THE CONSTITUTIONAL COURT OF TURKEY

SELECTED JUDGMENTS

2018

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(Individual Application)

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Adress : Ahlatlıbel Mah. İncek Şehit Savcı
Mehmet Selim Kiraz Bulvarı No: 4
06805 Çankaya, Ankara / TURKEY
Phone : +90 312 463 73 00
Fax : +90 312 463 74 00
E-mail : ayam@anayasa.gov.tr
Twitter : @aymconstcourt
Web : www.anayasa.gov.tr/en

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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 2018 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 inadmissibility decisions and judgments which are capable of providing an insight into the case-law established in 2018 by the Plenary and Sections of the Turkish Constitutional Court through the individual application mechanism. In the selection of the decisions and judgments, several factors such as their contribution to the development of the Court's case-law, their capacity to serve as a precedent judgment in similar cases as well as the public interest that they attract are taken into consideration.

The book includes two chapters: chapter one is comprised of inadmissibility decisions and chapter two is of judgments where the Constitutional Court deals with the merits of the case following its examination on the admissibility. The inadmissibility decisions are outlined in chronological order whereas the judgments are primarily classified relying on the sequence of the Constitutional provisions where relevant fundamental rights and freedoms are enshrined. Subsequently, the judgments on each fundamental right or freedom are given chronologically.

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 decisions and judgments included herein are the ones which particularly embody the unprecedented caselaw 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 judgments, as to the complaints of alleged violations of the right to a fair trial as well as the freedom of expression and dissemination of thought and etc.). In this sense, the main issue discussed in the judgment is focalized while selecting the fundamental right title under which the judgment would be classified, and the judgment is presented under a title related to only one fundamental right.

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The applicant was sentenced to life imprisonment by the State Security Court (a military court) and the sentence became final upon the appellate review of the Court of Cassation. The applicant lodged an application to the ECHR that found a violation of his right to be tried by an independent and impartial court. The applicant's request of re-trial, in consequence, was dismissed as well as the appeal he lodged against this decision. The Constitutional Court found a violation of the right to be tried by an independent and impartial tribunal.

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The applicant, wife of the deceased A.E.E., became a party to the attachment proceedings initiated due to the bills of exchange issued in the name of her husband. Upon the finalization of the proceedings, the residence owned by her husband A.E.E. was attached by the creditor. It was then sold to a third party by auction. The enforcement court, dismissing the applicant's

request for termination (annulment) of the tender, also imposed an administrative fine on her due to the procedure whereby a fine was automatically imposed in every case where such request was dismissed on the merits. Finding a violation, the Court concluded, inter alia, that the impugned fine placed an extraordinary burden on the applicant.

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The applicant, working as an office staff in a social assistance and solidarity foundation on a contractual basis, requested an additional payment to which she was entitled under the relevant law. Upon rejection of her request by the foundation, she brought an action at the end of which she was awarded the relevant amount. However, on appeal, the Regional Court of Appeal quashed the first instance decision and dismissed the case whereas the other chambers of the Regional Court of Appeal decided in favour of the workers having similar claims, which allegedly resulted from the difference of opinion among the chambers of the Court of Cassation, which had held the appellate reviews on such disputes in the past. Finding a violation, the Court concluded that the fairness of the proceedings was prejudiced due to the failure to operate the mechanism of case-law unification, which was capable of eliminating the deep-rooted and long-standing difference.

CHAPTER ONE
ADMISSIBILITY DECISIONS

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

DECISION

KADRİ CEYHAN

(Application no. 2014/1924)

17 May 2018

On 17 May 2018, the Plenary of the Constitutional Court found inadmissible the alleged violation of the right to life safeguarded by Article 17 of the Constitution for non-exhaustion of legal remedies in the individual application lodged by *Kadri Ceyhan* (no. 2014/1924).

THE FACTS

[8-49] A military unit that was practicing shooting in the area where the applicant was living collected the unexploded ammunition in the area and recorded the ammunition that could not be found.

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

The military prosecutor's office filed a criminal case against two soldiers (accused persons) superiors of the unit practicing in the area, for the offence of misconduct on account of negligence and delay. While the proceedings were still pending, the applicant lodged an individual application alleging that the investigation into the incident was not completed within a reasonable time and that a criminal case was not brought against those responsible.

After the individual application, the applicant joined the proceedings against the accused persons before the military court as an intervening party. The military court convicted the accused persons for misconduct in office. The applicant did not appeal against this judgment. However, the appeal process initiated by the accused persons is still pending before the Court of Cassation.

V. EXAMINATION AND GROUNDS

50. The Constitutional Court, at its session of 17 May 2018, examined the application and decided as follows:

A. The Applicant's Allegations and the Ministry's Observations

51. The applicant maintained that his life had not been protected as the unexploded ordnance had not been removed from the firing range after a military exercise and also alleged that the competent authorities had remained passive for years and failed to initiate a criminal case against those who were responsible. He maintained that the competent authorities' failure to conduct an effective investigation was on account of the policy of impunity pursued by the State towards the public officers. He further asserted that the State failed to take the necessary measures to protect individuals' lives in similar incidents as well as to set up an effective judicial system by granting impunity.

52. The applicant also maintained that he was a national of Kurdish origin; that in the South Eastern Anatolia Region where individuals of Kurdish origin like him were residing, many people died due to the failure to remove the unexploded ordnance; that they had to live with the unexploded artillery ordnance in this region for being of Kurdish origin; and that he himself was exposed to the impugned act for the very same reason. He therefore alleged that the prohibition of discrimination had been violated.

53. He accordingly alleged that the rights to life, to a fair trial and to an effective remedy, which are safeguarded respectively by Articles 17, 36 and 40 of the Constitution, as well as the principle of equality enshrined in Article 10 of the Constitution had been violated. He requested the Court to find the alleged violations as well as to award him pecuniary and non-pecuniary compensation.

54. In its observations, the Ministry of Justice noted that the application must be examined from the standpoint of the right to life safeguarded by Article 17 of the Constitution; however, regard being had to the particular circumstances of the present case, it was considered that the application must be declared inadmissible due to the applicant's failure to exhaust available legal remedies as he had not resorted to the civil remedy capable of establishing the responsibility, deriving from the right to life and falling under the State's positive obligation, on the part of the relevant military staff or the administration, as well as of awarding compensation if necessary.

B. The Court's Assessment

1. Applicability

55. 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."*

56. 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).

57. In the present case, the applicant is alive. Therefore, an examination must be conducted primarily as regards the applicability of Article 17 § 1 of the Constitution where the right to life is enshrined.

58. In order for the application of the principles concerning right to life in a given case, there must be an unnatural death. However, in certain cases, the incident may be examined within the scope of the right to life, even if there has occurred no death (see *Mehmet Karadağ*, no. 2013/2030, 26 June 2014, § 20).

59. In the present case, although the applicant was injured due to detonation of an explosive substance, the Court concluded that the application must be examined from the standpoint of the right to life given the lethal effect of the substance, effect of the explosion on the applicant's physical integrity and the other relevant factors.

2. Scope of Examination

60. It was considered that the allegations raised in connection with the rights to a fair trial and to an effective remedy, which are safeguarded respectively by Articles 36 and 40 of the Constitution, fell under the scope of the right to life. Accordingly, these allegations were examined also from this standpoint.

61. Besides, the applicant maintained that the prohibition of discrimination, taken in conjunction with the right to life, had been

breached, alleging that he had been subject to the impugned act for being of Kurdish citizen.

62. The alleged violations of the principle of equality safeguarded by Article 10 of the Constitution as well as of the prohibition of discrimination laid down in Article 14 of the Convention cannot be examined abstractly, and they must be examined in conjunction with the other fundamental rights and freedoms enshrined both in the Constitution and the Convention (see *Onurhan Solmaz*, no. 2012/1049, 26 March 2013, § 33).

63. However, in order for an examination as to an alleged discrimination, the applicant must demonstrate with reasonable ground that the difference in treatment between him and the persons in a similar situation with him was based on a discriminatory reason such as race, colour, sex, religion, language and etc. in the absence of any legitimate ground (see *Adnan Oktar (3)*, no. 2013/1123, 2 October 2013, § 50).

64. In the present case, the applicant however failed to demonstrate any concrete findings and evidence so as to substantiate his allegations. Therefore, the Court found it unnecessary to make any examination as to the alleged violation of the principle of equality raised in conjunction with the right to life.

3. Admissibility

65. The applicant maintained that in his case, the right to life had been violated due to the public authorities' failure to take the necessary measures, as well as the failure to conduct an effective criminal investigation by displaying a passive conduct. Therefore, in the present case, not only the State's failure to take the necessary administrative measures intended to protect the right to life but also its failure to set up an effective judicial system capable of punishing those who have given rise to the violation of the said right.

66. In the present case, the application form and annexes thereto include no information or document indicating that the applicant had resorted to an administrative or civil compensation remedy. Nor did he provide any explanation as to the effectiveness of such remedies.

67. Therefore, at the outset, the scope of the State's obligations under the right to life, as well as the question whether the compensation remedy, which the applicant did not exhaust before lodging an individual application, is capable of finding a violation and offering an appropriate redress for the violation must be ascertained.

68. Such an ascertainment would also elucidate whether the compensation remedy is sufficient to acknowledge that the State set up a judicial system which has a deterrent effect so as to prevent similar violations, is appropriate for the incident and capable of ensuring a sufficient judicial reaction.

69. The last sentence of Article 148 § 3 of the Constitution reads as follows:

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

70. Article 45 § 2 of Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court reads as follows:

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

71. The requirement of exhausting legal remedies, as stipulated by the constitutional and statutory 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 it is primarily for the administrative authorities and inferior courts to remedy 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).

72. However, a remedy may be considered effective only when it is available and effective both in law and in practice and the relevant authority, which is resorted to, is entitled to deal with the alleged violation in essence. For a remedy to be effective, it must either prevent

an alleged violation or its continuation or find any violation that has already occurred and provide adequate redress for it. In addition, in case of an alleged violation that has occurred, an effective remedy must offer procedural safeguards capable of awarding compensation and ensuring identification of those who are responsible (see *S.S.A.*, no. 2013/2355, 7 November 2013, § 28).

73. Article 5 of the Constitution titled *"Fundamental aims and duties of the State"* reads, insofar as relevant, as follows:

> *"The fundamental aims and duties of the State are to safeguard … the Republic and democracy, 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."*

74. Article 125 §§ 1 and 7 of the Constitution reads as follows:

> *"Recourse to judicial review shall be available against all actions and acts of administration.*
>
> *…*
>
> *The administration shall be liable to compensate for damages resulting from its actions and acts."*

75. The right to life enshrined in Article 17 of the Constitution, when read together with Article 5 thereof, imposes both positive and negative obligations on the State (see *Serpil Kerimoğlu and Others*, § 50).

76. The State is liable not only to refrain from the intentional and unlawful taking of life of any person within its jurisdiction as a negative obligation incumbent on it, but also to safeguard the right to life enjoyed by all individuals within its jurisdiction against the risks likely to arise from the acts of public authorities, other individuals and even the individuals themselves (see *Serpil Kerimoğlu and Others*, §§ 50 and 51).

77. The State's positive obligations within the scope of the right to life have also a procedural aspect (see *Serpil Kerimoğlu and Others*, § 54). This obligation concerning the right to life can be fulfilled via criminal, civil or administrative investigations, depending on the nature of the case. However, in cases of death caused intentionally, the State has an obligation, by virtue of Article 17 of the Constitution, to conduct a criminal investigation capable of leading to the identification and punishment of those responsible. In such cases, imposing an administrative sanction or awarding compensation as a result of administrative investigations and actions for compensation is not sufficient to redress the violation and thereby to remove the victim status (see *Serpil Kerimoğlu and Others*, § 55).

78. The aim of the criminal investigation is to ensure the effective implementation of the law protecting the right to life and to hold those responsible accountable. This is not an obligation of result, but of means. In addition, Article 17 of the Constitution does not grant the applicants the right to have third parties tried or punished for a criminal offence or impose an obligation on the State to conclude all proceedings in a verdict of conviction (see *Serpil Kerimoğlu and Others*, § 56).

79. A different approach may be adopted in terms of the obligation to conduct an investigation into deaths caused by unintentional acts. In this context, the positive obligation to *set up an effective judicial system* may be deemed to have been fulfilled by ensuring victims to have access to legal, administrative and even disciplinary remedies in cases where the right to life has not been violated intentionally (see *Serpil Kerimoğlu and Others*, § 59).

80. What the Court attaches importance at this point is that the judicial system never allows for any uncertainty in respect of the liability arising from the interferences with the right to life due to unintentional acts. This is necessary for the purposes of maintaining public confidence in the judicial system and ensuring the embrace of the state of law.

81. However, in cases where the death has resulted from unintentional acts, if the public authorities have failed to take the necessary measures within their authority to eliminate the risks resulting from a dangerous activity despite being aware of the probable outcomes thereof or if they

act based on erroneous judgment or fault going beyond mere negligence, bringing no accusation, or conducting no trial, against those putting the individuals' lives at risk may give rise to a breach of the right to life -regardless of the legal remedies to which the victims have resorted on their own initiative- (see *Serpil Kerimoğlu and Others*, § 60).

82. Therefore, in the present case, while discussing the question whether the rule on the exhaustion of available legal remedies was satisfied, it is necessary to make an examination as to the judicial system set up by the State to protect the right to life. Besides, this rule must be applied with some degree of flexibility and without excessive formalism. It must not be considered as an absolute rule which is capable of being applied to the same extent in every case. In other words, in reviewing whether this rule has been observed, it is essential to have regard to the particular circumstances of the case concerning the allegation that the right to life was not protected.

83. Another issue to be noted is the fact that in cases where there are several remedies of the same capacity but one or a few of them have been exhausted, it is not certainly necessary, for fulfilment of the rule of exhaustion, to exhaust all the available remedies.

84. However, in cases where there exists another effective remedy which the applicants did not use on their own initiative, the effective judicial system to be set up by the State within the scope of the right to life does not lead to the conclusion that they would not be exempted from exhausting this remedy in every case and under all circumstances. An acknowledgment to the contract would impair the rule of exhaustion of available remedies and thereby lead to the non-exhaustion of an effective remedy, which would deprive the State of the opportunity to examine the alleged violations of the right to life through a legal remedy which is effective for such allegations.

85. Turning to the particular circumstances of the instant case in the light of these explanations, the competent authorities acted in a speedy fashion and conducted inquiries as to the material evidence collected from the incident scene. The relevant authorities immediately launched an investigation into the impugned incident, took the statements of the applicant and the eye-

witness within the scope of the investigation as well as conducted ballistic examinations so as to find the source of the explosive material. At the end of the investigation conducted in this way, it was concluded that the incident had taken place under the responsibility of the public authorities; and that the information necessary and sufficient to be capable of ensuring the identification of those responsible had been obtained. In other words, through the investigation conducted into the impugned incident, the reason underlying the incident and the liability resulting from the interference with the right to life were not left in a state of uncertainty.

86. At the end of the investigation, on a date after lodging of the individual application, the public authorities considered to be responsible for the impugned incident were sentenced to punishment. The applicant did not appeal against the decision due to alleged insufficiency of the sentence imposed or any other ground. It has been further observed that the investigation could not be completed within a reasonable time given the nature and particular circumstances of the case.

87. The applicant did not maintain that his right to life had been violated intentionally. Nor did the Court find any element that would require it to get the impression that his injury had been caused intentionally. In the incident where the applicant ascribed fault to the relevant administration, he alleged that the public officers who had had personal responsibility in the incident for displaying negligence were not identified and punished speedily.

88. At this point, it must be ascertained whether it was certainly necessary to conduct a criminal investigation capable of speedy identification of those responsible, within the scope of the obligation to set up an affective judicial system, in the incident cause of which and where the responsibility of public authorities resulting from the interference with the right to life could be determined through a criminal investigation.

89. In making this assessment, the Court has reiterated its case-law to the effect that in cases where the violation of the right to life is not caused intentionally, the positive obligation to *set up an effective judicial system* may be deemed to have been satisfied by ensuring the victims' access to civil, administrative and even disciplinary remedies; and that however, in cases where the public authorities fail to take the necessary

and sufficient measures, within the scope of the powers conferred upon them, to eliminate the risks emanating from a dangerous activity despite being aware of its possible outcomes, bringing no charge or conducting no trial against those who put the individuals' lives at risk may lead to a breach of the right to life (see *Dilek Genç and Others* [Plenary], 2014/3944, 1 February 2018, § 63).

90. Secondly, it must be noted that any negligence displayed in the removal and disposal of ammunition pose a threat to the individuals' lives; that the public authority knew or should have known such threat; and that the positive obligation inherent in the right to life is applicable also in terms of public safety.

91. In addition, it is undoubted that the State's obligation to protect individual's life comes into play only when the individual faces a threat that would require his protection and this threat is foreseeable by the competent authorities. Otherwise, this obligation cannot be said to arise.

92. Accordingly, what must be borne in mind in such assessments is the existence of a threat to the individuals' lives for the obligation to protect the right to life to come into play. The subsequent issue is to determine what kind of a judicial remedy -in conjunction with another remedy or alone-, within the scope of the State's positive obligation to set up an effective judicial system, may constitute a sufficient judicial reaction to such incidents where deaths have been caused by negligence due to the failure to take reasonable measures despite the foreseeable threats.

93. At this point, it should be primarily noted that in case of any foreseeable threat resulting from the public authorities' failure to take the necessary and sufficient measures, it cannot be necessarily require the public officers, who were personally liable for displaying negligence, to account for the incident through criminal sanctions, in order not to impair the important role in the prevention of similar incidents. Compensatory remedies may suffice to prevent similar violations of the right to life based on the conditions under which such incidents took place, the degree of liability resulting from negligence and, if any, the nature of the public activity conducted. Any consideration to the contrary would clearly contradict with the general acknowledgement that if the infringement of

the right to life is not caused intentionally, the positive obligation to set up an "effective judicial system" may be satisfied if civil, administrative or even disciplinary remedies are available to the victim. In this regard, in examining the applicant's complaints that his life was not protected against a foreseeable threat and that the public authorities who allegedly had negligence were not punished swiftly, the Court is to consider the liability involved in the present case and similar incidents, the particular conditions of the incident and the effectiveness of the existing judicial system in respect of the impugned incident as a whole.

94. The applicant complained of the failure of the relevant authorities to file a criminal case swiftly against the public officers allegedly being responsible. He maintained that the impunity granted by the State to public officers in such incidents led to this situation. According to him, the State preferred to remain inactive by not conducting an effective criminal investigation into such kinds of incidents and thereby infringed its obligation to set up an effective judicial system so as to prevent similar violations of the right to life due to the impunity policy it applied.

95. In the incident allegedly involving negligence in the collection of explosive substances that were under the administration's responsibility, it may be said that the reason underlying the interference with the right to life was researched in depth and a criminal investigation capable of leading to the effective implementation of the relevant statutory provisions designed to protect the right to life as well as to the establishment of the responsibilities on the part of the public officers was conducted. Considering the conditions under which this tragic incident giving rise to the applicant's injury took place, the Court has considered that unlike the complaints in question, the State was not liable, for fulfilling its positive obligation to set up an effective judicial system, to conduct a criminal investigation capable of absolutely ensuring the punishment of the public officers allegedly bearing personal liability in negligence.

96. It has been accordingly concluded that the compensatory remedy, which was alleged not to be accessible and effective neither by the applicant in terms of his claims, satisfied the State's obligation to set up an effective judicial system and was capable of determining any kind of -objective and subjective- liability in the incident and offering appropriate redress for

the pecuniary and non-pecuniary damage sustained and claimed by the applicant.

97. The competent authorities' failure to act with reasonable speed to punish those who were responsible did not impair the effectiveness of the compensatory remedy capable of establishing the liabilities in the incident and offering an appropriate and sufficient redress for the damage sustained. Therefore, it has been concluded that the applicant was indeed provided by the State with an effective legal remedy –along with a criminal investigation which did not leave the liability in uncertainty– under its obligation to set up an effective judicial system within the meaning of Article 17 of the Constitution; and that the applicant however lodged an individual application with the Court without exhausting the available legal remedy.

98. In this regard, it has been concluded that in the present case, the applicant had failed to exhaust the judicial remedy, prescribed by law concerning the alleged violation of the State's obligation to protect individuals' lives and proven to be effective also in practice through the case-law of the Council of State, before lodging his individual application.

99. For these reasons, the Court found the application inadmissible for *non-exhaustion of legal remedies* without any further examination as to the other admissibility criteria.

Mr. Zühtü ARSLAN, Mr. Engin YILDIRIM, Mr. Serruh KALELİ, Mr. Hasan Tahsin GÖKCAN and Mr. Kadir ÖZKAYA did not agree with this conclusion.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 17 May 2018:

A. By MAJORITY and by dissenting opinion of Mr. Zühtü ARSLAN, Mr. Engin YILDIRIM, Mr. Serruh KALELİ, Mr. Hasan Tahsin GÖKCAN and Mr. Kadir ÖZKAYA, that the alleged violation of the right to life be DECLARED INADMISSIBLE *for non-exhaustion of legal remedies*; and

B. UNANIMOUSLY that the court expenses be COVERED by the applicant.

DISSENTING OPINION OF PRESIDENT ZÜHTÜ ARSLAN, VICE-PRESIDENT ENGİN YILDIRIM AND JUSTICES SERRUH KALELİ, HASAN TAHSİN GÖKCAN AND KADİR ÖZKAYA

1. The applicant maintained that his right to life was violated as he had sustained a life-threatening injury due to explosion of the ammunition left on a plot of land following a military exercise and no effective criminal investigation had been conducted into the incident.

2. A military unit fired shots with artillery and similar weapons, during a military exercise, at an old quarry located in the region where the applicant was living. Following the military exercise, as it was found out that certain ammunitions had not exploded, the exploration and annihilation process was conducted. At the end of this process, it was recorded in a minute that an unexploded bombshell of a grenade launcher, known as T-40, was missing and could not be found.

3. The applicant, who was 17 years old and a shepherd at the relevant time, started to tamper with a piece of metal he found while grazing his animals at the land where the military exercise had been performed. When he hit the metal on a stone on the ground, it exploded. As a result of the explosion, the applicant was severely injured, his right hand was separated from the wrist joint and therefore sustained a life-threatening situation.

4. On 31 December 2013, a criminal case was filed against the battalion commander of the unit that practised shooting, as well as against a squadron leader charged in that battalion for "misconduct in public office by negligence". At the end of the proceedings, the Diyarbakır Military Court imposed a judicial fine on the accused persons due to the imputed offence by its decision of 1 June 2015. This decision was appealed, but the appeal process is still pending.

5. The majority of the Court has declared the application inadmissible for the non-exhaustion of the legal remedies, stating that in cases where the death has been caused by negligence, as in the present case, the State is not necessarily obliged to launch a criminal investigation; and that the effective judicial remedy in such cases is to bring an action for compensation which the applicant failed to exhaust.

6. Article 17 of the Constitution where the right to life is enshrined imposes on the State a positive obligation to "set up an effective judicial system" capable of ensuring identification, and if necessary, punishment, of those who are responsible for each incident of unnatural death. The aim pursued is to guarantee the effective implementation of the law that protects the right to life and to ensure that those responsible account for the deaths (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, § 54).

7. This procedural obligation may be satisfied through criminal, civil and administrative investigations, depending on the nature of the impugned incident. In principle, in cases of death caused by unintentional acts, the positive obligation does not necessarily entail an effective criminal investigation, as in deaths resulting from a medical error (see *Serpil Kerimoğlu and Others*, § 59).

