapons and ammunition to the Al-Qaeda", which simply refuted the opinions of the State of the Republic of Turkey and the Ministry of Foreign Affairs. It was a planned and organized action which aimed at putting the State of the Republic of Turkey, the Ministry of Foreign Affairs of the Republic of Turkey and the MIT in a position of a country acting unrealistically, cooperating with terrorist organizations such as Al-Qaeda and Isis and supplying weapons to them in the international arena -in the eyes of the world countries and world public opinion- . It further aimed at refuting the thesis of the Ministry of Foreign Affairs at the Geneva II Conference from the very beginning and putting the Republic of Turkey and our country's intelligence organization the MIT in a position to hardly defend themselves, and it thus planned to weaken the Republic of Turkey.

This espionage activity, therefore, aimed at strengthening Syria's hand against Turkey and rendering the Government and State of the Republic of Turkey, the National Intelligence Organization and the Ministry of Foreign Affairs weak, guilty and helpless in the international community and against the Assad regime in Syria.

……

Furthermore, another purpose of the espionage activity was to render the National Intelligence Organization helpless, weak and incapable before the

foreign countries and foreign intelligence organizations; to render it non-functional and unworkable even in our country and to disgrace it; and thereby to turn our country into a zone where foreign intelligence organizations swarm and carry our operations at their will. This per se demonstrates that the suspects' action amounted to an espionage activity.

The fact that the activities of the National Intelligence Organization were tried to be deciphered on the given dates every ten days and tried to be prevented constantly was another proof demonstrating that the espionage activity in question was more systematic, organized and planned.

Besides, the fact that the denunciations in question had never been made to reveal the foreign spies in our country and never targeted any foreign intelligence organization, but generally targeted our intelligence organization the MIT, clearly demonstrates that the primary target of the espionage activity was the Government and State of the Republic of Turkey and the National Intelligence Organization.

One of the purposes sought to be achieved by means of committing the crimes in question was to target the MIT and render it inactive, non-functional, ineffective and weakened, and thereby to provide foreign intelligence organizations an easy working zone in our country. This is important in terms of demonstrating the scope of the crime of espionage committed by the suspects, as well as the intensity of deliberation on the part of them.

Furthermore, there were difficulties in collecting evidence in order to reveal all aspects of the incident during the investigation phase. In this context, most of our requests for collecting evidence have been rejected on various legal grounds. For these reasons, it has not been possible to reveal all aspects of the incident thoroughly.

In addition, regard being had to the facts that all suspects, who were involved in the incident and identified or not identified, were, by the very nature of their duties, well acquainted with the legal and judicial phases and processes in our country, that most of them were intelligence officers, and that therefore endeavoured to commit the imputed offences by showing due diligence in terms of confidentiality and not leaving behind evidence as far as possible; it cannot be said that such serious, organized, planned and

systematic offences against the State of the Republic of Turkey would be able to be revealed in-depth and with their all aspects without leaving any secret about the incident.

However, even considering the incident and the actions of the above-mentioned suspects together, a lot of concrete and strong evidence have been collected as to the fact that the suspects committed the imputed offences as part of a scenario."

15. Approximately one year after the actions had been brought against the operations into the MIT TRUCKS, the applicant Can Dündar, in the 29 May 2015 issue of the Cumhuriyet newspaper, published news which included the titles *"Here are the weapons Mr. Erdoğan says do not exist. (İşte Erdoğan'ın yok dediği silahlar.)", "The photos that will create a tremendous impression on the world's agenda are published for the first time. (Dünya gündemini sarsacak görüntüler ilk kez yayımlanıyor.)", "the Minister of Interior Mr. Ala had asked "Do you know what inside is?". (İçişleri Bakanı Ala, "İçindekileri biliyor musunuz?" demişti.)", "We now know. (Artık biliyoruz.)", "They said they were carrying medicine. (İlaç taşıyor dediler.)", "They said they were taking aid to the Turkmens. (Türkmenlere yardım götürüyordu dediler.)", "They persistently denied the allegation of carrying weapons. (Silah iddiasını ısrarla reddettiler.)", "They took into custody the public prosecutor who had stopped the TRUCK and the gendarmerie officer who had searched it. (TIR'ı durduran savcıyı, arayan jandarma komutanını gözaltına aldılar.)", "However, in the end, the photos of the weapons to be taken to Syria in the TRUCK that belonged to the MIT have been revealed. (Ama sonunda MİT'e ait TIR içinde Suriye'ye götürülen silahların görüntüleri ortaya çıktı.)", "the Cumhuriyet has reached the photos of the TRUCKS that were stopped on 19 January 2014 upon denunciation. MIT TRUCKS are full of weapons. (Cumhuriyet, 19 Ocak 2014'te ihbar üzerine durdurulan TIR'ların görüntülerine ulaştı. MİT TIR'ları ağzına kadar silah dolu.)" and "They were hidden under the medicines. (İlaçların altına gizlenmiş.)".* The news in question also gave information about the origin and quantity of the weapons. It also included some statements on this matter by some statesmen, members of parliament, public officials and members of the judiciary taking part in this operation.

16. The applicant Erdem GÜL in the Cumhuriyet newspaper of 12 June 2015, published, on the same matter, news which contained the

titles *"Gendarmerie says they exist. (Jandarma var dedi.)"*, *"The Gendarmerie reveals the weapons in the MIT TRUCKS that Mr. Erdoğan says exist or not. (Erdoğan'ın var ya da yok dediği MİT TIR'larındaki silahları Jandarma tescilledi.)"*, *"The report issued by the Gendarmerie General Command after the examinations made on the weapons found in the MIT TRUCKS that were stopped in Adana includes terrifying findings and information. (Adana'da durdurulan MİT TIR'larındaki silahlar üzerinde Jandarma Genel Komutanlığınca yapılan inceleme raporunda ürkütücü tespit ve bilgiler yer aldı.)"*, and *"High explosives, armoured penetrating weapons, incendiary weapons, lethal, wounding, burning and destructive weapons. (Yüksek infilak güçlü patlayıcı, zırhlı delici, yangın çıkarıcı, öldürücü, yaralayıcı, yakıcı, yıkıcı.)"*. The content of the news included the expressions that "*The Gendarmerie report pertaining to the weapons found in the MIT TRUCKS that were stopped in Adana included terrifying findings and information. According to the expert report issued by the Gendarmerie General Command on 23 January 2014, 4 days after the stopping of the TRUCKS on 19 January, the weapons might explode immediately or after a while or as a result of a crash; and they were lethal, wounding, burning and destructive weapons for living creatures, which could be regarded as explosives within the scope of the TCC. The uncertainties related to the MIT TRUCKS incident in Adana, which have always been on the top of the agenda of Turkey since the date on which it occurred and could not be sufficiently enlightened due to broadcast ban, are further clarified by the expert report issued by the Gendarmerie General Command.".* It also gave information about the origin and technical features of the weapons alleged to have been found in the TRUCKS that had been stopped at the Sirkeli Tool Booths in Adana. The news also stated that the public prosecutor who had sent the samples of the materials in the TRUCKS to the Gendarmerie Criminal Lab was detained and that the Governor submitted complaints about the public prosecutors who had been involved in this operation to the Supreme Council of Judges and Prosecutors. Below the news, there was other news, which had direct or indirect relation with this news, titled *"Evasive response from the Ministry of Foreign Affairs: "While the Ministry of Foreign Affairs denied the allegations that Turkey provided support to the Isis, it ignored the assistance provided to others. (Dışişlerinden kaçamak yanıt: Dışişleri, Işid'e Türkiye'nin destek verdiğini yalanlarken diğerlerine yapılan yardımı görmezden*

geldi.)" and *"Embarrassed explanation by the Chief Public Prosecutor's Office. (Başsavcılıktan mahcup açıklama.)"*.

17. After the İstanbul Chief Public Prosecutor's Office announced to the public on 29 May 2015 that it launched an investigation into the incident, and following the above-mentioned developments concerning the investigation process, the applicants were summoned to the prosecutor's office on 26 November 2015. The İstanbul Chief Public Prosecutor's Office explained to the applicants, in brief, that "*The quality of the materials found as a result of the operation carried out on the MIT TRUCKS upon a false denunciation by the armed terrorist organization should have remained secret in order to ensure the security or domestic and foreign interests of the State; however, it was revealed to the public. The task conducted by the Undersecretariat of the MIT as per Law no. 2937 was among the activities carried out in accordance with the national interests of the country. The information and photos included in the news should have remained secret in order to ensure the security or domestic and foreign interests of the State. The ultimate aim of the organization that carried out operation on the MIT trucks was to create an image, on the basis of false denunciations and evidence, that the State of the Republic of Turkey was a country supporting terrorism, and to cause it to appear before the International Criminal Court. The relevant documents had been obtained for this purpose and published to disclose the State secrets."*. Having made this explanation, the prosecutor's office took the applicants' statements on the matter.

18. The applicants stated that they were journalists and had been engaging in journalism for years; that they had published the news in question as a reflex of journalism; that they had had no other purpose; and that they had no links with any terrorist organization. The applicant Can Dündar accused some other persons concerning the organization asked to him. Both applicants were asked from whom they had obtained the photos they used in the news. They told that they would not disclose their journalistic source. The prosecutor's office stated that they had determined a correspondence between two persons –who were identified-, which revealed that one day before the date on which the applicant Can Dündar published the news, the photos of the TRUCKS had been leaked in exchange for money. The applicant Can Dündar

was asked whether he had obtained the photos from these persons and whether he had been offered money to publish them. He stated that he did not recognize those persons and that therefore he had no information about the correspondence between them. He again stated that he would not disclose the journalistic source.

19. On the same day, the İstanbul Chief Public Prosecutor's Office referred the applicants to the court, requesting their detention on remand. The İstanbul Magistrate Judge's Office no. 7 ordered the applicants detention on remand. In its decision, the judge's office relied on the fact that the applicants were expected to have known these activities of the terrorist organization by virtue of their profession, as well as on the grounds that they had given rise to intense public debates, and several actions had been filed on account of these activities. However, the applicants published the information and photos that should have been kept confidential to ensure the security of the State, which created a strong suspicion of their having committed the imputed offence. As regards the allegations that the incidents which were mentioned in the news published by the applicants had previously been discussed by the public and that therefore they were no longer secret, the judge's office specified that the applicants accepted having published some documents for the first time. Consequently, the applicants were detained on remand for "*aiding an armed terrorist organisation knowingly and willingly, without being a member of it*", for "*obtaining information that, by its nature, must be kept confidential for reasons relating to the domestic or foreign political interests of the State, for the purpose of political or military espionage*" and for "*disclosing, for the purpose of political or military espionage, the information that must be kept confidential for reasons relating to the security of the State*". In addition, it was pointed out that the imputed offences fell into the scope of Article 100 § 3 (a)(11) of Law no. 5271 and that implementation of other security measures would not be sufficient.

20. The applicants appealed against the detention order. The Magistrate Judge's Office no. 8 dismissed the applicants' appeal. In the reasoning of its decision, the judge's office stated that it had been announced to the public that the investigation into the trucks had been kept confidential for reasons relating to the security or domestic or

foreign political interests of the State, therefore, the publication of the news by the applicants amounted to aiding and abetting the terrorist organization knowingly and willingly.

21. The bill of indictment filed by the İstanbul Chief Public Prosecutor's Office at the end of the investigation against the applicants was accepted by the 14th Chamber of the İstanbul Assize Court on 27 January 2016 and a date was set for the hearing based on the preliminary proceedings report. On 29 February 2016 some newspapers, news portals and television channels issued information stating that the applicant Can Dündar had obtained the information subject of the said news from persons having relationship with the above-mentioned terrorist organization to publish it for his self-interest and that 3 lawyers were detained regarding the matter.

22. The applicants, in their petition for individual application, maintained that they had been engaging in journalism for many years; that they had never been found guilty within the scope of their journalistic activities; that they had made news concerning an incident having an important place on the public agenda; that the news had aimed at enlightening the public; that nevertheless, an investigation was launched against them; that they did not have access to the content of the investigation file due to a restriction order issued by the court; that although there was no strong indication of guilt which justified the detention order against them, they were detained on remand approximately six months after the investigation had been launched; and that they had never fled nor destroyed or tampered with evidence. In this regard, they alleged that their rights enshrined in Articles 19, 26 and 28 of the Constitution were violated, and they requested that the consequences of the alleged violations be redressed.

23. There is no hesitation that the freedom of expression is an essential element of democracies. There is no doubt that freedom of the press is a more sheltered area in favour of freedoms in the context of freedom of expression. In addition, both freedoms cannot be completely eliminated, but may be restricted by the criteria set forth in the Constitution and the European Convention on Human Rights.

24. Accordingly, the freedoms of expression and the press may be restricted for the purposes of "maintaining national security", "preventing offences", "punishing offenders", "preventing disclosure of information duly classified as State secret" and "prevention of disclosure of confidential information of the State", pursuant to Articles 26 § 2 and 28 § 5 of the Constitution. To that end, it is possible to criminalize, and impose punishment for, the act of disclosing confidential information of the State through press. Therefore, it is acceptable that pursuant to Article 13 of the Constitution, detention measure can be applied, during the investigation and prosecution to be carried out, in respect of press members alleged to have performed such acts. As a matter of fact, the ECHR considers that the press must perform its duties within the boundaries of the journalism ethics.

25. In addition, right to personal liberty and security is safeguarded by the Constitution. However, this right is not absolute and may be subject to limitations by law. In Article 19 of the Constitution, it is set out that everyone has the right to personal liberty and security, and that individuals may be deprived of their freedoms, provided that the procedure and conditions of detention are prescribed by law. Article 19 § 3 therein stipulates that individuals against whom there is strong evidence of having committed an offence may be arrested by decision of a judge solely for the purposes of preventing escape, or preventing the destruction or alteration of evidence, as well as in other circumstances prescribed by law and necessitating detention. In this context, the prerequisite for detention is the existence of a strong indication that the individual has committed an offence. Therefore, in each case, the accusation must be supported with plausible evidence. However, for accusing a person, it is not absolutely necessary that adequate evidence be available at the stage of his arrest or detention on remand. In addition to existence of justifications for detention, the criterion of lawfulness must also be met. In this sense, grounds for detention are specified in Article 100 of Law no. 5271.

26. In the present case, among the criteria for the restriction of the freedom of expression and the press, the prevailing one is the "national security" criterion, rather than the disclosure of confidential information,

and this cannot be defined merely as the disclosure of confidential information classified as "State secret". National security is a criterion the definition of which has not been made so far and the framework of which has changed according to the particular circumstances of each case. This criterion has also been broadly interpreted in some decisions of the Supreme Court of the United States that is also known for its approaches in favour of freedom. In addition, there are judgments of the ECHR where it has acknowledged that the circumstances in each country may vary. This variability is directly related to being aware of duties and responsibilities in the enjoyment of the freedom of expression, the country's democratic experiences, geopolitical position, powers in foreign policy, terrorism problem and risk of war.

27. Thoughts, expressions or acts that do not pose a problem or get reaction in a society during an ordinary period may fall into a different scope or have different effects or get different reactions in case of extraordinary circumstances.

28. When a country is at war, it is very likely that dissidents will be regarded as traitors or unfaithful persons, due to the existing policies. An individual who perceives a threat against his own life or the lives of his relatives does not show tolerance to the dissidents during a period when his patriotism feelings are very strong and the nation has come together. The Government, on the other hand, never wants that the motivation of the enemies increases with the image of a divided country against the enemies nor that those fighting against the enemies are discouraged. For this reason, the line between being dissident and being traitor in time of war is on a very slippery ground (*Assistant Professor Mehmet Emin AKGÜL*, article, AUHFD, 61 (1) 2012:1-42).

29. The concept of national security is, by its very nature, subjective. The meanings attributed by the country to the concept of national security are influenced by different situations specific to that country. Therefore, the ECHR does not interpret the concept of national security in absolute terms, but it leaves a wide margin of appreciation to the national authorities by taking into consideration the specific conditions of each country. However, in this context, the ECHR sets the minimum

threshold and imposes on the State the burden of proof with respect to the interference to be made with the freedom of expression for the purposes of national security. At this point, one of the issues to be taken into consideration is the fact that the State, while discharging the burden of proof, must take measures to ensure that the secrets and concerns about national security are not revealed to the public.

30. In addition, the concept of national security is a criterion where political priorities prevail. In determination of the content of the concept of national security, the political authority has the utmost priority. No one other than the political authority is expected to precisely know the delicate balances in terms of the State policies and the foreign policies. However, the political will, while enjoying this priority, is obliged to apply the criteria that will ensure the rule of law. If the authority governing the State perceives a threat against the national security and puts forward some arguments in this respect and expresses that the threat against the national security is serious, ignorance of this argument will fall foul of the duties and responsibilities within the scope of the freedom of expression. There is no doubt that sharing political internal conflicts with the public and keeping on the agenda certain issues which are related to international policies and where national interests are at stake are situations leading to different consequences.

31. The fact that prior to the present case, investigations had been launched into the incidents called "MIT TRUCKS" and there had been ongoing proceedings in this respect points out that the case is not merely related to reporting news on an issue that had previously appeared in the press. In the majority opinion, it has been underlined that the evidence pertaining to the detention order was not sufficiently evaluated in such a case concerning the freedom of the press and that there was no concrete fact substantiating the strong suspicion of guilt. However, according to the ongoing practices of the Constitutional Court, the criteria for assessment of evidence and for existence of strong suspicion of guilt differ in terms of the complaints about initial detention and the complaints about the continued detention or excessive length of detention on remand.

32. As a matter of fact, in many applications, the Constitutional Court has made the following assessments: "*In addition to existence of strong suspicion of guilt, an individual may also be detained on remand for the purposes of preventing him from fleeing or destroying or tampering with evidence. Even though the initial grounds for detention may be deemed sufficient for the continuance of detention until a certain period of time, it must be explained in the decisions on the extension of the detention period that the grounds for detention are still valid, as well as the justifications thereof. In the event that these grounds are found "relevant" and "sufficient", an assessment must be made as to whether the proceedings were conducted with due diligence or not. Factors such as complexity of the case, whether it is related to organized crimes and the number of the accused are taken into consideration in the assessment of the due diligence in question. When all these elements are considered together, a conclusion may be reached as to whether the period is reasonable or not.*" (see, for example, *Murat Narman*, no. 2012/1137, 2 July 2013, § 63).

33. The judicial review of initial detention is limited to the assessment of whether there exists convincing evidence showing that the suspect committed an offence and of the lawfulness of detention in this sense. In this context, the existence of strong indications of having committed a crime might be sufficient for initial detention. In the present case, regard being had to the justifications of the courts' detention order and their decisions upon the applicants' appeal at this stage of the investigation, strong suspicion of guilt, as well as the grounds for detention cannot be said not to exist.

34. In addition, considering the period during which the concrete facts summarized above occurred, war on terrorism that will last for an indefinite period increases the possibility that the emergency measures of temporary nature will become permanent. It is not true to accept the fight against terrorism as a war. However, given the situation in our country, there exist a) a hot environment at the southern border where a number of countries are involved and border violations occur, rules of engagement are always implemented de facto and terrorists can easily enter the country under the refugee problem; b) a conflict environment in terms of the foreign policy where, for example, in the aftermath of major terrorist attacks that occurred in our country, a number of countries

only sent messages of condolence from their countries and some others adopted, with various excuses, an attitude that was not in favour of our country; however, after the bombings that occurred in France, all world countries visited that country for support and condemned terrorism; and c) an environment where, in the country, there are intense debates on the fact that the Government has faced coup attempts by the police and the judiciary and where such allegations are seriously subject to investigations and prosecutions (even the Constitutional Court has adjudicated some applications concerning the alleged violations of rights in this respect). This clearly shows that the country is not within an ordinary period of fight against terrorism and that it faces multiple international political clamps.

35. Where a connection can be established between the finding that an expression may result in violence in the near future or that the real purpose of the expression is to cause such a violence and the fact that violence has occurred or may occur, it is of utmost priority to preserve the existing legal order against internal threats aiming at overthrowing the Government that is vested with the primary authority and duty to protect the country and to maintain the public order, as well as against internal threats directed towards the national security. Thus, a choice needs to be made between individual freedoms and the public order. Especially, in an environment where external threats have increased, where neighbouring states are planning to set new borders, where our cognates are directly targeted and caused to be in need of our help and where terrorism has escalated, internal conflicts against the Government leads to more concern about the national security.

36. From this aspect, it cannot be said that the domestic court did not take into consideration the balance to be struck between the broad protection afforded by freedom of the press and the national security that is accepted as the criterion for restriction. Both the bill of indictment concerning "MIT TRUCKS" –known to the public by this name- and the bill of indictment issued within the scope of investigation into the present case demonstrate that the court struck a balance between the national security and the applicants' freedoms while ordering their detention on remand and that there was no arbitrariness or an obvious erroneous conclusion in the evaluation of evidence.

37. In addition, there is no doubt that it is duty of journalists to convey the news and ideas considered to contribute to the public interest or public debates to people, within the framework of the concept of journalism. However, while performing this duty, journalists must abide by journalism ethics. The State may impose restrictions on the news to be published by the journalists regarding a very delicate matter such as national security, as well as the public authorities may prevent the publication of certain news on such matters. At this point, there is no doubt that judicial review takes an active role and provides an essential guarantee for freedoms.

38. In the assessment of the application, acknowledgement of the fact that the applicants had been detained on remand on account of reporting news on an issue that had already been subject to news 16 months before and was no longer secret for having been discussed by the public constitutes a reductive approach. The facts underlying the detention order and the evidence in respect thereof must be examined from the point of view of the trial courts. As a matter of fact, according to the established practices of the Constitutional Court, interpretation of the legal provisions and their application to the case falls within the inferior courts' discretionary power. Therefore, the assessments made by the inferior courts, which are not obviously arbitrary and do not include any interpretation manifestly contrary to the Constitution and the laws, must be taken into account.

39. Therefore, regard being had to the proceedings known as "MIT TRUCKS investigation" which was the starting point of the events; to the fact that a restriction order was issued on the investigation files concerning the incidents -subject-matter of the news- that occurred at the Syrian border and were directly related to the current foreign policy balance; to the fact that the applicants accepted having been informed of the restriction order; and to the issues such as the date of the news and their contents, the quality and scope of the news forming a basis for the detention order against the applicants can be revealed. In view of the considerations above and "the national security" that is accepted as the criterion for restriction, as regards the applicants' complaints, the conclusion that the impugned news that were published again sixteen

months later and formed a basis for the applicants' detention on remand shall be subject to protection under freedom of the press cannot be considered to have been reached as a result of sufficient examinations.

40. For the reasons explained above, I consider that there have been no violations of the applicants' right to personal liberty and security, as well as their freedoms of expression and the press, therefore I do not agree with the majority opinion.

DISSENTING OPINION OF JUSTICE KADİR ÖZKAYA

I. SUBJECT-MATTER OF THE APPLICATION

1. The present case concerned the alleged violations of the right to liberty and security as well as freedoms of expression and the press of the applicants Can Dündar, who was editor-in-chief of the Cumhuriyet daily newspaper, and Erdem Gül, who was the Ankara Representative of the same newspaper, due to their detention for the offences below:

a) "aiding and abetting an armed terrorist organisation knowingly and willingly, without being a member of it";

b) "obtaining information in possession of the State that must be kept confidential, for the purpose of political or military espionage"; and

c) "disclosing, for the purpose of espionage, the information that must be kept confidential for reasons related to the security of the State".

II. THE FACTS

2. According to the press statement made by the İstanbul Chief Public Prosecutor's Office on 27 November 2015, which is also available in the case file, some TRUCKS that were stated to have belonged to the National Intelligence Agency had been stopped by force of arms on 1 January 2014 and 19 January 2014 respectively in Hatay and Adana, on the ground that they had allegedly been loaded with weapons, and they had been searched by inflicting battery and violence on the members of the MIT dealing with the TRUCKS. These actions had been carried out through the instructions of Fetullah Gülen, the leader of the FETÖ/PDY Armed Terrorist Organization, and Emre Uslu, in accordance with the ultimate objective of the organization "to create an image -on the

basis of false denunciations and evidence- that the State of the Republic of Turkey was a country supporting terrorism, and thus to cause the Republic of Turkey to appear before the International Criminal Court". Therefore, an investigation was launched into the incident. At the end of the investigation, some police officers and members of the judiciary were detained for "membership of an armed terrorist organization" and "attempting to overthrow the Government of the Republic of Turkey and prevent it from performing its duties".

3. Immediately after the MIT TRUCKS had been stopped, it was announced to the public though the statements made by the competent authorities of the State of the Republic of Turkey and through the letters sent to the relevant units within the scope of the investigation that the materials in the MIT TRUCKS that were carrying aid to Turkmens in Syria fell into the scope of activities carried out for the national interest of the country in accordance with the duties and authorities granted to the Undersecretariat of the MIT by the State Intelligence Services and the National Intelligence Organization Act no. 2937 and that "they, by their very nature, needed to remain confidential for reasons related to the security of the State, as well as the State's domestic and foreign political interests".

4. In addition, the followings were inferred from the relevant available documents before our Court:

a) Concerning the incident underlying the detention order that is subject to the application, the 21 January 2014 issue of the Aydınlık newspaper contained the news titled "Here is the ammunition in the TRUCK (İşte TIR'daki Cephane)". The news included the claims that "Ammunition was found in 3 TRUCKS belonging to the MIT that were stopped in Adana. The Aydınlık newspaper has reached the photos of the search. It was determined that the TRUCKS were not carrying "humanitarian materials", but cannon balls." On the same day, the news titled "Aydınlık reaches the photo of the ammunition: that is no small matter, but cannon ball (Aydınlık mühimmatın fotoğrafına ulaştı: boru değil top mermisi)" was published on the website of the same newspaper with the same content. The news also contained a photo of the cannon

balls alleged to have been found in one of the cases in the TRUCKS. The same and the next issues of the newspaper also included the comments of some authors on the materials alleged to have been carried by the TRUCKS.

b) Approximately 1 year and 4 months after the incident concerning the TRUCKS alleged to have been stopped by force of arms and searched although it had been stated that they had belonged to the MIT, Can Dündar published, on the 29 May 2015 issue of the Cumhuriyet newspaper, the news with the titles and contents such as "THE PHOTOS THAT WILL CREATE A TREMENDOUS IMPRESSION ON THE WORLD'S AGENDA ARE PUBLISHED FOR THE FIRST TIME (DÜNYA GÜNDEMİNİ SARSACAK GÖRÜNTÜLER İLK KEZ YAYIMLANIYOR)", "Here are the weapons Mr. Erdoğan says do not exist (İşte Erdoğan'ın yok dediği silahlar)", "MIT TRUCKS ARE FULL OF WEAPONS (MİT TIR'LARI AĞZINA KADAR SİLAH DOLU)", "THE PUBLIC PROSECUTOR WAS PREVENTED (SAVCI ENGELLENDİ)", "WEAPONS TO SYRIA (SURİYE'YE SİLAH)", "LIST OF THE WEAPONS IN THE MIT TRUCKS (MİT TIRINDAN ÇIKAN SİLAHLARIN DÖKÜMÜ)", "They were hidden under the medicines (İlaçların altına gizlenmiş)", "Mr Takçı says: MİT does not have such duty (Takçı: MİT'in böyle bir görevi yok)", "WHY DO WE PUBLISH? (NEDEN YAYIMLIYORUZ?), "They said they were carrying medicine (İlaç taşıyor dediler)" – "They said they were taking aid to the Turkmens (Türkmenlere yardım götürüyordu dediler)" – "They persistently denied allegations of weapons (Silah iddiasını ısrarla reddettiler)" – "They took into custody the public prosecutor who had stopped the TRUCK and the gendarmerie commander who had searched it (TIR'ı durduran savcıyı, arayan jandarma komutanını gözaltına aldılar)", "However, in the end, the photos of the weapons to be taken to Syria in the TRUCK that belonged to the MIT have been revealed (Ama sonunda MİT'e ait TIR içinde Suriye'ye götürülen silahların görüntüleri ortaya çıktı)" and "HERE ARE THOSE WEAPONS (İŞTE O SİLAHLAR)".

c) Following the news reported by Can Dündar in the 29 May 2015 issue of the Cumhuriyet newspaper, the news titled "Cumhuriyet reaches the photos 16 months later – GOOD MORNING! (Cumhuriyet 16 Ay

Sonra Görüntülere 'UlaŞtı' - GÜNAYDIN!)" was published on the same day on the website of the Aydınlık newspaper. According to the content of the news, the Aydınlık newspaper had for the first time, namely two days after the incident, published the photos, which was later published in the Cumhuriyet newspaper. It was underlined that the photos were not published in the Cumhuriyet newspaper for the first time. The 30 May 2015 issue of the Aydınlık newspaper had also reported similar news".

d) Upon the publication of the news reported by Can Dündar, the İstanbul Chief Public Prosecutor's Office announced to the public on 29 May 2015 that pursuant to Articles 327, 328 and 330 of the Turkish Criminal Code no. 5237, dated 26 September 2004, as well as Articles 6 and 7 of the Anti-Terror Law no. 3713, dated 12 April 1991, an investigation was launched for the offences such as "obtaining information related to the security of the State, conducting political and military espionage, disclosing information that must be kept confidential and making propaganda of a terrorist organization".

e) On the same date, the İstanbul Chief Public Prosecutor's Office also requested from the incumbent court that pursuant to Article 8 (a) of Law no. 5651 on Regulating Broadcasting in the Internet and Fighting against Crimes Committed through Internet Broadcasting, dated 4 May 2007, access to the contents of the news be blocked and that in the event that the contents in question were not removed, access to the relevant websites be completely blocked. The İstanbul Magistrate Judge's Office no. 8, on the same day, by a decision miscellaneous no. 2015/1330 and dated 29 May 2015, ordered the blocking of access to the news in question, on the ground that they might lead to an inconvenient situation as regards the national and international interests, as well as, national security of the Republic of Turkey.

f) While the investigation launched on 29 May 2015 was still pending, the applicant Erdem Gül reported news titled "Dirty operation (Kirli operasyon)" in the 11 June 2015 issue of the Cumhuriyet newspaper. The İstanbul Chief Public Prosecutor's Office considered that the news in question served the ultimate objective of the FETÖ/PDY armed terrorist organization.

g) While the investigation was still pending, the applicant Erdem Gül reported news in the 12 June 2015 issue of the Cumhuriyet newspaper, by referring to the Gendarmerie Criminal Analysis reports concerning the MIT TRUCKS in question. The news contained the titles "THE GENDARMERIE REVEALS THE WEAPONS IN THE MIT TRUCKS THAT MR. ERDOĞAN SAYS EXIST OR NOT - Gendarmerie says they exist (ERDOĞAN'IN VAR YA DA YOK DEDİĞİ MİT TIR'LARINDAKI SİLAHLARI JANDARMA TESCİLLEDİ - Jandarma var dedi)", "LETHAL WEAPONS (ÖLDÜRÜCÜ SİLAHLAR)", "PRODUCED IN RUSSIA (ÜRETİM YERİ RUSYA)" and "Gendarmerie confirms the lethal weapons (Jandarma öldürücü silahları doğruladı)" and also included detailed explanations. The photos of the weapons and ammunition alleged to have been in the TRUCKS were published within the contents of the news.

h) While the same investigation was still pending, the applicant Erdem Gül reported news in the 15 October 2015 issue of the Cumhuriyet newspaper, titled "… the hand that feeds you! (Besle kargayı …)". The İstanbul Chief Public Prosecutor's Office again considered that the said news served the ultimate objective of the FETÖ/PDY armed terrorist organization.

i) Following these developments and approximately six months after the announcement to the public that an investigation was launched, the applicants Can Dündar and Erdem Gül were summoned by phone on 26 December 2015 to have their statements taken. They were charged with "obtaining information that, by its nature, must be kept confidential for reasons related to the security or domestic or foreign political interests of the State, for the purpose of political or military espionage", "disclosing information that, by its nature, must be kept confidential for reasons related to the security or domestic or foreign political interests of the State, for the purpose of political or military espionage" and "aiding the FETÖ/PDY armed terrorist organisation knowingly and willingly, without being a member of it".

5. The questions addressed to the applicant Can Dündar at the İstanbul Chief Public Prosecutor's Office on 26 November 2015 and his response to these questions were as follows:

"...

2- It was announced to the public through the statements made by the competent authorities of the State of the Republic of Turkey that during the operations that were carried out within the scope of the investigations against the so-called Jerusalem Army Terrorist Organization, on 1 January 2014 and 19 January 2014 respectively in Kırıkhan District of Hatay Province and Ceyhan District of Adana Province, upon false denunciations made in accordance with the instructions of Fetullah Gülen, the leader of the FETÖ/PDY Armed Terrorist Organization, and Emre Uslu, the heads and members of the FETÖ/PDY stopped and searched the MIT trucks by using arms and inflicting battery and violence on the members of the MIT. It was further announced that the aid materials in the MIT TRUCKS that were carrying aid to Turkmens in Syria, by their very nature, needed to remain confidential for reasons related to the security of the State, as well as the State's domestic and foreign political interests.

Furthermore, by the letter of the National Intelligence Organization no. 112-54128131 and dated 6 February 2014, it was indicated that the trucks served the activities carried out for the national interests of the country in accordance with the duties and authorities granted to the Undersecretariat of the MIT under Law no. 2937 on the State Intelligence Services and the National Intelligence Organization.

It has been understood that, despite these, within the scope of the news titled "Here are the weapons Mr. Erdoğan says do not exist (İşte Erdoğan'ın yok dediği silahlar)" reported by you in the 29 May 2015 issue of the Cumhuriyet newspaper of which you are the editor-in-chief; you obtained and disclosed the information and photos related to the trucks -belonging to the National Intelligence Organization and carrying aid as a State secret- that were stopped on 19 January 2014 in Ceyhan District of Adana Province, which should have remained confidential for the security or domestic or foreign political interests of the State. You obtained and disclosed these information and photos to serve the ultimate objective of the FETÖ/PDY armed terrorist organization, namely to create an image -on the basis of false denunciations and evidence- that the State of the Republic of Turkey was a country supporting terrorism, and thus to cause the Republic of Turkey to appear before the International Criminal Court.

Where and from whom did you obtain these photos? Why did you publish them? Did you receive any instruction from anyone to publish these information and photos?

REPLY:

I have been a journalist for 35 years. I worked as an author and editor-in-chief for various newspapers. I have no connection whatsoever with the formation you called as the FETÖ/PDY Armed Terrorist Organization. I have no relationship with Fetullah Gülen or Emre Uslu. I am the victim of the investigation you are conducting against me right now. In fact, as a member of the press, I have always mentioned the risks of such formations within the State for years. The headline I used in my newspaper about the incident called as the stopping of MIT trucks in Adana was totally part of the journalistic activities. Apart from this, I definitely have no relation with espionage or aiding an organization or any other offence. In fact, those who had told, addressing the formation you called as the FETÖ, that "We have given whatever they wanted" should be tried. The news that I reported solely fall into the scope of journalistic activities. What occurred in Susurluk and to which extent the activities called as the State secret have reached are obvious. At the same time, as an academic member, I prepared my master's thesis on "State secret". I am in a position to assess what is secret or not. It is also a desperate situation that two institutions of the State have fallen out with each other due to this incident. As a journalist, this event is newsworthy for me. My purpose is to warn and inform the public. At the same time, it is also in the interest of the State to prevent a number of errors. As a matter of fact, similarly, within the scope of the events known as Watergate and Irangate scandals, the journalists were tried to be subject to criminal proceedings due to the news they had reported, which had been considered as State secret. However, after years, those who had carried out the impugned operations on behalf of the State were tried and convicted. By virtue of the journalism ethics, I cannot tell how I obtained these information and documents. However, I can say that no one or no organization can give me any instruction in this regard. I have never experienced this throughout my professional life. What I do is completely a journalistic activity.

…

4- It was established that one day before the publication of the news reported by you, there had been a correspondence between E.E. and B.K., which stated "The photos of the MIT trucks have been leaked in exchange for money".

Did you receive the photos from these persons? Were you offered money to publish them?

REPLY:

I do not recognize those persons. Neither do I have information about the correspondence you have mentioned. In any case, the newspaper was published. I do not want to disclose the source of the news, but I can say that she/he has no relationship with the community (cemaat).

…

These photos relate to the news reported in the Aydınlık newspaper on 21 January 2014. However, some of them are different. They are newsworthy. Therefore, what I have done is a journalistic activity. I have had no other aim.

…"

6. The questions addressed to the applicant Erdem Gül at the İstanbul Chief Public Prosecutor's Office on 26 November 2015 and his response to these questions were as follows:

"...

2- It was announced to the public through the statements made by the competent authorities of the State of the Republic of Turkey that during the operations that were carried out within the scope of the investigations against the so-called Jerusalem Army Terrorist Organization, on 1 January 2014 and 19 January 2014 respectively in Kırıkhan District of Hatay Province and Ceyhan District of Adana Province, upon false denunciations made in accordance with the instructions of Fetullah Gülen, the leader of the FETÖ/PDY Armed Terrorist Organization, and Emre Uslu, the heads and members of the FETÖ/PDY stopped and searched the MIT trucks by using arms and inflicting battery and violence on the members of the MIT. It was further announced that the the aid materials in the MIT TRUCKS that were

carrying aid to Turkmens in Syria, by their very nature, needed to remain confidential for reasons related to the security of the State, as well as the State's domestic and foreign political interests.

Furthermore, by the letter of the National Intelligence Organization no. 112-54128131 and dated 6 February 2014, it was indicated that the trucks served the activities carried out for the national interests of the country in accordance with the duties and authorities granted to the Undersecretariat of the MIT under Law no. 2937 on the State Intelligence Services and the National Intelligence Organization.

It has been understood that, despite these, within the scope of the news titled "Gendarmerie says they exist (Jandarma var dedi)" reported by you in the 12 June 2015 issue of Cumnhuriyet daily newspaper; you obtained and disclosed the information and photos related to the materials in the trucks -belonging to the National Intelligence Organization and carrying aid as a State secret- that were stopped on 19 January 2014 in Ceyhan District of Adana Province, which should have remained confidential for the security or domestic or foreign political interests of the State. You obtained and disclosed these information and photos to serve the ultimate objective of the FETÖ/PDY armed terrorist organization, namely to create an image -on the basis of false denunciations and evidence- that the State of the Republic of Turkey was a country supporting terrorism, and thus to cause the Republic of Turkey to appear before the International Criminal Court.

Where and from whom did you obtain these photos? Why did you publish them? Did you receive any instruction from anyone to publish these information and photos?

REPLY:

I have been a journalist for 20-25 years. As you know, I cannot disclose my source. Therefore, I am sorry that I cannot give any information in this regard. I graduated from the School of Press and Broadcasting. I am a journalist of Ankara. I underline this, because Ankara journalists deals with the State bureaucracy. I published the impugned news automatically. I have no illegal purpose. I am a journalist and I publish everything that is newsworthy. I have never carried out any activities in accordance with

the objectives of any organization or formation. While publishing this news, I did not act in favour of or against anyone. My purpose is to inform the people. I cannot exactly remember the name of B.K. I know E.E. from the social media. I did not meet both of them.

I want to again express that what I did was due to journalism reflex. I cannot consider events like a public prosecutor or a judge. I have had no intention of committing a crime or aiding an organization.

…"

7. The counsels of the applicants submitted, in brief, that the applicants' act was related to the news published by them and that the condition stipulated in Article 26 of the Press Law no. 5187 dated 9 June 2004 was not satisfied. The relevant provision required that criminal cases regarding the offences committed through printed works should be filed within four months.

8. On the same day, the İstanbul Chief Public Prosecutor's Office requested the applicants' detention on remand, for "aiding and abetting an armed terrorist organisation knowingly and willingly, without being a member of it", "obtaining information in possession of the State that must be kept confidential, for the purpose of political or military espionage" and "disclosing, for the purpose of espionage, the information that must be kept confidential for reasons related to the security of the State".

9. The applicants made submissions before the magistrate judge's office, which were similar to their statements before the chief public prosecutor's office.

10. On 26 November 2015, the İstanbulMagistrate Judge's Office no. 7, by a decision no. 2015/490, ordered the applicants' detention on remand for "aiding and abetting an armed terrorist organisation knowingly and willingly, without being a member of it", "obtaining information in possession of the State that must be kept confidential, for the purpose of political or military espionage" and "disclosing, for the purpose of espionage, the information that must be kept confidential for reasons related to the security of the State".

11. The reasoning of the magistrate judge's office in ordering the applicant Can Dündar's detention on remand is as follows:

"a) … Concerning the imputed offence of aiding and abetting an armed terrorist organisation knowingly and willingly, without being a member of it, regard being had to the available evidence; to the fact that the Adana and İstanbul Chief Public Prosecutor's Offices launched investigations into the incident in which the MIT trucks were stopped on 1 January 2014 and 19 January 2014 and against those involved in this operation; to the fact that by virtue of his profession, the suspect was in a position to have information about these investigations, however, despite the investigation conducted by the Istanbul Chief Public Prosecutor's Office into the organization, the suspect published the documents concerning the MIT trucks that needed to remain confidential for reasons related to the security of the State, as well as the State's domestic and foreign political interests; to the fact that the suspect's act falls into the scope of Articles 220 § 7 and 314 § 2 of the Turkish Criminal Code ("the TCC") and therefore there exists a strong suspicion of having committed the imputed offence; to the fact that the imputed offence falls into the scope of Article 100 § 3 (a)(11) of the Code of Criminal Procedure ("the CCP"); and to the fact that application of the provisions related to conditional bail will be insufficient, the suspect will be DETAINED in accordance with Article 100 and following Articles of the CCP;

b) … Concerning the imputed offence of obtaining information in possession of the State that must be kept confidential, for the purpose of political or military espionage, regard being had to the available evidence; to the fact that although the suspects and their defence counsels stated that the subject-matter of the document concerning the MIT trucks, which they obtained and published, had previously been discussed by the public and therefore they were no longer secret, the relevant document had been obtained by the suspect for the first time, as also accepted by him, and therefore there exists a strong suspicion of having committed the imputed offence; to the fact that the imputed offence falls into the scope of Article 100 § 3 (a)(11) of the Code of Criminal Procedure ("the CCP"); and to the fact that application of the provisions related to conditional bail will be insufficient, the suspect will be DETAINED in accordance with Article 100 and following Articles of the CCP;

c) … Concerning the imputed offence of disclosing, for the purpose of espionage, the information that must be kept confidential for reasons related to the security of the State, regard being had to the available evidence; to the fact that in addition to the printed works, the applicant also published the information that needed to remain confidential for reasons related to the security of the State on the internet; to the fact that although the suspects and their defence counsels stated that the subject-matter of the document concerning the MIT trucks, which they obtained and published, had previously been discussed by the public and therefore they were no longer secret, the relevant document was published by the suspect for the first time, as also accepted by him, and therefore there exists a strong suspicion of having committed the imputed offence; to the fact that the imputed offence falls into the scope of Article 100 § 3 (a)(11) of the Code of Criminal Procedure ("the CCP"); and to the fact that application of the provisions related to conditional bail will be insufficient, the suspect will be DETAINED in accordance with Article 100 and following Articles of the CCP;

…"

12. The decision and its reasoning issued with respect to the applicant Erdem Gül by the İstanbul Magistrate Judge's Office no. 7 is the same with the above-mentioned reasoning with respect to the applicant Can Dündar and is cited in the same decision.

13. The applicants appealed against the above-mentioned decision. The İstanbul Magistrate Judge's Office no. 8, by a decision miscellaneous no. 2015/1330 and dated 1 December 2015, dismissed the applicants' request. The reasoning of the decision is as follows:

"As it is understood that the offence of aiding and abetting the FETÖ/PDY Armed Terrorist Organisation knowingly and willingly without being a member of it, which is imputed to the suspects, (Article 314 § 2 of the TCC with reference to Article 220 § 7 thereof) is among the offences listed in Article 100 of the CCP which provides that the risk of fleeing and tampering with evidence may be deemed as existing if there is a strong suspicion that these offences were committed; that on 1 January 2014 and 19 January 2014, respectively in Kırıkhan District of Hatay Province and Ceyhan District of Adana Province, the members of the terrorist organization, who are still

detained, stopped and searched the MIT trucks, through false denunciations and instructions, by using arms and inflicting battery and violence; that an image that the State of the Republic of Turkey was supporting terrorism was tried to be created in the international arena; that this image was supported by the news, articles and screenplays released through the press; that although it was announced to the public that the activities of the MIT carried out for the national interests of the country, by their very nature, needed to remain confidential for reasons related to the security of the State, as well as the State's domestic and foreign political interests, the suspects published the impugned information and photos within the scope of the news they reported in the Cumhuriyet newspaper on 29 May 2015, 11 June 2015, 12 June 2015 and 15 October 2015; that as also stated by the suspects, although certain news had been reported on the same matter before, the photos were published for the first time by the suspects, as well as, the same contents were also published on the internet; that in this way, the suspects knowingly and willingly served the objective of the FETÖ/PDY Armed Terrorist Organization to create an image that the State of the Republic of Turkey and its heads supported terrorism and thereby to cause them to appear before the International Criminal Court; that the suspects did not give information as to how they obtained the relevant information, photos and documents; that they obtained and disclosed these documents that should have remained confidential, for the purpose of espionage; that their acts cannot be considered within the scope of journalism; that Article 11 of the Press Law regulates the criminal liability, and while reporting the news, journalists are also required to abide by the laws and judicial decisions of the State where they live as citizens; and that regard also being had to the statements of the suspects and the content of the news reported by them, there exists evidence justifying the strong suspicion of guilt, and considering the imputed offences and the sentence stipulated by the law, the suspects' detention on remand constitutes a proportionate measure; therefore, in accordance with the procedure and the law… the suspects' appeal… is dismissed."

14. Upon the dismissal of their appeal, the applicants lodged an individual application on 4 December 2015.

15. The applicants' subsequent appeals against the detention order were dismissed on 11 December 2015, 25 December 2015 and 7 January

2016 respectively by the İstanbul Magistrate Judge's Office no. 6, the İstanbul Magistrate Judge's Office no. 2 and the İstanbul Magistrate Judge's Office no. 3. The request submitted by the İstanbul Chief Public Prosecutor's Office on 25 December 2015 for the applicants' continued detention was accepted by the İstanbul Magistrate Judge's Office no. 8 on 25 December 2015. The applicants' appeal against this decision was dismissed by the İstanbul Magistrate Judge's Office no. 9 on 13 January 2016. On the date of examination of their individual application, the applicants were still detained on remand.

III. RELEVANT LAW

16. As the relevant legal provisions are cited in the judgment on which we partly agreed, they will not be cited again.

IV. EXAMINATION

17. The Applicants' Allegations:

The applicants maintained that they had been engaging in journalism for many years; that they had never been found guilty for their news, documentaries or articles during the period they worked as journalists; that the incident related to the stopping of trucks had been an issue on the public agenda; that this issue had also been mentioned in many television news and other newspapers and that even many politicians had made statements on this issue; that the news they had made as to whether the trucks had been carrying weapons and as to where they had been going, which had an important place on the public agenda, aimed at enlightening the public; that although it had been stated that an investigation had been launched against them following the impugned news they had made, they could not effectively apply to a judicial authority due to a restriction order that had been issued within the scope of the investigation; that their statements were taken and they were detained on remand six months after the opening of the investigation and publication of the impugned news; that there was no strong indication of guilt which justified the detention order against them; and that they had never fled nor destroyed or tampered with evidence. In this regard, the applicants alleged that their right to personal liberty

and security enshrined in Article 19 of the Constitution, as well as, their freedoms of expression and the press stipulated in Articles 26 and 28 of the Constitution were violated, and they requested that the consequences of the alleged violations be redressed.

18. Admissibility of the Alleged Unlawfulness of Detention on Remand and Alleged Violations of the Freedoms of Expression and the Press:

19. We agree with the conclusion that the alleged unlawfulness of the applicants' detention on remand and alleged violation of their freedoms of expression and the press must be declared admissible for not being manifestly ill-founded and there being no other grounds to declare them inadmissible.

20. Merits:

21. We exactly agree with the explanations, which were made by the majority in the general judgment, concerning the lawfulness of detention on remand as a measure, the scope of Article 19 of the Constitution, the general principles on the freedoms of expression and the press and the grounds for the restriction of these freedoms.

22. However, for the reasons explained below, we do not agree with the assessments made in terms of the application of these general principles to the present case, as well as the violation found.

23. As stated in many judgments of the Court, as long as the rights and freedoms enshrined in the Constitution are not violated, in other words, there is no interpretation obviously contrary to the Constitution and there is no obvious arbitrariness in the evaluation of evidence, which results in the violation of the rights and freedoms, the inferior courts' conclusions, their interpretations of the legal provisions or issues as to factual or legal errors cannot be subject to examination within the scope of individual application. In this context, it is solely within the inferior courts' discretionary power to interpret legal provisions on detention and apply them to the case at hand.

24. In the present case, the applicants did not lodge an application challenging the unreasonable length of their detention on remand, but the "initial detention" order against them.

25. From the date on which the individual application procedure was introduced until today, in the judicial review of all applications challenging the initial detention order, it has been accepted that existence of strong indication of guilt might be deemed sufficient (see *Hidayet Karaca* [Plenary], no. 2015/144; and *İzzet Alpergin* [Plenary], no. 2013/385). As regards the allegations challenging initial detention, unlike the allegations challenging unreasonable length of detention, an examination shall be made solely on the existence of strong indication of guilt and on the lawfulness of detention. Unless there is no obvious erroneous conclusion or arbitrariness, the court's discretionary power in determining the grounds for initial detention will not be subject to examination. In this respect, no decision of violation has been rendered until today.

26. Accordingly, while scrutinizing the detention order that is the subject-matter of the present application, the grounds relied on by the judge issuing the detention order and the justifications given, it must be taken into consideration that the decision that is the subject-matter of the application is an initial detention order against the applicants.

27. The majority of our Court concluded that the applicants' right to personal liberty and security safeguarded by Article 19 of the Constitution and their freedoms of expression and the press respectively safeguarded by Articles 26 and 28 of the Constitution were violated on the following grounds:

The main fact forming a basis for the detention order against the applicants was the publication, in the Cumhuriyet newspaper, of the news concerning the TRUCKS that had been stopped and searched. In the detention order, it was stated that the available evidence pertaining to the imputed offence was sufficient for the applicants' detention on remand, however, no evidence was mentioned other than the impugned news. The applicants were charged with the offences of publishing the photos and information that are the subject-matter of the news for the purpose of "aiding and abetting an armed terrorist organisation knowingly and willingly" and obtaining and disclosing them "for the purpose of political and military espionage". However,

in the reasoning of the detention order, it was not explained which concrete facts attributable to the applicants led to the strong suspicion of guilt concerning the publication of the said news for "political and military espionage purposes". With regards to strong suspicion of guilt concerning "aiding and abetting an armed terrorist organisation knowingly and willingly, without being a member of it", the grounds of detention order did not provide any concrete facts other than the opinion that "by virtue of their profession, the applicants were expected to have known that the news they had published had been related to a terrorist organization against which there had been an ongoing investigation". The news published in another newspaper on 21 January 2014, two days after the stopping and search of the trucks, included a photo and some information pertaining to the materials alleged to be carried by the trucks. In addition to the abstract discussions by the public on what was in the trucks, the fact that similar photos and information had been published approximately sixteen months before the imputed news and that even on the date of examination of the application file they were easily accessible on the internet must be taken into consideration in the determination of the existence of a strong suspicion of guilt. In this context, whether the publication of the news similar to a previously published one continued to pose a threat against national security must be specified in the grounds of the measures to be applied with respect to the impugned news. During approximately six-month period from the first announcement of the investigation until the date when the applicants were summoned to have their statements taken, the İstanbul Chief Prosecutor's Office did not take the applicants' statements, and no measure was implemented against the applicants such as custody or detention on remand. The questions addressed to the applicants and the grounds for their detention did not reveal any evidence –apart from the news published– collected throughout the said period substantiating the allegation that they had committed the crimes they were charged with. Accordingly, the circumstances of the case and the grounds of the detention order did not sufficiently put forth why it was "necessary" to place the applicants in detention on remand approximately six months after an investigation into the said news had been launched and without considering that similar news concerning an incident giving rise to

intense public discussions had also been published several months before. In addition, regard being had to the assessments on the lawfulness of the applicants' detention on remand and considering that the only fact taken as a basis for the charges against the applicants was the publication of the relevant news, a severe measure such as detention, which did not meet the criteria of lawfulness, cannot be considered proportionate and necessary in a democratic society. Furthermore, the applicants were detained approximately six months after an investigation into the impugned news had been launched and without considering that similar news had been published sixteen months before in another newspaper, which constituted an interference with their freedoms of expression and the press. The circumstances of the present case and the grounds of the detention order did not put forth any "pressing social need" that gave rise to such an interference and its necessity in a democratic society to ensure the national security.

28. As also stated by the majority, while the European Court of Human Rights ("the ECHR") points out that a restriction can be imposed on the publication of information for reasons related to the national security, it underlines that in order to prevent any violation, such a restriction must be necessary in a democratic society as well as it must serve a pressing social need. In this respect, the ECHR considers that the confiscation of books, magazines, newspapers, and etc. which include information in the form of State secret and disclosure of which prejudices the national security is in breach of Article 10 of the Constitution, on the ground that where these publications have already been accessed and thus have become public, such an interference is no longer necessary in a democratic society, as well as there is no pressing social for the interference. In one of its judgments, the ECHR specified that the State's interlocutory injunctions granted prior to the publication of a book including information in the form of State secret might be justified; however, since the book had first been published in the USA and then in England, these interlocutory injunctions have become meaningless. According to the ECHR, the interference in question was no longer necessary in a democratic society after it had been published (Zeynep Hazar; BASIN ÖZGÜRLÜĞÜ VE ULUSAL GÜVENLİK, Gazi Üniversitesi Hukuk Fakültesi Dergisi, Volume: XVII, Y.2013, pp.1-2).

29. In the present case, the subject-matter of the news published by the applicants, which related to the MIT TRUCKS, had been the subject of the news in another newspaper 1 year and 4 months before, and therefore it had previously been discussed by the public, and thus had become public. Accordingly, when considered from solely this point of view, the imputed act of "disclosing the confidential information" did not materialize, and therefore, in merely this context, the applicants' detention on remand was in breach of their freedoms of expression and the press.

30. In the present case, the issue that is the subject-matter of the case had been subject to the news published in another newspaper sixteen months before. It had given rise to public debates, had been subject to judicial proceedings and had been announced to the public that the impugned issue, by its very nature, "should have remained confidential for reasons related to the security of the State, as well as the State's domestic and foreign political interests". Besides, although it was described by the applicants as "an issue that would create a tremendous impression on the world's agenda", except for the news that had been published in another newspaper sixteen months before, no media outlet published news on this issue during the sixteen months. As sixteen months passed, the impugned issue was no longer of a current nature in terms of journalism. Nevertheless, having been the subject-matter of the news that had been published in another newspaper before, the impugned issue was again put on the public agenda with a different content by the applicants. Accordingly, the impugned news made by the applicants cannot be interpreted, without elaborating the causes and effects in terms of "national security", as solely reporting of news on an issue that had already been published in another newspaper before, within the scope of freedoms of expression and the press, regard being also had to the fact that the grounds for the applicants' detention on remand were "aiding and abetting an armed terrorist organisation knowingly and willingly, without being a member of it", "obtaining information in possession of the State that must be kept confidential, for the purpose of political or military espionage" and "disclosing, for the purpose of espionage, the information that must be kept confidential for

reasons related to the security of the State" and considering the facts and developments surrounding the incident.

31. As a matter of fact, "national security" is one of the reasons for restricting the freedom of the press, which is a special aspect of the freedom of expression, in the Turkish law, the European Convention on Human Rights and the U.S. law. Restriction of the freedom of the press for reasons related to the national security falls into the category of the protection of the State and the society.

32. The ECHR, while interpreting the concept of national security, does not disregard the different situations specific to each country, and it leaves a wide margin of appreciation to the national authorities by taking into consideration the specific conditions of each country. However, in this context, the ECHR sets the minimum threshold and imposes on the State the burden of proof with respect to the interference to be made with the freedom of expression for the purposes of national security. At this point, it underlines that the State, while discharging the burden of proof, is allowed to take reasonable measures to ensure that the secrets and concerns about national security are not revealed to the public.

33. The magistrate judge, while ordering the applicants' initial detention, might have taken into consideration the fact that the news subject-matter of the present case, beyond contributing to the national public debates, might have intended to threaten the national security by impairing the State's foreign strategies or to incriminate the State, by always keeping the impugned issue on the agenda, especially in international sphere, thus the offence of "aiding the FETÖ/PDY armed terrorist organisation knowingly and willingly, without being a member of it" might have been committed as charged (independently of the outcome of the proceedings carried out/to be carried out against the applicants). This probable consideration of the magistrate judge has not been taken into account. The Court has concluded that the grounds for the detention order were not sufficient; that why such a measure had been deemed necessary could not be understood in the circumstances of the present case and from the grounds of detention; and that which "pressing social need" had led to an interference with the freedoms of

expression and the press by detention on remand and whether it was necessary in a democratic society for the protection of national security could not be understood in the circumstances of the present case and from the grounds of detention. Accordingly, the Court has failed to make a broad assessment in terms of the magistrate judge's considerations.

34. In addition, freedom of expression and the press and freedom to receive and impart information are certainly applicable also to the issues disturbing the State. However, in view of the information and documents available in the file, the following conclusions were reached in the present case:

Neither the İstanbul Magistrate Judge's Office no. 7, while ordering the applicants' detention on remand, nor the İstanbul Magistrate Judge's Office no. 8, while dismissing the applicants' appeal against the detention order issued against them, considered the incident solely as the publication of the said news.

a) Some TRUCKS that were later stated to have belonged to the National Intelligence Agency had been stopped by force of arms on 1 January 2014 and 19 January 2014 respectively in Hatay and Adana. They had been searched by inflicting battery and violence on the members of the MIT dealing with the TRUCKS. Those who had searched the TRUCKS had reported that the TRUCKS had been carrying weapons and ammunition, they had recorded the search and the issue had been brought to the national and international public attention;

b) Immediately after the developments, an investigation was launched and it was announced to the public though the statements made by the competent authorities of the State of the Republic of Turkey and through the letters sent to the relevant units that the materials in the MIT TRUCKS that were carrying aid to Turkmens in Syria fell into the scope of activities carried out for the national interest of the country in accordance with the duties and authorities granted to the Undersecretariat of the MIT by the State Intelligence Services and the National Intelligence Organization Act no. 2937 and that "they, by their very nature, needed to remain confidential for reasons related to the security of the State, as well as the State's domestic and foreign political interests".

c) It was found out that these actions had been carried out through the instructions of Fetullah Gülen, the leader of the FETÖ/PDY Armed Terrorist Organization, and Emre Uslu, in accordance with the ultimate objective of the organization "to create an image -on the basis of false denunciations and evidence- that the State of the Republic of Turkey was a country supporting terrorism, and thus to cause the Republic of Turkey to appear before the International Criminal Court". Therefore, an investigation was launched into the incident. At the end of the investigation, some police officers and members of the judiciary were detained for "membership of an armed terrorist organization" and "attempting to overthrow the Government of the Republic of Turkey and prevent it from performing its duties".

d) In spite of this, approximately 1 year and 4 months after the incident, on the 29 May 2015, news was published on the relevant issue -the topicality of which became highly questionable due to the time elapsed- with the titles and contents such as "THE PHOTOS THAT WILL CREATE A TREMENDOUS IMPRESSION ON THE WORLD'S AGENDA ARE PUBLISHED FOR THE FIRST TIME (DÜNYA GÜNDEMİNİ SARSACAK GÖRÜNTÜLER İLK KEZ YAYIMLANIYOR)", "Here are the weapons Mr. Erdoğan says do not exist (İşte Erdoğan'ın yok dediği silahlar)", "MIT TRUCKS ARE FULL OF WEAPONS (MİT TIR'LARI AĞZINA KADAR SİLAH DOLU)", "THE PUBLIC PROSECUTOR WAS PREVENTED (SAVCI ENGELLENDİ)", "WEAPONS TO SYRIA (SURİYE'YE SİLAH)", "LIST OF THE WEAPONS IN THE MIT TRUCKS (MİT TIRINDAN ÇIKAN SİLAHLARIN DÖKÜMÜ)", "They were hidden under the medicines (İlaçların altına gizlenmiş)", "Mr Takçı says: MİT does not have such duty (Takçı: MİT'in böyle bir görevi yok)", "WHY DO WE PUBLISH? (NEDEN YAYIMLIYORUZ?), "They said they were carrying medicine (İlaç taşıyor dediler)" – "They said they were taking aid to the Turkmens (Türkmenlere yardım götürüyordu dediler)" – "They persistently denied allegations of weapons (Silah iddiasını ısrarla reddettiler)" – "They took into custody the public prosecutor who had stopped the TRUCK and the gendarmerie officer who had searched it (TIR'ı durduran savcıyı, arayan jandarma komutanını gözaltına aldılar)", "However, in the end, the photos of the weapons to be taken to Syria in the TRUCK that belonged to the MIT have been revealed (Ama sonunda

MİT'e ait TIR içinde Suriye'ye götürülen silahların görüntüleri ortaya çıktı)" and "HERE ARE THOSE WEAPONS (İŞTE O SİLAHLAR)".

e) It was emphasized in the impugned news that the photos published would "create a tremendous impression on the world's agenda" and that they were "published for the first time". The applicant Can Dündar, in his statement, told that "*These photos relate to the news reported in the Aydınlık newspaper on 21 January 2014. However, some of them are different.".* Although he stated that the published photos were related to the news that had previously published in the Aydınlık newspaper, he did not tell that they were exactly the same information and photos, in other words, he did not tell that he had quoted from the Aydınlık newspaper. He was asked "*It was established that one day before the publication of the news reported by you, there had been a correspondence between E.E. and B.K., which stated "The photos of the MIT trucks have been disclosed leaked in exchange for money". Did you receive the photos from these persons? Were you offered money to publish them?"*. He replied "*I do not recognize those persons. Neither do I have information about the correspondence you have mentioned. In any case, the newspaper has been already published. I do not want to disclose the journalistic source…".*

f) On 29 May 2015, the İstanbul Chief Public Prosecutor's Office requested from the incumbent court that pursuant to Article 8 (a) of Law on Regulating Broadcasting in the Internet and Fighting against Crimes Committed through Internet Broadcasting, which is numbered 5651 and dated 4 May 2007, access to the contents of the news be blocked and that in the event that the contents in question were not removed, access to the relevant websites be completely blocked. The İstanbul Magistrate Judge's Office no. 8, on the same day, by a decision miscellaneous no. 2015/1330 and dated 29 May 2015, ordered the blocking of access to the news in question, on the ground that they might lead to an inconvenient situation as regards the national and international interests, as well as, national security of the Republic of Turkey.

g) While the investigation into the incident was still pending, the applicant Erdem Gül reported news titled "Dirty operation (Kirli operasyon)" in the 11 June 2015 issue of the Cumhuriyet newspaper. The İstanbul Chief Public Prosecutor's Office considered that the news in

question served the ultimate objective of the FETÖ/PDY armed terrorist organization.

h) While the investigation was still pending, the applicant Erdem Gül reported news in the 12 June 2015 issue of the Cumhuriyet newspaper, by referring to the Gendarmerie Criminal Analysis reports concerning the MIT TRUCKS in question. The news contained the titles "THE GENDARMERIE REVEALS THE WEAPONS IN THE MIT TRUCKS THAT MR. ERDOĞAN SAYS EXIST OR NOT - Gendarmerie says they exist (ERDOĞAN'IN VAR YADA YOK DEDİĞİ MİT TIR'LARINDAKI SİLAHLARI JANDARMA TESCİLLEDİ - Jandarma var dedi)", "LETHAL WEAPONS (ÖLDÜRÜCÜ SİLAHLAR)", "PRODUCED IN RUSSIA (ÜRETİM YERİ RUSYA)" and "Gendarmerie confirms the lethal weapons (Jandarma öldürücü silahları doğruladı)" and included detailed explanations. The photos of the weapons and ammunition alleged to have been in the TRUCKS were published within the contents of the news. During his statement-taking process, the applicant Erdem Gül was asked *"Where and from whom did you obtain these photos? Why did you publish them? Did you receive any instruction from anyone to publish these information and photos?"*. He replied *"I have been a journalist for 20-25 years. As you know, I cannot disclose my source. Therefore, I am sorry that I cannot give any information in this regard."*.

i) While the same investigation was still pending, the applicant Erdem Gül reported news in the 15 October 2015 issue of the Cumhuriyet newspaper, titled "… the hand that feeds you! (Besle kargayı …)". The İstanbul Chief Public Prosecutor's Office again considered that the said news served the ultimate objective of the FETÖ/PDY armed terrorist organization.