8. However, in cases where the death has resulted from unintentional acts, if the public authorities have failed to take the necessary measures , within the scope of the powers conferred upon them, to eliminate the risks *resulting from a dangerous activity* despite being aware of the probable outcomes, or if they act based on erroneous judgment or fault going beyond mere negligence, it is certainly necessary to conduct a criminal investigation against those who are responsible (see *Serpil Kerimoğlu and Others*, § 60; for the ECHR's judgment in the same vein, see *Öneryıldız v. Turkey* [GC], no. 48939/99, 30 November 2004, § 93; and *Budayeva and Others v. Russia*, no. 15339/02, … 15343/02, 20 March 2008, § 140).

9. In brief, in case of any acts or behaviours which clearly put the individuals' life at risk, it is necessary to conduct an effective criminal investigation and prosecution to be completed within a reasonable time and capable of leading to identification of those who are responsible. In examining an individual application lodged with respect to this matter, what the Court has to do is to assess whether the criminal investigation and prosecution in the given case were effective.

10. On the other hand, as noted in the majority's decision, in cases where there are several remedies intended for the same purpose but one or a few of them have been exhausted, the rule of exhaustion does not necessarily require the exhaustion of all the available remedies.

11. In the present case, the applicant complained of the failure of the relevant authorities to conduct an effective investigation capable of leading to the identification and punishment of those who were responsible for his lethal injury. In fact, in case of any death or severe injury resulting from the public officers' negligence going beyond a simple erroneous judgment, as in the present case, criminal investigation and prosecution are an effective judicial remedy for the elucidation of the incident. In this case, in assessing whether the State has fulfilled its positive obligation, the applicant is not expected to necessarily exhaust the other available remedies.

12. The obligation to conduct an effective investigation within the meaning of the right to life requires the investigation to be capable of leading to the clarification of the incident in all aspects on one hand and to be completed within the shortest time possible, on the other.

13. The investigation and prosecution conducted in the present case demonstrate that the State has fulfilled its "obligation to clarify" the incident. As a matter of fact, in the report issued during the investigation process by the expert board which was appointed by the Turkish Land Forces Command upon the request of the military prosecutor's office, it is noted *"Necessary orders and instructions concerning the shooting practice were given before the practice. However, there are deficiencies in reporting the unexploded ammunition to the superiors and in management and coordination of the process whereby the land including the unexploded substance was secured"*.

14. The military court accordingly concluded that a minute had been issued concerning the unexploded ammunition which could not be found; however, no security measure had been taken in this respect; that the applicant was not of full age at the time of incident and had not performed his military service yet; and that he could not therefore be expected to know that the piece of metal, which he caused to explode by hitting on a stone, was indeed an unexploded ammunition and might explode.

15. On the other hand, the fulfilment of the obligation to clarify is not sufficient for an investigation to be effective. Article 17 of the Constitution also entails that the investigation/prosecution conducted into a death, or fatal injuries as in the present case, be sufficiently swift. In other words, an effective investigation and prosecution clearly entail a requirement

of reasonable expedition and due diligence. In the present case, the procedural aspect of the right to life was violated as the investigation conducted into the incident had been procrastinated for a long time, and the criminal case filed thereafter continued for many years and has not been concluded yet despite ten years having elapsed.

For these reasons, we do not agree with the majority's decision finding the application inadmissible.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

DECISION

NİHAT AKBULAK

(Application no. 2015/10131)

7 June 2018

On 7 June 2018, the Plenary of the Constitutional Court declared inadmissible the alleged violation of the right to a reasoned decision under the right to a fair trial safeguarded by Article 36 of the Constitution in the individual application lodged by *Nihat Akbulak* (no. 2015/10131).

THE FACTS

[8-27] A criminal case was filed against the applicant by the incumbent chief public prosecutor's office for allegedly committing a sexual assault against the victim, his cousin, on 5 November 2019.

By its decision of 29 November 2011, the incumbent assize court convicted, by a majority, the applicant of the imputed offence relying on the victim's statements which were mainly coherent and in support of the other available evidence, the report issued by the Forensic Medicine Institute and the witness' statements. In the dissenting opinion, it was indicated that given the contradiction in some of her statements and the way in which the incident occurred, the impugned incident had taken place with the victim's consent.

On 18 September 2014, the applicant submitted a letter to, and requested, the appellate court to take into consideration a message which was sent to him by the victim following 9 August 2014 and where the victim wrote that indeed the applicant had no fault.

However, his conviction decision was unanimously upheld by the Court of Cassation.

On 3 March 2015, the applicant requested a retrial due to the new evidence that appeared following his finalised conviction decision. However, his request was dismissed as the issues raised in his request were indeed the same with those already raised and assessed during the first- and second-instance proceedings. His challenge against the dismissal decision was also dismissed by a majority.

On 8 June 015, he lodged an individual application with the Constitutional Court.

V. EXAMINATION AND GROUNDS

28. The Constitutional Court, at its session of 7 June 2018, examined the application and decided as follows:

A. The Applicant's Allegations

29. The applicant maintained that the relevant court had dismissed his request for a retrial on incorrect grounds despite the failure to consider, at any stage of the proceedings, the *new and significant* evidence which appeared following the conviction decision and was capable of influencing the outcome of the proceedings. He accordingly alleged that his right to a reasoned decision had been violated.

B. The Court's Assessment

30. Retrial or reopening of the proceedings, which is applied for in cases where it is subsequently revealed that there is an erroneous in the final decision issued at the end of a trial, is a remedy whereby a fresh decision may be issued, if the grounds specified in the law are fulfilled, by the incumbent trial court by means of a retrial following the finalisation of the initial decision issued at the end of the criminal trial.

31. In criminal trials, the right to apply for a retrial against the finalised decisions is afforded to the parties, pursuant to Article 311 of the Code of Criminal Procedure no. 5271 ("Code no. 5271") on limited grounds. As set out in Article 319 of the same Code, the request for a retrial shall be rejected if it has not been lodged in the way specified in the Code, or if there is no legal ground that would justify reopening of the proceedings, or if the evidence that would substantiate such request has not been provided. Otherwise, the request for a retrial shall be notified to the public prosecutor as well as to the relevant party within 7 days if there is any opinion or consideration to be submitted. If the incumbent court finds the request for a retrial justified, then the evidence would be gathered. Following the evidence-gathering process, if the incumbent court finds the request for a retrial founded and admissible, it would then order a retrial and holding of a hearing pursuant to Article 321 of the same Code.

32. In its judgment in the case of *H.Ç.* (no. 2015/6867, 18 April 2018, §§ 24-27) as well as in its several other judgments, the Court has considered that the judicial processes prior to the order for a retrial are also covered by Article 36 of the Constitution and accordingly accepted that the safeguards inherent in the right to a fair trial would apply also to such processes.

33. However, the Court now deems it necessary to review this case-law. The ground leading the Court to engage in such a review is its current decisions whereby it found the individual applications, lodged with respect to decisions dismissing certain requests made at any stage upon the issuance of the final decision, not to fall within the scope of its jurisdiction *ratione materiae* as there is no longer a criminal charge. In its decisions in the cases of *Topo Kaya* (no. 2014/5363, 5 December 2017) concerning the dismissal of the requests for the stay of execution of the prison sentence as well as of *İnan Çoban* (no. 2014/15208, 19 December 2017) concerning *ex post facto* trial, the Court held that these applications did not fall into the scope of its jurisdiction *ratione materiae*, stating that the applicants' requests were not related to a stage when they were *under a criminal charge*. Therefore, the complaints with respect to the stages prior to the order for a retrial had also to be re-examined, with a view to ensuring adaptation of the case-law concerning the question whether the different requests filed at the stage where the person concerned is not under any criminal charge would be considered to fall under the right to a fair trial.

34. Pursuant to Article 45 § 1 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, in order for an examination of an individual application, the right alleged to be infringed by a public authority must be safeguarded not only by the Constitution, but it must also fall under the scope of the Convention and its additional protocols to which Turkey is a party. Applications involving any alleged violation of the rights falling outside the joint protection realm of the Constitution and the Convention are not within the scope of the individual examination (see *Onurhan Solmaz,* no. 2012/1049, 26 March 2013, § 18).

35. In Article 6 of the Convention, it is set forth that the rights and principles concerning the right to a fair trial shall apply to the determination

of the disputes as to civil rights and obligations or of any criminal charge. Thereby, the scope of this right is limited to these issues. Accordingly, the applications involving alleged violation of the right to a fair trial, except for these issues, cannot be examined through individual application mechanism for falling outside the scope of both the Constitution and the Convention (see *Onurhan Solmaz*, § 23).

36. It is clear that the admissibility stage, which is the first stage when the request for a retrial is assessed, is not conducted in a way that would resolve the question of proving the facts. In other words, at this stage, the merits of the criminal charge is not examined upon revoking the initial decision. In the present case, the applicant's complaints are related to a stage when he was not under a criminal charge (he was convicted). That is to say, it has been observed that his complaint relates to the stage *as to the admissibility of the request for a retrial* which is held pursuant to Article 319 of the Code no. 5271 upon the finalisation of the conviction decision; that the alleged violation does not concern a stage under which the applicant *was under a criminal charge*; and that therefore, this part of the application does not fall under the scope of the right to a fair trial.

37. Besides, the fundamental rights and freedoms that are safeguarded under the Convention may be effectively protected only when the violation judgments rendered by the European Court of Human Rights ("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 (see *Sıddıka Dülek and Others*, no. 2013/2750, 17 February 2016, § 69). As a matter of fact, a violation judgment rendered by the ECHR is considered as a ground for a retrial by virtue of the Code of Criminal Procedure no. 5271 ("Code no. 5271"), with a view to ensuring protection of t fundamental rights and freedoms both in theory and in practice. The Code no. 5271 leaves no discretion to the judicial authorities in this sense and entails that a case which is concluded with a finalised decision would be reheard through the reopening of the proceedings.

38. As also set forth in Article 50 of Code no. 6216, if the violation found by the Constitutional Court arises out of a court decision, the file shall be sent to the relevant court for holding a retrial in order for the redress of the violation and the consequences thereof. In cases where the Court orders a retrial with a view to ensuring the redress of the violation found, the inferior court has no discretion to admit the existence of the ground requiring retrial and to revoke the initial decision, unlike the practice of reopening of the proceedings introduced in the relevant procedural laws. That is because in cases where a violation is found, the discretion as to the necessity of holding a retrial is not left to the inferior courts but to the Constitutional Court that has found the violation. The inferior courts are obliged to take necessary actions so as to redress the consequences of the violation, as indicated in the violation judgment rendered by the Constitutional Court.

39. Therefore, the allegations as to the requests for a retrial, which are intended for the redress of the violations found by the Constitutional Court and the ECHR and the consequences thereof, fall under the scope of the right to a fair trial. As also in the present application, the allegations as to the requests for a retrial, save for these two exceptions, are not explicitly within the scope of the right to a fair trial.

40. For these reasons, the application must be declared inadmissible for *lack of jurisdiction ratione materiae* without any further examination as to the other admissibility criteria.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 7 June 2018 that

A. The alleged violation of the right to a reasoned decision be DECLARED INADMISSIBLE for *lack of jurisdiction ratione materiae*;

B. The court fee be COVERED by the applicant.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

DECISION

BAYRAM SİVRİ

(Application no. 2017/34955)

3 July 2018

On 3 July 2018, the Second Section of the Constitutional Court found inadmissible the alleged violations of the right to respect for family life and the freedom of communication, safeguarded respectively by Articles 20 and 22 of the Constitution, in the individual application lodged by *Bayram Sivri* (no. 2017/34955).

THE FACTS

[6-34] After the coup attempt of 15 July 2016, the applicant was detained and placed in a prison for his alleged membership of the Fetullahist Terrorist Organization/Parallel State Structure (FETÖ/PDY).

In line with the Decree Law no. 667 on the Measures under the State of Emergency, the Administrative and Supervisory Board of the Prison decided that those who were already detained for the offences specified in the Decree Law and those who were detained for the first time and placed in the prison would exercise their right to contact by phone once every 15 days during the state of emergency.

The applicant's challenge against this decision was dismissed by the execution judge. Besides, his appeal against the decision of the execution judge was dismissed by the relevant assize court.

V. EXAMINATION AND GROUNDS

35. The Constitutional Court, at its session of 3 July 2018, examined the application and decided as follows:

A. Request for Legal Aid

36. The applicant requested to be granted legal aid, maintaining that he could not afford to pay the litigation costs for being detained on remand.

37. In accordance with the principles set out in *Mehmet Şerif Ay* judgment of the Constitutional Court (no. 2012/1181, 17 September 2013), the request for legal aid made by the applicant, who could not apparently pay the court expenses without incurring financial difficulties, should be accepted for not being manifestly ill-founded (see *Mehmet Şerif Ay*, §§ 22-27).

B. Alleged Violations of the Right to Respect for Family Life and the Freedom of Communication

1. The Applicant's Allegations and the Ministry's Observations

38.The applicant maintained that his right to contact by phone had been disproportionately restricted without any justification; and that such restriction had been applied only to a certain group of prisoners. He further alleged that although the other prisoners enjoyed the right to contact with a larger circle of family and relatives by phone once a week, he had been restrained from communicating with his family, which was the most important factor that would raise the morale and motivation. He accordingly maintained that there had been violations of the principle of equality, the right to respect for family life, as well as the freedom of communication.

39. In its observations, the Ministry noted that given the nature of the offence underlying the applicant's detention, the impugned restriction was considered reasonable for the prevention of offence and maintenance of prison discipline, as an inevitable result of being placed in a prison; and that the application was to be found manifestly ill-founded as the impugned restriction was in compliance with the established case-law of the European Court of Human Rights ("the ECHR") and the Constitutional Court.

2. The Court's Assessment

40. Article 20 § 1 of the Constitution titled *"Privacy and protection of private life"*, which would be taken into consideration in the examination of the present case, 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."*

41. 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."

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). The application was examined from the standpoint of the right to respect for family life and the freedom of communication.

43. For an examination as to the alleged violation of the principle of equality, it must be primarily revealed that there had been a difference in treatment between the applicant and the persons in similar situations with him. It has been observed that in the present case, the impugned restriction imposed on the right to contact by phone was not applied to all detainees but applied to those who were detained for the certain offences specified in Article 6 §1 of the Law no. 6749 on the Adoption of the Decree Law on the Measures Taken under the State of Emergency with Certain Amendment ("Law no. 6749"); that it resulted from the conditions prevailing during the state of emergency; and that the restriction was applied to those detained on remand for the offences specified in Law no. 6749 without any distinction.

44. It is clear that the security risks associated with the conditions of detention in prison, which are incurred by those who are detained on remand due to the offences set out in Law no. 6749, are not of the same degree with those of the prisoners who are not within this scope. Besides, in Turkish law, those who are detained or convicted due to the said offences

are subject to different processes not only in terms of the conditions of placement in prison but also in terms of the sentence execution regime. Therefore, those detained on account of terrorist offences, including the applicant, are considered to fall into a category different than that of the individuals detained due to the other types of offences and cannot be said to have the same status. Regard being had to the fact that the applicant did not complain of any difference in treatment between him and the other detainees of the same offence, the Court did not find it necessary to make an assessment under the principle of equality.

45. Article 15 of the Constitution, titled "*Suspension of the exercise of fundamental rights and freedoms*", reads as follows:

> *"In times of war, mobilization, martial law or a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures which are contrary to the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated.*
>
> *Even under the circumstances indicated in the first paragraph, the individual's right to life, the integrity of his/her corporeal and spiritual existence shall be inviolable except where death occurs through acts in conformity with law of war; no one shall be compelled to reveal his/her religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties shall not be made retroactive; nor shall anyone be held guilty until so proven by a court ruling."*

46. The Court has noted that in examining the individual applications regarding the measures taken during the periods when emergency administration procedures are in force, it would take into account the protection regime set out in Article 15 of the Constitution with respect to fundamental rights and freedoms (see *Aydın Yavuz and Others*, §§ 187-191). In this sense, it has been considered that the impugned practice as to the applicant's right to contact by phone was related to the incidents necessitating the declaration of the state of emergency.

47. In this regard, the restriction imposed on the applicant's right to contact by phone would be examined from the standpoint of Article 15 of the Constitution. In the course of this examination, it would be

primarily ascertained whether the impugned restriction was contrary to the safeguards set out in Articles 13, 20 and 22 of the Constitution. In case of any contradiction, it would be then assessed whether it was justified by the criteria set forth in Article 15 of the Constitution (in the context of the right to personal liberty and security, see *Aydın Yavuz and Others*, §§ 193-195 and 242; and in the context of the right to education, see *Mehmet Ali Eneze*, no. 2017/35352, 23 May 2018, § 31).

a. Scope of the Right and Existence of the Interference

48. 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 its privacy, 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).

49. The right to respect for family life is safeguarded by Article 20 § 1 of the Constitution which points to, when taken together with its legislative intention, the public authorities' inability to interfere with private and family life, as well as the necessity that a person organises and steers his personal and family life in the way he chooses. It is the constitutional arrangement that corresponds to the right to respect for family life safeguarded by Article 8 of the European Convention on Human Rights ("the Convention") (see *Murat Atılgan*, no. 2013/9047, 7 May 2015, § 22; and *Marcus Frank Cerny* [Plenary], no. 2013/5126, 2 July 2015, § 36).

50. Pursuant to Article 19 of the Constitution, the restriction of the prisoners' freedom of communication and right to respect for family life is an inevitable and natural consequence of being held in a prison, which is lawful. On the other hand, the right to respect for family life requires the prison administration to take the measures that would ensure

the prisoners to maintain contacts with their families and relatives (see *Mehmet Zahit Şahin*, no. 2013/4708, 20 April 2016, § 36).

51. However, in fulfilling this obligation, the inevitable and natural consequences of being held in prison are to be taken into consideration. In this context, a fair balance is to be struck between the public order and the prevention of offences, and the right to respect for family life and the freedom of communication. It must be nevertheless borne in mind that as a natural consequence of placement in prison, the administration has a broader discretionary power in involving in an interference (see *Mehmet Koray Eryaşa*, § 89).

52. It should be primarily indicated that in the present case, the applicant did not raise any allegation to the effect that he had been completely precluded from communicating with his family members and relatives. His complaint was based on the alleged inability to contact with his family and relatives more frequently as he had been afforded the right to contact by phone only once within 15 days and for 10 minutes. Therefore, his individual application was examined under this scope.

53. The restriction imposed on the right, of those convicted or detained on account of certain offences, to contact by phone by virtue of the decision of the Administrative and Monitoring Board of the prisons does not constitute a breach of the freedom of communication and the right to respect for family life.

b. Whether the Interference Constituted a Violation

54. Article 13 of the Constitution, titled "*Restriction of fundamental rights and freedoms*", insofar as relevant 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 ... These restrictions shall not be contrary to … the requirements of the democratic order of the society and … the principle of proportionality."*

55. Unless the impugned restriction complies with Article 13 of the Constitution, it would be in breach of Articles 20 and 22 of the Constitution. Therefore, it must be ascertained at the outset whether the restriction complied with the requirements set out in Article 13 of the Constitution and

applicable to the present case, namely being prescribed by law, pursuing a legitimate aim, being compatible with the requirements of a democratic society, as well as not being contrary to the principle of proportionality.

i. Lawfulness

56. The interference with the applicant's right to contact by phone was based on the State of Emergency Decree Law no. 667 and Article 6 § 1 (e) of Law no. 6749 on the adoption of this Decree Law.

57. It is set forth in Article 6 § 1 (e) of Law no. 6749 that those who are detained on account of certain offences defined in the Turkish Criminal Code no. 5237, dated 26 September 2004, and falling under the scope of the Anti-Terror Law no. 3713, dated 12 April 1991, shall be allowed to contact by phone, during the period when the state of emergency remains in force, merely with the individuals specified in Article 6 § 1 (e) of the same Law for only once within 15 days and up to 10 minutes.

58. In this sense, it has been concluded that the applicant detained on account of an offence falling within the scope of Law no. 3713 was made subject to the statutory arrangement in Article 6 of Law no. 6749, which satisfied the condition of *being restricted by law*.

ii. Legitimate Aim

59. It is natural that certain rights and opportunities afforded to detainees and convicts may vary by the gravity of the criminal charges raised against them. Regard being had to the gravity of the offences covered by Law no. 3713 and particular circumstances of the state of emergency, it has been accordingly considered that the restriction of the right to contact by phone of those who were detained on account of certain offences so as to maintain the public order and the prison security and discipline satisfied the condition of pursuing a legitimate aim.

iii. Compatibility with the Requirements of a Democratic Society and Proportionality

60. The reasonable grounds that are likely to be relied on as a justification for the interferences with the fundamental rights of the convicts and

detainees must be substantiated with the relevant facts and information within the framework of all circumstances of a given case. Besides, during such an examination, the offence imputed to the relevant person and the reasons of his detention must be also taken into consideration (see *Mehmet Zahit Şahin*, § 63).

61. In this sense, the principal point of the assessments to be made with respect to the impugned incident in the present case is the question whether the grounds relied on by the administrative authorities causing the interference and the relevant inferior courts in their decisions provided a plausible explanation to the effect that the restriction imposed on the right to communication satisfied *the requirement of being compatible with the requirements of a democratic society* and *the principle of proportionality* (see *Mehmet Zahit Şahin*, § 64; and *Ahmet Temiz*, no. 2013/1822, 20 May 2015, § 68).

62. The applicant being detained for his alleged membership of a terrorist organisation was allowed to contact with his family members under the conditions which are specified in Article 6 of Law no. 6749. In the application, there is no allegation or findings to the contrary. The applicant could make these contacts in the periods that were predetermined.

63. Within the framework of the legal regime applied prior to the adoption of Law no. 6749, the detainees and convicts held in prisons were afforded the right to contact by phone once a week and being limited to 10 minutes.

64. It is set forth in the above-mentioned statutory arrangement enacted subsequently that those who are held in prisons on account of membership of a terrorist organisation or any offence committed within the scope of the activities of terrorist organisations shall be allowed to contact by phone, during the state of emergency, only once within 15 days and being limited to 10 minutes. The applicant's right to contact by phone was restricted, within the framework of the said provision, by the decision of the Administrative and Monitoring Board dated 24 August 2016.

65. In this context, so as to have a better understanding of the impugned interference with to right to contact by phone, it is necessary to recall

certain information on the military coup attempt of 15 July 2016 and the subsequent developments.

66. There is a long-standing terror problem in Turkey. During the significant period of the republic, the State has made every effort to quell the organised and armed acts of violence. Along with its main struggle against the PKK for the last 35 years, Turkey has also undergone several attacks of, and struggled against, the other terrorist organisations (namely DHKP/C, TKP/ML, Al-Qaida, Daesh and Hezbollah). On 15 July 2016, a military coup attempt was staged by a structure namely the FETÖ/PDY (see *Aydın Yavuz and Others*, §§ 12-25).

67. An investigation was conducted against many persons considered to have involved in the coup attempt of 15 July, or to have a relation with the FETÖ/PDY even if having no direct involvement with the coup attempt, all across the country upon the instruction of the chief public prosecutor's offices during and after the coup attempt. Within the scope of these investigations, many public officers, notably those taking office at the Turkish Armed Forces, security directorates and in the judiciary, and civilians were arrested and taken into custody, and a significant number of these persons were detained on remand by virtue of a court decision (see *Aydın Yavuz and Others*, § 51). Besides, a certain part of the guardians and gendarmerie personnel in charge for ensuring safety and protection of the detainees and a significant part of the security officers who may be assigned, when necessary, to ensure safety of detainees were dismissed or suspended from public office for having a link with the terrorist organisations (see *Aydın Yavuz and Others*, § 357).

68. The ECHR has also considered the military coup attempt of 15 July 2016 as a public threat to the nation (see *Şahin Alpay v. Turkey*, no. 16538/17, 20 March 2018, § 77).

69. In the present case, the applicant was made subject, on account of the offence imputed to him, to a restriction on the frequency of the exercise of his right to contact by phone. It appears that the reason underlying the impugned restriction was the aim to maintain discipline and security in the prison. Given the nature of the coup attempt of 15 July 2016 that posed a threat to the existence of the nation, the fact that many persons

were detained and/or convicted in the aftermath of the coup attempt on account of terrorist offences, as well as the significant decrease in the number of public officers engaged in ensuring the safety of the detainees and convicts, it has been concluded that the impugned interference was necessary in a democratic society.

70. In the assessment as to the proportionality of the restriction of the applicant's right to contact by phone, it must be borne in mind that it was limited to the period when the state of emergency would be in force and that the length of communication was not shortened. Nor did the applicant allege that he could not exercise his right to contact by phone.

71. In the light of all these considerations, it has been concluded that with respect to the impugned interference whereby the applicant's right to contact by phone was restricted -which did not preclude him from maintaining his relations with the family members-, a fair balance was struck between the legitimate aim pursued by the public authorities causing the interference and the applicant's personal interest; and that the interference that was necessary in a democratic society was also proportionate to the aim sought to be attained, regard being had to the need to maintain the public order as required by the state of emergency conditions, the aim to maintain the security and discipline in the prison, as well as to the gravity of the offence imputed to the applicant.

72. For these reasons, the application -which clearly involves no violation- must be declared inadmissible for *being manifestly ill-founded* without any further examination as to the other admissibility criteria.

73. As the interference with the applicant's right to contact by phone was not in contradiction with the safeguards set out in the Constitution (Articles 13, 20 and 22), there is no need to make any separate examination as to the criteria laid down in Article 15 of the Constitution.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 3 July 2018 that

A. The request for legal aid be ACCEPTED;

B. The alleged violations of the right to respect for family life and the freedom of communication be DECLARED INADMISSIBLE for *being manifestly ill-founded*; and

C. The applicant be COMPLETELY EXEMPTED from the court expenses payment of which would cause the applicant to incur a financial difficulty pursuant to Article 399 § 2 of the Code of Civil Procedure dated 12 January 2011 and no. 6100.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

DECISION

İBRAHİM KAPTAN

(Application no. 2017/30510)

18 July 2018

On 18 July 2018, the Second Section of the Constitutional Court found inadmissible the alleged violations of the prohibition of ill-treatment and the principle of equality in the individual application lodged by *İbrahim Kaptan* (no. 2017/30510).

THE FACTS

[5-45] After the coup attempt of 15 July 2016, the applicant was detained and placed in a prison for his alleged membership of the Fetullahist Terrorist Organization/Parallel State Structure (FETÖ/PDY).

With the decision of the Administrative and Supervisory Board of the Prison, titled "Provision of Prisoners with Training and Rehabilitation Activities", it was held that those who had been detained within the scope of the investigations conducted into the FETÖ/PDY would not be allowed to participate in the training and rehabilitation activities. It was underlined in the reasoning of the decision that the state of emergency was continuing and that the number of persons detained within the scope of the relevant investigations was high, and that therefore the measure in question was taken in order to prevent any security vulnerability.

The applicant's challenge to this decision was dismissed by the execution judge. Thereupon, the applicant appealed against the decision of the execution judge. The incumbent assize court dismissed the applicant's appeal.

Thereafter, the applicant lodged an individual application with the Court on 13 July 2017.

V. EXAMINATION AND GROUNDS

46. The Constitutional Court, at its session of 18 July 2018, examined the application and decided as follows:

A. Request for Legal Aid

47. The applicant, indicating that he could not afford to pay the application fee and relevant expenses for being detained on remand, requested legal aid.

48. In consideration of the principles laid down in the Court's recent judgments, the Court accepted the applicant's request for legal aid for not being manifestly ill-founded in order not to cause financial difficulties to him (see *Mehmet Şerif Ay*, no. 2012/1181, 19 September 2013, §§ 22-27).

B. Alleged Violation of the Prohibition of Ill-Treatment

1. The Applicant's Allegations

49. The applicant maintained that

i. His detention conditions attained the threshold of torture and increased his physical and mental sufferings as he had not been allowed to use sports halls, library, workshops and multi-purpose hall and could not participate in such kinds of trainings and rehabilitation activities.

ii. He had suffered from backache, inguinal pain, loss of vision, constipation and sleep problems. His preclusion from using library also hindered him in making researches and occupying his mind.

iii. He therefore complained of the alleged violations of the prohibition of torture and ill-treatment, as well as of the right to a fair trial and accordingly requested the Court to find a violation and award him compensation.

2. The Court's Assessment

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

"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 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). Given the nature of the complaints raised by the applicant, it appears that his allegations that he was deprived of the opportunity to participate in training and rehabilitation activities mainly fall into the scope of the prohibition of ill-treatment. Therefore, all

allegations raised by the applicant were examined under the prohibition of ill-treatment safeguarded by Article 17 of the Constitution.

52. The State's obligation to respect for the individuals' right to protect and improve their corporeal and spiritual existence primarily requires the public authorities to refrain from interfering with this right, in other words, from causing individuals physical and mental damage in cases specified in the third paragraph of the said provision. It is the State's negative duty emanating from its obligation to respect for individuals' corporeal and spiritual integrity (see *Cezmi Demir and Others*, no. 2013/293, 17 July 2014, § 81).

53. Article 17 § 3 of the Constitution and Article 3 of the Convention do not contain any limitation and point to the absolute nature of the prohibition of torture, inhuman and degrading treatments or penalties. The absolute nature of the prohibition of ill-treatment does not embody an exception even in times of war or any other general threat to the nation within the meaning of Article 15 of the Constitution. In the same vein, nor does Article 15 of the Convention provide any exception to the prohibition of ill-treatment (see *Turan Günana*, no. 2013/3550, 19 November 2014, § 33).

54. Detention conditions, treatments inflicted on prisoners, discriminatory behaviours and conducts, defamatory expressions used by state agents, or degrading treatments such as forcing a person to eat or drink something unusual may constitute treatment *incompatible with human dignity* (see *Cezmi Demir and Others*, § 90). The convicts and detainees may be lawfully deprived of the right to personal liberty and security under Article 19 of the Constitution (see *İbrahim Uysal,* no. 2014/1711, 23 July 2014, §§ 29-33), whereas they generally have the other fundamental rights and freedoms falling under the joint protection realm of the Constitution and the Convention. However, the rights enjoyed by prisoners may be restricted in case of any acceptable and reasonable requirements for preventing the commission of offences and maintaining order, namely for maintaining security in the prison, as an inevitable consequence of detention in a prison.

55. The provision *"No one shall be subjected to torture or mal-treatment; no one shall be subjected to penalties or treatment incompatible with human*

dignity", laid down in Article 17 § 3 of the Constitution, is also applicable to the practices as to convicts and detainees. This is explicitly emphasised in Article 2 § 2 of the Law no. 5275 on the Execution of Penalties and Security Measures, which is titled *"The basic principle of execution"* and provides for *"In the execution of penalties and security measures, there shall be no cruel, inhuman, degrading or humiliating treatment"* as well as in Article 6 § 1 (b) of the same Law which provides for *"A person shall deprived of his liberty necessitated by the imprisonment sentence under the physical and mental conditions that ensure respect for human dignity"*. Therefore, in the enforcement of conviction decisions or detention orders, the conditions under which convicts and detainees will be held must ensure respect for human dignity (see *Turan Günana*, § 36).

56. The issues to be regarded as ill-treatment in prisons may appear in different circumstances, which may result either from the intentional conducts of the prison administration and officers or from mismanagement or inadequate resources. Therefore, the life sustained by convicts in the prisons must be assessed in all aspects. The life in prisons must be taken into consideration widely ranging from the activities performed by prisoners to the general conditions of the relations between prisoners and prison officers (see *Turan Günana*, § 37). Article 17 of the Constitution also secures that the conditions under which a convict or detainee is held in a prison be compatible with human dignity. The method of execution and the conducts during the execution process must not cause hardship exceeding the inevitable level of suffering associated with the deprivation of liberty (see *Turan Günana*, § 39).

57. In addition to the foregoing issues, for a treatment to fall into Article 17 § 3 of the Constitution, it must have attained the minimum threshold of severity. This minimum threshold may vary by, and must therefore depend on, the particular circumstances of each case. In this sense, in determining the level of severity, factors such as the duration of the impugned treatment; its physical and mental effects, as well as sex, age and mental health of the victim are of importance (see *Tahir Canan*, § 23).

58. In the present case, the applicant was detained for his alleged membership of a terrorist organisation and placed in the Menemen T-type

Prison. He complained of having been precluded from participating in training and rehabilitation activities.

59. It should be primarily noted that the restrictions imposed on prisoners, who have been detained within the scope of a criminal investigation or prosecution or whose imprisonment sentence has been finalised, as to their participation in training and rehabilitation activities do not *per se* constitute a breach of Article 17 of the Constitution. The imposition of such restrictions for maintaining discipline and security may derive from the very nature of the detention measure and execution of sentence. However, it must not be disregarded that preclusion from training and rehabilitation activities to the extent that would go beyond the intended purpose of detention or execution, amount to arbitrariness and excessiveness and thereby impair the prisoners' physical and mental health may constitute ill-treatment under Article 17 § 3 of the Constitution, provided that it has attained a minimum threshold of severity.

60. The Court has noted that in assessing the detention conditions in prisons within the meaning of Article 17 § 3 of the Constitution, these conditions must be taken into consideration, along with the applicant's allegations in a given application, and accordingly, the severity and aim of the applied measures as well as their consequences for individuals must be considered as a whole (see *Turan Günana*, § 38). Therefore, the particular circumstances of the present case, the nature, duration and aim of the restriction whereby the applicant was devoid of rehabilitation activities as well as its effects on the applicant must be taken into account.

61. In the present case, the applicant detained on 20 March 2017 was placed in a cell measuring 60 square meters, with a yard for fresh air measuring 35 square meters. Pursuant to the relevant legislation and as set forth in Additional Article 27 of the Recommendation Rec (2006) 2 of the Committee of Ministers to Member States on the European Prison Rules, the applicant was provided with the opportunity of at least one hour of walking and personally exercise in the yard for fresh air. Besides, the applicant had access to periodicals and non-periodicals as well as to newspapers, books and printed publications issued by state institutions, universities, public professional organisations, and -on condition of not

being banned by courts- by foundations exempted from tax by the Council of Ministers and the associations serving for public interest.

62. Besides, it is clearly set forth in the relevant legislation that the applicant, like the other prisoners, had the right to access to medical examination and treatment opportunities as well as medical devices for the protection of his physical and mental health and diagnosis of disorders. The medical institutions operating under the Ministry of Health, under the Ministry of Labour and Social Security and under the universities have been assigned to render this service. It is further laid down that the physician serving at the relevant prison shall inspect the prison at least once a month and issue a report including suggestions to be put into practice with respect to medical conditions.

63. In the present case, the applicant was not allowed to participate in training and rehabilitation activities such as to use indoor and outdoor sports halls and library. The relevant prison administration noted that the impugned restrictions had been imposed to ensure the prisoners' safety, to prevent organisational activities, as well as to preclude terrorist organisations from guiding the prisoners in line with the organisational purposes and giving them orders and instructions. In the assessments made in consideration of the aims pursued by the prison administration, it has been revealed that the impugned interference had acceptable and reasonable grounds such as the prevention of commission of offence and maintaining discipline at the prison, as an inevitable consequence of detention. It has been further observed that the applicant had the opportunity to go outside for fresh air for at least one hour on daily basis during which he could do outdoor exercises; that he was not subject to any restriction in having access to any periodicals or non-periodicals including books and journals, which are not found inconvenient, as well as to information; and that the impugned restriction, which had been indeed temporary, was lifted by the decision of the Prison's Management and Supervisory Board on 8 June 2018. Nor did the applicant raise any allegations to the effect that he had been deprived of medical support for the treatment of his diseases and for the protection of his mental and physical health, or that he could not communicate with the outside world to a reasonable extent.

64. Given the particular circumstances of the present case, the Court has concluded that the suffering caused by the very nature of the temporary measure, which had a reasonable basis, and incurred as an inevitable consequence of detention did not attain a minimum threshold of severity from the standpoint of Article 17 § 3 of the Constitution.

65. As it has been observed that there was no violation of the prohibition of ill-treatment for the above-mentioned reasons, this part of the application must be declared inadmissible for *being manifestly ill-founded*.

C. Alleged Violation of the Principle of Equality in conjunction with the Prohibition of Ill-Treatment

1. The Applicant's Allegations

66. The applicant maintained that the principle of equality was breached as such a restriction had been imposed merely on those detained within the scope of the investigations conducted against the FETÖ/PDY, and the other detainees and convicts had not been subjected to a discriminatory treatment.

2. The Court's Assessment

67. Article 10 §§ 1, 4 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.*
>
> …
>
> *No privilege shall be granted to any individual, family, group or class.*
>
> …
>
> *State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings."*

68. 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's allegation essentially concerns that the impugned restriction whereby the prisoners were precluded from participating in training and rehabilitation activities has been applied merely to those detained on remand within the scope of the FETÖ/PDY investigations. It has been accordingly considered that this allegation raised by the applicant be examined under the principle of equality in conjunction with the prohibition of ill-treatment, which is safeguarded by Article 17 of the Constitution.

69. Even if Article 10 of the Constitution is not formulated as including the *prohibition of discrimination* in its wording, this prohibition must be effectively put into practice as the principle of equality involves, in constitutional context, a normative value to be based on in any case (see the Court's judgment no. E.1996/15, K.1996/34, 29 September 1996). In other words, the principle of equality also embodies the prohibition of discrimination as a concrete standard norm (see *Tuğba Arslan* [Plenary], no. 2014/256, 25 June 2014, § 108; and *Nurcan Yolcu* [Plenary], no. 2013/9880, 11 November 2015, § 34).

70. The notion of *"everyone"* specified in Article 10 § 1 of the Constitution does not delimit the potential scopes of the principle of equality and the prohibition of discrimination. Besides, as it is set forth in the same paragraph that no distinction shall be allowed on *"such grounds"*, it is clearly indicated that the grounds of discrimination is not limited to those listed in the relevant provision, and thereby the scope of the issues where no discrimination is allowed is extended (see *Tuğba Arslan*, 109).

71. No limitation is set in Article 10 of the Constitution as to the individual to enjoy the principle of equality as well as to the scope of the principle. Pursuant to Article 11 of the Constitution, which provides for *"The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals"*, it is clear that the principle of equality enshrined in the Constitution under the heading *"General Principles"* is also applicable to the bodies, institutions and individuals specified in the said provision. Moreover, pursuant to the last paragraph of Article 10, which provides for *"State organs and administrative authorities are obliged to act in*

compliance with the principle of equality before the law in all their proceedings", the legislative, executive and judicial organs and administrative authorities are to act in line with the principle of equality (see *Tuğba Arslan*, § 110; and *Nurcan Yolcu*, § 35).

72. In Article 10 § 1 of the Constitution, it is set forth that there shall be no discrimination *"as to language, race, colour, sex, political opinion, philosophical belief, religion and sect"*, which also stresses that no distinction shall be allowed *"on any such grounds"*. In this sense, it is clear that the Constitution attaches more importance to the types of discriminatory treatment that are explicitly mentioned, and that such treatments may be justified only on *"particularly important grounds"*. The more the discriminatory treatment is considered severe, the more important would be the grounds to be relied on by the State to justify such treatment. In other words, in case of any potentially serious discrimination, the margin of appreciation accorded to the State would be generally narrower (see *Tuğba Arslan*, §§ 145, 146; and *Nurcan Yolcu*, § 36).

73. The Court defines the principle of equality as follows:

> *"The principle of equality enshrined in Article 10 of the Constitution applies to those who are in the same legal status. This principle stipulates equality not in action but in legal terms. The purpose of this principle is to ensure that those who are in the same status be subject to the same process before laws and to prevent any distinction and privilege. This principle prohibits the breach of equality before laws due to applying different rules to certain individuals and communities of the same status. Equality before the law does not mean that everyone would be bound by the same rules in every aspect. The circumstances specific to these individuals and communities may require the application of different rules and practices in respect of them. If the same legal situations are subject to the same rules whereas the different legal situations are subject to different rules, the principle of equality enshrined in the Constitution is not impaired." (see the Court's judgment no. E.2009/47, K.2011/51, 17 March 2011).*

74. As noted above, the principle of equality, which pursues the aim of ensuring those of the same legal status be subject to the same process, prohibits the application of different rules to the individuals in the same

status. However, in a democratic society, in cases where a difference in treatment has an objective and reasonable basis and the method applied in this difference is proportionate, the principle of equality cannot be said to be impaired. Therefore, this principle would not be breached if the difference in treatment inflicted on those who are of the same legal status has an objective and reasonable basis, is proportionate to the prescribed legitimate aim, in other words, if it does not place an excessive and extraordinary burden on the relevant person.

75. In this sense, the following factors must be taken into consideration in determining whether the principle of equality has been breached:

i. Whether there is a difference in treatment, towards the individuals or groups of the same legal status, as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds;

ii. Whether this difference in treatment has an objective and reasonable basis;

iii. Whether it is proportionate.

76. The applicant, detained for his alleged membership of a terrorist organisation, was placed in the Menemen T-type Prison. He complained that those detained in the same prison within the scope of the FETÖ-PDY investigations, like himself, were deprived of the training and rehabilitation activities, whereas the other detainees and convicts were not. In this sense, the questions to be ascertained in the present case are whether there was a difference in treatment inflicted on the applicant; if there was, whether such a treatment had an objective and reasonable basis; and whether the method used and leading to difference in treatment was proportionate.

77. In the present case, the prison administration provided the prisoners with the opportunity to participate in some training and rehabilitation activities -such as using indoor and outdoor sports halls and library- with a view to maintaining their health and welfare. However, it appears that by virtue of the decision of 19 October 2016, it was ordered that those detained in the prison within the scope of the FETÖ/PDY investigations

would not participate in these training and rehabilitation activities. Given the impugned practice whereby the other prisoners including those detained or convicted of terrorist offences were not subject to such a restriction and only those detained within the scope of the FETÖ/PDY investigations were deprived of such activities, it has been observed that this practice constituted a different treatment in respect of the applicant.

78. In consideration of the reasoning of the decision issued by the Prison's Management and Supervisory Board, it has been observed that the impugned practice was intended for the prevention of organisational activities to be performed by those detained within the scope of the FETÖ/PDY investigations, their guidance by, and receiving orders and instructions from, the said terrorist organisation, as well as for ensuring the safety of the prisoners. It was further emphasised in the reasoning that as the state of emergency was still in force and there were so many individuals detained within the scope of the FETÖ/PDY investigations, the said measure had been put into practice so as to avoid any security vulnerability.

79. Given the complex nature of the FETÖ/PDY structure, clandestine nature of the organisational relationship and the reasons underlying the state of emergency in force at the relevant time, it is clearly possible for many individuals detained within the scope of the said investigations and placed at the same prisons to continue engaging in organisational activities. Therefore, the impugned difference in treatment in pursuit of prevention of such a possibility was based on objective and reasonable grounds.

80. The question whether the method applied and leading to difference in treatment was proportionate is a paramount criterion in ascertaining whether a fair balance has been struck between the aim pursued by the difference in treatment and the fundamental rights and freedoms. In the present case, it must be discussed whether such a balance was struck by the public authorities in respect of the prohibition of ill-treatment. As mentioned above, it has been observed that despite under limited terms and conditions, the applicant had the opportunity to do physical exercise and to have access to books; and that the impugned practice was indeed a

temporary measure. Therefore, the Court has concluded that the method applied was proportionate.

81. As a result, even if the applicant was clearly subjected to a difference in treatment, it has been considered that the impugned treatment was based on objective and reasonable grounds; and the method applied was proportionate.

82. For these reasons, as it is explicit that the principle of equality, taken in conjunction with the prohibition of ill-treatment, was not breached, this part of the application must be declared inadmissible for *being manifestly ill-founded*.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 18 July 2018 that

A. The applicant's request for legal aid be ACCEPTED;

B. 1. The alleged violation of the prohibition of ill-treatment be DECLARED INADMISSIBLE *for being manifestly ill-founded*;

2. The alleged violation of the principle of equality in conjunction with the prohibition of ill-treatment be DECLARED INADMISSIBLE *for being manifestly ill-founded*; and

C. As the payment of the court expenses by the applicant would be unjust pursuant to Article 339 § 2 of the Code of Civil Procedure no. 6100 and dated 12 January 2011, he would BE COMPLETELY EXEMPTED from the court expenses.

CHAPTER TWO
JUDGMENTS

RIGHT TO LIFE (ARTICLE 17 § 1)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

CEMBELİ ERDEM

(Application no. 2014/19077)

18 April 2018

On 18 April 2018, the First Section of the Constitutional Court found a violation of the procedural aspect of the right to life, safeguarded in Article 17 of the Constitution, concerning the obligation to conduct an effective investigation in the individual application lodged by *Cembeli Erdem* (no. 2014/19077).

THE FACTS

[8-73] On the date of incident, the hearing-impaired applicant, who resides in Diyarbakır, saw a crowd while he was going to his house. Then, he felt a pain on his back and fell to the ground.

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

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

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

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

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

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

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

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

V. EXAMINATION AND GROUNDS

74. The Constitutional Court, at its session of 18 April 2018, examined the application and decided as follows:

A. The Applicant's Allegations and the Ministry's Observations

75. The applicant maintained that during the investigation into the incident, the evidence capable of fully revealing the material truth had not been collected in a timely and sufficient manner, in order to protect the police officer who had injured the applicant; that the police officer had been given a punishment which was clearly disproportionate to the impugned act in the form of a severe attack and however, the punishment had not been executed as the court granted suspension of the pronouncement of the relevant decision; and that the investigation had not been concluded within a reasonable time.

76. The applicant alleged that the inadequate sentence imposed on the police officer, which was not even executed for being suspended, also caused him to suffer distress and sorrow, independent of the incident itself. According to the applicant, it amounted to an ill-treatment.

77. Maintaining that the relevant statutory arrangements had been all applied in favour of the accused person for being a police officer; and that he was in need of care by his family members due to the injuries he had sustained, which prevented him from undertaking his own care, the applicant further alleged that the principle of equality and the right to respect for private life had been violated.

78. He accordingly maintained that there had been violations of Article 10, 17, 37 of the Constitution and Articles 3, 6, 8, 13 and 14 of the Convention. He requested the Court to find the violations under these provisions and to award him compensation for pecuniary and non-pecuniary damage suffered by him.

79. In its observations, the Ministry noted that the applicant's allegations be examined from the standpoint of the right to life. It then listed the principles set by the European Court of Human Rights ("the ECHR") for an effective investigation to be conducted within the scope of the said right.

80. Making a reference to the acts performed within the scope of the impugned investigation, the Ministry also noted that it was for the Court to assess the complaint in question.

81. In his counter-statements against the Ministry's observations, the applicant reiterated his allegations and claims specified in the application form.

B. The Court's Assessment

82. 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."*

83. Article 5 of the Constitution titled *"Fundamental aims and duties of the State"* insofar as relevant reads as follows:

> *"The fundamental aims and duties of the State are to safeguard … the Republic and democracy, 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."

1. Applicability

84. In the present case, the applicant is alive. Therefore, an examination must be conducted primarily as regards the applicability of Article 17 § 1 of the Constitution where the right to life is enshrined.

85. In order for the principles concerning right to life to be applied in a given case, there must be an unnatural death. However, in certain cases, the incident may be examined within the scope of the right to life, even if there has occurred no death (see *Mehmet Karadağ*, no. 2013/2030, 26 June 2014, § 20).

86. An application concerning an incident that has not resulted in death can also be examined within the scope of the right to life, given the circumstances of the case, such as the nature of the act against the victim and the intent of the perpetrator. In making this assessment, the question whether the act is potentially lethal or not, and the consequences of the act in respect of the physical integrity of the victim, are of importance (see *Siyahmet Şiran and Mustafa Çelik*, no. 2014/7227, 12 January 2007, § 69; and *Yasin Ağca*, no. 2014/13163, 11 May 2017, §§ 109 and 110).