In addition, regard being had to the fact that the news and photos that had previously been published in another newspaper on the same issue were not exactly the same with those published by the applicants and that the applicants did not quote the relevant information and photos from the newspaper in question, and regard being had to the domestic and foreign developments during the period where the State's impugned activities had been carried out, to the developments regarding the issues directly concerning the national interests and the national

security, to the objectives of the FETÖ/PDY armed terrorist organization, to all facts surrounding the incident, such as the activities of the terrorist organization, and to the applicants' responses to the questions addressed to them, it was concluded that "… *in this way, the suspects knowingly and willingly served the objective of the FETÖ/PDY Armed Terrorist Organization to create an image that the State of the Republic of Turkey and its heads supported terrorism and thereby to cause them to appear before the International Criminal Court; that the suspects did not give information as to how they obtained the relevant information, photos and documents; that they obtained and disclosed these documents that should have remained confidential, for the purpose of espionage; that their acts cannot be considered within the scope of journalism; that Article 11 of the Press Law regulates the criminal liability, and while reporting the news, journalists are also required to abide by the laws and judicial decisions of the State where they live as citizens; and that regard also being had to the statements of the suspects and the content of the news reported by them, there exists evidence justifying the strong suspicion of guilt, and considering the imputed offences and the sentence stipulated by the law, the suspects' detention on remand constitutes a proportionate measure…*".

35. Considering that the applicants' appeal was against their initial detention order, as well as considering the aforementioned facts, it appears that the courts relied on sufficient grounds substantiating the existence of strong suspicion of guilt on the part of the applicants both in the detention order and in the decision dismissing their appeal against the detention order; therefore, it is concluded that the applicants' right to personal liberty and security safeguarded by Article 19 of the Constitution and their freedoms of expression and the press respectively safeguarded by Articles 26 and 28 of the Constitution were not violated.

36. For the reasons explained above, I consider that the applicants' right to personal liberty and security safeguarded by Article 19 of the Constitution and their freedoms of expression and the press respectively safeguarded by Articles 26 and 28 of the Constitution were not violated and that their application must be dismissed. Therefore, I do not agree with the conclusion of the majority who found "violation" in the present case.

DISSENTING OPINION OF JUSTICE RIDVAN GÜLEÇ

1. The present case concerned the alleged violations of the right to liberty and security as well as freedoms of expression and the press of the applicants Can Dündar, who was editor-in-chief of the Cumhuriyet newspaper, and Erdem Gül, who was the Ankara Representative of the same newspaper, due to their detention, on account of the photos and information they had published in the newspaper and on the internet, for "aiding and abetting an armed terrorist organisation knowingly and willingly, without being a member of it", "obtaining information in possession of the State that must be kept confidential, for the purpose of political or military espionage" and "disclosing, for the purpose of espionage, the information that must be kept confidential for reasons related to the security of the State".

2. I do not agree with the conclusion of the Court that has found violations of Articles 19, 26 and 28 of the Constitution in respect of the applicants, for the reasons below.

3. According to the reasoning of the violation judgment delivered by the majority, the applicants carried out journalistic activities; the news which they reported within the scope of these activities included similar elements with a previously published one that had been disclosed to the public; they were summoned to the İstanbul Chief Public Prosecutor's Office to give statement six months after the impugned news had been published, and hence they were detained on remand; the reasoning of the detention order issued against them contained no grounds justifying their detention on remand; and there was not sufficient suspicion of guilt on the part of them justifying their detention on remand.

4. Furthermore, in the reasoning of the judgment finding violations of the applicants' freedoms of expression and the press, it was stated that the applicants' detention on remand might have a deterrent effect on freedoms of the press members, and they might not perform journalistic activities freely within the scope of the society's right to receive information.

5. For the reasons explained above, alleged violations of Articles 19, 26 and 28 must be examined respectively under each Constitutional provision. Otherwise, the limits set by the Constitution may be exceeded or the remedy before the Constitutional Court that is of secondary nature may be ignored.

6. Of course, it does not constitute a crime to report any fact as news or publish any thought or opinion as part of journalistic activities carried out within the scope of the freedoms of expression and the press. Within the framework of responsible journalism, it is duty of journalists to convey to the people the news and ideas considered to contribute to the public interest or public debates. However, while performing this duty, journalists must abide by journalism ethics. The State may impose restrictions on the news to be published by the journalists regarding a very delicate matter such as national security, as well as the public authorities may prevent the publication of certain news on such matters (see *Observer and Guardian v. the United Kingdom*). As a matter of fact, the acts that do not comply with the journalism ethics may be considered as offence and hence punished.

7. However, the applicants were detained for "aiding and abetting an armed terrorist organisation knowingly and willingly, without being a member of it", "obtaining information in possession of the State that must be kept confidential, for the purpose of political or military espionage" and "disclosing, for the purpose of espionage, the information that must be kept confidential for reasons related to the security of the State". Accordingly, it appears that the charges against the applicants did not concern the news or publications issued within the scope of the freedoms of expression and the press, but they were charged with very serious and grave offences such as aiding a terrorist organization and obtaining and disclosing State secrets for the purpose of espionage.

8. In addition, the applicants' allegations concerning their detention on remand and the alleged violations of their freedoms of expression and the press shall not be examined together. Regard being had to the fact that even the first hearing of the criminal case initiated before the 14th Chamber of the İstanbul Assize Court has not been held yet, examination

of the detention order within the scope of the freedoms of expression and the press may impede the functioning of the judicial mechanisms that are vested with the actual duty and competence in terms of the protection of fundamental rights and freedoms in the circumstances of the present case.

9. Examination of the applicants' complaints within the scope of freedom of expression and dissemination of thought (Article 26 of the Constitution) and freedom of the press (Articles 28 of the Constitution) may prevent the relevant judicial authorities that are vested with the actual duty and competence from prosecuting or it may hinder the independence and effectiveness of the prosecution process. The Constitutional Court's substituting itself for the competent judicial authority in examining material facts does not comply with the provision of the Constitution which provides that in the individual application, the issues to be considered in appellate review shall not be subject to examination and the requirement that in order to lodge an individual application, the legal remedies must be exhausted. It appears that the issues set forth in the bill of indictment prepared by the public prosecutor's office and the offences attributed to the applicants are not considered as offences falling solely within the scope of freedom of the press and dissemination of thought. On the contrary, the charges against the applicants were based on Articles 220 § 7, 314, 328 and 330 of the Turkish Criminal Code. In fact, the applicants' detention was ordered three times, namely for each offence attributed to them (cited above).

10. The alleged violation of the applicants' freedom of the press and their right to disseminate opinions is premature. Furthermore, at this stage, it is not possible to make an assessment as to whether the impugned news reported within the scope of the freedom of the press were required by the pressing social need to receive information and whether there was a reasonable balance between the means of interference with the freedom and the aim pursued.

11. In the reasoning of the detention order issued against the applicants, it was asserted that the news and photos published in the newspaper and on the website were within the scope of an activity

carried out in accordance with the objectives of the FETÖ/PDY (Parallel State Structure) armed terrorist organization, rather than the public's right to receive information within the scope of journalistic activities. It is considered that examination of the present application, besides the challenge raised against initial detention, within the scope of freedoms of expression and the press may influence the ongoing proceedings, as well as it may restrict the court's discretionary power in assessing the evidence.

12. The issues as to whether the acts attributed to the applicants constitute a crime and whether the impugned acts can be considered as journalistic activities carried out within the scope of freedoms of expression and the press can be resolved by the trial court at the end of the proceedings, relying on the available evidence. Similarly, lawfulness of the conclusion reached by the trial court may be subject to appellate review. Except for the situations leading to the violations of rights and freedoms as a result of interpretations obviously contrary to the Constitution and obvious arbitrariness in the assessment of evidence, it is within the inferior courts' discretionary power to decide on as to whether the imputed acts constituted an offence, to interpret legal provisions, including those on detention, and to apply them to the present case (see *H. Karaca*).

13. In cases falling within the discretionary power of the inferior courts, the Constitutional Court cannot make assessments on the material fact. In the present case, the evidence and allegations put forward by the prosecution were considered as journalistic activities, and thus a violation was found. The scope of the individual application procedure that was introduced in our legal system with the constitutional amendment of 2010 has been set by the constitution-maker in a very precise and clear manner. Accordingly, in order to lodge an individual application, the ordinary legal remedies must be exhausted. While a dispute related to the freedoms of expression and the press -the judicial process of which has not been concluded yet- can only be examined within the scope of detention review, finding of a violation as a result of an examination based on a broad interpretation shall be contrary to the principle of rule of law.

14. The alleged violations of the applicants' rights, safeguarded by Article 19 of the Constitution, due to their detention on remand can only be examined within the scope of their right to personal liberty and security. In this context, it must be concluded that the alleged violations of the applicants' freedoms of expression and the press cannot be examined at this stage.

15. The rules on initial detention during criminal investigation are regulated in the Constitution and the relevant laws in detail. In Article 19 § 1 of the Constitution, it is set out in principle that everyone has the right to personal liberty and security. Certain circumstances under which individuals may be deprived of their freedoms, provided that the procedure and conditions of detention are prescribed by law, are listed in Article 19 §§ 2 and 3 thereof. Therefore, the freedom of a person may be restricted only in cases where one of the circumstances specified in this article exists (see *Ramazan Aras*).

16. Article 19 § 3 of the Constitution stipulates that individuals against whom there is strong evidence of having committed an offence may be arrested by decision of a judge solely for the purposes of preventing escape, or preventing the destruction or alteration of evidence, as well as in other circumstances prescribed by law and necessitating detention. In this context, the prerequisite for detention is the existence of a strong indication that the individual has committed an offence. This is a condition *sine qua non* for having recourse to the detention measure. Therefore, the accusation must be supported with plausible evidence likely to be considered strong. Nature of the facts and information which may be considered as plausible evidence is mainly based on the particular circumstances of each case (see *Hanefi Avcı*).

17. In the present case, which is known to the public as the MIT trucks case and the prosecution of which is still pending, some police officers and members of the judiciary who were alleged to be members of the FETÖ/PDY armed terrorist organization were detained for "membership of an armed terrorist organization", "obtaining and disclosing information on the security and political activities of the State" and "attempting to overthrow the Government of the Republic of Turkey and prevent it

from performing its duties". It is an undeniable fact that these offences fall into the category of crimes requiring the most severe punishment in the criminal law and in the criminal policy of the constitution-maker.

18. It appears that even in the most advanced democracies in the world in terms of rights and freedoms, in the event of concerns about national security, certain restrictions and criteria shall be applied to the fundamental rights and freedoms of individuals and groups. In the present case, it is understood from the arguments of the judicial authorities that the TRUCKS which allegedly belonged to the National Intelligence Organization of the Republic of Turkey were stopped upon a denunciation, the materials carried by them were disclosed, and afterwards, the issue was conveyed to the Turkish and world public in a way that would endanger the national security of the Turkish State.

19. States are known to carry out similar activities within or outside their own geographical borders for their national security and national interests, which are the guarantees for maintaining their existence. Publication of information and documents related to these activities on the visual and social media is unacceptable for the State authorities. Julian Assange, who has been accused of publishing the intelligence data known as WikiLeaks Documents all around the world, still lives in the Ecuadorian Embassy in London as a political refugee. Although the United Kingdom and the United States requested his extradition for trial for the offences against national security, the Ecuadorian Government brought the issue before the International Organizations and rejected the relevant requests. Similarly, Edward Snowden, a US citizen, was accused of leaking the confidential information belonging to the US National Security Agency to a British newspaper and was forced to continue his life outside his country. I express such phenomena, of which there are much more examples around the world, in order to demonstrate that all States, with no exception, have developed certain reactions to issues related to national security, State secret, national interest and espionage.

20. The ongoing civil war and conflicts in Syria with which Turkey shares the longest geographical border have reached an extent which seriously threaten the national security of our country. The problems created by the conflicts in the region affect not only our country but also

all European countries in terms of immigrants, terrorist activities and global instability. In this respect, in accordance with the rules enshrined in the Preliminary Provisions and Articles 3, 5 and 6 of the Constitution, where the integrity of the State, fundamental aims and duties of the State and sovereignty are defined, it is a duty and political obligation of the State of the Republic of Turkey to take the necessary measures and carry out activities in order to ensure the national security, protect our national interests and help our cognates and oppressed people living in the region. The news and information on the TRUCKS belonging to the National Intelligence Organization and the materials carried by them must be examined in the context of national security that is enshrined in many provisions of the Constitution, as the impugned activity was carried out by the National Intelligence Organization that is legally incumbent to perform such activities of the State within the scope of the above-mentioned duty and obligation of the latter. From this point of view, relying on the grounds specified in the judgment of the majority, it is not possible to conclude that the applicants' freedoms of expression and the press have been violated.

21. The bill of indictment issued about the incident where the MIT TRUCKS had been stopped in Adana and Mersin was accepted by the 2nd Chamber of the Tarsus Assize Court, and the file was sent to the 16th Criminal Chamber of the Court of Cassation in the capacity of the first instance court that would carry out the proceedings. In the bill of indictment, the accused were charged with the offences specified in Paragraph 17 above. The applicants' publication of confidential photos related to this incident on a newspaper and website demonstrates that they had been informed of the charges attributed by the judicial authorities within the scope of the incident still being prosecuted, they had been aware that the allegations included very serious accusations related to the national security of the State. In fact, in their letters of individual application, the applicants stated that this issue could be considered by the judicial authorities as "a violation of the confidentiality of the investigation", thus they implicitly accepted the issue.

22. As a matter of fact, the material facts that are not the subject-matter of the individual application and will arise at the end of the

proceedings carried out by the inferior courts shall not be examined by the Constitutional Court. As the alleged violations of the applicants' freedoms of expression and the press shall be examined at the end of the proceedings which are still pending, the present application shall be examined in relation to the lawfulness of the applicants' initial detention and as to whether it was in breach of any rights of the applicants.

23. Referring to the judgment of *Hanefi Avcı*, we have stated that nature of the facts and information which may be considered as plausible evidence is mainly based on the particular circumstances of each case. However, for accusing a person, it is not absolutely necessary that adequate evidence be available at the stage of his arrest or detention on remand. In fact, the aim of detention is to conduct the judicial process in a more reliable manner by means of substantiating or eliminating the suspicions forming a basis for detention on remand. Accordingly, the facts forming a basis for the suspicions on which the accusation is based and the facts which would be discussed at the subsequent stages of the criminal proceedings and which would be a basis for conviction must not be considered at the same level (see *Mustafa Ali Balbay*).

24. Detention is regulated in Article 100 of Law no. 5271. According to this Article, a person can be detained only in cases where there exists a strong suspicion that he committed the crimes of which he is accused and there is a ground for his detention. A "ground for arrest" may be deemed as existing; a) if the suspect or accused had fled, eluded or if there are specific facts which justify the suspicion that he is going to flee; b) if the conduct of the suspect or the accused tend to show the existence of a strong suspicion that he is going to attempt to destroy, hide or tamper with the evidence and to put an unlawful pressure on witnesses, the victims or other individuals. The same article also provides a list of the offences for which a ground for detention may be deemed as existing, in the event that there is a strong suspicion of their having been committed (see *Ramazan Aras*).

25. Besides, issues as to the interpretation of law or as to factual or legal errors, which are included in the inferior courts' decisions, cannot be dealt with during the individual application process unless

fundamental rights and freedoms enshrined in the Constitution are violated. It is also within the inferior courts' discretionary power to interpret legal provisions on detention and apply them to the present case. However, in case of an interpretation obviously contrary to the laws or to the Constitution and where there is an obvious arbitrariness in the evaluation of evidence, which results in violation of rights and freedoms, such decision shall be subject to review within the scope of individual application. Acknowledgement to the contrary shall not comply with the objective of the individual application (see *Ramazan Aras*).

26. It falls to the trial court to determine, relying on the available evidence, whether the acts attributed to the applicants constituted an offence, at the end of the proceedings. Likewise, lawfulness of this determination may be subject to appellate review.

27. For the reasons explained above and in the light of the relevant case-law of the Constitutional Court and the ECHR, I am of the opinion that while the alleged violations of Articles 19, 26 and 28 of the Constitution in respect of the applicants satisfy the admissibility criteria, finding of a violation is not appropriate.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

MEHMET BARANSU (2)

(Application no. 2015/7231)

17 May 2016

On 17 May 2016, the Second Section of the Constitutional Court found no violation of the applicant's right to personal liberty and security safeguarded by Article 19 § 3 of the Constitution and his freedoms of expression and the press safeguarded respectively by Articles 26 and 28 of the Constitution in the individual application lodged by *Mehmet Baransu* (no. 2015/7231).

THE FACTS

[7-59] In the Taraf newspaper where the applicant was working as a reporter, the news entitled "The Fatih Mosque would be bombed – Name of the Coup is Sledgehammer (Balyoz)", "Detention of two thousand persons" and "Sledgehammer Government – These teams would bomb the mosques" were published respectively on 20 January 2010, 21 January 2010 and 22 January 2010. The persons making the news in question were the applicant and two other journalists working in the same newspaper with the applicant.

The applicant submitted copies of three DVDs and one CD forming a basis for the news on 21 January 2010 and a document of 2.229 pages, nineteen CDs and ten voice records on 29 January 2010 to the İstanbul Chief Public Prosecutor's Office. The applicant informed that these documents and materials had been delivered to him by an informant.

As a result of the investigation conducted on the basis of information included in these documents and materials delivered by the applicant, the case known to the public as the "Sledgehammer Case" was initiated by the İstanbul Chief Public Prosecutor's Office. At the end of the proceedings, many accused were convicted. At the end of appellate review, the conviction decision rendered in respect of 237 accused was upheld by the 9th Criminal Chamber of the Court of Cassation. The Constitutional Court held in individual applications lodged by certain accused that there had been a breach of the right to a fair trial.

Upon the Constitutional Court's judgment finding a violation and the complaints raised by the accused persons tried in the case, the chief public

prosecutor's office initiated an investigation into the evidence on which the decision was based and mainly consisting of digital data in 2014. On the other hand, as the expert reports received during the re-trial made upon the judgment finding a violation concluded that the digital evidence predicated in the case was not reliable, these reports were also included in the investigation file.

The applicant was taken into custody on 1 March 2015 within the scope of the above-cited investigation, and the İstanbul Chief Public Prosecutor's Office requested the applicant be detained for the offences of "establishing an organization for committing an offence", "destroying, misusing, obtaining by fraudulent, stealing the documents pertaining to the security of the State", "obtaining confidential documents concerning the security of the State", and "disclosing information concerning the security of the State and political benefit and required to be kept confidential".

The İstanbul Magistrate's Judge Office no. 5 rejected the request for the offence of "establishing an organization for committing an offence" as there was no strong suspicion of offence and for the offence of "disclosing information concerning the security of the State and political benefit and required to be kept confidential" as the period of filing a case which was specified in the Press Law had been time-barred. The applicant's detention was ordered for the offences of "obtaining confidential documents concerning the security of the State" and "destroying, misusing, obtaining by fraudulent, stealing the documents pertaining to the security of the State".

IV. EXAMINATION AND GROUNDS

60. The Constitutional Court, at its session of 17 May 2016, examined the application and decided as follows.

A. The Applicant's Allegations

61. The applicant maintained that he was detained on remand for obtaining the documents which were known to the public as "the Sledgehammer coup plan" and subject-matter of the news published in the Taraf newspaper five years ago; that the request for his detention for publishing the documents in question had been rejected by the relevant magistrate judge's office due to the expiry of the time-limit which was

set out in Article 26 of the Press Law no. 5187 as a condition for trial and prescribed for filing a criminal case; however, the magistrate judge's office ordered his detention on the charge of obtaining the same documents. He further asserted that his obtaining and disclosure of the information in the news fell within the scope of journalistic (press) activities; that the document constituting an offence and alleged to have been destroyed was not an original copy but a photocopy; that he had not used copies of the documents in question for any purpose other than publishing, and these documents were then submitted to the relevant prosecutor's office; that his detention had been ordered in spite of not committing the imputed offences; that the fact that he did not attempt to flee in spite of having been previously taken into custody and released for several times was not taken into consideration by the magistrate judge's office which acknowledged the risk of his fleeing by merely considering the probable punishment to be imposed on him; and that there was no risk of his tampering with evidence. He also claimed that the grounds as to why conditional bail would remain insufficient were not enumerated in his detention order, and his detention was contrary to the principle of proportionality; that his appeal against the detention order and his request for release were rejected without any justification; that the magistrate judge's offices ordering his detention on remand were in breach of the principle of the legal judge and failed to provide assurance of impartial and independent court; that the documents forming a basis for the accusation were not shown to him; and that he could not effectively exercise his right to challenge as he could not examine the investigation file on which a restriction order was issued and there was a closed-circuit mechanism which was devoid of safeguards afforded by a tribunal. The applicant accordingly alleged that there was a breach of the right to personal liberty and security safeguarded by Article 19 of the Constitution, the freedoms of expression and the press safeguarded by Articles 26 and 28, the right to a fair trial safeguarded by Article 36, the principle of natural judge safeguarded by Article 37 as well as the right to an effective remedy safeguarded by Article 40 thereof. He requested the Court, in the first place, to indicate a measure which would ensure his release and to find a violation of the relevant articles.

B. The Court's Assessment

62. The Constitutional Court is not bound by the legal qualification of the incidents by the applicant and, in itself, makes the legal definition of the facts (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). In this respect, the Court found it appropriate to examine,

i. the applicant's complaint that the magistrate judge's offices ordering his detention on remand were in breach of the principle of the natural judge and failed to provide safeguards afforded by an impartial and independent tribunal, within the scope Article 19 § 3 of the Constitution;

ii. his complaints that the documents forming a basis for the accusation were not shown to him; and that he could not effectively exercise his right to challenge as he could not examine the investigation file on which a restriction order was issued and there was a closed-circuit mechanism which was devoid of safeguards afforded by a tribunal, within the scope Article 19 § 8 of the Constitution;

iii. his complaints that his detention was ordered in spite of not committing the imputed offences; that the document constituting an offence and alleged to have been destroyed was not an original copy but a photocopy; that he had not used copies of the documents in question for any purpose other than publishing; that the fact that he did not attempt to flee in spite of having been previously taken into custody and released for several times was not taken into consideration by the magistrate judge's office which acknowledged the risk of his fleeing by merely considering the probable punishment to be imposed on him; that there was no risk of his tampering with evidence; that the grounds as to why conditional bail would remain insufficient were not enumerated in his detention order, and his detention was contrary to the principle of proportionality; that his appeal against the detention order and his request for release were rejected without any justification, within the scope Article 19 § 3 of the Constitution;

iv. his complaints that he was detained on remand for obtaining the documents which were subject-matter of the news published as a part of journalistic activities; that the request for his detention for publishing the

documents in question had been rejected by the magistrate judge's office due to expiry of the time-limit which was set out in Article 26 of Law no. 5187 as a condition for trial and prescribed for filing a criminal case; however, the magistrate judge's office ordered his detention on the charge of obtaining the same documents; and that his obtaining and disclosure of the information in the news fell within the scope of journalistic (press) activities, within the scope Articles 26 and 28 of the Constitution.

63. Besides, the applicant requested to be released two days after his appeal against his first detention order. The İstanbul Magistrate Judge's Office no. 4 assessed and, through its decision dated 19 March 2015, rejected the applicant's request by indicating that the first detention order was legitimate and that any concrete evidence to end his detention had not been submitted. It appears that, within the scope of the individual application lodged about 1 month and 20 days after the first detention order, the applicant generally complained of unlawfulness of his detention but did not explicitly raise any allegation that his detention exceeded the reasonable time. The Constitutional Court is not liable, in every case, to *ex officio* review lawfulness and to establish whether fundamental rights have been violated, on the basis of general and abstract allegations (see *Sami Özbil*, no. 2012/543, 15 October 2014, § 50). For these reasons, it has been concluded that the applicant's complaints about his detention must be examined under Article 19 § 3 of the Constitution to establish whether his detention is lawful.

1. Admissibility

a. Alleged Contradiction of the Magistrate Judge's Offices to the Principles of the Natural Judge, Independent and Impartial Judge

64. The applicant maintained that the magistrate judge's offices ordering detention contradicted the principles of the legal judge and did not provide the safeguards of an impartial and independent tribunal.

65. In its observations, the Ministry made a reference to similar judgments rendered by the European Court of Human Rights ("the ECHR") and indicated that "the tribunal" imposing a restriction on the right to personal liberty and security must be established by law; that in

order to establish whether a tribunal can be considered "independent", regard must be had to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence; that the magistrate judge's offices were established by the Law on Amendments to the Turkish Criminal Code and Certain Laws no. 6545 and dated 18 June 2014, and judges already holding office were assigned to these offices by the High Council of Judges and Prosecutors ("the HCJP") according to their career, qualification and competency; and that the magistrate judge's offices were also organized, likewise the other courts, in accordance with the principle of an independent tribunal and guarantee of tenure of judges.

66. In his counter-statement against the observations of the Ministry, the applicant maintained that Article 5 of the European Convention on Human Rights ("the Convention") requires "a judge" or "a tribunal" to have certain fundamental judicial guarantees, qualifications or characteristics; that these tribunals must be established by law and have the guarantee of independence and impartiality; that they must observe the principles of adversarial proceedings and equality of arms; that the tribunal ordering detention must have the guarantee of the natural judge; and that one of the requirements sought for tribunals was to inspire confidence. He also indicated that in criminal law, the principle concerning the establishment of the tribunal by law implied that the tribunal must be established by law prior to commission of the offence; however, the magistrate judge's offices ordering his detention were established by the ruling party, as a project, subsequent to the date when the imputed offences had been committed; and that these offices were not independent and impartial.

67. As stated in the previous judgments of the Court, the principle of natural judge is defined as the pre-determination, by law, of the venue of jurisdiction to deal with the case before an offence is committed or a dispute arises. This principle precludes the establishment of judicial bodies or appointment of judges after an offence is committed or a dispute arises, in other words, the appointment of judges by considering the accused or parties of the case (see the Court's judgment no. E.2014/164, K.2015/12, 14 January 2015).

68. Nevertheless, the guarantee of legal (natural) judge cannot be interpreted to the effect that recently established tribunals or judges recently assigned to the already existing tribunals can in no way preside over trials concerning pre-committed offences. On condition of not being limited to a certain incident, person or community, cases where a recently established tribunal or a judge recently assigned to an already existing tribunal deals with disputes that have arisen prior to establishment or appointment are not contrary to the principle of legal judge (see the Court's judgment no. E.2014/164, K.2015/12, 14 January 2015).

69. Accordingly, in the event that a provision does not aim at determining the venue of jurisdiction to deal with the case after a certain offence is committed and applies to all relevant cases following its entry into force, it cannot be contrary to the principle of natural judge (see the Court's judgment no. E.2009/52, K.2010/16, 21 January 2010).

70. In Article 9 of the Constitution, it is explicitly enshrined that judicial power will be exercised by independent courts, and Article 138 thereof explains what should be inferred from the independence of courts. Pursuant to the latter provision, "*No organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, or make recommendations or suggestions*". Independence means that, in resolving a dispute, the tribunal must be independent *vis-à-vis*, and must not be under the influence of, the legislative and executive powers, parties of the case, third parties as well as the other judicial organs (see the Court's judgment no. E.2014/164, K.2015/12, 14 January 2015).

71. The manner of appointment of members of the tribunal, their terms of office, existence of safeguards against the outside pressures and the question whether it presents an appearance of independence are of importance in determining whether a tribunal is independent *vis-à-vis* the administration and parties of the case (see *Yaşasın Aslan*, no. 2013/1134, 16 May 2013, 28).

72. Article 6 of the Convention explicitly mentions of the right to a trial by an impartial tribunal, as an element inherent in the right to a fair trial. On the other hand, Article 36 of the Constitution does not include

any explicit indication as to the independence of tribunals. However, pursuant to the Court's case-law, this is also an implicit element of the right to a fair trial. Besides, regard being had to the fact that impartiality and independence of tribunals are two elements complementing one another, it is explicit that, as required by the principle of holism, Articles 138, 139 and 140 of the Constitution must also be taken into consideration in making an assessment as to the right to a trial by an impartial tribunal (see *Tahir Gökatalay*, no. 2013/1780, 20 March 2014, § 60).

73. The notion of impartiality of tribunals is explained through the institutional structure of the tribunals and attitude of the incumbent judge towards the cases to be dealt with. In the first place, legal and administrative arrangements concerning the establishment and organization of tribunals must not give the impression that they are not impartial. As a matter of fact, institutional impartiality is related to the independence of tribunals. For impartiality, the pre-requisite of independence must be primarily fulfilled, and additionally, the institutional structure must appear to be impartial (see the Court's judgment no. E.2014/164, K.2015/12, 14 January 2015).

74. The second element pointing out the impartiality of tribunals concerns the subjective attitudes of judges towards the case to be dealt with. The judge to handle the case must treat equally, be impartial and unbiased *vis-à-vis* the parties of the case as well as deliver a decision, on the basis of his personal conviction, in line with legal rules and without remaining under any pressure or inspiration. This is what's expected of judges by the Constitution and laws. Acts to the contrary are made subject to disciplinary and criminal sanctions by the legal order (see the Court's judgment no. E.2014/164 K.2015/12, 14 January 2015).

75. In the present case, the magistrate judge's offices alleged not to be independent and impartial rejected the public prosecutor's requests and rendered decisions in favour of the suspects. It accordingly appears that the İstanbul Magistrate Judge's Office no. 5 dismissed the request for the applicant's detention on remand for having disclosed information concerning the security and political interests of the State and required to be kept confidential and for having established an organization to commit an offence.

76. It is revealed that the relevant judges are performing the above-cited duties after being appointed by the HCJP on the basis of a legal arrangement of general nature. Therefore, in the absence of any concrete biased act or attitude towards the applicant and by taking into account facts of which authenticity and nature could not be precisely established as well as assessments and comments put forth during political discussions, it is not possible to acknowledge that the incumbent judges have failed to act in an independent and impartial manner (see *Hikmet Kopar and Others* [Plenary], no. 2014/14061, 8 April 2014, § 114; and *Hidayet Karaca* [Plenary], no. 2015/144, 14 July 2015, § 78).

77. As a matter of fact, the Court rejected the request for annulment of the relevant provision of the law whereby the magistrate judge's offices were established on the grounds that, as all other judges, the magistrate judges were appointed by the HCJP and had the guarantee of tenure of judges afforded by Article 139 of the Constitution; that these tribunals were organized in the manner prescribed by the Constitution and in accordance with the principles of independent tribunals and tenure of judges, as all other courts; that there was no factor in their organizational structure and functioning that led to the conclusion that these tribunals would fail to be impartial; that besides in cases where it was proven by concrete, objective and plausible evidence that the judge lacked impartiality, there also existed procedural provisions precluding him from handling the case (see the Court's judgment no. E.2014/164 K.2015/12, 14 January 2015).

78. For the reasons explained above, as it was clear that there was no violation with regard to the applicant's allegation that he was detained on remand by the magistrate judge's office, which was established in breach of the principle of natural judge, which lacked independence and impartiality and which was not in the capacity of a tribunal, this part of the application was declared inadmissible for *being manifestly ill-founded*.

Mr. Alparslan ALTAN did not agree with this conclusion.

b. Alleged Inability to Effectively Exercise the Right to Challenge

79. The applicant alleged that he was not provided with the documents forming a basis for the accusation; and that he could not effectively

exercise his right to challenge as he could not examine the investigation file due to the restriction order imposed thereon and there was a close-circuit mechanism which was devoid of safeguards afforded by a tribunal.

80. In its observations, the Ministry indicated by making a reference to the similar judgments of the Constitutional Court and the ECHR that certain evidence may be kept confidential in order to conduct the investigation efficiently and prevent the suspects from tampering with evidence; however, this legitimate purpose cannot be extended so as to significantly impair the right to defence; that essential information must be provided to the suspect's defence counsel in the appropriate manner in order for an assessment as to the lawfulness of detention; that it was not requisite to specify all accusations during detention, and it was sufficient to ensure access by the suspect or the accused or his lawyer to information and documents that were of fundamental significance and forming a basis for detention. It was further stated that in the present incident, the applicant had examined the documents, the basis of the accusation against him, before submitting them to the İstanbul Chief Public Prosecutor's Office; that the questions asked to the applicant during his interrogation by the police were sufficiently explicit for the evidence as to the accusation against him; that in his challenges to detention, the applicant made explanations concerning fundamental aspects forming a basis for the accusations against him; and that it was within the discretionary power of the law-maker to afford the magistrate judge's offices with the power to review the challenges to detention, and this would not render the exercise of the right to challenge ineffective.

81. In his counter-statements against the observations of the Ministry, the applicant alleged that he could not have access to investigation file due to the restriction order, which was in breach of the principles of adversarial proceedings and equality of arms; and that there was a closed-circuit mechanism whereby challenges to detention were reviewed.

82. As required by Article 19 § 4 of the Constitution, individuals arrested or detained would 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 would be made, at the latest, before the individual is brought before a judge.

83. 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."*

84. Pursuant to this provision of the Constitution, any person deprived of his liberty is entitled to apply to a competent judicial authority in order to ensure speedy conclusion of proceedings regarding him and his immediate release if his detention is unlawful. Although it is not possible to afford all safeguards inherent in the right to a fair trial through this procedure prescribed in this provision, it must be ensured that concrete safeguards appropriate for the circumstances of the alleged detention must be provided by a judicial decision (see *Mehmet Haberal*, no. 2012/849, 4 December 2013, §§ 122 and 123).

85. In review of the challenges against the continued detention or the request for release, the principles of equality of arms and adversarial proceedings must be observed (see *Hikmet Yayğın*, no. 2013/1279, 30 December 2014, § 30).

86. The principle of equality of arms means that the parties to a given case are ensured to be subject to the same conditions, in respect of procedural rights, and to raise their allegations and defence submissions before a tribunal, in a reasonable manner, without giving an advantage to one party over the other. An advantage afforded not to both parties but merely to one party would be in breach of the principle of equality of arms even if there exists no evidence indicating that it has led to an unfavourable outcome (see *Bülent Karataş*, no. 2013/6428, 26 June 2014, § 70).

87. Besides, the principle of adversarial proceedings requires that the parties be granted the right to be informed of and make comments on the case file, thereby participate effectively in the proceedings. This principle

is closely related with the principle of equality of arms, and these two principles are complementing one another. That is because in cases where the principle of adversarial proceedings is breached, the balance between the parties for presenting their case would be impaired (see *Bülent Karataş*, § 71).

88. A restriction may be imposed on access to certain evidence at the investigation stage particularly for the purposes of protecting fundamental rights of third parties, maintaining public interest or securing methods to which judicial authorities have recourse in conducting investigation. Therefore, it cannot be said that the restriction imposed on the defence counsel's right to examine the investigation file, with a view to properly conducting the investigation phase, is not necessary for the democratic order of the society. However, the restriction to be imposed on the right to access to investigation file must be proportionate to the aim intended to be reached with the restriction order and must not preclude the sufficient exercise of the right to defence (see the Court's judgment no. E.2014/195 K.2015/116, 23 December 2015, § 107).

89. The ECHR considers that deprivation of access by the defence counsel to the file is in breach of the principle of equality of arms (see *Ceviz v. Turkey*, no. 8140/08, 17 July 2012, § 41). However, according to the ECHR, there may be restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security, the need to keep secret certain police methods of investigation or the protection of the fundamental rights of another person. Nevertheless, any difficulties caused to the defendant by a limitation on his rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (see *A. and Others v. the United Kingdom*, no. 3455/05, 19 February 2009, § 205).

90. The person arrested must be informed, in a non-technical and plain language, of the basic factual and legal reasons for his arrest and thereby, he should have the opportunity to have recourse to a tribunal whereby he could challenge the lawfulness of deprivation of his liberty under Article 19 § 8 of the Constitution. Article 19 § 4 of the Constitution entails that information conveyed to the person arrested or detained during his

arrest or detention include a full list of the imputed offences; in other words, he must be provided with information or an explanation as to all evidence forming a basis for accusations against him (see *Günay Dağ and Others* [Plenary], no. 2013/1631, 17 December 2015, § 175).

91. In the event that the applicant is asked questions, during the hearing, as to the contents of documents access to which has been restricted and he makes a reference to the content of these documents in his challenge to the detention order, it must be acknowledged that he has had access to the documents forming a basis for his detention as well as a sufficient knowledge of their contents, and thereby, he has the opportunity to sufficiently challenge the reasons for his detention. In such a case, the person detained has a sufficient knowledge of the content of documents forming a basis for his detention (see *Hidayet Karaca,* § 107).

92. In the present case, regard being had to the applicant's defence submissions before the police and the court, it has been observed that the applicant was informed of the nature of imputed offences; that during his interrogation by the police, twenty eight questions concerning the imputed offence were put to him, and thereby, the accusations against him were explained in detail; that these questions also revealed the contents of certain evidence forming a basis for these charges; that he exhaustively presented his defence submissions against the accusations against him during both his interrogation by the police and hearing by the court; that in his defence submissions, he made statements also in issues concerning the content and nature of evidence as a basis for his accusation; and that as the evidence forming a basis for his accusation mainly consisted of CDs, DVDs, audio tapes and other documents that had been submitted by the applicant to the İstanbul Chief Public Prosecutor's Office, he had been already aware of the existence and contents of such evidence in the pre-investigation period. It has been further revealed that in his petition requesting his release and submitted two days after the adjudication of his challenge against the detention order, the applicant exhaustively presented his defence submissions as to the procedures and principles, made detailed classifications of the facts and evidence forming a basis for his accusation as well as mentioned of several details included in the evidence. In addition, in the letter, dated 2 March 2015, of the İstanbul

Chief Public Prosecutor's Office concerning the request for the applicant's detention, a detailed information was provided with respect to the acts of which he was accused and the facts and evidence (in general with the content and scope thereof) taken as a basis for the accusation. This letter was also read out to the applicant during his hearing by the İstanbul Magistrate Judge's Office no. 5 in the presence of his defence counsels and before his interrogation. Nor did the applicant raise any complaint that his access to records of statements, expert's reports and reports concerning other judicial processes during which he was entitled to be present was restricted, which contravened Article 153 § 3 of Law no. 5271. It has been accordingly concluded that the applicant and his defence counsels had access to information forming a basis for the accusations against him as well as for his detention.

93. Regard being had to the facts that within the scope of the judicial review of the initial period of the applicant's deprivation of freedom on suspicion of committing an offence, the applicant and his defence counsels were notified of basic issues forming a basis for the accusations and that the applicant was also provided with the opportunity to challenge them, it cannot be acknowledged that the applicant was deprived of access to the investigation file merely due to the restriction order, and thereby the principles of equality of arms and the adversarial proceedings were breached.

94. In addition, the review of challenges against the orders issued by the magistrate judge's offices established by virtue of Article 48 of Law no. 6545 will be conducted by the magistrate judge's office with consecutive number, in the event that there are more than one magistrate judge's office within the same venue of jurisdiction, pursuant to Article 268 § 3 (a) of the Code of Criminal Procedure no. 5271 ("the CCP" or "Law no. 5271").

95. In the present case, the applicant's allegations that the magistrate judge's offices ordering detention were in breach of the principles of natural judge, impartial and independent judge were declared inadmissible for being manifestly ill-founded. Therefore, the Court did not find justified the applicant's allegation that the authority assigned to review his challenge to the detention order was the magistrate judge's offices which were not

in the capacity of an independent and impartial tribunal, and that due to this closed-circuit mechanism, there was no remedy whereby detention orders may be challenged effectively (see *Hikmet Kopar and Others*, § 133).

96. The Court had previously examined the request for annulment of the legal provision which set out that the authority to review the challenges to the orders issued by the magistrate judge's offices was still held by these offices. Accordingly, the Court dismissed the request on the grounds that there was no constitutional norm requiring the review of the challenges to the orders of the magistrate judge's offices by a higher or another court; that courts titled with the name of a province or district or having more than one "chamber" due to the workload cannot be considered to be the same tribunal in respect of the judicial activities performed and examination of appellate requests; that the magistrate judge's offices designated as the authority to receive and examine the challenges pursuant to Articles 268 § 3, titled appeal remedy, of Law no. 5271 were entitled to review the challenged orders and adjudicate on the merits of the case; and that it was therefore an effective appeal remedy (see the Court's judgment no. E.2014/164, K.2015/12, 14 January 2015).

97. For these reasons, as it is clear that there is no violation with regard to the applicant's allegations that the principles of equality of arms and adversarial proceedings were impaired due to the restriction order imposed at the investigation stage and that he could not effectively challenge his detention order due to the designation of the magistrate judge's offices as the authority to receive and examine challenges, the Court found this part of the application inadmissible for *being manifestly ill-founded*.

Mr. Alparslan ALTAN did not agree with this conclusion.

c. Alleged Unlawfulness of Detention and Alleged Violation of the Freedoms of Expression and the Press

98. The applicant maintained that the detention order issued in the absence of strong suspicion of guilt and reasons for detention was unlawful; and that he was detained on remand for his journalistic activities.

99. Given the circumstances of the present case, it has been considered that the alleged violation of the applicant's right to personal liberty and

security must be examined in conjunction with the alleged violations of their freedoms of expression and the press.

100. In order for an assessment to be able to be made as to whether the legal remedies were exhausted within the scope of the alleged violations of the freedoms of expression and the press, the subject-matter of the application must be determined within the scope of the allegation in question. The subject-matter of the application before the Constitutional Court is the alleged violations of the applicant's freedoms of expression and the press on account of his "detention on remand" for having obtained the documents that were subject-matter of the news published in the newspaper he was taking office, and it is not related to the merits of the investigation or to the probable outcome of the investigation or the proceedings.

101. In order that the alleged violations of the freedoms of expression and the press due to detention can be examined, the continuing investigation or proceedings does not need to be completed. It has been observed that the applicant challenged the detention order against him, which underlies his allegations, and thereby exhausted the available domestic remedies. In its recent judgment, the Constitutional Court held that in order for an examination as to the effect of the pre-trial detention of the applicants who were a journalist due to the impugned news published on their freedoms of expression and the press, it would not need to wait for the conclusion of the proceedings (see *Erdem Gül and Can Dündar* [Plenary], no. 2015/18567, 25 February 2016, § 58).

102. The ECHR examined the allegations as to the effects of the detention on the freedoms of expression and the press without requiring the finalization of the investigation and prosecution phases and dismissed the Government's objection as to non-exhaustion of domestic remedies (see *Nedim Şener v. Turkey*, no. 38270/11, 8 July 2014, §§ 88, 90, 96; and *Şık v. Turkey*, no. 53413/11, 8 July 2014, §§ 77-79, 85).

103. The alleged unlawfulness of the applicant's detention on remand and alleged violations of his freedoms of expression and the press must be declared admissible for not being manifestly ill-founded and there being no other grounds to declare them inadmissible.

2. Merits

104. The Constitutional Court's examination in the instant case is limited to the lawfulness of the applicant's detention on remand and to the effects of the detention on his freedoms of expression and the press, independently of the investigation and trial conducted against the applicant and of the probable outcome of the investigation or the proceedings.

105. Accusation means notification, by competent authorities, to a person that he has allegedly committed an offence (see *Ersin Ceyhan*, no. 2013/695, 9 January 2014, § 32). The questions whether the above-cited acts imputed to the applicant constitute an offence, whether legal elements of the offence/offences have been formed in respect of the applicant and whether he committed the imputed offences may be established by judicial authorities conducting the investigation and/or trial procedures on the basis of evidence obtained at the end of the investigation/trial to be conducted in harmony. The question whether the conclusion reached by the judicial authorities is lawful may be determined through the appellate review. Except for circumstances giving rise to violation of fundamental rights and freedoms due to an interpretation explicitly contrary to the Constitution and explicit arbitrariness in assessment of evidence, the determination as to whether the imputed acts constitute an offence, interpretation of legal provisions and application of these provisions to concrete cases are within the discretionary power of the inferior courts (see *Mehmet Haberal*, § 77).

106. The review to be carried out at this stage does not concern the merits of the investigation process pending in respect of the applicant or, if filed, merits of the case to be heard. Nor does it aim at determining whether the offence(s) imputed to the applicant occurred.

a. Alleged Unlawfulness of Detention

i. The Applicant's Allegations and the Ministry's Observations

107. The applicant maintained that in spite of not having committed the imputed offences, his detention was ordered; that the impugned document alleged to have been destroyed was not original but a photocopy; that

he did not use the copies he had obtained for any purposes other than publication; that in spite of being previously taken into custody and released, he did never attempt to flee; however, this fact was ignored by the relevant tribunal which acknowledged, by merely taking into consideration the probable punishment to be imposed, that there was a risk of his fleeing; that there was no risk, on his part, of tampering with the evidence; that the grounds as to why the conditional bail would be insufficient was not specified in his detention order, and his detention was contrary to the principle of "proportionality"; and that his challenges to the detention order and requests for release were dismissed without any justification.

108. In its observations, the Ministry, making a reference to the similar judgments of the Constitutional Court and the ECHR, indicated that in order to deprive a person of liberty on suspicion of having committed an offence, there must exist a reasonable suspicion of, or plausible grounds for, guilt; that for there to be a reasonable suspicion, there must be facts or information which would satisfy an objective observer -who will also take into consideration the evidence obtained and circumstances of the concrete case- that the person concerned may have committed an offence; that the severity and gravity of the offence imputed to the applicant are elements concerning the assessment of his risk of fleeing; that existence of reasonable suspicion may justify detention to a certain period; that the applicant himself acknowledged that he had obtained the confidential document titled "Egemen Operation Plan"; that this document was not published by him; and that the applicant was also accused of destroying some confidential documents obtained by him or using them for other purposes.

109. In his counter-statement, the applicant noted that the gravity of punishment to be imposed cannot merely be a presumption for the risk of fleeing; that although it was alleged that he did not make use of (certain) documents at his disposal in his capacity as a journalist and report them as news, it was the journalist himself who was entitled to determine which document would be used within the scope of a journalistic activity; that a journalist cannot be forced to disclose his journalistic source; and that his detention was arbitrary.

ii. General Principles

110. Right to personal liberty and security is a fundamental right that ensures the prevention of arbitrary interference by the State with the freedoms of individuals (see *Erdem Gül and Can Dündar*, § 62).

111. In Article 19 § 1 of the Constitution, it is set out in principle that everyone has the right to personal liberty and security. Certain circumstances under which individuals may be deprived of their freedoms, provided that the procedure and conditions of detention are prescribed by law, are listed in Article 19 §§ 2 and 3 thereof. Therefore, the freedom of a person may be restricted only in cases where one of the circumstances specified in this article exists (see *Murat Narman,* no. 2012/1137, 2 July 2013, § 42).

112. Likewise the provisions enshrined in the Constitution, Article 5 § 1 of the Convention sets out that everyone has the right to personal liberty and security and that no one can be deprived of liberty save in the cases specified in subparagraphs (a)-(f) and in accordance with a procedure prescribed by law (see *Mehmet İlker Başbuğ*, no. 2014/912, 6 March 2014, § 42).

113. The obligation to ensure the restrictions on personal liberty to be in compliance with the principle and procedure prescribed in law is, in principle, incumbent upon the administrative bodies and inferior courts. The administrative bodies and courts are liable to abide by legal rules concerning principles and procedures. Objective of Article 19 of the Constitution is to protect individuals against arbitrary deprivation of liberty, and under exceptional circumstances prescribed therein, the restrictions on personal liberty must be in conformity with the objective of this provision (see *Abdullah Ünal*, no. 2012/1094, 7 March 2014, § 38).

114. Article 19 § 3 of the Constitution reads as follows:

> *"Individuals against whom there is strong evidence of having committed an offence may be arrested by decision of a judge solely for the purposes of preventing escape, or preventing the destruction or alteration of evidence, as well as in other circumstances prescribed by law and necessitating detention. Arrest of a person without a decision by a judge may be executed only when a*

person is caught in flagrante delicto or in cases where delay is likely to thwart the course of justice; the conditions for such acts shall be defined by law."

115. The relevant provision stipulates that individuals against whom there is strong evidence of having committed an offence may be arrested by decision of a judge solely for the purposes of preventing escape, or preventing the destruction or alteration of evidence, as well as in other circumstances prescribed by law and necessitating detention. In this context, the prerequisite for detention is the existence of a strong indication that the individual has committed an offence. This is a condition *sine qua non* for having recourse to the detention measure. Therefore, the accusation must be supported with plausible evidence likely to be considered strong. Nature of the facts and information which may be considered as plausible evidence is mainly based on the particular circumstances of each case (see *Mustafa Ali Balbay*, no. 2012/1272, 4 December 2013, § 72).

116. However, on the basis of the above-mentioned consideration, for accusing a person, it is not absolutely necessary that adequate evidence be available at the stage of his arrest or detention on remand. In fact, the aim of detention is to conduct the judicial process in a more reliable manner by means of substantiating or eliminating the suspicions forming a basis for detention on remand. Accordingly, the facts forming a basis for the suspicions on which the accusation is based and the facts which would be discussed at the subsequent stages of the criminal proceedings and which would be a basis for conviction must not be considered at the same level (see *Mustafa Ali Balbay*, § 73).

117. Detention measure is regulated in Article 100 *et. seq.* of Law no. 5271. Pursuant to Article 100, a person may be detained on remand only in case of existence of facts indicating strong suspicion of his guilt and a ground for his detention. Such grounds are also enumerated therein. According to this Article, a "ground for arrest" may be deemed as existing; a) if the suspect or accused had fled, eluded or if there are specific facts which justify the suspicion that he is going to flee; b) if the conduct of the suspect or the accused tend to show the existence of a strong suspicion that he is going to attempt to destroy, hide or tamper with the evidence and to put an unlawful pressure on witnesses, the victims or other

individuals. The same article also provides a list of the offences for which a ground for detention may be deemed as existing, in the event that there is a strong suspicion of their having been committed (see *Ramazan Aras*, no. 20112/239, 2 July 2013, § 46).

118. Pursuant to Article 19 § 3 of the Constitution, an individual may be detained in order to obtain evidence necessary for filing a case against him, provided there is strong indication of his guilt. Aim of detention is to proceed with the criminal investigation with a view to confirming or refuting suspicions against him (see *Dursun Çiçek*, no. 2012/1108, 16 July 2014, § 87).

119. In addition, detention that is a severe and harsh measure may be deemed reasonable only if it is proven that another less severe measure would not be sufficient for protecting individual's interest and public interest. In this respect, lawfulness of deprivation of liberty is not sufficient for applying detention measure. This measure must also be "necessary" under the specific circumstances of the present case (see *Erdem Gül and Can Dündar*, § 68). This is also required by the element of "necessity", one of the components of the "proportionality" principle that is among the criteria sought for restricting fundamental rights and freedoms set out in Article 13 of the Constitution (see the Court's judgment no. E.2015/40 K.2016/5, 28 January 2016). In order for a balance required to be struck between the aim pursued and the interference made, measures of conditional bail must be primarily assessed and the question as to why conditional bail would remain insufficient must be justified in detention orders (see *Engin Demir* [Plenary], no. 2013/2947, 17 December 2015, § 69).

120. Besides, issues as to the interpretation of law or as to factual or legal errors, which are included in the inferior courts' decisions, cannot be dealt with during the individual application process unless fundamental rights and freedoms enshrined in the Constitution are violated. It is also within the inferior courts' discretionary power to interpret legal provisions on detention and apply them to the present cases (see *Abdullah Ünal*, § 39). However, it is the Constitutional Court's duty to examine whether the conditions set out in Article 19 § 3 of the Constitution are indicated in the grounds of detention orders which are subject-matter of the individual application and whether the proportionality principle, one of the criteria

sought for restriction of fundamental rights and freedoms and set out in Article 13 of the Constitution, has been observed in applying detention measure under the specific circumstances of the present case (see *Erdem Gül and Can Dündar*, § 69).

121. Detention of an individual by a judicial decision devoid of reasoning cannot be accepted. However, a suspect or accused may be detained on remand on the basis of reasons justifying his detention. However, a detention order with excessively short reasoning or without any legal provision as a ground should not be assessed within this scope. In cases where the authority for challenge or appeal authority does not provide detailed justification in its decision for concurring with the challenged or appealed decision or the grounds specified therein, this is not, in principle, in breach of the right to a reasoned decision (see *Hanefi Avcı*, no. 2013/2814, 18 June 2014, §§ 70 and 71).

iii. Application of Principles to the Present Case

122. In the present case, an investigation was conducted against the applicant by the İstanbul Chief Public Prosecutor's Office which requested the applicant's detention for establishing an organization to commit an offence; destroying, misusing, obtaining by trickery, stealing documents concerning the security of the State; obtaining confidential documents concerning the security of the State; and disclosing information concerning the security and political interests of the State and required to be kept confidential.

123. However, the İstanbul Magistrate Judge's Office no. 5, which assessed the request for the applicant's detention, rejected the request insofar as it related to the offence of establishing an organization to commit an offence, set out in Article 220 of Law no. 5237, for lack of strong suspicion of guilt, as well as to the offence of disclosing information concerning the security and political interests of the State and required to be kept confidential, set out in Article 329 of the same Code, for expiry of the time-limit which was set out in Article 26 of the Press Law no. 5187.

124. Therefore, the applicant was not detained on remand on account of the news published in 2010 in the Taraf Newspaper where he took office,

the contents thereof, the aim pursued in publication of these news or their probable impacts or consequences.

125. It appears that the magistrate judge's office issued a detention order in respect of the applicant for *"obtaining confidential documents concerning the security of the State"* set out in Article 327 of Law no. 5237 and *"destroying, misusing, obtaining by trickery, stealing documents concerning the security of the State"* set out in Article 326 thereof.

126. The constitutional review as to whether the right to personal liberty and security has been violated must be primarily conducted concerning the question as to whether there was a "strong indication" of guilt, which is one of the compulsory conditions enumerated in Article 19 § 3 of the Constitution for applying detention measure. Having regard to the fact that the subject-matter of the application was the detention measure and that there was a pending investigation against the applicant, the Constitutional Court restricted its review with the question as to whether reasoning of the detention order issued by the magistrate judge's office and the request letter for detention had indicated the concrete facts revealing the strong suspicion of guilt.

127. In the present case, in ordering the applicant's detention on 2 March 2015, the İstanbul Magistrate Judge's Office no. 5 acknowledged the existence of strong suspicion of guilt for the imputed offences of destroying, misusing, obtaining by trickery and stealing documents concerning the security of the State and obtaining confidential documents concerning the security of the State by relying on the facts that the applicant obtained the "Sledgehammer coup plan" and CDs/DVDs and documents pertaining thereto as well as Egemen Operation Plan which was "strictly confidential" and included information required to be kept confidential for the security of the State or its domestic or foreign political interests; that 118 confidential documents recorded in CDs obtained by the applicant were revealed to be stolen; that according to his statement, he destroyed these documents, even if copies, instead of submitting them to the relevant authorities; that however, it could not be determined yet whether he had indeed destroyed them; that it was unknown where the confidential documents that could not be found were or by whom they

were retained or for what purpose they would be used; and that the person said to have provided the applicant with these documents and whether there had been persons acting together with him could not be determined.

128. It has been inferred from the request letter for detention issued by the İstanbul Chief Public Prosecutor's Office and the reasoning of the detention order issued by the İstanbul Magistrate Judge's Office no. 5 that the document forming a basis for the offences of destroying, misusing, obtaining by trickery, stealing documents concerning the security of the State and obtaining confidential documents concerning the security of the State, for which the applicant's detention was ordered, was the Egemen Operation Plan.

129. The Egemen Operation Plan was, according to the findings of the investigation authorities, obtained from the plan room of the 1st Army Command. It has been observed that the question how the plan was taken out of the place where it had been kept could not be clarified; and that at the end of the investigation conducted by the Military Prosecutor's Office of the 1st Army Command into the leaking of the documents submitted by the applicant to the İstanbul Chief Public Prosecutor's Office from the military location where they were preserved, a decision of non-prosecution was rendered, due to the expiry of the period of limitation for filing a case, in respect of the relevant offences.

130. It has been observed that E.S., whose statement was taken, in the capacity of complainant, by the İstanbul Chief Public Prosecutor's Office on 4 December 2014 and who made presentation of the land assault to be conducted in case of a probable war within the scope of the Egemen Operation Plan, stated that the CD stolen from the Plan Room of the 1st Army Command had included also the Egemen Operation Plan and the annexes thereto; that the presentation which concerned a land assault planned within the scope of the Egemen Operation Plan in case of a possible war and which was made at the 1st Army Command between 3 March 2003 and 5 March 2003 had not been completely included in the documents and seminar audio tapes submitted by the applicant to the İstanbul Chief Public Prosecutor's Office; that very private and confidential documents (information) concerning the strategy to be applied in case of

a war had been included in this presentation; and that it was not known where these records were. It has been further revealed that out of the ten audio tapes submitted by the applicant and enumerated as from "1/1" to "1/10", the sixth tape was not enumerated as "6/10" according to the number sequence assigned, but as "6"; and that the tape enumerated six did not include the presentation in question but a presentation made by an academician concerning earthquake. Although it could not be determined where the audio tape including the presentation was and whether it was destroyed, E.S. informed the investigation authorities of the fact that the relevant country had learned the content of presentation in the audio tapes taken from the Plan Room of the 1st Army Command and took measures which would render impossible an operation to be carried out towards the region planned to be attacked during the land assault.

131. Accordingly, the Presidency of the General Staff had primarily found out that, among the documents submitted by the applicant, the information included in the Egemen Operation Plan was to be kept confidential for the security, domestic and foreign political interests of the State and likely to jeopardize the war preparations or efficiency, or military operations, of the State in case of its disclosure; and that among the documents submitted by the applicant, there were 118 "strictly confidential" documents within the scope of the Egemen Operation Plan. The Presidency of the General Staff notified this situation, and sent a list of these documents, to the İstanbul Chief Public Prosecutor's Office.

132. The applicant indicated that the documents, which had been delivered to him by a person (introduced himself as a retired military officer) unknown to him, included military operation plans in addition to the Egemen Operation Plan; and that he had submitted these documents to the chief public prosecutor, without making any news concerning the content thereof, as they were confidential and were not eligible for being subject-matter of news.

133. It therefore appears that the documents obtained by the applicant from a retired military official (according to his explanation) and subsequently submitted to the İstanbul Chief Public Prosecutor's Office were confidential instruments concerning the security of the State (in

case of its disclosure, it may jeopardize the State's war preparations or its efficiency in war or military actions); and that these documents did not appear in the news published in the Taraf Newspaper.

134. Regard being had to the fact that the Egemen Operation Plan, which was among the documents submitted to the İstanbul Chief Public Prosecutor's Office, was not reported as news in the Taraf Newspaper and which was classified by the General Staff as "strictly confidential", was also embodying an operation strategy to be followed in case of a war with a country, the Court found reasonable the public authorities' assessments that obtaining or learning of these information and documents by any person other than military authorities or relevant public authorities would have a risk leading to extremely severe outcomes in terms of security and diplomatic relations of the country.

135. Accordingly, given the above-summarized content of the investigation file of the applicant, the request letter for detention issued by the İstanbul Chief Public Prosecutor's Office, the acts imputed to him, the evidence relied on and the grounds specified in the detention order of the İstanbul Magistrate Judge's Office no. 5, it has been concluded that there was strong indication that the applicant might have committed an offence.

136. On the other hand, it must be assessed whether the detention measure was "necessary" within the scope of the proportionality principle, which is one of the criteria set out in Article 13 of the Constitution. Taking into account the investigation pending against the applicant, the Court would conduct the constitutional review in respect thereof on the basis of only the detention process and the reasons for the applicant's detention.

137. In the detention order issued by the Magistrate Judge's Office, the reasons for detention were specified by indicating that there was a risk of fleeing due to the amount of sentence likely to be imposed on the applicant for the offences in question; and that the investigation had not been concluded yet and had been pending in a comprehensive and multi-directional level. It was also stated that the measure of conditional bail would be insufficient given the period of sanction set out in the relevant Law for the imputed offences; and that the detention was a proportionate measure.

138. The applicant delivered 3 DVDs and 1 CD on 21 January 2010, a bag of documents consisting of 2.229 pages as well as 19 CDs and 10 audio tapes on 29 January 2010 to the İstanbul Chief Public Prosecutor's Office. It has been observed that all information and documents, which were among the documents and materials delivered by the applicant, were not reported as news; and that the news published were, in general, related to the "Sledgehammer coup plan" which was subsequently told by the Presidency of the General Staff not to be in the possession of the Turkish Armed Forces (TAF). In this respect, certain documents and texts were published in the Taraf Newspaper where the applicant was a reporter on and subsequent to 20 January 2010 and it was indicated therein that a structure within the TAF was planning to stage a coup, and "the Sledgehammer coup plan" and other operation plans had been prepared to that end. This news was prepared by the applicant and his colleagues Y.Ç. and Y.O. working in the same newspaper. These publications and the subsequent process remained on the public agenda for a long period, and the TAF staff whose names were given in the documents delivered by the applicant and many of whom were high-ranking officials were subsequently investigated and prosecuted. There is no information indicating that an investigation was conducted against the applicant or an offence was imputed to the applicant during this process. Nor was the applicant heard as a suspect or an accused in the course of the investigation and proceedings conducted against the TAF staff on the basis of the documents delivered by him.

139. It has been observed that upon the criminal complaint of certain accused persons tried within the scope of the trial, in respect of which the Constitutional Court rendered a judgment finding a violation in the case of the TAF staff, the investigation as a result of which the applicant was detained on remand was initiated in 2014; that during the re-trial made following the Court's judgment finding a violation, the fact established in the expert's reports that the documents submitted by the applicant to the İstanbul Chief Public Prosecutor's Office and forming the basic foundation of the case were not reliable was also made subject to the investigation which was conducted on this basis; and that the investigation into the criminal complaint made by the relevant court was also merged with the investigation file no. 2014/16320.

140. It has been revealed that the applicant was started to be investigated and later detained on remand in line with the statement of the complainant E.S. that the documents submitted by the applicant to the İstanbul Chief Public Prosecutor's Office did not contain the presentation concerning the strategy to be followed in case of a probable war, which had been prepared by him within the scope of the Egemen Operation Plan, and as a result of the information provided, as to the content and nature of the documents, by the Presidency of the General Staff to the investigation authorities.

141. Accordingly, it was concluded that there was a reason for detention within the scope of the investigation conducted against the applicant. Moreover, given the investigation process, it has been revealed that there was no ground for reaching the conclusion that the detention was not necessary.

142. In this respect, it has been observed that the circumstances of the incident which is the subject-matter of the Court's recent judgment of *Erdem Gül and Can Dündar* ([Plenary], no. 2015/18567, 25 February 2016) differ from the circumstances of the incident which is subject-matter of the present individual application. Such differences may be summarized as follows:

i. While concluding that there was a violation of the applicants' rights to personal liberty and security in the judgment of *Erdem Gül and Can Dündar*, the following facts were relied on: the applicants had been detained on the basis of two news published by the applicants; that any concrete evidence other than these news was not specified in the detention order; and that issues and photo similar to those specified and used in the impugned news had appeared also in news published in another newspaper sixteen months ago. However, in the incident giving rise to the individual application, it has been revealed that although the İstanbul Chief Public Prosecutor's Office requested the applicant's detention for establishing an organization to commit an offence and disclosing information concerning the security and political interests of the State and required to be kept confidential, the incumbent magistrate judge's office rejected the request for his detention for these offences; and that thus, the news published in 2010 in the Taraf Newspaper where the applicant was

serving, the content, purpose, possible effects and consequences of these news were not taken as a basis for the applicant's detention. It has been observed that the basis for the accusations due to which the applicant's detention was ordered was the allegations that confidential documents within the scope of the Egemen Operation Plan, which was required to be kept confidential for the security and domestic or foreign political interests of the State and which was, in case of being disclosed, likely to endanger the war preparations or efficiency or military operations of the State and which was taken away from a military office, had been obtained; that a certain part of these documents (even their copies) had been destroyed or destructed; and that certain information included in these documents had been leaked to another country. It has been also observed that the plan in question had not been published in the news in the Taraf Newspaper.

ii. It has been found out that, in the judgment of *Erdem Gül and Can Dündar*, during the period of six months starting from the date when it was announced to the public that an investigation had been initiated against the applicants to the date when the applicants were detained on remand, the investigating authorities could not obtain any evidence other than the news in question. However, in the present individual application, the investigation against the applicant had been initiated upon the criminal complaint filed, following the Constitutional Court's judgment finding a violation, by persons tried within the scope of the case which was subject-matter of that judgment. In the course of the period elapsing until the applicant's detention, the investigation authorities took the statements of the complainants and witnesses, conducted inquiries into the nature of the relevant documents and assessed the expert reports received during the re-trial initiated upon the Constitutional Court's violation judgment and the criminal complaint of the court conducting the trial. It has been understood that at the end of these processes, the investigation was directed against the applicant.