87. Regard being had to the fact that the impugned act was performed by a gun on account of which the applicant sustained life-threatening injury, there is no doubt that the act was likely to cause death. Considering this nature of the impugned act, its severe effects on the physical integrity and other relevant factors as a whole, the Court concluded that the application must be examined from the standpoint of the right to life.

88. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). It has been considered that the applicant's complaint in essence concerns his being subjected to lethal violence, the failure to conduct an effective investigation into

the incident and the failure to ensure accountability for an effective deterrence. Therefore, it has been considered that the allegations raised by the applicant in connection with the other rights fall within the scope of the right to life, and these allegations were therefore examined within the scope of the mentioned right.

2. Scope of Examination

89. The applicant alleged, *inter alia*, that the principle of equality had been breached as the judicial authorities had applied the relevant statutory arrangements in favour of the accused person for being a police officer.

90. It should be primarily noted that the alleged violations of the principle of equality safeguarded by Article 10 of the Constitution as well as of the prohibition of discrimination laid down in Article 14 of the Convention cannot be examined abstractly, and it must be examined in conjunction with the other fundamental rights and freedoms enshrined both in the Constitution and the Convention (see *Onurhan Solmaz*, no. 2012/1049, 26 March 2013, § 33).

91. Besides, in order for an examination as to an alleged discrimination, the applicant must demonstrate with reasonable ground that the difference in treatment between him and the persons in a similar situation with him was based on a discriminatory reason such as race, colour, sex, religion, language and etc. in the absence of any legitimate ground (see *Adnan Oktar (3)*, no. 2013/1123, 2 October 2013, § 50).

92. In the present case, the applicant however failed to provide a sufficient explanation as to the judicial practices that were complained of as allegedly amounting to a difference in treatment. Nor did he mention the discriminatory reason underlying the alleged difference. The applicant did not allege that there was a difference between the impugned practice and those performed regarding persons in a similar situation with him, which was based on language, religion, race, sex and etc. in the absence of any legitimate ground. The reason underlying the alleged discriminatory treatment is not related to the applicant himself but to the accused person for being a police officer.

93. Besides, irrespective of the above-mentioned consideration, the applicant also failed to provide any concrete finding and evidence to justify his allegation. Accordingly, the Court did not find it necessary to make an examination from the standpoint of the principle of equality invoked by the applicant in conjunction with the right to life.

94. On the other hand, it is undisputed that in the present case, the applicant was injured on account of the shot fired by a police officer. However, there are major differences between the applicant's allegations and the judicial authorities' acknowledgement as to the occurrence of the impugned incident.

95. The applicant maintained that he had been attempted to be intentionally killed by the police officer who had evidently pointed his gun at him. However, in the decision issued at the end of the investigation, it was indicated that the applicant had been hit by a ricochet bullet fired by the police officer into the air.

96. As required by the negative obligation incumbent on the State concerning the right to life, the officers who use force by exercising public authority bear the liability not to end the life of any individual in an intentional and unlawful way (see *Serpil Kerimoğlu and Others,* no. 2012/752, 17 September 2013, § 51). This obligation concerns the use of force that results or may result in both deliberate killing and death without premeditation (see *Cemil Danışman,* no. 2013/6319, 16 June 2014, § 44).

97. The last paragraph of Article 17 of the Constitution provides for 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*.

98. Lethal force must be used as a last resort in cases specified in the Constitution and where there is no other way of intervention. Therefore, having also regard to the inviolable nature of the right to life, the necessity and proportionality of the use of force that might result in death must be subjected to a strict review.

99. At this point, it should be especially emphasised that the criminal acts performed by public officers, which put the individuals' lives at risk -including those committed by the use of armed force, or those resulting in death or fatal injury on account of the officers' negligence-, should in no way be allowed to go unpunished.

100. In addition, it should be noted that the relevant legislation empowers the inferior courts to suspend the pronouncement of the judgment in such cases; however, this is not obligatory, and the judge enjoys full discretion in this regard. The courts should exercise this power so as not to mitigate or eliminate the consequences of an act constituting a heavy offence but to demonstrate that the acts in question would never be tolerated.

101. It is of critical importance to ensure the maintenance of public confidence, the rule of law and the prevention of the impression that unlawful acts are tolerated.

102. In cases where the police officers have resorted to the use of armed force, the suspension of the penalty may lead not only to impunity but also to a clear disproportionality between the severity of the acts and the punishment imposed. In such cases, as the applicants' victim status caused by the violation of the right to life could not be removed, the Constitutional Court might be obliged to intervene in the case although it usually respects the inferior courts' decision whereby the sanction to be imposed is specified and does not directly have such a duty.

103. At this point, it should again be noted that the Court is also entitled to deal with the cases where there is a clear disproportionality between the severity of the acts committed by the public officers within the scope of Article 17 of the Constitution and the punishment imposed, even if it is not directly for the Court to deal with the questions of criminal liability (see *Cezmi Demir and Others*, no. 2013/293, 17 July 2014, § 76).

104. In the present case, it may be asserted that a further examination by the Court to ascertain whether the use of armed force was absolutely necessary and proportionate would be unnecessary as the inferior court indicated in its decision that the applicant had been injured in breach

of the provisions concerning the use of armed force, thereby finding a violation of Article 17 of the Constitution. If this assertion is accepted, the Court's examination would be limited to the determination as to whether the inferior court provided an appropriate and adequate redress (punishment) for the said violation.

105. In the present case, the judicial authorities acknowledged that the applicant was not directly subject to the use of armed force. The incumbent inferior court concluded that the permissible limit of the use of armed force against the applicant had not been exceeded deliberately or by negligence; and that therefore, there was no contradiction with the requirements, in other words safeguards, as to the resort to armed force which are enshrined in the Constitution. It also considered that the applicant's injury had not been caused by any negligence involved in the violence used against him. It acknowledged that the negligence in question was caused not on account of the contravention with the provisions on the permissible limits of the use of armed force but under the general provisions on gross negligence, which are laid down in the relevant law.

106. On the other hand, the applicant asserted the contrary and even maintained that he had been clearly targeted by the police officer resorting to the armed force; and that therefore, the police officer should have been sentenced to severe punishments. In this sense, regard being had to the inferior court's consideration and the applicant's allegation that he had been clearly targeted, it appears that the Court should assess and elucidate whether the use of armed force was absolutely necessary and proportionate. Accordingly, the Court cannot confine itself to establishing whether the unfair treatment was redressed by the imposition of a sufficient punishment.

107. However, the Court has no sufficient information or finding to assess the applicant's allegations and the inferior court's consideration because the conditions in which the impugned incident took place could not be established, as would be explained in detail below in the assessment as to the procedural aspect of the right to life.

108. Therefore, the applicant's complaints that the substantive aspect of his right to life insofar as it relates to the State's obligation to prevent

arbitrary killing by its agents had been violated and that the unjust treatment he sustained had not been compensated for as the police officer responsible went unpunished could not be addressed at this stage. Therefore, the Court's examination was limited to the question whether the State's obligation to conduct an effective investigation was fulfilled, save for as regards the complaint that the authorities failed to ensure effective deterrence as a requirement inherent in accountability.

3. Admissibility

109. In the present case, the applicant filed an administrative action and claimed compensation on account of the impugned incident. The administrative proceedings are still pending.

110. It should be primarily noted that in all cases where the right to life has not been violated or the physical integrity has not been damaged intentionally, the positive obligation to conduct an effective investigation does not necessarily entail an effective criminal investigation. It may be sufficient to provide civil, administrative and even disciplinary remedies to the victims (see *Serpil Kerimoğlu and Others*, § 59).

111. In the present case, although the inferior court considered that the impugned incident had been caused not intentionally but within the scope of general provisions on gross negligence laid down in the relevant law, it was concluded that the remedy of compensation could not ensure fulfilment of the State's positive obligation to conduct an effective investigation due to the allegation that the police officer intentionally resorted to the armed force.

112. Accordingly, the alleged violation was declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

4. Merits

a. General Principles

113. The right to life enshrined in Article 17 of the Constitution, when read together with Article 5 thereof, imposes positive and negative obligations on the State (see *Serpil Kerimoğlu and Others*, § 50).

114. The positive obligations incumbent on the State within the right to life also have a procedural aspect. Within the framework of this procedural obligation, the State is required to carry out an effective official investigation capable of ensuring identification, and if necessary, punishment, of those who are responsible for each incident of unnatural death. The main aim of this type of investigation is to guarantee the effective implementation of the law that protects the right to life and to ensure that those responsible, if any, account for the incident (see *Serpil Kerimoğlu and Others*, § 54).

115. On the other hand, the aim of the criminal investigation is to ensure the effective enforcement of the statutory provisions protecting the right to life and to hold those responsible accountable. This is not an obligation of result but of appropriate means. In addition, Article 17 of the Constitution does not grant the applicants the right to have third parties prosecuted or sentenced for a criminal offence; nor does it place an obligation on the State to conclude all proceedings in a verdict of conviction (see *Serpil Kerimoğlu and Others*, § 56). However, provided that the circumstances of each given case are assessed separately, the acts that manifestly jeopardise the individuals' lives as well as grave attacks towards material and spiritual existence must not be allowed to go unpunished (see *Filiz Aka*, no. 2013/8365, 10 June 2015, § 32).

116. In order for a criminal investigation with respect to the right to life to be effective, the investigation authorities need to act *ex officio* and collect all evidence capable of elucidating the circumstances of a death as well as of identifying those who are responsible. A deficiency in the investigation that would reduce the likelihood of discovering the cause of death or identifying those who are responsible bears the risk of clashing with the obligation of conducting an effective investigation (see *Serpil Kerimoğlu and Others*, § 57).

117. To ensure the effectiveness of investigations into the cases of deaths arising from the use of force by public officers, the investigation authorities must be independent from those who might have been involved in the case. This requirement not only defines hierarchical and institutional independence but also necessitates that the investigation be actually carried out independently (see *Cemil Danışman*, § 96).

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

119. Besides, the investigations must be conducted with a reasonable speed and due diligence. 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 are of critical importance for the clarification of the events, maintenance of the individuals' commitment to the rule of law and precluding the impression that the authorities tolerate and remain indifferent to unlawful acts (see *Deniz Yazıcı*, no. 2013/6359, 10 December 2014, § 96).

b. Application of Principles to the Present Case

120. In the present case, it was maintained that no effective investigation had been conducted into the incident. The applicant reached the conclusion that no effective investigation had been conducted, on the basis of two main complaints. The first one relates to the alleged failure to collect, in a sufficient and timely manner, the evidence concerning the incident in order to protect the police officer responsible. The second complaint is the alleged failure to conduct the investigation with a reasonable speed.

121. The applicant did not complain that the investigation had not been initiated *ex officio* and immediately; that it had not been open to public scrutiny; that effective participation had not been ensured; and that the investigation authorities had not been independent from the persons who might have involved in the incident. Nor is there any information or finding to the effect that these principles were breached in the present case.

122. Considering the applicant's complaints in the light of the above-cited principles, the Court would assess whether the investigation authorities took the reasonable measures, which were reasonably

expected from them as required by Article 17 of the Constitution, to collect all evidence capable of establishing the "type of responsibility", which would ensure clarification of the cause of the incident as well as of the question whether the right to life had been breached intentionally.

123. Although, during the investigation, the incident scene investigation was conducted without delay, the material evidence at the incident scene including the bullet leading to the applicant's injury was secured for examination, and it was found established, as a result of the ballistic examination, that the shot which injured the applicant had been fired by the relevant police officer, it is evident that there are issues undermining the effectiveness of the investigation in determining the circumstances under which the incident took place.

124. One of these issues is the fact that why the authorities waited for about six months to make a comparison between the police officers' gun and the bullet in question as well as cartridge cases although it was revealed by the examination reports of the Security Directorate, dated 1 September and 15 September 2010, that some of the police officers present at the incident scene had fired their guns during the incident, and the bullet extracted from the applicant's body had been received by the Incident Scene Investigation Team a few hours after the incident.

125. The same ambiguity is also at stake for the request to obtain video footage of the incident scene. It has been observed that the video footage of the incident scene was requested also six months later. However, the video footage was preserved only for two months and then deleted. Therefore, it became impossible to collect this evidence which was so important as to eliminate the need to conduct any other inquiry into the incident.

126. Another prominent issue coming into play for the collection of evidence is the failure, during the investigation, to revisit the incident scene to have the incident reconstructed although it was acknowledged that the police officer responsible for the incident had fired a shot in the air but hit the applicant by a ricochet. The incident scene investigation team determined the locations of the spent bullet cases fired by the police officer and the cartridge bullets as well as the signs of hits by certain bullets. It therefore appears that the discovery, if should have been conducted at

the incident scene, would be capable of revealing the credibility of the police officers involved in the incident to which there was allegedly no other eyewitness. It has been observed that it could have been possible to easily elucidate the incident by eliminating the discrepancy between the claimant and the defence if it had been established, by the incident scene investigation, that there were discrepancies between the police officers' statements and the location of material evidence at the incident scene, the way followed by the bullet, the position of the gun fired by the police officer as well as the place where the applicant fell to the ground. However, these steps were never taken during the investigation. As a matter of fact, in such kinds of incidents, incident scene investigation is of great importance for the judicial authorities to elucidate the circumstances of the incident and to establish the material fact.

127. On the other hand, the determination in the expertise report that the bullet fired by the police officer and injuring the applicant was deformed, which was not explicitly specified in the bill of indictment issued by the chief public prosecutor's office and in the reasoning of the decision rendered by the inferior court, led the judicial authorities to consider that the applicant had not been directly targeted but hit by a ricochet. This consideration was clearly specified in the preliminary survey conducted with respect to the police officer.

128. The applicant, hit as a result of a ricochet bullet, sustained severe fractures in his backbone and other bones on account of which he became paralysed. Besides, the bullet caused severe damage not only to the applicant's bones but also to his internal organs such as lung, diaphragm and spleen.

129. Firstly, it should be noted that it is a frequent case where the bullets, upon entering through the body, may strike the bones, or may stay in the body for any other reasons. The situation is exactly the same in the present case. It is also highly likely that the bullet becomes deformed for striking the bones through the body directly or by changing its trajectory. However, despite this well-known fact, during the investigation in the present case, no inquiry including an expertise report was conducted as to the deformation of the bullet that had been shot in the incident, and it was accepted that the bullet had been deformed outside the body.

130. Besides, it appears that a total of 16 judicial reports were issued in respect of the applicant. Nor did any of these reports address the question whether a bullet with a diameter of 9 mm, as used in the present case, would cause such a severe damage if it hit the body in a deformed way upon ricocheting off a place (wall). However, it is of utmost importance, for clarifying the impugned incident, to ascertain whether a deformed cartridge bullet could penetrate the body downwards, by entering inside from the lungs at the back, in a way that could cause severe fractures on the backbone and other bones and cause severe damage to the internal organs.

131. The most important issue needed to be taken into consideration in the investigation is the fact that the police officer, the suspect of the present case, was asked, for the first time, to provide his defence submissions within about 3 years after the incident and within about 2 years after it was revealed through the expertise report that his gun had been used in the incident.

132. In cases where death or a fatal injury occurs, such delays in taking statements of the perpetrators *per se* suffice to explicitly demonstrate the lack of due diligence in these investigations. This may also cause the impression, in cases where the law-enforcement officers have involved, before the eyes of both the victim and, in general, the society that these officers have acted in a vacuum of authority whereby they are not responsible towards anyone including the judicial authorities for their acts.

133. The last failure to be mentioned in the collection of evidence is that it had not been researched whether there was any eyewitness other than the workmates of the police officer, who was the suspect of the incident. As indicated in the relevant reports and according to the judicial authorities, there were other individuals who did not attend the demonstration -like the applicant-, and the police officer acted with the intent of protecting these persons.

134. There is no information in the application form or the investigation documents that an inquiry was conducted to identify these individuals who were at the incident scene but did not attend the demonstration. It

has been observed that a separate investigation into the acts of violence was carried out, independently of this investigation, by the specially authorized unit of the chief public prosecutor's office. In the investigation conducted by this unit, no inquiry was conducted, either by examining this investigation file or through any other means, to ascertain whether there was any eyewitness to the impugned incident as it was presumed that the eyewitnesses, if any, had been identified during this investigation. Although it may be asserted that the eyewitnesses could not testify every moment of the incident due to the tension of, and the clash taking place at, the incident scene, it should be noted that it was also the same for the police officers whose statements were taken within the scope of the investigation.

135. As a result, it has been concluded that the competent authorities failed to take, or caused delay in taking, the measures reasonably expected from them in revealing the material facts, that is to say, in clarifying the incident.

136. The last issue to be taken into consideration with regard to the effectiveness of the investigation is whether it was conducted with reasonable speed.

137. The determination whether the investigation was conducted with due diligence and speed depends on the particular circumstances of every concrete case, number of the suspects and accused persons involved in the investigation, the nature of the charges, the complexity of the incident and the question whether there is any factor or difficulty to hinder the progress of the investigation (see *Fahriye Erkek and Others*, no. 2013/4668, 16 September 2015, § 91).

138. The impugned investigation could be concluded within approximately 4 years and 2 months. The lack of due diligence in collecting the evidence in a timely manner not only hindered the full clarification of the incident in all its dimensions but also led to the procrastination of the investigation without any justification despite the existence of no obstacle or difficulty, as well as to the impression that such unlawful acts in which a law-enforcement officer has been involved are tolerated or confronted with indifference.

139. For these reasons, the Court found a violation of the procedural aspect of the obligation to conduct an effective investigation that is inherent in the right to life.

5. Application of Article 50 of Code no. 6216

140. 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."*

141. In his application form, the applicant requested the Court to award him an equitable amount of compensation for pecuniary and non-pecuniary damage he had sustained. By his letter in response to the Ministry's observations, he requested a total of 150,000 Turkish liras ("TRY") out of which is TRY 100,000 is for his pecuniary damage and TRY 50,000 is for his non-pecuniary damage.

142. In the present case, it has been concluded that the procedural aspect of the obligation to conduct an affective investigation inherent in the right to life was violated.

143. As there is a legal interest in conducting a retrial to redress the consequences of the violation of the procedural aspect of the right to life,

a copy of the judgment must be sent to the 5th Chamber of the Diyarbakır Criminal Court of First Instance to conduct a retrial.

144. The applicant must be awarded a net amount of TRY 30,000 in compensation for the non-pecuniary damage he sustained due to the violation of the procedural aspect of the right to life, which could not be redressed by merely the finding of a violation.

145. The Court may award compensation for the pecuniary damage sustained only when there is a casual link between the alleged pecuniary damage and the violation found. In the present case, the Court found a violation of the obligation to conduct an effective investigation. The applicant's claim for pecuniary compensation must be rejected as he failed to submit any information or document to demonstrate the causal link between his claim in respect of the pecuniary damage sustained by him and the violation found.

146. The total court expense of TRY 2,186.10 including the court fee of TRY 206.10 and the counsel fee of TRY 1,980, which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 18 April 2018 that

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

B. The procedural aspect of the obligation to conduct an effective investigation, which is inherent in the right to life safeguarded by Article 17 of the Constitution, was VIOLATED;

C. A copy of the judgment be SENT to the 5th Chamber of the Diyarbakır Criminal Court of First Instance for a retrial in order to redress the consequences of the violation of the procedural aspect of the right to life;

D. A net amount of TRY 30,000 be PAID to the applicant as non-pecuniary compensation, and other claims for compensation be DISMISSED;

E. The total expense of TRY 2.186.10 including the court fee of TRY 206.10 and the counsel fee of TRY 1,980 be REIMBURSED TO THE APPLICANT;

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; and

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

NAZİKER ONBAŞI AND OTHERS

(Application no. 2014/18224)

9 May 2018

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

THE FACTS

[9-30] The applicants' brother lost his life as a result of *inrush* (sudden eruption of gas and coal) *and methane gas poisoning* that occurred in a mine operated by a hard coal company affiliated to the Turkish Hard Coal Institution (TTK).

The incumbent chief public prosecutor's office launched an investigation into the incident. The applicants filed a criminal complaint against those alleged to be responsible.

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

Thereupon, the chief public prosecutor's office issued a decision of non-prosecution regarding the Chairman and five members of the Executive Board. The objection filed against this decision was dismissed by the competent court.

Having being notified of dismissal decision, the applicants then lodged an individual application with the Court on 30 March 2015.

V. EXAMINATION AND GROUNDS

31. The Constitutional Court, at its session of 9 May 2018, examined the application and decided as follows:

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

32. The applicants alleged that the procedural aspect of the right to life, the rights to a fair trial as well as to an effective remedy had been violated

on the grounds that no permission had been granted for launching an investigation against the Chairman and members of the Executive Board of the TTK despite the expert reports of 30 April and 5 December 2013, which was obtained by the Zonguldak Chief Public Prosecutor's Office and where these persons were clearly found to be at fault; and that their challenge against the decision granting no permission had been rejected without any justification.

33. The applicants also maintained that the suspects in respect of whom the Zonguldak Chief Public Prosecutor's Office issued a decision of non-prosecution had been also responsible for the incident; but no action had been brought against them. They accordingly alleged that there had been violations of the procedural aspect of the right to life, the right to a fair trial and the right to an effective remedy.

34. In its observations, the Ministry made a reference to the various judgments rendered by the Constitutional Court and stated that in the present case, an investigation had been immediately conducted into the incident and the available evidence had been collected; and that despite the allegation that the decision dismissing the challenge to the decision granting no permission for investigation was unreasoned, it may be deemed sufficient for the decisions rendered by the appeal authority to simply make a reference to the challenged decision if the appeal authority was of the same opinion with the deciding body.

35. In their counter-statements against the Ministry's observations, the applicants maintained that the Ministry reached a conclusion that an inadmissibility decision must be rendered in their case by making deficient and erroneous references to the Court's judgments; that although it was deemed sufficient for the appeal authority to simply make a reference to the challenged decision if upholding the original decision, the impugned decision should have been reasoned as the Regional Administrative Court had acted in its capacity as a first instance court.

B. The Court's Assessment

36. 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."

37. Relevant part of Article 5 of the Constitution titled *"Fundamental aims and duties of the State"* reads as follows:

"The fundamental aims and duties of the State are to safeguard … the Republic and democracy, 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."

38. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). It has been considered that the applicants' allegations concern the failure of the relevant authorities to conduct an effective investigation into the death of their next-of-kin. Therefore, these allegations were, as a whole, examined under the State's obligation to conduct an effective investigation inherent in the right to life which is safeguarded by Article 17 of the Constitution.

1. Admissibility

a. As regards the Decision of Non-Prosecution

39. As required by the subsidiary nature of the individual application mechanism, for an individual application to be lodged with the Constitutional Court, the ordinary legal remedies must be primarily exhausted. The applicant is to raise, primarily and in due course of time, his complaints –subject matter of the individual application– before the competent administrative and judicial authorities, to submit the relevant information and evidence to these authorities, as well as to pay due regard to pursue his case and application during this process (see *İsmail Buğra İşlek*, no. 2013/1177, 26 March 2013, § 17).

40. Regard being had to the fact that in cases where a criminal investigation or a set of proceedings involves stages concluded at different

times through decisions of non-prosecution, acquittal, conviction or suspension of pronouncement of the verdict, these stages are concerning the responsibility of different individuals in a given case. Therefore, the investigation processes may need to be considered as a whole (see *Süleyman Deveci*, no. 2013/3017, 16 December 2015, § 69).