143. For these reasons, the Court found no violation of the right to personal liberty and security safeguarded by Article 19 § 3 of the Constitution with respect to the alleged unlawfulness of detention.

Mr. Alparslan Altan did not agree with this conclusion.

b. Alleged Violation of the Freedoms of Expression and the Press

i. The Applicant's Allegations and the Ministry's Observations

144. The applicant maintained that he was detained on remand for having obtained the documents which were the subject-matter of the news published within the scope of journalistic activities; that although the request for his detention for having published these documents was rejected by the incumbent magistrate judge's office due to the expiry of the time-limit set out as a condition for trial in Article 26 of Law no. 5281 and prescribed for filling a criminal case, the magistrate judge's office ordered his detention for having obtained the same documents; and that the acts of obtaining and disclosing information that was subject-matter of the news fell into the scope of journalistic (press) activities.

145. In its observations, the Ministry indicated that the applicant's complaints concerned, in essence, the unlawfulness of his detention; that the investigation was not related to the information and documents published and obtained for publication; that the applicant was not detained on remand due to the news published in the Taraf Newspaper, and in fact, the İstanbul Magistrate Judge's Office no. 5 rejected the request for his detention for having disclosed information concerning the security and political interests of the State and required to be kept confidential; that the reason for his detention was stealing and destroying of 118 confidential documents with regard to the "strictly confidential" Egemen Operation Plan, which had been obtained along with CDs and DVDs of the "Sledgehammer coup plan"; and that in this respect, the investigation against the applicant was not initiated upon the reporting of an incident through the press or due to the fact that these documents were at his disposal.

146. The applicant asserted, in his counter-statements against the observations of the Ministry, that he was forced to disclose his journalistic sources; that, in his capacity as a journalist, he was entitled to keep certain confidential documents at his disposal with a view to informing the public; and that the main reason for his detention was the documents that fell into the scope of journalistic activities.

ii. General Principles

147. Relevant part of Article 26, titled *"Freedom of expression and dissemination of thought"*, of the Constitution reads as follows:

"Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities…

The exercise of these freedoms may be restricted for the purposes of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.

(…)

The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law."

148. Relevant part of Article 28, titled *"Freedom of the press"*, of the Constitution reads 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 limitation of freedom of the press, the provisions of articles 26 and 27 of the Constitution shall apply.

Anyone who writes any news or articles which threaten the internal or external of the State or the indivisible integrity of the State with its territory and nation, which tend to incite offence, riot or insurrection, or which refer to classified state secrets or has them printed, and anyone who prints

or transmits such news or articles to others for the purposes above, shall be held responsible under the law relevant to these offences. Distribution may be prevented as a precautionary measure by the decision of a judge, or in case delay is deemed prejudicial, by the competent authority explicitly designated by law. The authority preventing the distribution shall notify a competent judge of its decision within twenty-four hours at the latest. The order preventing distribution shall become null and void unless upheld by a competent judge within forty-eight hours at the latest.

(…)".

149. In several judgments of the Court, basic principles concerning the freedoms of expression and the press are mentioned in detail (see *Fatih Taş* [Plenary], no. 2013/1461, 12 November 2014, §§ 57-67; *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, §§ 30-38; *Ali Rıza Üçer (2)* [Plenary], no. 2013/8598, 2 July 2015, §§ 30-33; *Ergün Poyraz (2)* [Plenary], no. 2013/8503, 27 October 2015, §§ 33-39; and *Medya Gündem Dijital Yayıncılık Ticaret A.Ş.* [Plenary], no. 2013/2623, 11 November 2015, §§ 44).

150. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. It is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (for a similar judgment of the ECHR, see *Handyside v. the United Kingdom*, no. 5493/72, 24 September 1976, § 49). Existence of social and political pluralism depends on the ability to express any kind of opinion freely and in a peaceful manner (see *Emin Aydın*, no. 2013/2602, 23 January 2014, § 41).

151. Freedom of the press, which is a specific aspect of the freedom of expression, is not a safeguard protecting merely the right of the press to impart and disseminate news. It is also directly related to the public's right to receive news and ideas for ensuring democratic pluralism (see *Erdem Gül and Can Dündar*, § 87).

152. In addition, the freedoms of expression and the press are not absolute rights which may be subject to restrictions. As a matter of fact, the grounds for such restriction are set out in Article 26 § 2 of the Constitution, which concerns the right to expression. In restricting the freedom of the press, Articles 26 and 27 of the Constitution will in principle apply pursuant to Article 28 § 4 thereof. Besides, exceptional circumstances whereby the freedom of the press may be restricted are indicated in Article 28 §§ 5, 7 and 9 of the Constitution (see *Bekir Coşkun*, § 37).

153. Accordingly, the freedoms of expression and the press may be restricted for the purposes of "maintaining national security", "preventing offences", "punishing offenders", "preventing disclosure of information duly classified as State secret" and "prevention of disclosure of confidential information of the State", pursuant to Articles 26 § 2 and 28 § 5 of the Constitution. To that end, it is possible to criminalize, and impose punishment for, the act of disclosing confidential information of the State through press. Nor is there a constitutional obstacle before applying detention measure, during the investigation and prosecution to be carried out, in respect of press members alleged to have performed such acts (see *Erdem Gül and Can Dündar*, § 89).

154. However, in order for the press to exercise its right to impart and disseminate news, it must, in the first place, have access to news or information. The journalist's ability to have access to any kind of news, information and opinion depends on the diversity of journalistic sources and availability of the means for reaching news. The journalist's right to non-disclosure of his journalistic source must be protected for, at least, ensuring news to reveal the apparent truth of the relevant time when it is published. In this respect, keeping the journalistic source confidential is one of the basic requirements of the freedom of the press. This right is a part of the freedom of "receiving or imparting information or ideas without interference by official authorities" safeguarded by Article 26 of the Constitution. Accordingly, the phrase *"the press is free and shall not be censored"*, which is set out in the first sentence of Article 28 § 1 of the Constitution, also indirectly provides assurance for the protection of journalistic sources.

155. In the view of the ECHR, the right of journalists not to disclose their sources constitutes a part of the right to information and is not a mere privilege (see *Tillack v. Belgium*, no. 20477/05, 27 November 2007, § 65). In cases where confidentiality of journalistic sources is not protected, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the task and role of the press to provide accurate and reliable information and create an informed public opinion may be undermined. Although the freedoms of expression and the press may be restricted, any interference with the confidentiality of journalistic source cannot be compatible with the press freedom, which is safeguarded under Article 28 of the Constitution, unless it is justified by an overriding requirement in the public interest (for similar judgments of the ECHR, see *Goodwin v. the United Kingdom*, no. 17488/90, 27 March 1996, § 39; *Roemen and Schmut v. Luxemburg*, no. 51772/99, 25 February 2003, § 46; and *Voskuil v. the Netherlands*, no. 64752/01, 22 November 2007, § 65).

156. With respect to the disclosure of journalistic sources, Article 12 of Law no. 5187 sets forth that publishers, chief editors and authors of periodicals cannot be forced to disclose their journalistic sources of any kind including information and documents and to testify on this matter. Thereby, confidentiality of journalistic sources is under the protection of this Law. It has been further observed that this provision does not introduce any exceptions with respect to the principle of the protection of confidentiality of these sources.

iii. Application of Principles to the Present Case

157. In the present case, the İstanbul Magistrate Judge's Office no. 5 dismissed the request for the applicant's detention for "disclosing information pertaining to the security and political interests of the State and required to be kept confidential. It is therefore out of the question that the applicant was detained on remand due to the news published in the Taraf Newspaper in 2010.

158. It has been revealed that the document, which was delivered to the applicant, according to his statement, by a retired military officer and which was subsequently submitted by him to the İstanbul Chief Public Prosecutor's Office, confidential documents in CDs/DVDs and

audio tapes and thus the Egemen Operation Plan were not included in the news published in the Taraf Newspaper; and that this plan formed the fundamental basis for the accusation against him. The Presidency of Turkish General Staff informed the investigation authorities of the fact that the "Sledgehammer coup plan", which was the main subject-matter of the news published in the Taraf Newspaper by the applicant and his two colleagues, as well as the plans forming a part of the Sledgehammer coup plan, namely "Belaying, Thunderstorm, Sheet" and etc., were not belonging to the TAF. Besides, there is no information indicating that an investigation was conducted against two other journalists publishing the news with the applicant or that they were detained on remand on account of the news. The applicant was not subject to an investigation following the publication of the news. He was not accused of any criminal offence within the scope of the case conducted against many TAF staff following the publication of the news. Nor was he heard as a suspect/accused or even witness.

159. Both the applicant and the Ministry in its observations stated that the Egemen Operation Plan forming the fundamental basis for the accusations on account of which the applicant's detention was ordered had not appeared in the news published in the Taraf Newspaper.

160. In addition, the Court examined the alleged unlawfulness of the applicant's detention and concluded that there existed convincing evidence showing that he might have committed an offence as well as reasons for his detention. Therefore, the Court found unfounded the applicant's allegations that the investigation was conducted merely on account of his acts falling into the scope of the freedoms of expression and the press and that he was detained on account of his journalistic activities (see *Hidayet Karaca*, § 116 and *Günay Dağ and Others*, § 202).

161. Furthermore, in the course of his questioning by police, the applicant was asked to provide information on where, from whom and when he had received the documents and digital data including the ones subject-matter of the impugned news and submitted to the İstanbul Chief Public Prosecutor's Office. However, the investigation authorities did not inform him that he would be exposed to a sanction if he refused to disclose his journalistic source. Within the scope of the investigation, the

applicant was not accused of such an act in the letter of the prosecutor's office requesting his detention. Nor did the detention order of the İstanbul Magistrate Judge's Office no. 5 include any statement that the applicant was detained for non-disclosing the identity of the person who had supplied the documents or his journalistic source of the impugned news. Although he was questioned as a witness on 26 January 2010 within the scope of the investigation conducted by the military prosecutor's office into unauthorized taking away of the impugned documents from the 1st Army Command, he did not provide any information about the identity of the person who had supplied the documents. The military prosecutor's office did not investigate the way how the applicant had obtained the documents or accuse him of this act. Besides, it rendered a decision of non-prosecution in this respect. Consequently, it cannot be said that the applicant was forced to disclose his journalistic source of the news published in the Taraf Newspaper or exposed to a sanction by the public authorities for non-disclosure of his source.

162. Therefore, the applicant's detention did not constitute an interference with his freedoms of expression and the press by the nature of acts/offences on the basis of which the detention order was issued and the reasons for his arrest and detention.

163. It has been further observed that in assessing the request for the applicant's detention, the magistrate judge's office showed the expiry of the time-limit prescribed for filing a case in Article 26 of the Law no. 5187 as a ground for dismissing the request for the offence of disclosing information pertaining to security and political interests of the State and required to be kept confidential; and that an assessment under the same provision was not made in respect of the offence of obtaining confidential documents pertaining to the security of the State. However, unless any right and freedom enshrined in the Constitution is violated, issues with respect to errors in interpretation of legal provisions or errors of law or fact in the inferior courts' decisions cannot be examined within the scope of individual application system. It is within the discretionary power of the investigation authorities and the inferior courts to decide in respect of which acts and/or offences the time-limit set out in Article 26 of Law no. 5187 would apply, thus to interpret legal provisions, as well as to apply these legal provisions to the concrete cases.

164. For the reasons explained above, the Court found no violation of the freedoms of expression and the press safeguarded by Articles 26 and 28 of the Constitution.

Mr. Alparslan ALTAN did not agree with this conclusion.

V. JUDGMENT

For the reasons explained above, the Constitutional Court held on 17 May 2016:

A. 1. By MAJORITY and by dissenting opinion of Mr. Alparslan ALTAN, that the allegation that the magistrate judge's offices were in breach of the principles of natural judge as well as the independent and impartial judge, within the scope of the right to personal liberty and security, be DECLARED INADMISSIBLE for *being manifestly ill-founded*;

2. By MAJORITY and by dissenting opinion of Mr. Alparslan ALTAN, that the allegation that the right to challenge could not be effectively exercised within the scope of the right to personal liberty and security be DECLARED INADMISSIBLE for *being manifestly ill-founded*;

3. UNANIMOUSLY that the alleged unlawfulness of detention within the scope of the right to personal liberty and security be DECLARED ADMISSIBLE;

4. UNANIMOUSLY that the alleged violation of the freedoms of expression and the press be DECLARED ADMISSIBLE;

B. 1. By MAJORITY and by dissenting opinion of Mr. Alparslan ALTAN, that there was NO VIOLATION of the right to personal liberty and security safeguarded under Article 19 § 3 of the Constitution;

2. By MAJORITY and by dissenting opinion of Mr. Alparslan ALTAN, that there was NO VIOLATION of the freedoms of expression and the press safeguarded under Articles 26 and 28 of the Constitution;

C. That the court expenses be COVERED by the applicant; and

D. That a copy of the judgment be SENT to the Ministry of Justice.

DISSENTING OPINION OF JUSTICE ALPARSLAN ALTAN

1. The Section examined the applicant's allegations that the magistrate judge's offices ordering his detention was contrary to the principle of legal judge and failed to afford the guarantee of an impartial and independent tribunal; that due to the closed-circuit challenge mechanism, which was devoid of safeguards afforded by a tribunal, he could not use effectively his right to challenge. The Section also examined the alleged violations of the personal liberty and security as well as the freedoms of expression and the press. The majority of the Section declared the former allegations inadmissible for being manifestly ill-founded. In terms of the latter allegation, namely the alleged violation of the personal liberty and security as well as the freedoms of expression and the press, the majority of the Section found no violation. However, I did not agree with the decision of the majority on these headings for the following grounds.

I. SUMMARY OF THE FACTS

2. At the relevant time, the applicant was as a reporter of the Taraf Newspaper, a national daily. He made several news especially on military issues, which attracted public attention, through this newspaper.

3. On an unknown date, he was provided with 3 DVDs and 1 CD including documents concerning a coup plan by an unknown person who was his journalistic source.

4. Upon request, he submitted copies of 3 DVDs and 1 CD, the basis of the impugned news, to the İstanbul Chief Public Prosecutor's Office, in return for a minute, on 21 January 2010.

5. About nine days after the first meeting, the same journalistic source, unknown to the applicant, had delivered a bag of documents and materials stated to be "original" to the applicant, who then submitted them to the İstanbul Chief Public Prosecutor's Office on 29 January 2010.

6. With respect to the unauthorized taking away, from the 1st Army Command, of the documents which were submitted by the applicant to the İstanbul Chief Public Prosecutor's Office, an investigation was conducted by the Military Prosecutor's Office of the 1st Army Command.

However, person(s) taking away the documents from the military unit could not be identified. The Military Prosecutor's Office issued a decision of non-prosecution, dated 7 September 2010 and no. E.2010/474 K.2010/59, at the end of this investigation on the grounds that *"due to the expiry of the prescribed time-limit for filing a case, it is not possible, according to the law, to file a criminal case against a person or persons, for the offences of neglect of public duty, misconduct in public duty and persistence in insubordination, which are likely to occur for performing any act in breach of the Command's instructions that are concerning the preservation of confidential documents and instruments on military activities, their delivery to archives and controlled records offices in line with Command's instructions, orders, directives and the other legislation as well as that are concerning seminar activities"*.

7. Upon the complaints raised, by those accused tried within the case where a violation was found, following the Court's violation judgment (see *Sencer Başat and Others* [Plenary], no. 2013/7800, 18 June 2014), the İstanbul Chief Public Prosecutor's Office initiated an investigation no. 2014/116320 into the evidence relied on in this case and mainly comprising of digital data.

8. During this investigation, the prosecutor's offices asked, by its letter of 25 November 2014, the Presidency of the General Staff to provide information as to whether CD and DVDs, which the applicant had submitted to the İstanbul Chief Public Prosecutor's Office, contained "strictly confidential" and "confidential" documents concerning the Egemen Operation Plan for the security and military interests of the State.

9. In addition, the İstanbul Chief Public Prosecutor's Office requested *"a restriction"* to be imposed on the counsel's or representative's power to examine the file content or to take a copy of documents therein, within the scope of the investigation conducted into the offences of "establishing an organization to commit an offence, obtaining confidential documents pertaining to the State's security and fabricating an offence", pursuant to Article 153 § 2 of the Code of Criminal Procedure dated 4 December 2014 and no. 5271 (the CCP). By its decision, dated 15 December 2014 and miscellaneous no. 2014/2922, the İstanbul Magistrate Judge's Office no. 1 accepted the request as *"there is a probability, on the part of the counsel*

or representative, of endangering the aim of the investigation in examining the content of the file or taking a copy thereof".

10. Upon the request of the İstanbul Chief Public Prosecutor's Office within the scope of the investigation, the İstanbul Magistrate Judge's Office no. 1 ordered, by its decision dated 27 February 2015 and miscellaneous no. 2015/1203, a search of the applicant's home and its extensions, his cars as well as on his body on the grounds that *"the persons who had unauthorizedly taken away the documents, which were included in 19 CD and 4 DVD copies delivered [by the applicant] and which were concerning the Egemen Operation Plan and "strictly confidential" for the security and military interests of the State, from the 1st Army Command* ***had acted*** *in unity with the suspect Mehmet Baransu* ***under a criminal organization****; that the suspect obtained documents pertaining to the State's security;* ***that in spite of being aware that these documents were strictly confidential, he did not submit them to the competent authorities but took a copy thereof and, according to his statement, destroyed the original copies****; and that he disclosed information pertaining to the security and political interests of the State…".*

11. On 1 March 2015, the applicant was taken into custody within the scope of this investigation.

12. The applicant was, in general, asked whether the signatures and statements on the minutes indicating the delivery of certain documents that were subject-matter of the news published in Taraf Newspaper to the İstanbul Chief Public Prosecutor's Office belonged to him, as well as how and/or from whom he had obtained these documents and digital data. He replied that the signatures and statements on the relevant minutes were of him; and that the documents and digital data **had been delivered to him at two different dates by a man introducing him as a retired military officer, and he then submitted them to the İstanbul Chief Public Prosecutor's Office.**

13. He further stated that he examined these documents together with the journalists working in the same newspaper with him, namely A.A., Y.Ç., Y.O., K.T. and another journalist whose name he could not remember; that **he did not print out or scan the documents; that he did not publish any document other than the coup plan; that he submitted all documents**

to the prosecutor's office and security directorate; that any document of this nature did not appear in the course of the trial conducted subsequent to the published news or in the news subsequently published; that he did not destroy the original documents that he had examined but submitted them to the State's authorities; and that **they subsequently destroyed the CD copies they had taken for making news**.

14. In his statement, he further indicated that he had examined the documents, subject-matter of the published news, together with the newspaper's administration staff; however, he submitted the **original documents subsequently delivered to him to the State's institutions without sharing them with anyone else;** that copies of certain documents in the case-file of the proceedings were also in his possession; that he also submitted all audio tapes delivered to him to the **State's institutions**; that he used certain documents included in copies of these tapes in his book titled "Military Headquarters"; that these copies had been provided also to certain journalists; and that **these audio tapes were made available through internet, journals and television.**

15. Stating that the applicant had obtained documents pertaining to the State's security from the suspects whose identities could not be identified yet and with whom he acted in unity under a criminal organization; that **in spite of being aware that these documents were "strictly confidential", he had taken a copy thereof instead of submitting them to the competent authorities and destroyed the original copies according to his statement**; and that he disclosed information pertaining to the security and political interest of the State, the İstanbul Chief Public Prosecutor's Office **requested,** on 2 March 2015, **the applicant's detention** for "establishing an organization to commit an offence", "destroying, misusing and stealing by trickery the documents pertaining to the State's security", "obtaining confidential documents pertaining to the State's security" and "disclosing information pertaining to the security and political interests of the State and required to be kept confidential".

16. The applicant was heard by the İstanbul Magistrate Judge's Office no. 5 on 2 March 2015. During his hearing, he presented statements which were, in general, in line with his above-cited questioning by the İstanbul

Anti-Terror Branch. The relevant part of his statements during the hearing were as follows:

"… While I was on the way to the workplace, ***the person, who was my journalistic source,*** *approached me and … told 'I will give you significant news'. I listened to what he explained to me and glanced through the documents he showed me… He mentioned of a coup plan… He showed me original documents in his possession. I looked through these documents among which there were also electronic ones. We met at a place like a tea garden. He took a copy of 3 DVDs and 1 CD and delivered them to me. At our first meeting, certain documents were original, and there were handwritten notes. There were also power point documents. I then took DVDs and CD to examine them.* ***T.Ç., who was acting chief public prosecutor at the relevant time, asked me to deliver everything in our possession. I then submitted, in return for a minute, 3 DVDs and 1 CD in my possession to the prosecutor's office after having taken a copy thereof…*** *In the meantime, the military prosecutor's office also asked us to submit documents… Then the administration of the newspaper submitted copies of the CDs… About 9 days after when the news was on the agenda,* ***the same person holding a bag at his hand made me stop and told me that he wished to deliver me all original copies…*** *I took the original copies and arrived at the workplace…* ***[On the same day], I submitted the bag and documents to the public prosecutor B.B… I did not destroy, in any way, original copies of the documents and CDs given to me. Instead, I submitted them to the public prosecutor, who was the competent authority…*** *DVDs I had received also included military operation plans along with the Sledgehammer coup plan such as the* ***EGEMEN OPERATION PLAN. However, according to us, the latter plan did not involve any criminal element*** *and it is indeed a game of war…* ***As the documents pertaining to the EGEMEN OPERATION PLAN were not eligible for being reported as news and were confidential, we did not report any news concerning these documents and submitted them to the public prosecutor.*** *As a matter of fact, we could not review all documents within the bag… We destroyed the DVDs and CDs including documents I had previously taken, after having printed out the documents necessary for us. We did not take any document from the bag. We took printouts from DVDs*

and CD that had been delivered to us previously. However, ***we did not take any printout of, or make any news concerning, the EGEMEN OPERATION PLAN, which was among the documents in the DVDs and CD****. As the remaining documents were not of an interest for us and were matters to be dealt with by the public prosecutor's office,* ***we destroyed the copy in our possession …*** *I delivered the documents to the public prosecutor's office.* ***If these documents have been stolen, it is not my duty to identify the persons having done so****…".*

17. By the order of the Magistrate Judge's Office dated 2 March 2015 and no. 2015/109, the applicant was detained on remand for *"destroying, misusing or stealing by trickery the documents pertaining to the State's security"* and *"obtaining confidential information pertaining to the State's security"*. The relevant part of the applicant's detention order read as follows:

"…

3) The suspect's detention was requested for destroying, misusing or stealing by trickery the documents pertaining to the State's security and for obtaining confidential information pertaining to the State's security. According to evidence present in the case-file, ***it has been revealed that the suspect obtained*** *the plan known as the Sledgehammer coup plan, the DVDs, CDs and documents pertaining thereto as well as the Egemen Operation Plan. It has been further revealed that the Egemen Operation Plan is "STRICTLY CONFIDENTIAL"; that information in this plan was to be kept confidential for the security or domestic or foreign political interests of the State; and that 118 confidential documents in these CDs were also stolen. The suspect stated that* ***he had destroyed himself*** *the copies of these documents instead of delivering them to the relevant authorities. However,* ***it has not been established for sure that he had destroyed them. It is still unknown where the confidential documents that could not be found are, in whose possession they are and for what purpose they would be used.*** *There is no finding as to the person who was told by the suspect to have provided the documents and who introduced himself as a retired military officer. Is there also no finding* ***whether there is any other person acting in union with that person.*** *Taken the suspect's acts as a whole,* ***there are***

concrete evidence indicating strong suspicion of *having committed the offences of destroying, misusing and stealing by trickery the documents pertaining to the State's security as well as of obtaining confidential documents pertaining to the State's security. Given the lower and upper limit of sentences prescribed in the law for these offences, it has been revealed that there is no condition prohibiting detention or posing an obstacle for trial set out in Article 100 et. seq. of the CCP. Given the amount of sentence likely to be imposed on the suspect for the imputed offence,* ***it has been observed that there is reasonable suspicion that he may flee.*** *It has been also concluded that the measure of conditional bail, which is a less severe measure, would remain insufficient at this stage pursuant to the principle of 'proportionality' regard being had to the facts that* ***the investigation has not been completed yet, it has been still conducted in an exhaustive and multi-dimensional manner*** *and to the probable penalties or measures prescribed for the imputed offences."*

18. On 9 March 2015, the applicant challenged his detention order. The İstanbul Magistrate Judge's Office no. 6 rejected, by its decision dated 16 March 2015 and no. 2015/1371, the applicant's challenge with final effect as *"the detention order was compatible with procedure and the law"*.

19. On 18 March 2015, the applicant filed a request for his release before the İstanbul Magistrate Judge's Office no. 4. By its decision dated 19 March 2015 and miscellaneous no. 2015/1461, this magistrate judge's office rejected his challenge on the grounds that *"the detention order dated 02 March 2015 and no. 2015/109, which was issued by the İstanbul Magistrate Judge's Office no. 5, was legitimate and that* ***any concrete evidence to end his detention has not been submitted"***.

20. On 31 March 2015, the applicant challenged the above-cited decision. However, by the decision of the İstanbul Magistrate Judge's Office no. 5 dated 31 March 2015 and miscellaneous no. 2015/2029, his challenge was rejected with final effect on the ground that *"the decision dismissing the applicant's request for release was compatible with procedure and the law, and there was no new evidence justifying his release"*.

II. ASSESSMENT

21. The assessment will be presented under separate headings for the allegations declared inadmissible by the Court's majority for being manifestly ill-founded and for the other allegations.

A. Alleged Incompatibility of the Magistrate Judge's Offices with the Principles of Natural, Independent and Impartial Judge and Alleged Inability to Effectively Enjoy the Right to Challenge

22. The applicant maintained that the magistrate judge's offices ordering his detention were contrary to the principle of legal judge; that they were not impartial and independent; and that he could not effectively enjoy his right to challenge as the documents forming a basis for the accusations were not shown to him, he could not examine the investigation file due to the restriction order imposed and there was a closed-circuit challenge mechanism which was devoid of safeguards afforded by a tribunal.

23. The majority of the Court found these allegations inadmissible for being manifestly ill-founded.

24. In Article 37 of the Constitution where it is set out that no one may be tried by any judicial authority other than the legally designated court, and extraordinary tribunals with jurisdiction that would in effect remove a person from the jurisdiction of his legally designated court shall not be established, the principle of natural judge is laid down.

25. In one of the Court's judgment, this principle is defined as follows:

"The guarantee of natural judge is one of the conditions sine qua non for a state of law. Also in the previous judgments of the Court, the notion of natural judge is defined as pre-determination of the venue of jurisdiction to deal with the case before an offence is committed or a case occurs. In other words, this principle precludes establishment of tribunals subsequent to the occurrence of dispute or appointment of judges by taking into consideration the parties of the case.

…

In order for legal structure of a venue in respect of its establishment, duty, functioning and trial procedure to be followed to comply with the principle of natural judge, it is not per se sufficient to make such arrangement by law. In addition, this arrangement must be performed before the dispute to be dealt with occurs. Therefore, the principle of natural judge embodies not only "legality" but also "pre-determination." (see the Court's judgment dated 17 July 2013 and no. E.2012/146 K. 2013/93).

26. Article 13 of the Convention also underlines *"the right to an effective remedy before a national authority"*. The ECHR considers the effective remedy as *"a remedy which is not theoretical or illusory but practical and real, that is to say, effective"*. Accordingly, a remedy whereby individuals could not yield an effective result for the protection of their rights, which is devoid of sufficient safeguards of review and exists only in appearance cannot be regarded effective within the meaning of both the Constitution and the Convention. Therefore, the right to an effective remedy may be ensured only when the appeal authority is independent internally and externally, entitled to amend the decision under its review when necessary and capable of offering the applicant with the opportunity of an effective review.

27. According to the ECHR, in a review to be conducted under Article 5 § 4 of the ECHR, the judicial authority to conduct the review must be primarily authorized by law and must be independent and impartial. It must be also capable of conducting review of lawfulness and, if any unlawfulness is at stake, it must be entitled to release individuals. In this sense, the ECHR considers that the review conducted within the scope of Article 5 § 4 of the Convention inspires confidence in both the society and, specifically in criminal investigations, the suspect/accused. In the ECHR's view, to give such confidence, the judicial authority to conduct review under Article 5 § 4 of the Convention (the guarantee of habeas corpus) must have certain qualifications. Given the judgments of the ECHR, such qualifications and features required to be inherent in the judicial organ which would review the request and in the procedure of deprivation of any kind of liberty including those under Article 5 § 1(c) of the Convention may be enumerated as follows: *"guarantee of habeas corpus must be judicial in nature and offer suitable safeguards for the particular circumstances of the*

concrete incident; the review must be conducted in respect of lawfulness; there must be a trial compatible with the principles of adversarial proceedings and equality of arms; the trial must be re-conducted at reasonable intervals and concluded in a short time; in cases of detention under Article 5 § 1 (c) of the Convention (within the scope of criminal investigations), the person detained must be heard at reasonable intervals, and the decisions rendered must be reasoned. Even if the judicial body to review the request must not have all safeguards enshrined in Article 6 of the ECHR, which protects the right to a fair trial, it must have basic judicial qualifications, namely independence and impartiality as well as being established by law (guarantee of natural judge). During the proceedings, safeguards such as the right to access to a court, the right to legal assistance and the right to examine and cross-examine witnesses must be protected. The judicial organ must be entitled not only to express its advisory opinion but also to order release of the person in case of any unlawfulness. Consequently, the person concerned must be heard effectively by judge, and habeas corpus proceedings must offer a reasonable prospect or expectation of success both in theory and in practice. Otherwise, the remedy in question would not be considered as an effective remedy which must be exhausted" (see Mehmet Öncü, *"the European Court of Human Rights and Pre-trial Detention (1): Reasonable Time for Detention"; Essays in Honour of Haşim Kılıç*, Anayasa Mahkemesi Yayınları, Volume 1, Ankara 2015, pp. 1596-1598). The aim pursued in citing these requirements is to offer individuals, who have been deprived of liberty under Article 5 § 1 (c) of the Convention, an effective means of review also in the other exceptional circumstances.

28. The ECHR indicates that one of the most basic opportunities inherent in Article 5 § 3 of the Convention is judicial review intended to minimize the risk of arbitrariness and to protect rule of law. It is for the judicial authorities to develop procedures appropriate for the requirements of the judicial review. However, these procedures must also comply with the Convention. This review must be conducted by *"a judge"* or *"other officer authorized by law to exercise judicial power"* pursuant to Article 5 § 3 of the Convention. The judge specified in this provision must satisfy certain conditions each of which constitutes an assurance for the person arrested. One of these most significant conditions is his independence and impartiality from the executive. In one of its judgment, the ECHR found

a violation of Article 5 § 3 of the Convention since the military judge, who was sitting on the bench of the State Security Court that cannot be considered independent and impartial pursuant to Article 6 § 1, also lacked the capacity of independent judge entitled to order the applicant's detention on remand (see *Bülbül v. Turkey*, no. 47297/99, 22 May 2007, §§ 23 and 24).

29. In general, impartiality means lack of bias, prejudice and interest which would have a bearing on the settlement of the case as well as having no opinion or interest *vis-à-vis*, in favour or to the detriment of the parties of the case. Impartiality has two aspects, subjective and objective. In this respect, not only the judge's personal impartiality in the case but also the impression given by the court, as an institution, on an individual must be taken into consideration (see the Court's judgment no. 2013/1780, 20 March 2014, §§ 61 and 62). Accordingly, judge cannot be biased and is also liable to create the impression, to the individuals being tried and to the society, that he is impartial. Therefore, administration of justice is not only sufficient, and the parties of the case must also observe and believe that it is administered in an impartial way.

30. The ECHR emphasizes that under the objective test of impartiality, what is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. In making examinations as to objective impartiality, the standpoint of the accused is important but not decisive. What is decisive is whether this fear can be objectively justified. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see *Hauschildt v. Denmark*, no. 10486/83, 24 May 1989, § 48). For this, the judge is not necessarily required to have actually acted unfair or with bias. However, the personal impartiality of a judge must be presumed until there is proof, and it is found established, that the judge trying the case has showed bias and partial conduct, personal conviction or interest for one of the parties of the case.

31. Judge's independence and impartiality indeed differ from each other, but at the same time are overlapping with one another. As a matter

of fact, a judge who is not independent cannot be expected to render an impartial decision. That is because, it is highly probable for a judge who is not independent and is exposed to pressures to give a decision not according to the law and his own conscience but in line with the requests of those who apply pressures on him.

32. In a system of separation of powers, in case of any interference by the executive with a view to influencing the proceedings before a tribunal, objective impartiality will be impaired. As a matter of fact, in the case of *Sovtransavto Holding v. Ukraine*, the President of Ukraine drew the attention of the President of the Supreme Arbitration Tribunal to the need to protect the State's interests, while the proceedings initiated by the applicant Russian company in Ukraine was still pending. Without considering whether it had an impact on the outcome of the proceedings, the ECHR held that this expression of the Ukraine's President casted doubt on the independence and impartiality of the Supreme Arbitration Tribunal (see *Sovtransavto Holding v. Ukraine*, no. 48553/99, 25 July 2002).

33. Within the framework of the principle of natural judge taken in conjunction with the principle of impartiality, tribunals established at any date subsequent to the commission of the offence may cause doubts, on the part of the persons being tried, that they have been established for punishing them and are not therefore impartial.

34. As regards the legal arrangement on the establishment of the magistrate judge's offices, as is exhaustively discussed in the dissenting opinion of the Court's judgment dated 14 January 2015 and no. E.2014/164 and K.2015/12, independence and impartiality of the judge to decide on the preventive measure is highly important for the reliability of the proceedings. It appears that challenges to the orders issued concerning the investigatory actions by the magistrate judge's office are reviewed by *"the magistrate judge's offices that are interoperating and of the same instance"* instead of *"a different and higher independent tribunal"*. Such a review does not, in the first place, inspire reasonable confidence in individuals having recourse to this remedy. As a matter of fact, the challenge procedure may be considered as an effective remedy which inspires confidence only when the magistrate judge's offices are independent, and can operate without being impressed, from one another. However, pursuant to the legal

arrangement as to these offices, *"a review mechanism among equals"* and thereby *"a closed-circuit review procedure"* have been introduced. It cannot be said that such a closed-circuit system may offer a reasonable prospect of success for, and thereby inspire confidence in, individuals who have resorted to this system. In fact, the primary aim of conducting such reviews through a system which is not functioning in a closed-circuit manner is to enable review of the challenged orders by *"higher tribunals affording more safeguards"* and, thereby, to inspire confidence in those concerned and in society beyond any doubt.

35. Accordingly, in the present incident, confidence can be inspired, to a certain extent, primarily in those concerned and in the society for this legal remedy when a preventive measure –such as detention– which constitutes the severest interference with the personal liberty and security is ensured to be reviewed by different courts from different perspectives. In this way, individuals may be provided with the opportunity of a more reliable review. A review to be conducted in this respect with a different point of view would on one hand reduce the risk of *"internal blindness"* likely to be faced in a closed-circuit review system and reduce the risk of reflection of personal bias/preferences on the decisions to be rendered, on the other. Nevertheless, the legal arrangement as to the magistrate judge's offices, which have introduced a closed-circuit system, has removed the opportunity of reviewing unlawfulness of detention, the severest interference with the personal liberty and security, by different courts from different perspectives. In this respect, individuals are deprived of a review mechanism of high standard, which is required in a state of law, since a closed-circuit system increases, in the first place, the risk of *"internal blindness"*. In the system introduced, judges ordering detention and reviewing this order are interoperating. In addition, in conjunction with the risk of *"internal blindness"*, repercussions of personal bias/preferences on orders/decisions in such a system and risk of making technical-legal errors are highly possible. That is because, the system operates in a closed-circuit manner and fails to provide an opportunity of effective review that is conducted from different points of view.

36. It appears that Article 19 of the Constitution, titled *"personal liberty and security"*, is almost the same with Article 5 of the Convention, titled

"right to liberty and security", in respect of its wording, content and objective. This similarity is also observed between Article 19 § 8 of the Constitution and Article 5 § 4 of the Convention. These paragraphs are same in respect of their wording, content and objective. Pursuant to Article 19 § 8 of the Constitution, *"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 aim of safeguards afforded by both paragraphs is to provide individuals deprived of their liberty with the opportunity of an accessible and effective judicial review whereby they could argue for their liberty, which offers a reasonable prospect of success and is capable of inspiring confidence in individuals/accused, as well as to prevent public authorities from arbitrarily depriving individuals of their liberty.

37. When Article 268 § 3 (a) of Law no. 5271 is considered within the scope of safeguards prescribed in Article 19 § 8 of the Constitution, it is observed in the first place that as the challenges are reviewed in a closed-circuit manner through the mechanism introduced in subparagraph (a), it cannot provide the opportunity of an effective judicial review offering a reasonable prospect of success and capable of inspiring confidence in suspects/accused. In this mechanism, in cases where there are two magistrate judges in the same venue of jurisdiction, they review and uphold each other's decisions. In this respect, in adjudicating any challenge raised, judge acts with the awareness that he reviews decisions rendered by an authority who will in return review his decisions as well. Therefore, there occurs a vicious circle among magistrate judge's offices reviewing challenges. This vicious circle/closed-circuit system leads the challenge procedure resorted to against the decisions of the magistrate judge's offices to become "a non-effective review which exists only in appearance" for those concerned.

38. In the present case, the applicant was detained on 2 March 2015 by the İstanbul Magistrate Judge's Office no. 5. His challenge against the detention order was rejected by the İstanbul Magistrate Judge's Office no. 6 on 9 March 2015. His request for release was dismissed by the İstanbul Magistrate Judge's Office no. 4 on 18 March 2015. It is accordingly seen that the constitutional inconveniences and contradictions that are

abstractly mentioned in the dissenting opinion of the Court's judgment on the magistrate judge's offices, which is dated 14 January 2015 and no. E.2014/164 K. 2015/12, and that are briefly explained above are also present in the concrete case.

39. For these reasons, I did not agree with the majority's decision as these allegations are not manifestly ill-founded and must therefore be examined on the merits.

B. Alleged Unlawfulness of Detention

40. The applicant maintained that in spite of not having committed the imputed offences, his detention was ordered; that the document forming the basis for the offence and alleged to have been destroyed was not original but a photocopy; that he did not use the documents he had obtained for any purpose other than publishing; that in spite of having been previously taken into custody and released for several times, he did not attempt to flee; that however, the judicial authorities did not take into consideration this fact but accepted the risk of his fleeing by only taking into account the probable punishment to be imposed on him; that there was no risk of his tampering with the evidence; that in his detention order, the grounds as to why the conditional bail would remain insufficient in his case were not specified; that his detention was in breach of the "proportionality" principle; and that his challenges to the detention order and requests for release were dismissed without any justification.

41. In its observations, the Ministry indicated that the applicant himself admitted having obtained the confidential document, the Egemen Operation Plan; that however, he did not publish it; and that he was also accused of destroying certain confidential documents obtained by him or using them for any other purpose.

42. In his counter-statements against the observations of the Ministry, the applicant asserted that the severity of the punishment to be imposed cannot be a presumption for fleeing; that although he did not use the documents in his possession and report any news concerning them in his capacity as a journalist, it was for the journalist to decide which documents would be used within the scope of journalistic activities; that the journalist

cannot be urged to disclose his journalistic source; and that his detention was arbitrary.

1. General Principles

43. 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 provide 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,* no. 2012/239, 2 July 2013, § 43; and *Murat Narman*, no. 2012/1137, 2 July 2013, § 42).

44. As in the provisions of the Constitution, Article 5 § 1 of the Convention sets forth that everyone has the right to liberty and security; and that no one can be deprived of his liberty save in the circumstances specified in Article (a)-(f) thereof and in accordance with a procedure prescribed by law (see *Mehmet İlker Başbuğ*, no. 2014/912, 6 March 2014, § 42). The aim pursued by Article 19 of the Constitution is to protect individuals from being arbitrarily deprived of their liberty, and any restriction under the exceptional circumstances specified therein must be compatible with the aim of this provision (see *Abdullah Ünal*, no. 2012/1094, 7 March 2014, § 38).

45. Article 19 § 7 of the Constitution enshrines that persons under detention have the right to request trial within a reasonable time and to be released during investigation or prosecution. In this respect, in criminal proceedings, it is essential that the proceedings must be concluded with due diligence and within the shortest possible time. Certain *"exceptional measures"* may be applied with a view to concluding the criminal proceedings within the shortest possible time and in a proper manner.

46. Accordingly, in Article 19 § 3 of the Constitution, it is set forth that individuals against whom there is strong evidence of having committed an offence may be arrested by decision of a judge solely for the purposes of preventing escape, or preventing the destruction or alteration of evidence, as well as in other circumstances prescribed by law and necessitating detention.

47. In this respect, detention of an individual depends primarily on existence of strong suspicion of his guilt. This is a condition *sine qua non* for the detention measure. To that end, charges must be supported with plausible evidence that may be considered strong. Nature of facts and information likely to be accepted as plausible evidence depends, to a significant extent, on the particular circumstances of the concrete case (see *Hanefi Avcı*, no. 2013/2814, 18 June 2014, § 46). Accordingly, plausible evidence to form a basis for strong suspicion must depend not on subjective feelings and opinions of public officials but certainly on objective material facts.

48. Detention is the **severest from of** measure restricting personal liberty. Detention, which is a preventive measure, is removal of an individual's freedom of physical movement *"temporarily"* before a final decision is rendered as to his guilt. It must be borne in mind that by its very nature, detention, which is *"a temporary measure*", is not a way of punishment, that it cannot be resorted for the purpose of punishing and that ***"what is essential is release pending trial".***

49. Therefore, this measure must be resorted only in exceptional circumstances. In case of an opportunity to attain the aims pursued with detention measure through other less severe preventive measures, the detention measure must not be applied. Otherwise, it would explicitly constitute a breach of the aim of detention measure and thus Article 19 of the Constitution.

50. Likewise, in our law, detention is a discretionary form of preventive measure, and even if conditions sought for detention are satisfied, it is not certainly necessary to resort to detention measure. Therefore, in recourse to detention, it must be taken into consideration that ***"personal liberty is essential whereas detention measure is exceptional"***.

51. For having recourse to detention, a preventive measure of exceptional nature, certain conditions are to be satisfied. As mentioned above, a person may be detained on remand in cases where there is strong suspicion of his guilt. This is an element *sine qua non* for the detention measure. There must be plausible evidence, which may be considered

strong, to support such suspicion. Nature of facts and information likely to be accepted as plausible evidence depends, to a significant extent, on the particular circumstances of the concrete case (see *Mustafa Ali Balbay*, no. 2012/1272, 4 December 2013, § 72).

52. In this respect, strong suspicion cannot be based on feelings, fears or ideological, religious, political or moral biases of the pre-trial authorities and must be certainly supported by objective material facts. In other words, strong suspicion must be supported with material facts that would satisfy an objective observer.

53. Secondly, there must also exist the grounds for detention specified in Article 100 § 2 of the CCP, along with the existence of strong suspicion. Pursuant to Article 100 thereof, an individual may be detained on remand only in case of the existence of facts indicating strong suspicion of his having committed an offence as well as of a ground for his detention. The grounds for detention are specified in the relevant provision. Accordingly, a detention order may be issued in case of (a) existence of concrete indications that suspect or accused would flee or hide himself and if (b) suspect's or accused's behaviours lead to a strong suspicion that he would 1) destroy, conceal or alter the evidence or 2) attempt to put pressure on witness, victim or anyone else (see *Ramazan Aras*, § 46).

54. In addition to the strong suspicion of guilt, which is one of the conditions for lawful detention, at least one of the grounds for detention is to *"continue to exist at every stage of detention"*. These requirements as to grounds for detention must also be assessed *"concretely"* in respect of every suspect and *"indicated in the reasoning of the detention order"*. Unlike the Convention system, our national legislation does not make any distinction, on this matter, between the initial detention order and the subsequent reviews of detention.

55. Pursuant to Article 101 of the CCP, in decisions ordering detention, ordering continued detention or dismissing the request for release, evidence which indicates strong suspicion of guilt, risk of feeling and tampering with evidence, the grounds for detention and the *"proportionality"* of detention measure is to be *"supported with concrete fact"* and *"clearly"* put forth. The question whether detention has been effected on legal grounds

may be answered only through the examination of reasoning part of the decision ordering detention or ordering continued detention. Besides, accused/his defence counsel may properly defend himself/him upon being informed of the ground for his detention, and the authority to receive and review the challenges may conduct a review in respect thereof if they have been aware of the content of the reasoning. Through the reasoning part in the orders, it is shown that decisions are reasonable, non-contradictory and plausibly justified. Therefore, an order where merely the ground for detention −risk of fleeing or tampering with evidence− is specified and provisions of the relevant legislation are reiterated cannot be qualified as reasoned.

56. Another condition required for resorting to detention measure is the existence of a balance between the aim pursued by ordering an individual's detention and the detention which amounts to a severe interference with the right to personal liberty and security. As in the procedure of punishment, *"the proportionality principle"* must have a significant function in the application of preventive measures. In this respect, lawfulness of deprivation of an individual of his liberty is not sufficient for resorting to the detention measure. It must be also "necessary" under the circumstances of the concrete case (see *Erdem Gül and Can Dündar* [Plenary], no. 2015/18567, 25 February 2016, § 68). This is also a requisite of the "necessity", one of the elements inherent in the principle of "proportionality", which is among the criteria allowing the restriction of fundamental rights and freedoms enshrined in Article 13 of the Constitution (see the Court's judgment no. E.2015/40 K.2016/5, 28 January 2016). In detention orders, for the balance required to be struck between the legitimate aim pursued and the interference, the practice of conditional bail must be primarily considered and then it must be justified why the conditional bail would remain insufficient (see *Engin Demir* [Plenary], no. 2013/2947, 17 December 2015, § 69).

57. It is for the Constitutional Court to review whether the conditions set out in Article 19 § 3 of the Constitution have been indicated in the reasoning parts of the detention orders, which are under examination within the scope of the individual application system, and whether, in resorting to detention measure under the circumstances of the present

case, the proportionality principle -one of the criteria set out in Article 13 of the Constitution and allowing the restriction of fundamental rights and freedoms- have been complied with (see *Erdem Gül and Can Dündar*, § 69).

58. The proportionality principle entails that the preventive measures giving rise to deprivation of liberty be applied in ascending order from less severe to the severest. If it is possible to attain the aim of the criminal proceedings through a less severe measure, this less severe measure must be resorted to in the first place. Otherwise, the interference with the personal liberty would be contrary to the proportionality principle, and the distinction between preventive measure and punishment would also be removed. As a matter of fact, Article 100 § 1 of the CCP sets forth that a detention order cannot be issued if it is disproportionate to the gravity of the offence, punishment likely to be imposed or preventive measure to be applied.

59. In issuing a detention order as a requisite of the proportionality principle, the nature of the imputed offences and special condition of the individual must be taken into consideration; the alternative preventive measures likely to be applied instead of detention must be assessed within the scope of this principle; and accordingly, the grounds for detention must be "individualized".

60. In Article 5 § 3 of the Convention, it is set forth that an individual arrested or detained has the right to be promptly brought before a judge as well as the right to be tried within a reasonable time or to be released during the judicial prosecution. As the accused would be deemed innocent unless the case is concluded with a final conviction, the courts also need to take into consideration the presumption of innocence while deciding whether the detention is reasonable in the present case. Continued detention can be justified in a given case only if there are specific indications of a "*genuine requirement of public interest*" which, notwithstanding the presumption of innocence, outweighs the right to personal liberty and security safeguarded by Article 19 of the Constitution (see *Murat Narman*, § 61). It is primarily the inferior courts' task to ensure that detention in a given case does not exceed a certain period of time. To that end, the inferior courts must examine all facts having a bearing on the above-cited public

interest, and these facts and findings must be put forth in the decisions on the request for release (see *Murat Narman*, § 62).

61. It should be also indicated that Article 19 § 7 of the Constitution cannot be seen as authorising pre-trial detention unconditionally provided that it lasts no longer than a certain period. Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities (for a similar judgment of the ECHR, see *Belchev v. Bulgaria*, no. 39270/98, 8 April 2004, § 82). In its several judgments, the ECHR concludes that in cases where tribunals use stereotype expressions and grounds in decisions ordering detention and continued detention, this would be in breach of Article 5 § 3 of the Convention (see *Çayan Bilgin v. Turkey*, no. 37912/04, 8 December 2009; *Kürüm v. Turkey*, no. 56493/17, 26 January 2010; *Erdem v. Germany*, no. 38321/97, 5 July 2001; *Shishkov v. Bulgaria*, no. 38822/97, 9 January 2003; and *Ilijkov v. Bulgaria*, no. 33977/96, 26 July 2001, § 84).

62. Besides, if the relevant law prescribes a presumption concerning the grounds for detention (as in the catalogue offences), it is mandatory to convincingly demonstrate the existence of concrete facts which require interference with personal liberty (for a similar judgment of the ECHR, see *Contrada v. Italy*, no. 27143/95, 24 August 1998, §§ 58-65).

63. Pursuant to Article 101 of the CCP, existence of strong suspicion of guilt and grounds for detention as well as evidence proving the proportionality of detention measure are to be *"justified and explicitly demonstrated by concrete facts"* in the reasoning parts of the decisions on detention, continued detention or dismissal of the request for release.

64. The interpretation of legal provisions on detention and their application to a given case are within the discretionary power of the inferior courts. However, in case of any practice performed on the basis of *"explicitly unlawful or unconstitutional"* considerations or any explicit arbitrariness in the assessment of evidence, such decisions giving rise to violation of any right or freedom must be examined within the individual application system. Any acknowledgement to the contrary is not compatible with the aim pursued in introducing the individual application mechanism (see *Ramazan Aras*, § 49).

2. Assessment as to the Concrete Case

65. In the present case, the detention order was issued for the offences of *"obtaining confidential documents pertaining to the State's security"* and *"destroying, misusing or stealing by trickery confidential documents pertaining to the State's security"* which are respectively set out in Articles 327 and 326 of the Turkish Criminal Code no. 5237.

66. The constitutional review as to whether the right to personal liberty and security was breached must be conducted to the effect that would primarily reveal whether there exist *"strong indication of guilt"* and *"ground for detention"* which are the conditions required for resorting to detention within the meaning of Article 19 § 3 of the Constitution. Such review must be also conducted with respect to the criteria for the application of these conditions.

67. It has been comprehended from the letter of the İstanbul Chief Public Prosecutor's Office requesting the applicant's detention and reasoning part of the detention order issued by the İstanbul Magistrate Judge's Office no. 5 that the document underlying the applicant's detention is the Egemen Operation Plan.

68. It should be noted that the question how the Egemen Operation Plan was taken away from the plan room of the 1st Army Command could not be clarified, and the investigation conducted by the military prosecutor's office into this incident was concluded by its decision of non-prosecution of 7 September 2010, which constitutes one of the most important issues required to be taken into consideration in making an assessment as to the applicant's allegations.

69. E.S., whose statement was taken as a complainant on 4 December 2014 by the İstanbul Chief Public Prosecutor's Office and who had made a presentation concerning the Egemen Operation Plan, stated that CDs that should have been in the plan room of the 1st Army Command included, inter alia, the Egemen Operation Plan; however, this plan was not among the documents submitted by the applicant to the İstanbul Chief Public Prosecutor's Office. The applicant's detention is based on this document/evidence which the applicant had obtained beyond his own will and which

is still lost and could be found neither by the investigation authorities. Therefore, it is apparent that both the reasoning of the detention order issued by the magistrate judge's office and the reasoning of the judgment rendered by the Court's majority depend on this document which could not be obtained from the applicant or anyone else and of which whereabouts were not also known by the investigation authorities.

70. It is not also revealed where the audio tape pertaining to the above-mentioned presentation was or whether it was destroyed or not. However, this issue is indicated as one of the grounds in the reasoning part of the detention order. Nor did the investigation authorities reach any information on this matter.

71. The applicant indicated that among the documents delivered to him by an unknown person, there were several military operation plans including the Egemen Operation Plan; and that as these documents were not eligible for being reported as news and were confidential in nature, he submitted them to the public prosecutor without making any news about their contents. Therefore, the Egemen Operation Plan, which was among the documents submitted by the applicant to the İstanbul Chief Public Prosecutor's Office, was not mentioned in the news published in the Taraf Newspaper.

72. During the hearing, the applicant stated that on the way to the newspaper's headquarters, he was given the relevant documents by a man who was his journalistic source. This fact was also acknowledged by the tribunal ordering his detention.

73. In making an assessment as to the lawfulness of detention, the main issue required to be examined is whether relevant and sufficient reasons for detention has been applied. The magistrate judge's office issuing the detention order primarily indicated in its reasoning that the Egemen Operation Plan had been obtained by the applicant. However, neither the suspect during his questioning and the hearing nor the complainant in his statements mentioned of this fact. Nor did the applicant's file include any finding or evidence supporting it. It is explicit that these documents were provided to the applicant by another person.

74. In the detention order, it is secondly indicated that 118 confidential documents in the CDs that were among the documents given the applicant by an unknown person were revealed to be stolen. The investigation conducted by the military prosecutor's office in 2010 as to these stolen documents was ended by the decision of "non-prosecution".

75. In the detention order issued by the magistrate judge's office, it is noted that documents given to the applicant by an unknown person or even copies thereof were not submitted to the relevant authorities. It is further indicated that in spite of the applicant's statement that he had destroyed them, it has not been known yet whether they were indeed destroyed. It is also stated that it is still unknown whereabouts of these confidential documents, in whose possession they are and for what purpose they would be used; and that the person from whom the suspect obtained the documents could not be still identified. Accordingly, it is seen that on account of the documents submitted by the applicant to the public prosecutor's office on 21 January 2010 as well as the next week, the applicant's detention was ordered on 2 March 2015 for *"destroying, misusing, obtaining and stealing by trickery any document pertaining to the State's security"* and *"obtaining trickery any document pertaining to the State's security"*, based -to a significant extent- on "unknown", "unidentified" and "non-existing" matters.

76. It is beyond any doubt that such findings in the detention order amount to reversal of the burden of proof, which occupies an extremely important place in the criminal justice system. The burden of proof in detention could not be reversed by requiring the person detained to demonstrate the existence of grounds which would justify his release (for a similar judgment of the ECHR, see *Suominen v. Finland*, no. 37801/97, 1 July 2003, § 37). The burden of proof is on the national authorities, and the competent authorities must prove that the relevant person's detention is compulsory (for a similar judgment of the ECHR, see *Hutchison Reid v. the United Kingdom*, no. 50272/99, 20 February 2003, § 71). The burden to prove material facts is on the public/competent authorities. Shifting of the burden of proof which is indeed on the competent authorities to the applicant and ordering the continuation of his detention as long as he could not convince the inferior courts cannot be accepted (for a similar

judgment of the ECHR, see *Ilijkov v. Bulgaria*, no. 33977/96, 26 July 2001, § 87). In the present case, the burden to determine whether these documents were destroyed, where they were, by whom and for what purpose they were retained and to identify the person providing these documents was imposed on the applicant. Therefore, the burden of proof on these issues was imposed on him and relied on as a ground for his detention.

77. It is also possible to observe this matter in the reasoning parts of the decisions dismissing the applicant's challenges to his detention. The magistrate judge's offices reviewing the challenges rejected them with a final effect on the grounds, which are in support of the above-cited consideration, that *"… as no concrete evidence to end his detention was submitted"* and *"…as there is no new evidence to require his release"*.

78. In the reasoning of the judgment rendered by the Court's majority finding no violation, it is stated *"… regard being had to the above-mentioned content of the investigation file, the acts imputed to the applicant by the letter of the İstanbul Chief Public Prosecutor's Office requesting his detention, the evidence relied on for these acts and the grounds specified in the detention order of the İstanbul Magistrate Judge's Office no. 5, it has been concluded that there is strong suspicion that the applicant might have committed the imputed offences"*. In the majority's opinion, the grounds for the applicant's detention were explained by stating that *"… given the amount of sentence likely to be imposed on the applicant for the offences underlying the detention order, there is a risk of his fleeing, and the investigation has still been pending…"*. Besides, it is indicated that *"given the period of sanction prescribed in the law for the imputed offences, the conditional bail would be insufficient, and detention measure is proportionate…"*. However, this approach does not comply with the established case-law of the Court. That is because, our Court has adopted a higher standard of protection particularly for detention orders which have a bearing especially also on another fundamental right (see *Engin Demir,* [Plenary], no. 2013/2947; and *Erdem Gül and Can Dündar* [Plenary], no. 2015/18567).

79. In Article 19 § 3 of the Constitution, it is set forth that persons against whom there is strong indication of guilt may be detained by a decision of a judge solely for the purposes of preventing escape, or preventing the

destruction or alteration of evidence, as well as in other circumstances prescribed by law and necessitating detention. However, in the present case, neither the prevention of the risk of his destroying or tampering with the evidence nor the underlying facts thereof were discussed in the grounds for the applicant's detention and for dismissal of his challenges.

80. The element *sine qua non* for detention of a person is the existence of strong suspicion of guilt, and thus the accusation must be supported with plausible evidence likely to be deemed strong. Accordingly, the plausible evidence to form a basis for strong suspicion is to be based not on subjective feelings and considerations of the public authorities but certainly on objective material facts. In the reasoning of the detention order issued by the magistrate judge's office in the present case and the judgment reached by the Court's majority, it was not expressed what the plausible evidence indicating strong suspicion of guilt, the condition *sine qua non* for detention, was but certain abstract considerations were merely mentioned of.

81. It must be borne in mind that detention that is, out of the preventive measures, the *severest form of temporary measure restricting*" the personal liberty is not a punishment and cannot be used for the purpose of punishing; and that *"what is essential is release pending trial"*. Therefore, this measure should be resorted only in necessary cases and should not be applied if there is an opportunity to attain the aims pursued with detention through other forms of less severe preventive measures. Likewise, detention is an optional preventive measure in our law, and even if the conditions for detention are satisfied, detention measure is not necessarily applied in every case. Therefore, in applying detention measure, it must be borne in mind that *"personal liberty is essential and detention measure is exceptional"*. However, in the detention order of the magistrate judge's office, the requirements of the real public interest overweighing the personal liberty were not indicated, and it was only mentioned, without any concrete consideration, that the detention measure was proportionate, and the conditional bail would be insufficient. It was not explained why a less severe preventive measure would be insufficient in the present case. Nor were the grounds as to why the detention measure was proportionate enumerated in a way that would satisfy an objective observer. As a matter

of fact, Article 100 § 1 of the CCP sets forth that in case of not being proportionate to the gravity of the imputed offence, the punishment likely to be imposed or the preventive measure to be applied, a detention order cannot be issued. There were no objective material facts which were in support of his detention in the detention order. It should not be forgotten that even in the initial detention, it must be *"convincingly"* demonstrated in the detention order that detention is legitimate. However, the reasoning of the judgment of the Court's majority did not contain any assessment in this respect.

82. Besides, apart from the existence of strong suspicion of guilt, it is also necessary for issuing a detention order that at least one of the grounds for detention would *"continue to exist during every stage of detention"*. It is also requisite that these conditions about the grounds for detention must also be assessed *"concretely"* in respect of each suspect and *"indicated in the reasoning part"*. Given the reasoning of the detention order in the present case, it has been observed that the grounds for detention were not legally justified, and it was presumed that facts and grounds requiring detention had already existed.

83. Pursuant to Article 101 of the CCP, in decisions ordering detention, continued detention or dismissing request for release, evidence which indicates strong suspicion of guilt, the risk of fleeing and tampering with evidence, the existence of reasons for detention as well as proportionality of the detention measure must be *"clearly"* demonstrated and *"justified with concrete facts"*. The question as to whether detention is based on legal grounds may be revealed only through the examination of the reasoning of the decisions ordering detention or the continued detention.

84. Regard being had to the detention order in the present case, it has been observed that existence of the risk of the applicant's fleeing or tampering with the evidence was relied on as a ground for his detention; and that no ground as explained above was specified, but instead, stereotype expressions and sentences included in the relevant law were reiterated. Reiteration of phrases mentioned in the law does not mean that the decision is reasoned.

85. For these reasons, I did not agree with the majority's opinion that, as regards the alleged unlawfulness of the applicant's detention, there was no violation of the right to personal liberty and security safeguarded by Article 19 § 3 of the Constitution.

C. Alleged Violation of the Freedoms of Expression and the Press

86. The applicant maintained that he was detained on remand for having obtained the documents which were subject-matter of the news published within the scope of the journalistic activities; that the request for his detention due to publishing the documents that were subject-matter of the news in question was rejected by the magistrate judge's office due to the expiry of the time-limit set as a condition for a trial and prescribed for filing a criminal case in Article 26 of the Law no. 5187; that however, the magistrate judge's office ordered his detention for obtaining the same documents; and that it was within the scope of journalistic activities to obtain and disclose the information which was subject-matter of the news.

87. In its observations, the Ministry indicated that the very essence of the applicant's complaints concerned the alleged unlawfulness of his detention; and that in this sense, the investigation conducted against the applicant was not initiated upon his reporting an incident as news in the press or for his possession of the documents in question.

88. In his counter-statements against the Ministry's observations, the applicant alleged that he was forced to disclose his journalistic source; that in his capacity as a journalist, he was entitled to retain certain confidential documents to inform the public; and that the element underlying his detention was the documents that indeed fell into the scope of journalistic activities.

1. General Principles

89. In several judgments rendered by the Court, the basic principles concerning the freedom of expression and the press are defined exhaustively (see *Fatih Taş* [Plenary], no. 2013/1461, 12 November 2014, §§ 57-67, 80, 94; *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, §§ 30-38, *Ali Rıza Üçer (2)* [Plenary], no. 2013/8598, 2 July 2015, §§ 30-33; *Ergün Poyraz (2)* [Plenary], no. 2013/8503, 27 October 2015, §§ 33-39; and *Medya*

Gündem Dijital Yayıncılık Ticaret A.Ş. [Plenary], no. 2013/2623, 11 November 2015, § 44).

90. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for the progress of the society and sell-fulfilment of individuals. It is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society" (for a judgment of the ECHR, see *Handyside v. the United Kingdom*, no. 5493/72, 24 September 1976, § 49). Achievement of social and political pluralism depends on the ability to freely express any kind of opinion in a peaceful manner (see *Emin Aydın*, no. 2013/2602, 23 January 2014, § 41).

91. Freedom of the press, a special aspect of the freedom of expression, does not only protect the right of the press to report and impart news. It is directly related to the public's freedom to access to news and ideas for ensuring democratic pluralism. It is also an indispensable requirement of a democratic pluralism to ensure the public's access to news and ideas within the scope of debates of public interest and thereby to ensure public's participation in such debates. Accordingly, ability of the press, within the scope of journalistic ethics, to impart news and convictions, as the public "watchdog", also contributes to ensure transparency and accountability in a democratic state (for similar judgments of the ECHR, see *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, 7 February 2012, § 102; *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, 20 May 1999, §§ 59 and 62; and *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, 17 December 2004, § 71). A sound democracy requires supervision of the public authorities not only by the legislator or the judiciary but also by other actors in the political arena such as non-governmental organizations and the press or political parties (see *Ali Rıza Üçer (2)*, § 55).

92. In addition, in order for the press to exercise its right to report and impart news, it must first of all have access to news or information. The journalist's ability to have access to any kind of news, information and ideas depends on the diversity of his journalistic sources and availability of the means for reaching news. The journalist's right not to disclose his

journalistic source must be protected for, at least, ensuring news to reveal the apparent truth of the relevant time when it is published. In this respect, keeping the journalistic source confidential is one of the basic requirements of the freedom of the press. This right is a part of the freedom of "receiving or imparting information or ideas without interference by official authorities" safeguarded by Article 26 of the Constitution. Accordingly, the phrase *"the press is free and shall not be censored"*, which is set out in the first sentence of Article 28 § 1 of the Constitution, also indirectly provides assurance for the protection of journalistic sources.

93. In the view of the ECHR, the right of journalists not to disclose their sources constitutes a part of the right to information and is not a mere privilege (see *Tillack v. Belgium*, no. 20477/05, 27 November 2007, § 65). In cases where confidentiality of journalistic sources is not protected, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the task and role of the press to provide accurate and reliable information and create an informed public opinion may be undermined. Although the freedoms of expression and the press may be restricted, any interference with the confidentiality of journalistic source cannot be compatible with the press freedom, which is safeguarded under Article 28 of the Constitution, unless it is justified by an overriding requirement in the public interest (for similar judgments of the ECHR, see *Goodwin v. the United Kingdom*, no. 17488/90, 27 March 1996, § 39; *Roemen and Schmut v. Luxemburg*, no. 51772/99, 25 February 2003, § 46; and *Voskuil v. the Netherlands*, no. 64752/01, 22 November 2007, § 65).