41. Article 17 of the Constitution where the right to life is enshrined and Article 5 thereof where the State's fundamental purposes and duties are laid down entail, when taken together, the obligation to conduct an effective investigation capable of ensuring identification, and if necessary, punishment, of those who are responsible for each incident of unnatural death. However, such an investigation must not be limited merely to establishing whether a certain person is responsible for the incident but must be of the scope and nature that would clarify the circumstances of the incident in all aspects. As a matter of fact, the assessment as to the effectiveness of the investigation may be duly made by not being limited to a decision issued in respect of a certain person, but dealing with the investigation process as a whole, in consideration of the particular circumstances of a given case (see *Gülcan Keleş and Others*, no. 2014/797, 22 March 2017, § 30).

42. Regard being had to the present case from this standpoint, it has been observed that although the applicants lodged individual applications due to the decision of non-prosecution issued in respect of certain persons in the course of the investigation conducted by the chief public prosecutor's office into the incident, a bill of indictment was indeed issued in respect of the certain suspects; the proceedings having initiated upon the acceptance of the indictment by the incumbent court are still pending; and therefore, it is still possible -as a result of an inquiry to be made during these proceedings- to identify, and file a criminal case against, those who have responsibility in the incident. Accordingly, it appears that if any responsibility is found also on the part of the persons in respect of whom the decision of non-prosecution was rendered, there is no obstacle to filing a criminal case against them.

43. Therefore, in the present case, it has been concluded that the judicial remedies prescribed in the law were not exhausted before the lodging of this individual application with the Court.

44. For these reasons, this part of the application must be declared inadmissible for *non-exhaustion of available legal remedies* without any further examination as to the other admissibility criteria.

b. As regards the Decision Granting no Permission for Investigation

45. By the very nature of the right to life, an application concerning this right with respect to the person who has lost his life can be filed only by his relatives who have suffered losses due to his death (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, § 41).The applicants are the deceased's siblings. Therefore, there is no deficiency in terms of eligibility for filing a case.

46. The file contains no information or document to the effect that the decision granting no permission for investigation, which was issued by the Ministry of Energy and Natural Resources on 25 February 2014, was served on the applicants. Nor did the Ministry provide any information or document indicating that the decision had been served on them. In this case, it must be acknowledged that the applicants became aware of this decision on 22 October 2014 when they were served with the decision of no further examination, which was issued on 19 September 2014 by the Zonguldak Chief Public Prosecutor's Office. The applicants lodged an individual application within 30 days following 22 October 2014 when they became aware of the decision. In this sense, there is no expiry of time-limit prescribed for lodging an individual application in the present case.

47. Besides, the applicants did not maintain that there was a deliberate breach of the right to life. Nor was there any element which would cause the applicants to get the impression that the death of their next-of-kin had been intentionally caused.

48. As explained below under the heading of the general principles, in every case involving death or injury that has resulted from unintentional acts, it is not necessarily required to conduct an effective criminal proceedings with a view to fulfilling the obligation to set up an effective judicial system. However, in cases where -even if the act is not intentional- the death has resulted from the public authorities' erroneous judgment or fault which is beyond mere negligence -in other words from the public authorities' failure to take necessary and sufficient measures, within the

scope of the powers conferred upon them, so as to eliminate the risks emanating from a dangerous activity despite being aware of the possible outcomes-, an effective criminal investigation would be necessarily carried out.

49. In this sense, another issue to be addressed in terms of the admissibility of the present application is whether the positive obligation to "set up an effective judicial system", which is incumbent on the State under the right to life, necessarily requires conduction of an effective investigation.

50. The obligation to conduct an investigation into the deaths resulting from unintentional acts does not necessarily entail criminal proceedings in every case. In such cases, it may be sufficient to provide civil, administrative and even disciplinary remedies to the victims (see *Serpil Kerimoğlu and Others*, § 59). However, in cases where the death results from unintentional acts but there is an erroneous judgment or fault, which is beyond mere negligence, on the part of the public authorities, in other words they have failed to take necessary and sufficient measures, within the scope of the powers conferred upon them, to eliminate the risks emanating from a dangerous activity despite being aware of the possible outcomes, a criminal investigation is to be conducted against those who have responsibility in the incident -even if those concerned have resorted to other civil remedies.

51. At this point, it should be primarily noted that operating a coal mine is a dangerous activity as involving certain risks to the lives and physical integrity of individuals, notably those of the workers of the mine. Therefore, the State is liable, by virtue of its obligation to protect individuals' lives, to take necessary measures so as to protect lives and physical integrity of individuals as well as to prevent deaths and injuries during the performance of this service.

52. In consideration of the case-file as a whole, it has been observed that the risk of inrush was known at the scene of accident where many people lost their lives due to the similar incidents taking place in previous years; and that according to the expert reports, it was possible to take measures against this existing risk.

53. In the present case which involves a predictable risk which could be eliminated by the taking of certain measures, it has been concluded that it was certainly necessary to conduct an effective criminal investigation, as a requirement of the obligation to set up an effective judicial system.

54. Accordingly, the alleged violation of the procedural aspect of the right to life must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

a. General Principles

55. The procedural aspect of the positive obligations incumbent on the State within the meaning of the right to life requires the authorities to carry out an effective investigation capable of ensuring identification, and if necessary, punishment, of those who are responsible for each incident of unnatural death. 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 those responsible are accountable against the deaths which occur due to their intervention or under their responsibility or due to the actions of other individuals (see *Serpil Kerimoğlu and Others*, § 54).

56. This procedural obligation inherent in the right to life may be fulfilled by conducting criminal, civil or administrative investigations depending on the very nature of each incident. In cases pertaining to incidents of death caused intentionally or due to ill-treatment, the State has an obligation, under Article 17 of the Constitution, to conduct criminal investigations that are capable of ensuring the identification and punishment of those responsible. In such incidents, merely imposing an administrative sanction or awarding compensation as a result of an administrative investigation and action for compensation is not sufficient to eliminate the violation and thus to remove the victim status (see *Serpil Kerimoğlu and Others,* no. 2012/752, 17 September 2013, § 55).

57. A different approach may be adopted in terms of the obligation to conduct an investigation into deaths caused by unintentional acts. In this context, this positive obligation does not necessarily entail criminal

proceedings in all cases where the right to life has not been violated or the physical integrity has not been damaged intentionally. It may be sufficient to provide civil, administrative and even disciplinary remedies to the victims (see *Serpil Kerimoğlu and Others*, § 59).

58. However, in cases where the death has resulted from unintentional acts, if the public authorities have failed to take necessary measures within the powers conferred upon them to eliminate the risks resulting from a dangerous activity despite being aware of its probable outcomes or if they act based on erroneous judgment or fault going beyond mere negligence, a criminal investigation must be initiated against those putting the individuals' lives at risk even if the victims have resorted to other legal remedies (see *Serpil Kerimoğlu and Others*, § 60).

59. On the other hand, the aim of the criminal investigation is to ensure the effective implementation of the statutory provisions protecting the right to life and to hold those responsible accountable. This is not an obligation of result but of appropriate means. In addition, Article 17 of the Constitution does not grant the applicants the right to have third parties prosecuted or sentenced for a criminal offence; nor does it place an obligation on the State to conclude all proceedings by a verdict of conviction (see *Serpil Kerimoğlu and Others*, § 56).

60. In a state governed by rule of law, it may be deemed reasonable to make the launch of a judicial investigation against public officers subjected to the permission of a certain authority as they perform their duties on behalf of the State and they frequently face the risks of being complained and investigated due to certain factors associated with the performance of their public duties (see *Hidayet Enmek and Eyüpsabri Tinaş*, no. 2013/7907, 21 April 2016, § 106).

61. As a matter of fact, it is laid down in Article 129 § 6 of the Constitution that prosecution of public servants and other public officials for alleged offences shall be subject, except in cases prescribed by law, to the permission of the administrative authority designated by law (see *Hidayet Enmek and Eyüpsabri Tinaş*, § 107).

62. As within the framework of the principle of constitutional holism, it is compulsory to implement the constitutional provisions in a collective way

and in the light of the general principles of law, the obligation to conduct an effective investigation, and the provisions whereby the prosecution of public officials shall be subject to permission are to be interpreted in harmony with one another (see *Hidayet Enmek and Eyüpsabri Tinaş*, § 108).

b. Application of Principles to the Present Case

63. In the present case, the applicants' brother M.Y. died as a result of the inrush and coal gas poisoning taking place in a mine operating under the Kozlu Hard Coal Authority, affiliated to the TTK which is a public economic enterprise under the Ministry of Energy and Natural Resources.

64. The procedural aspect of the State's positive obligations under the right to life entails the conduction of an effective investigation which is capable of ensuring clarification of the incident of death in all aspects and identification of those who are responsible.

65. In the present case, an investigation was conducted into the impugned incident by the Zonguldak Chief Public Prosecutor's Office. Within the scope of the investigation, two expert reports were obtained. In these reports, the reasons why the accident took place and those who could be responsible for the accident were addressed. There is certain information that the Chairman and members of the TTK's Executive Board had liability in the incident on the grounds that the work was assigned to a sub-contractor with no expertise or experience in the field, by the institution which itself had the necessary expertise for the work, and that an improper system which made the inspection difficult and increased the risk was operated.

66. Accordingly, the Zonguldak Chief Public Prosecutor's Office sought permission for launching an investigation against those individuals.

67. As a result of the preliminary examination conducted thereafter, it was found appropriate to grant no permission for investigation as there was no direct causal link between the fault attributed to the persons in respect whom the permission was sought and the impugned incident.

68. The Ministry of Energy and Natural Resources accordingly refused to grant permission for an investigation. Therefore, this has led

to the discontinuation of the judicial process conducted in respect of these persons.

69. It is therefore necessary to assess the impacts of the procedure whereby the permission for investigation is sought under Law no. 4483 on the effectiveness of the investigation.

70. This procedure is designed to make a preliminary examination prior to the initiation of a criminal investigation into the offences allegedly committed by public officers in relation to their office and to make a preliminary assessment as to whether there was a ground to necessitate a criminal investigation, with a view to preventing public officers from facing with unnecessary charges due to claims and complaints raised on account of the alleged offences as well as to avoiding any delay in the performance of their public offices. In this sense, the procedure designed to get permission for investigation must not be applied in a way which would, by going beyond the said aim, cause delay in criminal proceedings and hinder an effective investigation or cause the impression that the public officers are exempted from criminal investigation.

71. As regards a dangerous activity, the ability to identify those who should have minimised the possible risks against the lives and physical integrity of individuals and taken necessary measures, as well as the judicial reaction to be taken by the State against the persons in this respect, are of importance also for the prevention of similar incidents.

72. In the present case, the decision granting no permission for investigation is apparently based on the determination as to the "lack of an exact causal link between the fault and the inrush/eruption" which is included in the expert report.

73. In reply to the question put by the Zonguldak Chief Public Prosecutor's Office to determine whether the faults attributed to the relevant Ministries, the TTK's Board members and the other institutions had a direct impact on the inrush/eruption taking place in the present case, it is noted in the expert report that the members of the Executive Board, having undersigned the contract, were found to be at fault; however, there was no exact causal link between this fault and the inrush/eruption. It has

been observed that both the question put by the chief public prosecutor's office and the determination included in the expert report concerned a technical issue as to the existence of a direct causal link between the fault and the accident. Within the meaning of criminal law, it is only for the judicial authorities to ascertain whether there is a causal link between a given action and a consequence.

74. The obligation to conduct an effective investigation, which is incumbent on the State within the scope of the right to life, requires the relevant authorities to conduct a criminal investigation that is capable of ensuring identification and, if necessary, punishment of those who are responsible. In the present case where the public authorities were found to be at fault through the expert reports, it fell foul of the principles of an effective investigation to decide, on the basis of the rules of the relevant administration, whether there was a causal link, within the scope of the criminal law, between the fault determined and the consequence in question and to accordingly order discontinuation of the judicial process.

75. Besides, the examinations and assessments to be made by administrative courts dealing with the challenges against the decisions granting no permission for investigation must be carried out with due diligence in order not to prolong the criminal proceedings and hinder effective conduction of an investigation, or not to give the impression that the public officers are exempted from a criminal investigation.

76. In the present case, the challenge against the procedure whereby the Ministry of Energy and Natural Resources refused to grant permission for investigation was rejected by the Regional Administrative Court *"as the preliminary examination report and the attached documents were not of the nature and capacity to require an investigation"*. It appears that the examination made by the Ankara Regional Administrative Court did not include any assessment as regards the requirement that the procedure whereby permission for investigation is sought must not be operated in a way that would cause delay in criminal proceedings and hinder an effective investigation or give the impression that the public officers are exempted from criminal investigation.

77. Given the scope of the case-file as a whole, it has been observed that although the public officers -in respect of whom permission for investigation had been sought- were found to be at fault, the permission was not granted due to the lack of a causal link between the fault and the accident, which should have been indeed determined through an examination by judicial authorities; and that thereby, the judicial process was discontinued. It has been accordingly concluded that these two facts posed an obstacle to the conduct of an effective investigation into the death of the applicants' next-of-kin.

78. The conclusion that an effective criminal investigation is to be conducted into the incident does not mean that the judicial process to be conducted against those who are responsible necessarily entails filing of a case or conclusion of the proceedings by a certain verdict; but points to the necessity of the effective application of appropriate means which would lead to identification of those who are responsible and ensure their accountability.

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

3. Application of Article 50 of Code no. 6216

80. 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."

81. The applicants requested the Court to find a violation and to award 30,000 Turkish liras ("TRY") to each of them in respect of non-pecuniary damage.

82. In the present case, it has been concluded that the procedural aspect of the right to life was violated.

83. As there is a legal interest in conducting a retrial in order to redress the consequences of the violation of the procedural aspect of the right to life, a copy of the judgment must be sent to the Ankara Regional Administrative Court for a retrial.

84. As sending a copy of the judgment to the relevant court for a retrial offers a sufficient redress for the violation found, the applicants' claims in respect of non-pecuniary compensation must be rejected.

85. The total court expense of TRY 2,186.10 including the court fee of TRY 206.10 and the counsel fee of TRY 1,980, which is calculated over the documents in the case file, must be reimbursed jointly to the applicants.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 9 May 2018 that

A. 1. The application insofar as it concerns the decision of non-prosecution be DECLARED INADMISSIBLE *for non-exhaustion of available legal remedies*;

2. The alleged violation of the procedural aspect of the right to life due to the refusal to grant permission for investigation 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 Ankara Regional Administrative Court (E.2014/331, K.2014/346) for a retrial in order to redress the consequences of the violation of the procedural aspect of the right to life;

D. The applicants' claims for compensation be DISMISSED;

E. The total expense of TRY 2.186.10 including the court fee of TRY 206.10 and the counsel fee of TRY 1,980 be REIMBURSED JOINTLY 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;

G. A copy of the judgment be SENT to the Ministry of Energy and Natural Resources; and

H. 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

M. K.

(Application no. 2015/13077)

12 June 2018

On 12 June 2018, the Second Section of the Constitutional Court found a violation of the right to protect and improve corporeal and spiritual existence safeguarded in Article 17 of the Constitution in the individual application lodged by *M.K.* (no. 2015/13077).

THE FACTS

[8-35] The applicant, who is a transsexual person, requested to amend her sex in the civil register from female to male. After the two-year follow up by the Department of Mental Health and Disorders, it was reported that the applicant experienced a male gender identity and that the sex change was appropriate.

The applicant, relying on this report, brought an action before the civil court seeking authorisation to undergo a gender reassignment surgery. The court dismissed the case on the ground that according to the medical board report, the applicant was not permanently sterilised and therefore the conditions for the sex change were not fulfilled. Upon appeal, the court's decision was upheld. The applicant subsequently lodged an individual application with the Constitutional Court.

In the meantime, upon referral by another civil court, the Constitutional Court annulled the law requiring sterilisation on the basis of which the applicant's request had been dismissed.

The applicant's subsequent application to the civil court was accepted and the sex change was allowed.

V. EXAMINATION AND GROUNDS

36. The Constitutional Court, at its session of 12 June 2018, examined the application and decided as follows:

A. The Applicant's Allegations and the Ministry's Observations

37. The applicant complained that the condition of *being permanently devoid of reproductive capacity*, which is laid down in Article 40 of the Turkish Civil Code no. 4721 and sought for the access to gender reassignment,

forced the transgender persons to undergo sterilisation surgery. She maintained that although such a medical interference could be allowed only with the relevant person's consent, the prescription of this process as a condition for gender reassignment rendered the interference involuntary; and that there were troubles faced during such kinds of medical surgeries due to the absence of a relevant legislation as to the sterilisation process pertaining to transgender persons. She alleged that the courts dismissed the requests for gender reassignment if transgender persons had the reproductive capacity; that the hospitals did not perform the sterilisation surgery without the court's authorisation; and that the action brought by her for authorisation was dismissed only for not fulfilling the condition of sterilisation. She accordingly maintained that the right to protect and improve her corporeal and spiritual existence enshrined in Article 17 of the Constitution had been violated. She also noted that she was in a difficult situation as she could not change her identity card although she was going to marry.

38. The applicant requested the Court to keep her identity confidential in the documents accessible to the public.

39. In its observations, the Ministry stated that as the applicant brought Article 40 of Code no. 4721 before the Court through individual application, her application must be examined from the standpoint of the competence *ratione materiae* in consideration of the requirement that the legislative acts cannot be subject-matter of an individual application. Besides, as the applicant did not file a request for rectification of the judgment, the Ministry also stressed that an examination must be conducted with respect to the requirement of the exhaustion of legal remedies. Lastly, given the possibility that if the applicant filed a request with the local court anew, her request might be accepted in pursuance of the Court's judgment no. E.2017/130 K.2017/165 and dated 29 November 2017, it was also underlined that the question whether the requirement of exhaustion of legal remedies had been satisfied be examined under the particular circumstances of the present case.

40. In her counter-statements against the Ministry's observations, the applicant noted that her individual application was not related

to the provision of law in question, but rather its implementation; and that therefore, her application must be declared admissible in terms of competence *ratione materiae*. She further maintained that the request for rectification of judgment was an optional remedy; and that as the Court's judgment cited in the Ministry's observations was rendered after she had lodged her application, she sustained non-pecuniary damage until that date, and her application must be examined on its merits and a violation must be found. On 8 January 2018, the applicant informed that the 1st Chamber of the Şanlıurfa Civil Court allowed her to undergo a surgery, and she accordingly had a surgery to become *devoid of reproductive capability*; and that on 20 June 2018, she would undergo a gender reassignment surgery.

B. The Court's Assessment

41. Article 17 §§ 1 and 2 of the Constitution, titled *"Personal inviolability, corporeal and spiritual existence of the individual"*, which would be relied on it the assessment of the applicant's allegation, reads as follows:

> *"Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence.*
>
> *The corporeal integrity of the individual shall not be violated except under medical necessity and in cases prescribed by law and shall not be subjected to scientific or medical experiments without his/her consent."*

42. All legal interests involved 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 life within the framework of Article 8 of the Convention. In addition, a special protection is afforded to the right to physical and mental integrity by virtue of Article 17 § 2 of the Constitution whereby it is provided for

that the corporeal integrity of the individual shall not be violated except under medical necessity and in cases prescribed by law and shall not be subjected to scientific or medical experiments without his consent (see *Halime Sare Aysal* [Plenary], no. 2013/1789, 11 November 2015, § 47).

43. The notion of private life also encompasses the physical and spiritual self-determination, and the right in question protects individuals against the attacks of both the public authorities and private persons towards physical and spiritual integrity (see *Halime Sare Aysal*, § 48).

1. Admissibility

44. The applicant lodged an individual application upon the rejection of her request for gender reassignment and stated that she could not change her sex as the acceptance of such requests were conditioned upon *being deprived of reproductive capacity* under Article 40 of Code no. 4721, which was in breach of the right to protect and improve her corporeal and spiritual existence. In other words, the applicant did not request the annulment of the said provision of law by abstractly referring to its alleged unconstitutionality, but to the contrary filed an individual application, maintaining that the said provision gave rise to the violation of her fundamental right. Therefore, her complaint was found to fall within the competence of the Constitutional Court.

45. On the other hand, as regards the judgments rectification of which may be requested, it is for the applicants to assess whether this remedy is effective. If an applicant, as in the present case, does not consider effective the remedy of rectification of judgment, he may file an individual application within the prescribed period following the upholding decision issued at the end of the appeal process. Besides, even if the given applicant finds the opportunity to raise her complaint anew before the inferior courts due to the developments after lodging an individual application, the Court does not take these facts into consideration in its assessment as to the requirement of the exhaustion of legal remedies. In this sense, it must be accepted that the applicant exhausted the available legal remedies.

46. However, the legal facts occurring upon the lodging of individual application are of importance in making an assessment to determine

whether the applicant still has victim status. In assessing the issue of victim status, the Court must consider whether the issues complained of by the applicant still exist and whether the probable effects of the impugned violation have been remedied (see *Arman Mazman*, no. 2013/1752, 26 June 2014, § 41).

47. In the present case, on 20 March 2014, the applicant applied to the relevant court with a request for gender reassignment for the first time, and her request was dismissed on 20 June 2014. Upon the finalisation of the decision, she filed an individual application. The applicant once again applied to the 1st Chamber of the Şanlıurfa Civil Court on 12 December 2016 and sought authorisation for gender reassignment. In the meantime, on 29 November 2017, the Court found unconstitutional and accordingly annulled the requirement of *being deprived of reproductive capacity*, which was sought for gender re-assignment in Article 40 § 1 of Code no. 4721, the legal basis of the dismissal of the applicant's first case before the inferior court. Upon this annulment, the applicant's request was accepted, and she was granted authorisation. This decision became final on 7 February 2018.

48. Accordingly, it has been observed that the applicant undergone a gender re-assignment surgery within about 4 years, which undoubtedly has had direct effects on the applicant's private life. Besides, the acceptance of the applicant's second request by the court is irrespective of the alleged violation of the applicant's fundamental rights and freedoms due to the first dismissal decision. Therefore, it has been concluded that the applicant continued to have victim status (see *Y.Y. v. Turkey*, §§ 53 and 54).

49. The application was declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

a. Existence of an Interference

50. The applicant complained of the dismissal of her request for undergoing a gender re-assignment surgery by the inferior courts for not *being deprived of reproductive capacity*. In this regard, it has been considered that as the applicant was forced to undergo a *sterilisation* surgery, which

required her to waive the capacity to reproduce, during the gender re-assignment process started by her, the impugned first instance decision constituted an interference with her corporeal integrity. This dismissal decision constituted an interference also with gender identity and right to personal development.

b. Whether the Interference Constituted a Violation

51. 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."

52. The above-mentioned interference would constitute a violation of Article 17 of the Constitution unless it satisfies the requirements laid down in Article 13 of the Constitution. Therefore, it must be examined whether the interference in the present case was prescribed by law, pursued a legitimate aim, and was in compliance with the requirements of the democratic order of the society and the principle of proportionality, which are prescribed in Article 13 of the Constitution and applicable to the present case.

i. Lawfulness

53. In dismissing the applicant's request for undergoing a gender re-assignment surgery, the inferior court relied on Article 40 of Code no. 4721. Her case was dismissed as the applicant did not satisfy the requirement of being permanently devoid of reproductive capacity as stated in the said provision. In this sense, it has been observed that the impugned interference had a legal basis.

ii. Legitimate Aim

54. It appears that considering the irreversible nature of, and risks entailed by, gender re-assignment surgeries, the law-maker makes the

gender re-assignment process subject to certain rules and to review so as to prevent such surgeries from becoming an ordinary process by allowing them to be performed without any authorisation, to maintain public order as well as to ensure courts not to serve merely as an approving authority in the process of making a sex change in the civil register. In this sense, the law-maker has introduced the condition, for undergoing a gender re-assignment surgery, to obtain authorisation from the incumbent court in Article 40 § 1 of Code no. 40. It has been observed that the law-maker has also prescribed the requirement of being permanently devoid of reproductive capacity, along with the conditions laid down in the same paragraph, so as to obtain such an authorisation (see the Court's judgment no. E.2017/130, K.2017/165, 29 November 2017, § 20).