94. With respect to the disclosure of journalistic sources, Article 12 of Law no. 5187 sets forth that publishers, chief editors and authors of periodicals cannot be forced to disclose their journalistic sources of any kind including information and documents and to testify on this matter. Thereby, confidentiality of journalistic sources is under the protection of this Law. This provision does not introduce any exceptions with respect to the principle of the protection of confidentiality of these sources.

95. In addition, the freedoms of expression and the press are not absolute rights which may be subject to restrictions. As a matter of fact, the grounds for such restriction are set out in Article 26 § 2 of the Constitution, which concerns the freedom of expression. In restricting the freedom of the press,

Articles 26 and 27 of the Constitution will in principle apply pursuant to Article 28 § 4 thereof. Besides, exceptional circumstances whereby the freedom of the press may be restricted are indicated in Article 28 §§ 5, 7 and 9 of the Constitution (see *Bekir Coşkun*, § 37).

96. Accordingly, the freedoms of expression and the press may be restricted for the purposes of "maintaining national security", "preventing offences", "punishing offenders", "preventing disclosure of information duly classified as State secret" and "prevention of disclosure of confidential information of the State", pursuant to Articles 26 § 2 and 28 § 5 of the Constitution. To that end, it is possible to criminalize, and impose punishment for, the act of disclosing confidential information of the State through the press. Nor is there a constitutional obstacle before applying detention measure, during the investigation and prosecution to be carried out, in respect of press members alleged to have performed such acts (see *Erdem Gül and Can Dündar*, § 89). Indeed, also according to the ECHR, the press must act in compliance with the rules of journalistic ethics in performing its duties. As regards a very delicate matter such as national security, the State may impose certain restrictions on the news to be made by journalists and, accordingly, public authorities may hinder reporting of certain news (see *Observer and Guardian v. the United Kingdom*, §§ 61-65).

97. However, restrictions to be imposed on the freedoms of expression and the press for these purposes must comply with the principles of "being necessary in a democratic society" and "proportionality", which are among the general conditions laid down in Article 13 of the Constitution for imposing a restriction. The principle of being necessary in a democratic society must be interpreted on the basis of pluralism, tolerance and broadmindedness. The proportionality principle reflects the relation between the aim of the restriction and the means used to attain this aim. The review of proportionality is to review, based on the aim pursued, the means chosen for attaining this aim. Therefore, in interferences with the freedoms of expression and the press, it must be assessed whether the means chosen for attaining the aim pursued is "practicable", "necessary" and "proportionate" (see *Fatih Taş*, §§ 90, 92 and 96).

98. Accordingly, in determining whether a judicial or administrative interference with the freedoms of expression and the press has been

"necessary", the Court assesses whether the interference has met "a pressing social need" (see *Bejdar Ro Amed*, no. 2013/7363, 14 April 2015, § 68; and for a similar judgment of the ECHR, see *Handyside v. the United Kingdom*, § 48). Such an assessment to be made within this framework must be conducted on the basis of the grounds relied on by the public authorities.

99. As regards the examination as to whether the other necessary conditions for issuing a detention order pursuant to Article 100 of the CCP exist, it should be primarily noted that, within the framework of the established judgments of the Court, specific condition of the person whose detention is ordered or, if detained on remand, who requests to be released, as well as the general circumstances of the case must be taken into consideration in decisions ordering detention and continued detention. Thereby, it is necessary to individualize the grounds for detention in every case (see *Mustafa Ali Balbay*, § 116).

100. Besides, the link between the detention measure and democratic society must also be mentioned. The notion of "democratic society" cited in several provisions of the Constitution must be interpreted with a contemporary understanding which promotes freedom. The democratic society test clearly demonstrates the parallelism between Article 13 of the Constitution and Articles 9, 10 and 11 of the Convention where this test is applied. Accordingly, the democratic society test must be interpreted on the basis of pluralism, tolerance and broadmindedness (for similar judgments of the ECHR, see *Handyside v. the United Kingdom*, no. 5493/72, 7 December 1976, § 49; and *Başkaya and Okçuoğlu v. Turkey*, nos. 23536/94 and 24408/94, 8 July 1999, § 61).

101. As a matter of fact, pursuant to the established case-law of the Court, democracies are the regimes where fundamental rights and freedoms are ensured and safeguarded to the widest extent. Restrictions impairing the very essence of fundamental rights and freedoms and thereby rendering them non-enjoyable cannot be considered to comply with the requirements of a democratic society. Therefore, fundamental rights and freedoms may be restricted only by law and to the extent strictly necessary for maintaining democratic society only in exceptional cases and provided that the very essence of these rights and freedoms are

not infringed upon (see the Court's judgment no. E.2006/142 K.2008/148, 24 September 2008).

102. Another safeguard to be applied in any kind of restriction to be imposed on fundamental rights and freedoms is "the proportionality principle" set out in Article 13 of the Constitution. If the restriction halts the enjoyment of any fundamental right or freedom by infringing upon its very essence, hampers its enjoyment to a significant extent, renders it ineffective or impairs the balance between the means of restriction and the aim pursued in a way which would be in breach of the principle of proportionality, then the restriction would be contrary to the requirements of a democratic society (see *Abdullah Öcalan*, no. 2013/409, 25 June 2014, § 94).

103. Pursuant to the Court's judgment, proportionality demonstrates the relation between the aim pursued and the means for restricting fundamental rights and freedoms. The proportionality review is the review, on the basis of the aim pursued, of the means chosen for attaining this aim (see *Sebahat Tuncel*, no. 2012/1051, 20 February 2014, § 84; and *Abdullah Öcalan*, § 97). Therefore, for instance, in interferences with the right to trade union, it must be considered whether the means chosen for attaining the aim pursued is suitable, necessary and proportionate.

104. As also mentioned above, in decisions ordering detention and continued detention, it is compulsory to take into consideration the specific condition of the person requesting release as well as general circumstances of the case and thus to individualize the grounds for detention. Particularly in cases where restriction is imposed, due to detention, on any fundamental right and freedom involving general public interest such as the *"freedom of expression"*, *"freedom of the press"*, *"right to stand for elections and engage in political activities as a member of parliament"*, *"right to trade union"*, along with on the right to personal liberty and security, particular regard must be had to the questions whether the measure is proportionate and the grounds relied on are *"relevant"* and *"sufficient"*. That is because, it must be taken into consideration that resorting to detention measure, which leads to more severe consequences than the other preventive measures, intensively and to a wide extent may render these fundamental rights and freedoms ineffective and non-functional.

105. As a matter of fact, in its judgments of *Mustafa Ali Balbay* (no. 2012/1272, 4 December 2013) and *Mehmet Haberal* (no. 2012/849, 4 December 2013), the Court noted that regard being had to the applicants' capacity as a member of parliament, the right to stand for election and engage in political activities as well as the right to personal liberty and security must be taken into consideration in the decisions ordering their continued detention. The relevant part of the reasoning reiterated in both judgments reads as follows:

"The exception introduced in Article 83 of the Constitution with reference to Article 14 thereof must be interpreted narrowly and in favour of the freedom, regard also being had to the right to stand for elections set forth in Article 67 of the Constitution. Therefore, if the person whose continued detention has been ordered is a member of parliament, a new conflicting value is added to those which have already existed. Accordingly, along with the right to personal liberty and security, regard must also be had to the public interest which is deprived of as the elected member of parliament cannot engage in legislative activities for being detained on remand. In this scope, in ordering the continued detention of the persons who have been elected as a member of parliament, the courts are to demonstrate, relying on concrete facts, the existence of an interest required to be protected and overweighing the interest deriving from both the right to personal liberty and security and the enjoyment of the right to stand for elections and engage in political activities. Thereupon, in assessing whether the reasonable period has been exceeded, it must be also considered whether the allegations raised by the applicant upon being elected as a member of parliament were assessed properly in the decisions ordering his continued detention. Therefore, if a proportionate balance is struck between the applicant's rights to engage in political activities and to represent as an elected member of parliament and the public interest in continuation of his detention, it may be concluded that the grounds for continued detention are relevant and sufficient.

Accordingly, in reviewing the detention status of a member of parliament tried on account of a criminal charge within the scope of Article 14 of the Constitution, it must be taken into consideration that the preventive measure in the form of detention may render the right to stand for elections ineffective, on condition that his investigation is initiated before the elections …

In ordering continued detention, it is compulsory to take into consideration the specific condition of the person requesting release as well as general circumstances of the case and thus to individualize the grounds for detention. The courts assessing the applicant's requests for release failed to sufficiently individualize the grounds they relied on while dismissing these requests and to establish concrete and plausible facts indicating the risk, on the part of the applicant elected as a member of parliament, of fleeing or tampering with evidence."

106. The approach adopted in this judgment must also be applied not only in decisions ordering continued detention but also in rendering initial detention order, and specific conditions of the person whose detention has been ordered must be taken into consideration.

107. In this respect, within the scope of this judgment, if the person whose continued detention has been ordered is a member of parliament, a new conflicting value arises. Besides, the public interest deprived of due to his inability to enjoy his rights to engage in political activities and to represent along with the right to personal liberty and security must also be taken into consideration. Likewise, in cases where a journalist is detained on remand, freedoms of the press and expression must also be taken into account. The Court also adopted the same approach in respect of the freedoms of the press, association and the right to trade union that are the other aspects of the freedom of expression and association (see *Engin Demir*, §§ 62 *et. seq.*).

108. In the ECHR's point of view, the nature and severity of the sanctions imposed are also the factors to be taken into account when assessing the proportionality of an interference with the exercise of the freedom of expression as well as with the different aspects of this freedom, namely freedoms of the press, freedom of association, right to engage in political activities and right to trade union. If the sanction imposed, even if not severe in nature, has a deterrent effect on the applicant, the ECHR finds it problematic. According to the ECHR, the sanction imposed must be justified on the basis of the above-mentioned criteria (see *AxelSpringer AG v. Germany* [GC], no. 39954/08, 7 February 2015, § 95). It acknowledges that even not severe penalties imposed within the scope of a trade-union activities are of a nature which would deter union members from

engaging in trade-union activities performed in the pursuit of their own interests (see *Kaya and Seyhan v. Turkey*, no. 30946/04, 15 December 2009, § 30; *Karaçay v. Turkey*, no. 6615/03, 27 June 2007, § 37; and *Ezelin v. France*, no. 11800/85, 26 April 1991, § 43).

109. In striking a balance between the measure prescribed and the fundamental right or freedom to be restricted or eliminated, due diligence must be paid to the applicability of the other preventive measures which would not prevent the exercise of this right or freedom. In case of existence of the grounds for detention specified in Article 100 of the CCP in an investigation conducted into an offence, Article 109 thereof sets forth the suspect may be subject to a conditional bail instead of being detained on remand. It has been further observed that number of such practices have increased by virtue of the amendments made to Article 109 by Law no. 6352 on Amendment to Certain Laws to Increase the Efficiency of Judicial Services and Suspension of Penalties and Trials Regarding Offences Committed via the Press, dated 2 July 2012.

2. Assessment of the Present Case

110. In the present case, given the decisions dismissing the challenges to initial detention and the continued detention, it appears that the magistrate judge's offices ordering the applicant's detention had relied on the existence of concrete evidence indicating strong suspicion of guilt, the lower and upper limits of penalties prescribed in the law for these offences, the amount of sentence likely to be imposed on the suspect for the imputed offence, the risk of his fleeing as well as on the facts that the imputed offence is among the ones specified in Article *100 et. seq.* of the CCP and that the investigation has been still pending.

111. However, these decisions do not indicate on the basis of which plausible evidence the strong suspicion of guilt was found and the reasons indicating the risk of the applicant's fleeing. Nor is there any explanation, in the reasoning of the detention order, as to the legal and logical foundations of the risk of fleeing. The question as to why the applicant, who had himself delivered the documents in his possession to the prosecutor's office, would intend to flee should have been explained in a way that would satisfy an objective observer.

112. Likewise, as the evidence relied on is the documents that had been given to the applicant and were then submitted to the prosecutor's office, there is no risk of the applicant's tampering with the evidence. Regard being had to these considerations, it has been observed that the grounds specified in the detention order are *"formulaic"* or *"stereotype"* reasons that are indicated by the Court in its several judgments.

113. In the decisions ordering detention and continued detention, the reasons why the provisions of conditional bail were not applied are not discussed. As from 5 July 2012 when the amendment introduced by Law no. 6352 and dated 2 July 2012 took effect, it became possible for the applicant to avail himself of the provisions of conditional bail which are prescribed in Article 109 § 3 of the CCP instead of being detained on remand. It has been nevertheless observed that, in the above-mentioned decisions ordering continued detention, the measures of conditional bail were not sufficiently taken into consideration for the balance required to be struck between the legitimate aim pursued and the interference in question, and the question as to why these measures would remain insufficient was not justified. However, in order for demonstrating that the detention measure is proportionate, it must be proven that the measure of conditional bail has remained insufficient. Regard being had to all these considerations, it is explicit that, in ordering the applicant's continued detention, no proportionate balance was struck between the public interest expected of pre-trial detention and the applicant's right to personal liberty and security (in the same vein, see *Engin Demir* [Plenary], § 69).

114. Another element relied on by the magistrate judge's office ordering the applicant's detention is the fact that the imputed offence is one of the "catalogue" offences. In the reasoning of the decision ordering his continued detention, it is indicated that there is a legal presumption indicating the existence of grounds for detention in respect of certain offences including those imputed to the applicant within the scope of Article 100 § 3 of the CCP (risk of fleeing or tampering with evidence and putting pressure on witnesses, victims and other persons).

115. Even if the relevant law includes a presumption on the reasons for detention, the existence of concrete facts which necessitates an interference

with personal liberty must be convincingly demonstrated (see *Contrada v. Italy*, no. 27143/95, 24 August 1998, §§ 58-65). Accordingly, the ECHR stresses that any system of mandatory detention on remand is *per se* incompatible with Article 5 § 3 of the Convention (see *Ilijkov v. Bulgaria,* no. 33977/96, 26 July 2001, § 84).

116. However, it has been observed that in the present case, existence of the concrete facts necessitating detention was not proven, and the relevant judicial authorities confined themselves to make a reference to the fact that the imputed offence was one of the catalogue offences laid down in Article 100 § 3 of the CCP (for similar judgments of the ECHR, see *Galip Doğru v. Turkey*, no. 36001/06, 28 April 2015, § 58; and also see *Engin Demir* [Plenary], § 66).

117. Besides, in making an assessment as to the principles of being necessary in a democratic society and proportionality, probable "deterrent effect" of the interferences with the freedoms of expression and the press both on the applicants and, in general, on the press must also be taken into consideration (see *Ergün Poyraz (2)*, § 79; and for similar judgments of the ECHR, see *Nedim Şener v. Turkey*, § 122 and *Şık v. Turkey*, § 111).

118. In the present case, it is explicit that the grounds for the detention of the applicant, who was a journalist and whose detention and continued detention were ordered on accounts of the documents delivered to him by an unknown person within the scope of journalistic activities, may have a deterrent effect on his freedoms of expression and the press.

119. For these reasons, I consider that the Court should have found a violation of the freedoms of expression and the press, which are safeguarded by Articles 26 and 28 of the Constitution respectively, in conjunction with the right to personal liberty and security safeguarded by Article 19 § 3 of the Constitution. Therefore, I did not agree with the conclusion reached by the Court's majority that there was no violation of the freedoms of expression and the press safeguarded by Articles 26 and 28 of the Constitution.

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

TEVFİK TÜRKMEN

(Application no. 2013/9704)

3 March 2016

On 3 March 2016, the Plenary of the Constitutional Court found violations of the right to respect for private life and the freedom of communication safeguarded respectively by Articles 20 and 22 of the Constitution in the individual application lodged by *Tevfik Türkme*n (no. 2013/9704).

THE FACTS

[9-39] The applicant who had been serving as a contracted non-commissioned officer as of 30 August 2003 at the Air Forces Command requested the renewal of his contract at a date close to the expiry of his contract period of 9 years. However, his contract was not renewed by the administration.

The action brought by the applicant for the annulment of the non-renewal of his contract was dismissed by the 1st Chamber of the Supreme Military Administrative Court ("the SMAC") on 21/5/2013. In its judgment, the SMAC noted that the administration had enjoyed its discretionary power lawfully while taking necessary actions on the grounds that the applicant had sent e-mails which had infringed confidentiality, which were not related to his duty and were sent for social purposes via his e-mail address created for internal use only; that he had used his e-mail address with a view to organizing tours and travels. The SMAC also specified that there was no manifest error of assessment on the part of the administration in respect thereof. This judgment became final after the remedy for rectification of the judgment had been exhausted.

IV. EXAMINATION AND GROUNDS

40. The Constitutional Court, at its session of 3 March 2016, examined the application and decided as follows.

A. The Applicant's Allegations

41. The applicant maintained that his e-mails falling into the scope of his private life had been examined and recorded in the absence of a judge decision; that his expired employment contract with the air forces

had not been renewed on the basis of the impugned e-mails which were not supported by concrete facts and evidence and author of which was unknown and which embodied no unlawful content, without taking his defence submissions; that in his action brought for non-renewal of his employment contract was also dismissed by the Supreme Military Administrative Court ("SMAC") relied on the documents having no probative value. He accordingly alleged that his rights enshrined in Articles 5, 10, 11, 20, 35, 36, 37, 38, 49, 60 and 129 of the Constitution had been violated and accordingly requested a re-trial and compensation along with finding of a violation.

B. The Court's Assessment

42. 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). In the present case, the applicant had been serving in the Air Forces Command as a non-commissioned officer on a contractual basis, and upon the expiry of his employment contract, it was not renewed. It appears that the underlying reason is the e-mails received or sent by the applicant via TSK-NET e-mail system, which is peculiar to the military staff. There is no finding that these e-mails contained any personal information, photo, image, record and etc. belonging to the applicant. As the concrete reason underlying the non-renewal of his contract was the monitoring of the applicant's institutional e-mail account and the contents thereof, his allegations were examined within the framework of the right to respect for private life and the freedom of communication safeguarded by Articles 20 and 22 of the Constitution respectively.

43. The right and duty to work, which is enshrined in Article 49 of the Constitution and referred to by the applicant in his application form, is one of the fundamental rights and freedoms safeguarded by the Constitution but is not covered by the European Convention on Human Rights ("the Convention") or any of its additional Protocols to which Turkey is a party. However, his complaint regarding the freedom of work is associated with the right to respect for private life as well as the freedom of communication which are under the joint realm of the

Constitution and the Convention. Therefore, the alleged violation of Article 49 of the Constitution must be assessed within the framework of the applicant's allegations as to the violations of Articles 20 and 22 of the Constitution.

1. Admissibility

44. The Court declared the application admissible for not being manifestly ill-founded and there being no other grounds to declare it inadmissible.

2. Merits

45. In its observations, the Ministry of Justice ("Ministry"), referring to similar judgments rendered by the European Court of Human Rights ("ECHR"), has accordingly noted that Article 8 of the Convention guarantees the right to a private social life; that there is no principal reason which requires the exclusion of professional activities from the scope of the notion of private life; that an individual serving as a public officer may raise a complaint due to his dismissal from office under Article 8 of the Convention; that the investigation carried out by the inspector into the individuals' private lives as well as the resulting administrative dismissal essentially motivated by the conclusions drawn from their behaviours and conducts could be considered as an interference with the right to respect for his private life; and that although it is possible to use information gathered with respect to individuals seeking to be employed in certain positions, which are of importance for national security, in assessing their eligibility for the positions, this practice intended for protecting and maintaining national security must afford sufficient and efficient safeguards against the risk of misuse.

46. In his counter-statements against the Ministry's observations, the applicant noted that he completely agreed with the issues specified in the Ministry's observations.

47. In its letter of 10 July 2015, the Air Forces Command stated that that the Turkish Armed Forces (TAF) had informed the TAF personnel of the practice that the communications sent or received via e-mail system would

be monitored by the E-mail Monitoring Unit; that the Instruction on E-mail System no. MY 411-7 TSK-NET, which was issued by the Turkish General Staff on 14 May 2007, was notified to all officers by publication on the intranet site and was thus easily accessible by all officers through their computers; that the officers were provided with practical explanations concerning the principles as to the use, and security, of information systems during the Briefings on the Security of Communications Electronics and Information System (CIS) and Briefings on the Security of Information Systems, which were regularly held on yearly basis; and that as it would be impossible for the applicant to use his institutional computer and perform his activities without attending the security briefings, it must be accepted that he had already attended such briefings.

48. Article 20 § 1 of the Constitution, titled *"Privacy of private life"*, reads 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."

49. Article 22 of the Constitution, titled *"Freedom of communication"*, reads 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 abovementioned 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."

50. Article 20 of the Constitution embodies the right to respect for private life. Private life is a broad notion not susceptible to exhaustive definition. This notion affords protection for, *inter alia*, the individual's physical and moral integrity, his physical and social identity, his name, sexual orientation and sexual life (see *Ahmet Acartürk*, no. 2013/2084, 15 October 2015, § 46). Issues such as personal information and data, personal development and family life are also covered by this right.

51. Private life safeguards a "private social life"; in other words, a "private life" within the meaning of the individual's right to develop his social identity. In this respect, the right in question also encompasses the right to establish contact with others in order to establish and develop relations. It is indicated in the ECHR's case-law that the professional activities cannot be considered to fall outside the scope of the "private life" notion. Restrictions on an individual's professional life may fall within Article 8 of the Convention where they have repercussions on the manner in which he or she constructs his or her social identity by developing relationships with others. It should be noted in this connection that it is in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity to develop relationships with the outside world (see *Özpınar v. Turkey*, no. 20999/04, 19 October 2010, § 45; and *Niemietz v. Germany*, no. 13710/88, 16 December 1992, § 29).

52. The ECHR stresses that the investigation carried out by the inspector into the individuals' private lives as well as the resulting administrative dismissal essentially motivated by the conclusions drawn from their behaviours and conducts can be considered as an interference with their right to respect for private life (See *Özpınar v. Turkey*, §§ 47-48).

53. Article 22 of the Constitution sets forth that everyone has the freedom of communication and that privacy of communication is essential. In Article 8 of the Convention, it is enshrined that everyone has the right to respect for his correspondence. The joint protection realm of the Constitution and the Convention affords safeguards not only for the freedom of communication but also for privacy of the communication, regardless of its content and form. In this context, expressions used in

the oral, written and visual communications, either mutual or collective, of individuals must be kept confidential. Communications via post, e-mail, telephone, fax and internet must be considered to fall under the scope of the freedom of communication as well as confidentiality of communication (see *Mehmet Koray Eryaşa*, no. 2013/6693, 16 April 2015, § 49).

54. The freedom of communication and the principle of confidentiality of communication safeguards individuals' communications not only in their private dwellings but also in their workplaces (see *Bülent Polat* [Plenary], no. 2013/7666, 10 December 2015, § 65).

55. It is amongst the safeguards afforded by the Constitution and the Convention to prevent public authorities from arbitrarily interfering with the individual's freedom of communication and confidentiality thereof (see *Mehmet Koray Eryaşa*, § 50).

a. Existence of Interference

56. In the present case, it has been observed that the e-mails sent and received by the applicant via the institutional e-mail address operated by the Air Forces Command system were monitored by the E-mail Monitoring Unit; that in deciding not to renew the applicant's contract as a non-commissioned officer, the administration also took the contents of these e-mails into consideration; and that the 1st Chamber of the SMAC, which dismissed the applicant's action against his dismissal from military office, considered the contents of the e-mails in question in the reasoning of its decision dated 21 May 2013. It has been accordingly concluded that the applicant's right to respect for his private life as well as freedom of communication have been interfered with as his e-mails sent and received at the workplace were collected, stored and relied on as a basis for the administrative act in the form of the non-renewal of his employment contract.

b. Whether the Interference Constituted a Violation

57. In Article 20 § 2 of the Constitution, it is set forth that the right to respect for private life may be restricted on certain grounds, and it

is thereby accepted that this right is not absolute. It is also indicated in several judgments rendered by the Court *"along with certain restrictions inherent in fundamental rights and freedoms, the principles enshrined in other provisions of the Constitution also set the innate boundary for these rights and freedoms. In other words, the scope and objective extent of fundamental rights and freedoms should be determined not independently in terms of each norm but according to the meaning inferred from the Constitution as a whole"* (see the Court's judgment no. E. 2012/100 K.2013/84, 4 July 2013).

58. The grounds justifying a restriction on the freedom of communication are set forth in Article 22 § 2 of the Constitution.

59. Article 13 of the Constitution, titled *"Restriction of fundamental rights and freedoms"*, reads 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."*

60. The said provision of the Constitution is of fundamental importance for establishing the regime which embodies, inter alia, the grounds justifying any restriction of the rights and freedoms and the safeguards. It accordingly indicates under which conditions the fundamental rights and freedoms enshrined in the Constitution may be restricted by the law-maker. Within the framework of the principle of constitutional holism, it is requisite that the constitutional provisions be applied collectively and in consideration of general rules of law. It is thus clear that all standards as regards the safeguards, notably the requirement of restriction by law enshrined in the said provision, must be taken into consideration also in determination of the scope of the rights laid down in Articles 20 and 22 of the Constitution (see *Sevim Akat Eşki*, no. 2013/2187, 19 December 2013, § 35).

61. Therefore, in dealing with the alleged interferences with the right to respect for private life and the freedom of communication, the

questions of lawfulness and as to whether any ground justifying the interference exists must be considered under the particular circumstances of each concrete case.

i. Lawfulness

62. The Court has already discussed, in its previous judgments, whether monitoring of the institutional e-mail account of a military officer serving at the Air Forces Command as well as the contents thereof had a legal basis. Accordingly, the Court has observed that although it is not clearly set forth in Article 5 of Law no. 2937 and Article 2 of Law no. 1324 that e-mails of the TAF staff would be subject to monitoring within the scope of intelligence activities and counter-intelligence service, it is set out that public institutions and organizations are entrusted with the duty to engage in counter-intelligence activities and that the Chief of the Turkish General Staff shall carry out the intelligence services through the Forces Commands and their affiliated institutions. It has been further observed that the authority entrusted to the Chief of the Turkish General Staff within the scope of these statutory regulations also encompasses the authority to perform regulatory acts in order to ensure performance of intelligence service; that the Turkish General Staff and the Air Forces Command issued instructions in this respect on 27 February 2006 and 22 March 2006 respectively; that these instructions were then formed into MY 411-7 TSK-NET E-mail System Directive of the Turkish General Staff ("the Directive") which is dated 14 may 2007 and embodies sufficiently explicit provision allowing for monitoring of the messages sent via the military officer's institutional e-mail account; and that these statutory arrangements met the *"lawfulness"* condition (see *Bülent Polat* §§ 73-96). The Court has found no ground which would require it to depart from its previous judgments.

63. It appears that the applicant's contract was not renewed on the basis of Articles 10 and 12 of Law no. 4678 as well as Article 14 of the Regulation on Contracted Officers and Non-Commissioned Officers.

64. In this sense, the interference with the applicant's right to respect for his private life as well as his freedom of communication had a legal basis.

ii. Legitimate Aim

65. In the present case, there was an interference with the applicant's freedom of communication and the right to respect for private life on the ground that the contents of the e-mails obtained through the monitoring of messages sent and received by the applicant via his institutional e-mail address were relied on for non-renewal of his contract. As would be seen, the impugned interference falls under the scope of the freedom of communication enshrined in Article 22 of the Constitution and the right to respect for private life enshrined in Article 20 thereof, as well.

66. In order for an interference with the freedom of communication to be considered legitimate, it must be based on one or several grounds enumerated in Article 22 § 2 of the Constitution, namely maintaining national security, public order, prevention of offence, protection of public health and public morals, or protection of the rights and freedoms of others.

67. It appears that the monitoring of messages sent/received via institutional e-mail addresses assigned by the TAF to its staff for professional purposes is intended for ensuring information security and conducting counter-intelligence activities. In this respect, it has been observed that in the present case, the impugned interference by the military authority, which is in charge of maintaining security throughout the country, aimed at ensuring security of information created and transmitted via the system enabling communication among the military staff. It has been accordingly concluded that the impugned interference aimed at maintaining national security for the purposes of information security and counter-intelligence, which constituted a legitimate aim within the meaning of Articles 20 and 22 of the Constitution (see *Bülent Polat*, §§ 101-103).

iii. Necessity in a democratic society and proportionality

68. An interference with the individuals' fundamental rights must be proportionate to the legitimate aim pursued by this interference. Three tests to be taken into consideration in the assessment of the commensurateness, namely necessity in a democratic society, the very

essence of the right and the proportionality, are also specified in Article 13 of the Constitution (see *Marcus Frank Cerny* [Plenary], no. 2013/5126, 2 July 2015, 70).

69. The phrase "necessary in a democratic society", which is expressed in the ECHR's case-law, means that the interference must, inter alia, correspond to a pressing social need and be proportionate to the legitimate aim pursued (see *Silver and Others v. the United Kingdom*, no. 5947/72, 25 March 1983, § 97).

70. The very essence of the right, if infringed, renders the fundamental right or freedom in question dysfunctional. It refers to the core of the right or freedom and thereby affords individuals minimum safeguards, which are intangible, with respect of every fundamental right and freedom. In this sense, restrictions which make the exercise of the relevant right extremely difficult, make it dysfunctional, or eliminate it must be considered to have impaired the very essence of the right. Also, in the context of the freedom of communication, any such restriction, which eliminates the freedom, makes it dysfunctional or makes its exercise extremely difficult, would clearly impair its very essence. The aim of the principle of proportionality is to prevent excessive restrictions on fundamental rights and freedoms. As noted in the judgments rendered by the Court, the principle of proportionality embodies three sub-principles: suitability which means that the means used for restriction is suitable to the aim pursued by the restriction; necessity which means that the restrictive measure is necessary to attain the pursued aim; and commensurateness which requires the means to be commensurate with the aim as well as the restriction not to place a disproportionate burden (see the Court's judgment no. E.2012/100 K.2013/84, 4 July 2013).

71. In determining whether a restriction has been imposed in accordance with the above-cited requirements, it must be taken into consideration whether the burden imposed on applicant was outweighed by the legitimate aim underlying the impugned measure constituting an interference, and whether a fair balance was struck between the general interest pursued and the protection of the individual's fundamental right. This balance applicable to the restriction of all fundamental rights

and freedoms by virtue of Article 13 of the Constitution must be taken into account also in respect of the restriction imposed on the right to respect for private life and the freedom of communication. Besides, in a field subject to strict rules and conditions such as personnel regime, the public authorities may, of course, exercise a wide margin of appreciation depending on the nature of the act and the aim pursued by the restriction. However, the question whether a fair balance was struck between the freedom of communication as well as the right to respect for private life and the legitimate interest in ensuring the public service to be performed in accordance with the above-mentioned considerations must be taken into account (see *Marcus Frank Cerny*, § 73).

72. His position as a public officer requires an individual to undergo certain burdens and responsibilities as well as to be subject to restrictions which are not applicable to ordinary persons, along with certain privileges and advantages the position affords to him. As the individual holds the public position of his own accord, he is therefore considered to have consented to make use of the privileges of this position and to bear its burdens, as well. The characteristics inherent in the public service entail these advantages and restrictions (see *İhsan Asutay*, no. 2012/606, 20 February 2014, § 38).

73. In the ECHR's judgment, it is noted that the monitoring of an employee's telephone, e-mail or internet usage at the workplace would not be *per se*, to a certain extent, in breach of the Convention; and it is therefore necessary to make an assessment in consideration of the ordinary and reasonable requirements of the workplace as well as the legitimate aims (see *Copland v. the United Kingdom*, no. 62617/00, 3 April 2007, § 48).

74. In the present case, it has been observed that the e-mails sent and received via the institutional e-mail account operated by the Air Forces Command were monitored by the E-mail Monitoring Unit. This system is a limited communication system which is allocated by the TAF to its own staff for professional purposes and which is available only for internal use and allows for communication among military personnel and transmission of data concerning military service. It also appears that

through the system in question, the military officers could also create classified e-mails -which may be read only by the relevant parties- by use of electronic signature and encryption; and that such e-mails could not be monitored by the E-mail Monitoring Unit. In the present case, the e-mails monitored by the E-mail Monitoring Unit were the messages sent unencrypted. It is inevitable for the administration, within the meaning of the legitimate aim of maintaining national security, to take administrative measures that would enable monitoring communications in order to ensure security of information and data created via the e-mail system, to prevent sending of any data which may cause intelligence vulnerability, and to understand whether necessary encrypting process has been followed and whether there is any breach of confidentiality. The administration has laid down the principles on the monitoring of the communications of military staff through the institutional e-mail addresses in a sufficiently clear manner and informed all staff of these principles through notification.

75. In the present case, while the applicant was serving at the Air Forces Command as a non-commissioned officer, his employment contract, upon being expired, was not renewed by the administration. In deciding not to renew his contract, the administration relied on the need for contracted personnel as well as on the messages sent/received by the applicant via his institutional e-mail account. At the end of the examination made by the E-mail Monitoring Unit, it has been found out that the applicant sent, on 1 January 2006 and 14 June 2010 through his institutional e-mail account, 3 e-mails which were in breach of the confidentiality, 352 e-mails which were not related to his profession but intended only for chatting, and 393 e-mails which were for social purposes. It has been further observed that within the same period, the applicant received 4 e-mails in breach of confidentiality, 2 e-mails involving political propaganda, 522 e-mails which were not related to his profession but intended only for chatting and 587 e-mails which were for social purposes. It has been accordingly revealed that the applicant used his e-mail account for the purpose of tour and trip organizations which he made with another military officer in the capacity of a squadron leader; that the e-mails the applicant sent/received were in breach of the

confidentiality; and that he received e-mails involving political issues/ intended for propaganda. There is no explanation as to the contents of the messages which were sent by the applicant via his institutional e-mail account to the other military officer and which were found by the E-mail Monitoring Unit to be in breach of confidentiality. Nor is there any finding to the effect that the information included in these messages was leaked from the military network or that the military officer to whom these e-mails were sent had no authority to have access to this information.

76. The e-mails obtained within the scope of intelligence activities were sent between 2006 and 2010, and they were disclosed on 24 June 2010 as a result of the monitoring conducted by the E-mail Monitoring Unit. The contents of these e-mails were relied on for the non-renewal of the applicant's contract. It appears that these contents contain messages which are not related to the profession but are intended for chatting and pursue social purposes, as well as contain articles and images concerning certain historical events.

77. It should be borne in mind that in recruiting personnel in a status where stricter rules apply as a requirement of the military discipline, the TAF has a broader margin of appreciation. Accordingly, it has been concluded that in cases where an electronic communication system, which is required to be used in line with professional purposes, and the correspondences with the system are monitored and where the system is found to have been misused for personal purposes, the interference with the use of this system may be deemed to be necessary in a democratic society.

78. In determining as to whether the interference with the applicant's freedom of communication and right to respect for his private life was proportionate, the nature of the information included in these e-mails, the way in which such information was used and the severity of the sanction imposed on the basis of such information must be taken into consideration.

79. After the administration had found out that the institutional e-mail account had been used by the applicant for non-professional purposes and in breach of the rules specified in the Instruction, it

nevertheless continued to employ him until the expiry of his contract (nearly for a period of 2 years);. Nor did the administration conduct a disciplinary investigation, or impose any sanction including termination of the contract, against him. Thereby, the administration also indirectly accept that the applicant's impugned act was not of such a nature so as to preclude him from performing public service.

80. The administration's act in the form of non-renewal of the applicant's contract at the end of the monitoring of communication via his institutional e-mail account has a significant effect not only on his professional life but also on his economic future due to being deprived of his main source of income. Although the military staff whose contract is not renewed shall be entitled to health-care services and compensation, for a limited period of time, provided that certain conditions are fulfilled pursuant to Articles 16 and 18 of Law no. 4678, it is clear that such entitlements would not suffice to redress such a severe consequence as loss of job. Besides, the pre-requisite of being entitled to these opportunities is the lack of any fault on the part of the relevant staff in non-renewal of the contract. In the present case, given the grounds relied on by the administration in non-renewing the applicant's contract, he may also be fully devoid of these opportunities. Furthermore, it must be taken into consideration that the applicant whose contract was not renewed after having served for 9 years as a non-commissioned officer has fewer opportunities -to find a job at another sector excluding military- than individuals engaged in other professions.

81. Although it has been taken into consideration that the act complained of by the applicant was not the termination of his contract but its non-renewal, it has been concluded that the administration, relying on the applicant's use of his institutional e-mail account for non-professional purposes and accordingly its use for chatting and social purposes, in deciding not to renew his contract upon the expiry of nine-year service (contract) in the military failed to struck a fair balance between the general interest pursued through the interference and the loss sustained by the individual whose fundamental rights and freedoms have been restricted, also regard being had to the facts that the applicant had high conduct grades and had no unfavourable opinion

from his superiors, had no disciplinary sanction, was rewarded letters of appreciation and qualified as an "excellent" officer. It has been also decided that the interference with the applicant's right to respect for his private life as well as freedom of communication was disproportionate.

82. For these reasons, the Court found violations of the right to respect for private life and the freedom of communication safeguarded respectively by Articles 20 and 22 of the Constitution.

Mr. Burhan ÜSTÜN, Mr. Serdar ÖZGÜLDÜR, Mr. Recep KÖMÜRCÜ, Mr. Alparslan ALTAN, Mr. Nuri NECİPOĞLU, Mr. Celal Mümtaz AKINCI and Mr. M. Emin KUZ did not agree with this conclusion.

3. Application of Article 50 of Code no. 6216

83. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, reads as follows:

"1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled…

(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."

84. The applicant requested the Court to find a violation and to order a re-trial.

85. In the present case, the Court has found violations of the right to respect for private life and freedom of communication safeguarded respectively by Articles 20 and 22 of the Constitution.

86. As there is a legal interest in conducting a re-trial with a view to redressing the consequences of the violations of the said right and freedom, it must be decided that a copy of the judgment be sent to the 1st Chamber of the SMAC to conduct a re-trial.

87. Although the applicant claimed both pecuniary and non-pecuniary compensation, his claims for compensation must be dismissed as the order to send the judgment to the relevant tribunal in order to conduct a re-trial would constitute sufficient just satisfaction for the violations suffered by the applicant.

88. The total court expense of 1,998.35 Turkish Liras (T"RY") including the court fee of TRY 198.35 and the counsel fee of TRY 1,800, which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 3 March 2016:

A. UNANIMOUSLY that the application be DECLARED ADMISSIBLE;

B. By MAJORITY and by dissenting opinions of Mr. Burhan ÜSTÜN, Mr. Serdar ÖZGÜLDÜR, Mr. Recep KÖMÜRCÜ, Mr. Alparslan ALTAN, Mr. Nuri NECİPOĞLU, Mr. Celal Mümtaz AKINCI and Mr. M. Emin KUZ that the right to respect for private life safeguarded by Article 20 of the Constitution and the freedom of communication safeguarded by Article 22 thereof were VIOLATED;

C. UNANIMOUSLY that a copy of the judgment be SENT to the 1st Chamber of the SMAC to conduct a re-trial for redressing the consequences of the violations of the said right and freedom;

D. UNANIMOUSLY that the total court expense of TRY 1.998,35 including the court fee of TRY 198.35 and the counsel fee of TRY 1,800 be REIMBURSED TO THE APPLICANT;

E. UNANIMOUSLY that 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;

F. UNANIMOUSLY that a copy of the judgment be SENT to the Ministry of Justice.

DISSENTING OPINIONS OF JUSTICES BURHAN ÜSTÜN, SERDAR ÖZGÜLDÜR, RECEP KÖÜRCÜ, NURİ NECİPOĞLU AND CELAL MÜMTAZ AKINCI

The military status of "contracted" commissioned/non-commissioned officer differs from the status of "regular" commissioned/non-commissioned officer. In this respect, the administration has a wide margin of appreciation in "renewing the contract" as in the present case. Undoubtedly, this margin of appreciation must be exercised in an objective manner consistent with public interest. It has been accordingly observed that in the present case where it was found out that the applicant had sent 3 e-mails in breach of confidentiality, 352 non-professional e-mails intended for chatting and 393 e-mails intended for social purposes, within the period of his expired contract period, through his computer assigned for public service, there is no aspect which impairs the objectivity of the margin of appreciation exercised by the administration in "deciding not to renew the contract" based on the conclusion that he would not perform effectively within the next contract period as well as in consideration of the disciplinary and military service requirements, which thereby reveal to be in the public interest. As we have accordingly concluded that the dismissal, by the military administrative tribunal, of the action brought by the applicant for annulment of the aforesaid act did not give rise to any violation; and that there were no grounds leading to the violation of the right to respect for private life and the freedom of communication, we disagree with the conclusion whereby the majority of the Court found violations of the said right and freedom.

DISSENTING OPINION OF JUSTICE ALPARSLAN ALTAN

1. The application concerns the alleged violations of the right to respect for private life and the freedom of communication due to non-renewal of the employment contract of the applicant, who was a non-commissioned officer, on account of his e-mails.

2. The majority of the Court found violations of the right to respect for private life safeguarded by Article 20 of the Constitution and the freedom of communication safeguarded by Article 22 thereof on the grounds that non-renewal of the applicant's contract, which was already expired, due to his e-mails was neither necessary in a democratic society nor proportionate.

3. In the incident giving rise to the present case, the expired contract of the applicant, who was a contracted non-commissioned officer at the TAF, was not renewed by the administration as he had used the electronic communication system, which should have been used for professional purposes, for personal purposes in spite of having been provided with other means to carry out his private communications.

4. According to the letter of the Air Forces Command dated 17 July 2015, the TSK Net E-Mail System is a limited communication system which is allocated by the TAF to its own staff for professional purposes and which is available only for internal use and allows for communication among military personnel and transmission of data concerning military service.

5. On 30 August 2003, the applicant signed a 9-year contract with the Air Forces Command so as to serve as a contracted non-commissioned officer. Upon the expiry of his contract, the administration decided not to renew his contract. The administration stated that it had exercised its discretion by taking into consideration the need of the Air Forces Command for contracted staff as well as the applicant's career summary (year of experience, awards/appreciations/penalties, intelligence on his personal status, trainings received and success in these trainings). The classified document, which is one of the documents taken into consideration, consists of the Survey Result Report of 24 June 2010 and

its annexes, which were issued by the E-Mail Monitoring Unit concerning the messages sent/received by the applicant via TSK Net E-mail System peculiar to the staff at the Air Forces Command. There are findings in the Report to the effect that the applicant used his e-mail account for tours and trips which he organized together with another military officers with the rank of squadron leader; and that he had breached confidentiality through the e-mails he sent/received and received e-mails with political motives/propaganda. According to these findings, the applicant sent 3 e-mails in breach of confidentiality, 352 non-professional e-mails intended for chatting and 393 e-mails created for social purposes and received 4 e-mails in breach of confidentiality, 2 e-mails involving political propaganda, 522 non-professional e-mails and 587 e-mails created for social purposes.

6. The impugned incident was dealt with by the relevant judicial tribunals which primarily noted that it was an administrative contract underlying the impugned case; that those with whom the contract was signed did not have the status of "public officer"; that there was no regulation which forced the administration to renew the contract after it had expired; that the administration was afforded a margin of appreciation whereby it was entitled to seek certain qualifications in staff to perform public service as well as to dismiss those who would cause prejudice to public service; and that the administration exercised its discretion in a lawful manner, and there was no manifest error of assessment.

7. The scope of the examination to be made by the Court which would deal with the impugned incident through individual application mechanism must be determined well. In examining the alleged violations of the right to respect for private life and the freedom of communication safeguarded respectively by Articles 20 and 22 of the Constitution, the Court should consider the applicant's legal status, personal situation, practices prior to the incident as well as nature and characteristics of the institution where the applicant was serving. Assessments made irrespective of such particulars of the present case may lead to wrong conclusions.

8. It is clear that the Air Forces Command operating under the Turkish Armed Forces has a wide discretion to ensure the use of the communication system -which is allocated to the staff for professional purposes, is available only for internal use and enables transmission of data on military service only among military staff- in line with its intended purposes, as well as to take relevant measures so as to prevent any use which does not fit for the intended purposes. As a matter of fact, the Directive on MY 411-7 TSK-NET E-mail System, which was issued by the Turkish General Staff on 14 May 2007, also embodies principles on this matter and lays down conditions and principles for monitoring of the communication system. Besides, it is explicitly set forth in Article 5 § 2 of the Directive that a legal action shall be taken against the staff who have misused the e-mail system and have made a habit of misusing even if this act does not constitute another offence. The Air Forces Command noted that the said Directive and the instructions on the principles of use of e-mail system had been notified to all staff.

9. The administration's decision not to renew the applicant's contract is based on hundreds of messages which were sent/received by him through the TSK-NET e-mail system used by and among the staff of the Air Forces Command, which were formulated for tour and trip organizations, social purpose, and some of which were also in breach of confidentiality. The impugned messages do not contain any information, photo, image and record belonging to the applicant himself.

10. As also emphasized in the reasoning put forward by the majority, it appears that the monitoring of the communications via the institutional e-mail addresses allocated by the TAF to its own staff aims at ensuring information security and counter-intelligence. In this respect, in the present case, it has been observed that the impugned interference by the military administration, which is liable to protect and maintain country security, was intended for ensuring security of information created and shared via the system used as a means for communication by and among the staff. Therefore, the interference aimed at ensuring national security within the framework of information security and counter-intelligence activities, which is a legitimate aim within the meaning of Articles 20 and 22 of the Constitution (see *Bülent Polat*, §§ 101-103).

11. As also indicated in the majority's conclusion, it must be taken into consideration that in recruiting personnel in a position for which stricter rules apply as required by the military discipline, the TAF has a wider margin of appreciation. Accordingly, it has been concluded that in cases where an electronic communication system required to be used in line with its intended purpose as well as the communications via the system are monitored and where it is found out that the communication system is misused for personal purposes, any interference with such use may be deemed to be necessary in a democratic society.

12. In the judgment, the majority has reiterated the grounds with which I also agree, and in the last section, the majority has noted that the applicant continued performing his duties until the expiry of his contract period without being subject to any disciplinary action and any sanction as to the termination of his contract in spite of having acted contrary to the rules; that his deprivation of main source of income due to the termination of his contract would adversely affect his economic future; that the applicant whose contract was not renewed after having served for 9 years as a non-commissioned officer has fewer opportunities -to find a job at another sector excluding military- than individuals engaged in other professions; and that the applicant had high conduct grades and had no unfavourable opinion from his superiors and no disciplinary sanction. The majority has accordingly concluded that the interference with the applicant's private life and freedom of communication was disproportionate.

13. The applicant's having good personal record and being subject to no disciplinary sanction until the end of his contract cannot be considered as a factor compelling the administration to renew the contract for the next period. Besides, the considerations to the effect that the applicant's economic future would adversely affect or it would be difficult for the applicant to find another job due to non-renewal of the contract are a matter of debate and cannot be taken into account in terms of examinations as to whether there has been a violation.

14. The issue needed to be meticulously discussed by the Court in its examination is the extent to which the administration's wide margin

of appreciation in terms of the requirements of the military service -recognized by the majority of the Court- may be interfered with. In the present case, the factor which also extends the administration's margin of appreciation, which is indeed wide, is the establishment of the employment relation between the administration and the applicant through a contract. In its examinations within the scope of individual application mechanism, the Court should accept that, except for practices involving manifest arbitrariness, the TAF has a much wider margin of appeciation in processes concerning the non-renewal of a contract, which are dealt with also by the Supreme Military Administrative Court.

15. The Court has previously examined cases where the contracts of the applicants, who were military officers, had not been renewed due to their e-mails. In these cases, the Court dismissed the alleged violations, considering the special status afforded to the TAF by virtue of the military discipline as well as the latter's wide margin of appreciation.

16. In this respect, the grounds relied on and the conclusion reached by the Plenary of the Court in its judgment no. 2013/7666 and dated 10 December 2015 are as follows:

> *"63. The ECHR stresses that the investigation carried out into the individuals' private lives within the framework of their professional lives as well as the resulting administrative dismissal essentially motivated by the conclusions drawn from their behaviours and conducts could be considered as an interference with the right to respect for private life (see Özpınar v. Turkey, § 47).*
>
> *…*
>
> *65. The freedom of communication and the principle of confidentiality of communication safeguard individuals' communications not only in their private dwellings but also in their workplaces (see Halford v. the United Kingdom, no. 20605/92, 25 June 1997, § 44; and Copland v. the United Kingdom, no. 62617/00, 3 April 2007, §§ 41, 43 and 44).*
>
> *66. It is amongst the safeguards afforded by both the Constitution and the Convention to prevent public authorities from arbitrarily interfering with the individuals' freedom of communication and confidentiality of their*

communications. Monitoring of the content of communication constitutes a severe interference with the confidentiality of communication and thereby with the freedom of communication (see Mehmet Koray Eryaşa, § 50).

i. Existence of an Interference

67. In the present case, it has been observed that the e-mails sent and received by the applicant via the e-mail system operated by the Air Forces Command were monitored by the E-mail Monitoring Unit; that in deciding not to renew the applicant's contract, the administration took into consideration these e-mails as well; and that the 1st Chamber of the Supreme Military Administrative Court also relied on the contents of these e-mails in dismissing the applicant's action brought due to non-renewal of his contract, by its decision of 28 May 2013. It has been accordingly concluded that the applicant's right to respect for private life as well as freedom of communication have been interfered with as his e-mails sent and received at the workplace were collected, stored and relied on as a basis for the administrative act (non-renewal of the employment contract).

…

Lawfulness

…

84. By its interlocutory decision, the Court asked the Air Forces Command to provide information about the legislation allowing the monitoring of the e-mails sent/received by the TAF staff. As noted in the reply of the Air Forces Command, the legal basis of the monitoring of the e-mails sent/received via the institutional e-mail account by the E-mail Monitoring Unit is formed by Article 5 § 1 (a/3) of Law no. 2937, Article 2 § 2 (a) of Law no. 1324, the instruction no. 6406668 and dated 27 February 2006, which was issued by the Turkish General Staff, as well as the Directive no. MY 411-7 TSK-Net E-mail System of the Turkish General Staff dated 14 May 2007.

85. In Article 5 of Law no. 2937, the duties incumbent on the ministries and the other public institutions and organizations concerning the State intelligence are specified, and in Article 5 § 1 (a/3) of the same Law, "counter-intelligence activities" are enumerated among these duties.

86. In Article 2 § 2 (a) of Law no. 1324, it is set forth that the Chief of the General Staff shall ensure performance of the intelligence, operational,

organizational, training, education and logistic services through the Land, Naval and Air Forces Commands and the affiliated institutions of the Turkish General Staff.

87. It has been observed that although it is not clearly set forth in these provisions that e-mails of the TAF staff would be subject to monitoring within the scope of intelligence activities and counter-intelligence service, it is set out that public institutions and organizations are entrusted with the duty to engage in counter-intelligence activities and that the Chief of the Turkish General Staff shall carry out the intelligence services through the Forces Commands and their affiliated institutions. It has been further observed that the authority entrusted to the Chief of the Turkish General Staff within the scope of these statutory regulations also encompasses the authority to perform regulatory acts in order to ensure performance of intelligence service. It should be borne in mind that the extent to which the legislation -which could not offer solution for every possibility as it has been worded in an abstract fashion- shall afford protection for fundamental rights and freedoms mainly relate to the field for which the relevant text is formed, its content as well as the qualification and numbers of its addressees. Therefore, the complex nature or abstract nature, to a certain extent, of the legal provision cannot be per se considered to be in breach of the principle of foreseeability (see Halime Sare Aysal [Plenary], no. 2013/1789, 11 November 2015, § 61).

88. In this respect, the statutory arrangement in question establishes the main framework of the impugned restriction and may also leave the determination of the operational conditions and procedural details mainly to the regulatory acts. However, also in this case, the relevant regulatory act must be accessible to its addressees and clear and precise to the extent that could sufficiently elucidate the content (see Halime Sare Aysal, § 62).

89. Accordingly, it must be discussed whether the regulatory acts, issued by the Turkish General Staff by virtue of the power entrusted to it by the relevant Law and allowing for the monitoring of e-mails sent by military staff through their computers at the workplace, have satisfied the accessibility and clarity requirements.

90. The instruction no. 6406668 and dated 27 February 2006, which was issued by the Turkish General Staff in line with the said statutory arrangements, is the first administrative act which envisages the establishment

of E-mail Monitoring Units. It is noted in this instruction that the TSK-Net E-mail System was established for the purposes of ensuring coordination at the military quarters, exchanging information, notifying orders as well as sending/ receiving new year, feast day celebrations and similar types of messages; that the E-mail Monitoring Units under the intelligence departments would be established in order to determine whether the sent/received e-mails are related to profession as well as intended for intelligence and counter-intelligence purposes; and that the staff who are entitled to use the institutional e-mail system shall be notified of the prohibitions and sanctions against signature.

91. In order for the fulfilment of this instruction, the Air Forces Command issued the order no. 48960 and dated 22 March 2006 whereby it is specified that e-mails would be subject to examination by the E-mail Monitoring Unit in order to ascertain whether they are related to profession and intended for intelligence and counter-intelligence purposes; that the directive shall be notified to all staff against signature, and the copies of notification would be kept in their personal files within the unit.

92. The issues specified in these orders have been turned into a special directive, the MY 411-7 TSK-NET E-mail System Directive of 14 May 2007, which was issued by the Turkish General Staff ("the Directive"). By virtue of this Directive, the staff are banned from using the system for non-professional purposes as well as from sending images, audio, video and written files which do not fit for public morals, and it is also set forth that a legal action shall be taken against the staff who have used the e-mail system outside its intended purpose even if his act does not constitute another offence.

93. In Section 4, Article 5 of the said Directive, it is provided for that the E-mail Monitoring Unit may monitor e-mails in order to determine whether the e-mails are related to their profession, the intelligence and the counter-intelligence services, within the scope of monthly and annual monitoring plans, either within or beyond the users' knowledge.

94. It is further set forth that the staff may create a message through their e-signatures and encryption, and such messages may be read only by their addressees. It has been therefore understood that the E-mail Monitoring Unit cannot have access to the content of e-mails which have been created by use of e-signature and encryption method, which is also approved by the Air Forces Command in its letter of 24 July 2015.

95. According to the reply given on 24 July 2015 to the Court's interlocutory decision of 25 June 2015, it has been observed that these orders and the Directive were not published in the Official Gazette but made available on 14 May 2007 on the intranet to which the TAF staff could have access through their computers at the workplace; and that the applicant, who was a TSK-NET user, had the opportunity to have access to the Directive at any time. It has been further observed that the document "Rules to be Observed by Information System Users", setting forth that any game, letter, image, video, music and presentation files which are not related to the profession and are not suitable cannot be saved and used on the computers; and that document security principles must be observed when e-mails are sent via intranet, was served on the applicant on 29 December 2009; that the order on the Use of TSK-NET E-mail System was served on him on 30 July 2010; and that all these documents are kept in his personal file.

96. Accordingly, it has been revealed that the said Directive embodies provisions which are sufficiently clear to the effect that the messages sent by the military staff via their institutional e-mail account may be monitored. It has been further observed that the provisions in question were sufficiently accessible and foreseeable by the applicant regard being had to the fact that they were made available on 14 May 2007 on intranet whereby the TAF staff could have access through their computers at the workplace and also notified to the applicant against his signature. It has been therefore concluded that these provisions satisfied the "lawfulness" condition.

97. The applicant's contract was not renewed by the military administration by virtue of Articles 6 and 12 of Law no. 4678 as well as Article 14 of the Regulation on Contracted Commissioned and Non-Commissioned Officers.

98. It has been accordingly observed that the interference with the applicant's right to respect for private life and freedom of communication had a lawful basis.

Legitimate Aim

…

100. An interference with the freedom of communication may be considered legitimate only when it is based on one or several grounds specified in Article 22 § 2 of the Constitution, namely maintaining national security, public

order, prevention of commitment of offence and protection of public health and public morals or the others' rights and freedoms.

101. Pursuant to Article 5 § 1 (a/3) of Law no. 2937 and Article 2 § 2 (a) of Law no. 1324, the counter-intelligence has been designated as the duties entrusted to the public institutions and organizations, and the Chief of the General Staff shall perform the intelligence service through the Force Commands and affiliated institutions. In the Directive, it is set forth that institutional e-mail accounts of the TAF staff shall be subject to monitoring, within or beyond the users' knowledge, in order to find out whether the messages are intended for profession/service as well as in terms of intelligence and counter-intelligence purposes.

102. It is thereby set forth in the Directive that the E-mail Monitoring Units are entitled to monitor the messages with a view to ascertaining whether the e-mails are intended for profession/service, whether necessary encryption process has been followed, whether there has been any breach of confidentiality and whether there has been any video, audio files or infected files and files involving malicious codes. It accordingly appears that the said monitoring of the communications via the institutional e-mail addresses allocated to the military staff by the TAF for professional purposes is for ensuring data security and counter-intelligence.

103. In this scope, it has been revealed that the interference in the present case by the military administration in charge of protecting and maintaining the country's safety were intended for ensuring security of data created and shared via the system whereby the military staff maintained communication with each other to conduct the military service. It has been therefore concluded that the impugned interference was for maintaining national security within the meaning of information security and counter-intelligence, which was a legitimate aim under Articles 20 and 22 of the Constitution.

Necessity in A Democratic Society and Proportionality

…

112. In the ECHR's judgments, it is set forth that the monitoring of an employee's telephone, e-mail or internet usage at the workplace to a certain extent would not be per se constitute a breach of the Contract; and that it is necessary to make an assessment in consideration of the ordinary and

reasonable requirements of the workplace as well as of the legitimate aims (see Copland v. the United Kingdom, § 48).

113. In the present case, the e-mails sent/received by the applicant via the institutional e-mail system operated by the Air Forces Command were monitored by the E-mail Monitoring Unit. This system is a limited communication system which is allocated by the TAF to its own staff for professional purposes and which is available only for internal use and allows for communication among military personnel and transmission of data concerning military service. Through the system in question, the military officers could also create classified e-mails -which may be read only by the relevant parties- by use of electronic signature and encryption; and that such e-mails could not be monitored by the E-mail Monitoring Unit. In the present case, the e-mails monitored by the E-mail Monitoring Unit were the messages sent unencrypted. It is inevitable for the administration, within the meaning of the legitimate aim of maintaining national security, to take administrative measures that would enable monitoring communications in order to ensure security of information and data created via the e-mail system, to prevent sending of any data which may cause intelligence vulnerability, and to understand whether necessary encrypting process has been followed and whether there is any breach of confidentiality. The administration has laid down the principles on the monitoring of the communications by military staff through the institutional e-mail addresses in a sufficiently clear manner and informed all staff of these principles through notification. Thereby, the applicant was also notified of the relevant procedure. Therefore, it cannot be said that the applicant was unaware of the procedure. It has been accordingly concluded that the monitoring of the applicant's e-mails sent/received through the institutional e-mail system was necessary in a democratic society.

114. Besides, regard being had to the facts that, as stated in the letter of the Air Forces Command dated 24 July 2015, the military staff were provided with the opportunity to create e-mails which were confidential as being encrypted through TSK-NET E-mail System (intranet); that they also had the opportunity to use communication means other than intranet, through which confidential communication could also be ensured; that they could also communicate by telephones at the workplace or their mobile phones at certain places; and that they could also use their personal e-mails which could not be subject to monitoring, the monitoring of the applicant's communications though his institutional e-mail address cannot be said to be disproportionate.

115. Besides, the applicant served as a military officer at the Air Forces Command, and his contract, which had been expired, was not renewed by the administration. In exercising its discretionary power, the administration relied on the grounds such as the need for contracted staff and immoral letters, images and caricatures in the applicant's e-mails. As these messages and images were also related to the applicant's title, the TAF employing the applicant considered it as a factor adversely affecting the institution's reputation. It has been accordingly revealed that the military administration decided not to renew the contract of the applicant for tarnishing the institution's prestige as a social need to protect the institutional reputation and to prevent re-occurrence of such acts. As required by the duties undertaken by the TAF to ensure and maintain national security, those wishing to serve at the TAF are to be subject to certain restrictions which other persons are not subject. Therefore, it is undoubted that the TAF has a wide margin of appreciation concerning the qualifications to be sought in its staff.

116. In the present case, it must be borne in mind that the act complained of by the applicant was not the termination of his contract but its non-renewal. The administration did not terminate the applicant's contract due to sending of impugned images and writings. However, upon the expiry of the contract period, in assessing whether to extend the applicant's contract, the administration decided not to renew it by relying on his conducts, rewards, penalties as well as the report issued by the e-mail monitoring units. Regard being had to the wide margin of appreciation conferred upon the TAF in employing staff in the status for which much stricter rules apply as a requirement of military discipline, the non-renewal of the applicant's contract cannot be said to be unnecessary in a democratic society and disproportionate.

117. For these reasons, as the applicant's allegations constituted no violation, the Court has found no violation of the rights enshrined in Articles 20 and 22 of the Constitution."

17. The abovementioned grounds are applicable to the present case, and there are also no particular circumstances which would require the Plenary of the Court to depart from its previous judgment.

18. It must be accepted that the non-renewal of the applicant's contract on the basis of the findings to the effect that the applicant used his e-mail account for organizing tours and trips together with a squadron leader,

that he breached confidentiality through the e-mails he sent/received, and that there were also e-mails involving politics/propaganda, falls within the margin of appreciation of the Turkish Armed Forces. In consideration of the fact that the applicant's contract was not terminated but not renewed, the impugned interference cannot be said to be unnecessary in a democratic society and disproportionate.

19. As I am of the opinion that neither the applicant's right to respect for private life nor his freedom of communication safeguarded respectively by Articles 20 and 22 of the Constitution has been violated, I disagree with the majority's conclusion finding violations of the said right and freedom.

DISSENTING OPINION OF JUSTICE M. EMİN KUZ

The majority of the Court found violations of the right to respect for private life and the freedom of communication due to non-renewal of the applicant's contract. In the reasoning of the judgment, the majority noted that the interference with the applicant's said right and freedom satisfied the lawfulness requirement and pursued a legitimate aim; but no fair balance could be struck between the general interest in non-renewal of the applicant's contract and the loss suffered by him; and that therefore, the impugned interference was found disproportionate.

In the present case, the contract of the applicant serving as a contracted non-commissioned officer was not renewed. In the action brought by the applicant against this act, the defendant administration noted in its defence submissions that his contract had not been renewed within the scope of the administration's discretionary power and in consideration of the need for contracted staff, the applicant's conducts, the available intelligence about him and other relevant issues. As also revealed from the documents submitted by the administration to the Supreme Military Administrative Court ("SMAC"), the Turkish Armed Forces found out that the applicant misused his e-mail account, which was allocated to the staff for professional purposes, was not for external use and allowed transmission of data only among military staff and only concerning

military service, and thereby breached confidentiality through his e-mails.

The administration has laid down the principles on the monitoring of the communications by military staff through the institutional e-mail addresses, for the purpose of maintaining national security, in a sufficiently clear manner and informed all staff of these principles through notification. Regard being had to the facts that through this e-mail system, the military staff may create a message through their e-signatures and encryption which could be read only by their addressees; that the E-mail Monitoring Unit cannot have access to the content of e-mails; that the military staff also have the opportunity to use communication means other than intranet, through which confidential communication could also be ensured; that they could also use their personal e-mails which could not be subject to monitoring, the monitoring of the applicant's communications though his institutional e-mail address cannot be said to be unnecessary in a democratic society and disproportionate (see *Bülent Polat* [Plenary], no. 2013/7666, 10 December 2015, §§ 113 and 114).

Besides, the Law no. 4678 on the Contracted Commissioned and Non-Commissioned Officers to be Employed at the Turkish Armed Forces embodies no provision as to the circumstances under which a contract will be renewed. Nor does the Regulation on the Commissioned and Non-Commissioned Officers, which was put into force relying on this Law, contain any provision which requires the administration to renew the contract. Moreover, as also inferred from Article 16 § 3 (a) and Article 18 § 1 of the said Law where the rights to be conferred on contracted and non-contracted officers whose contracts will not be renewed in the absence of "any fault attributable to them" are specified, the administration is given a wide margin of appreciation in renewing the contracts. In consideration of the requirements of the service, the administration may even decide not to renew the contract of the contracted staff in the absence of any fault attributable to them.

Therefore, it cannot be said that the monitoring of the applicant's communications via intranet system allocated to him for the performance of military service and the reliance by the administration, *inter alia*, on the results of the monitoring cannot be considered disproportionate.