55. The said statutory arrangement pursues the aims not only of maintaining public order, but also of public health given the irreversible nature of, and risks posed to health by, gender re-assignment surgery. It has been accordingly concluded that the impugned interference and the statutory arrangement forming a basis for it pursued a legitimate aim within the meaning of Article 17 of the Constitution and Article 8 of the Convention.

iii. Compliance with the Requirements of the Democratic Order of the Society and Proportionality

(1) General Principles

56. An interference having a legal basis and pursuing a legitimate aim will not constitute a violation only when it complies with the requirements laid down in Article 13 of the Constitution, i.e. being necessary in a democratic society, not infringing the very essence of the right and being proportionate.

57. 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).

58. 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).

59. Such margin of appreciation has an extent specific to each case. The extent is reduced or expanded depending on the 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).

60. In cases where paramount rights or legal interests concerning the existence or identity of an individual are at stake, the margin of appreciation is narrower, and there must exist particularly serious reasons to justify such interferences (see *Serap Tortuk*, § 51).

(2) Application of Principles to the Present Case

61. The action brought by the applicant for being allowed to undergo a gender re-assignment surgery was dismissed for her not being *deprived of reproductive capacity.* The application concerns the applicant's freedom to assign her gender identity within the scope of the right to self-determination and personal autonomy.

62. In the Turkish legal system, the process of *gender re-assignment* consists of two stages. At the first stage, the given person needs to obtain

authorisation from the incumbent court for gender re-assignment, and at the second stage, upon the gender re-assignment surgery performed in line with the court's authorisation, sex marker in the civil register documents is changed, and thereby this change is legally recognised. In Article 40 § 1 of Code no. 4721, the conditions sought for allowing a gender re-assignment by courts are laid down. Accordingly, in order for the court to grant authorisation for gender re-assignment, the person wishing to undergo a gender re-assignment surgery must personally apply to the court, be over 18 years old, not be married, be a transsexual person, undergo such process as required for her mental health, as well as must be permanently devoid of reproductive capacity. It is also required that the last three conditions must be certified by a medical board report to be issued by a training and research hospital.

63. Transsexual persons experience a gender identity that is inconsistent with their assigned sex. They may be either innately deprived of, or have, reproductive capacity. Transsexual persons who are innately deprived of this capacity or who subsequently lose it permanently may undergo gender re-assignment surgery by obtaining authorisation to that end from the incumbent court if the other conditions specified in Article 40 § 1 of the Law are also satisfied. On the other hand, the transsexual persons having reproductive capacity may be allowed by the court to undergo gender reassignment surgery if they are permanently deprived of reproductive capacity, along with the fulfilment of other conditions, which requires them to be subjected to a medical intervention (see the Court's judgment no. E.2017/130, K.2017/165, 29 November 2017, §§ 22 and 23).

64. In this case, the condition of being deprived of reproductive capacity, in other words, the condition of infertility, is set as a condition for undergoing the gender re-assignment surgery to change sex. Those who are innately fertile may voluntarily waive this capacity by undergoing a sterilisation process. Sterilisation surgeries, a medical intervention carried out so as to remove a man's or woman's ability to make a baby (reproductive capacity), may be performed only with the consent of the given adult. The applicant asserted that as the sterilisation process was made specific to the sex of either female or male, the transsexual persons are unable to undergo this process due to the legal gap in this sense.

However, the applicant's complaint is mainly related not to her inability to undergo sterilisation surgery, but rather to the violation of her right to respect for corporeal existence for having had to undergo such a medical intervention. Therefore, the question whether these processes were accessible for transsexual persons was not dealt with in this individual application examination of which was confined to the statutory provision whereby transsexual persons are to undergo a medical intervention prior to the gender re-assignment process, as well as to the necessity of such process.

65. The interference caused, by the court decision and the statutory provision forming a basis for this decision, in order to achieve the above-cited legitimate aims could be considered necessary in a democratic society only if it has met a pressing social need. In this regard, the necessity of the impugned interference must be substantiated with relevant and sufficient reasons.

66. In the present case, the applicant has psychologically experienced since her puberty ages as male and undergone hormone therapy to that end. The applicant behaving as a male in her social circle is called also with a male name. The applicant, who was about to marry, could not change her identity card for failing to obtain the necessary authorisation for the gender re-assignment surgery. It is also established by the medical report issued by a board of experts that despite of having female genital organs, the applicant has indeed experienced the male gender identity; that and she is a transsexual person. It has been accordingly concluded that she should change her assigned gender identity to male. Therefore, it has been observed that the applicant felt herself to belong to the opposite sex and led her life in this way for years; and that she was determined on this matter. Therefore, it could not be established how the statutory arrangement -intended for the protection of health given the irrevocable nature of, and the risks involved in, gender re-assignment surgeries- as well as of the impugned practice are of importance for those who are determined to change their sex.

67. On the other hand, it is also stressed in the medical report that following the gender re-assignment surgery, the applicant would be

deprived of the reproductive capacity of both sexes. Nevertheless, the authorisation sought by the applicant for undergoing a gender re-assignment surgery was not granted by the incumbent court for still having reproductive capacity.

68. It is undoubted that once a transsexual person having reproductive capacity undergoes a gender re-assignment surgery in accordance with applicable medical methods, he/she will become permanently deprived of reproductive capacity as a natural consequence of this surgery (see the Court's judgment no. E.2017/130, K.2017/165, 29 November 2017, § 24).

69. The condition of *being permanently deprived of reproductive capacity*, which is laid down in Article 40 § 1 of Code no. 4721, apparently forces transsexual persons to undergo a medical intervention prior to the gender re-assignment surgery. Although it was undoubted that transsexual persons with reproductive capacity would become permanently deprived of this capacity following gender re-assignment surgery, it was indicated neither in the inferior courts' reasoning nor in the statutory provision on which these courts relied why such a medical intervention -whereby these persons would waive their reproductive capacity before undergoing a gender re-assignment surgery- was necessary.

70. On 29 October 2017, a date following the applicant's individual application, the Court found the phrase *"being permanently deprived of reproductive capacity"* in Article 40 § 1 of Code no. 4721 in breach of Articles 13, 17 and 20 of the Constitution and therefore annulled it for imposing a disproportionate restriction on the grounds that it constituted an interference to which the person concerned should not have been subjected physically and mentally, and that no reasonable balance could be struck between this restriction imposed on the corporeal and spiritual existence as well as private life of the relevant person and the aim sought to be pursued. It has been accordingly concluded that the interference with the applicant's right to protect her corporeal and spiritual existence could not be considered *necessary* in a democratic society.

71. For these reasons, the Court found a violation of the right to protect and improve the corporeal and spiritual existence safeguarded by Article 17 of the Constitution.

3. Application of Article 50 of Code no. 6216

72. Article 50 §§ 1 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."*

73. The applicant requested a retrial and claimed 10,000 Turkish liras ("TRY") for the non-pecuniary damage suffered by her.

74. It has been concluded that the applicant's right to protect and improve her corporeal and spiritual existence was violated.

75. The fresh proceedings instituted as regard the applicant's complaint in the light of the developments taking place subsequent to her individual application were concluded in her favour. Therefore, there is no legal interest in conducting a retrial so as to eliminate the consequences of the violation.

76. Regard being had to the fresh court decision issued in respect of the applicant, which was contrary to the court decision she complained of, after she had lodged an individual application, it has been concluded that merely the finding of a violation of the relevant fundamental rights and freedoms would constitute a sufficient redress. Therefore, the applicant's claim for non-pecuniary compensation was dismissed.

77. The total court expense of TRY 2,206.90 including the court fee of TRY 226.90 and the counsel fee of TRY 1,980, which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 12 June 2018 that

A. The applicant's request for keeping her identity confidential in the documents accessible to the public be ACCEPTED given the distress experienced by her as a transsexual;

B. 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 be VIOLATED;

D. The applicant's claim for non-pecuniary compensation be DISMISSED;

E. The total expense of TRY 2.206.90 including the court fee of TRY 226.90 and the counsel fee of TRY 1,980 be REIMBURSED to the applicant;

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;

G. A copy of the judgment be SENT to the 3rd Chamber of the Şanlıurfa Civil Court (file no. E.2014/264, K.2014/484); and

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

EBRU BİLGİN

(Application no. 2014/7998)

19 July 2018

On 19 July 2018, the Plenary of the Constitutional Court found a 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 *Ebru Bilgin* (no. 2014/7998).

THE FACTS

[9-67] The applicant holding office as a veterinarian in a public institution was given a written warning, by the institution director, to pay due diligence for maintaining peace within the institution. At a subsequent date, she was subject to disciplinary sanction, namely reprimand, for acting in breach of the principle of team-work, breaking peace and order at the institution and failing to behave respectfully toward her superiors. The action for annulment brought by the applicant against the disciplinary sanction was dismissed by the administrative court.

After the completion of the procedures for changing her place of duty, she was then assigned to serve at different units within the same institution. The applicant, who was asked to present her defence submissions for being absent from work on account of her treatment, submitted her prescription to the administration. However, it was not found sufficient by the administration, and the institution director imposed disciplinary sanctions on her.

Upon the letter sent by the institution director to the relevant Ministry for assignment of the applicant in other units of the Ministry, she was accordingly appointed to the Provincial Directorate under the Governor's Office. The action brought for annulment of this decision was dismissed by the administrative court. She appealed against the administrative court's decision; however, her appeal was also dismissed by the Regional Administrative Court.

In the meantime, she submitted petitions to the Institution Directorate, the Prime Ministry Communication Centre (BIMER) as well as to the Ministry and maintained that she had been forced to work under

inappropriate conditions, insulted and exposed to psychological harassment by the institution director.

The report issued by the Governor's Office upon the applicant's request for an investigation against the institution director indicated that she was subjected to psychological harassment, and accordingly the Governor's Office granted permission for initiating an investigation against the director.

The incumbent chief public prosecutor's office issued an indictment against the director and accused him of misconduct and threatening. However, he was acquitted by the relevant criminal court. The applicant's action for damage was dismissed by the inferior court. Besides, her appeal against the dismissal decision was also rejected by the incumbent court.

V. EXAMINATION AND GROUNDS

68. The Constitutional Court, at its session of 19 July 2018, examined the application and decided as follows:

A. The Applicant's Allegations

69. The applicant maintained that:

i. In 2012, she was unjustly displaced, as a compulsory appointment, from the institution where she had been appointed in 2007;

ii. During the period she was working, she was ostracised, defamed and threatened by her workmates, notably the director of the institution. The units she was working were changed, and inquiries were conducted into her medical information;

iii. She was tried to be intimidated through disciplinary penalties and warnings imposed arbitrarily;

iv. She was made subjected to systematic and continuous psychological harassment, and therefore, her health deteriorated;

v. The relevant administration failed to take necessary measures so as to prevent such acts, actions and omissions infringed her corporeal and spiritual integrity. Those responsible went unpunished.

vi. Although the damage caused by a public officer on account of his negligence or fault in the exercise of public service should have been compensated for as constituting neglect of duty, the non-pecuniary damage she had suffered was not remedied;

vii. Despite the administrative decisions proving that she had been subjected to psychological harassment and her applications with the relevant judicial authorities, she was not provided with an effective redress and means of protection. She accordingly alleged that the right to protect and improve her corporeal and spiritual existence as well as the right to work had been violated. She requested the Court to find a violation of the said rights as well as to award her compensation.

B. The Court's Assessment

70. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see Tahir Canan, no. 2012/969, 18 September 2013, § 16). It has been considered that as the applicant's complaints involve allegations as to her physical and mental integrity and fall under the scope of psychological harassment, they must be examined under Article 17 of the Constitution, given the previous judgments rendered by the Court (see *Hüdayi Ercoşkun*, no. 2013/6235, 10 March 2016, §§ 59 and 60; *Sümeyye Örnek*, no. 2014/11091, 7 June 2017, § 16; and *Mehmet Bayrakcı*, no. 2014/8715, 5 April 2018, § 50).

71. Article 17 §§ 1 and 3 of the Constitution, titled *"Personal inviolability, corporeal and spiritual existence of the individual"*, which forms the legal basis for the Court's examination, 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."

72. Article 40 § 3 of the Constitution, titled *"Protection of fundamental rights and freedoms"*, reads as follows:

"Damages incurred to any person through unlawful acts by public officials shall be compensated for by the State as per the law. The state reserves the right of recourse to the official responsible."

73. Article 125 § 7 of the Constitution, titled *"Judicial review"*, reads as follows:

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

74. Article 129 § 5 of the Constitution, titled *"Duties and responsibilities, and guarantees in disciplinary proceedings"*, reads as follows:

"Compensation suits concerning damages arising from faults committed by public servants and other public officials in the exercise of their duties shall be filed only against the administration in accordance with the procedure and conditions prescribed by law, as long as the compensation is subrogated against them."

75. In this context, it is specified in Article 17 § 1 of the Constitution that everyone has the right to protect and improve his/ her corporeal and spiritual existence. This right corresponds to the right to physical and moral integrity safeguarded within the scope of the right to respect for private life under Article 8 of the Convention (see *Sevim Akat Eşki*, no. 2013/2187, 19 December 2013, § 30).

76. The previous judgments of the Court set the principles as to the fundamental rights protected by Article 17 §§ 1 and 3 of the Constitution, as to the fact that an impugned act may fall into the scope of Article 17 § 3 of Constitution only when it has attained a minimum level of severity, and as to the circumstances needed to be taken into consideration in determining this level (see *Şehnaz Ayhan,* no. 2013/6229, 15 April 2014, §§ 21-26; *Işıl Yaykır*, no. 2013/2284, 15 April 2014, §§ 31-36; *Emel Leloğlu*, no. 2013/3512, 17 July 2014, §§ 26-31; *Hüdayi Ercoşkun*, §§ 84-88; and *Hacer Kahraman*, no. 2013/7935, 20 April 2016, §§ 51-56). In the light of the above-mentioned findings, it has been considered that given the way and method in which the treatments, forming the subject matter of the present case, had been inflicted on the applicant as well as their physical and mental effects, the application did not attain the minimum level of

severity required to fall into the scope of Article 17 § 3 of the Constitution. Therefore, the applicant's complaints were examined under Article 17 § 1 of the Constitution.

1. Admissibility

77. In its previous judgments, the Court notes that the civil remedy for compensation is an accessible and effective remedy offering a reasonable chance of redress for the similar kinds of alleged violations like in the present application (see *Işıl Yaykır*, § 44; *Asılı Kırmızı Demirseren*, no. 2013/5680, 15 April 2014, § 41; *Gülşin Oral*, no. 2013/6129, 16 September 2015, § 47; and *Sümeyye Örnek*, § 26). In the present case, it has been observed that the applicant brought an action for compensation which was unsuccessful; and that thereupon, she lodged an individual application. The Court accordingly concluded that despite the pending criminal proceedings, the available legal remedies had been exhausted.

78. The alleged violation of the applicant's right to protect and improve her corporeal and spiritual existence must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

Mr. Serdar ÖZGÜLDÜR did not agree with this conclusion.

2. Merits

a. General Principles

79. In its previous judgments, the Court has provided explanatory assessments and set general principles as to the scope of the negative and positive obligations incumbent on the State, within the meaning of the protection of corporeal and spiritual existence of the individuals who are working, under Article 17 as well as Articles 5, 12, 49 and 56 of the Constitution, as to the commitments of the States parties to international conventions, notably the Revised European Social Charter and those signed within the framework of the International Labour Organisation (ILO), and as to the arrangements put into practice in this regard (see *Mehmet Bayrakcı*, §§ 61-88).

80. In these assessments, the Court has stressed that on condition of considering every present case on the basis of its particular circumstances, there must be certain elements to acknowledge that the acts, actions or omissions allegedly sustained by individuals at their workplaces have attained the level of psychological harassment. In this sense, according to the publications and reports issued by the ILO and the Ministry of Labour and Social Security, any given treatment may be qualified as psychological harassment in cases where:

i. As regards the workplace, such treatments are inflicted by the directors and/or other employees at the workplace, or such treatments are tolerated;

ii. These treatments are inflicted repetitively on a continuous basis, involve arbitrariness, are systematic and deliberate, and intended for intimidation and ostracism;

iii. These treatments cause damage, or involve a serious risk, to the victim's personality, professional life or health (see *Mehmet Bayrakcı*, § 69).

81. The gravity of the consequences resulting from such kind of treatments may vary by several factors such as the victim's position, duration and frequency of the impugned treatments, the person(s) inflicting such treatments, as well as the victim's sex, age and health status (see *Aynur Özdemir and Others*, no. 2013/2453, 24 March 2016, § 79; *Hacer Kahraman*, § 69; and *Mehmet Bayrakcı*, § 70).

82. In this regard, the positive obligations incumbent on the State, within the meaning of Article 17 § 1 of the Constitution, as regards the acts, actions or omissions posing a threat to the individuals' spiritual integrity and qualified as psychological harassment by attaining an unbearable level of severity and gravity for their lives are mainly as follows:

i. To take measures so as to prevent any behaviours and conducts, in the form of psychological harassment, towards employees;

ii. To establish supervision mechanisms to effectively deal with the complaints;

iii. To ensure the elimination of difficulties before the employees who must be granted privileges and the provision of facilitative opportunities for them;

iv. To ensure establishment of legal framework that would enable the redress of pecuniary and non-pecuniary damages sustained by those who are subjected to deterrent and deliberate conducts and to ensure the punishment of those responsible within the legal framework if these conducts constitute an offence;

v. Ensuring that in actions brought for compensation for the damages incurred, the victims be afforded effective procedural safeguards whereby they could defend their rights under fair conditions, and that the decisions rendered by the courts, in pursuit of the safeguards inherent in fundamental rights, at the end of the proceedings have relevant and sufficient grounds (see *Mehmet Bayrakcı*, § 71).

83. Lastly, as frequently emphasised in its previous judgment, the Court is of the opinion that it is primarily for the inferior courts to resolve the issues with respect to the interpretation of the legislation. In ascertaining whether any given acts, actions and omissions allegedly performed in a systematic and deliberate manner would be qualified as psychological harassment, the inferior courts that have direct access to the parties and evidence are undoubtedly in a better position than the Constitutional Court to assess the particular circumstances of a given case. Therefore, the Court's role is confined to determining whether the relevant rules have been interpreted in accordance with the Constitution (see *Aynur Özdemir and Others*, § 81; *Hacer Kahraman*, § 70; and *Mehmet Bayrakcı*, § 72).

b. Application of Principles to the Present Case

84. The applicant maintained that the director of the relevant institution had performed unlawful disciplinary actions against her; that her defence submissions had been frequently taken; that the units where she had been working had been changed; that she had been threatened and defamed; that her medical information had been inquired; that she had been ostracised and she had been displaced to another workplace as a compulsory appointment; and that she had been subjected to psychological

harassment. She also indicated that her physical and mental health had been adversely affected due to the acts by the director of the institution intimidating her as well as the administration's failure to take necessary measures.

85. The impugned treatments inflicted on the applicant at her workplace and affecting her physical and mental integrity must be examined under the State's positive obligations in line with the above-mentioned principles.

86. In the present case, it has been observed that the report of 9 April 2012, which was issued by the relevant Governor's Office as a result of the preliminary inquiry conducted in respect of Y.K., director of the institution, in consideration of the applicant's complaints, as well as the decision granting permission for investigation against Y.K., which was issued on 12 April 2012 by the Governor's Office, include findings in support of her complaints. It is further indicated in the decision that the applicant's units were changed many times; that the director of the institution was in search of her faults; that no oral communication was held with her, and all issues were notified to her in written; that in every case, a disciplinary investigation was instituted against her, and she was frequently asked to submit her defence submissions; and that in cases where her defence submissions were found inadequate, she should have been given a penalty; however, she was once again asked to defend herself. It is further noted that the medical reports where the applicant was diagnosed with complex anxiety and depressive disorder were submitted to the institution in the meanwhile; that the applicant was faced with unfavourable situations such as taking a sick leave, and that several administrative investigations were conducted on account thereof within the institution. In the reasoning part of the decision, it is clearly expressed that the applicant was subjected to psychological harassment by Y.K., director of the institution. Therefore, a criminal case was filed against Y.K. by the Erzurum Chief Public Prosecutor's Office for misconduct in office and threatening.

87. Besides, at the end of the administrative investigation initiated upon the request of the director of the institution, the applicant whose continued performance at the same workplace had been found inconvenient was

appointed to another institution operating under the Governor's Office on 2 October 2012. In the action brought for annulment of this appointment, the incumbent administrative court did not find the change of the applicant's place of work justified in legal terms but dismissed the action as it was not appropriate for the applicant and the director to work at the same institution. The action for compensation brought by the applicant was also dismissed as a permission for investigation against Y.K. had been granted by the administration and therefore, there was no fault attributable to the administration to the extent that would undermine the applicant's honour and dignity.

88. It is undoubted that in assessing whether the acts, actions and omissions to which the applicant was subjected attained an unbearable level of severity and gravity in respect of their effects on her life, the process must be taken into consideration as a whole.

89. In cases where, as in the present case, the place of work or description of task of an employee is changed by the authorised persons or administrative boards and where a sanction is to be imposed, it is usual to institute administrative investigations. The administrative acts performed to that end are also in pursuance of the aim of public interest. However, in performing such kinds of administrative acts, the principle of impartiality must be observed, and any arbitrary conduct must be avoided. In cases to the contrary, the authorities or persons liable to review the lawfulness of the acts performed by the authorised persons or administrative boards are expected to take measures with a view to removing any possible unfavourable situation having occurred or likely to occur.

90. In the present case, it has been observed that the acts of frequently initiating investigations against the applicant, warning her in written on a continuous basis, taking her defence submissions frequently, and questioning the accuracy of the medical documents submitted by her although her health problems were known involve arbitrariness. As also found established by the administration, it has been concluded that the impugned acts and actions attaining the threshold to gain continuity and apparently performed for the purpose of intimidation in professional terms attained an unbearable level of severity and gravity for the effects on the applicant's life.

91. The public authorities should not confine themselves to establishing the situations that amount to psychological harassment, but also take the effective measures so as to prevent the occurrence of such behaviours or to redress them. For instance, in the present case, to make proper changes in the applicant's working conditions by considering the relevant public standards and not ignoring her request or to impose certain additional administrative sanctions on the public official complained of may be qualified as effective measures. Although an administrative investigation was conducted in line with the applicant's complaints raised notably in 2010-2012 and subsequently a criminal case was filed against the public official allegedly subjecting the applicant to psychological harassment, the administration failed to show due diligence to take measures to prevent the repetition of such conducts. As a matter of fact, it appears that upon the request by the director of the institution, the applicant was subjected to a compulsory appointment.

92. On the other hand, it is set forth in the domestic law that in case of any damage sustained by individuals on account of the faults committed by public officials in exercising their powers, an action for compensation may be brought against the relevant administration which may subsequently subrogate the claim against the officials concerned. In the present case, it is clear that there is a neglect of duty attributable to the administration due to its failure to take effective measures on time despite the finding that the impugned acts and actions attained an unbearable level of severity and gravity for the applicant's life; and that the damage sustained by the applicant must be redressed. However, in the decision dismissing the action for compensation, no fault was attributed to the administration, and it was noted that the applicant was entitled to bring an action for compensation, before the courts of ordinary jurisdiction, against the director of the institution.

93. It was also indicated therein that a criminal case was brought against the person allegedly committing psychological harassment, and he was tried. Although filing a criminal case is an important element for ensuring deterrence, it is not, in the present case, *per se* sufficient for the redress of the applicant's pecuniary and non-pecuniary damages. Actions for compensation cover a group of unlawful acts and actions wider than

that of the criminal acts considered to constitute an offence in criminal law and offer more prospect of redress to the victims within the scope of criminal liability. Given the fact that in the domestic legal system, the opportunity to submit a personal claim through the criminal proceedings has been removed and that the main aim of the liability to compensate is to offer redress for the damage suffered, it appears that in the present case, the action for compensation is undoubtedly the remedy that would offer redress within the context of the right to protect and improve the corporeal and spiritual existence. Upon resorting to effective judicial remedies, it is then expected that the pecuniary and non-pecuniary damages sustained by the applicant being subjected to psychological harassment be redressed in proportion to the fault attributed to the administration. In this sense, it has been concluded that in the present case, the dismissal decision issued by the incumbent administrative court at the end of the action for compensation brought by the applicant did not contain relevant and sufficient reasons to secure the safeguards inherent in the right to protect and improve the corporeal and spiritual existence and to offer redress for the damages sustained by the applicant.

94. Consequently, the Court has concluded that the positive obligations incumbent on the public authorities pursuant to the right to protect and improve the corporeal and spiritual existence were not fulfilled on the grounds that these authorities failed to take effective measures to prevent the occurrence of the impugned conducts, which amount to psychological harassment, although they attained the unbearable level of severity and gravity in terms of their effects on the applicant's life; that the damages sustained by the applicant were not remedied; and that the conclusions reached by the inferior courts at the end of the proceedings were lacked of relevant and sufficient grounds.

95. For these reasons, the Court has found a violation of the applicant's right to protect and improve her corporeal and spiritual existence safeguarded by Article 17 of the Constitution.

Mr. Serdar ÖZGÜLDÜR did not agree with this conclusion.

Mr. Hicabi DURSUN, Mr. Hasan Tahsin GÖKCAN and Mr. Kadir ÖZKAYA agreed with the conclusion finding a violation but on a different ground.

3. Application of Article 50 of Code no. 6216

96. 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."*

97. In the Court's judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the general principles as to how the consequences of a violation found would be redressed are laid down.

98. In this judgment, it is noted that in order to determine the appropriate way of redress, the reason underlying the violation must be determined. Accordingly, in cases where the violation results from a court decision, the Court holds that a copy of the violation judgment be sent to the relevant inferior court for a retrial with a view to redressing the violation and its consequences, pursuant to Article 50 § 2 of Code no. 6216 and Article 79 § 1 (a) of the Internal Regulations of the Court (see *Mehmet Doğan*, §§ 57 and 58).

99. In *Mehmet Doğan* judgment, the Court has provided explanations on the obligations incumbent on the inferior courts to conduct a retrial and the steps to be taken by them with a view to redressing the consequences of the violation. Accordingly, in cases where the Court orders a retrial in

order to redress the found violation, the inferior court does not have any margin of appreciation in acknowledging the reason requiring a retrial and in annulling its former decision, which is different from the process of reopening of the proceedings set out in the relevant procedural laws. That is because in cases where a violation is found, the discretion to decide whether a retrial is required is accorded not to the inferior courts but to the Constitutional Court finding the violation. At this stage, the inferior court is obliged to take the necessary steps to redress the consequences of the violation, as indicated by the Constitutional Court in its violation judgment (see *Mehmet Doğan*, § 59).

100. In this sense, the step to be primarily taken by the inferior court is to annul its former decision which is found to be in breach of a fundamental right or freedom or to have failed to redress a violation by administrative authorities of a fundamental right or freedom. Upon annulling its decision, the inferior court is to perform all necessary actions with a view to redressing the consequences of the violation found by the Constitutional Court. Within this framework, if a given violation results from a procedural action performed or a procedural omission committed during the proceedings, the said procedural process is to be performed anew in a way that would eliminate the violation (or if not performed yet, it is to be performed for the first time). On the other hand, in cases where the violation is found by the Constitutional Court to have resulted from the administrative act or action, or the outcome of the inferior court's decision (but not from the procedural processes performed or failed to be performed by the inferior court), the inferior court is to redress the consequences of the found violation without performing any procedural action, but directly and, as much as possible, issuing -over the case-file- a decision contrary to its former decision (see *Mehmet Doğan*, § 60).

101. The applicant requested the Court to find a violation and award her compensation.

102. The Court found a violation as the administrative court's decision dismissing the applicant's action for compensation did not contain relevant and sufficient reasons that would secure the safeguards inherent in the right to protect and improve the corporeal and spiritual existence

and that would redress the damages suffered by the applicant. Therefore, it has been observed that the violation found in the present case results from the inferior court's decision.

103. Accordingly, there is a legal interest in conducting a retrial to redress the consequences of the violation of the right to protect and improve the corporeal and spiritual existence. A retrial to be conducted accordingly is for ensuring the redress of the violation and its consequences pursuant to Article 50 § 2 of Code no. 6216. In this sense, the step to be taken by inferior courts is to primarily revoke the initial decision leading to violation and to ultimately issue a fresh decision in line with the Court's violation judgment. Therefore, a copy of the judgment must be sent to the 1st Chamber of the Erzurum Administrative Court for a retrial.

104. On the other hand, the applicant's claim for compensation must be rejected as it has been considered that ordering a retrial would constitute sufficient just satisfaction for the redress of the violation and consequences thereof.

105. The court fee of 412.20 Turkish liras ("TRY"), which is calculated over the document in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

The Constitutional Court UNANIMOUSLY held on 19 July 2018:

A. By MAJORITY and by dissenting opinion of Mr. Serdar ÖZGÜLDÜR, that the alleged violation of the right to protect and improve the corporeal and spiritual existence be DECLARED ADMISSIBLE;

B. By MAJORITY and by dissenting opinion of Mr. Serdar ÖZGÜLDÜR, that the right to protect and improve the corporeal and spiritual existence safeguarded by Article 17 of the Constitution was VIOLATED;

C. That a copy of the judgment be SENT to the 1st Chamber of the Erzurum Administrative Court (E.2012/882, K.2013/1383) for a retrial in order to redress the consequences of the violation of the right to protect and improve the corporeal and spiritual existence;

D. That the applicant's claims for compensation be REJECTED;

E. That the court fee of TRY 412.20 be REIMBURSED TO THE APPLICANT;

F. That 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. That a copy of the judgment be SENT to the Ministry of Justice.

DISSENTING OPINION OF JUSTICE SERDAR ÖZGÜLDÜR

According to the decision issued by the 1st Chamber of the Erzurum Administrative Court, no. E.2012/882, K.2013/1383 and dated 30 December 2013, which is the subject-matter of the present application, the applicant brought an action for compensation for the non-pecuniary damage she had sustained on account of the conducts -such as being subject to mobbing, wearing, intimidation, lack of self-confidence and etc.- allegedly displayed by the director and his staff at the relevant institution towards her. However, it was dismissed by the administrative court for the following reasons:

"…By virtue of the decision of the Governor's Office, a permission for investigation was granted, pursuant to Law no. 4483, for enabling the incumbent prosecutor's office to conduct an investigation into the applicant's allegations that the director of the institution, Y.K., had continuously shouted at, insulted and threatened her; that the director had displayed aggressive behaviours and conducts towards her; that she had been frequently asked to provide her defence submissions and thereby tried to be intimidated; that the complaints she had brought before the Prime Ministry Communication Centre (BIMER) had not been taken into consideration; and that she had been continuously subjected to mobbing by Y.K. at the workplace. It has been observed that a trial was conducted against the director of the institution. In such cases, in order for the court to award compensation for non-pecuniary damage pursuant to the principles of the administrative law, there must be a severe distress or suffering, or a damage to the victim's honour and dignity, or a condition diminishing the victim's ability to maintain her life or to earn, which is caused by an unlawful act or action performed by the administration. In the present case, a permission for investigation was granted, and thus the defendant administration ensured that Y.K., director of the institution, be subjected to a trial. In consideration of these issues, it has been concluded that **there was no situation undermining the plaintiff's honour and dignity, which was caused by any unlawful action of, or any action attributable to, the administration**; and that therefore, the conditions sought, in the administrative law, for the payment of compensation for non-pecuniary damage by the defendant administration were not satisfied. **Besides, it**

is possible to file a case, before a court exercising judicial jurisdiction, by the plaintiff against the director Y.K. for any damage if sustained on account of Y.K.'s personal behaviours, namely the act of mobbing. For these reasons, the administrative court found it appropriate to dismiss this action…"

As is seen, in this decision, it was noted that in case of "any personal fault not related to the profession" committed by the relevant official of the administration, an action for compensation could be filed in the judicial jurisdiction; and that in the present case, there was no liability to compensate incumbent on the defendant administration.

In the same vein, in its decision no. E.2015/448, K.2015/453 and dated 1 June 2015 in a different case, the Civil Chamber of the Court of Jurisdictional Disputes reached the following conclusions on this matter:

"… The case concerns the compensation claim for the pecuniary and non-pecuniary damage sustained by the plaintiffs as A.D., gym teacher in a primary school affiliated to the Ministry of National Education, battered E.A. who had insulted A.D.'s son on 11 January 2013. In principle, an action for compensation for the damage occurring due to the exercise by a public official of his duties and powers may be brought, based on the principle of neglect of duty, merely before an administrative court against the administration, and if the administration is held liable, by the relevant court, to pay compensation, it may subrogate the compensation against the official concerned in accordance with the terms and conditions laid down in the relevant legislation. However, in cases where the impugned acts or actions performed by public officials during the exercise of their duties have caused by their severe personal fault and this fault does not amount to neglect of duty, there would be no causal link between the impugned acts or actions and the act of neglect of duty. Therefore, it would not be possible for the public official to enjoy the above-mentioned constitutional and legal protection, and an action against him due to his personal fault cannot be brought before an administrative court within the framework of Law no. 2577. In the light of this consideration, **it has been concluded that although the criminal acts were performed by the plaintiff during the exercise of his public office, they could not be**

considered as a requisite of public service; that therefore, no causal link was found between the administration's neglect of duty resulting from the plaintiff's severe personal fault and the impugned incident; and that accordingly, the case must be heard by the courts exercising judicial jurisdiction within the scope of the provisions of private law governing the tortious acts. For these reasons, it has been held that the application filed by the 1st Chamber of the Samsun Administrative Court be accepted, and the decision of lack of jurisdiction issued by the Ayancık Criminal Court be annulled. **Conclusion: the competent authority to hear the case is the courts exercising judicial jurisdiction…**"

The reasoning part of the judgment of the General Assembly of Civil Chambers of the Court of Cassation, no. E.2017/4-1433, K.2018/49 and dated 17 January 2018, which was rendered in accordance with the above-mentioned decision of the Court of Jurisdictional Disputes is also explanatory in this respect:

"…The dispute brought before the General Assembly of the Civil Chambers upon reinstating the original decision concerns the questions whether the impugned acts and actions allegedly constituting mobbing resulted from the neglect of duty on the part of the defendant public official or his personal fault, and whether any liability could be attributed to the defendant… As regards the damages resulting from the criminal acts performed deliberately by the civil servant's or public official's own will or in contravention of the explicit provisions laid down in the laws, any objective causal link cannot be said to exist between the impugned act and the exercise of public duty. It is undoubted that such cases do not fall within the legal scope of Article 13 of the Civil Servants Law no. 657. That is because no link between the fault, which is easily separated from, and falls outside the scope of, the profession, and public duty is established, and the personal fault on the part of the relevant public official comes into play. At this point, it is of importance to clearly determine the scope and elements of the personal fault in making a distinction between misconduct in office and personal fault. As known, **misconduct in office is in the form of a personal fault which cannot be separated from the office performed by the public official.** Such personal fault is committed in association with the office and therefore by way of the duties, powers and means accorded

by the administration to its agent. **As regards the personal fault,** the public official's impugned act must involve deeds and faults which may be easily separated from the public office. In other words, **in personal fault**, the unlawful acts and actions performed by a public official acting on behalf of the administration, which cannot be attributed to the administration but rather directly to the official himself and which involve his personal liability, are at stake, and **the public official has committed the impugned act causing damage in performing his public office but merely based on his personal fault.** Both in theory and in judicial decisions, the acts and actions personally performed by the officials are not considered as an administrative act and action, and **it is concluded that the authority to deal with the cases involving personal faults is the courts exercising judicial jurisdiction; and that the adversary party is the official himself…** As a result, pursuant to Article 129 § 5 of the Constitution and Article 13 § 1 of the Civil Servants Law no. 657, the actions for compensation for the damages caused by the faulty acts performed by the civil servants and other public officials in exercising their powers may be brought against the relevant administration under the terms and conditions specified in the law and on condition that these damages be subrogated against the civil servants or public officials concerned. **However, such actions to be brought against the administration are confined to the behaviours and conducts that have resulted from any misconduct in office and are in the form of administrative act and action. Notably in cases of tortious acts, the public official cannot avail himself of this safeguard enshrined in the Constitution and the private laws.** In consideration of all these explanations and the mentioned statutory arrangements, it has been observed that **the plaintiff claimed compensation for non-pecuniary damage sustained by him due to the defendant's acts amounting to intimidation; however, the plaintiff's claim was based not on the rector's act associated with his profession but merely on his personal fault. Therefore, as it has been observed that the defendant's act was not associated with his profession and was based on his personal fault and that there was no act in the form of a misconduct in office, the quashing decision, which indicated that the case must be dealt with by courts exercising judicial jurisdiction and which was also approved by the General Assembly of the Civil Chambers, should have been complied**

with. Therefore, the decision which does not comply with the quashing decision but instead reinstated the original decision is contrary to the procedure and law…"

In the light of the above-mentioned judicial decisions, the applicant's case was examined. It has been accordingly concluded that the acts and behaviours of the applicant's superior Y.K., which were qualified as "mobbing" by the applicant and also found established by the judicial decisions (issued by the criminal court and administrative court) in line with the relevant administrative reports, were not indeed associated with his profession and in the nature of "personal fault", which could be completely separated from his profession; that therefore, the competent authority to deal with these claims were not the administrative courts but the courts exercising judicial jurisdiction as indicated by the 1st Chamber of the Erzurum Administrative Court; that accordingly, the applicant should have brought an action seeking compensation against Y.K. before a court of judicial jurisdiction; and that failing to do so, the applicant then lodged an individual application with the Court, relying on the dismissal decision issued by the administrative court, which lacked jurisdiction to adjudicate the case. I therefore consider that in the present case, the applicant failed to exhaust the available legal remedies.

For these reasons, as I am of the opinion that the present application should have been declared inadmissible for non-exhaustion of available remedies, I do not agree with the conclusion finding a violation of Article 17 § 1 of the Constitution, which was reached by the majority proceeding with the examination on the merits of the case.

CONCURRING OPINION OF JUSTICES HİCABİ DURSUN AND KADİR ÖZKAYA

1. The application concerns the alleged violation of the applicant's right to protect and improve her corporeal and spiritual existence due to the psychological harassment she had been subjected to, following the dismissal of the action for compensation brought by her before the incumbent administrative court, seeking TRY 15,000 for the non-pecuniary damage sustained by her as she had been continuously subjected to intimidation by Y.K., director of the institution she was working, and by his staff, her self-confidence had been impaired, and they had attempted to cause damage to her professional life, which all amounted to psychological harassment.

2. In brief, the applicant maintained that the right to protect and improve her corporeal and spiritual existence as well as the right to work had been violated for not being provided with an effective redress and protection although the administrative decisions found established that she had been subjected to psychological harassment and she had recourse to relevant judicial authorities.

3. In the present case, the Court considered that given the way and method how the impugned treatment had been inflicted and notably their physical and mental effects, these treatments were not such as to reach the minimum threshold of severity required in order to fall within the scope of Article 17 § 3 of the Constitution; and that the application be accordingly examined under Article 17 § 1 thereof. The application involving the alleged violation of the right to protect and improve the corporeal and spiritual existence was declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility. We have also agreed with this conclusion.

4. In its examination on the merits of the case, the Court's majority took account of the process how the impugned incidents took place and considered all the impugned incidents as a whole. At the end of the examination whereby it was assessed whether the acts and actions inflicted on the applicant, in respect of the effects on the applicant's life, had attained an unbearable level of severity and gravity, it was concluded

that these acts and actions were of continuous nature and amounted to intimidation in professional terms; and that they attained an unbearable level of severity and gravity for the applicant with health problems. It was further noted that the public authorities failed to take effective measures so as to prevent the occurrence of the behaviours amounting to psychological harassment; that the damages sustained by the applicant were not remedied; and that the decisions issued by the inferior courts at the end of the proceedings did not contain relevant and sufficient grounds. The Court's majority accordingly concluded that the positive obligations incumbent on the public authorities under the right to protect and improve the corporeal and spiritual existence had not been fulfilled and accordingly found a violation of the said right safeguarded by Article 17 of the Constitution.

5. The subject matter of the applicant's case is the dismissal decision issued by the incumbent administrative court in the action for compensation brought for TRY 15,000 for the non-pecuniary damage sustained by her for being subjected to psychological harassment by the director and staff of the institution on the grounds that for the administrative court to award non-pecuniary compensation, the person concerned must have suffered severe distress and anguish due to an unlawful act or action performed by the administration, her honour and dignity must have been undermined, and events restricting the ability to maintain her life and to earn must have taken place; that however, in the impugned case, a permission for investigation against Y.K., director of the institution, had been granted by the administration, and thereby, the director's personal conducts and behaviours had been subject to trial; that therefore, there was no fault attributable to the administration, which undermined the applicant's honour and dignity; and that an action for compensation might be brought before the relevant court exercising judicial jurisdiction in respect of the damages resulting from Y.K.'s personal behaviours.

6. As is seen, in the present case, the impugned acts, actions and behaviours of Y.K., director of the institution, and the staff, which were qualified as psychological harassment by the applicant and in respect of which she brought an action for compensation, were not considered as an administrative act, conduct and behaviour performed and displayed in

relation with the performance of public service, but rather as a personal act and action. Accordingly, the applicant's request for compensation was dismissed mainly on this ground by the administrative court. In this decision, the administrative court did not elaborate on, and make an assessment as to, the question whether the impugned acts and actions had any effect on the applicant's corporeal and spiritual existence and if any, how and to which extent such effect occurred.

7. Therefore, in the present application, in examining the question whether there was a violation of the right to protect and improve the corporeal and spiritual existence safeguarded by Article 17 of the Constitution, it was sufficient to take into account the conclusion reached by the dismissal decision issued by the administrative court and the grounds relied on therein. Accordingly, any reasoning should have not been provided by the Court's majority by considering and assessing further issues which were not dealt with by the inferior court. In other words, in the present case, in finding a violation of the right to protect and improve the corporeal and spiritual existence safeguarded by Article 17 of the Constitution, the Court should have confined its conclusion to the finding that although the acts and actions inflicted on the applicant were in the nature of administrative acts, behaviours and conducts displayed for the performance of public service, the inferior court reached a conclusion to the contrary. We consider that the Court should have left, to the inferior courts, the assessment as to the extent and the way of the effect caused by the impugned acts and actions on the applicant's corporeal and spiritual existence.

8. Therefore, we agree merely with the finding of a violation, which should have been found on the above-specified ground.

CONCURRING OPINION OF JUSTICE HASAN TAHSİN GÖKCAN WITH RESPECT TO THE RIGHT TO PRIVATE LIFE AND ITS SCOPE

1. In the present case, the Court found a violation of the applicant's right to protect and improve her corporeal and spiritual existence safeguarded by Article 17 § 1 of the Constitution due to her being subjected to psychological harassment. I agree with the finding of a violation; however, I consider that the application should have been examined under the right to respect for private life.

2. I have previously expressed my assessments in this respect in the concurring opinion attached to the judgment in the case no. 2014/13327, which was published in the Official Gazette no. 30376 and dated 20 March 2018. Moreover, another concurring opinion of a similar content, which was formulated in an application examined under the right to honour and dignity (no. 18891), was published in the Official Gazette no. 30445 and dated 8 June 2018. Therefore, as regards the extent and scope of Article 8 of the Convention and Articles 17 and 20 of the Constitution as well as their places within the basic rights system prescribed by the Constitution, I want to make a reference to the above-mentioned opinions. I will provide brief information about the reasons why I have agreed with the Court's majority on a different ground.

3. In the present case, the Court considered that the application indeed fell into the scope of the right to respect for private life, which corresponded to Article 17 § 1 of the Constitution (see §§ 75-76). In cases where the extent of the interference with the applicant is more severe, the examination would be undoubtedly made under Article 17 § 3 of the Constitution, which is a specific norm. However, the approach adopted by the Court's majority that the present application be examined within the scope of Article 17 § 1 not only narrowed the scope of the right to respect for private life enshrined in Article 20 of the Constitution but also restrained the right to protect and develop the existence, a personal right of general and basic nature, which is laid down in Article 17 § 1 of the Constitution to a specific field of private life.

4. The majority has thereby acknowledged that Article 17 §§ 1 and 2 of the Constitution constitutes a part of Article 20 thereof, that is to say, is a

specific aspect -laid down in Article 17- of the right to respect for private life. However, Article 17 also embodies the right to life (paragraphs 1 and 4) and the prohibition of torture and other forms of ill-treatment (paragraph 3). As a matter of fact, Article 17 of the Constitution is formulated so as to correspond to the right to life and the prohibition of torture and ill-treatment, which are respectively laid down in Articles 2 and 3 of the Convention, and accordingly worded as the individuals' corporeal and spiritual existence and integrity so as to establish the link between the said right and prohibition. In this sense, the right to protect and improve the corporeal and spiritual existence and the right to physical integrity undoubtedly have a place in the basic rights system of the Constitution. However, insofar as there are special arrangements as to the private life in the Constitution (Articles 20, 21, 22), to render the first two paragraphs of Article 17 specific to private life does not comply with the systematic interpretation of the Constitution.

5. On the other hand, would not it mean to ignore the relation between the rights concerning the individuals' corporeal and spiritual existence as well as integrity and the other rights to consider that the former rights are related to private life? Is there no relation between the right to protect and improve the corporeal and spiritual existence and the other rights e.g. the freedom of religion and conscience, the right to personal freedom and security, the freedom of expression, the freedom of science and the arts, the right to property and the right to legal remedies? Which fundamental rights and freedoms do not relate to the right to protect and improve the corporeal and spiritual existence? In the individual applications lodged on the basis of special forms of rights -where the subject matter mainly concerns the spiritual existence-, should the examination be made not in terms of the rights laid down in Articles 24-36 of the Constitution, but rather under Article 17 § 1 of the Constitution? In fact, the rationale behind the reasoning of the judgment indicates that the individual applications be mainly examined within the scope of Article 17. Nor is there any reasonable explanation as to why such a distinction is made in terms of the issues related to the right to respect for private life, while there is no distinction in the other rights.

6. As also noted in the other concurring opinions, Article 17 §§ 1 and 2 of the Constitution is a general and ideal norm *vis-à-vis* the fundamental rights that are specifically enshrined. However, even in cases where the subject matter of the given individual application concerns the physical integrity as well as the corporeal and spiritual existence, the issue must be examined under the relevant fundamental right. The first two paragraphs of Article 17 of the Constitution may be regarded as an auxiliary norm in such examination. Any interpretation to the contrary narrows the scope of the fundamental rights specifically enshrined and is also contrary to the constitutional systematics. I therefore consider that the present application should have been examined, and a violation should have been found, under the right to respect for private life enshrined in Article 20 § 1 of the Constitution.

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

PINAR DURKO

(Application no. 2015/16449)

28 June 2018

On 28 June 2018, the First Section of the Constitutional Court found a violation of the prohibition of treatment incompatible with human dignity safeguarded by Article 17 of the Constitution in the individual application lodged by *Pınar Durko* (no. 2015/16449).

THE FACTS

[8-52] A group of university students organised a march in the university campus to protest the attacks carried out by the members of a terrorist organization against the security forces.

Upon a warning by the police officers, the majority of the group dispersed, and a group of students moved towards the faculty where the students with opposing views had previously carried out various activities. In order to prevent a clash between the student groups with opposing views, the police officers asked both groups to disperse.