Besides, in the reasoning of the judgment rendered by the Court's majority, it is specified that as no disciplinary investigation was conducted and the applicant's contract was not terminated, until the expiry of the contract's term, even after it had been revealed that the institutional e-mail account had been misused for non-professional purposes and in breach of the pre-determined rules, the administration indirectly accepted that the applicant's acts were not of such nature as to preclude him from performing public service (§ 79). However, this consideration reflects an understanding which ignores the difference between the status of contracted staff and that of public officers. As also indicated in the SMAC's decision on the impugned incident, unlike the public officers, the contracted officers are not afforded job security. The statutory arrangement concerning contracted staff, which is set forth in Law no. 4678, affords a much wider margin of appreciation to the administration than many other laws including provision on the status of contracted staff, as a requisite of the nature of the military service. In this regard, it is in the administration's discretionary power – within the meaning of Law no. 4678 and the relevant Regulation, not to conduct an investigation into, and not to terminate his contract due to, the applicant's use of his institutional e-mail address for purposes not related to military service. It is also in the administration's discretion to take the applicant's acts into account in the assessments as to the renewal of the contract instead of imposing a disciplinary sanction on him or terminating his contract, given the short period up to the expiry of the contract period. Any consideration to the contrary would eliminate the difference between the status of contracted commissioned/non-commissioned officers and that of other commissioned/non-commissioned officers, as well as render the said Law dysfunctional.

In this sense, given the stricter rules applicable as a requisite of military service as well as the wide discretion afforded to the administration concerning contracted staff, the non-renewal of the applicant's contract by the administration relying on his conducts, rewards and penalties as well as on the report issued at the end of the monitoring of his e-mails cannot be found disproportionate.

For these reasons and on the basis of other grounds relied on in the dismissal decision previously rendered by the Plenary of the Court, no. 2013/7666 and dated 10 December 2015, I do not agree with the majority's conclusion that the applicant's right to respect for private life and freedom of communication were violated.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

ADEM YÜKSEL

(Application no. 2013/9045)

1 June 2016

On 1 June 2016, the Plenary of the Constitutional Court found a violation of the right to respect for private life safeguarded by Article 20 of the Constitution in the individual application lodged by *Adem Yüksel* (no. 2013/9045).

THE FACTS

[8-47] On 11 August 2011, the applicant started to serve as a military attaché in the Tbilisi Embassy while working in the Turkish Armed Forces ("the TAF") as a staff colonel. Thereupon, the applicant's wife who was working as a civilian officer in the TAF took unpaid leave.

In September and December 2011, four tape records of sexually explicit content alleged to belong to the applicant's wife were broadcasted on the Internet. The applicant was ordered to return to the country upon a written order of 16 December 2011 in which the ground thereof was not specified and was subsequently assigned under the command of the Presidency of the Turkish General Staff. On 19 December 2011, the applicant's statement was taken by the administrative investigation board. The applicant's wife, who returned from abroad three days later, rejected the allegations during the interview made with the board and did not find it necessary to submit a sample voice record at this stage.

In the report of 26 December 2011 drawn up by the Presidency of the Criminal Department of the Gendarmerie General Command upon the request of the administrative investigation board, it was stated that voice of the woman in the tape records broadcasted via Internet "most probably" belong to the same person; and that there was no manipulation in the records. Within the same period, the administrative investigation board heard eight workmates working in the same workplace with the applicant's wife on 23 and 26 December 2011 with a view to establishing whether the tape records broadcasted on the Internet belonged to the applicant's wife or not. Moreover, out of these personnel whose statements were taken, those who did not have any knowledge concerning the impugned tape records were enabled to listen to a certain part of the records, and subsequently, their statements were taken. Given the information available in the tape records, it has been

concluded that the voice in these records might belong to the applicant's wife. On 30 December 2011, the applicant's permanent appointment to abroad was cancelled upon the approval of the Chief of the General Staff on 30 December 2011 due to these tape records broadcasted via Internet, and the applicant was then charged in the 3rd Corps Command of the Land Forces Command (İstanbul).

Thereupon, on 9 January 2012, the applicant brought an action before the 1st Chamber of the Supreme Military Administrative Court ("the SMAC") for the stay of execution and revocation of the act of "cancellation of the appointment for a permanent task abroad". The applicant's request for the stay of execution was rejected on 6 March 2012.

In the meanwhile, the applicant filed a criminal complaint against the relevant military officers who made the tape records alleged to belong to the applicant's wife listened to the other personnel serving in the TAF; however, an authorization for investigation was not granted. This decision was served on the applicant on 7 May 2012.

During the stage of exchanging of petitions, the applicant requested from the court to be provided with a copy of the confidential documents. The court decided not to render a decision concerning the applicant's request on the ground that it was the Secretariat General's task to allow for the examination of the confidential documents in an action which was at the notification stage and noted that upon the decision of the Secretariat General, an appeal may be lodged with the Chamber.

In the meantime, an administrative investigation was initiated against the applicant's wife due to these tape records broadcasted on the internet, and the High Disciplinary Board of the Ministry of National Defence imposed a penalty of dismissal from profession on the applicant's wife. An action was brought against this decision before the 2nd Chamber of the SMAC within the prescribed period.

Thereupon, the decision on dismissal of the applicant's wife from profession and a warning letter within the scope of Article 153 of the Military Criminal Code were served on the applicant. On 13 August

2012, the applicant requested to be retired by reserving his legal rights and was retired on 27 September 2012 upon the approval of the Minister of the National Defence.

The Secretariat General of the SMAC did not find the request for the examination of the confidential documents in the action brought by the applicant appropriate. Upon the objection to the decision, the 1st Chamber of the SMAC accepted the request partially.

The applicant maintained that his representative had become aware, upon examining the confidential information, of the fact that the administrative investigation board had been established due to the tape records; and that the administrative investigation board had acted in an unduly manner, by illegal methods and on the basis of a tape record actor of which was not identified.

In the meantime, a total of eleven persons including the applicant and his wife filed criminal complaints on various dates on the ground that unsubstantial posts including aspersions and defamations against them were made available on the social networking site. It was concluded that three suspects identified within the scope of the investigation had no relation with the offences committed, and accordingly the chief public prosecutor's office rendered a decision of non-prosecution.

While the action brought by the applicant's wife was pending, she accepted to give a sample voice record. Thereupon, the Presidency of the Criminal Department of the Gendarmerie General Command specified in its report that the woman in the tape records broadcasted via Internet was "most probably the same person" with the applicant's wife.

At the end of the hearing held on 19 March 2013, an interlocutory decision was taken, and accordingly information was requested from the Presidency of the 2nd Chamber of the SMAC, which subsequently provided information in a letter concerning the action and submitted the criminal reports concerning the tape records to the court.

The 1st Chamber of the SMAC dismissed the action brought by the applicant on 18 June 2013.

The action brought by the applicant's wife due to the penalty of dismissal from profession and her request for rectification of the judgment were dismissed by the SMAC.

IV. EXAMINATION AND GROUND

48. The Constitutional Court, at its session of 1 June 2016, examined the application and decided as follows:

A. The Applicant's Allegations

49. The applicant maintained in his application form that while he was serving as a staff officer, he had to retire at the age of 47; that the tape records broadcasted via internet could not be accepted as evidence; that the sole basis underlying the impugned administrative act was the issues that must fall within the scope of private life; that the tape records of which authenticity had not been demonstrated with any legal evidence were relied on in the administrative act only on the basis of discretion; and that these tapes did not have evidential value and were obtained unlawfully, which were also raised before the SMAC. He also alleged that the evidence underlying the impugned administrative act was not genuine; that there was an unlawful interference with his private and family life; that the requests made had not been taken into account; that these tape records had been also listened to the workmates of his wife, which was an unfavourable and incorrect procedure; that the SMAC had not found the acts performed by the administration sufficient to award non-pecuniary compensation but rather dismissed the applicant's action as the impugned administrative act was based on material facts; that the dismissal decision did not include any grounds as to why his claims and defence submissions had not been taken into consideration; that the trial was concluded on the basis of an incomplete examination; that their requests for obtaining a report from the Forensic Medicine Institute had not been accepted; that he suffered morally as he had to retire pending the judicial process, which amounted to torture and mobbing; that he had been exposed to degrading treatments; and that there had been violations of the prohibition of torture and ill-treatment, the right to private and family life as well as the right to a fair trial. He therefore

claimed 200,000 Turkish Liras ("TRY") and TRY 150,000 in compensation for his pecuniary and non-pecuniary damage.

B. The Court's Assessment

50. The applicant mainly complained of the alleged violation of his constitutional rights as the action brought by him due to cancellation of his appointment for a permanent task abroad on account of the tapes made available via internet had been dismissed, as well as of his being forced to retire due to these tapes. 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).

51. The events taking place in the relevant period were initially related to the applicant's professional life, and he brought an action on this account. The administrative act, which allegedly led to a violation, was based not on the decision rendered at the end of the action brought by him at the outset but on the administrative act ordering cancellation of his appointment for a permanent task abroad. In examining the present application, the Court must therefore consider the events taking place during the cancellation of the appointment for a permanent task abroad within the scope of Article 20 of the Constitution. The applicant's allegations as to his being compelled to retire were also discussed under a separate heading within the scope of Article 17 of the Constitution.

1. Alleged Violation of the Right to Respect for Private Life due to the Administrative Act Ordering Cancellation of the Appointment for a Permanent Task Abroad and Dismissal of the Action Brought

a. Admissibility

52. The applicant's allegations that his constitutional rights were violated -as he had been appointed to a position within his country of origin upon the termination of his post in Georgia because he no longer had the capacity to represent his country abroad due to the impugned tapes which had been made available via internet, the administration subsequently decided to cancel his appointment for a permanent task abroad, and the action brought by him for revocation of the administrative act as well as being awarded non-pecuniary compensation

was dismissed- are not manifestly ill-founded. As there being no other grounds for its inadmissibility, the application was declared admissible.

b. Merits

i. General Principles

53. Article 20 of the Constitution reads 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."

54. Article 8 of the European Convention on Human Rights ("the Convention") reads 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."

55. The right to respect for private life is set forth under Article 20 of the Constitution. Private life is a broad concept which does not lend itself to an exhaustive definition. However, this concept covers such elements as the corporeal and spiritual integrity, physical and social identity, name, sexual orientation and sex life, as well as personal information and data, personal development, family life, and etc. (see *Ata Türkeri*, no. 2013/6057, 16 December 2015, § 30).

56. The notion of private life guarantees that individuals lead a private social life, namely a "private life" within the meaning of their right to develop their social identities. In this sense, respect for private life must also comprise the right to establish and develop relationships with other human beings. According to the case-law of the European Court of Human Rights ("the ECHR"), there is no reason to consider that the notion of "private life" excludes professional activities. Restrictions on working life may fall under Article 8 when they affect the way in which the individual forges his social identity through the development of relationships with his peers. At this point, it should be noted that in the course of their working lives, the majority of people have a significant opportunity of developing relationships with the outside world (see *Özpınar v. Turkey*, no. 20999/04, 19 October 2010, § 45; and *Niemietz v. Germany*, no. 13710/88, 16 December 1992, § 29).

57. One of the legal interests safeguarded within the scope of the right to respect for private life is the right of privacy. However, the right of privacy does not only represent the right to be left alone, but it also covers the individual's legal interest of controlling the information about him. An individual has an interest in the fact that any information concerning himself is not disclosed or disseminated without his consent, that such information is not accessed by the others and is not used without his consent, in other words, that such information remains confidential. This points out the individual's right to determine the future of the information about him (see the Court's judgments no. E.2009/1 K.2011/82, 18 May 2011; no. E.1986/24 K.1987/7, 31 March 1987; and *Işıl Yaykır*, no. 2013/2284, 15 April 2014, § 37).

58. Besides, the notion of private life covers several varying circumstances such as name, image, reputation, family information, sexual identity, health, confidentiality of communication. The more the private life is interfered with by way of technological improvements, the higher the need for its protection is. It is therefore necessary, in a democratic state of law liable to protect and reinforce freedoms, to protect and safeguard individuals against interferences and to keep to a minimum the interference, as required by the right to respect for private life. In this sense, there is an obligation incumbent on both individuals and the State to avoid displaying conducts which would preclude effective exercise of this right.

59. Professional life is often intricately linked to private life, especially if factors relating to private life, in the strict sense of the term, are regarded as qualifying criteria for a given profession. Professional life is therefore part of the zone of interaction between a person and the others which, even in a public context, may fall within the scope of private life (see, for the ECHR's judgment in the same vein, *Fernandez Martinez v. Spain* [GC], no. 56030/07, 12 June 2014, § 110).

60. It is undoubted that the shift in the applicant's place of duty from abroad to his country of origin adversely affected his professional life. However, existence of such unfavourable outcomes does not *per se* lead to an unconstitutionality. Nevertheless, the issue at stake in the present case is to ascertain the reasons underlying this shift and to examine the constitutionality of these reasons (see, for the ECHR's judgment in the same vein, *Sodan v. Turkey*, no. 18650/052, 2 February 2016, § 43).

61. The essential object of Article 20 of the Constitution is to protect the individual against arbitrary interference by the public authorities. Besides, the State also has a positive obligation to afford an effective protection, and to respect, for private and family life. This obligation may involve the adoption of measures designed to secure respect for private and family life even in the sphere of the relations of individuals between themselves (see, for the ECHR's judgment in the same vein, *X and Y v. the Netherlands*, no. 8978/80, 26 March 1985, § 23).

ii. Application of Principles to the Present Case

(1) Existence of an Interference

62. The ECHR underlines that the investigation carried out by the inspector into the individuals' private lives as well as the resulting administrative dismissal essentially motivated by the conclusions drawn from their behaviours and conducts could be considered as an interference with the right to respect for his private life (see *Özpınar v. Turkey*, § 47).

63. In the present case, the public authorities decided to cancel the applicant's appointment for a permanent task abroad due to reasons falling into the scope of his private and family life, which was an administrative act constituting an interference with his private life. However, in the context of the complaint raised by the applicant, the impugned administrative act was examined as an interference not having an effect on his wife's professional life but merely on his own professional life.

(2) Whether the Interference Constituted a Violation

64. Article 20 of the Constitution embodies certain grounds of restriction concerning the privacy of private life, which appear not to cover all aspects of the right. However, even the rights in respect of which any specific ground of restriction is prescribed have boundaries deriving from their very nature. Besides, a restriction may be imposed on these rights by also relying on the other provisions of the Constitution. At this point, the safeguards laid down in Article 13 of the Constitution come into play (see *Sevim Akat Eşki*, no. 2013/2187, 19 December 2013, § 33).

65. Article 13 of the Constitution reads 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. This constitutional provision is of vital importance in respect of the restriction of fundamental rights and freedoms as well as of the safeguards against such restrictions. It lays down the circumstances under which all fundamental rights and freedoms enshrined in the Constitution may be restricted by the legislator. As required by the principle of the constitutional holism, the constitutional provisions are to be implemented collectively and in consideration of the general rules of law. It is therefore clear that all criteria concerning the safeguards specified in Article 13 of the Constitution, notably the requirement of restricting only by law, must be taken into consideration also in determination of the scope of the right enshrined in Article 20 of the Constitution (see *Sevim Akat Eşki*, § 35).

(a) Lawfulness

67. The requirement that fundamental rights and freedoms may be restricted only by law is of great importance in the constitutional jurisdiction. In case of an interference with any fundamental right or freedom, the primary question to be clarified is whether there is a provision of law which justifies the interference; in other words whether the interference has a legal basis (see *Sevim Akat Eşki*, § 36).

68. The requirement "prescribed by law", which is also mentioned in the ECHR's case-law, embodies three basic three principles. The first principle is that the interference in question must have a basis in the domestic law. The second principle requires that the law underlying the interference be adequately accessible for those concerned. The third principle is that this statutory arrangement be formulated with sufficient precision to enable those concerned to regulate their conduct and to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Silver and Others v. the United Kingdom*, no. 5947/72 …, 25 March 1983, §§ 86-88).

69. The administrative act complained of in the present case was performed by virtue of Additional Article 10 and Article 163 of Law no. 926, Article 28 of the Regulation as well as Articles 5 and 18 of the Directive.

70. The provision of law forming the basis of the interference and the Regulation and the Directive issued pursuant to this Law are accessible and foreseeable arrangements capable of clearly indicating the limits of any interference with fundamental rights and freedoms. It has been accordingly concluded that the impugned interference has satisfied the "lawfulness" requirement.

(b) Legitimate Aim

71. An interference with an individual's private life may be deemed justified only when it relies on one or several grounds of maintaining national security and public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms of others, which are laid down in Article 20 § 2 of the Constitution.

72. Regard being had to the scope of the said Directive, it appears that the statutory arrangements included therein are designated to indicate the measures that may be taken by the administrative bodies in cases where an official no longer has the capacity to represent. It is inferred therefrom that an appointment for a permanent task abroad may be cancelled for the purposes of maintaining public order, securing military discipline and ensuring dignity and prestige inherent in the military profession. It has been accordingly concluded that this amounts to a legitimate aim within the meaning of Article 20 § 2 of the Constitution.

(c) Necessity in a Democratic Society and Proportionality

73. The phrase "necessary in a democratic society", which is indicated in the ECHR's case-law, means that the interference must, inter alia, correspond to a pressing social need and be proportionate to the legitimate aim pursued (see *Silver and Others v. the United Kingdom*, § 97).

74. Contemporary democracies are the regimes whereby the fundamental rights and freedoms are ensured and safeguarded to the widest extent possible. The restrictions which infringe the very essence of fundamental rights and freedoms and which limit them to a great extent or render them completely dysfunctional cannot be considered to comply with the requirements of a democratic society. As the aim pursued by the State governed by rule of law is to ensure the exercise by individuals

of fundamental rights and freedoms to the widest extent possible, the statutory arrangements are to be formulated with an approach where human being is ascribed with greatest importance. Therefore, not only the extent of the restrictions imposed but also of the conditions, reasons, method of such restrictions as well as available legal remedies prescribed against such restrictions must be assessed as a whole within the scope of the notion of "democratic society" (see *Serap Tortuk*, no. 2013/9660, 21 January 2015, § 46).

75. The public authorities enjoy a margin of appreciation at two different stages in restricting a fundamental right. First, they may enjoy this margin of appreciation in choosing the aim of restriction, and second, in determining the necessity of the restriction, which has been imposed in order to attain the legitimate aim pursued. However, the margin of appreciation given to the public authorities is not unlimited, and arguments raised to justify the alleged interference must be suitable, necessary and proportionate (see *Serap Tortuk,* § 49).

76. Such margin of appreciation has an extent specific to each case. The extent is reduced or expanded depending on factors such as the nature of the right which is under protection or of the legal interest and its significance in respect of the person concerned (see *Serap Tortuk*, § 50).

77. In cases where paramount rights or legal interests concerning the most intimate aspect of private life or concerning the existence or identity of an individual are at stake, the margin of appreciation is narrower. In this context, if the particular aspects of the right to respect for private life, namely sexuality and intimacy, are at stake, the margin of appreciation must be much narrower. Accordingly, there must exist particularly serious reasons for the legitimacy of interferences with these aspects (see, for the ECHR's judgment in the same vein, *Dudgeon v. the United Kingdom*, no. 7525/76, 22 October 1981, § 52).

78. That is because, the most intimate of the individual's private life and the right to respect for this sphere are clearly one of the key rights which are necessary for the individual's personal safety, existence and identity (see *Serap Tortuk*, § 51).

79. Besides, in an area which is subject to strict rules and conditions such as personnel regime, the public authorities are naturally afforded a wide margin of appreciation varying by the nature of the activity and the aim of restriction. In this sense, regard being had to the fact that the notion of private life is not confined only to a most intimate aspect of one's private life but also guarantees the right to lead a "private social life", it is clear that notably public officers may be subject to restrictions in respect of certain aspects of their private life which are also interrelated with their professional life. However, as in cases of restrictions imposed on other persons, these public officers must avail themselves of the minimum safeguards. It is notably requisite to consider whether a fair balance was struck between the individual's right to respect for private life and the legitimate interest in ensuring the performance of public service in accordance with the abovementioned principles (see *Serap Tortuk*, § 57).

80. Therefore, it is clear that the impugned administrative act was justified on the abovementioned legitimate grounds; however, the restriction apparently constituting an interference with the applicant's private life must avoid infringing the very essence of the said right to the extent that would render it dysfunctional. It must be accordingly assessed, in the particular circumstances of the present case, whether a fair balance was struck between the applicant's personal interest within the meaning of Article 20 of the Constitution and the public interest or any other person's interest.

81. In the present case, it is apparent that the applicant was assigned to a domestic task four months after his appointment as an attaché to the Tbilisi Embassy; and that he was subsequently subject to an administrative act whereby his permanent appointment abroad was cancelled. The applicant maintained that he could not at the outset become aware of the legal ground underlying the impugned interference with his professional life but learned it only after he had submitted his defence submission during the proceedings. The applicant, who was informed of the outcome of the administrative act only through an instruction, could fully understand the reason underlying the administrative act from the classified information which was examined during the action brought

by him against the annulment of the impugned administrative act and after he had submitted a petition for retirement. In this sense, the ground underlying the impugned administrative act whereby the applicant was assigned with a domestic task during his foreign mission and his appointment abroad would be probably no longer possible during his professional life is the tapes containing sexually explicit conversations, which were made available through internet. According to the defendant administration, these tapes belonged to the applicant's wife.

82. During the impugned process, several decisions were taken on the basis not of the applicant's own conversations but of those between his wife and other persons. In appointing those who would serve as a military attaché, their capacity to represent is naturally taken into consideration, which also requires an insight into their family life. It accordingly falls within the administration's margin of appreciation to make the tapes allegedly related not to the applicant himself but to his wife subject to an investigation.

83. It is also necessary to determine whether there is any responsibility on the part of the applicant and his wife in the disclosure of the tapes via internet. Several persons, along with the applicant and his wife, also filed a criminal complaint before the Ankara Chief Public Prosecutor's Office due to the tapes made available via their social media accounts and sought for the identification and punishment of those responsible. Besides, the applicant disputed the authenticity of the impugned tapes both before the military investigation board and the civil prosecutor's office. Therefore, regard being had to the fact that several persons including the applicant raised a complaint on different grounds, the administration could not attribute any concrete responsibility to the applicant.

84. In the course of the investigation conducted, the right to privacy, which is one of the most significant elements of the private life, inevitably became an issue. The conversations in the impugned tapes were made known to the former workmates of the applicant's wife, and the workmates were asked whether the person in the tapes was his wife. The applicant was also working in the same workplace at that time.

85. On the other hand, in reappointing the applicant to a position within his country of origin four months after his appointment to the Tbilisi Embassy as a military attaché and in subsequently cancelling his permanent appointment abroad, the administration relied on the tapes allegedly belonging to the applicant's wife, which were proven to exist by virtue of the gendarmerie criminal reports indicating that the tapes had not been manipulated. The sole ground relied on by the TAF in deciding that the applicant had sustained a loss of dignity was these tapes, and accordingly his permanent appointment was cancelled as a measure required by the military service. The defendant administration reiterated during the proceedings that the sole and actual ground for it to take such a measure was the tapes made available via internet and further asserted that these tapes could not be considered to fall into scope of private life.

86. The High Disciplinary Board of the Ministry of National Defence decided to dismiss the applicant's wife from office due to the tapes pending the proceedings before the SMAC, and within the scope of the action brought in this respect, the same tapes were subject to an examination. As a result of the examination conducted by the Gendarmerie Criminal Department, a report was issued to the effect that the voice of the applicant's wife and the voice in the impugned tapes "most probably belonged to the same person". In its decision, the incumbent court only referred to the process during which the report was issued. The court merely found established that the act performed in respect of the applicant was based on material facts.

87. Accordingly, it has been observed that at the outset, an incomprehensive examination was conducted to ascertain whether the tapes on internet, which could not be certainly identified, belonged to the applicant's wife; that these tapes were listened to other persons working in the same workplace with the applicant and his wife on suspicion of belonging to the latter. In consideration of the Gendarmerie Criminal Department's report of 26 December 2011, the applicant's appointment to a permanent task abroad was cancelled.

88. At the outset, the applicant certainly denied the authenticity of the tapes in question. The applicant further noted during the proceedings

that even if these tapes were considered to be authentic, they could not be said to be obtained lawfully given the fact that they were obtained through internet.

89. As a result, it has been concluded that regard being had to the procedure applied during the administrative process in the present case, the administration led to the disclosure, to a more extent, of the most intimate part of private life, which resulted in the infringement of a much greater personal interest in comparison to the public interest pursued. As a matter of fact, the applicant and his wife filed a criminal complaint before the military prosecutor's office against the military officers acting on behalf of the administration for official misconduct, defamation and insult before the applicant was retired and after he had become aware of the impugned acts. However, their criminal complaint remained fruitless as no instruction for an investigation had been given.

90. It should be also noted that the authority afforded to the courts to review the lawfulness of an administrative act is not confined to the question whether the impugned act was based on concrete facts. In the present case, the SMAC did not address the applicant's arguments that the impugned tapes had been obtained through internet; that the content of the gendarmerie criminal reports was not definite; that disclosure of these tapes to the applicant's workmates had infringed his personal rights; and that there was no available evidence other than the tapes. In consideration of the justifications given by the SMAC, it has been observed that the dismissal of the applicant's action did not only have a bearing on the applicant's professional life but also directly give an impression that the tapes were authentic as the reports issued by the Gendarmerie Criminal Department had been relied on, which caused the applicant himself and his family to be in a difficult situation.

91. For these reasons, the Court found a violation of the right to respect for private life safeguarded by Article 20 of the Constitution.

2. The Applicant's Allegation that He was Compelled to Retire

92. In its observations, the Ministry noted that the applicant's allegation that he was compelled to retire against the risk of being subject

to mobbing and punishment be declared inadmissible for the failure to duly exhaust the available legal remedies.

93. In his counter statements against the Ministry's observations, the applicant asserted in brief that the action he had brought and the criminal complaints they had filed remained inconclusive; that he could not obtain any result through the legal remedies prescribed in the Turkish law; and that he had been destitute of appointment abroad and ultimately of his profession due to this unjust and groundless cyber-attack.

94. In the application form, the applicant noted that he had been given warning that an act would be taken against him pursuant to Article 153 of Law no. 1632; that if he refused to divorce his wife, he would face the risk of being deprived of his military rank due to these tapes; that he had to retire pending the judicial proceedings; that the non-pecuniary damage he had suffered amounted to torture and mobbing; that he had been subject to degrading treatments; and that therefore the prohibition of torture and ill-treatment had been violated.

95. As noted above, the applicant submitted his defence submissions to the relevant Command ten days after he had been given a letter of warning. It is understood from his defence submissions that the applicant requested to be retired on account of the impugned process. Thereafter, he was retired on 27 September 2012 upon the approval of the Ministry of National Defence.

96. Individual application to the Constitutional Court is a legal remedy of subsidiary nature. It is essential that the alleged violations of the fundamental rights and freedoms be dealt with and concluded primarily through ordinary legal remedies before ordinary judicial courts. An individual may resort to the individual application remedy only when the alleged violations could not be redressed through the ordinary review mechanism (see *Bayram Gök*, no. 2012/946, 26 March 2013, § 18).

97. As required by the subsidiary nature of the individual application mechanism, the allegations which have not been raised through the ordinary legal remedies before general courts cannot be brought before the Constitutional Court. In the same vein, new information and

documents which have not been previously submitted to general courts cannot be submitted to the Constitutional Court (see *Bayram Gök*, § 20).

98. The subject of the impugned administrative act performed in respect of the applicant is not identical with the subject-matter which is complained of. The subject-matter of the action brought by the applicant is the "cancellation of his appointment to a permanent task abroad", while his complaint is being compelled to retire under the threat of a punishment. It therefore appears that the applicant has brought before the Court new allegations which he has not been previously raised before the inferior court.

99. Regard being had to the applicant's retirement and his complaints and claims raised within the scope of the dismissal of the action brought by him, one of the legal remedies to which he may have recourse in respect of the complaint of his being compelled to retire is the action for compensation.

100. Therefore, in the present case, the administrative and judicial bodies should have primarily dealt with the questions as to whether there was a causal link between the applicant's retirement and the tapes allegedly belonging to his wife, which were made available via internet, and whether the State has fulfilled its negative and positive obligations within the meaning of the applicant's right to improve his corporeal and spiritual existence.

101. For these reasons, the Court declared this part of the application inadmissible for non-exhaustion of legal remedies.

3. Application of Article 50 of Code no. 6216

102. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, reads as follows:

> *"(1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled...*

(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."

103. The applicant requested the Court to find a violation as well as to award TRY 150,000 and TRY 200,000 respectively for pecuniary and non-pecuniary damages he sustained.

104. In the present case, it has been concluded that the right to respect for private life was violated. The Court has found no legal interest in ordering a retrial as the applicant was already retired.

105. The applicant must be awarded TRY 25,000 in compensation for non-pecuniary damage which could not be redressed by merely finding a violation.

106. The Court may award compensation also for pecuniary damage sustained only when there is a casual link between the alleged pecuniary damage and the violation found. The applicant's claim for pecuniary compensation must be rejected given the nature of the action brought by him as well as the fact that he did not claim any pecuniary compensation through this action.

107. The total court expense of TRY 1,998.35 including the court fee of TRY 198.35 and the counsel fee of TRY 1,800, which is calculated over the documents in the case file, must be reimbursed to the applicant.

V. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 1 June 2016 that

A. 1. The alleged violation of the right to respect for private life due to the administrative act whereby the applicant's appointment to

permanent task abroad was cancelled as well as due to dismissal of the action brought by him be DECLARED ADMISSIBLE;

2. The allegation that he was compelled to retire for being under the threat of a punishment be DECLARED INADMISSIBLE for *non-exhaustion of legal remedies*;

B. The right to respect for private life safeguarded by Article 20 of the Constitution was VIOLATED;

C. A net amount of TRY 25,000 be PAID to the applicant as non-pecuniary compensation, and other claims for compensation be DISMISSED;

D. The total expense of TRY 1.998.35 including the court fee of TRY 198.35 and the counsel fee of TRY 1,800 be REIMBURSED TO THE APPLICANT;

E. The payments 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;

F. A copy of the judgment be sent to the 1st Chamber of the Supreme Military Administrative Court for information; and

G. A copy of the judgment be SENT to the Ministry of Justice.

FREEDOM OF COMMUNICATION (ARTICLE 22)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

ÖMÜR KARA AND ONURSAL ÖZBEK

(Application no. 2013/4825)

24 March 2016

On 24 March 2016, the Second Section of the Constitutional Court found no violation of the right to respect for private life and the privacy of communication respectively safeguarded by Articles 20 and 22 of the Constitution in the individual application lodged by *Ömür Kara and Onursal Özbek* (no. 2013/4825).

THE FACTS

[8-29] The first applicant Ömür Kara and the second applicant Onursal Özbek were employed by the employer, T. Ticaret A.Ş. ("the Company"), having signed an employment contract on 1 March 2010 and 11 April 2011 respectively.

The applicants also signed a Commitment Letter on Information Security, as a part of their employment contracts, in which Article 2 briefly provides that *"any computer, e-mail, internet, telephone, USB memory and such kind of resources and communication means provided by the Company for business purposes cannot be used by employees for personal purposes other than those that are strictly necessary, for any unacceptable purpose and in a way which is contrary to public moral and customs"* and Article 6 provides that *"without giving prior notice and warning to the employees, the Company's officials are entitled, at any time, to monitor IT and communication resources used by the employees, to back-up and report employees' correspondences and communication records, -if necessary- to inspect and seize these correspondences and records in detail as well as to impose any restriction on the employees' utilization of such resources"*.

After a while, the second applicant's wife informed one of the Company officials of the emotional relationship between the applicants and, in support of this claim, submitted a copy of the applicants' e-mail correspondences. Therefore, the applicants were denied access to their computers at the workplace in order for a monitoring process whereby the employer could check the accuracy of the claim in question.

Upon the inquiries carried out by the Company, the applicants' employment contracts were terminated, on 21 May 2012, by the former

pursuant to the relevant paragraph of Article 25 of the Labour Law, which is titled *"acts and behaviours in breach of moral and good faith principles"*.

The applicants then filed an action before the 12th Chamber of the Bakırköy Labour Court for reinstatement on 20 June 2012; however the labour court dismissed the actions. Thereupon, the applicants appealed the first instance decisions before the Court of Cassation which also dismissed the appellate request. Accordingly, after being upheld by the Court of Cassation, the first instance decisions became final.

On 27 June 2013, the applicants lodged an individual application with the Constitutional Court.

IV. EXAMINATION AND GROUNDS

30. The Constitutional Court, at its session of 24 March 2016, examined the application and decided as follows.

A. The Applicants' Allegations

31. The applicants maintained that the contents of their correspondence via their personal e-mail accounts had been accessed by their employer without their consent; that their employment contracts had been terminated on the basis of these contents; that the contents of their correspondence had been considered as evidence within the scope of the declaratory action filed by them in request for reinstatement; that the court which had examined the contents of their correspondence, by disregarding the manner in which they had been obtained, had decided that their contracts had lawfully been terminated; that due to the second applicant's ex-wife's being heard as witness before the court, the action in question had proceeded over the details of their private lives; that thereby, the court had caused the contents of their correspondence related to their private lives to become public; that the court had failed to provide them with protection against the unlawful interference with their private lives by third persons; and that their opinions which they had submitted during the proceedings had been questioned. In this respect, the applicants alleged that their rights safeguarded by Articles 20, 22 and 25 of the Constitution had been violated.

B. The Court's Assessment

32. The Constitutional Court is not bound by the legal qualification of the facts by the applicants and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16).

33. The Ministry stated, in its observations, that the complaints regarding the use of the applicants' private correspondence as evidence were related to the examination as to whether a fair trial had been conducted; that therefore they must be examined within the scope of the right to a fair trial; and that it had submitted its observations to that effect in applications where similar complaints had been put forward. Furthermore, in the assessment of the conducts of the respondent employer, taking into consideration the facts that an action for compensation may be filed against the respondent Company and that a criminal complaint may also be filed against the relevant persons, it must be examined whether legal remedies have been exhausted. In the assessment of the use of the private correspondence as evidence, the relationship between the scope of the private life and the termination of employment contract must be examined, as well as it must be examined whether the right to respect for private life requires the public authorities to take measures. In this context, relevant judgments of the European Court of Human Rights ("the ECHR") containing similar allegations of violation were pointed out.

34. In their counter-statements which they submitted against the Ministry's observations, the applicants stated that their allegations of violation were not related to the fairness of the proceedings, but to the right to respect for private life and the privacy of communication, and they reiterated their observations and requests which they had submitted in their application letters.

35. As it was understood that the allegations in question had stemmed from the courts' failure to provide the applicants with protection against the unlawful interference with their private lives by third persons and the courts' having accepted their private correspondence as evidence and caused them to become public, the examination would not deal with the fairness of the assessment of the evidence, but it would be carried out in

conformity with the essence of the allegations, namely within the scope of the right to respect for private life and the privacy of communication.

1. Admissibility

36. The applicants filed an action for reinstatement on the ground that their employment contracts had been terminated on the basis of the contents of their correspondence via their e-mail accounts, which had been in breach of the respect for their private lives and of their freedom of communication, thereby nullifying the termination of their employment contracts. It was therefore concluded that the applicants had submitted before the instance courts their complaints regarding the interference by their employers by means of checking their correspondence.

37. Accordingly, the alleged violation of the right to respect for private life and the privacy of communication was declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

38. The applicants mainly alleged that the courts had failed to protect their private lives against the interferences by third persons; that their private correspondence had been accepted as evidence and made public by the courts; and that therefore their rights guaranteed under Articles 20 and 22 of the Constitution had been violated.

39. Pursuant to the provisions of Article 148 § 3 of the Constitution and Article 45 § 1 of Code no. 6216, in order for the merits of an individual application lodged with the Constitutional Court to be examined, the right claimed to have been interfered with by the public power must, in addition to being guaranteed in the Constitution, fall within the scope of the Convention and the additional protocols to which Turkey is a party. In other words, it is not possible to declare admissible an application which contains a claim as to the violation of a right falling outside the common protection area of the Constitution and the Convention (see *Onurhan Solmaz*, no. 2012/1049, 26 March 2013, § 18).

40. Article 20 § 1 of the Constitution, titled "*Privacy of private life*", provides 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."

41. Article 22 of the Constitution, titled "*Freedom of communication*", provides 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 11 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."

42. Article 8 of the Convention, titled "*Right to respect for private and family life*", provides 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."

43. The right to respect for private life is protected under Article 20 of the Constitution. The State must abstain from any arbitrary interference with the individuals' private and family lives and prevent them against unjust attacks of the third parties. Private life is a broad concept which does not lend itself to an exhaustive definition. However, this concept covers such elements as the corporeal and spiritual integrity, physical and social identity, name, sexual orientation and sex life, as well as personal information and data, personal development, family life, and etc. (see *Bülent Polat* [Plenary], no. 2013/7666, 10 December 2015, § 61). Furthermore, given the purpose of the guarantees provided by Articles 20 and 22 of the Constitution, the data obtained by monitoring the personal phone calls and the use of internet in workplaces, as in the present case, shall be examined within the scope of this right (For similar judgments of the ECHR, see *Barbulescu v. Romania*, no. 61496/08, 12 January 2016, § 36).

44. The notion of private life guarantees that individuals lead a private social life, namely a "private life" within the meaning of their right to develop their social identities. In this sense, respect for private life must also comprise, to a certain degree, the right to establish and develop relationships with other human beings. According to the case-law of the ECHR, there is no reason to consider that the notion of "private life" excludes professional activities. Restrictions on working life may fall under Article 8 when they affect the way in which the individual forges his social identity through the development of relationships with her/his peers. At this point, it should be noted that in the course of their working lives, the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world (see *Bülent Polat*, § 62; *Özpınar v. Turkey*, no. 20999/04, 19 October 2010, § 45; and *Niemietz v. Germany*, no. 13710/88, 16 December 1992, § 29).

a. General Principles

45. Fundamental rights which fall within the scope of the common protection area of the Constitution and the Convention may be impaired not only by the direct implementation of the public force, but also through the interference of third parties in a way leading to disputes between private persons. While in the first situation, there is no hesitation as to

the direct fulfilment by the public authorities of the negative and positive obligations incumbent on them for ensuring the relevant safeguards, the second situation requires an assessment in the particular circumstances of each case as to what kind of protection the State is expected to afford the individuals against the interference by third parties and what the scope of its obligations is.

46. Pursuant to Article 11 of the Constitution, the provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals. Accordingly, the Constitution protects all individuals' rights and freedoms enshrined therein. The scope of the fundamental aims and duties of the State stipulated in Article 5 of the Constitution and the emphasis in Article 12 of the Constitution on the nature of fundamental rights and freedoms reinforce this area of protection. In some cases, public authorities may undertake positive obligations to ensure the effective protection of the relevant rights and freedoms, even if they stem from the disputes between private persons. In cases where disputes arise between private persons, in the examination of whether the guarantees provided by the fundamental rights and freedoms have been fulfilled, such applications -regard being had to their particular circumstances- may be examined within the scope of the State's positive obligations, as the private persons shall not be held responsible for the obligations imposed on the public authorities by the Constitution (see *Barbulescu v. Romania*, § 53).

47. Such obligations require that a legal infrastructure be set up for the resolution of disputes between private persons; that the disputes in question be examined through fair proceedings including procedural safeguards; and that it be examined whether the constitutional safeguards concerning fundamental rights have been respected during these proceedings. These requirements stem from the obligation of the public authorities not to tolerate the unjust interferences by third parties with the rights and freedoms of individuals. As a matter of fact, the inferior courts play a role in the protection of safeguards by delivering binding decisions for the resolution of disputes between private persons. At this point, bringing the disputes before the judicial authorities and the resolution of

them through fair proceedings constitute a part of the positive obligations incumbent on the public authorities.

48. The ECHR points out that such disputes, even if they do not arise out of the direct interference by the State, may entail the obligation of the State; and that although the essential object is to protect the individual against arbitrary interference by public authorities, the State may in certain circumstances be obliged to intervene in the relationship between private individuals by taking reasonable and appropriate measures to secure the effective enjoyment of the rights enshrined in the Convention (see *Sorensen and Rasmussen v. Denmark* [GC], nos. 52562/99, 52620/99, 11 January 2006, § 57; and *Palomo Sanchez and Others v. Spain* [GC], no. 28955/06, ..., 12 September 2011, § 59).

49. The obligations of public authorities in terms of private law relations between persons other than the actors using public force, as in the present case, are to take the necessary measures to prevent the interference by third persons with the fundamental rights and freedoms of individuals, in the present application the right to respect for private life and the privacy of communication, and to ensure protection through the courts. Although the necessary structural measures are taken by public authorities, in cases where individuals are not provided with protection against the interference by third parties in the decisions of the courts conducting the proceedings in dispute, their obligations mentioned above shall not be deemed to have been fulfilled. This means that the rights and freedoms of individuals are left unprotected through the courts, which are public authorities.

50. Accordingly, in cases where the disputes concerning alleged interferences with the rights, safeguarded by the Constitution, of individuals working within the scope of private law employment relationship, the inferior courts must not ignore these safeguards, a fair balance must be struck between the competing interests of employer and employees, it must be examined whether the interference by the employer by means of monitoring the applicants' institutional email accounts was proportionate to the legitimate aim pursued by the employer and relevant and sufficient grounds must be submitted while delivering the judgment.

51. Inferior courts, while striking a balance between the parties and examining the proportionality of the interference, must consider -in the circumstances of the case- how the restricting and compelling regulations are defined in employment contracts, whether the parties are informed of these regulations, whether the legitimate aim which resulted in an interference with the fundamental rights of employers was proportionate to the interference, and whether the termination of employment contracts, as in the present application, was a reasonable and proportionate action in view of the acts or inactivity of the employees. In addition, the inferior courts must act in due diligence to ensure that the procedures carried out during the proceedings and the reasoning of the decision delivered at the end of the proceedings do not constitute per se an interference with the private life.

52. The ECHR examines, in cases brought before it for the alleged violations of Article 8-11 of the Convention in terms of private law employment relationships, whether the Contracting Parties have fulfilled their positive obligations stemming from these articles and ascertain whether the relevant rights of the applicants who were dismissed have adequately been secured by national courts in the context of private law employment relationships (see *Palomo Sanchez and Others v. Spain*, § 61).

53. The ECHR considers that national courts must strike a fair balance between the competing interests of the individuals and of the community in private law disputes concerning the rights enshrined in Articles 8-11 of the Convention (see *Köpke v. Germany*, no. 420/07, 5 October 2010; *Palomo Sanchez and Others v. Spain*, § 62; and *Eweida and Others v. the United Kingdom*, no. 48420/10, ..., 15 January 2013, § 84). In addition, it must be determined whether the interferences made with the relevant rights under protection within the scope of the private law employment relationship were proportionate to the legitimate aim pursued and whether the justifications submitted in the decisions of national courts were both relevant and sufficient (see *Palomo Sanchez and Others v. Spain*, § 63).

54. Pursuant to the employment contracts signed by private persons by paying regard to mutual interests, the parties naturally undertake certain responsibilities, they undertake that they will abide by certain restrictive

rules during working hours and they are informed of the sanctions they will face if they fail to comply with the contract. At this point, in order for the employer, by considering the interests in the continuation of peace and confidence at the workplace, to limit certain rights of the employees during working hours and thereby ensuring the targeted working order, the employees may be obliged to abide by certain rules. However, the issues that compel employees to abide by such restrictive and established special rules must not impinge on the essence of their fundamental rights, they must clearly be stipulated in the employment contracts signed by the parties, and the employees must be provided with information on these issues. In cases where employees are not duly informed or warned, they will have reasonable expectations that there will not be any arbitrary interference with their fundamental rights and freedoms, and therefore such interference by the employers, who are generally in a position of determining the conditions of the contracts, to be directed at their employees will not become acceptable.

55. It is primarily under the inferior courts' power and responsibility to determine the competing interests, to strike a reasonable balance and to establish whether the interferences were proportionate to the legitimate aim pursued by the employer. There is no doubt that the inferior courts, which are in direct contact with all parties of the case, are in more advantageous position to assess the circumstances of the case. The role of the Constitutional Court is restricted to the determination as to whether these rules have been interpreted in conformity with the Constitution. Accordingly, the Constitutional Court is authorized to supervise the procedure followed by the inferior courts and to determine especially whether the courts have paid regard to the safeguards enshrined in Articles 20 and 22 of the Constitution while interpreting the lawfulness of the interferences with the rights and freedoms of the parties which are already limited. In this scope, the Constitutional Court's task is not to determine whether there was an actual ground for the termination of the contracts, nor to take the place of the inferior courts, but rather to review the decisions taken by the public authorities within their margin of appreciation from the standpoint of the guarantees concerning the right to respect for private life and the freedom of communication.

56. In this connection, the ECHR reiterates that it has an authority to supervise the procedure followed by the national courts and in particular, to establish whether or not the national courts paid regard to the safeguards set forth in the Convention, especially in Article 8 thereof, while interpreting and applying the legislation provisions. In addition, the ECHR, in accordance with the principle of subsidiarity on which it relies while reviewing the applications, does not supervise the margin of appreciation of the national courts in the interpretation of their legislation provisions; however, it reviews whether the conclusions of the national courts were in line with the standards enshrined in Article 8 of the Convention, and thus whether the conclusions of the national courts amounted to a violation of the right to respect for private life (see *Petrenco v. Moldova*, no. 20928/05, 30 June 2010, § 54; and *Palomo Sanchez and Others v. Spain*, § 55).

57. In the present case, the alleged failure to ensure the safeguards provided by the fundamental rights and freedoms must be examined within the scope of the State's positive obligations, as the dispute in question had taken place between private persons.

58. As stated above, the limits of the negative and positive obligations that may be considered within the scope of the right to respect for private life and in which cases the positive obligations necessitate favourable acts cannot be determined by setting precise boundaries, and these obligations may vary in each cases.

59. The applicants maintained that although the monitoring of their email accounts constituted an unjust interference with their private lives and their freedom of communication, in the actions for reinstatement which they brought requesting that the termination of their employment contracts be found unjust and they be reinstated, such a determination was not made. On the contrary, due to the decisions of the courts, these interferences were legitimized and their correspondence were caused to become public. The applicants' allegations in this respect must be examined by considering the circumstances of the period during which the facts taken as grounds for the interferences had occurred and by also considering whether the inferior courts acted in conformity with the aforementioned principles in the course of the proceedings before them.

60. In the present case, seven witnesses including the ex-wife of the second applicant were heard at the first hearing held on 31 January 2013 before the 12th Chamber of the Bakırköy Labour Court that was conducting the reinstatement proceedings in respect of the applicants. Witness statements generally included the observations of the witnesses on the relationship between the applicants and on their intimacy. In addition, the reflections of the applicants' intimacy, working in different departments, on their productivity and performance and in general on the workplace environment were also mentioned in the witness statements. In this connection, in the statements of the applicants, as well as of the other witnesses working in the same Company with the applicants, no unfavourable assessment was made on the productivity and performance of the applicants; and some of the witnesses stated that they had received some information on the applicants' being close to each other but that they were not aware of the existence of a relationship beyond friendship between them.

61. When the parties' statements which they made during the proceedings and the witness statements are examined, it could not be established whether the correspondence between the applicants, which had been disclosed by the ex-wife of the second applicant to their employer, had been made through their personal or institutional e-mail accounts; however, regard being had to the statement of a witness, who had been working as a human resources director in the relevant Company on the date when the applicants' employment contracts were terminated, before the court as *"… We have done research, through the data processing system, on whether the plaintiff used his e-mail account for special purposes. Indeed, the mentioned e-mails are available in the computer records."* and to the acknowledgement in the petitions submitted by the employer to the inferior courts, it has been understood that the employer, who had been informed of the situation through the contents of the applicants' correspondence in question and the statements of the second applicant's ex-wife, monitored the applicants' institutional e-mail accounts through the data processing system in order to verify the accuracy of the applicants' correspondence in question.

62. As it appears from the case files, assessments were made to the effect that the correspondence between the applicants had been disclosed to the authorized person or organs of the respondent Company by third persons who were not party to the case; that afterwards, the employer had monitored the applicants' institutional e-mail accounts; and that the applicants' employment contracts had been terminated on various grounds, especially on the grounds that the contents of the relevant correspondence had been contrary to the employment contracts. It was also considered that the respondent Company had submitted the relevant correspondence to the inferior courts as evidence; that the justifications of the decisions rendered by the courts that had examined the evidence and heard the witnesses had not contained any details about the contents of the correspondence in question; and that according to the employer, it had not been possible to maintain the business relationships with the applicants; and as a result, the applicants' cases were dismissed.

63. In the present case, there was a conflict between the interests of the employer in the continuation of peace and discipline in the workplace within the scope of the rules set by him and the applicants' right to respect for their private lives and the privacy of communication. However, the Constitutional Court's duty is not to make a direct assessment on the disputes between the private persons. The role of the Constitutional Court is to supervise the procedure followed by the inferior courts, which delivers binding decisions for the parties, in the resolution of the dispute and to determine whether the inferior courts paid regard to the safeguards enshrined in Articles 20 and 22 of the Constitution while interpreting the lawfulness of the interferences with the rights and freedoms of the parties which are already limited.

64. Pursuant to the provisions set forth in the employment contracts signed between the applicants and their employer, the applicants had undertaken to abide by the Internal Regulation on the rules to be followed in the workplace, the Basic Regulations, orientation booklet, the Travel Regulations, instructions and procedures, as integral parts of their employment contracts.

65. The regulations allowing for arbitrary and unlimited interferences by the employers with their employees' private lives and their freedom of communication are unacceptable within the scope of Articles 11 and 12 of the Constitution. However, in cases where there are regulations that explicitly include the rules set in accordance with the commercial requirements and disciplinary understanding of the company, which are not contrary to the safeguards provided by the constitutional rights and freedoms, the laws and international treaties, and where the employees are informed of and warned about these regulations beforehand, it may be reasonable to take measures with a view to limiting certain rights of the employees, especially during working hours, to a certain extent and compelling them not to fall foul of the rules. Accordingly, in cases where no information is provided in this respect and no warning is made to the employees, it must be accepted that the employees will have reasonable expectations that there will not be any interference with their rights and freedoms, and they must be provided with the safeguards ensured by these rights and freedoms.

66. Within the scope of the examination made in this respect, it has been understood that each page of the Workplace Basic Regulations, the Information Security Contract, the regulations including the basic management principles and basic rules of conduct, the regulations including ethical rules for the commercial relations of the company, the Travel Regulations, the Workplace Disciplinary Regulations, the Workplace Personnel Regulations and the Workplace Dress Code, which are accepted as part of the employment contracts, had been signed by the applicants, along with their employment contracts. Thus, it may be concluded that the applicants were adequately informed of all general regulations including rules and restrictions set by the employer for the purpose of ensuring peace and discipline in the workplace.

67. It appears that, by signing in particular the Information Security Contract, the applicants had undertaken not to use the computers, e-mail accounts, internet, telephone, communication programs and other sources of information technologies and communication instruments for personal purposes beyond essential needs, for fun and for the acts against manners

and customs. Furthermore, the applicants had also acknowledged and undertaken that the directors of the company might always monitor the information technologies and communication sources used by the applicants without informing or warning them; that their correspondence and communication records might be backed up, reported, examined in detail where necessary, seized or limited for use.

68. The use of the Company sources, computers and institutional e-mail accounts for private purposes had strictly been banned through the regulations which had been part of the employment contracts, and the applicants had been warned and informed of the fact that where necessary, their correspondence and communication records might be monitored and examined. However, it has been understood that although the personal e-mail accounts and communication instruments was allowed to be used during working hours, the applicants carried out their private correspondence through their institutional e-mail accounts during working hours, which was in breach of their employment contracts. Therefore, the applicants cannot be considered to have had reasonable expectations with regard to the protection of their private correspondence that they carried out through their institutional e-mail accounts.

69. Furthermore, the employer examined the applicants' institutional e-mail accounts in order to verify the allegation that the applicants had acted contrary to the Company regulations, after he had been informed of the applicants' correspondence submitted by the ex-wife of the second applicant to the directors of the Company. In addition to the determination made in this respect, regard also being had to the provisions of Law no. 4857 and the regulations stipulated in the employment contracts, it has been concluded that the employer had pursued a legitimate aim by monitoring the correspondence between the applicants in order to verify whether they had used their institutional e-mail accounts for private purposes and in accordance with the Basic Regulations; that the interference by the employer had been proportionate to the legitimate aim pursued; and that these issues had been taken into account in the decisions of the inferior courts.

70. When the proceedings before the courts are examined, it appears, in the first place, that the applicants had submitted their evidence before the

inferior courts and that they had been able to enjoy their right to submit their allegations and their right to defence without facing any obstacle. It has also been understood that the correspondence in question was made during working hours for private purposes; that the applicants was informed of and warned about the regulations concerning the workplace order and they signed the relevant documents in this respect; that on suspicion that applicant acted contrary to their employment contracts, their employer monitored their institutional e-mail accounts in a way falling within the predetermined limits of interference; and that there is no other information as to the fact that the employer accessed and monitored other data about the applicants. During the proceedings, it was concluded that the rotas and personal files of the applicants had been requested and examined by the instance courts; that the contents of the correspondence in question had not been stated in the reasoning of the decisions; that a limited assessment had been on the subject-matter of the case; that in the decisions it had been underlined that due to the applicants' improper acts, unfavourable situations had occurred in the workplace, which had led the employer to terminate the applicants' employment contracts; that besides Law no. 4857, the applicants' acts had also been contrary to the employment contracts and internal regulations of the workplace; and that therefore there was nothing unlawful in the termination of the applicants' contracts. Furthermore, the statement of the ex-wife of the second applicant in the capacity of witness only contained the questions which were asked by the courts in order to verify the employer's allegations and which did not have any intimate aspect, and in the course of the proceedings or in the reasoning of the decisions, there was no element that caused the applicants' private lives to become public and violated the privacy of communication.

71. It was concluded, in the decisions of the inferior courts, that given the fact that the applicants had no reasonable expectations, a balance was struck between the competing interests of the applicants and the employer; that assessments were made as to whether the interference made by the employer through the monitoring of the institutional e-mail accounts of the applicants had been proportionate to the legitimate purpose pursued by the employer in accordance with the internal regulations

of the Company; that it was examined whether the termination of the applicants' employment contracts had been reasonable and proportionate to their acts; that for all these reasons, relevant and sufficient grounds were available for dismissal of the applicants' case; and that the contents of the applicants' correspondence were not announced to the public either during the proceedings or in the reasoning of the decisions.

72. Consequently, as the inferior courts that resolved the disputes arising out of the private law employment relationships fulfilled their positive obligations for the protection of constitutional safeguards by finding relevant and sufficient grounds and the contents of the correspondence between the applicants were not announced to the public, it must be concluded that the applicants' right to respect for their private lives and the privacy of communication, which are respectively safeguarded by Articles 20 and 22 of the Constitution, were not violated.

V. JUDGMENT

The Constitutional Court UNANIMOUSLY held on 24 March 2016 that

A. The alleged violations of the right to respect for private life and of the privacy of communication be DECLARED ADMISSIBLE;

B. The right to respect for private life and the privacy of communication, which are respectively safeguarded by Articles 20 and 22 of the Constitution, were NOT VIOLATED; and

C. The court expenses be COVERED by the applicants.

FREEDOM OF EXPRESSION AND DISSEMINATION OF THOUGHT (ARTICLE 26)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

İLTER NUR

(Application no. 2013/6829)

14 April 2016

On 14 April 2016, the Second Section of the Constitutional Court found a violation of the freedom of expression safeguarded by Article 26 of the Constitution in the individual application lodged by *İlter Nur* (no. 2013/6829).

THE FACTS

[6-13] While the applicant was serving as a worker having service contract with a contractor firm under the Turkish Electricity Transmission Corporation ("the TEİAŞ"), he applied to the Prime Ministry Communications Centre and complained of the working conditions at the workplace, the inequality between him and the other workers and ineffectiveness of the inspections carried out by the inspectors at the workplace. Upon his complaint, his service contract was terminated. In the action brought by the applicant for invalidity of the termination of his service contract and for his reinstatement, the 2nd Chamber of the Samsun Labour Court decided that the termination would be annulled and the applicant would be reinstated to his former position. Upon the appeal of the decision, the Court of Cassation found the termination of the applicant's service contract justified as the worker exercised his right to legal remedies by means of using defaming and abusing statements, quashed the first instance decision and dismissed the action under its substantive aspect.

IV. EXAMINATION AND GROUNDS

14.The Constitutional Court, at its session of 14 April 2016, examined the application and decided as follows:

A. The Applicant's Allegations

15. The applicant asserted that his employment contract was terminated on account of the complaint that he had filed with Communications Centre of the Prime Ministry ("BİMER") in respect of his workplace while he was working at the workplace operated by the subcontractor of the Turkish Electricity Transmission Company (Türkiye Elektrik İletim A.Ş) ("TEİAŞ"), that even though he won the case before

the First Instance Court, the Court of Cassation quashed the said decision and that his case was rejected, that thereby his right to legal remedy and right to a fair trial were violated and therefore he requested retrial.

B. The Court's Assessment

1. **Admissibility**

16. The Constitutional Court ("the 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).

17. The essential issue in the present application was the termination of the applicant's employment contract due to his petition lodged with the BİMER. In this connection, the applicant alleged that he had written the petition of complaint in order to claim his right, and that the termination of his employment contract and the rejection of his objections for this reason had violated his right to legal remedy and right to a fair trial. Accordingly, the substance of the applicant's complaint was the termination of the employment contract under the provisions of the rightful termination due to the complaint he had filed with the BİMER. This should be considered as a severe sanction in the form of the termination of the employment contract due to the issues raised by the applicant in his complaint.

18. In the present case, the fact that the applicant who worked as installer of heating systems at the workplace operated by a subcontractor under the TEİAŞ 10th Transmission Facility Operation Group Directorate lodged his complaints with the BİMER in relation to the matters that he deemed unlawful as regards the employer company would clearly benefit from the protection of Article 26 of the Constitution. Therefore, although the applicant alleged that his complaint's constituting a reason for rightful termination had violated the right to legal remedy, the substance of his allegations concerned the freedom of expression due to his statements containing denunciation.

19. For the reasons mentioned above, the applicant's allegations were examined on the basis of the freedom of expression guaranteed by Article 26 of the Constitution. Moreover, the alleged violation of the freedom

of expression must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

20. Article 26 of the Constitution, titled "*Freedom of expression and dissemination of thought*", reads 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."*

21. In a great number of judgments, the Constitutional Court has outlined in detail the basic principles of the freedom of expression (see *Nilgün Halloran,* no. 2012/1184, 16 July 2014, §§ 30, 36; *İbrahim Bilmez,* no. 2013/434, 26 February 2015, § 40, 54; *Fatih Taş* [Plenary], no. 2013/1461, 12 November 2014, §§ 58, 80, 94; *Kamuran Reşit Bekir* [Plenary], no. 2013/3614, 8 April 2015, §§ 46, 50, 54; *Medya Gündem Dijital Yayıncılık Ticaret A.Ş.* [Plenary], no. 2013/2623, 11 November 2015, § 44; *Hüseyin Sürensoy*, no. 2013/749, 6 October 2015, §§ 47, 50, 51; *Ali Rıza Üçer (2)* [Plenary], no. 2013/8598, 2 July 2015, §§ 30-33; and others)

22. The existence of social and political pluralism depends on the peaceful and free expression of all kinds of ideas. Similarly, an individual could actualize his/her peculiar personality in an environment where he/

she could freely express and discuss his/her ideas. Freedom of expression is a value that we need in order to define, understand and perceive ourselves and to shape our relations with others within this framework (see *Emin Aydın,* no. 2013/2602, 23 January 2014, § 41).

23. Freedom of expression is one of the indispensable pillars of a democratic society and one of the fundamental conditions in terms of the progression of society and the development of individuals. In this context, the Court has noted that the freedom of expressions is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population and that such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society (for a similar judgment of the ECHR, see *Handyside v. the United Kingdom*, no. 5493/72, 24 September 1976, § 49).

24. Taking into account the importance of freedom of expression in ensuring democratic pluralism, the assumption that only the State has a negative obligation not to interfere in the exercise of freedom of expression is not sufficient for an effective protection. For the real and effective use of the freedom of expression, it must be acknowledged that the State also has positive obligations beyond its obligation not to interfere. In this context, the positive obligation must cover not only the relations between the State and the individual, but also the relations between the individuals (for similar judgments of the ECHR, see *Fuentes Bobo v. Spain*, no. 39293/98, 29 February 2000, § 38; *Özgür Gündem v. Turkey*, no. 23144/93, 16 March 2000, §§ 42-46; and *Palomo Sanchez and Others v. Spain* [GC], no. 28955/06 ..., 12 September 2011, § 59).

25. In the present case, the applicant was dismissed within the framework of the provisions of termination by the company where he had been employed, not by the State. The action filed by the applicant concerning the termination of the employment contract was dismissed by the Court of Cassation. In this connection, it cannot be acknowledged that the interference with the applicant's freedom of expression stemmed from the interference of the public authorities. However, in the event

that the subject matter of the application was the failure of the public authorities to fulfil their obligations with regard to the protection of freedom of expression regulated under Article 26 of the Constitution, the public authorities then may be held responsible. In these circumstances, it is possible to examine the present case in terms of the positive obligations of the State within the meaning of Article 26 of the Constitution. In this regard, the duty falling on the Constitutional Court is to determine whether the balance between the conflicting interests of the individual and the public is fairly struck.

26. In the present case, the persons employed as workers in a private company are expected to act in accordance with the rules of ethics and goodwill in their relationship with the employer. In this regard, the disclosure of professional secrets or an attack to the honour and reputation of the employer may be considered a legitimate reason for rightful termination. The question of legitimacy cannot be regarded as an obstacle for workers to benefit from the protection of freedom of expression regulated under Article 26 of the Constitution as individuals, in view of the principle that "*everyone*" shall enjoy freedom of expression. Therefore, the safeguard provided by Article 26 of the Constitution also encompasses the statements made, in general, by the private sector employees on their employers concerning their duties.

27. On the other hand, in accordance with the exceptions set forth in the second paragraph of Article 26 of the Constitution, freedom of expression is not an absolute right. Although the freedom of expression has a restricted nature, the restrictions in question should be interpreted more narrowly and the need for restriction should be convincing and reasonable in view of the importance of freedom of expression for democratic societies. The criteria set out in Article 13 of the Constitution must be taken into account when imposing a restriction on fundamental rights and freedoms. For this reason, the review of the restrictions imposed on freedom of expression should be within the framework the criteria set out in Article 13 and in accordance with of Article 26 of the Constitution.

28. In the light of the above-mentioned principles, in determining whether freedom of expression is violated or not, it must first be

determined whether there had been an interference with the applicant's freedom of expression, and if so, whether the interference had been based on legitimate grounds. In order to be considered legitimate within the meaning of Article 26 of the Constitution, the found interference must be based on one or more grounds specified in the second paragraph of the same article and must comply with the safeguards stipulated in Article 13 of the Constitution on the restriction of rights and freedoms. For this reason, it should be determined whether the restriction is in conformity with the conditions of not impairing the essence as provided for in Article 13 of the Constitution, being prescribed by the relevant Article of the Constitution and by law, and conforming with the letter and spirit of the Constitution, the requirements of the democratic order of the society and the secular republic and the principle of proportionality.

a. Existence of Interference

29. On account of the petition of complaint he had filed with the BİMER against the company he had been working for, the applicant's employment contract was terminated within the scope of the provisions of rightful termination. The action filed by the applicant in respect of the unlawfulness of the termination was dismissed. Therefore, termination of the applicant's employment contract within the scope of the provisions of rightful termination on account of the fact that applicant had raised his complaints must be considered as an interference with the freedom of expression.

b. Whether the Interference Constituted a Violation

30. The above-mentioned interference constitutes violations of Articles 13 and 26 of the Constitution provided that it is not based on one or more grounds specified in Article 26 of the Constitution or does not meet the criteria provided for in Article 13 of the Constitution. For this reason, it should be determined whether the interference is in conformity with the conditions of not impairing the essence as provided for in Article 13 of the Constitution, being prescribed by the relevant Article of the Constitution and by law, and conforming with the letter and spirit of the Constitution, the requirements of the democratic order of the society and the secular republic and the principle of proportionality.

i. Lawfulness

31. It is considered that the grounds for the termination of the applicant's employment contract for rightful reasons were based on Article 25 § 2 (b) and (e) of Law no. 4857. The said provision was found to meet the criterion of "lawfulness" as well as the requirements of "accessibility" and "foreseeability" (see, among many other authorities, *Tuğba Arslan* [Plenary], no. 2014/256, 25 June 2014, §§ 80-101).

ii. Legitimate Aim

32. In the reasoning of its judgment on dismissal, the 7th Civil Chamber of the Court of Cassation established that the expressions in the applicant's complaint contained insults and provocation targeting the employer. Moreover, in its reasoning, the first instance court considered the reasons for rightful termination within the context of the applicant's "*engaging in conduct incompatible with honesty and loyalty such as abuse of the employer's trust, theft and disclosure of the employer's trade secrets*" as provided by Article 25 § 2 (e) of Law no. 4857. In view of both decisions, as regards the dismissal of the action by the Court of Cassation on account of the fact that the complaint was determined to contain insults and provocation, in spite of the fact that the applicant's first action was accepted by the first instance court, it must be acknowledged that the grounds for finding the impugned termination rightful were the protection of the honour and reputation of the employer. In this context, it must be accepted that the purpose of the interference with the freedom of expression within the framework of the regulations under Article 26 § 2 of the Constitution was legitimate and fell within the scope of the "*protection of the reputation or rights of others*".

iii. Necessity in a Democratic Society and Proportionality

33. In the present case, the applicant, who was a worker, filed a complaint with the BİMER about the employer's activities and reported the problems he personally encountered and the conduct of the company. In such circumstances, as a rule, a worker's notification of the public authorities about the unlawful conducts in the workplace or injustice of the employer is within the scope of the guarantee of freedom

of expression. Such a situation may concern only a worker, or a group of workers, who are aware of what is happening at the workplace and may be notified to the employer or to the public (for a similar judgment of the ECHR, see *Langner v. Germany*, no. 14464/11, 17 September 2015, § 44).

34. In this context, in case of an interference with the freedom of expression, the Constitutional Court must assess whether "*relevant*" and "*sufficient*" grounds have been put forward to justify the measures taken, and whether "*a reasonable balance is struck between the means employed and the aim sought to be achieved by the restriction*" in terms of the requirements of the democratic society (see *Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, §§ 64-73). Such an assessment must take into account the motive by which the applicant makes a statement in the particular circumstances of the case, the legal and factual bases, style and possible interpretations of the statement as well as its effects on the employer, and the sanction imposed on the applicant.

35. Having regard to the particular circumstances of the application, the applicant worked as installer of heating systems at the workplace operated by a subcontractor under the TEİAŞ 10th Transmission Facility Operation Group Directorate. With his complaint filed with the BİMER, the applicant sought help from the relevant public authorities by reporting his personal situation at the company and the conduct of the company. Moreover, the petition was only submitted to the relevant public authority and not publicly disclosed, in other words, it was not an announcement made to the public in a way that undermines the company's reputation. In this context, the petition of complaint was only seen by the relevant public authorities and the company and learned by a limited number of people.

36. As a rule, the right of a worker to report the employer, on his or her own motion by exercising his/her civil right within the scope of the requirements of the rule of law, cannot be considered as a ground for rightful termination, unless the employee deliberately or informally provides false information. As a matter of fact, the 7th Civil Chamber of the Court of Cassation emphasized the same issue and noted that the certain parts of the applicant's complaint filed with the BİMER sought help and fell within the scope of the right to legal remedy.

37. However, the Court of Cassation acknowledged that the following expressions of the applicant constituted insult and provocation: *"When an inspector comes, they offer food to him and send him back; they don't care about us. If we are to complain, they threaten us. They are always treating us as if we were construction workers."* The Constitutional Court stated that in individual applications concerning freedom of expression, the removal of a statement from its context could lead to erroneous results in the application of the principles contained in Articles 13 and 26 of the Constitution and in making an acceptable assessment of the findings collected (see *Fatih Taş*, § 99). For instance, when expression of an opinion constitutes an attack on the reputation and rights of others when removed from its context in which it is expressed, this does not in itself justify an interference with the freedom expression. Therefore, the expressions that the Court of Cassation considers insulting and provoking must be considered as a whole together with the other expressions in the same context.

38. Having regard to the applicant's petition of complaint, it does not have an aggressive style, but contains expressions seeking help and emphasizing his helplessness. The applicant had tried to express the injustice he had faced in his work, in particular when compared to other employees. Furthermore, the applicant alleged that the employer had underpaid the insurance fees and altered the employee's working hours in official documents, in spite of the fact that the employees worked shifts. The applicant also used the expression, "*When an inspector comes, they offer food to him and send him back; they don't care about us. If we are to complain, they threaten us. They are always treating us as if we were construction workers"*, in order to emphasize that his complaint had not been investigated with due diligence.

39. Therefore, having regard to the applicant's petition of complaint as a whole, whether the words containing insults and provocation had been said in the context of emphasizing the failure to investigate the applicant's complaint with due diligence was not mentioned in the reasoning. In particular, whether the aforementioned statements had targeted the inspectors allegedly not performing their duties, along with the employer, was not assessed. Moreover, the impugned reasoning also lacked an assessment as to whether the petition of complaint would have

negative consequences for the employer's reputation given that it had not been publicly disclosed to any person other than the public authorities and the company. Having regard to the less severe nature of the effects of the petition of complaint on the employer in comparison with the negative effects on the applicant caused by the sanction in the form of termination of his employment contract under the provisions of justified termination, it has been observed that the necessity of the application of these provisions was not discussed in the reasoning. As regards the termination of the applicant's employment contract under the provisions of justified termination, it has been considered that in the reasoning of the relevant decision, no relevant and sufficient grounds were put forth in terms of striking a fair balance between the applicant's freedom of expression and the employer's reputation and interests in ensuring peace in business relations.

40. In the light of the above, it must be held that freedom of expression safeguarded by Article 26 of the Constitution has been violated.

3. Application of Article 50 of Code no. 6216

41. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, reads as follows:

"1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled.

(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."

42. The applicant requested the annulment of the decision delivered against him.

43. It has been concluded that freedom of expression was violated.

44. As there is a legal interest in conducting retrial in order to redress the consequences of the violation of the applicant's freedom of expression, a copy of the judgment must be sent to the 7th Civil Chamber of the Court of Cassation for retrial.

45. The total court expense of 198.35 Turkish liras (TRY) calculated over the documents in the case file must be reimbursed to the applicant.

V. JUDGMENT

The Constitutional Court UNANIMOUSLY held on 14 April 2016 that

A. Alleged violation of the freedom of expression be DECLARED ADMISSIBLE,

B. Freedom of expression guaranteed under Article 26 of the Constitution was VIOLATED,

C. A copy of the judgment be SENT to the 7th Civil Chamber of the Court of Cassation for retrial in order to redress the consequences of the violation of freedom of expression,

D. The total court expense of TRY 198.35 be REIMBURSED TO THE APPLICANT,

E. 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; and

F. A copy of the judgment be SENT to the Ministry of Justice.

RIGHT TO PROPERTY
(ARTICLE 35)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

HALİS TOPRAK AND OTHERS

(Application no. 2013/4488)

23 March 2016

On 23 March 2016, the First Section of the Constitutional Court found no violation of the right to property safeguarded by Article 35 of the Constitution in the individual application lodged by *Halis Toprak and Others* (no. 2013/4488).

THE FACTS

[9-26] The applicants are shareholders of Toprakbank A.Ş. which was liquidated after having been seized ("the Bank"). Before their transfer to the Savings Deposit Insurance Fund ("the TMSF"), 95% of the bank shares were belonging to the applicants and the Toprak Companies Group owned by the applicants. By the decision of the Banking Regulation and Supervision Agency ("the Agency") dated 11 December 2000, the Bank was decided to be closely monitored on the ground that their assets became frozen due to the loans supplied to the companies belonging to the Toprak Group and due to income-expense disequilibrium and insufficiency of capital structure. In the course of the close monitoring period, the Agency recommended that the Bank would increase its capital; the loans supplied to the Toprak Group companies would be re-paid; cash inflow to the bank would be immediately ensured; the structure of the organization would be rendered efficient and profitable; and that Toprak Off-Shore's activities would be terminated and its accounts would be transferred to the Bank. The Agency issued such warnings: this situation impaired the income-expense balance of the Bank; a deficit in the equity had been caused; and that the facilities supplied to the Toprak Off-Shore had exceeded the loan limits. The Agency also suggested the Bank to find fund through a strategic partner or the sale of Toprak Group firms; to settle the Toprak Group loans through cash proceeds or to secure such loans on collateral.

The Agency decided that the partnership rights, except for the dividend, and management and control of the Bank, which failed to comply with the warnings and recommendations, be transferred to the TMSF. The Fund Board of the TMSF decided that 45.5 million Turkish liras, the part of the Bank's loss corresponding to the paid-up capital, be taken over in return for the payment at the same amount to be made to the Bank; and that the share certificates be requested to be registered in the Bank's stock register

in the name of the TMSF. The Bank's Board of Directors were replaced by the TMSF. Upon its transfer to the TMSF, the Bank was subject to an independent audit with a view to establishing its real financial status. It was accordingly revealed that the loss of the Bank of which size of assets was 1,905 million Turkish Liras was approximately 1,306 million Turkish Liras; and that the long-term loans supplied to the Toprak Group firms were approximately 678 million Turkish Liras. Pursuant to the decisions dated 26 March 2002 of the Agency and the Fund Board of Directors, the Bank was merged with the Bayındırbank, and its banking license was revoked on 30 September 2002.

The real estate properties included among the Bank assets and its subsidiaries were sold by the TMSF, and it was especially tried to collect the Bank's losses by means of signing a protocol at the amount of 453 million USD with the applicants who were controlling shareholders of the Bank with a view to collecting the debts owed to the Bank due to the loans of the Toprak Group firms. Y.P., who was the holder of the 1.000 lot share certificates, brought an action for annulment before the Thirteenth Chamber of the Supreme Administrative Court in 2005 and requested annulment of the transfer of the Bank to the TMSF. The Thirteenth Chamber of the Supreme Administrative Court decided to dismiss the case, and the appellate review was also dismissed by the Plenary Session of the Chambers for Administrative Cases. Thereafter, a request for rectification of the judgment was made. While the process of rectification of the judgment was pending, the defendant Y.P. transferred 1.000 lot share certificates of the Bank to the applicants for a total amount of 1,000 Turkish Liras by virtue of the Share Certificates Transfer and Assignment Letter. The parties were accepted to become a party to the proceedings at the stage of rectification of the judgment due to the transfer and assignment in question; however the Supreme Administrative Court decided to reject the request for rectification of the judgment.

IV. EXAMINATION AND GROUNDS

27. The Constitutional Court, at its session of 23 March 2016, examined the application and decided as follows.

A. The Applicants' Allegations

28. The applicants maintained that the rights to a fair trial and to property along with the principle of equality had been violated by indicating that the seizure of Toprakbank Inc., where they were the controlling shareholder, through the decision of the Banking Regulation and Supervision Agency ("the Agency") constituted an interference with their property; that Article 14 § 3 of the abolished Law no. 4389, which is the basis of the interference, set forth that the losses of banks exceeding their equity must be in accordance with the "evaluation principles" to be determined by the Agency; however, the Bank was transferred to the Saving Deposit Insurance Fund ("the Fund") without clearly specifying the aforementioned evaluation principles, which should be determined by the Authority according to the provisions of the law; and that therefore, there was an interference with the right to property without abiding by the explicit provision of the law. They further claimed that the Supreme Administrative Court also determined that the transfer of a bank to the Fund without specifying the "evaluation principles" was manifestly inconsistent with the law as was the case with the decision on Demirbank concerning the same issue; that even though it was necessary to "*take as the basis the balance sheet of the transferred bank which is to be drawn as of the date of transfer*" according to Article 14 § 5 of the abolished Law no. 4389 which constituted the basis of the Bank's transfer to the Fund, a balance sheet (real asset balance sheet), which was to be drawn based on the actual values of the items forming the Bank's real assets on the balance sheet day, was not prepared; that had the balance sheet been prepared, it would have been seen that their assets covered their debts, that as a result, the interference with the property did not meet the criteria for lawfulness; that there are tangible data (e-mails sent by the IMF executives to the executives of the Authority) demonstrating that the interference was carried out not for the public interest but through the imposition of the International Monetary Fund (IMF); that according to the statistics released immediately after the seizure of the Bank, the Bank's profit was even considerably higher than the profit of Vakıflar Bankası T.A.O .,which is a public bank, and constituted 26% of the total profit of the thirty-three banks operating in Turkey at the time; that an interim injunction was also imposed upon their

estates along with the decision to seize the Bank; that they were placed under an international travel ban; that their right to establish a bank in the future was revoked, and that the interference with their property was thus disproportionate; that even though there was a previous judgement rendered by the Supreme Administrative Court on the same issue in line with their allegations, the Supreme Administrative Court held an incomplete examination during the prosecution process concerning the seizure of Toprakbank Inc., and despite being presented in concrete terms, their substantial allegations were not investigated and addressed by the Supreme Administrative Court. Accordingly, the applicants requested the Court to find a violation of the rights at stake and award the applicants an amount of 36 million Turkish Liras (TRY).

B. The Court's Assessment

29. The applicants request to be awarded a compensation of 36 million Turkish Liras on the ground that they were aggrieved due to the transfer of the Bank, within which they were the controlling shareholder, to the Fund with the decision of the Authority. It is understood that the amount of the requested compensation is the value of the Bank estimated by the applicants corresponding to their shares prior to the seizure of the Bank.

30. The applicants did not complain, in their individual application, of an action for compensation requesting the corresponding amount to their shares prior to the seizure of the Bank or an action for annulment against the decision of the Authority on the transfer of the shares. The subject matter of the application is the lawsuit filed in the 13th Chamber of the Supreme Administrative Court in 2005 in request for the cancellation of the transfer of the Bank to the Fund on the basis of the 1,000 lots of bank stocks owned by Y.P. who is the junior partner of the Bank. The applicants became involved in the present case within the course of rectification of the judgment by purchasing the 1,000 lots of bank stocks pertaining to Y.P. through the letter of conveyance dated 20 August 2009 in exchange for 1,000 Turkish Liras. The Plenary Session of the Administrative Law Chambers of the Supreme Administrative Court acknowledged the applicants as a party with the decision dated 1 October 2012 however unanimously rejected the request of rectification of judgement.

31. In the present case, the individual application of the applicants must be examined in respect of the right to property, limited to the 1,000 lots of bank stocks which were previously subject to administrative action.

32. Since the complaints of the applicants that an interim injunction was imposed upon their estates along with the decision to seize the Bank, that they were placed under an international travel ban, that their right to establish a bank in the future was revoked, are not the subject matter of the lawsuit constituting the subject of the application, remedies with regard to these complaints cannot be said to be exhausted. Therefore, the aforementioned complaints shall not be examined in the present application.

33. Furthermore, the applicants maintained that their rights to a reasoned decision were violated, indicating that the Bank was transferred to the Fund without the "*evaluation principles*" stipulated in Article 14 § 3 (c) of the abolished Law no. 4389 being clearly specified, that even though it was necessary to "*take the balance sheet of the transferred bank which is to be drawn as of the date of transfer as the basis*" according to Article 14 § 5 of the abolished Law no. 4389, which constituted the basis of the Bank's transfer, this was not presented, and that the above-mentioned matters were not examined in the decision of the Supreme Administrative Court.

34. Upon the examination of the case-file, which is subject to the application, it is seen that there were no allegations set forth concerning the evaluation principles either in the lawsuit petition presented by Y.P., the owner of the 1,000 lots of bank stocks, to the Supreme Administrative Court in 2005 or in the petition of appeal presented to the Plenary Session of the Administrative Law Chambers of the Supreme Administrative Court on 17 April 2006 upon the dismissal of action. However, the aforementioned allegation was included on page 10 of the petition dated 15 September 2008 in request for rectification of judgment submitted by Y.P. and on page 13 of the petition dated 11 September 2008 in request for rectification of judgement and for becoming an intervening part submitted by Toprak Kağıt Inc.. By the decision dated 1 October 2012 of the Plenary Session of the Administrative Law Chambers of the Supreme Administrative Court, which conclude the requests for rectification of judgment, these requests

were rejected on the grounds that they did not rest upon one of the reasons stated in Article 54 of Law no. 2577.

35. It is understood that the applicants' allegations regarding the evaluation principles were examined neither by the 13th Chamber of the Supreme Administrative Court dealing with the case in the capacity of the first instance court nor by the Plenary Session of the Administrative Law Chambers of the Supreme Administrative Court at the appellate stage due to the fact that the allegations were not duly set forth, and that the requests for rectification of judgement was rejected on the ground that they did not rest upon one of the reasons stated in Article 54 of the Law no. 2577.

36. In the present case, since it is understood that the applicants' allegations regarding the evaluation principles, indicated as the reason behind the violation of their rights to a reasoned decision, were not subject to an examination by a competent court, it is not possible to consider that, in the present application, the available remedies with regard to these allegations have been duly exhausted. Hence, the allegations with regard to the right to a reasoned decision shall not be examined in this application.

37. While the applicants maintained that the principle of equality was violated, they did not disclose on the basis of which reason indicated in Article 10 of the Constitution they were subject to different treatment. Within this framework, the applicants complained that while the seizure procedure of another bank in an essentially different case was cancelled, the seizure procedure concerning their own Bank, which is claimed to be of similar quality, was not cancelled. However, since the present matter shall be examined in terms of the right to property, there shall be no examination in terms of the principle of equality.

38. The applicants' allegations regarding the transfer of the Bank to the Fund and the proceedings following the transfer were examined within the scope of the right to property.

1. Admissibility

39. The allegation regarding the violation of the right to property is not manifestly ill-founded and there exists no ground to declare it inadmissible, therefore it must be declared admissible.

2. Merits

40. The applicants maintained that their rights to property had been violated, by indicating that the Bank was transferred to the Fund by the Authority without the "*evaluation principles*" set forth in Article 14 § 3 of the abolished Law no. 4389 being specified, that the balance sheet constituting the basis of the Bank's transfer was a result-based balance sheet while the real asset balance sheet should have been taken as the basis, that had this balance sheet been taken as the basis, it would have been seen that their assets covered their debts and the Bank could not be seized, that there were also tangible data demonstrating that the interference was carried out through the imposition of the IMF and not for the public interest, that the interference was disproportionate since there existed other measures which were less substantial than the transfer of the Bank to the Fund and since their assets could cover their liabilities, that the transfer process of Demirbank, which was in a similar situation, to the Fund was cancelled by the Supreme Administrative Court.

a. Existence of Property, Interference and Victim Status

41. Article 35 of the Constitution, titled "*Right to Property*", is as follows:

"Everyone has the right to own and inherit property.

These rights may be limited by law only in view of public interest.

The exercise of the right to property shall not contravene public interest."

42. Article 1 of the Protocol No. 1 to the European Convention on Human Rights (the Convention), titled "*Protection of property*", is as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

43. Pursuant to the provisions of Article 148 § 3 of the Constitution and Article 45 § 1 of Code no. 6216, in order for an examination to be made on the merits of an individual application lodged with the Constitutional Court, the right alleged to be interfered with by the public force must not only be safeguarded by the Constitution but it must also fall under the scope of the Convention and the additional protocols thereto to which Turkey is a party. (see the judgment of the Court, *Onurhan Solmaz,* no. 2012/1049, 26 March 2013, § 18).

44. The right to property falling into the common protection area of the Constitution and of the Convention is a guarantee that protects existing property and assets. The right to acquire ownership of a property, which a person does not currently own, is not included within the concept of property protected by the Constitution and the Convention, no matter how strong the individual's interest in this issue is. As an exception to this, in certain circumstances, an "economic value" or a "legitimate expectation" aimed at claiming a legally enforceable "*liability*" may draw upon the right to property falling into the common protection area of the Constitution and of the Convention (see the judgment of the Court, *Kemal Yeler and Ali Arslan Çelebi,* no. 2012/636, 15 April 2014, § 36-37). The right to claim is one of the fundamental rights of the individuals under the right to property (see the judgement of the Court, no. E.2008/58 K.2011/37, 10 February 2011).

45. There exists no dispute as to whether the Bank operated in the banking sector with its extensive branch network, thousands of personnel and an authorized capital stock of 45.5 million Turkish Liras until the date of transfer of the Bank to the Fund. The Bank possessed not only a certain clientele but also the licence to establish and operate a bank in addition to its moveable and immoveable properties. All of the above-mentioned assets are active assets required to be considered within the concept of "*property and possessions*" within the scope of the right to property falling into the common protection area of the Constitution and of the Convention (for similar judgements of ECHR, see *Buzescu v. Romania,* no. 61302/00, 4 May 2005, § 81; *Van marle and Others v. the Netherlands,* 26 June 1986, § 41; *Capital Bank AD v. Bulgaria,* no. 49429/99, 24 February 2006, § 130; *Megadat.com v. Moldavia,* no. 21151/04, §§ 62, 63; *Bimer S. A. v. Moldavia*, no.

15084/03, 10 July 2007, § 49; *Tre Traktörer AB v. Sweden*, no. 10873/84, 7 July 1989, §§ 53-55).

46. The applicants are the shareholders of the Bank, which is undoubtedly included within the concepts of property and possession within the scope of the right to property. Since the share certificate, which is a security accorded by corporations to their stockholders in order to certify their shares, provides its holder/owner with the rights to property of the corporation that issues the certificate at the rate/in the percentage indicated on the bond in varying forms depending on the type, it is unquestionable that the Bank is a property within the scope of the Article 35 of the Constitution.

47. On the other hand, pursuant to the provisions of Article 148 § 3 of the Constitution and Article 45 § 1 of Code no. 6216, every natural and legal person with civil rights who think that any one of his / her fundamental rights and freedoms, guaranteed in the Constitution and included within the scope of the Convention and its Protocols to which Turkey is a party, has been violated by the public authorities, is conferred the capacity to sue in terms of individual applications to the Constitutional Court. It is prescribed in Article 46 § 1 of Code no. 6216 that the individual application may only be lodged by those, whose current and personal right is directly affected due to the act, action or negligence that is claimed to result in the violation.

48. Article 46 of Code no. 6216, titled "Persons who have the right of 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 as follows; a "*current right of the applicant must be violated*" due to the act, action or negligence of the public authority which is subject 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 the judgement of the Court, *Onur Doğanay*, no. 2013/1977, 9 January 2014, § 42).

49. The European Court of Human Rights (ECHR) interprets the concept of "*victim*" autonomously and as independent from the notions of domestic law such as concepts related to an interest or the capacity to act (*Sanles Sanles v. Spain*, no. 48335/99, 26 October 2000) however pays regard to whether the applicant is party to domestic proceedings (*Micallef v. Malta* [GC], no. 17056/06, 15 October 2009).

50. Since it is understood that the applicants have 1,000 lots of bank stocks, which are the subject matter of the case before the Supreme Administrative Court, and that they were acknowledged as a party with the decision of Plenary Session of the Administrative Law Chambers of the Supreme Administrative Court dated 1 October 2012 for the above-mentioned reason, in the present case, the applicants have the right to property limited to the 1,000 lots of bank stocks. Hence, even though the applicants were the controlling shareholders of the Bank prior to its transfer to the Fund, with regard to the present application, it is understood that the applicants have a worthwhile advantage limited to 1,000 lots of bank stocks within the scope of the right to property, falling into the common protection area of the Constitution and of the European Convention on Human Rights (the Convention).

51. The shareholder rights, except for dividends, along with the management and inspection of the Bank, which was taken under close monitoring with the decision of the Authority dated 11 December 2000, were transferred to the Fund with the decision of the Authrotiy dated 30 November 2001; and based on the decisions of the Fund dated 26 March 2002, the Bank was merged under Bayındırbank and its banking license was abolished as of 30 September 2002. It is clear that there was an interference with the right to property of the applicants since it is understood that all the aforementioned procedures impacted the rights to property conferred by the shares of the applicants, who were the former controlling shareholders of the Bank, and that eventually their shares completely lost their value.

b. Nature of the Interference

52. The right to property, which is guaranteed as a fundamental right in the Article 35 of the Constitution, is a right that provides the individual

with the opportunity to utilize and dispose his/her possession at will and to benefit from its products so as long he / she does not encroach on someone else's rights and abides by the restrictions imposed by laws. According to the Constitution, this right may be limited only by law in view of public interest. Article 35 of the Constitution stipulates that the right to property is not an absolute right and may be limited in view of public interest (see judgment of the Court, *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 28,32).

53. Article 35 of the Constitution and Article 1 of the Protocol No. 1 to the Convention incorporate the right to property under similar provisions. Both regulations consist of three rules. While the first sentence of the Convention vests individuals with the right to peaceful enjoyment of their possessions, the Constitution recognizes the right to property in broader terms. The second sentences of the provisions stipulate the conditions, under which persons may be deprived of their property or under which conditions their property may be restricted (see judgement of the Court, *Necmiye Çiftçi and Others*, no. 2013/1301, 30 December 2014, § 46).

54. The third sentences of both provisions pertain to the control or regulation of the use of property. While Article 35 § 3 of the Constitution includes a general principle on the exercise of the right indicating that the exercise of the right to property shall not contravene public interest, Article 1 § 2 of the Protocol No. 1 to the Convention acknowledges the authority of the contracting states to "*control the use of property*" in accordance with the general interest, reserving the right to regulate the property in view of public interest and to enforce such laws as they deem necessary to secure the payment of taxes or other contributions or penalties. However, numerous articles of the Constitution authorize the state to control the use of property or to regulate the property where necessary (see judgement of the Court, *Necmiye Çiftçi and Others*, § 47).

55. According to the ECHR, the second and third rules are specific manifestations of the first rule, expressed as the principle of peaceful enjoyment of one's possessions, and therefore must be understood in the light of the first rule, which holds a general qualification (*James and Others v. the United Kingdom* [GC], no. 8793/79, 21 February 1986, § 37).

56. Article 167 § 1 of the Constitution reads as follows, "*The State shall take measures to ensure and promote the sound and orderly functioning of the markets for money, credit, capital, goods and services; and shall prevent the formation of monopolies and cartels in the markets, emerged in practice or by agreement*." Article 1 of the abolished Law no. 4389 identifies the objective as follows, "*The objective of this law is to regulate the principles regarding the establishment, management, operation, transfer, merger, liquidation and supervision of banks in order to ensure the protection of the rights and interests of depositors and the effective functioning of the credit system by taking into consideration the requirements of establishing confidence and stability and economic development in financial markets*."

57. The abolished Law no. 4389 and Law no. 5411 along with numerous other laws created public institutions (such as the Authority, Fund and Capital Markets Board ("the CMB")) so as to achieve this objective and allocated to the State the duty of establishing confidence and stability in financial markets and protecting the rights of depositors through the agency of these institutions. For this purpose, systems such as deposit insurance have been adopted.

58. In the present case, the Bank, whose shareholder rights except for dividends along with its management and inspection were transferred to the Fund with the decision of the Authority dated 30 November 2001, was merged with other banks under Bayındırbank pursuant to the decisions of the Fund dated 26 March 2002. The banking license of the Bank was abolished as of 30 September 2002. As a result of these procedures, the Bank was dissolved and its assets, debts and claims were liquidated with subsequent procedures.

59. While the applicants were deprived of their property at the end of the above-mentioned process, the assets of the Bank were not expropriated for public interest or the Bank was not nationalized and transformed into a state bank. It is clear that the process of Bank's transfer to the Fund dated 30 November 2001 was carried out for the purpose of establishing confidence and stability in the banking sector, ensuring the effective functioning of the credit system and protecting the rights and interests of the depositors as prescribed in Article 167 of the Constitution and Article

1 of the abolished Law no. 4389 within the scope of the regulatory and supervisory powers granted to the Authority. As a matter of fact, these objectives are stated in the decision of the Authority dated 30 November 2001. In the present case, it is required to examine the interference within the scope of the authority of the State to control the use of property or to regulate the property.

60. At this stage, it is necessary to examine the lawfulness, legitimate aim and proportionality of the interference with the right to property of the applicant.

c. Whether the Interference Constitutes a Violation

i. Lawfulness

61. Article 35 of the Constitution prescribes that everyone has the right to property, that this right may be limited by law only in view of public interest, that the exercise of the right to property shall not contravene public interest.

62. Articles 35 and 13 of the Constitution stipulate that the limitations on the right to property shall be made in view of public interest and by law. While the ECHR recognizes that the principles developed through jurisprudence on the basis of stabilized judicial decisions may meet the requirement of lawfulness by interpreting the conditions set forth by the law, in other words, lawfulness in broader terms (*Malonei v. the United Kingdom,* no. 8691/79, 2 August 1984, §§ 66-68), the Constitution provides a broader protection compared to the Convention by prescribing that all limitations may be made only by law under absolute terms and conditions (see judgement of the Court, *Mehmet Akdoğan and Others,* § 31).

63. The text of the law and its enforcement must have legal clarity and definiteness, as much as the existence of the law itself, to the degree to which the individuals may foresee the consequences of their actions. In other words, the quality of the law is also essential in determining whether or not the requirement of lawfulness is met (see the judgement of the Court, *Necmiye Çiftçi and Others,* § 56).

64. Principles of legal security, clarity and definiteness are among the preconditions of a state of law. The principle of legal security aimed at ensuring the legal security of persons requires that the legal norms should be foreseeable, that individuals can trust the state in all their actions and operations, and that the state should refrain from methods that would undermine this sense of security in its legal arrangements. The principle of clarity and definiteness indicates that legal arrangements must be clear, comprehensible and enforceable in a way that shall allow for any hesitation or doubt on the part of neither the individuals nor the administration and that they must include protective measures against arbitrary practices of public authorities. In this respect, the text of the law must be formulated in such a way to enable individuals to foresee, at a certain degree of clarity and definiteness, which concrete actions and facts are associated to which legal sanctions or consequences by means of receiving legal assistance if necessary. Therefore, the possible effects and consequences of the law must be sufficiently foreseeable prior to its enforcement (see the judgment of the Court, no. E.2013/39, K.2013/65, 22 May 2013).

65. The applicants maintained that even though Article 14 § 3 of the abolished Law no. 4389 which is the basis of the interference, stipulates that the losses of banks exceeding their equity must be in accordance with the "evaluation principles" to be determined by the Authroity, the Bank was transferred to the Fund without the aforementioned evaluation principles, which should be determined by the Authority according to the provisions of the law, being clearly specified, that in the decision on Demirbank, the transfer of this Bank to the Fund was determined to be manifestly inconsistent with the law, that even though it was necessary to "*take the balance sheet of the transferred bank which is to be drawn as of the date of transfer as the basis*" according to Article 14 § 5 of the abolished Law no. 4389, which constituted the basis of the Bank's transfer to the Fund, a balance sheet (real asset balance sheet), which was to be drawn based on the actual values of the items forming the Bank's real assets on the balance sheet day, was not prepared, that had the balance sheet been prepared, it would have been seen that their assets covered their debts, that as a result, the interference with the property did not meet the criteria for lawfulness.

66. First and foremost, the differences in jurisprudence concerning similar cases between coordinate judicial authorities arising from the characteristics of the concrete case cannot be solely regarded as a violation of rights. Nor can the differences of interpretation between inferior courts or courts of appeal regarding the parties' demands and evidences with respect to disputes be solely recognized as a violation of rights (see judgement of the Court, *Miraş Mümessillik İnş. Taah. Reklam. Paz. Yay. San. Tic. A.Ş.*, no. 2012/1056, 16 April 2013, § 36).

67. Demirbank Trading Inc. and Toprakbank Inc. are two different legal entities and their process of being transferred to the Fund with the decision of the Agency occurred on different dates and in different ways. The prosecution processes of the lawsuits filed in request for the cancellation of the transfer are also different from each other. Therefore, in two separate cases, where the concrete circumstances are different from each other, the fact that the courts did not reach the same verdict cannot per se be recognized as violation of rights.

68. It is clear from the present case that the rights to property of the applicants were interfered with by the decision of the Agency dated 30 November 2001 and numbered 538. The basis of interference in the decision to interfere was referred to in Article 14 §§ 3, 4 of the abolished Law no. 4389. Paragraph (3) of the aforementioned Article establishes the opportunity to interfere if the Bank does not take the required measures in accordance with the paragraph (2) or if there is no potential to reinforce its financial structure despite having taken the necessary measures.

69. In the Demirbank case, which is cited by the applicants as a precedent, the 10th Chamber of the Supreme Administrative Court deemed the administrative act as lawful, however with the decision dated 3 June 2003 and numbered 2003/783, K.2003/960, the Supreme Administrative Court Plenary Session of the Administrative Law Chamber determined by majority of votes that the transfer decision, which was made within the scope of Article 14 § 2 of the abolished Law no. 4389 and without investigating the options that would ensure net liquidity balance of the Bank, is not in compliance with laws, indicating that even though the report prepared by certified bank examiners prior to the transfer

recommended the removal of public papers from the Bank's portfolio through clearing for the purpose of betterment, no clearing took place, that after the transfer, banks were disburdened by resorting to a voluntary clearing practice for all banks, that the report of State Supervisory Council and the reports on the financial structure stated that the Bank would have experienced no problems regarding profit and liquidity had the clearing process took place, that the risky loans of the Bank did not amount to much compared to its total credits, and that its active quality was high.

70. The reasons cited in the decision of the Agency dated 30 November 2001 for the transfer of the Bank to the Fund in the subject matter of the application are referred to in Article 14 §§ 3, 4 of the abolished Law no. 4389. In the study prepared by the Fund (TMSF Raf temizliği çalışması, 25 Bankaya ne oldu?, Toprakbank, www.tmsf.org.tr – the Fund Stacks Cleaning Study, What happened to 25 Banks, Toprakbank, www.tmsf.org.tr), the fact that the Bank's resources were primarily extended as long-term credit to Toprak Group companies (approximately 678 million Turkish Liras), that the resources of the Bank's foreign depository (Toprakbank Offshore) were again extended as credit to the Group companies and that the shareholders were paid dividends by over-reporting the profits even though the Bank derived no profit in the years of 1998 and 1999 (approximately 25 million and 60 million Turkish Liras) are cited as the principal reasons behind the seizure of the Bank.

71. In the letter dated 31 December 2015 of the Department of Legal Affairs of the Agency, it is set forth that the Bank was instructed by letters, submitted by the Agency on numerous occasions after the Bank was taken under close monitoring with the decision dated 11 December 2000, to put an end to extending credits to controlling shareholders, to secure, collect and liquidate the credits provided to Toprak Group companies, to increase the capital, to shut down the Toprak Offshore depositories, to terminate fiduciary transactions and to avoid profit distribution, that even though the Bank was requested with the letter dated 18 April 2001 to present a realistic and feasible plan concerning the measures to be taken due to the deterioration of the financial structure following the crises of November 2000 and February 2001, the submitted plan was insufficient or did not

meet the requirements, that the Agency appointed a board member to the Bank on 9 July 2001 and instructed to not enforce decisions that were not signed by this person, that the Bank was requested with the letter dated 19 July 2001 to eliminate the maturity mismatch in the structure of assets and liabilities, to redress the balance of income and expenditures and to boost its equities, however sufficient progress could not be achieved within the one-year close monitoring period, that in the reports of the certified bank examiners dated 11 March 2002 prepared as a result of the analysis of financial statements dated 30 November 2001, when the Bank was transferred to the Fund, it is stated that the Bank had a loss of 1,306 million Turkish Liras arising from outstanding loans primarily provided to Toprak Group companies, that the equities of the Bank amounted to (-) 1,222 million Turkish Liras, that the Bank's shareholders, who were directly or indirectly in charge of the management and supervision of the Bank, exploited the resources of the Bank in a way that would endanger the Bank, that they caused losses for the Bank in this manner, and that as a result, the financial structure of the Bank was undermined beyond repair.

72. In the present case, aside from Article 14 § 3 of the abolished Law no. 4389, it is seen that the primary reason behind the seizure of the Bank rests upon paragraph (4) of the aforementioned Article with regard to extending the resources of the Bank to controlling shareholders. It is understood that there is no obligation to specify evaluation principles in order to draw conclusions regarding the present paragraph and that the present situation may easily be put forth with the identification of the loan amount and the debtors.

73. The applicants maintain that it is necessary to "*take the balance sheet of the transferred bank which is to be drawn as of the date of transfer as the basis"* according to Article 14 § 5 of the abolished Law no. 4389 and that this is required to be a real asset balance sheet. In the present case which is subject to the application, the Fund drew a transfer balance sheet as of 30 November 2001 which was the date of transfer and determined that the Bank's loss amounted to 1,306 million Turkish Liras. In the decision of the Agency dated 30 November 2001, it is indicated that the primary reason behind the seizure of the Bank is the intensive extension of credits to

Group companies and that the loss set forth in the aforementioned Fund study arose from the outstanding loans extended to Group companies. It is understood that even if the real estates of the Bank were worth higher than the figure cited in the balance sheet as claimed by the applicant, there exist no statements clarifying how the loss of 1,306 million Turkish Liras would be covered. Within this framework, it is seen that the operations conducted by the Fund for the purpose of collecting the Bank's loss lasted for years and the applicants acknowledged their debts arising from Group credits, that the applicants signed a protocol with the Fund by acknowledging the debt of 453 million USD and in the long term, they were able to repay their debts arising from the credits that they had received from the Bank on behalf of Group companies.

74. Moreover, it is understood that even though the Bank was taken under close monitoring with the decision of the Agency dated 11 December 2000 pursuant to Article 14 § 2 of the abolished Law no. 4389 and was requested to take the necessary measures, no measures were taken to improve the Bank's condition for about a year, and on the contrary, the Bank's financial situation deteriorated and its losses increased; and it is possible to observe this situation on the balance sheets recognized by the Bank itself prior to its transfer. The above-mentioned matters were examined by the 13th Chamber of the Supreme Administrative Court and by the Supreme Administrative Court Plenary Session of the Administrative Law Chamber and it was concluded that the decision of the Agency on the transfer of the Bank to the Fund was lawful.

75. The aforementioned explicit arrangements were published in the Official Gazette and on the websites of the relevant institutions and they were accessible and comprehensible on the date of publication. In the present case, it has been concluded that the legal basis of the operation subject to interference is comprehensible and its probable outcomes are foreseeable; in conclusion the operation subject to interference do have a legal basis.

76. At the present stage, whether the interference pursued a legitimate aim in view of public interest shall be examined.

ii. Legitimate Aim

77. The notion of public interest refers, in general terms, to the benefit of society that is separate from and superior to private or self-interests. All public actions must ultimately lead to the objective of achieving public interest. By its very nature, public interest is a broad concept. The legislative and executive bodies have wide discretion in determining what is in the public interest by taking into account the needs of the society. In the case of a dispute on the issue of public interest, it is clear that specialized courts of first instance and courts of appeal are in a better position to resolve the dispute. Interference with the discretion of authorized public bodies in determining what is in the public interest is out of the question unless it is understood that it is manifestly ill-founded or arbitrary in the individual application examination of the Constitutional Court. The obligation to prove that the interference is not in the public interest belongs to the person submitting this allegation (see judgment of the Court, *Mehmet Akdoğan and Others,* §§ 34, 35, 36).

78. By its very nature, public interest is a broad concept. It is unavoidable that there would be a wide array of opinions on what is in the general interest of the public. What is in the public interest might not only vary with the political, economic and social preferences of the legislative and executive bodies, but the changing economic, social and political conditions may also require altering an action or service carried out in view of public interest (see judgement of the Court, *Habibe Kalender and Others,* no. 2013/3845, 1 December 2015, § 33).

79. The applicants have maintained that there are tangible data (e-mails sent by the IMF executives to the executives of the Agency) demonstrating that the interference was carried out not for the public interest but through the imposition of the IMF.

80. First and foremost, no documents were submitted to indicate that the applicants' allegations concerning the e-mails sent by the IMF executives to the executives of the Agency were subject to a lawsuit prior to the individual application. In the examination, it is not possible to pay regard to these allegations which are purely speculative.

81. It was decided to transfer the Bank to the Fund, the Bank, which did not take the measures requested in the decision of the Agency dated 30 November 2001 and subject to application, which extended the resources of the Bank to Group companies in a way that undermined the secure functioning of the Bank, whose losses accumulated to exceed its equities and which would have undermined the rights of the depositors and the confidence and stability of the financial system due to the weakness of its financial structure had it continued to operate in that particular state. It is clear that the objectives of securing the rights of the depositors and ensuring the confidence and stability of the financial system as cited in the decision serve the public interest. The aforementioned objective of public interest is in line with the objectives of ensuring that private enterprises operate in accordance with national economic requirements and social objectives and that the markets for money, credit, capital, goods and services function in a sound and orderly manner as prescribed in Articles 48 and 167 of the Constitution which stipulate that the State may interfere with the market economy under certain circumstances.

82. At the present stage, it is required to examine the proportionality of the interferences, which have been established to be in public interest.

iii. Proportionality

83. Article 13 of the Constitution, titled "*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.*"

84. According to Article 35 of the Constitution, right to property may only be limited by procedures stipulated by law and in view of public interest. In accordance with the principle of proportionality contained in Article 13 of the Constitution, in the case of limiting the rights to property

of persons, a fair balance must be struck between the public interest to be ensured and the rights of the individual.

85. The principle of proportionality consists of three sub-principles; "*suitability*", "*necessity*" and "*proportionality*". "*Suitability*" suggests that the interfering action must be suitable for attaining its aim, "*necessity*" indicates that the interference must be imperative in terms of the desired aim, which means that it should not be possible to attain the same objective with a less substantial interference, and "*proportionality*" refers to the requirement of striking a reasonable balance between the interference with the right of the individual and the desired aim (see judgment of the Court, *Mehmet Akdoğan and Others*, § 38).

86. When examining whether an interference with the right to property is in conformity with the Convention, the ECHR not only stresses that the interference must serve the public interest or general interest but also that a fair balance must be struck between the general interest of the society and the protection of individual rights. Within this framework, the ECHR concludes that the interference is disproportionate if the individuals are deprived of their property without receiving a reasonable payment in proportion to the worth of their property. However, the right to property protected by the Convention does not guarantee the payment of the full price in all cases. The ECHR may find a payment lower than the market value of the property divested in view of legitimate public interest to be in conformity with the principle of proportionality in exceptional cases oriented towards enforcing extensive measures such as making an economic reform or establishing social justice (see *Sporrong and Lönnroth v. Sweden*, no. 7151/75; 72/52/75, 23 September 1982, § 69; *James and Others v. the United Kingdom*, no. 8793/79, 21 February 1986, § 54; *Papachelas v. Greece*, no. 31423/96, 25 March 1999, § 48; and *Lithgow and Others v. the United Kingdom*, no. 9006/80, 9262/81, 9263/81, 9265/81; 9266/81; 9313/81; 9405/81, 8 July 1986, § 120, 121).

87. The aforementioned third rules contained in the Constitution and in the Convention authorize the State to control and regulate the exercise of property or the right to property. In the exercise of the regulatory authority which provides a broader discretion compared to the authority

to limit property, it is established as a rule that the requirements of the principles of lawfulness, legitimacy and proportionality must be met (for a similar judgment of the ECHR, see *Depalle v. France* [GC], no. 34044/02, 29 March 2010, §§ 83 and 84). Accordingly, the authority to regulate the right to property must also be exercised by law and in view of public interest. Furthermore, the obligation to pay compensation for divestment of property in line with the principle of proportionality may not be required when the regulatory authority is exercised depending on the circumstances of litigation (see *Depalle v. France,* § 91).

88. The applicants maintained that according to the statistics released immediately after the seizure of the Bank, the Bank's profit was considerably high, that an interim injunction was also imposed upon their assets along with the decision to seize the Bank, that they were placed under an international travel ban, that their right to establish a bank in the future was revoked, and that the interference with their property was thus disproportionate.

89. In the Demirbank case, which is cited by the applicants as a precedent, the recommendation to remove public papers from the Bank's portfolio through clearing as indicated in the decision dated 3 June 2003 of the Supreme Administrative Court Plenary Session of the Administrative Law Chamber is a less substantial interference specific to the Demirbank case and as set forth in the decision, it is concluded that the seizure of the Bank, without trying a clearing procedure to resolve the problem arising from the high number of government debt securities (GDDS) in the portfolio of Demirbank and the liquidity squeeze due to the economic crisis, was not in compliance with laws.

90. It is set forth in the documents submitted in the appendix to the application that the Bank was taken under close monitoring by the Agency on 11 December 2000 within the scope of Article 14 of the abolished Law no. 4389 and was requested to take a series of measures, however no progress was made and on the contrary, the financial situation of the Bank deteriorated and its loses increased; in the decision of the Agency dated 30 November 2001 and the decision of the Plenary Session of the Administrative Law Chamber dated 26 June 2008, it is also indicated that

the Bank was transferred to the Fund due to the fact that the requisite measures were not taken and its financial situation constituted a risk for the rights of depositors and for the confidence and stability of the financial market. In the present case, it is understood that the applicants' allegations with regard to the necessity to employ less substantial measures is not pertinent as the financial situation of the Bank did not improve but rather deteriorated in spite of the employment of a less substantial measure.

91. In the present case subject to the application, the less substantial interference foreseen for the Bank was tested with the decision of close monitoring dated 11 December 2000 and the Bank was requested to increase the capital, to collect the credits provided to Group companies, to promptly ensure cash inflow to the Bank, to make the organizational structure effective and efficient and to terminate the activities of Toprak Offshore and to transfer its accounts to the Bank. Moreover, the Bank was also recommended by the Agency to generate funds through the sale of strategic partners and Group companies, to liquidate Group credits through cash collection or to secure them on collateral.

92. Although the applicants claim that the Bank was in profit, the financial statements dated 30 September 2001, which were prepared prior to the seizure of the Bank, disclose that while the Bank's losses amounted to 123 million Turkish Liras, its equities were (-) 38 million Turkish Liras. In the audit reports, prepared with the aim of revealing the real financial structure after the transfer, it is established that the Bank's actual amount of loss was 1,306 million Turkish Liras on the day of transfer and that the primary reason behind this situation was the outstanding loans extended to Group firms (678 million principal and 108 million rediscount), that the equities of the Bank amounted to (-) 1,222 million Turkish Liras.

93. In the letter dated 11 December 2015 of the Fund, it is elucidated that as of the date of transfer, Toprak Group's debts to the Bank amounted to 792 million Turkish Liras (approximately 534 million USD), that 395 million USD were collected once the reductions, granted through the protocols signed with Toprak Group after the transfer, and payments to third parties were deducted, that the total transfer of funds by the Fund to the Bank, so that the Bank fulfils its deposit liabilities among others

and covers its loss, amounted to 846 million Turkish Liras (approximately 629 million USD at the exchange rates of CBRT), that the Bank's loss was 1,306 million Turkish Liras on the date of transfer, which corresponded to approximately 30 times the capital of the Bank, that it is not possible for a bank in this condition to carry any economic added value and accordingly, to effect payments to its shareholders.

94. The reasons behind the seizure of the Bank are not confined to the fact that the equities of the Bank could not cover its losses, as a matter of fact, the reasons are elaborated as follows; the failure to repay the loans extended to Group companies which constituted the main source of losses, hence, the employment of the Bank's resources for the benefit of its controlling shareholders, furthermore, the disturbance of the Bank's liquidity balance, the maturity mismatch in the structure of assets and liabilities, the lack of efficiency and effectiveness in the organizational structure, the transfer of funds to Toprak Offshore and extension of these funds to Group companies, the lack of balance in income and expenditures, the existence of fiduciary transactions, and the payment of dividends to the shareholders by reporting profits despite the fact that the Bank was losing money.

95. Not only did the applicants not take necessary measures to reinforce the Bank's financial condition in the course of the close monitoring period, but they also did not clarify with which less substantial measures a bank with such a disordered financial structure could have continued to operate without being transferred to the Fund and without bringing damages to the financial markets, to the economy and to its depositors in the atmosphere of an economic crisis. Even though the applicants maintain that their personal estates and the estates of the Group companies which they own would have been enough to cover the Bank's losses, they have not been able to explain why they did not repay the Group credit debts and improve the financial condition of the Bank by making the above-mentioned sales despite the instructions and recommendations of the Agency during the close monitoring period, which lasted for approximately a year.

96. Furthermore, based on the documents prepared by the Fund, it is understood that protocols were signed with the applicants, who were the

controlling shareholders of the Bank, on 18 December 2004, 6 February 2008 and 8 June 2012 for the purpose of settling their debts to the Bank arising from the credits extended to Group companies, that these protocols were signed by the applicants, who were the controlling shareholders of the Bank, hence they acknowledged the debts, that upon failure to comply with the protocols, collections were made from the estates of the controlling shareholders of the Bank pursuant to the Law no. 6183 and that the repayment of the applicants' debts within the scope of the protocols extended over a period of time that lasted until recently, and that a total of 395 million USD were repaid following the reductions and netting . In the present case, it is clear that it was not possible to improve the financial condition of the Bank through simple measures such as the sale of real estates and subsidiaries and to cover its losses in the short term.

97. Moreover, once banks are transferred to the Fund, deposit liabilities and obligations to cover the banks' debts and losses are also transferred to the Fund. Since the resources of the Fund are not sufficient, the deposits, debts and losses of the transferred banks are compensated through government domestic debt securities provided by the Treasury to the Fund and as a result, the Fund becomes indebted to the Treasury. The Fund then pays its debt to the Treasury with the funds obtained by selling the assets and collecting the debts of the transferred Banks. However, the expenditures arising from the transferred banks have resulted in a cost significantly higher than the revenue acquired through the liquidation of these banks. With the Law no. 5787 for the uncollected Treasury receivables and with the first paragraph of the provisional Article 17 of the Law no. 4749, the Minister of Finance has been authorized to cancel the Treasury receivables born and/or shall be born from the government domestic debt securities (GDDS) provided to the Fund until the date of 31 December 2007 without being associated with the income and expense accounts of the budget, and with the approval of the Minister of Finance dated 11 November 2008, Treasury receivables born and/or shall be born from GDDS amounting to a total of 93,292 million Turkish Liras, of which 50,666 million Turkish Liras, is principal, 20,170 million Turkish Liras is interest and 22,456 million Turkish Liras is default interest, have been

cancelled (see Turkish Court of Accounts; 2008 Treasury Transaction Report, pp. 72 and 73).

98. It is hereby concluded that the fair balance to be struck is not disturbed when the interference with the applicants' right to property is compared to the public interest observed in the transfer of the Bank to the Fund in an effort to avoid damages to the financial markets and to protect the rights of depositors by transferring the losses and deposit liabilities of the Bank to the Fund, considering the fact that the Bank's losses, primarily arising from unpaid Group credits, amounted to 1,306 million Turkish Liras as of the date of transfer and its condition continued to deteriorate even though the applicants were warned and granted time to take the necessary measures for the Bank which they owned.

99. For the reasons explained above, it must be held that the applicants' right to property guaranteed under Article 35 of the Constitution was not violated.

V. JUDGMENT

For the above-mentioned reasons, the Constitutional Court UNANIMOUSLY held on 23 March 2016 that

A. The alleged violation of the right to property be DECLARED ADMISSIBLE;

B. The right to property safeguarded by Article 35 of the Constitution was NOT VIOLATED; and

C. The court expenses be COVERED by the applicants.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

NARSAN PLASTİK SAN. VE TİC. LTD. ŞTİ.

(Application no. 2013/6842)

20 April 2016

On 20 April 2016, the First Section of the Constitutional Court found a violation of the right to property safeguarded by Article 35 of the Constitution in the individual application lodged by *Narsan Plastik San. Tic. Ltd. Şti.* (no. 2013/6842).

THE FACTS

[7-36] The applicant which is a limited liability company dealing in scrap plastics applied to the relevant administration concerning its sales value-added tax ("VAT") of which was paid by the applicant by means of deduction. The applicant informed the administration that it was dealing with manufacturing of granule from scrap plastics and asked whether the granules manufactured from scrap was subject to VAT exemption like plastic scrap. In its letter addressed by the administration to the applicant, it is stated that all kinds of raw, semi-manufactured and manufactured products having characteristics of metal, glass, plastics and paper which are in the form of bullions or turned into bullions were exempted from VAT. In line with the above-cited reply given by the administration, the applicant made its sales exempted from VAT in 2004.

Having heard that the other taxpayers were provided with an opinion different than the one submitted to it, the applicant once again asked the administration whether the plastic granule and plastic pieces were within the scope of the exemption or not. In the letter of 30/3/2005 submitted by the administration, it was informed that as the plastic pieces still retained the characteristics of scrap and wastes, they were subject to exemption; however, as the plastic granule was subjected to process, it lost the characteristics of scrap and wastes and was not within the scope of the exemption. As from this date, the applicant applied VAT in its sales of granule and continued benefitting from exemption in respect of the other plastic scrap sales in line with the letter submitted by the administration.

The administration referred the issue to the Revenue Administration upon the applicant's request for receiving opinion. The Revenue Administration specified in its letter dated 23/1/2006 that as per the General Communiqué on VAT with serial no. 97, the plastic scraps and wastes were within the scope of exemption; however, as pet bottle pieces,

plastic burrs, plastic granules and similar products obtained after plastic scraps and wastes had been processed were no longer in the form of scrap waste and turned into finished products, such materials were not subject to exemption. Thereupon, the Revenue Administration made the applicant's sales of plastic granule, burrs and similar products, which were made in 2004 and 2005 and exempted from VAT, subject to *ex officio* tax assessment without imposing any penalty in respect thereof.

The applicant thereupon brought an action before the Tax Court against these acts. In both actions concerning VAT of 2004 and 2005, the court accepted them on the grounds that "... it is obvious that value added tax could not be collected as the complainant has acted in line with the opinion submitted by the administration; and as it is not possible for the plaintiff, after this stage, to impose this tax on those who have purchased the products, the collection of this tax from the plaintiff would obviously cause an unjust decrease in its assets. Accordingly, the impugned value added tax is not found to be in compliance with the legislation".

At the appellate stage, one of these decisions concerning the year of 2004 was primarily quashed by the 9th Chamber of the Supreme Administrative Court. And subsequently at the stage of rectification of the judgment, it was upheld by the judgment dated 9 February 2010 as it was concluded that as no distinction was introduced in Article 17 of the Law no. 3065 concerning the sale of plastics, sale of plastics turned into granule upon being processed must be exempted from VAT. Accordingly, the judgment became final in favour of the applicant. The decision concerning the year of 2005 was quashed by the judgment of the 9th Chamber of the Supreme Administrative Court dated 20 January 2009 on the grounds that plastics turned into granule were not in the form of scrap for being turned into manufactured products upon being processed; that it was possible for the administration to always depart from its erroneous opinion and to take a new action; and that the erroneous opinion submitted would not remove the plaintiff's obligation (on the basis of the same reasoning of the first quashing judgment rendered by the Chamber in the case concerning the assessment of 2004). The applicant did not submit any document indicating that it made a request for rectification of the Supreme Administrative Court's judgment. The

decision rendered by the Tax Court in line with the quashing judgment was upheld at the appellate review stage and thus became final.

The applicant requested a re-trial from the court for revocation of the impugned taxes; however, its request was also dismissed.

IV. EXAMINATION AND GROUND

37. The Constitutional Court, at its session of 20 April 2016, examined the application and decided as follows:

A. The Applicant's Allegations

38. The applicant company maintained that it had consulted the relevant administration for the VAT (value added tax) inclusion or exclusion of plastic burrs and granules from plastic scraps and wastes which the applicant company sold in 2004 and 2005 and had exempted these sales from the VAT in accordance with the opinion submitted by the administration; that however, an *ex officio* process of taxation had been conducted with the claim that these sales were not indeed exempted from VAT and VAT should have been calculated over them; that the applicant company had then brought an action against the taxes, and at the ends of the proceedings concerning the taxation of 12 months within 2004, the 2nd Chamber of the İzmir Tax Court had ordered revocation of the impugned taxation for being unlawful, which had been also upheld by the 9th Chamber of the Supreme Administrative Court; that however, the decision rendered by the tax court for the revocation of the taxation of 12 months within 2005 had been quashed by the same chamber of the Supreme Administrative Court which at that time found the taxation not unlawful, thereby leading to conflicting decisions on the same matter. The applicant also asserted that many firms, notably Petkim Petrokimya A.Ş., had also exempted their sales from VAT during the relevant period but had not been subject to any *ex officio* taxation process; that neither the relevant Law nor the General Communiqués on VAT contained any provision which required plastic burrs and granules from plastic scraps and wastes of 2004 and 2005 to be subject to VAT; and that therefore the rights and principles enshrined in Articles 10 and 40 of the Constitution had been violated. It accordingly requested a retrial and revocation of

the unfairly-levied taxes which are due as well as the reimbursement of the recently-paid amounts.

B. The Court's Assessment

1. Admissibility

39. 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). The applicant maintained that Articles 10 and 40 of the Constitution had been violated on account of the conflicting judicial decisions, which must be assessed under the right to a fair trial. The applicant's complaint of being subject to *ex officio* taxation for its sales that had been exempted from tax pursuant to the legislation in force in 2005 and special notices issued by the relevant administration was examined within the scope of the right to property.

40. As the application is not manifestly ill-founded and there being no other grounds to declare it inadmissible, the alleged violations of the right to a fair trial and the right to property must be declared admissible.

2. Merits

a. Alleged Violation of the Right to a Fair Trial

41. The applicant company maintained that the discrepancy between the judicial decisions on the same matter was in breach of his rights.

42. The Ministry of Justice ("Ministry") has indicated in its observations that as the applicant's complaint concerns the outcome of the proceedings, it is for the Court to consider whether the trial was in its entirety fair; that the material and legal errors and omissions in the inferior courts' decisions could not be dealt with during the examination of individual application; that conflicting interpretation of, and conflicting case-law on, the same legal text between independent judicial tribunals of the same instance could not be *per se* considered to constitute a violation of the right to a fair trial; that in the present case, as also stated in the Supreme Administrative Court's decision, the administration changed its erroneous opinion and performed a new transaction.

43. The applicant's complaint concerns, in essence, the different conclusion reached by the same chamber of the Supreme Administrative Court in two cases arising from the same incident rather than the outcome of the trial conducted by it. In this respect, the applicant's allegations went beyond the complaint of an appeal remedy within the meaning of Article 148 § 4 of the Constitution, and therefore, it must be examined whether the discrepancies in the Supreme Administrative Court's decisions impaired the right to a fair trial.

44. Article 36 § 1 of the Constitution titled *"Right to a legal remedy"* reads 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. No court shall refuse to hear a case within its jurisdiction."*

45. Article 141 § 3 of the Constitution reads as follows:

> *"The decisions of all courts shall be written with a justification."*

46. Article 6 § 1 of the European Court of Human Rights ("Convention") titled *"Right to a fair trial"*, in so far as relevant, reads as follows:

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

47. Article 36 § 1 of the Constitution sets forth that everyone has the right of litigation either as plaintiff or defendant before the courts. As a natural consequence thereof, the rights to claim, self-defence as well as to a fair trial are safeguarded by this provision. Beyond being a fundamental right, the right to legal remedies safeguarded by this article is one of the most effective safeguards ensuring proper enjoyment of the other fundamental rights and freedoms and their protection. In this regard, it is clear that Article 141 of the Constitution, where it is set forth that any kind of court decisions is to be reasoned, must also be taken into consideration in determining the scope of the right to legal remedies (see *Vedat Benli*, no. 2013/307, 16 May 2013, § 30).

48. Principle of legal certainty or security, which is among the primary elements of a state of law, ensures a certain stability in legal situations and thereby promoting public confidence in courts. The persistence of conflicting judicial decisions may reduce the confidence in judicial system and result in judicial uncertainty (see *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, 20 October 2011, § 57).

49. However, different decisions rendered on the same matter by the same court would not *per se* amount to infringement of the right to a fair trial. It must be accepted that the probability of rendering decisions with different conclusions is an inevitable characteristic of Turkish judicial system consisting of various high courts such as the Court of Cassation, the Supreme Administrative Court, the Supreme Military Administrative Court and etc.. Protection of reasonable confidence of individuals and the principle of legal security do not entail a right requiring inalterability of case-law. As the courts' failure to pursue a dynamic and progressive approach in their interpretation would hinder reform or progress, changes in decisions do not fall foul of the proper administration of justice (see *Türkan Bal* [Plenary], no. 2013/6932, 6 January 2015, §§ 52 and 53).

50. Different nature of disputes or incidents in cases brought before courts justifies the difference in assessments in two separate decisions, and thereby, conflicting decisions rendered with regard to the same matter would be out of the question. Changes in the courts' jurisprudence fall within the judicial organs' margin of appreciation and take place when the former conclusion is not found satisfactory. However, if a conclusion different than that of the former decisions on the same matter has been reached, the courts are to provide a reasonable explanation for such difference. The role needed to be undertaken by higher courts is to offer a solution for the inconsistencies in the case-law likely to arise in judicial decisions. Nevertheless, in certain circumstances as in the interpretation of a recently-adopted legislation, it will undoubtedly take a certain period of time for the case-law to become established (see *Türkan Bal*, §§ 54-56).

51. In cases where there are different conclusions, which do not result from the subject-matter of the cases, in decisions rendered on the same

matter by the higher courts or any court resolving a dispute in its capacity as a final authority, the step needed to be taken will not be ascertaining which assessment or interpretation is accurate and should be preferred. However, the Court is entitled to make an examination as to whether the changes in the court decisions have led to a legal uncertainty and have been foreseeable by the applicant (see *Türkan Bal*, § 57).

52. In the present case, the applicant company exempted its sales of plastic granules, burrs and other scrap materials from VAT for the period of 2004 in line with the opinion (notice) of the İzmir Revenue Office, which is dated 17 February 2004. However, after the relevant administration had levied the exempted tax in opposition to the opinion previously submitted, the applicant company brought an action before the tax court. The decision issued by the incumbent tax court was at first quashed by the 9th Chamber of the Supreme Administrative Court but subsequently upheld in the process of rectification of the judgment whereby the relevant chamber concluded that as the decision of 9 February 2010 made no distinction as to the sale of plastics for which an exemption is granted in Article 17 of Law no. 3065, sale of plastics converted to granule by being processed should be exempted from VAT. Thereafter, the decision became final in favour of the applicant company.

53. Likewise, the applicant company exempted from VAT its sales of such materials other than granules of plastic, in line with the opinion (notice) of 30 March 2005 issued by the relevant administration, from this date on. However, after the relevant administration had *ex officio* levied the exempted tax in opposition to the opinion previously submitted, the applicant company brought an action before the tax court. The decision issued by the tax court was also quashed by the 9th Chamber of the Supreme Administrative Court at the appeal stage on the grounds that plastic converted into granule was not in the form of scrap and plastics were converted into granule by way of melting; that the administration could at any stage depart from its erroneous opinion and take a new step; that the erroneous opinion submitted by the administration would not change the conclusion that the incurred VAT to be collected by the plaintiff was required to be paid (same as the grounds of the quashing judgment rendered in the case of 2004). The applicant company did not

file a request for rectification of the judgment. In the appeal review of the decision issued by the tax court in line with the quashing judgment, the relevant Chamber upheld, by majority, the first instance decision stating that the decision issued in line with the quashing judgment could be reviewed only in terms of the grounds for quashing and the decision in question appeared to be in compliance with the quashing judgment. Thereafter, the decision became final.

54. It has been accordingly observed that the same Chamber of the Supreme Administrative Court made two different interpretations as to the question whether the applicant company's sales of 2004 and 2005, which were of the same nature, were subject to VAT exemption.

55. Variations in judicial decisions are favourable in that they are capable of ensuring adaptation of legal dynamism and courts' approaches with the developments taking place. However, in cases where chambers of the higher courts, which are indeed expected to ensure uniformity in practice, reach different conclusions in similar cases without providing a satisfactory ground, it would give rise to variable and contradictory consequences. This would be fall foul of the principles of legal certainty and foreseeability. Besides, if such a perception becomes established in the society, then the expected confidence by individuals in judicial system and court decisions may be impaired (see *Türkan Bal*, § 64).

56. By an amendment of 25 December 2003 to Law no. 3065, the sale of scrap metal, plastic, paper, cullet and glass wastes have been exempted from VAT. However, the relevant Law does not make any determination as to the materials which would be considered as scrap and waste, and the General Communiqué on VAT no. 86 and the General Communiqués issued et seq. define in general what scrap and waste materials are but do not elaborate on the matter. Therefore, taxpayers have applied to the tax administrations about the nature of the materials which fell under exemption, and variable information was provided to the taxpayers by the different administrations. It is decided by virtue of the General Communiqué no. 97 that was promulgated in the Official Gazette of 31 December 2005 that the processed material shall be considered to fall under the scope of scrap and waste. As from that date, sale of processed scrap and waste plastics have been excluded from the exemption.

57. It is evident that during the period when the determination as to the scope of the scrap materials falling under the exemption was made neither by the relevant law nor the General Communiqués, it would take time for the relevant judicial organs to make such determination and for the decisions rendered in this respect to become established; and that during such a period, different decisions might be issued. As a matter of fact, both judgments whereby the Supreme Administrative Courts reached different conclusions were rendered by majority and with dissenting opinion. Regard being had to these two judgments rendered by the relevant Chamber of the Supreme Administrative Court, it has been observed that both of them had sufficient and plausible grounds; and that the conclusion reached in the judgment which was against the applicant company also complied with the General Communiqué no. 97.

58. The relevant chamber of the Supreme Administrative Court rendered two different judgments, adopting two different interpretations, with respect to two cases filed by the same applicant concerning its sales of 2004 and 2005 due to the gap in the legislation as well as practice. In consideration of these judgments, the Court has observed that there is no other judgment other than those of the applicant company which were rendered with respect to the 2004 and 2005 sales of granule plastics and other scrap materials and which lacked legal certainty; that therefore, these judgments do not have a bearing on individuals so as to undermine their confidence in legal certainty, which would fall foul of the principles of legal certainty and foreseeability and have an effect limited to the applicant company.

59. Besides, the plaintiffs who consider the said judgement unlawful have the opportunities to persuade the relevant tax courts so as to make them reinstate their original decisions in the face of the Chamber's decision as well as to ensure discussion of the disputed decisions before the Assembly of Tax Courts and elimination of the contradiction resulting from conflicting decisions. Moreover, pursuant to Article 40 of the Law no. 2575 on the Council of State, which is dated 6 January 1982, those concerned may apply to the Council of State for unification of the conflicting case-law, which is a remedy whereby discrepancies among decisions may be eliminated.

60. Regard being had to the facts that two different judgments were rendered by the same Chamber in respect of the applicant on account of the provisions of law which were not sufficiently clear and precise at the relevant time as well as of administrative practices; that both judgments rendered in order to remedy the gap in the legislation through case-law provided satisfactory justification; that different judgments on the same matter were rendered merely in the applicant's case, which has not therefore reached the extent that would impair the legal certainty; and that there are mechanisms which are capable of eliminating the discrepancies between these two judgments, it has been concluded that the judgments have not created any legal certainty.

61. For these reasons, the Court has found no violation of the applicant's right to a fair trial safeguarded by Article 36 of the Constitution.

b. Alleged Violation of the Right to Propety

62. The applicant company maintained that the relevant tax office *ex officio* levied tax on its sales which the applicant had exempted from VAT in accordance with the opinion submitted by the administration; that many firms notably Petkim Petrokimya A.Ş. had exempted their sales from VAT at the relevant time but these firms had not been subject to *ex officio* taxation; and that the relevant Law and General Communiqués on VAT did not contain any provision to the effect that plastic burrs and granules from plastic scraps and wastes of 2004 and 2005 would be subject to VAT. The applicant accordingly claimed that its relevant rights had been violated.

63. The Ministry did not submit any observations under the right to property.

64. Article 35 of the Constitution, titled *"Right to property"*, reads as follows:

> *"Everyone has the right to own and inherit property.*
>
> *These rights may be limited by law only in view of public interest.*
>
> *The exercise of the right to property shall not contravene public interest."*

65. Article 13 of the Constitution, titled *"Restriction of fundamental rights and freedoms"*, reads 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. Article 1 of the Additional Protocol (no. 1) to the Convention, titled *"Protection of property"*, reads as follows:

> *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*

67. Article 73 § 3 of the Constitution, titled *"Duty to Pay Taxes"*, reads as follows:

> *"Taxes, fees, duties, and other such financial obligations shall be imposed, amended, or revoked by law."*

68. The right to property is enshrined with similar wording in both Article 35 of the Constitution and Article 1 of the Additional Protocol no. 1 to the Convention. Both provisions embody three rules. The first sentence of the Convention affords everyone the right to peaceful enjoyment of his possessions whereas the Constitution defines the right to property in a broader sense. The second sentences of both provisions set forth the circumstances under which persons may be deprived of their property or restrictions may be imposed on their property (see *Necmiye Çiftçi and Others*, no. 2013/1301, 30 December 2014, § 46).

69. The third sentences of both provisions are related to the control of, or making arrangements as to, the use of property. Article 35 *in fine* of the

Constitution embodies a general principle to the effect that the exercise of the right to property cannot be contrary to the public interest. Article 1 § 2 of the Additional Protocol no. 1 to the Convention acknowledges that the Contracting States are entitled to "control the use of property" in line with the public interest by reserving the rights to regulate the ownership in the public interest and to apply relevant laws deemed necessary with respect to taxes, other contributions and collections of fines. Besides, several articles of the Constitution entitle the State to control the use of property or to regulate property when necessary (see *Necmiye Çiftçi and Others*, § 47).

70. According to the European Court of Human Rights ("the ECHR"), the second and third rules are special aspects of the first rule, which enunciates the principle of the peaceful enjoyment of property, and it is therefore necessary to construe the second and third rules in the light of the general principle enunciated in the first rule (see *James and Others v. the United Kingdom* [GC], no. 8793/79, 21 February 1986, § 37).

71. Regulations intended for determining, altering, and ensuring payment of, taxes and similar liabilities as well as social security premiums and contributions are worded separately in the Convention and laid down in separate provisions in the Constitution. However, these legal arrangements must be, as being in general intended for regulating and controlling the use of property, examined not under a separate heading but within the scope of the State's power to regulate the use of properties or control the use of property in the public interest (see *Arif Sarıgül*, no. 2013/8324, 23 February 2016, § 50). As regards the interferences with the right to property by way of taxation, Article 1 § 2 of the Additional Protocol no. 1 to the Convention affords a wide power with respect to taxation policies to the States. It is accepted that as per this provision, the States have, in taxation-related measures, a margin of appreciation wider than that in the other spheres (see *Traves v. Italy*, no. 15117, 16 January 1995).

72. Article 13 of the Constitution embodies general principles as to the restriction of fundamental rights and freedoms whereas Article 35 sets out special principles as to the restriction of the right to property. Article 73 of the Constitution concerning the liability to pay taxes contains special

provisions as to the constitutional constraints of the interferences with the said right by way of taxation. In that case, as required by holism of the Constitution, the relevant provision of the Protocol as well as Article 35 of the Constitution in conjunction with Articles 13 and 73 thereof must be taken into consideration in the examination of the present case. Accordingly, the boundaries which will ensure the lawfulness of the taxation-related interference with the right to property will be set, and thereby the said right will be sufficiently and effectively protected within the framework of the constitutional provisions (see *Türkiye İş Bankası A.Ş.* [Plenary], no. 2014/6192, 12 November 2014, § 40).

73. In parallel with the requirement set forth in Articles 13 and 35 of the Constitution –the right to property may be restricted only by law– Article 73 § 3 of the Constitution where the principle of lawfulness of taxation is set forth is designed to ensure "certainty" and "foreseeability" of the tax-related obligations incumbent on taxpayers and thereby, ensuring the legal certainty for taxpayers. These criteria are also considered as sub-criteria of the requirement that the right to property may be restricted only by law. The certain and foreseeable natures of the taxation entail that the related provisions be "precise and comprehensible". It may be said that Article 73 § 3 of the Constitution affords protection at a level higher than the Convention against the interferences with the right to property by way of taxation. This has been elucidated by the Court which has noted *"The principle of lawfulness of taxation requires the inclusion of the restrictions which would preclude arbitrary practices based on discretion and also entails that introduction, alteration or revocation of arrangements as to tax-related obligation may be made only by law. Accordingly, issues such as taxpayers, tax assessment, ratio, imposition, accrual, collection of taxes, sanctions to be imposed and statutory time-limit are to be regulated by law"* (see the Court's judgment, no. E.2009/63, K.2011/66, 14 April 2011). In this sense, as per the Constitution, the interference with the right to property by way of taxation must be certainly based on a law (see *Türkiye İş Bankası A.Ş.*, § 42).

74. Articles 35 and 13 of the Constitution set forth that the right to property may be restricted only by law in the public interest. The ECHR broadly interprets the conditions prescribed in the law, namely

the lawfulness, and accordingly acknowledges that the principles laid down through case-law in the established judicial decisions may also satisfy the lawfulness requirement (see *Malonei v. the United Kingdom*, no. 8691/79, 2 August 1984, §§ 66-68), whereas the Constitution setting forth that any restrictions may be imposed definitely by law, thus affords a protection broader than the Convention (see *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 31).

75. Along with the existence of the law, its wording and implementation must also involve legal certainty to an extent that would enable individuals to foresee the consequences of their behaviours. In other words, the quality of the law is also of importance for ascertaining whether the lawfulness requirement has been satisfied (see *Necmiye Çiftçi and Others*, § 56). Principle of legal certainty involves sub-principles which are namely "accessibility" and "foreseeability". The former subprinciple entails publicity, that is to say, publication of the relevant legal arrangement (see *Spaček, s.r.o. v. the Czech Republic*, no. 26449/95, 9 November 1999, §§ 56-61) while the latter requires that in case of implementation of the legal rule, the consequences thereof can be foreseen (see *Hentrich v. France*, no. 13616/88, 22 September 1994, § 42).

76. In this sense, as required by the principle of lawfulness of taxation, the laws underlying the interferences through taxation must be clear, precise and reasonably definite in a way that would enable those concerned to easily access as well as to understand also by way of receiving professional assistance when necessary with a view to determining their behaviours (see *Youtube Llc Corporation Service Company and Others* [Plenary], no. 2014/4705, 29 May 2014, § 56). However, undoubtedly, the laws cannot be expected to have absolute precision. It is therefore accepted that legal arrangements may employ somewhat imprecise wording, which could be eliminated through its interpretation in practice (see the Court's judgments no. E.2009/9, K.2011/10, 16 June 2011; and no. E.2013/64, K.2013/142, 28 November 2013) (see, for the ECHR's judgment in the same vein, *Barthold v. Germany*, no. 8734/79, 25 March 1985, § 47). In such cases where the content and scope of the legal arrangement have been clarified through sub-arrangements or case-law; in other words, where certainty has been ensured for individuals, it may

be said that the criterion of foreseeability has been satisfied (see *Türkiye İş Bankası A.Ş.*, § 53).

77. In the present case, sales of metal, plastic, paper, glass scraps and wastes as well as sales of salvage goods, which were previously subjected to withholding, have been exempted from VAT by Article 14 § 4 (g), which was amended on 25 December 2003, of Law no. 3065. The Law does not provide any determination as to the materials to be considered as scrap and waste. In Section F of the General Communiqué no. 91, it is set forth that scope and nature of the scrap and waste materials exempted from taxation shall be determined according to the explanations provided in the relevant General Communiqués previously issued. In the Section titled *"Scope of Scraps Subjected to Withholding"* of the General Communiqué on VAT no. 86, scrap is defined as follows *"any kind of metal, plastic, paper and glass wastes; their mixtures which are in the form of waste; and any kind of manufactured, semi-manufactured and raw materials in the form of metal, plastic, paper and glass which cannot be re-used in exactly the same way or by means of repairment"*. This definition has a broad scope to the extent that would cover manufactured, semi-manufactured and raw materials. As a matter of fact, following the amendment made by Law no. 5228 to Article 17 of Law no. 3065, it has been indicated that wastes and scraps including the blocks formed by scrap metal are covered by the exemption; and that metal scraps and wastes having undergone a significant process shall also be exempted from VAT.

78. This situation has led the taxpayers to apply to relevant administrations for seeking information (special notice) about the materials falling into the scope of scrap and waste. As a matter of fact, the applicant company filed an application with the administration concerning its sales which were subjected to withholding and VAT and asked the administration whether granules from plastic waste would be exempted from VAT like plastic wastes. In the special notice of 17 February 2004, which was addressed to the applicant company, the administration indicated that following the amendment to Law no. 5035, sales of any kind of raw, semi-manufactured and manufactured metal, glass, plastic and paper materials in block were exempted from VAT; and that in the same vein, sales of plastic wastes formed into granule

by being processed were to be excluded from VAT. In line with the administration's reply, the applicant company made its sales of 2004 by exempting them from VAT.

79. Having heard that the administration had submitted different opinion to other taxpayers on the same matter, the applicant company once again asked the administration whether plastic granules and broken plastics were covered by the exemption. In the special note of 30 March 2005, the administration noted that broken plastics were subjected to exemption for being still in the form of scrap and waste but plastic granules were not as they were not in the form of scrap and waste for having been processed. From then on, the applicant company subjected its sales of granules to VAT but continued to exempt its sales of plastic wastes from VAT in accordance with the special notice.

80. Following the applicant's request for an opinion, the administration referred the matter to the Revenue Administration which noted in its letter of 23 January 2006 that according to the General Communiqué no. 97, plastic scraps and wastes were under exemption but broken plastics, plastic burrs, plastic granules and similar materials, which were obtained by processing scraps and wastes, were not covered by the exemption for being no longer scrap or waste but manufactured products. The Revenue Administration accordingly *ex officio* levied taxation, without imposing any fine, on the applicant company's 2004 and 2005 sales of plastic granules, burrs and similar types of products which had been exempted from VAT.

81. The applicant company brought actions against these transactions before the tax court which accepted both actions concerning 2004 and 2005 sales, indicating that "*… as it has been clear that value added tax was not paid in line with the opinion submitted by the administration and as it is impossible for the plaintiff to levy value added tax on its previous sales, it would constitute an unjust decline in its assets if the impugned amount is collected from the plaintiff. It has been therefore considered that levying value added tax in the present case is not lawful*".

82. The action concerning the 2004 sales was initially quashed by the 9th Chamber of the Council of State but subsequently upheld, by its

judgment of 9 February 2010 rendered upon the request for rectification of the judgment, on the ground that sales of plastics transformed into granules by being processed must be also exempted from VAT as Article 17 of Law no. 3065 did not make any distinction as to the sales of plastic materials that are subjected to exemption. Thereafter, the judgment became final in favour of the applicant company. On the other hand, the action concerning the 2005 sales was quashed by the 9th Chamber of the Council of State, by its judgment of 20 January 2009, on the grounds that plastics transformed into granule was no longer scrap as they were processed and thereby became a finished product; that the administration was entitled to change its erroneous opinion and to issue a new one at any time; that the administration's erroneous opinion would not change the conclusion that the applicant company was to pay the amount of value added tax that should have been collected by it (the same ground with that of the Chamber's first quashing judgment in the action of 2014 tax imposition). The applicant did not submit any document indicating that it requested rectification of the Chamber's judgment in the action concerning the sales of 2005. In the appeal review of the decision rendered by the tax court in line with the Chamber's quashing judgment, the Chamber by majority upheld the decision as the first instance decision which was issued in accordance with the quashing judgment could be reviewed only in terms of whether it was compatible with the grounds of quashing. Thereafter, the decision became final.

83. The legislator is entitled to determine what will be subjected to and exempted from taxation within the framework of Article 73 of the Constitution. Unless the constitutional boundaries are overstepped, it is not possible to interfere with the exercise of this authority. As the law text could not contain every detail concerning an issue, the legislator may, after setting the general framework by law, allow -through regulatory instruments of subsidiary nature- for elucidation and regulation of technical details concerning the implementation of the law. In this sense, the Ministry of Finance governs the practice as to the implementation of the Law on Value Added Tax through the General Communiqués.

84. Pursuant to the relevant legislation, taxpayers submit their statements on VAT, which has been incurred as a result of the transactions

performed within the month, in the following month and accordingly make payments on monthly basis. The General Communiqué on VAT no. 97, which was relied on by the administration in *ex officio* levying taxation for the applicant company's 2004 and 2005 sales, took effect upon being promulgated in the Official Gazette dated 31 December 2005. In this Communiqué, it is clearly noted that broken plastics, plastic burrs, plastic granules and similar products obtained through processed plastic scraps and wastes are not covered by the VAT exemption as they are no longer in the form of scraps and wastes and have become a product used as a raw material in the manufacturing sector.

85. Until that date, there was no clarification as to the definition of plastic scrap by the legislator, the Council of Ministers or the Ministry of Finance other than the definition provided for in the General Communiqué no. 86 where scrap is defined as follows: *"any kind of metal, plastic, paper and glass wastes; their mixture in the form of scrap; and any kind of manufactured, semi-manufactured and raw materials in the form of metal, plastic, paper and glass which cannot be re-used in exactly the same way or by means of repairment"*. This definition was in force until the explanation in General Communiqué no. 97 which reads as follows: *"broken plastics, plastic burrs, plastic granules and similar products obtained through processed plastic scraps and wastes shall not be covered by the VAT exemption as they are no longer scraps and wastes and have become a product used as a raw material in the manufacturing sector"*.

86. In consideration of the relevant judgments rendered by the Council of State, it has been observed that there are no judgments, other than those concerning the applicant company's case, as regards the years of 2004 and 2005 during which there was no detailed arrangement as to the VAT exemption to be applied to plastic scraps and wastes. It has been further observed that the administrations implementing tax laws provided different replies to the taxpayers' requests of 2004 and 2005, which sought for opinion on this matter.

87. The applicant company asked the administration whether its sales would be exempted from VAT due to lack of sufficient clarity in the legislation and accordingly exempted its sales from VAT. When it

subsequently became aware that the administrations submitted different opinions on the same matter, the applicant company once again applied to the administration and requested explanation (special notice). In line with both replies given by the administration, the applicant company either exempted its sales from taxation or partially subjected them to taxation.

88. The General Communiqué on VAT no. 97, which was relied on by the administration in *ex officio* levying taxation for the applicant company's 2005 sales, took effect upon being promulgated in the Official Gazette dated 31 December 2005. There is no other legal arrangement indicating that the applicant's sales were not covered by the tax exemption. The legal arrangements forming a basis for 2005 transactions do not clearly set forth that the applicant's sales could not benefit from VAT exemption; but to the contrary, provide for that all scraps and wastes are covered by the exemption without making any distinction. The applicant company accordingly exempted its sales from VAT or partially subjected them to VAT in line with the opinions submitted by the administration.

89. Besides, it would be in breach of the principle of lawfulness of the interference with the right to property enshrined in Articles 13, 35 and 73 of the Constitution to interpret and apply the provision -laid down in Article 369 of the Tax Procedural Law no. 213 and dated 4 January 1961 and reading as follows *"in cases where the competent authorities provide erroneous explanation in written to the taxpayer or where any case-law concerning the implementation of a provision has changed, no tax penalty shall be imposed and no default interest shall be calculated"*- to the effect that it constitutes a legal basis for the *ex officio* taxation upon the alteration of the administration's opinion as to the matters lacking a legal basis which are comprehensible and foreseeable.

90. Moreover, as noted in the judgments of the Council of State, VAT is a tax which is transferred from the production stage of economic chain to the subsequent stage and which is finally incurred by the consumer, buyer or service beneficiary. As the amount of value added tax accrued at every stage is paid by the relevant manufacturer or the seller to the tax office, retroactive tax imposition therefore leads the taxpayer to cover the

relevant tax as there is no other party that may subsequently incur the relevant amount due to the system in force. (see the judgment of the 11th Chamber of the Council of State, no. E.1997/785, K.1998/3508 and dated 19 October 1998).

91. In the present case, *ex officio* tax imposition on the applicant's transactions, which were indeed performed in line with the administration's opinion upon the expiry of the taxation period on the basis of a legal arrangement subsequently taking effect, is not a practice which the applicant company could reasonably foresee. Therefore, the applicant cannot be expected to foresee that its sales would be subjected to taxation.

92. For the reasons explained above, the *ex officio* tax imposition, which was retroactively performed for the period of 2015 on the basis of General Communiqué no. 97 promulgated in the Official Gazette dated 31 December 2005, did not involve the reasonable level of foreseeability and clarity required pursuant to the principle of lawfulness of taxation enshrined in Article 73 of the Constitution; that the lack of clarity in the legal provisions could be eliminated neither through administrative practices and arrangements of subsidiarity nature nor through judicial case-law; and that therefore, the taxation imposed on the applicant for its sales of 2015 lacked any foreseeable and clear legal basis. It has been accordingly concluded that the applicant's right to property safeguarded by Article 35 of the Constitution was violated.

Mr. Kadir ÖZKAYA agreed with the majority but on a different ground.

3. Application of Article 50 of Code no. 6216

93. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, reads as follows:

> *"(1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled...*

(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."

94. The applicant requested a retrial and revocation of the unjust outstanding taxes as well as reimbursement of the amount already paid.

95. In the present case, it has been concluded that there was a violation of the right to property.

96. It has been accordingly considered that as there is legal interest in conducting a retrial for redress of the consequences of the violation of the applicant's right to property, a copy of the judgment be sent to the İzmir 2nd Tax Court to conduct a retrial with a view to redressing consequences of the violation resulting from *ex officio* tax imposition, upon the expiry of the taxation period, on the basis of the provisions of a legal arrangement which subsequently took effect.

97. The court fee of 198.35 Turkish Liras (TRY), which is calculated over the documents in the case file, must be reimbursed to the applicant.

JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 20 April 2016 that

A. 1. The alleged violation of the right to a fair trial be DECLARED ADMISSIBLE;

2. The alleged violation of the right to property be DECLARED ADMISSIBLE;

B. 1. The right to a fair trial safeguarded by Article 36 of the Constitution was NOT VIOLATED;

2. The right to property safeguarded by Article 35 of the Constitution was VIOLATED;

C. A copy of the judgment be sent to the İzmir 2nd Tax Office for a retrial in order to redress the consequences of the violation of the right to property;

D. The court fee of TRY 198.35 be REIMBURSED TO THE APPLICANT;

E. The payments 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; and

F. A copy of the judgment be SENT to the Ministry of Justice.

CONCURRING OPINION BY JUSTICE KADİR ÖZKAYA

1. The applicant company maintained that the principles and rights enshrined in Articles 10 and 40 of the Constitution had been violated on the grounds that although sales of scraps and wastes such as broken plastics, burrs and granules were not subjected to VAT for the years of 2004 and 2005 and therefore no VAT was collected from the buyers in line with the opinions submitted by the Revenue Office, the administration *ex officio* levied taxation on these sales, upon the expiry of the taxation period, considering that these sales had been indeed subjected to taxation; that in the actions brought for revocation of the taxation subsequently imposed, different decisions were rendered; and that the action concerning the taxation levied with respect to 2005 sales was dismissed.

2. As laid down in the positive taxation law, the acts which have not been reported by taxpayers but found to be subjected to taxation by tax administration according to taxation laws may be at any time made subjected to taxation within the prescribed time-limit set in the relevant

laws. There may be therefore disputes raised by the parties concerned. The competent authority to resolve such dispute is the tribunals exercising tax jurisdiction.

3. In Article 1 § 1 of the Law on Value Added Tax dated 25 October 1984 and no. 3065, where the transactions to be subjected to value added tax are listed, it is set forth that sales and services performed within the framework of commercial, industrial and agricultural activities and self-employment activities shall be subjected to taxation. Article 2 of the same Law defines the term "sale", and in Article 8 § 1 (a), it is stated that in case of the sale of products and the performance of any service, those that are performing these transactions shall be liable to pay taxes. Article 17 of Law indicates certain circumstances which are exempted from taxation; in other words, which fall outside the scope of taxation. In Article 29 § 1, it is provided for that taxpayers may deduct the related taxes listed in this provision from the value added tax which is calculated over their acts subjected to taxation, unless otherwise is specified in this Law. In subparagraph 3 of the same provision, it is further laid down that the right of deduction may be exercised within the taxation period when the relevant documents are recorded in statutory books, provided that it will be within the calendar year in which the relevant transaction giving rise to taxation has been performed.

4. Value added tax is one of the taxes levied on expenses. It is imposed at every stage when an act performed by the production, distribution and service sectors is transferred to another, and taxes undertaken as a result of enterprise earnings are deducted from taxes owed to State treasury. It may be accordingly said that value added tax is a type of taxation which is based on the ability of shifting as well as of deducting the taxation amount paid during the good or service procurement, by way of tax shifting, from the taxation amount to be collected by the State treasury. It is thereby envisaged that the VAT be levied on the ultimate consumers. In this sense, for instance in the case of a sale, provider of the good, who is designated as the person liable for tax, shifts its liability to pat the relevant tax amount -calculated on the basis of the price of goods- to the purchaser; in other words, the provider collects both the price of goods and the value added tax from the purchaser. At the end

of each taxation period, taxpayers deduct the amount of value added tax -which they have paid or owed by virtue of the purchased and imported goods and procured services and which are documented by invoices or similar instruments- from the amount of value added tax which they have received or will receive -by virtue of the goods delivered or services performed by them- from their customers. They then state the remaining amount before the tax office and accordingly pay it. As the amount of taxation to be deducted has arisen at earlier stages and has been already transferred to the State treasury, tax deduction mechanism precludes repeated taxation on goods and services. This cycle goes on until the stage when the ultimate consumer comes into play. In other words, tax is covered by the ultimate consumer.

5. It is of importance for the applicability of value added tax to secure the means of tax shifting and deductions within its legal framework, which ensures both taxpayer and the other party of the legal transaction to shift the tax, thereby exercising the right to deduct.

6. On the other hand, the legislator is entitled to exempt certain acts from taxation. In case of a tax exemption, there is no amount of taxation which may be shifted (which may be collected) by the payer of the value added tax to the other party of the legal transaction. Therefore, in such cases, the taxpayer cannot collect any amount of taxation from the other party by indicating the relevant amount in the invoice due to exemption of the act from taxation, and the counter party of the legal transaction cannot also make any deduction from taxes that it has collected by virtue of its sale of products and provision of service. If a sale is not among the circumstances which provide for an exemption from value added tax, it will be undoubtedly subjected to taxation pursuant to Article 1 of the Law.

7. Article 17 § 4 (g) of Law no. 3065, which was amended by Article 8 of the Law no. 5035 on Amendment to Certain Laws dated 25 December 2003 and no. 5035 and took effect by 2 January 2004, reads as follows:

> *"Sale of gold bullion, dore gold bullion, silver bullion, foreign exchange, money, tax stamp, transaction stamp, valuable paper, share certificate, bond as well as metal, plastic, paper and glass wastes and scraps"*

8. The applicant, which is liable to pay value added tax, noted that it had requested a special notice in order to learn whether sales of plastics turned into granules by being processed would be exempted from value added tax by virtue of the amendment made to Law no. 5035; and that it did not levy value added tax on its sales in accordance with the special notice of 17 February 2004 which was submitted by the tax administration and indicated that sales of plastic granules were covered by the exemption from VAT.

9. The above-cited Article 17 § 4 (g) of Law was amended once again on 31 July 2004 by Law dated 16 July 2004 and no. 5228, which would take effect by 1 August 2004. The new wording of provision is as follows:

> *"Sale of gold bullion, silver bullion, gems (diamond, ruby, emerald, topaz, sapphire, chrysolite, pearl, cubic virconia), foreign exchange, money, tax stamp, valuable papers, share certificate, bond as well as metal, plastic, rubber, gum elastic, paper, glass wastes and scraps (including bullions from scrap metal)."*

10. In the letter of the Ministry of Finance dated 7 December 2004 and no. 0-55/5517-1850/58189, which is specified in the application form, it is stated that sales of broken plastics -which have been recycled by processing plastic scraps and wastes in the factory and which are used as a raw material in manufacturing of plastic-based materials- cannot be considered to be covered by the exemption pursuant to Article 17 § 4 (g) of Law no. 3065 as they are no longer in the form of a scrap or waste and have already become a product used in the manufacturing sector as a raw material. Making a reference to this letter, the applicant company applied to the tax administration on 16 March 2005 and accordingly requested elimination of discrepancy among the practices of different revenue offices and asked whether VAT exemption would apply to its sales.

11. In its special notice of 30 March 2005, the Revenue Office stated that broken plastics would not be subjected to value added tax, whereas plastic granules would be subjected to value added tax at the ratio of 18% without applying no withholding.

12. The applicant company maintained that it had exempted its sales from value added tax in line with this special notice; and that although it had acted in line with the relevant administration's opinion, the tax office *ex officio* levied tax on the ground that burrs and granules from plastic scraps and wastes, which it sold in 2004 and 2005, had not been exempted from, and should have been subjected to, VAT. Besides, according to the applicant, taxation was levied on its sales without any distinction as to the type of materials such as plastic, scrap plastic burrs and plastic granules.

13. In this sense, it must be primarily and notably taken into consideration that the tax office only levied value added tax on the applicant company but did not impose any fine for loss of tax.

14. This situation results from the tax administration's acknowledgment that it had misguided the applicant company through its special notices, pursuant to Article 369 of the Tax Procedural Law no. 213 and dated 4 January 1961, which was in force at the relevant time and which provides for that no fine for loss of tax may be imposed "in cases where the competent authorities have provided the taxpayer with erroneous explanation in written" or "in cases where the competent authorities have changed their opinions as to the manner in which a provision would apply or where any related case-law has been altered".

15. Article 369 of the Tax Procedural Law no. 213 was amended by Article 14 of Law no. 6009 and is accordingly worded as follows by 1 August 2010:

> *"No tax penalty shall be imposed and default interest shall be levied in cases where the competent authorities have provided the taxpayer with erroneous explanation in written or in cases where any case-law as to the manner in which a provision would apply has altered.*
>
> *In cases where the competent authorities have changed their opinions as to the application of a certain provision by way of making a change in the general communiqué or circular, the general communiqué or circular on the new opinion shall take effect as of the date of its issuance and shall not apply retroactively. However, this provision shall not apply to general communiqué or circular which has been revoked by the judicial authorities."*

16. Both the former and new wordings of Article 369 reveal that the law-maker stresses that any confusion caused by the administration or any change in its opinion would not preclude the accrual of principal tax amount. According to this provision, if a taxpayer faces a situation that is unforeseeable for him due to an explanation by the relevant administration or a change in the case-law, he will be subject to neither a tax penalty nor a default interest. The law-maker has accordingly indicated that the circumstances where the taxpayer or the tax responsible encounters an unforeseeable situation would not preclude accrual and collection of the principal tax amount. The provision -whereby it is accepted that the tax administration may unintentionally confuse taxpayers concerning the interpretation of a provision of law or may alter its previous caselaw- by itself points out the unforeseeable consequences to the detriment of taxpayers. In the present case, if the applicant company had not been misguided by virtue of the administration's explanation or the previous case-law had remained in force, it would have fulfilled its tax-related obligation within the prescribed period and thereby paid the principal tax amount. In other words, it would not have performed any transaction giving rise to a penalty as well as have been imposed a default interest due to the on-time accrual of the relevant tax amount. Therefore, unforeseeable circumstances due to a confusion or an opinion change by the administration do not preclude seeking the principal tax amount but only hinder imposition of a penalty or calculation of a default interest.

17. In consideration of the administrative arrangements concerning the sales made by the applicant company, it appears that in the General Communiqué no. 86 on Value Added Tax, which was promulgated in the Official Gazette dated 5 July 2002 and no. 24826, it is set forth that within the meaning of value added tax withholding, the term of scrap means any kind of metal, plastic, paper and glass scraps and their mixtures in the form of scrap as well as any kind of raw, semi-finished and finished products having the characteristics of metal, plastic, paper and glass materials which could not be used in accordance with their intended purpose exactly in the same manner or by way of being repaired.

18. In the General Communiqué no. 91 on Value Added Tax which was promulgated in the Official Gazette dated 28 February 2004 and no.

25387 following the amendment made by Law no. 5035 to Article 17 § 4 (g) of Law, it is merely indicated that the sales of scrap or waste metal, plastic, paper and glass materials to be made by 1 January 2004 would be exempted from VAT. There is no definition of scrap in this provision.

19. In the General Communiqué no. 97 on Value Added Tax which was promulgated in the Official Gazette dated 31 December 2005 and no. 26040, it is set forth that Article 17 § 4 (g) of the relevant Law was amended by Laws no. 5035 and 5228; and that sales of plastic scraps and wastes are not subjected to VAT, which subsequently reads as follows:

> *"However, broken plastics, plastic burrs, plastic granules and similar types of products -which have been recycled by processing plastic scraps and wastes and which are used as a raw material in manufacturing of plastic-based materials- cannot be considered to be covered by the exemption provided for in Article 17 § 4 (g) of the Law on VAT…"*

20. In the Court's judgment rendered by majority, it was concluded that the applicant company's right to property safeguarded by Article 35 of the Constitution had been violated on the grounds that the legal basis of the impugned interference could not ensure foreseeability and clarity; that the lack of clarity in the legal provisions could be eliminated neither through administrative practices and arrangements of subsidiarity nature nor through judicial case-law; and that therefore, the taxation imposed on the applicant for its sales of 2015 lacked any foreseeable and clear legal basis.

21. As expressed in doctrine and various judgments of the Council of State, VAT is a tax which is transferred from the production stage of economic chain to the subsequent stage and which is finally incurred by the consumer, buyer or service beneficiary. As the amount of value added tax accrued at every stage is paid by the relevant manufacturer or the seller to the tax office, retroactive tax imposition therefore leads the taxpayer to cover the relevant tax as there is no other party that may subsequently incur the relevant amount due to the system in force.

22. Accordingly, as it is the case also in the present case, it is undoubted that there was an interference with the applicant's right to property.

23. The fact that taxation must have a legal basis is undoubtedly a deep-rooted constitutional principle. In terms of tax law, the taxation statute is the principal resource with the most binding effect following the Constitution. The constitution-maker articulates this principle in Article 73 § 3 of the Constitution as follows: *"Taxes, fees, duties, and other such financial obligations shall be imposed, amended, or revoked by law"*. In both the Court's judgments and in doctrine, it is acknowledged that the principle of lawfulness of taxation requires not only that tax and similar types of financial liabilities may be imposed by law but also that the relevant legislation must also include the act underlying the taxation, tax base, rate, amount, deductions, exemptions and derogations, the manner of assessment, accrual and collection of taxes, the relevant sanctions, statutory prescription and similar issues (see the Court's judgments no. E.1977/107 K.1977/131, 29 November 1977; and no. E.2003/33 K.2004/101, 15 July 2004).

24. As required by the wide interpretation of the principle of lawfulness, it is of importance that taxation must have a legal basis. This requirement is so important that the constitution-maker has conferred the relevant administration with the authority to make arrangements as to taxation in very limited area, designated the Council of Ministers as the organ to exercise this power and clearly indicated the limits of this power in the Constitution. Reserving the legal arrangements as to the state of emergency as well as the state of martial law, Articles 73 § 4 and 167 § 2 of the Constitution point out the limited power conferred upon the administration in the field of taxation. The administration does not have any authority such as to impose or lift taxation and to set the scope of taxation exemptions and derogations, except for the exceptional circumstances in time of state of emergency and martial law. Besides, as also indicated in the judgment, Articles 13 and 35 of the Constitution putting an emphasis on the condition of lawfulness in terms of the restrictions imposed on the right to property must also be taken into consideration in the examination of individual applications.

25. Besides, there are, in the tax law, also certain auxiliary resources which do not introduce a new taxation norm and are used for providing an insight into the existing norms. The administration's regulatory

acts such as general communiqué, special notice and circular fall into this category. In the "Regulation on Fulfilling Taxpayers' Requests for Explanation" which took effect after being promulgated in Official Gazette dated 28 February 2010 and no. 27686 on the basis of Article 413 of Law no. 2013, the written opinions submitted by the competent authorities to the taxpayers and tax responsible parties in reply to the latter parties' requests for a written explanation on any disputed issue concerning taxation, which is not clear for them, are defined as special notice. Moreover, the General Communiqué no. 400 on Tax Procedural Law also embodies legal arrangements as to the special notices.

26. It has been observed that in doctrine and in judicial decisions, special notices are regarded as the auxiliary resources of tax law; addressed solely to the taxpayer concerned and are not binding for other taxpayers and judicial organs; intended only for obtaining the administration's opinion or ensuring the administration to reveal its opinion and cannot be a subject-matter of an annulment action in the administrative jurisdiction for not being an administrative act which is final and non-executable. Besides, nor are taxpayers and responsible parties obliged to act in line with the special notices that they have received.

27. The information so far provided reveals that in consideration of the significance of the principle of lawfulness in tax law, merely the provisions of law may be taken into consideration in the test of lawfulness, and administrative acts namely special notices -whereby the administration's opinions on the relevant taxpayer's status are reflected and which are not even in the form of an action of final nature, which is needed to be executed- cannot be taken into consideration in this test.

28. In the present case, the applicant company had had hesitation as to whether the taxation exemption provided for in Law no. 3065 would also apply to its own sales and accordingly requested a special notice from the relevant administration in order to eliminate the dispute. It then made its sales in accordance with the administration's replies. In finding a violation of the applicant's right to property, the majority of the Court concluded that the applicant's misguidance by the administration

through the latter's special notices had led to unforeseeability; and that therefore, the lawfulness requirement had not been satisfied in terms of the applicant.

29. It is undisputed that the applicant was misguided due to the special notices submitted by the administration. However, in the assessments to be made in this respect, the nature of special notices as a source in tax law as well as the consequences of misguidance through special notices in terms of positive law must be meticulously taken into consideration.

30. As also noted above, special notices are merely the administration's opinions which are submitted to taxpayers and tax responsible parties upon request but do not have any binding effect.

31. In Article 1 § 1 of Law no. 3065 on Value Added Tax, where transactions subjected to value added tax are listed, it is set forth that sales and services performed within the framework of commercial, industrial, agricultural activities and self-employment activities shall be subjected to taxation. In Article 8 § 1 (a) of the same Law, it is indicated that in cases where products are sold and a service is performed, those engaged in these processes shall be the party liable to tax. On the other hand, Article 17 of Law points out certain circumstances under which taxpayers shall be exempted from taxation, in other words which shall not be subjected to taxation.

32. The duty and authority to determine whether the applicant company's activities fall within the scope of the activities subjected to value added tax pursuant to Article 1 of the Law no. 3065 on Value Added Tax or whether they are covered by the exemptions set out in Article 17 of the same Law are incumbent primarily on the tax administration, and in case of any conflict in this respect, it is then for the tribunals exercising tax jurisdiction to make such determinations.

33. In this sense, the legal basis for the retroactive imposition of taxation with respect to the applicant's transactions, which had not been indeed covered by the exemption but considered to be exempted from taxation by the applicant in line with the special notice issued by the administration, is Article 369 of the Tax Procedural Law no. 213, Article 1

of the Law no. 3065 on Value Added Tax and the other relevant tax laws. It has been therefore concluded that the impugned interference with the applicant's right to property was based on a law.

34. In the present case, the majority of the Court attached importance, in terms of lawfulness, to the applicant's endeavour to remove the hesitation it had had with respect to the exemption from taxation set forth in the relevant provision as well as to the administration's opinion submitted in reply thereto.

35. Although it is undoubted that the applicant was misguided through the special notice issued by the administration, any tax penalty and default interest as well as any consequence that may give rise to a violation in terms of "principal amount of taxation" cannot be attributed to special notices which are among the auxiliary resources of tax law with no binding effect. Otherwise, it would go beyond the outcome which has been indicated by the law-maker in case of any misguidance through special notice.

36. In the present case, the conflict results not from a provision of law which is of poor quality and therefore unforeseeable but from the interpretation as to whether the applicant's transactions could be considered to fall into the scope of the relevant exemption. Such considerations wholly took place between the administration and the applicant within the context of special notices. According to the conclusion reached by the majority, the relevant provision of law is regarded deficient due to the misguiding nature of the special notices submitted to the applicant.

37. Scope of a provision of law may be at any time a matter of debate, and conflicts to arise in this sense may be resolved through administrative and judicial remedies. As a matter of fact, the questions as to whether the activities performed by the applicant and the product obtained through such activities still have the characteristics of scrap and waste or have transformed into a finished product as well as whether sales of such products are covered by the tax exemption may be determined primarily by the administration by use of statutory means and powers. In cases where such determination leads to a conflict, a conclusion may be

reached following an examination through the administrative jurisdiction within the framework of the principle of *ex officio* inquiry. In this respect, judicial authorities may also use the interpretation method which is qualified as an economic approach in tax law. Accordingly, in tax law, determination and assessment of the transaction underlying taxation by economic characterization and operability of the transaction is defined as economic analysis, whereas determination of legal provisions which would apply to the transaction underlying taxation by taking into consideration economic realities is defined as economic interpretation. It is thus clear that the administrative judicial authorities are not bound by the administrative opinion reflected in the special notices submitted to the applicant.

38. In the present case, the alleged violation of the right to property is resulted from the sales of 2004 and 2005. Article 17 § 4 (g) of the relevant Law, which was amended by Article 8 of Law no. 5035 and took effect on 2 January 2004, embodies the provision titled "sale of … scraps and wastes of plastic…". The same provision was once again amended by Law no. 5228 and took effect on 1 August 2004, which is titled "sale of plastic … scraps and wastes (…)". According to both wordings of the provisions, it is undisputed that the examination as to whether the applicant's sales of plastic granules were subjected to value added tax is not under the scope of individual application. Therefore, in terms of individual application, it cannot be concluded that the taxation statutes which are binding sources of tax law are unforeseeable, in consideration of special notices of administrative nature which misguided the applicant.

39. Regard being had to the facts that the interference in the present case had a legal basis and that special notices which are in the form of merely an administrative opinion could not affect the foreseeability of the legislation, it has been concluded that the assessment of lawfulness in the individual application examination is a problematic area.

40. Moreover, given the nature of value added tax and provisions embodied in the positive law concerning the functioning of value added tax, it must be also discussed whether the interference with the applicant's right to property due to the tax imposition, based on a law, in the public interest upon the expiry of the taxation period was proportionate.

41. The "principle of proportionality" enshrined in Article 13 of the Constitution is a safeguard needed to be primarily taken into consideration in the applications concerning the restriction of fundamental rights and freedoms. Proportionality reflects the link between the aims and means for restricting fundamental rights and freedoms. The review of proportionality is to conduct a review of the means chosen to achieve the pursued aim from the standpoint of this aim. Therefore, in cases involving interferences with the right to property, it must be assessed whether the means chosen to achieve the pursued aim is suitable, necessary and proportionate (see *Osman Bayrak*, no. 2013/3803, 25 February 2015, § 74).

42. In this respect, the new situation arising from the interference with the right to property and the impaired balance of interests must not place a personal and excessive burden on the individual (see *Korkut Bahadır*, no. 2014/4025, 11 December 2014, § 43).

43. In the present case, it has been revealed that the aim pursued by interfering with the applicant's right to property is to obtain public income and that the means of interference is to recognize the applicant as the payer of value added tax which is an indirect taxation.

44. By the very nature of value added tax as defined above and given the fact that its bearer is final consumers, the proportionality needed to be ensured between the aim and the means of interference may be said to be secured only when the applicant is afforded the rights to shift or deduct in terms of the tax which has been requested from, and consequently imposed on, it as well as which it would have collected from the parties receiving the goods at the relevant time if it had not been misguided by the administration.

45. In the present case, the applicant requested an opinion from the administration in order to clarify whether its sales were subjected to taxation following the amendment to the relevant law. The tax administration informed the applicant, through its special notice, that the latter's sales were covered by the tax exemption. Accordingly, the applicant did not apply value added tax to its sales and did not therefore collect value added tax from the purchaser to which the applicant

sold its products. Upon the expiry of the relevant taxation periods, the administration concluded that the applicant's sales could not be considered to fall within the scope of Article 17 § 4 (g) of Law no. 3065 and accordingly *ex officio* imposed taxation for the sales of 2004 and 2005 in order to collect the principal amount of the relevant tax but imposed no fine for loss of tax. Out of the taxations retroactively imposed for the years of 2004 and 2005, those concerning 2004 were adjudicated in the favour of the applicant, whereas those concerning 2005 were adjudicated to its detriment.

46. The legal system regulating the value added tax does not provide for any opportunity to shift, deduct or compensate the imposed taxation in cases where value added tax has been levied upon the expiry of the relevant taxation periods contrary to the special notice addressed by the administration to the taxpayers who have been misguided by such special notice and who could not be therefore associated with any wrongful intention, fault or negligence.

47. Besides, both the actual and legal difficulty for the applicant to get in contact with the parties to which it made sales at the relevant taxation periods as well as to demand the subsequently-levied value added tax amounts from these parties must also be taken into consideration in the present case.

48. Regard being had to the facts that the applicant was not provided with the opportunity to shift, deduct or compensate the relevant tax -which was demanded from and therefore imposed on the applicant but which would have been indeed collected from the purchasers at the relevant time if the applicant had not been misguided by the administration- and that the applicant was thereby caused to bear the relevant tax -of which it is not the bearer but the taxpayer-, which is contrary to the legal system concerning value added tax, the interference with the applicant's right to property cannot be said to be proportionate.

49. I have accordingly concluded that there was a violation of the applicant's right to property due to the disproportionate nature of the interference.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

NUSRAT KÜLAH

(Application no. 2013/6151)

21 April 2016

On 21 April 2016, the Second Section of the Constitutional Court found a violation of the right to property safeguarded by Article 35 of the Constitution in the individual application lodged by *Nusrat Küla*h (no. 2013/6151).

THE FACTS

[6-30] The land where the applicant had a share was expropriated for establishing a sports field and accordingly registered in the name of the Gaziantep Metropolitan Municipality in 1998. The Municipal Council subsequently amended the zoning plan covering the area where the expropriated land is located. Accordingly, the zoning plan of the land was changed into a commercial area on 20 July 1998. It was then sold by auction to third parties on 2 November 1998. A workplace was built on the land which was then registered as a "market" in the land registry.

The applicant brought an action for compensation against the metropolitan municipality and claimed the amount between the price of the land, which was sold to third parties, at the date of the action and the expropriation price paid to him. The incumbent court dismissed the action on 31 May 2012. The applicant appealed the dismissal decision; however, it was upheld by the Court of Cassation on 27 December 2012. The applicant's request for rectification of the judgment was also dismissed by the Court of Cassation.

Some of the other co-owners of the land, where the applicant had a share, also brought an action against the metropolitan municipality on 25 June 2010 and requested the return of the expropriated land or the reimbursement of its actual price as the expropriated land was not used in line with the original aim of expropriation. The action was accepted by the relevant court. By its judgment dated 20 March 2012, the Court of Cassation quashed the first instance decision, stating that no action could be brought against the expropriations, which were performed by reaching a compromise with the owner of the land.

The applicant lodged an individual application with the Court on 2 August 2013.

IV. EXAMINATION AND GROUNDS

31. The Constitutional Court, at its session of 21 April 2016, examined the application and decided as follows.

A. The Applicant's Allegations

32. The applicant maintained that his right to property had been violated on the ground that the action for compensation brought by him, on the basis of Articles 22 and 23 of Law no. 2942, upon the sale to the third parties of his immovable, which had been previously expropriated by the metropolitan municipality for establishing a sports field but which was -contrary to the public interest pursued- then turned into a commercial area by an amendment to the zoning plan, was dismissed pursuant to Article 8 of Law no. 2942. The applicant further alleged that there were violations of his right to a fair trial due to the conclusion of the proceedings although he had requested the trial court to await the outcome of another case of similar nature as well as of the principle of equality on the ground that another action on the same matter had been accepted whereas the action in the present case had been dismissed by the court. The applicant accordingly requested the Court to order a retrial and award him 45,000.000 Turkish Liras (TRY) in respect of his damages.

B. The Court's Assessment

1. Admissibility

33. 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). Although the applicant alleged that there had been violations of the right to a fair trial and the principle of equality along with the alleged violation of the right to property, he failed to submit any concrete information or document to demonstrate on which ground he had been subject to discrimination. Therefore, all complaints raised by him would be examined within the scope of the alleged violation of the right to property.

34. The Court declared the alleged violation of the right to property admissible for not being manifestly ill-founded and not being inadmissible for any other ground.

2. Merits

35. The applicant maintained that his right to property had been violated on the ground that the action for compensation brought by him, on the basis of Articles 22 and 23 of Law no. 2942 concerning reinstitution, upon the sale to the third parties of his immovable, which had been previously expropriated by the metropolitan municipality for establishing a sports field but which was -contrary to the public interest pursued- then turned into a commercial area by an amendment to the zoning plan, was dismissed as this action could not be brought pursuant to Article 8 of Law no. 2942.

36. Article 35 of the Constitution, titled *"Right to property"*, reads as follows:

"Everyone has the right to own and inherit property.

These rights may be limited by law only in view of public interest.

The exercise of the right to property shall not contravene public interest."

37. In Article 35 of the Constitution, it is set forth that everyone has the right to property which may be restricted by law only on grounds of public interest; and that the exercise of the right to property shall not be in breach of public interest (see *Habibe Kalender and Others*, no. 2013/3845, 1 December 2015, § 38).

38. Article 13 of the Constitution embodies the general principles concerning the restriction of fundamental rights and freedoms while Article 35 thereof embodies the special principles concerning the restriction of the right to property. In line with the arrangement in Article 13 of the Constitution, Article 35 also indicates that the restrictions to be imposed on the right to property are to be prescribed by law. In addition, Article 35 provides for that the restriction shall be imposed in the public interest and that the exercise of the right to property shall not be contrary to the public interest, thereby pointing out the requirement to strike a balance between the public interest and the personal interest (see *Türkiye İş Bankası A.Ş.*, no. 2014/6192, 12 November 2014, §§ 40 and 41).

39. In the present case, the primary matter to be resolved is to determine whether there was an interference with the "right to property". If there is an interference, it must be then ascertained whether the interference had a legal basis and pursued a legitimate aim, whether there was a reasonable relationship of proportionality between the means employed and the aim pursued as well as whether the burden imposed on the applicant was proportionate.

a. Existence of Property

40. The applicant complained of the subsequent transfer of his immovable, which was expropriated in the public interest but was never used to that end, to third parties after a short while.

41. The right to property enshrined in Article 35 of the Constitution is a safeguard that protects existing possessions, properties and assets. A person's right to obtain a property which is not already owned by that person does not fall within the notion of the property protected by the Constitution, no matter how strong his or her interest is in this matter. As an exception to this, an "economic value", or a "legitimate expectation" to obtain an enforceable "claim", may in certain circumstances benefit from the guarantee inherent in the right to property which is under joint protection of the Constitution and the Convention. Legitimate expectation is a sufficiently concrete expectation that arises from an enforceable claim reasonably demonstrated, that is based on a certain provision provided for in the national law or an established case-law which indicates that the prospects of success are high. In order for a legitimate expectation to arise, the existence of a dispute or serious claim does not suffice but there must exist an expectation with sufficient basis, which is based on a law or established case-law in the domestic law. (see *Kemal Yeler and Ali Arslan Çelebi*, no. 2012/636, 15 April 2014, §§ 36 and 37).

42. The determination as to the existence of the right to property based on a legitimate expectation falling into the scope of the joint protection realm of the Constitution and the Convention is contingent on the recognition of the ownership claim raised in the relevant legal system, and such recognition is ensured by virtue of the provisions of law and judicial decisions (see *Üçgen Nakliyat Ticaret Ltd. Şti.*, no. 2013/845, 20 November

2014, § 37). Any person complaining of an alleged violation of the right to property is initially required to prove the existence of such right (see *Hüseyin Remzi Polge*, no. 2013/2166, 25 June 2015, § 35).

43. The European Court of Human Rights ("the ECHR") indicates that in cases where the expropriated immovable property which is not used for the purpose of public utility, then the owner would at least have a "legitimate expectation" for its restitution, which therefore constitutes a property within the meaning of Article 1 of the Additional Protocol No. 1 to the Convention (see *Karaman v. Turkey*, no. 6489/03, 15 January 2008, § 29; and *Motais de Narbonne v. France*, no. 48161/99, § 18). Besides, in its judgment in the case of *Beneficio Cappella Paolini v. Malta* (no. 40786/98, 13 July 2004, §§ 34, 34). Besides, the ECHR notes that even in the absence of a statutory arrangement allowing for restitution of the portion of the property expropriated in the public interest, which has not been used for the purpose of public utility, the portion in question raises an issue within the meaning of the right to property.

44. In Articles 22 and 23 of Law no. 2942, the right to restitution of the owner of the expropriated property is enshrined. In this respect, the judgment rendered by the 18th Civil Chamber of the Court of Cassation, no. E.2013/19896 K.2014/88 and dated 13 January 2014, reads as follows:

> *"Regard being had to the wording and content of Articles 22 and 23 of the Expropriation Law, it has been observed that Article 22 imposes an obligation on the administration, whereas Article 23 accords a right to the property owner. Accordingly, it is set forth in Article 22 that in cases where the administration considers that the expropriated property no longer pursues the original intent of expropriation or any public interest (waiver upon the finalization of the expropriation), the administration is obliged to notify primarily the property owner of this conclusion; and that if the administration sells the property to any third person by failing to comply with its obligation to notify, then the owner shall be entitled to be reimbursed for the total value of the expropriated property, less the expropriated price, within the scope of the statutory arrangements prescribed in the law. In Article 23, the property owner is afforded the right to restitution of his property within the periods specified in the law if the administration, still seeking to use the expropriated property for the original intent of expropriation or for any aim in the public*

interest, has nevertheless taken any step to attain the aim pursued. However, as stated in Article 22, even in cases where the administration no longer needs the expropriated property, the property owner or the heirs do not have any right of litigation if the expropriated property was used for the purpose pursued, or turned into a facility, for the period of 5 years. Besides, to exercise the right to restitution, the expropriated property is not necessarily used in line with the designated purpose of expropriation as a whole; but even a portion used for the designated purpose would suffice to remove the liability to restitute the expropriated property.

As also specified in Article 22, if the administration decides to sell the expropriated property, which has not been used for 5 years even though it has been used in line with the designated purpose of expropriation or a facility, structure or building has been founded on it, the administration must primarily resort to the property owner or the heirs. If they do not want to re-purchase the property, the administration may then dispose of the property. In cases where no facility, structure or building has been founded on the property in spite of having being expropriated, or the expropriated property is not used for the original purpose, or it is sold by the administration in breach of the procedure prescribed in the law, the property owners or the heirs may claim the total price of the property, less the expropriation price, without being subject to any time-limit.

45. Accordingly, as indicated in the established case-law of the Court of Cassation in similar cases, if no facility, structure or building is not founded on an immovable in spite of having being expropriated, or the immovable has not been used in line with the aim pursued in expropriation and it is sold by the administration in breach of the procedure prescribed by law, the property owners or their heirs may demand the relevant amount, less the expropriation price, without being subject to any specific time-limits.

46. In addition, the decision rendered with respect to the action brought for compensation concerning the impugned immovable became final on 30 May 2013 when the relevant Chamber of the Court of Cassation dismissed the request for rectification of its initial judgment. It has been accordingly understood that Articles 22 §§ 2 and 3, 23 § 3 and Provisional Article 9, which were added to Law no. 2942 by Article 100 of Law no. 6552 and dated 10 September 2014 and which restrict the time-limits for bringing

an action on the basis of the provisions on restitution, are not applicable to the present case.

47. In the present case, the applicant's immovable was expropriated by the relevant metropolitan municipality for establishing a sports field zoning status of which was changed into a commercial area on 20 July 1998. It was then sold to third parties on 2 November 1998. It thus appears that the immovable in dispute was never utilized in the public interest. Therefore, the present case differs from the Court's judgment in the case of *Habibe Kalender and Others* where the immovable used for a long time in the public interest was transferred to third parties as a result of the changing conditions. In the latter case, the immovable was used for approximately 20 years in accordance with the original intent of the expropriation, and it was accordingly indicated that as it was not the case that there was no longer a need for the property, or no action was taken within five years, following its expropriation, it did not constitute a legitimate expectation within the meaning of the right to property (see *Habibe Kalender and Others*, §§ 45 and 48).

48. However, in the present case, the applicant's immovable was not used in the public interest after being expropriated but transferred to third parties shortly after its expropriation. Accordingly, the applicant has a legitimate expectation for return of the immovable as it was not used in the public interest.

49. In this sense, it is undoubted that the applicant's immovable property, which was expropriated in the public interest, falls under the safeguard afforded by Article 35 of the Constitution (see *Cemile Ünlü*, no. 2013/382, 16 April 2013, § 25). Besides, the failure to use the expropriated property in line with the public interest pursued at least constitutes a legitimate expectation for its return to the applicant. Accordingly, in the present case, there is no doubt as to the existence of the right to property under Article 35 of the Constitution.

b. Existence and Type of Interference

50. Article 35 of the Constitution and Article 1 of the Additional Protocol no. 1 to the Convention have parallel wordings, and the latter provision embodies three sub-principles. The first principle is the peaceful

enjoyment of the property or the right to respect for property, which is enshrined in the first sentence of the first paragraph. The second principle is related to the deprivation of property and makes it subject to certain conditions. This principle is set forth in the second sentence of the same paragraph. The third principle entitles the State to control the use of property by law in the public interest and to the extent required by this aim, which is enshrined in the second paragraph (see *Kenan Yıldırım and Turan Yıldırım*, no. 2013/711, 3 April 2014, §§ 58 and 59).

51. As the transfer of the applicant's immovable, which had been expropriated in the public interest, to third parties without being used in the public interest pursed amounted to deprivation of property (see *Karaman v. Turkey*, § 29; and *Motais De Narbonne v. France*, § 18), it has apparently constituted an interference with the right to property enshrined in Article 35 of the Constitution. It is therefore necessary to make an assessment as to the applicant's deprivation of his property within the framework of the second principle.

c. Whether the Interference Constituted a Violation

52. In the present case, the immovable in dispute was expropriated, pursuant to Article 8 of Law no. 2942, within the framework of the procurement procedure prescribed therein. However, the applicant alleged that the impugned expropriation did not actually pursue an aim in the public interest.

d. General Principles

53. As set out in Article 35 of the Constitution, the right to property may be restricted only in the public interest. Public interest, which is also called as social interest, common benefit and general interest and which is a common benefit beyond the personal interest, is a special ground for restriction prescribed by Article 35 of the Constitution with respect to the right to property and is interpreted in a broad manner to the extent that would also cover the terms, general interest and social interest (see the Court's judgment no. E.1999/46 K.2000/25, 20 September 2000). The term "public interest" is an aim of restriction as allowing for imposing a restriction on the right to property in cases when required by the public

interest. It also affords an effective protection for the said right by way of setting forth that the right to property cannot be restricted for any reason other than public interest, thereby setting a limit for restriction (see *Yunis Ağlar*, no. 2013/1239, 20 March 2014, § 28).

54. The act of expropriation, which is set out in Article 46 of the Constitution and main purpose of which is considered as *"public interest"*, is the termination of the private ownership of an immovable by the State, beyond the consent of its owner, in the public interest and in return for a payment. In Article 46 § 1 of the Constitution regulating the expropriation, it is set out *"the State and public corporations shall be entitled, where the public interest requires, to expropriate, and impose administrative servitude on, privately owned real estate wholly or in part in accordance with the principles and procedures prescribed by law, provided that the actual compensation is paid in advance"*. The constitutional elements of the expropriation are the existence of public interest, the observance of principles and procedures prescribed by law in performing an expropriation and advance payment, in cash, of the actual value of the expropriated property (see the Court's judgment no. E.2004/25 K.2008/42, 17 January 2008).

55. Public interest is by its very nature a broad term. The legislative body may naturally have a wide discretionary power with respect to statutory arrangements on the implementation of social and economic policies such as the laws providing for the deprivation of property by way of paying the relevant price. Unless being manifestly devoid of a reasonable ground, the legislative body's decision as to what would be in the public interest must be respected. Both the legislative and executive bodies have a wide discretionary power in determining what would be in the public interest by considering the needs of the society. If there has been an interference with the right to property by public authorities in order to implement an economic or social policy, it should be in principle assumed that the interference pursued a legitimate public interest. In case of a dispute as to the public interest, the first instance court and appeal courts specialized in expropriation-related matters are undoubtedly in a better position to resolve such disputes. Therefore, the burden to prove whether the interference has pursued a public interest rests on the claimant (see *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 35).

56. Public interest is a term which involves discretionary power afforded to the State organs. It is a criterion which is not susceptible to an objective definition and must be assessed individually in consideration of the particular circumstances of each concrete case. Any arrangement and practice devoid of a reasonable ground cannot be considered to fall into the scope of the discretionary power exercised in the public interest (see *Yunis Ağlar*, § 29).

ii. Application of Principles to the Present Case

57. The action for compensation brought by the applicant before the 1st Chamber of the Gaziantep Civil Court of First Instance for the alleged misuse of his immovable which had been indeed expropriated in the public interest but was never used for that purpose was dismissed by the civil court on 31 May 2002, pursuant to Article 8 of Law no. 2942, on the ground that no action could be filed against the acts of expropriation performed upon the compromise reached with the property owner. The applicant appealed the first instance decision; however, it was upheld by the 5th Civil Chamber of the Court of Cassation on 27 December 2012. The applicant's request for rectification of the Court of Cassation's judgment was also dismissed by the same Chamber on 30 May 2013.

58. In the present case, in dismissing the applicant's action, the civil court relied on Article 8 § 7 of Law no. 2942 which sets forth that an immovable which has been purchased or traded for in accordance with the procurement procedure prescribed herein would be deemed to have been taken over from its owner by way of expropriation and that no action for annulment may be brought against such act of expropriation or the price thereof. In another action brought by the other co-owners of an impugned property, the General Assembly of Civil Chambers of the Court of Cassation has stated in its judgment no. E.2013/5-381 K.2013/1597 and dated 27 November 2013 that Article 8 of the said Law is not applicable to the actions to be brought, pursuant to Articles 22 and 23 of the Law which regulate the behaviours and conducts of the administration following the expropriation, in cases where the immovable expropriated even by reaching a compromise has been sold for no longer involving a public interest.

59. As regards the individual applications, the duty incumbent on the Court is to examine whether the safeguards inherent in the rights which are under the joint protection of the Constitution and the Convention have been offered in each concrete case. Accordingly, unless there has been an interference with any right and freedom falling into the joint protection realm of the Constitution and Convention, the inferior courts' assessment of material facts and evidence, interpretation and application of legal provisions and the fairness of the proceedings as to the merits cannot be brought before the Court through individual application mechanism (see *Sebahat Tuncel (2),* no. 2014/1440, 26 February 2015, §§ 53, 54).

60. As a matter of fact, the ECHR notes that it is not incumbent to examine the errors of fact or of law allegedly committed by the domestic courts, which are primarily responsible for interpreting and applying domestic law unless they are in breach of the fundamental rights and freedoms safeguarded by the Convention; that it is not considered necessary to address a statutory regulation in an abstract manner; and that the ECHR's role is limited to the examination as to whether the manner in which the domestic law was applied is compatible with the Convention (see *Karaman v. Turkey*, § 30).

61. The main complaint raised by the applicant concerned the alleged non-existence of a ground justifying the expropriation as the immovable which was expropriated, by way of reaching a compromise, in the public interest in accordance with the prescribed procedure but was not used to that end; the acquirement by the relevant authority of an income through the immovable and his being deprived of the surplus income. In Article 8 of Law no. 2942 forming a basis for the dismissal of the action brought by the applicant, it is set forth that in cases where the expropriation has been performed upon a compromise, no action may be brought to challenge the act of expropriation itself or its price. In the present case, the applicant raised a challenge neither against the expropriation nor against the expropriation price.

62. Besides, even if it is accepted that such a restriction is laid down in Article 8 of Law no. 2942, it is explicit that this would not change the conclusion that an interference with the right to property enshrined in Article 35 of the Constitution on account of an expropriation devoid of

an aim of public interest is incompatible with the relevant safeguards, but only makes a difference as to the source of the interference as resulting from a legislative act. As a matter of fact, Article 35 of Law no. 2942 sets forth *"the former owner cannot claim ownership of, and demand payment in return for, the portions which have been allocated for road, green space and such public utility out of the parcels subject to adjustment pursuant to the zoning legislation as well as the portions which have been allocated with the owner's consent for public service and facilities"*.

63. In the present case, the applicant's share in the impugned immovable was expropriated by the Metropolitan Municipality on the ground that in the zoning plan it was within the boundaries of a sports field at the 100th Year Atatürk Cultural Park.

64. Zoning plans issued for ensuring the physical environment closely related to social life to become a healthy structure as well as for determining the balance for protection and utilization of land in the most rational manner are the documents which are to attain the aim of public interest. The questions as to whether these considerations have been fulfilled and whether the immovables at the planned locations have been compatible -in so far as it relates to the aim for which the immovables were assigned- with the urbanization principles, planning principles and public interest could be made subject to judicial review (see *Yunis Ağlar*, § 37). In the present case, it has been observed that no action for annulment was brought with a view to ensuring zoning plans to undergo a judicial review; and that the applicant's share was expropriated by way of compromise. It has been therefore concluded that the zoning arrangement and the expropriation made on the basis of this arrangement were performed for public interest purposes pursuant to Article 10 of Law no. 3194 and the relevant provisions of Law no. 2942.

65. However, it is not in principle *per se* sufficient for an act depriving of property to merely pursue a public-interest aim in an abstract manner; but it must be further required that the reasons underlying the public-interest aim be applied concretely (see *Motais de Norbonne v. France*, § 20).

66. In the present case, it has been observed that on 20 July 1998 the Metropolitan Municipal Council amended the zoning plan with respect

to the immovable where the applicant had a share and accordingly designated the zoning status of the immovable as a commercial area; and that on 2 November 1998 the immovable was sold by the Metropolitan municipality to third persons by auction.

67. In its judgments in similar cases, namely *Beneficio Cappella Paolini v. Malta* and *Karaman v. Turkey*, the ECHR has noted that the use of an immovable, which had been duly expropriated, -even in part- not for the aim of public interest contrary to the original intent of its expropriation by the administration was in breach of the requirements of the right to property set forth in Article 1 of the Additional Protocol no. 1 to the Convention (see *Beneficio Cappella Paolini v. Malta*i §§ 30,34; and *Karaman v. Turkey*, §§ 24-34). It has also indicated in its judgment of *Motais de Norbonne v. France* that in cases where the project in pursuance of the public interest underlying the expropriation is not put into practice for a long period upon the expropriation of the immovable and the applicant has been deprived of the surplus value having incurred within that period, it has been in breach of the right to property (see *Motais de Norbonne v. France*, §§ 16-23).

68. In the present case, the aim pursued for the public interest was to establish a sports field within a public park, and therefore, a zoning arrangement was performed and the immovable in question was expropriated. Upon the expropriation, the impugned immovable was not turned into a sports field in line with the pursued aim of public interest but converted to a commercial field and accordingly sold to third parties within a short period of approximately seven months following the expropriation. In other words, the administration neither attained the aim of public interest pursued nor used the immovable for any other aim of public utility. Besides, the metropolitan municipality changed the zoning status of the immovable –which had been expropriated for being designated as a sports field in the zoning plan– as a "commercial field" and thereby caused a surplus value with respect to the expropriated immovable. It however deprived the applicant of the surplus value and transferred certain portion of the immovable to private persons. It thus appears that the administration transferred the immovable, which it had taken over in the public interest relying on the zoning arrangements and

the act of expropriation underpinned by the Constitution and relevant laws, to third persons without having concretely achieved the aim of public interest underlying the impugned act of expropriation whereby the applicant was deprived of his property. The administration thus only performed a transfer of property, intended for generating income, beyond the applicant's legitimate consent. Therefore, the applicant was deprived of his property in breach of the safeguards enshrined in Article 35 of the Constitution as there was an interference with his right to property in the absence of any public interest justifying the expropriation.

69. It has been accordingly concluded that the interference with the applicant's right to property did not fulfil the legitimate aim requirement set forth in Article 35 of the Constitution due to the failure to concretely materialize the aim of public interest pursued by the impugned interference. As it has been observed that the applicant's right to property was interfered without the fulfilment of the legitimate aim requirement, the Court has not found it necessary to make an examination as to the proportionality.

70. For these reasons, the Court has found a violation of the right to property safeguarded by Article 35 of the Constitution.

3. Application of Article 50 of Code no. 6216

71. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, reads as follows:

"(1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled...

(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."

72. The applicant claimed TRY 45,000,000 in compensation and requested the Court to order a retrial.

73. In the present case, it has been concluded that there was a violation of the right to property.

74. Since there is legal interest in holding a retrial to redress the consequences of the violation of the right to property, a copy of the judgment must be sent to the 1st Chamber of the Gaziantep Civil Court for a retrial.

75. As it has been considered that ordering a retrial on account of the violation of the applicant's right to property constituted a just satisfaction, the Court rejected the applicant's claim for compensation.

76. The total court expense of TRY 1,998.35 including the court fee of TRY 198.35 and the counsel fee of TRY 1,800, which is calculated over the documents in the case file, must be reimbursed to the applicant.

JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 21 April 2016 that

A. The alleged violation of the applicant's right to property be DECLARED ADMISSIBLE;

B. The right to property safeguarded by Article 35 of the Constitution was VIOLATED;

C. A copy of the judgment be SENT to the 1st Chamber of the Gaziantep Civil Court for a retrial in order to redress the consequences of the violation;

D. The applicant's claims for compensation be REJECTED;

E. The total court expense of TRY 1,998.35 including the court fee of TRY 198.35 and the counsel fee of TRY 1,800 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; and

G. A copy of the judgment be SENT to the Ministry of Justice.

RIGHT TO A FAIR TRIAL (ARTICLE 36)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

YUSUF KARAKUŞ

(Application no. 2014/12002)

8 December 2016

On 8 December 2016, the First Section of the Constitutional Court found a violation of the right to a fair trial within a reasonable time within the scope of the right to a fair trial which is safeguarded by Article 36 of the Constitution in the individual application lodged by *Yusuf Karakuş and Others* (no. 2014/12002).

THE FACTS

[7-61] The İstanbul Security Directorate carried out operations against the Hezbollah terrorist organization on 17 January 2000. The organization leader was captured dead in the operation conducted by the security officers in a house. In the course of the search conducted in that house, many hard disks containing information about the organization were found.

On 6 May 2000, the applicants were taken into custody within the scope of the investigation initiated upon the information obtained during the above-mentioned operation. The applicants' statements were taken in the Anti-Terror Branch of the İstanbul Security Directorate in the absence of their defence counsels. On 7 May 2000, the applicants were sent to Ankara.

Hasan Kılıç, one of the applicants, denied the accusations in his statement taken in the absence of his defence counsel in the Anti-Terror Branch of the İstanbul Security Directorate. He then made detailed confessions in the course of his statement taken in the Anti-Terror Branch of the Ankara Security Directorate on 12 May 2000. He subsequently admitted the accusations against him before the State Security Court (the SSC).

Similarly, the applicant, Yusuf Karakuş, gave statements incriminating himself and the other suspects in his statements taken in the Anti-Terror Branch of the İstanbul Security Directorate on 7 May 2000, in the absence of his defence counsel. He also made detailed confessions in the course of his statements taken in the Ankara Security Directorate in the absence of his defence counsel and showed certain places pertaining to the imputed offence and evidence thereof.

The applicant Mehmet Şahin explained his life, his joining into the Tevhid-Selam group and his activities in detail during his statement taken in the Anti-Terror Branch of the İstanbul Security Directorate, in the absence of defence counsel. He also made detailed confessions in his statements taken by the Ankara Security Directorate in the absence of his defence counsel. The applicant subsequently declared before the public prosecutor's office of the Ankara SSC and the judge of the SSC that he had been associated with the Tevhid-Selam group but he had not got involved in any violent acts.

A criminal case was filed before the Ankara SSC no. 2 against the applicants for breach of the Constitution by the bill of indictment of the chief public prosecutor's office at the Ankara SSC dated 11 July 2000.

During the hearings, the applicants denied the accusations against them by maintaining that their statements taken at the investigation stage and amounting to confessions had been taken under duress.

The applicants were sentenced to imprisonment by virtue of the decision dated 7 January 2002 at the end of the trial held over the case-file no. E.2000/102 of the Ankara SSC no. 2. The applicants, Mehmet Şahin and Yusuf Karakuş, were sentenced for being a member of an armed gang aiming to change the constitutional order by force of arms while the other applicant, Hasan Kılıç, was sentenced for being a head having special authority in this armed gang.

This decision and the decision of 28 July 2005 which was rendered by the 11th Chamber of the Ankara Assize Court (closed) continuing to handle the proceedings were quashed by the 9th Criminal Chamber of the Court of Cassation.

The conviction decision of 17 January 2013, which relied on the applicants' confessions and statements incriminating each other at the investigation stage, was upheld by the judgment of the 9th Criminal Chamber of the Court of Cassation dated 31 March 2014.

V. EXAMINATION AND GROUNDS

62. The Constitutional Court, at its session of 8 December 2016, examined the application and decided as follows.

A. Alleged Violation of the Right to a Fair Trial in conjunction with the Right to Legal Assistance

1. The Applicants' Allegations and the Ministry's Observations

63. The applicants maintained that the trial had not been conducted fairly; and that they had been convicted mainly on the basis of their statements which had been taken under the police custody during which they had been denied legal assistance and which had been signed under duress and torture but content of which had not been admitted.

64. In its observations, the Ministry, with reference to the judgments of *Dağdelen and others v. Turkey* (no. 1767/03), indicated that use of confessions obtained through torture and maltreatment would undermine the fairness of trial; however, there existed no investigation documents at the Ankara Chief Public Prosecutor's Office in spite of the applicant's allegation that he had filed a criminal complaint with regard to being subjected to torture.

65. The applicant, Mehmet Şahin, reiterated his allegations included in the application form.

2. The Court's Assessment

66. The Constitutional Court is not bound by the legal qualification of the facts by the applicants and it makes such assessment itself (see Tahir Canan, no. 2012/969, 18 September 2013, § 16). The Court decided to examine the applicants' allegations within the scope of the right to legal assistance, which is one of the manifestations of the right to a fair trial.

67. Article 36 § 1 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.*"

a. Admissibility

68. The alleged violation of the right to a fair trial was declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

i. General Principles

69. Securing the rights of defence in criminal proceedings is one of the basic principles of a democratic society (see *Erol Aydeğer*, no. 2013/4784, 7 March 2014, § 32). Defence ensures the fair functioning of the criminal justice system. Unless a person is provided with the opportunity to put forward his defence against an allegation, it is not possible to carry out a trial in accordance with the principles of equality of arms and of adversarial proceedings and to reveal the material truth.

70. The "safeguards" ensured by the right to defence are essentially incorporated within the right to a fair trial. As the right to defence is one of the requirements of a state of law and one of the significant safeguards of the right to a fair trial, it is explicitly stated in Article 36 of the Constitution. The aforementioned article prescribes that everyone has the right to defence so long as they utilize legitimate means and procedures. Taking punitive action against persons without vesting them with the right to defence is not in compliance also with the presumption of innocence guaranteed by Article 38 of the Constitution. Therefore, a trial where the right to defence is not secured cannot be deemed to be fair.

71. The defence counsel is defined as the lawyer defending the suspect or the accused in criminal proceedings. The defence counsel, who serves in cases where the suspect or the accused has the opportunity to make a choice regarding his defence through the agency of a defence counsel, is a voluntary defence counsel while the one, who serves in cases where his/her appointment does not rest upon the will of the suspect or the accused, is an obligatory defence counsel (see judgment of the General Assembly of Criminal Chambers of the Court of Cassation no. E.2011/10-182, K.2011/204, 11 January 2011).

72. It is not sufficient to provide the suspect or the accused merely with the right to defence. The suspect and the accused must also avail of the "legitimate means and procedures" specified in Article 36 of the Constitution in making his1 defence. The opportunity to draw upon the know-how and experience of lawyers are among the legitimate means

and procedures to be resorted in making defence. The most significant one of the legitimate means and procedures referred to in Article 36 of the Constitution for the suspect and the accused is the exercise of the right to legal assistance. In other words, the right to legal assistance falls within the scope of the notion of "legitimate means and procedures" specified in Article 36 of the Constitution. In this respect, it is clear that the right to legal assistance is included within the scope and context of the right to a fair trial and is a natural consequence of this right. Hence, under the right to a fair trial, the person accused of an offence has the right to personally defend himself or to benefit from the legal assistance of a defence counsel of his own choice.

73. On the other hand, in the legislative intention for the addition of the phrase "a fair trial" in Article 36 of the Constitution, it is stressed that the right to a fair trial, which is also guaranteed by the international conventions to which Turkey is a party, was incorporated into the legal text. In fact, Article 6 § 3 (c) of the European Convention on Human Rights (the Convention) stipulates that everyone charged with a criminal offence has the right to defend himself in person or through legal assistance of a defence counsel of his own choosing or, if he has not sufficient means to pay for legal assistance to be given it free when the interests of justice so require.

74. So as to prevent the defence from being in a disadvantage position compared with the prosecution, it may be required to provide legal assistance for the suspect and the accused, along with the opportunity of defending himself personally (in person). The need for legal assistance of the person accused of a criminal offence may arise from overcoming difficulties in having an access to the evidence, lack of legal knowledge or the psychological state in which he is. Within this context, the right to legal assistance, ensuring the effective exercise of the right to defence, is also a requirement of the principle of "equality of arms", which constitutes another element of the right to a fair trial. In other words, the right to legal assistance ensures not only the effective exercise of the right to defence, but also functionality to the principle of equality of arms.

75. Another significant aspect of the right to legal assistance with regard to the right to a fair trial, which is enshrined in Article 36 of the

Constitution, is the acknowledgement that the State has the positive obligation to ensure the person accused of a criminal offence to enjoy this right. Article 36 of the Constitution also prescribes that if the person accused of a criminal offence has not sufficient means to pay for legal assistance or when the interests of justice so require, he must be provided with a defence counsel to be appointed *ex officio*. It may be required to appoint a defence counsel for the person accused of a criminal offence so as to ensure the fair functioning of the criminal justice system by considering the gravity of charges in conjunction with the specific circumstances of the suspect's/accused's case (e.g. being a foreigner), the complexity of the matter in dispute and the severity of the accusation. Therefore, it is impossible to demand the person accused of a criminal offence to defend himself/herself in person. If it is compulsory to appoint a defence counsel for the suspect/accused for the fair functioning of criminal justice system, the positive obligation to appoint a defence counsel must be fulfilled. On the other hand, the competent judicial authorities must take the necessary actions– as required by the duty of care– should they determine that the assigned defence counsel failed to provide an effective legal assistance (abstained from performing his duties).

76. The aforementioned right should be, in principle, afforded from the first interrogation of the suspect by the law enforcement officers. It is essential that the suspect be provided with right to legal assistance by the law enforcement officers from the first interrogation for, in general, the right to a fair trial to ensure an effective protection, in addition to the privilege against self-incrimination and the right to remain silent. That is because the evidence obtained at this stage determines the framework in which the offense in question shall be dealt with during the trial. Most particularly, as the legislation on criminal proceedings increasingly becomes more complex at the stage of evidence collection and utilization, the suspects may find themselves in a vulnerable state at this phase of the criminal procedures. The aforementioned state of vulnerability may be duly redressed only through the legal assistance of a defence counsel (see *Aligül Alkaya and Others*, [GC], no. 2013/1138, 27 October 2015, §§ 118, 135; and *Sami Özbil*, no. 2012/543, 15 October 2014, § 64).

77. Some of the above-mentioned requirements of the right to legal assistance are also specified in the relevant rules of procedure. Within this context, it is set forth in the Code of Criminal Procedure no. 5271 (Law no. 5271) that there exists an obligation to appoint a defence counsel, even if the suspect or the accused does not make a formal request for it or explicitly expresses of his will for non-appointment of a defence counsel, in cases where the suspect or the accused without a defence counsel is a minor, is disabled or deaf and mute to the extent to which he cannot defend himself; where the punishment for the offence, subject to investigation or prosecution, requires a minimum prison sentence of over five years; where there shall be a decision to keep the suspect or the accused under surveillance so as to inquire into his imputability in an official institution; where the suspect or the accused is sent to the court for being detained on remand; where a hearing is held in absentia due to the fact that the accused undermines the orderly conduct of the hearing with his actions; and where a hearing is held with regard to a fugitive suspect (see the judgment of the General Assembly of Criminal Chambers of the Court of Cassation, E.2011/10-182, K.2011/204, 11 January 2011). Pursuant to Article 150 § 1 of Law no. 5271, if the suspect or the accused states to be in no position to retain a defence counsel, a defence counsel shall be appointed upon request. According to Article 151 § 1 of the aforementioned Law, if the court-appointed defence counsel does not attend the court hearing, withdraws from the hearing or abstains from performing his duties, the judge or the court are to immediately take necessary action for appointment of another defence counsel.

78. The right to legal assistance is not absolute. It is possible to limit this right in exceptional cases. The present right may be limited in cases of compulsory grounds. Even in cases where compulsory grounds are indicated as a justification for denial of legal assistance, such limitations must not encroach upon the rights of the suspect/accused that are guaranteed within the context of the right to a fair trial (see *Aligül Alkaya and Others*, §§ 118, 137). What is essential in terms of the right to legal assistance is the suspect's/accused's ability to have effectively benefitted from legal assistance given the prosecution process as a whole. However, the right to defence shall not be considered to have been violated if the

restrictions on the right to legal assistance are redressed in the subsequent stages of the trial.

79. The accused possesses direct and immediate information on the incident. Hence, it is clear that the statements of the accused are tremendously significant in terms of clarifying the matter. In this respect, in any and all substantial cases, it is imperative to examine whether the person imputed with criminal offence issued self-incriminating statements in the absence of a defence counsel, whether the aforementioned confessions were held against him/her, whether the court drew negative conclusions from his/her silence and whether he/she was oppressed in any way. Within the course of criminal proceedings, the privilege against self-incrimination and the right to refuse to give evidence indicate the obligation to prove the accusations without resorting to evidence obtained by force or against the will of the accused. In the event that the confession issued by the accused under the supervision of law enforcement without having access to an attorney is used in the verdict of conviction, this shall lead to an irredeemable infringement of the right to defence. In the event that the confession, obtained during the investigation, is disaffirmed on the basis of having been obtained under torture and maltreatment, use of this confession as a basis by the court without examining the aforementioned disaffirmation points to a significant absence of due diligence.

80. In the examination of individual applications, the Constitution shall be based on; no review shall be made as to the compliance with the law. Hence, the practice of limiting access to an attorney on the basis of laws cannot be said to be in compliance with the Constitution. In assessing whether or not the right to legal assistance violates Article 36 of the Constitution, the particular circumstances of the present case must be taken into consideration within the integrity of the proceedings. The Constitutional Court determined that the reason why the suspects were not previously given access to legal assistance in terms of the offences within the jurisdiction of state security courts was a practice arising from the legislation (see *Aligül Alkaya and Others*, § 144, *Sami Özbil*, § 71; and *Güllüzar Erman*, no. 2012/542, 4 November 2014, § 48); however, the Court found violations on the grounds that the right to legal assistance was not

subsequently compensated (see *Aligül Alkaya and Others*, §§ 127-145, *Sami Özbil*, §§ 56-76; *Aynur Avyüzen*, no. 2014/784, 27 October 2016, §§ 37-58; and *Veli Özdemir*, no. 2014/785, 27 October 2016, §§ 39-62).

ii. Application of the Principles to the Present Case

81. In the present case, with respect to the offences falling into the jurisdiction of the state security courts, it is possible, in principle, for the applicants to obtain the assistance of a defence counsel while in custody only after a certain stage. Additional Article 31 of Law no. 3842 stipulates that the new regulations concerning detention procedures and provision of access to legal assistance shall not be applied to the offences falling within the jurisdiction of state security courts and that the provisions of Law no. 1412 prior to its amendment shall be implemented with regard to above-mentioned matters. The legislation which was in force at the time when the applicants were in custody did not provide the opportunity for obtaining assistance of a lawyer during the police custody. It has been observed that the applicants were held in custody under the mentioned conditions for a period between 8 and 13 days.

82. It has been observed that in the assessment concerning the acts within the scope of the offences imputed to the applicants, it has been observed that the applicants' and the other accused persons' statements alleged to have been taken in the police custody in the absence of their defence counsels and under duress were considered as evidence. It has been revealed that the applicants' conviction were ordered for the imputed offence on the basis of their statements which had been taken in the absence of a defence counsel and had not been subsequently confirmed before the court as well as the other evidence; that these statements taken in custody were significantly relied on as evidence for the applicants' conviction; and that the legal assistance and the other procedural guarantees provided at the subsequent stages failed to redress the damage caused to the applicants' right to defence at the outset of the investigation.

83. Article 148 of the Law no. 5271, which subsequently entered into force (during the proceedings), is capable of ensuring the investigation to be effective at the prosecution stage with respect to the statements which

are taken by the law-enforcement officers in the absence of a defence counsel and which are not confirmed before a judge or a court. However, this question was not discussed in the court's decision and could not be redressed at the appellate stage. The failure to provide the opportunity for access to legal assistance in the police custody and taking these statements at this stage as a basis for the conviction decision led to the breach of the right to a fair trial in conjunction with the right to legal assistance.

84. The Constitutional Court consequently held that there was a breach of the right to a fair trial in conjunction with the right to legal assistance within the scope of the right to a fair trial guaranteed in Article 36 of the Constitution.

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

85. The applicants maintained that there was a breach of their right to a trial within a reasonable time.

1. Admissibility

86. The allegation regarding the violation of the right to a trial within a reasonable time is not manifestly ill-founded and there exists no ground to declare it inadmissible, therefore it must be declared admissible.

2. Merits

87. In determining the duration of criminal proceedings, while the starting point (*dies a quo*) is taken as the date on which the person is notified by competent authorities of the imputed crime or the date on which the person is first affected by the imputation through the employment of certain measures such as search and detention; the end date (*dies ad quem*) is taken as the date of the final judgment on criminal charges or the date on which the Constitutional Court renders a judgment on the complaint concerning reasonable time for on-going proceedings (see *B.E.*, no. 2012/625, 9 January 2014, § 34).

88. In assessing whether or not the duration of the criminal proceedings is reasonable, the complexity and the levels of the proceedings, the conduct of the parties and relevant authorities within the course of the proceedings

and the quality of the applicant's interest in the speedy conclusion of the proceedings shall be taken into account (see *B.E.*, § 29).

89. Having regard to the aforementioned principles and the judgments rendered by the Constitutional Court in similar applications, it has been concluded that the duration of proceedings lasting for approximately 13 years, 10 months and 25 days in the present case was not reasonable.

90. Consequently, the Constitutional Court held that there was a breach of the right to a trial within a reasonable time guaranteed in Article 36 of the Constitution.

C. Other Alleged Violations within the Scope of the Right to a Fair Trial

91. The applicants maintained that there was a breach of their right to a fair trial guaranteed in Article 36 of the Constitution, stating that they were tried in special courts, that the organization referred to in the decision was fabricated, that their presumption of innocence was violated and that the outcome of the proceedings was not fair.

92. Having regard to the above-mentioned conclusion finding a violation of the applicants' right to a fair trial, it has been concluded that it is not required to render a separate decision on the admissibility and merits of further complaints within the scope of the right to a fair trial guaranteed in Article 36 of the Constitution.

D. Alleged Violation of the Right to Personal Liberty and Security

93. The applicants maintained that the maximum period of detention was exceeded and they were unduly detained. The applicant, Yusuf Karakuş, also maintained that his rights were not read and his relatives were not notified while he was in custody; that certain acts imputed on him were not subject to the conviction and that he was unduly detained for these acts.

94. Pursuant to Provisional Article 1 § 8 of the Code no. 6216 dated 30 March 2011 on Establishment and Rules of Procedure of the Constitutional Court, the Constitutional Court's jurisdiction *ratione temporis* commences on 23 September 2012, and the Court shall examine the individual

applications to be lodged against the last actions and decisions that were finalized after 23 September 2012 (see *Zafer Öztürk*, no. 2012/51, 25 December 2012, § 18). In the present case, it has been understood that while the applicants' custody period came to an end when they were detained on 14 May 2000 and 19 May 2000, the applicant Yusuf Karakuş's detention on remand on the basis of an imputed offence ended with his release on 28 July 2005.

95. Consequently, the Constitutional Court held that this section of the application was inadmissible due to *lack of jurisdiction ratione temporis*.

E. Alleged Violation of the Prohibition of Torture

1. As to the Applicants Hasan Kılıç and Yusuf Karakuş

96. The applicants maintained that their statements were taken by law-enforcement officers under torture and thus there was a breach of the prohibition of torture.

97. Owing to the secondary nature of the individual applications, lodging an application with the Constitutional Court requires the exhaustion of ordinary legal remedies. The applicant must first duly submit his complaint, which is subject to the individual application, to the competent administrative and judicial authorities in due time, present the available information and evidence to the these authorities and show due diligence so as to pursue his case and application within this period (see *İsmail Buğra İşlek*, no. 2013/1177, 26 March 2013, § 17).

98. In the event that the individual has a tenable allegation with regard to an unlawful treatment by a state official in breach of Article 17 of the Constitution, this article – interpreted in conjunction with the general obligation referred to in Article 5 of the Constitution, titled "*Fundamental aims and duties of the State*" – calls for an investigation. This investigation must be capable of identifying and punishing those responsible (see *Tahir Canan*, § 25).

99. It is essential to designate the type of investigation required by procedural obligations in a case based on whether or not the obligations with regard to the right to protect and improve one's corporeal and

spiritual existence call for a criminal penalty. In cases pertaining to incidents of death occurring as a result of intentional acts or assault or maltreatment, the State has the liability to conduct criminal investigations capable of identifying and punishing those responsible for the lethal assault or physical injury as per Article 17 of the Constitution (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, § 55).

100. It is understood that the legal remedy, which would provide a solution and offer reasonable prospects for the ascertainment of the material case and for the identification and punishment of those responsible with regard to the applicants' complaints, is to conduct an effective criminal investigation (see *Zeki Güngör*, no. 2013/8491, 31 March 2016, § 40). However, in the present case, no criminal investigation was initiated *ex officio* or upon the notification of the applicants.

101. Within the scope of the effective investigation liability of the State, it is clear that an *ex officio* investigation must be initiated where there exists strong indication of torture or maltreatment, even if the interference was made by third parties, or when there is no notification or complaint to this end (see *Tahir Canan*, § 25). Nevertheless, non-fulfilment of the obligation to initiate an *ex officio* investigation on the part of the State does not negate the applicants' obligation to duly submit their allegations to administrative and judicial authorities pursuant to the secondary nature of the individual applications (see *Zeki Güngör*, § 42).

102. It has been established that the effective remedy for the clarification of the material fact and the identification of potential criminal liability in the face of alleged assault of the applicants by law-enforcement officers is conducting a criminal investigation; however, the applicants lodged no application with the judicial authorities for the purpose of initiating a criminal investigation. The applicants did not submit any evidence refuting the aforementioned conclusion. Accordingly, having regard to the fact that the applicants, who maintained that they were subjected to actions falling into the scope of Article 17 § 3 of the Constitution, did not lodge any application to mobilize judicial authorities, it has been concluded that the present application cannot be examined by the Constitutional Court, pursuant to the secondary nature of the individual applications.

103. In the present case, it is understood that the applicants lodged an individual application without exhausting the legal remedies available to them.

104. Consequently, the Constitutional Court held that the application was inadmissible due to *non-exhaustion of domestic remedies*, without examining other admissibility criteria.

2. As to the Applicant Mehmet Şahin

105. The applicant maintained that his statements were taken by law-enforcement officers under torture, that this matter was not recorded in medical reports, that the investigation on those concerned resulted in a decision of non-prosecution, and thus there was a breach of the prohibition of torture.

106. Pursuant to Provisional Article 1 § 8 of the Code no. 6216, the Constitutional Court's jurisdiction *ratione temporis* commences on 23 September 2012, and the Court shall examine the individual applications to be lodged against the last actions and decisions that were finalized after 23 September 2012 (see *Zafer Öztürk*, no. 2012/51, 25 December 2012, § 17).

107. In the present case, it is understood that the decision of non-prosecution, which is subject to the application, was finalized prior to 23 September 2012.

108. Consequently, the Constitutional Court held that the application was inadmissible due to *lack of jurisdiction ratione temporis*, without examining other admissibility criteria.

F. Application of Article 50 of Code no. 6216

109. Article 50 §§ 1 and 2 of the Code no 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, reads as follows:

> *"(1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled…*

(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."

110. The applicants, Hasan Kılıç, Yusuf Karakuş and Mehmet Şahin requested to be awarded respectively 100,000 Turkish Liras ("TRY"), TRY 10,000 and TRY 10,000, for non-pecuniary damages sustained due to the violation of the right to a trial within a reasonable time. The applicants further claimed TRY 500,000 for pecuniary damages (Hasan Kılıç), TRY 100,000 for non-pecuniary damages (Yusuf Karakuş) and TRY 10,000 for non-pecuniary damages (Mehmet Şahin) sustained due to the violation of other rights.

111. It has been concluded that the right to a fair trial in conjunction with the right to legal assistance and the right to a trial within a reasonable time have been violated.

112. As there exists legal interest in conducting retrial for redress of the consequences of the violation of the right a fair trial in conjunction with the right to legal assistance, it has been concluded that a copy of the judgment must be sent to the (abolished) 11th Chamber of the Ankara Assize Court (authorized under Article 250 of the Code of Criminal Procedure) in order to conduct retrial.

113. For the purpose of compensating the non-pecuniary damages sustained due to the violation of the right to a trial within a reasonable time, which cannot be compensated solely with the determination of the violation, it has been concluded that the applicants, Yusuf Karakuş and Mehmet Şahin must respectively be awarded TRY 10,000 in line with their request; and the applicant, Hasan Kılıç must be awarded TRY 18,000 for non-pecuniary damages.

114. For the Constitutional Court to award pecuniary damages, a causal relation must be established between the material damage alleged to be suffered by the applicant Hasan Kılıç and the established violation. It has been concluded that the request for pecuniary damages must be rejected due to the fact that the applicant Hasan Kılıç did not submit any document on this matter.

115. The total court expense of TRY 2,006.10 including the court fee of TRY 206.10 and counsel fee of TRY 1,800, which is calculated over the document in the case file, must be reimbursed to the applicants respectively.

VI. JUDGMENT

The Constitutional Court UNANIMOUSLY held on 8 December 2016 that

A. 1. The alleged violation of the right to personal liberty and security be DECLARED INADMISSIBLE, for *lack of jurisdiction ratione temporis*;

2. The alleged violation of the prohibition of torture be DECLARED INADMISSIBLE, for *non-exhaustion of legal remedies* and for *lack of jurisdiction ratione temporis;*

3. The alleged violation of the right to a fair trial in conjunction with the right to legal assistance be DECLARED ADMISSIBLE;

4. The alleged violation of the right to a trial within a reasonable time be DECLARED ADMISSIBLE;

B. 1. The right to a fair trial in conjunction with the right to legal assistance within the scope of the right to a fair trial guaranteed in Article 36 of the Constitution was VIOLATED;

2. The right to a trial within a reasonable time guaranteed in Article 36 of the Constitution was VIOLATED;

C. A copy of the judgment be SENT to the (abolished) 11th Chamber of Ankara Assize Court (E.2006/294, K.2013/8) for holding retrial with a view to redressing the violation of the right to a fair trial in conjunction with the right to legal assistance and the consequences thereof;

D. The applicants Yusuf Karakuş and Mehmet Şahin be PAID TRY 10,000 respectively, the applicant Hasan Kılıç be PAID TRY 18,000 in respect of non-pecuniary damages, and other compensation claims be REJECTED;

E. The total court expense of TRY 2,006.10 including the court fee of TRY 206.10 and counsel fee of TRY 1,800 be REIMBURSED TO THE APPLICANTS RESPECTIVELY;

F. The payment be made within four months as from the date when the applicants apply 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; and

G. A copy of the judgment be SENT to the Ministry of Justice.

RIGHT TO UNION
(ARTICLE 51)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

HİKMET ASLAN

(Application no. 2014/11036)

16 June 2016

On 16 June 2016, the Second Section of the Constitutional Court found a violation of the right to union safeguarded by Article 51 of the Constitution in the individual application lodged by *Hikmet Aslan* (no. 2014/11036).

THE FACTS

[7-24] The applicant is a Turkish language and literature teacher at a high school in İstanbul. He is also a board member of a branch of the labour union, namely Eğitim ve Bilim Emekçileri Sendikası (Eğitim-Sen).

The relevant labour union organized a strike to be held on 21 December 2011 in order to defend social and economic rights as well as to announce its demands. The day before the strike, the applicant wore a cockade at the school, on which it was written that "*We are on strike on 21 December*".

On 20 December 2011, the school principal, along with the deputy principals, issued a report against the applicant, stating that the applicant wearing a cockade at the school and entering the classrooms with it, acted in breach of the school regulations. At the end of the subsequent investigation, the applicant was given a warning as a disciplinary punishment on 1 June 2012.

On 31 August 2012, the applicant challenged against the disciplinary punishment before the administrative court which later dismissed his application. The applicant's subsequent appeal was also rejected, and the decision against him was upheld.

Thereupon, the applicant filed an individual application on 2 July 2014.

V. EXAMINATION AND GROUNDS

25. The Constitutional Court, at its session of 16 June 2016, examined the application and decided as follows.

A. The Applicant's Allegations

26. The applicant maintained that he was a member of a labour union, namely EĞİTİM-SEN; that he had been imposed a sanction at the end of

the disciplinary investigation, which, according to him, was due to his membership to the said union; that it was not permissible under Article 18 of Law no. 4688 to be subject to oppression due to the labour union-related rights; that the investigation conducted as a result of wearing a cockade on 21 December 2011 had been initiated by the school principal against whom he had previously filed a complaint with the public prosecutor's office for the mobbing he had allegedly been subject to; that the investigation officer who had not been impartial and independent ordered sanction against him (the applicant); that the grounds for the sanction had not been explained to him and that no reference had been made to Law no. 657, which thus infringed the principle of legality of crimes and punishments (*nullum crimen, nulla poena sine lege*); that he had not been allowed to confront those who had given statement against him; that the documents he had submitted had not been taken into consideration in reaching the decision; that he had told that he would give his statement while his lawyer was present during the investigation, that in fact, his statement had been taken in the presence of his lawyer but these statements had not been included in the case file; that the allegations regarding the procedures and principles stated in the petition had not been addressed to; that many teachers working in the same school with him had also worn cockade, however it had been only him who had been subject to an action; that imposition of a disciplinary sanction on him for wearing the said cockade had been in breach of his freedom of thought and expression as well as his right to demonstration; that no restriction had been stipulated in the Constitution regarding the place where the demonstration would be held; that the court decisions against him had been null and void; and that no fair trial had been carried out during the disciplinary investigation and the proceedings before the court. As a result, the applicant claimed that his rights enshrined in Articles 10, 26, 34, 36 and 38 have been violated. In this respect, he requested that the violation be found; and he claimed non-pecuniary compensation, without stating any amount.

B. The Court's Assessment

27. The Ministry, in its observations, referred to the judgments of the European Court of Human Rights ("the ECHR") in similar cases and specified that the relevant issues should be taken into consideration in the

assessment of the applicant's allegations of violation and that the said act should not be considered within the scope of the labour union rights, but the freedom of expression.

28. 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). Although the applicant maintained that his having worn a cockade at school was related to his right to demonstration as he had worn it in relation to the strike organized by the union, his allegations should be examined within the scope of his freedom of assembly in relation to the labour union-related activities.

29. In addition, the applicant argued that he had been imposed disciplinary sanction for wearing a cockade at school in relation to the strike organized by the trade union of which he was a member, which, according to him, had actually resulted from the fact that there was hostility between the school principal and him. In this regard, he claimed that no action had been taken against the other teachers wearing a cockade, which was in breach of the principle of equality. Regarding the alleged violation of the principle of equality, the applicant is expected to adduce reasonable evidence to substantiate that he had been subject to different treatment than those who had been in a similar situation with him and that this difference had been based on discriminatory grounds such as race, colour, sex, religion, language, and etc. without a legal basis. In the present case, the applicant neither submitted similar cases, nor did he make any statement pointing to the type of the alleged discrimination and its manner. Therefore, as the alleged violations of the principle of equality cannot be put forth in an abstract manner and independently of other rights, they must be examined within the scope of the right to a fair trial as a whole. The applicant's allegations concerning the disciplinary investigation process, trial procedure, reasoning of the decisions and the conclusion of the case have been examined under the right to a fair trial.

1. Freedom of Assembly

a. Admissibility

30. The applicant's allegations that he had been imposed disciplinary sanction for his having worn a cockade at school, which had been related

to the strike organized by the labour union of which he was a member, in breach of his freedom of assembly are not manifestly ill-founded. The alleged violation of the freedom of association must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

31. The applicant claimed that he had worn the cockade within the scope of the strike legally organized by the labour union of which he was a member according to which he would not go to the school the next day; and that he had been imposed a disciplinary sanction only for this act of him, which was in breach of his freedom of expression.

32. The Ministry, in its observations, specified that the freedom of expression constituted one of the foundations of the democratic society within the scope of Article 10 of the European Convention on Human Rights ("the Convention") and that the freedom of expression applied not only to information and thoughts that were considered to be in favour or harmless or unimportant, but also to offensive, shocking or disturbing information and thoughts for a part of the state or society. In this context, it was stated that an examination should be made as to whether there had been an interference with the applicant's freedom of expression, whether the interference had been prescribed by the law, whether the interference had pursued a legitimate aim as well as whether the interference had been necessary in the democratic order of the society.

33. Article 13 of the Constitution, titled "*Restriction of fundamental rights and freedoms*", provides 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."*

34. Article 51 of the Constitution, titled "*Right to union*", read as follows:

"Employees and employers have the right to form unions and higher organizations, without prior permission, and they also possess the right to become a member of a union and to freely withdraw from membership, in order to safeguard and develop their economic and social rights and the interests of their members in their labour relations. No one shall be forced to become a member of a union or to withdraw from membership.

The right to form a union shall be solely restricted by law on the grounds of national security, public order, prevention of commission of crime, public health, public morals and protecting the rights and freedoms of others.

The formalities, conditions and procedures to be applied in exercising the right to form union shall be prescribed by law.

(Repealed on September 12, 2010; Act No. 5982)

The scope, exceptions and limits of the rights of civil servants who do not have a worker status are prescribed by law in line with the characteristics of their services.

The regulations, administration and functioning of unions and their higher bodies shall not be inconsistent with the fundamental characteristics of the Republic and principles of democracy."

35. The freedom of association stands for the individuals' freedom to come together by forming a collective entity which represents them in order to protect their own interests. Freedom of association gives individuals the opportunity to realise their political, cultural, social and economic goals as a community. The right to labour union brings about the employees' freedom of association by coming together so as to protect their personal and common interests. From this aspect, it is not an independent right, but a form or a special aspect of the freedom of association (see *Tayfun Cengiz*, no. 2013/8463, 18 September 2014, §§ 30, 32).

36. The fact that the activities carried out by the individuals continuously and coordinately are not regarded as association in our legal system does not mean that the freedom of association will not necessarily be mentioned within the provisions of the Constitution. In democracies, the existence of organizations under which citizens will come together and pursue common goals constitutes an important component of a sound society. In

democracies, such an "organization" enjoys fundamental rights needed to be respected and protected by the State (see *Tayfun Cengiz*, § 31).

37. The rights and freedoms enshrined in Articles 33 and 51 of the Constitution are brought together in Article 11 of the Convention. In addition, in the interpretation and application of Article 11 of the Constitution, the case-law of the ECHR under Article 10 of the Convention should be taken into consideration (see *Özgürlük ve Demokrasi Partisi v. Turkey*, no. 23885/94, 8 December 1999, § 37; and *Öllinger v. Austria,* no. 76900/01, 29 June 2006, § 38).

38. Article 51 of the Constitution imposes both negative and positive obligations on the State. The State's negative obligation not to interfere with the freedom of assembly enjoyed by the individuals as well as the labour unions within the scope of Article 51 is subject to the circumstances allowing for an interference on the grounds enumerated in Article 51 § 2-6. As a matter of fact, the criteria to be applied as regards the State's both obligations do not differ. Regardless of the State's positive or negative obligations, a fair balance must be struck between the conflicting ideas of the individual and the society. In the assessment of whether this fair balance has been struck, the Constitutional Court will pay regard to the fact that the public authorities enjoy a certain margin of appreciation in this respect (see *Tayfun Cengiz*, §§ 36 and 37).

39. In addition, the freedom of assembly may be subject to restrictions in accordance with the restriction regime set forth in the Constitution as regards the fundamental rights and freedoms. Articles 33 § 3 and 51 § 2 of the Constitution provides grounds for restriction concerning the freedom of assembly. However, the restrictions in this respect must have limitations as well. The criteria set forth in Article 13 of the Constitution must be taken into account in the restriction of fundamental rights and freedoms. Accordingly, the review of the restrictions on the freedom of assembly must be conducted in accordance with the criteria set forth in Article 13 of the Constitution as well as under Article 51 (see *Tayfun Cengiz*, § 38).

40. In the present case, the applicant, a teacher at a public school, wore a cockade at school, stating the strike decision -which will be carried out

the next day- of the labour union of which he was the board member of branch, and he entered the classrooms with it. The first instance court, stating that the applicant's having worn a cockade at school before the strike had no relation with the labour union activities, considered that the applicant had not complied with the rules and procedures determined by the authorities at the place of duty. There is no other act imputed to the applicant and subject to the disciplinary investigation.

41. In the present case, the initial matter to be resolved is to determine whether imposition of a warning against the applicant who had worn a cockade at school, pointing to the strike to be legally organized the next day by the labour union, had constituted an interference with the applicant's freedom of association. At the later stages, it must be established whether the interference had had a legal basis, whether it had pursued a legitimate aim, whether the restriction had been necessary in a democratic society and whether the means used had been proportionate.

i. Existence of Interference

42. There is no doubt that the applicant's having been imposed disciplinary sanction for his not complying with the obligations expected of a civil servant as a result of his wearing a cockade at school indicating the strike to be organized by the trade union the next day concerned his freedom of assembly as well as constituting an interference.

ii. Whether the Interference Constituted a Violation

43. Pursuant to Article 51 § 2 of the Constitution, no interference is allowed to be made with the freedom of assembly "if not prescribed by law" and if does not pursue the legitimate aims set forth therein. In addition, it is to be determined whether any restriction with the freedom of expression infringes upon the essence of the right and whether it is 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, as stipulated in Article 13 of the Constitution.

Legality

44. The applicant claimed that it was unclear which acts of him led to a disciplinary sanction against him and that the said acts were not set forth

in the law. As a result of the assessments made, it has been concluded that Article 8 titled "*Conduct and Cooperation*", Article 11 titled "*Duties and Responsibilities of Civil Servants*" and Article 125 titled "*Types of Disciplinary Sanction and the Acts and Situations to be Punished*" of Law no. 657, as well as Article 9 of the relevant Regulation meet the requirement of legality.

Legitimate Aim

45. The first instance court specified that "*the complainant's wearing a cockade at school on 20 December 2011 in relation to the strike decision of a labour union cannot be considered within the scope of labour union activities, as well as it had taken place at a location and time having no relation with the labour union activities*", therefore, the said interference had pursued the aim of protecting the public order and institutional discipline. The applicant claimed that the interference in question had not complied with the legitimate aim it had pursued.

46. In order for an interference with the freedom of assembly to be legitimate, it must have been made in accordance with the law on the grounds of national security, public order, prevention of commission of crime, public health, public morals and protecting the rights and freedoms of others as stipulated in Article 51 § 2 of the Constitution.

47. It has been concluded that even though it is assumed that the disciplinary sanction imposed on the applicant for his having worn a cockade at school where he was working, announcing the strike decision of the labour union of which he was a member, pursed the legitimate aims enumerated in Article 51 § 2 of the Constitution, it will be better to discuss this issue within the scope of the assessments to be made on the necessity of the interference.

Necessity in a Democratic Society and Proportionality

48. The applicant argued that his wearing a cockade at school did not comply with the restrictive regulations set forth in Law no. 657; that he had been imposed a disciplinary sanction based on the regulations and charges not covered by law; and that although other teachers working in the same school with him had also worn cockade, it had been only him who had been subject to an action. The applicant alleged that imposition of

a disciplinary sanction against him for his wearing a cockade announcing the legal strike decision of the labour union of which he was a member and in this way also announcing that he would not attend the school the next day had been in breach of his freedom of expression. The applicant further stressed that the relevant investigation had been initiated by the school principal who had taken office after him as well as mobbing him.

49. The Ministry, in its observations, underlined that the freedom of expression enshrined in Article 10 of the Convention was also enjoyed by the public officials and that besides, the exercise of this freedom by the public officials requires more sensitive approach of the authorities; this issue is embodied in the Convention within the scope of duties and responsibilities. The Ministry also specified that in case of any interference with the freedom of expression, it should be examined whether there are grounds justifying the measures taken as well as "*whether there is a reasonable balance between the aim pursued and the means employed*" in terms of the requirements of the democratic society.

50. Freedom of assembly, in general, and the right to union, in particular, are not absolute and may be subject to certain restrictions. An assessment is required to be made as to whether the restrictions set forth in Article 51 § 2 of the Constitution concerning the right to union comply with the principles of necessity in a democratic society and proportionality, which are safeguarded by Article 13 of the Constitution.

51. The concept of "democratic society" enshrined in the Constitution should be interpreted from a contemporary and liberal point of view. The criterion of "democratic society" clearly reflects the parallelism between Article 13 of the Constitution and Articles 9, 10 and 11 of the Constitution where this criterion is employed. Thus, the criterion of democratic society should be interpreted on the basis of pluralism, tolerance and open-mindedness (for judgments of the ECHR in the same vein, see *Handyside v. the United Kingdom*, no. 5493/72, 7 December 1976, § 49; and *Başkaya and Okçuoğlu v. Turkey*, nos. 23536/94, 24408/94, 8/7/1999, § 61). The Constitutional Court has also stressed this qualification many times in its previous judgments (see *Tayfun Cengiz*, § 52).

52. Accordingly, civil servants –who are individuals at the same time– enjoy the protection of fundamental principles of a democratic society such as pluralism, tolerance and open-mindedness. In other words, unless there is a case of inciting violence or the denial of democratic principles, even if some opinions expressed within the framework of the right to union and the manner in which they are expressed are unacceptable for the competent authorities, the measures aimed at eliminating the freedoms of expression and association cannot serve the democracy and yet, they imperil it (see *Kayasu v. Turkey*, nos. 64119/00, 76292/01, 13 November 2008, § 77).

53. Another guarantee which will intervene in all kinds of limitations on rights and freedoms is the ''principle of proportionality'' expressed under Article 13 of the Constitution. This principle is a guarantee which needs to be taken into consideration with priority in applications regarding the limitation of fundamental rights and freedoms. Although the requirements of a democratic order of the society 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 (see *Tayfun Cengiz*, § 53).

54. According to the decisions of the Constitutional Court, proportionality reflects the relationship between the objectives of limiting fundamental rights and freedoms and the means. The review of proportionality is the inspection of the means selected based on the sought objective in order to reach this objective. For this reason, in any interference with the right to union, whether the interference selected in order to achieve the sought objective is suitable, necessary and proportionate needs to be evaluated. In this context, the main axis for the evaluations to be carried out with regard to the relevant incident will be whether the justifications which the courts of instance that caused the interference relied on in their decisions are in line with the principles of ''necessity in a democratic society'' and ''proportionality'' with a view to restricting the right to union (see *Tayfun Cengiz*, §§ 54 and 55).

55. In addition, the freedom of association -when it comes to civil servants- raises the discussion of whether their opinions have been expressed in a balanced and impartial manner without any traces of politics, whether personal attitudes have been exhibited and whether their impartiality have been safeguarded. In this respect, the ECHR grants a margin of appreciation to the national authorities in determining the extent of the duties and responsibilities of the civil servants in relation to their position (see *İsmail Sezer v. Turkey*, 36807/07, 24 March 2015, § 28; *Ahmed and Others v. the United Kingdom*, no. 22954/93, 2 September 1998, §§ 53, 54; and *Otto v. Germany* (dec.), no. 27574/02, 24 November 2005). However, it should be noted that this situation that restricts the freedom of association has also limits.

56. It may be legitimate for a State to subject the civil servants, by reason of their status, to an obligation of commitment as well as to certain duties and responsibilities. However, it is beyond any doubt that the civil servants are also individuals and thus they have social aspects such as having political opinions, dealing with country and social problems and making choices and that they have the right to enjoy Articles 10 and 11 of the Convention (see *İsmail Sezer v. Turkey*, § 52; and *Vogt v. Germany*, no. 17851/91, 26 September 1995, § 53).

57. In addition, it should also be noted that the freedom of association guarantees the members of a union, for the defense of their interests, the right to have their union heard, but that it does not guarantee them a precise treatment by the State (see *İsmail Sezer v. Turkey*, § 50).

58. The Constitutional Court shall establish, in the particular circumstances of each case as well as considering the case as a whole, whether the impugned interference had been necessary in a democratic society, whether the essence of the right had been impaired during the interference and whether it had been proportionate (see *Yaman Akdeniz and Others*, no. 2014/3986, 2 April 2014, § 44). In this respect, the duties performed by the applicant, the conditions of his place of duty, the nature of the act subject to the disciplinary sanction and the reflection of the applicant's attitude to his duty will be evaluated.

59. Given the fact that the applicant is a Turkish language and literature teacher at a public school at secondary level and he is also a union representative, it should be borne in mind that he could not be deprived of the right to engage in the union activities, the organized form of expressing thoughts within the scope of freedom of expression. However, in situations where the necessity is indisputable in a democratic society, restrictions may be brought to political and social activities in the areas of military, security forces or some other areas. It has been understood that the applicant was not in a position that would require such restrictions or posed other security threats, as well as that the school administration did not complain that he had performed attitudes and actions falling foul of his impartiality.

60. The labour union of which the applicant was a member decided to organize a strike for one day on 21 December 2011 with a view to warning the Government within the framework of the Convention, the Constitution and the other relevant laws with the requests related to "collective bargaining, secured employment, basic salary to ensure them live properly, inclusion of additional payments in pensions, and cessation of pressures, punishments and exiles". On the cockade worn by the applicant it was written that "We are on strike on 21 December". It should be taken into consideration that the demonstration that the union had been planning to hold aimed at defending the social and personal rights of the working class, and that there had been no indication that it was not peaceful. Again, it should be evaluated that except for announcing the strike and its date, the cockade worn by the applicant the day before the strike contained no illegal phrases or signs that would hurt the public or misdirect them and that as the school where the applicant was working was a secondary school, the students were less likely to be influenced by their teachers when compared to primary education students.

61. The applicant claimed that he was the board member of a branch of the labour union and had tried to announce the reason why he would not go to school the next day in his capacity as the unionist and that he had committed no acts other than wearing a cockade. Although the cockade the type of which is explained above seems to be contrary to the legal arrangements concerning the appearance of a civil servant during his duty,

it should be accepted as a part of the labour union activity, as it had been worn temporarily the day before the strike that had been legally planned by the labour union, it had been related to the strike organization as a way of demonstrating the employees' solidarity as well as freely exercising their union rights and it had had an objective to inform the third parties. In this respect, the ECHR reiterates that, having regard to the eminent place of freedom of association in a democratic society, an individual does not enjoy this freedom if the possibilities of choice or action available to him remain ineffective or reduced to the point of offering no utility (see *Akın Şişman and Others v. Turkey*, no. 1305/05, 27 September 2011, §§ 32-34).

62. In the present case, the applicant was given a warning as a disciplinary sanction as a result of his act. The impugned sanction, however small it may be, is likely to dissuade union members such as the applicant from participating in strikes or actions legally organized in order to defend their interests (see *Kaya and Seyhan v. Turkey*, no. 30946/04, 15 December 2009, § 30; *Karaçay v. Turkey*, no. 6615/03, 27 June 2007, § 37; *Doğan Altun v. Turkey*, no. 7152/08, 26 May 2015, § 50; and *Ezelin v. France*, no. 11800/85, 26 April 1991, § 43).

63. Consequently, it has been concluded that the impugned warning as a disciplinary sanction had not been necessary in a democratic society for not serving a pressing social need. Therefore, there has been a violation of the applicant's right to union safeguarded by Article 51 of the Constitution.

2. Right to a Fair Trial

64. The applicant claimed that although he had stated during the disciplinary investigation that he would make his defence in the presence of a lawyer, he had not been granted additional time as well as an opportunity to defend himself, that he had been allowed to avail of the right to examine the witnesses, that the investigation against him had been conducted by the school principal against whom he had previously filed a complaint for the mobbing he had allegedly been subject to, and that the act with which he had been charged did not comply with the legal provisions.

65. However, given the circumstances of the case as well as finding of a violation of the right to union safeguarded by Article 51 of the Convention,

it has been concluded that the main legal issue raised by the applicant has been examined and resolved. Thus, there is no need for a further examination of the other complaints.

3. Application of Article 50 of Code no. 6216

66. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, reads as follows:

"1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled.

(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."

67. The applicant requested that a violation be found.

68. It has been concluded that the right to union was violated.

69. As there is a legal interest in conducting retrial in order to redress the consequences of the violation of the applicant's right to union, a copy of the judgment must be sent to the 5th Chamber of the Istanbul Administrative Court for retrial.

70. As finding of a violation has constituted an adequate redress for the applicant, his claim for compensation due to the alleged interference with his right to union must be dismissed.

71. The total court expense of 2,006.10 Turkish liras (TRY) including the court fee of TRY 206.10 and the counsel fee of TRY 1,800, which is

calculated over the documents in the case file, must be reimbursed to the applicant.

V. JUDGMENT

The Constitutional Court UNANIMOUSLY held on 16 June 2016 that

A. The alleged violation of the right to union be DECLARED ADMISSIBLE;

B. The right to union safeguarded by Article 51 of the Constitution was VIOLATED;

C. It was not necessary to examine the complaints under the right to a fair trial;

D. A copy of the judgment be SENT to the 5th Chamber of the Istanbul Administrative Court to conduct retrial in order to redress the consequences of the violation of the right to union;

E. The applicant's compensation claim be DISMISSED;

F. The total court expense of TRY 2,006.10 including the court fee of TRY 206.10 and the counsel fee of TRY 1,800 be REIMBURSED to the APPLICANT;

G. 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; and

H. A copy of the judgment be SENT to the Ministry of Justice.

FREEDOM OF POLITICAL ASSOCIATION (ARTICLE 68)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

DENİZ DÖNMEZ AND OTHERS

(Application no. 2014/4663)

9 June 2016

On 9 June 201, the First Section of the Constitutional Court found a violation of the freedom of political association safeguarded by Article 68 of the Constitution in the individual application lodged by *Deniz Dönmez and Others* (no. 2014/4663).

THE FACTS

[6-22] The applicant, the People's Liberation Party ("HKP"), is a political party, and the other applicants are the officials of district organizations of the HKP. The applicants, who are natural persons, were imposed fines on various dates for failing to hold the provincial/district congress within the prescribed period. These applicants' challenges against the administrative fines were dismissed, with final effect, by the incumbent courts as the decision whereby an administrative fine was imposed was not contrary to the procedure and the relevant law. The final decisions were served on the applicants on 5 March 2014, 22 August 2014 and 9 October 2014. They then lodged an individual application with the Court.

IV. EXAMINATION AND GROUNDS

23. The Constitutional Court, at its session of 9 June 2016, examined the application and decided as follows:

A. The Applicants' Allegations

24. The applicants stated that an administrative fine had been imposed on the chairpersons of the Administrative Boards of the District Organizations on the grounds of a failure to hold the district congress within the last three years in spite of existence of no provision under the relevant guidelines which entails imposition of an administrative fine in case of a failure to hold district congresses; that the reason underlying the failure to hold the district congress had been the lacking of the legally prescribed quorum to hold a plenary session; and that the imposition of an administrative fine on the administrators of a party, the members of which were not in a number sufficient to hold plenary sessions, - especially considering the fact that the majority of the administrators of People's Liberation Party are workers, unemployed people, students, and those from the low-income group of the community - would preclude

the party from performing its activities in monetary terms, lead to the closure of its district organizations, and hamper the involvement of the applicants in organizational and associational activities. The applicants accordingly alleged that their freedoms of expression and assembly due to the imposition of such an administrative fine which was in breach of the procedure and the law, as well as the principle of legality of criminal offences and penalties and the right to fair trial due to imposition of an administrative fine without any legal basis and in the absence of their defence submissions.

B. The Court's Assessment

25. Although the applicants alleged that their freedom of expression had been violated due to the unlawful imposition of an administrative fine on the administrator of a political party that has no quorum to hold a plenary session as well as to the dismissal by the incumbent court of their challenge against it, along with the violation of the principle of legality of criminal offences and penalties in terms of the applicant who are natural persons, the Court conducted the examination and assessment from the standpoint of the freedom of political association as these allegations in essence relate to this freedom.

1. **Admissibility**

26. The principles which concern the facts that the freedom of political association is under the joint protection of the Constitution and the European Convention on Human Rights ("the Convention") and that the legal person applicant (HKP) has victim status within the scope of the impugned incident and which relate to the admissibility of the application and are applicable to the cases similar to the present application have been set forth for the first time in the decision of *Metin Bayyar and People's Liberation Party* (no. 2014/15220, 4 June 2015, §§ 25-42). Examining the present application, the Court has found no ground to depart from the principles set forth in the said decision.

27. Therefore, the application must be declared admissible for all of the applicants yet there being no other grounds for its inadmissibility.

2. Merits

28. Freedom of expression is a means to convey and circulate the ideas and thereby enabling individuals and communities to be informed. Expressing the ideas including those opposing to the majority by any means, gaining stakeholders for the ideas expressed, materializing the ideas, and convincing others for the materialization thereof are amongst the pluralist democracy's requirements. Therefore, freedom of expression is of vital importance for the functioning of democracy (see *Fikriye Aylin and others,* no. 2013/6154, 11 December 2014, § 29*)*.

29. Freedom of association is the manner by which the freedom of expression is exercised via collective tools as well as enables individuals to protect their own benefits and to collectively achieve their political, cultural, social, and economic goals. Therefore, in interpretation and implementation of the Article 11 of the Convention, the case law established by the European Court of Human Rights ("the ECHR") under Article 10 of the Convention must be taken into consideration (see *Freedom and Democracy Party v. Turkey*, no. 23885/94, 8 December 1999, § 37; *Öllinger v. Austria*, no. 76900/01 , 29 June 2006, § 38).

30. As, under the freedom of association, the goal of political parties is to protect the ideas and freedom to express them, to establish a ground for enabling the individuals to select and make a choice, to ensure the proper functioning of democracy, and to ensure "pluralism", "broadmindedness", "tolerance", and similar concepts go beyond spurious concepts, these concepts are regarded as the indispensable means of democracy. The ECHR has stated that the free expression of the opinion of the people in the choice of the legislature is inconceivable without the participation of a plurality of political parties representing the different shades of opinion to be found within a country's population. Thereby, by relaying this range of opinion, political parties make an irreplaceable contribution to political debate, which is at the very core of the concept of a democratic society (see *United Communist Party of Turkey v. Turkey,* no. 19392/92, 30 January 1998, §§ 43, 44).

31. In the present case, the impugned administrative fines were imposed pursuant to Article 32 § 1 (b) of Law no. 5253 by a reference to Article

118 of Law no. 2820 due to the failure to hold ordinary congress within the three-year period following the formation. The fines in question were imposed by the local civilian authority in accordance with Article 33 of the Law no. 5253.

32. The content of the regulations on political parties, the Venice Commission's opinions on the authorities that will implement these regulations and the principles applicable to cases similar to the present one during the examination on the merits are elaborately assessed in the decision of *Metin Bayyar and People's Liberation Party.* Regard being had to the administrative sanction imposed in the present case, the authority imposing the sanction and the relevant statutory regulations, there is no ground to require the Court, in the present case, to depart from the principles set forth in relation to the assessment on the existence of any interference and as to whether the interference has constituted a violation as well as from the assessments as to the lawfulness condition.

33. In the concrete case, the administrative fines were imposed, on the applicants acting in the capacity of political party officials, by the Governor's and District Governor's Offices pursuant to the provision of "*The local civilian authority is authorized to decide on the administrative sanctions prescribed herein*", which is laid down in Article 33 § 2 "*Imposition of penalties*" of Law no. 5253. However, Article 118 of Law no. 2820 refers to the provisions regarding associations only in terms of "penal sanctions" but not to the procedure of implementation of these sanctions and to the authority to impose them.

34. On the other hand, Article 118 of Law no. 2820 sets forth that the penal sanctions regarding associations will be applicable not only to the political party officials, but also to the "political parties". However, the Court is empowered to close a political party or to deprive any political party of governmental aids in cases specified in the Law under Article 101 of Law no. 2820 and to give a warning, by virtue of Article 104 of the Law no. 2820, to political parties if any of the imperative provisions included in the same Law, except for Article 101 thereof, as well as of the imperative provisions laid down in other laws on political parties.

35. Therefore, it cannot be considered that the lawmaker refers, by Article 118 of Law no. 2820, to the provisions on associations also in terms of "*the authority to impose the penal sanctions*" prescribed by Article 33 of Law no. 5253 in addition to "*the penal sanctions*" set forth in Article 32 of the same Law (see *Metin Bayyar and People's Liberation Party*, § 64).

36. Accordingly, the civilian authorities cannot be said to have statutory power in imposing sanctions on the political party officials. However, Articles 101 and 104 of Law no. 2820 empower the Constitutional Court to impose sanctions only on the political parties in their capacities as a legal person but do not grant any explicit power in terms of the political parties' officials.

37. As stated by the abovementioned principles, it is necessary to explicitly set out the limitation and scope of the powers granted to public authorities within the scope of the statutory regulations on political parties and, by this means, to prevent the imposition of potentially arbitrary sanctions on the political parties and officials thereof.

38. Although, in consideration of the aforesaid matters, it is possible to impose the penal sanction, which is prescribed by Article 32 § 1 (d) of the Law no. 5253, on the political party officials that have failed to convoke any congress of the political party at every level and to organize the congresses in accordance with the statutory regulations, the Court has concluded that the authority to impose this penal sanction is not assigned by law with sufficient certainty as required in a state governed by rule of law.

39. For these reasons, it must be decided that the impugned administrative fines failed to satisfy the "lawfulness" condition and that the applicants' freedom of political association was violated.

Mr. Serruh KALELİ did not agree with this conclusion.

40. As the files must be sent to the relevant court for a retrial with a view redressing the violation and the consequences thereof the Court has not found it necessary to examine the alleged violation of the right to a fair trial as the administration imposing the administrative fine on the applicants failed to receive their defence submissions.

3. **Application of Article 50 of Code no. 6216**

41. The applicants requested the revocation of the decisions issued by the Gaziantep Magistrates' Court and Bartın and Borçka Magistrate Judges whereby their challenges against the administrative fines had been dismissed.

42. Paragraph (2) "*Judgments*" of Article 50 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, reads as follows:

> *"Where an ascertained violation stems from a court order, the file shall be returned to the relevant court for rehearing to eliminate the violation and consequences thereof. In the cases where no legal interest is to be derived from rehearing, a compensation judgment can be pronounced in favour of the applicant or the applicant can be referred to general courts to file an action. The court that is under the rehearing obligation shall, where possible, adjudge on the basis of the file in order to eliminate the violation and consequences thereof as having been noted by the Constitutional Court in its judgment for violation."*

43. Considering the fact that the applicants' freedom of political association was violated by virtue of the impugned administrative fines, the Court has found a legal interest in conducting a retrial in the cases where the applicants' challenges against the said administrative fines were dismissed. The file must be sent to the incumbent court for a retrial to redress the violation and consequences thereof.

44. The total court expense of 2,006.10 Turkish Liras ("TRY") including the court fee of TRY 206.10 and the counsel fee of TRY 1,800, which is calculated over the documents in the case file, must be reimbursed to each of the applicants who are natural persons.

V. JUDGMENT

For these reasons, the Constitutional Court held on 9 June 2016:

A. UNANIMOUSLY that the alleged violation of the freedom of political association be DECLARED ADMISSIBLE;

B. By MAJORITY and by dissenting opinion of Mr. Serruh KALELİ that the freedom of political association safeguarded by Article 68 of the Constitution was VIOLATED;

C. UNANIMOUSLY that there is NO NEED TO EXAMINE the alleged violation of the applicants' right to a fair trial;

D. UNANIMOUSLY that a copy of the judgment be SENT to the relevant courts for a retrial with a view to eliminating the violation and consequences thereof;

E. UNANIMOUSLY that the court expenses of TRY 2,006.10, consisting of the court fee of TRY 206.10 and the retainer of TRY 1,800.00, be JOINTLY REIMBURSED to the APPLICANTS;

F. UNANIMOUSLY that the payment be made within four months as from the date when the applicants file their applications with the Ministry of Finance following the notification of the judgment; In case of any default in payment, the legal INTEREST BE CHARGED for the period elapsing from the expiry of four-month time limit to the payment date; and

G. UNANIMOUSLY that a copy of the judgment be SENT to the Ministry of Justice.

DISSENTING OPINION OF JUSTICE SERRUH KALELİ

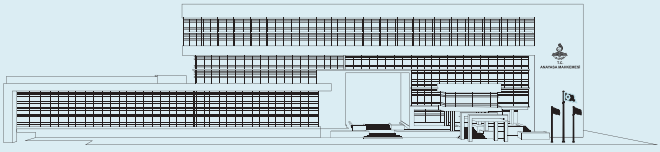
An administrative fine was imposed on the applicants for contravening the Law on Associations, and their challenges were dismissed, with final effect, by the incumbent Magistrate Judges.

The applicants alleged that the imposition of an administrative fine would preclude the People's Liberation Party from executing its activities in monetary terms, may lead to its closure, and would hamper their involvement in organizational and associational activities. They accordingly alleged that the impugned fine had been in violation of the principle of lawfulness and the right to a fair trial.

The Court adjudged by majority that the freedom of political association, which is safeguarded by Article 68 of the Constitution, had been violated.

The same matter had been examined also under the individual application no. 2014/15220, and I also submitted dissenting opinion in that application.

Relying on the same grounds specified in the individual application no. 2014/15220, I disagreed the majority opinion that the rights enshrined in Article 68 of the Constitution had been violated due to the administrative fine as I consider that the impugned intervention has been lawful, necessary, proportionate and fell outside the scope of the right.



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