As the students did not disperse and attacked the police officers by throwing stones, the police officers resorted to the use of force. During their intervention, the police officers also fired painted rubber balls. As a result, four students including the applicant were injured.

The chief public prosecutor's office launched an investigation into the incident and took the statements of the police officers and the injured students.

The applicant stated that while she was walking on the road to her classroom; she saw a crowd approaching the building, and due to the rush around, she stood motionless with her friend. During that time something hit her left eye, her friend cleaned the paint on her face, her eye was swollen and turned red, and she was taken to the hospital.

The report issued by the university hospital stated that the injury on the applicant's left eye could not be treated by a simple medical intervention and that whether the lesion caused a loss of function could be determined after the treatment was completed.

As the others sustained injuries that could be treated by a simple medical intervention and did not file a complaint regarding the incident, the chief public prosecutor's office issued a decision of non-prosecution with respect to the unidentified perpetrators. With respect to the applicant's injury, a permanent search warrant was issued.

The permanent search warrant ordered the search and identification of the perpetrator(s) until its expiry and submission of periodical reports as to the search results. The police reports submitted to the prosecutor's office at certain intervals stated that the perpetrators could not be identified.

Afterwards, the chief public prosecutor's office sent a writ to the security directorate, ordering that the identities and places of duty of the police officers using the guns firing painted rubber balls on the date of incident be reported.

The security directorate reported that approximately a thousand and five hundred police officers intervened in the events, however, the official documents relating to the events were not signed by all of them. The security directorate sent to the chief public prosecutor's office the identities and places of duty of the officers who had signed the document. A decision of non-prosecution was issued in respect of these officers.

Upon applicant's challenge, the incumbent assize court annulled the decision of non-prosecution. The chief public prosecutor's office then initiated a criminal case before the criminal court against some police officers on the ground that they had committed the offence of grievous bodily harm by exceeding the limits of the use of force.

The criminal court acquitted the accused persons as they were not proven guilty. This decision became final as it was not appealed. The criminal court then filed a criminal complaint for the identification of the real perpetrator(s). The chief public prosecutor's office launched a new investigation and issued a search warrant to identify and arrest the perpetrators within the statute of limitation.

V. EXAMINATION AND GROUNDS

53. The Constitutional Court, at its session of 28 June 2018, examined the application and decided as follows:

A. The Applicant's Allegations and the Ministry's Observations

54. The applicant maintained that the right to a fair trial safeguarded by Article 36 of the Constitution had been violated, stating that she still suffered a loss of sight in one of her eyes due to the impugned incident; that during the investigation conducted into the incident, the law-enforcement officer using the gun firing painted rubber ball had not been identified; that the investigation could not be completed within a reasonable time; and that her physical integrity had been infringed and she suffered due to the law enforcement officers' fault amounting to negligence.

55. In its observations as to the admissibility of the application, the Ministry noted that the application must be declared inadmissible as in cases where an infringement of the right to life or the physical integrity was not caused intentionally, the positive obligation to "*set up an effective judicial system*" did not necessarily entail the initiation and conduct of a criminal investigation in every case; that in the present case, there was no information that the applicant had brought an action for compensation before the criminal or administrative courts; and that the available legal remedies should have been exhausted prior to an individual application.

56. In its observations as to the merits of the application, the Ministry, making a reference to the judgments rendered by the European Court of Human Rights ("the ECHR") as well as by the Court and considering the actions taken at the investigation stage in the present case, noted that the reasonable steps had been taken for the clarification of the particular circumstances of the present case and the identification of those who were responsible; and that there was no ground to reach a conclusion that the criminal investigation conducted into the present case had been ineffective.

57. In her counter-statements against the Ministry's observations, the applicant reiterated her allegations stated in the application form and further maintained that she suffered a complete loss of sight in her one eye, which had been also raised before the incumbent administrative court, and that her application was to be examined under the scope of the right to a fair trial.

B. The Court's Assessment

58. 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). It has been considered that the allegations submitted by the applicant in connection with the right to a fair trial fall within the scope of the prohibition of treatment incompatible with human dignity safeguarded by Article 17 § 3 of the Constitution, and these allegations have been examined under the said provision.

59. On the other hand, in the examination of the complaints concerning the prohibition of treatment incompatible with human dignity, the substantive and procedural aspects of the prohibition should be considered separately, taking into account the negative and positive obligations of the State. Therefore, the applicant's complaints have been assessed separately from the standpoint of the substantive and procedural obligations incumbent on the State under Article 17 § 3 of the Constitution.

1. Admissibility

60. In making an assessment as to the admissibility of the application, a separate examination must be conducted from the standpoint of the admissibility criterion of non-exhaustion of available legal remedies.

61. In the case of *Özlem Kır* where a criminal investigation was conducted into the applicant's injury on account of a gas canister fired by the law enforcement officers intervening in a public event (no. 2014/5097, 28 September 2016, §§ 41 and 42), the Court reached the following conclusions with a reference to the cases of *Serpil Kerimoğlu and Others* (no. 2012/752, 17 September 2013, § 55) and *Turan Uytun and Kevzer Uytun* (no. 2013/9461, 15 December 2015, §§ 47 and 48):

> i. In cases pertaining to injuries resulting from a deliberate act 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 who are responsible.
>
> ii. In such incidents, the mere award of compensation as a result of administrative and civil investigations and proceedings is not sufficient

to redress the violation of the given right and to remove the victim status.

iii. It is an indispensable requirement of the obligation of investigation to establish beyond a reasonable doubt the conditions under which an act towards the physical integrity, which is directly related to the use of force by the security forces, as well as any possible criminal liability.

iv. Regardless of the legal remedies to which individuals have resorted on their own initiatives, bringing no criminal charge, or conducting no trial, against the public officials alleged to have caused death of an individual or damage to his physical integrity on account of such kinds of acts may give rise to the breach of Article 17 of the Constitution.

62. Accordingly, the present application cannot be declared inadmissible for non-exhaustion of the available legal remedies that are in the form of an administrative investigation or administrative and judicial action for compensation.

63. However, the investigation conducted by the incumbent chief public prosecutor's office into the impugned incident has been still pending. Therefore, it must be assessed whether the applicant should have awaited the outcome of this investigation before lodging her individual application.

64. The requirement of exhausting legal remedies 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 it primarily falls upon the administrative authorities and inferior courts to remedy 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).

65. In order for an examination as to the effectiveness of an investigation with respect to the right to life, it would be compatible with the subsidiarity nature of the protection mechanism afforded by individual application to await the conclusion of the investigation by the relevant public authorities provided that it does not exceed a reasonable time; however, it is not

absolutely necessary (see *Rahil Dink and Others*, no. 2012/848, 17 July 2014, § 77; and *Hüseyin Caruş*, no. 2013/7812, 6 October 2015, § 46).

66. However, the individual applications lodged as from the date when the applicants become, or are expected to become, aware that no investigation would be initiated; that there has been no progress in the investigation; that no effective investigation has been conducted into the incident; and that there is no real prospect of carrying out such an investigation in future must be declared admissible (see *Rahil Dink and Others*, § 77; and *Hüseyin Caruş*, § 47).

67. In the present case, in order to ascertain whether the available legal remedies have been exhausted, the framework of the State's positive obligation to *conduct an effective investigation* under Article 17 of the Constitution as well as the question whether it was fulfilled in the present case must be determined. Such a determination necessitates an examination on the merits of the present application.

68. The application was accordingly declared admissible for not being manifestly ill-founded and there being no other ground to declare it inadmissible.

2. Merits

a. Alleged Violation of the Substantive Aspect of the Prohibition of Treatment incompatible with Human Dignity

i. General Principles

69. Article 17 § 3 of the Constitution reads as follows:

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

70. The right to protect and develop one's corporeal and spiritual existence is safeguarded under Article 17 of the Constitution. The first paragraph of the same provision intends to protect human dignity. In its third paragraph, it is prescribed that no one shall be subjected to *torture* and *ill-treatment* as well as to penalties or treatment *incompatible with human dignity* (see *Cezmi Demir and Others*, no. 2013/293, 17 July 2014, § 80).

71. The State's obligation to respect for the individuals' right to protect and improve their corporeal and spiritual existence primarily requires the public authorities to refrain from interfering with this right, in other words, from causing individuals physical and mental damage in cases specified in the third paragraph of the said provision. It is the State's negative duty emanating from its obligation to respect for individuals' corporeal and spiritual integrity (see *Cezmi Demir and Others*, § 81).

72. Article 17 § 3 of the Constitution does not contain any limitation and points to the absolute nature of the prohibition of torture, inhuman and degrading treatments or penalties. The absolute nature of the prohibition of ill-treatment does not allow for an exception even in times of war or any other general threat to the nation within the meaning of Article 15 of the Constitution (see *Turan Günana*, no. 2013/3550, 19 November 2014, § 33).

73. Given its effects on individuals, ill-treatment is graded and defined with different terms in the Constitution. Therefore, it appears that the expressions included in Article 17 § 3 of the Constitution involve difference in terms of intensity. In order to ascertain whether a treatment may be qualified as *torture*, it is necessary to consider the distinction between the notions of *mal-treatment* as well as treatment *incompatible with human dignity* and the notion of torture that are specified in the said provision. It appears that such distinction is set by the Constitution with a view to attaching a special stigma to deliberate inhuman treatment causing very serious and cruel suffering and grading such treatments; and that these notions have a broader and different meaning than those of the offences of *torture, ill-treatment* and *insult* which are set out in the Turkish Criminal Code no. 5237 (see *Cezmi Demir and Others*, § 84).

74. Accordingly, pursuant to the given constitutional provision, treatment causing damage, to the highest extent, to an individual's corporeal and spiritual existence may be qualified as *torture* (see *Tahir Canan*, § 22). In addition to the severity of the treatment, there is a purposive element to torture, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which in Article 1 defines torture in terms of the *intentional* infliction of severe pain or suffering with the aim, *inter alia*, of obtaining

information, inflicting punishment or intimidating (see *Cezmi Demir and Others*, § 85).

75. Inhuman treatments which do not attain the level of *torture* but which have been premeditated, inflicted for hours during a long period and have caused physical injury, or moral or physical suffering may be defined as *mal-treatment* (see *Tahir Canan*, § 22). Suffering caused in such cases must go beyond the suffering inevitably inherent in a legitimate treatment or punishment. Unlike torture, mal-treatment does not involve the condition of causing a suffering with a certain motivation (see *Cezmi Demir and Others*, § 88).

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

77. In order to determine under the scope of which notion a treatment falls, each concrete case must be assessed in the light of its own particular circumstances. If a treatment is applied publicly or the public is informed of such treatment, it would play an important role in qualifying a treatment as degrading and incompatible with human dignity. However, it is also defined as ill-treatment if it makes him feel inferior. Besides, it is also taken into consideration whether the treatment is applied with the intent of humiliation or degradation. However, the failure to establish such intent would not mean that the treatment does not amount to ill-treatment. A treatment may be in the form of both inhuman treatment/mal-treatment and degrading treatment/treatment incompatible with human dignity. Any given form of torture constitutes inhuman or degrading treatment; however, every degrading treatment incompatible with human dignity may not amount to inhuman treatment/mal-treatment. Detention conditions, treatments towards those detained, discriminatory behaviours, defamatory expressions used by state agents, certain unfavourable situations experienced by the disabled, or degrading

treatments such as forcing a person to eat or drink something unusual may constitute treatment *incompatible with human dignity* (see *Cezmi Demir and Others*, § 90).

78. In addition, a treatment must attain a minimum level of severity if it is to fall within the scope of Article 17 § 3 of the Constitution. This minimum threshold is relative and must be determined in accordance with the particular circumstances of each case. In this scope, certain factors such as duration of the treatment, its physical and psychological effects and the victim's sex, age, and health condition are of importance (see *Tahir Canan*, § 23). In addition, the reason and purpose of the said treatment must also be taken into account. Whether the alleged ill-treatment had been imposed during an excited and strong emotional situation should be taken into consideration, as well (see *Cezmi Demir and Others*, § 83).

79. It should be noted that Article 17 of the Constitution does not prohibit the use of force for effecting an arrest. Nevertheless, such force may be used only if it is indispensable, and it must never be excessive (see *Ali Rıza Özer and Others* [Plenary], no. 2013/3924, 6 January 2015, § 81).

80. Recourse to physical force by security officers only in certain circumstances with definite boundaries may be considered not to form ill-treatment. In this sense, it is possible to apply physical force in cases necessitating arrest during meetings and demonstration marches on account of the demonstrators' own conducts. However, even in such cases, security officers may have recourse to physical force only if it is inevitable and applied in a proportionate way (see *Ali Rıza Özer and Others*, § 82).

ii. Application of Principles to the Present Case

81. As a result of panic and turmoil caused due to intervention by the law enforcement officers in social events, those who have attended the events but not led to any intervention or who have not attended the events but have been present at or around the incident scene may also be affected by this intervention. In this case, the law enforcement officers are to act in a controlled manner and to take the necessary measures so as to prevent any person other than those involved in the incident intervened by the law enforcement officers from being affected. It must nevertheless

be acknowledged that it may be difficult for the law enforcement officers to strictly apply these measures given the turmoil and panic caused by the intervention (for the Court's judgment in the same vein, see *Ali Rıza Özer and Others*, § 94).

82. In the present case, the applicant complained of the use of a gun with painted rubber ball against her. In this sense, the question to be discussed in the present case is whether the way in which this gun was used, which may give rise to severe injuries in case of being fired in an inappropriate manner, was appropriate in the particular circumstances of the present case.

83. Also, in the assessment which will be made as to the use of force by public officers, regard must be had to both the acts performed by those applying force and all stages of the incident, as a whole, including the planning and control of such acts (see *Cemil Danışman*, no. 2013/6319, 16 July 2014, § 57). The Court has applied this principle not only in the cases where the impugned interventions gave rise to death or fatal injuries and were examined under the scope of the right to life, but also in the case of *Özlem Kır* involving the alleged violation of the prohibition of ill-treatment given the dangerous nature of tear gas canisters, insofar as relevant.

84. Besides, the Court has held that the principles so far set concerning the use of firearms must be taken into consideration, insofar as relevant, as a criterion also in the assessments as to the use of tear gas canisters, which may give rise to deaths or severe injuries if fired inappropriately (see *Turan Uytun and Kevzer Uytun*, § 59).

85. Given the fact that O.N., K.D. and S.B. were also injured along with the applicant, who was severely injured during the impugned incident, it has been considered that the risk of causing death or injuries posed by guns firing painted rubber balls is not of lenient nature that could be ignored. Therefore, the criteria applied to the cases concerning deaths or injuries resulting from the use of firearm must also be applied, insofar as relevant, to the present case.

86. In the cases directly resulting from the use of a gun, the investigation authorities must *ex officio* reveal that it has been used *in an inevitable*

situation of the last resort and in a *proportionate* manner, as required by Article 17 of the Constitution. In this sense, the acts performed by the law enforcement officers, as well as the questions whether they were instructed appropriately, whether they were provided with sufficient training to use the guns firing painted rubber balls and whether they were negligent in taking measures so as to prevent the possible risks are to be assessed.

87. In the present case, it has been found established that the applicant was injured for being hit in her eye by a painted rubber ball. However, there were certain deficiencies in the investigation conducted by the incumbent chief public prosecutor's office with respect to the examination as to the alleged violation of the procedural aspect of the prohibition of treatment incompatible with human dignity. These deficiencies have hindered an assessment as to the questions whether the law enforcement officers using the gun had been trained in this respect, which actions had been performed and measures had been taken within the scope of the planning and control of the operation, as well as whether the legislation -whereby the law enforcement officers are empowered to use force- entails the necessary safeguards to prevent arbitrary and excessive use of such guns and to protect individuals from undesired accidents.

88. Therefore, the assessment as to the alleged violation of the procedural aspect of the prohibition of treatment incompatible with human dignity would be limited to the acts performed by law enforcement officers firing the gun with painted rubber balls during the impugned incident.

89. In the present case, the law enforcement officers taking measures to prevent any tragic events between students with opposing views after the demonstration held at the university campus tried to disperse the groups of students as some of them threw stones at them. The officers fired their guns with painted rubber balls to disperse the students, without pointing their guns at anyone, against those who were within the group attacking them and were far away. The law enforcement officers however failed to consider that there were also other students, who did not involve in the incident, as the incident scene was a university campus. The applicant sustained an injury for being hit by one of these painted rubber balls.

90. Although it appears from the available information and documents that there was an uproar during the incident, such an uproar did not eliminate the law enforcement officers' obligations to act in a controlled manner and to take the necessary measures to prevent any other person, who was not involved in the incident, from being affected by the intervention.

91. Regard being had to the consideration that the impugned incident took place due to the law enforcement officers' use of the gun with painted rubber balls in a way that would result in possible injuries and even deaths, it cannot be said that the applicant's injury was compatible with the expected consequences of the force used, and the necessary measures taken, by the law enforcements officers.

92. As a result, it has been concluded that the law enforcement officers failed to take the necessary measures to prevent the applicant from being affected by their intervention and caused her injury by firing painted rubber ball in an uncontrolled manner and without pointing the gun at anyone.

93. Taking into consideration the particular circumstances of the present case and the report obtained by the administrative court with respect to the applicant's injury, the Court concluded that the treatment by the law enforcement officers attained a certain level of severity, which went beyond a minimum level of severity envisaged by Article 17 § 3 of the Constitution.

94. Following this determination, it must be ascertained to which level the impugned act by the law enforcement officers attained. In this sense, considering the present case as a whole, the Court qualified the impugned acts as a treatment *incompatible with human dignity*.

95. For these reasons, the Court found a violation of the substantive aspect of the prohibition of treatment incompatible with human dignity, which is safeguarded by Article 17 § 3 of the Constitution.

b. Alleged Violation of the Procedural Aspect of the Prohibition of Treatment incompatible with Human Dignity

i. General Principles

96. 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. Taken in conjunction with the general obligation laid down in Article 5 of the Constitution titled *"Fundamental aims and duties of the State"*, Article 17 thereof 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 (see *Cezmi Demir and Others*, § 110).

97. The purpose of the criminal investigations conducted into such incidents is to ensure the effective application of the provisions of law intended for protecting the individuals' corporeal and spiritual existence as well as to hold those responsible accountable for death or injury. This is not an obligation of result, but one of means. However, the assessments specified herein do not imply that Article 17 of the Constitution entails the right for the applicants to have third parties prosecuted or sentenced for a criminal offence or imposes a duty to conclude all proceedings with a verdict of conviction or punishment (see *Cezmi Demir and Others*, § 113).

98. The obligation to conduct an effective investigation is considered to be satisfied only when:

- The competent authorities have acted *ex officio* immediately after becoming aware of the incident and gathered all available evidence capable of leading to the clarification of the incident and identification of those responsible (see *Cezmi Demir and Others*, § 114);

- The investigation has been open to public scrutiny, and the victims have been ensured to effectively participate in the investigation for the protection of their legitimate interests (see *Cezmi Demir and Others*, § 115);

- The individuals responsible for the investigation and those carrying out the inquiries are independent from those involved in the incident (see *Cezmi Demir and Others*, § 117);

- The investigations have been carried out with reasonable diligence and expedition (see *Deniz Yazıcı*, no. 2013/6359, 10 December 2014, § 96).

ii. Application of Principles to the Present Case

99. It appears that in the present case, the applicant did not raise any allegation to the effects that the investigation authorities, being aware of the alleged violation of the prohibition of ill-treatment specified above under the heading "General Principles", failed to take an action immediately; that her effective participation in the investigation process in pursuance of her legitimate interests was not ensured; and that the individuals responsible for the investigation and those carrying out the inquiries were not independent from those involved in the incident. Nor is there any deficiency in that regard. Indeed,

i. The incumbent chief public prosecutor's office immediately launched an *ex officio* investigation into the incident without waiting for an official complaint by the applicant.

ii. At the investigation stage, the applicant's statements were taken several times, and the applicant, who had the opportunity to challenge the decision of non-prosecution rendered at the end of the investigation, was not precluded from participating in the investigation.

iii. The police officers of various departments, who had jointly intervened in the incident, did not take role in the investigation.

100. Moreover, the impugned investigation must be assessed also in terms of the requirements that all evidence capable of clarifying the particular circumstances of the incident be collected and that the investigation be conducted with reasonable diligence and expedition.

101. In her statement, the applicant stated that she had been walking along with her friend at the time of incident during which she saw a man in black and holding a gun. Her friend, O.N. also noted that there had been police officers in civilian clothes, who were holding a gun with painted rubber balls at their hands. Pursuant to these statements, although it was possible to identify the police officers in civilian clothes to whom

these guns with had been provided and whether they had been provided necessary training and had received a certificate for the use of that kind of gun, as well as to identify and take the statements of the person who was with the applicant at the time of incident and thereby eye-witnessed to the impugned incident and to show the applicant and her friend the photos of the suspected police officers for identification, the incumbent chief public prosecutor's office issued a permanent search warrant as regards those responsible on 15 November 2007. Besides, until 19 January 2010, the chief public prosecutor's office did not take any step for the identification of the perpetrators other than including the minutes -issued to the effect that the perpetrators could not be identified- into the investigation documents.

102. Although the relevant security directorate indicated that the incident report had been signed only by certain law enforcement officers, the chief public prosecutor's office sent a writ to the public security branch office and ordered that the defence submissions of a total of 42 chief police officers and officers who undersigned the incident report be obtained. The chief public prosecutor's office also requested by letters rogatory from the relevant chief public prosecutor's office to take the statements of the other officers who had been appointed to other places. However, the chief public prosecutor's office also issued, for an unspecified reason, a new instruction to the public security branch office and ordered it not to take the submissions of the relevant chief public officers and public officers. A.G., one of the officers whose statement was taken by letters rogatory, stated *"At the time of incident, I was holding office at the Kocaeli Security Directorate. The registration number and signature on the minute did not belong to me and there was a confusion for the similarity in name as there was another police officer with the name A.G."*. The other police officers, S.A., M.T., U.D. and A.E. indicated that receiving a training and a certificate was necessary to use this gun. The chief public prosecutor's office, which did not conduct any inquiry into the allegations of the law enforcement officers whose statements had been taken, issued an additional decision of non-prosecution in respect of the officers whose statements had been taken on the grounds that 1.500 law enforcement officers had intervened in the incident; that the report issued with respect to the incident had been signed not by all officers involved in the incident, but only by a certain

part of them; and that no sufficient evidence could not be obtained for filing a criminal case against them for the imputed offence.

103. Failing to take into account that the applicant's challenge against the additional decision of non-prosecution was accepted as *"the discontinuation of the prosecution due to the non-identification of the police officer who performed the impugned act would not comply with the provisions of law and conscience. If necessary, all police officers intervening in the impugned incident are to be identified and questioned, and those who possessed the guns at the time of incident are to be identified through the official records"*, the chief public prosecutor's office filed a criminal case against the police officers whose statements had been taken through letters rogatory for having caused a severe injury by exceeding the allowable limit of using force. However, an acquittal decision was issued at the end of the criminal case as there was no identified perpetrator.

104. At the end of the investigation initiated on the criminal complaint filed by the incumbent criminal court for the identification of the real perpetrator(s), a permanent search warrant was issued once again, and the investigation initiated on 23 October 2007 could not be concluded despite the period of over 10 years that elapsed.

105. Regard being had to the failures to take the necessary steps in a timely fashion for the identification of those responsible, to conduct an effective investigation for the identification of the perpetrator(s) for over 2 years until 19 January 2010, to file a criminal case without an inquiry into the arguments raised by the suspects in their defence submissions and without identifying the real perpetrator(s) as well as the period of over 10 years during which the investigation could not be concluded, the Court has concluded that the investigation in the present case was not conducted with reasonable diligence and expedition, and that all evidence capable of leading to the clarification of the incident and identification of those responsible was not collected during the investigation.

106. For these reasons, the Court found a violation of the procedural aspect of the prohibition of treatment incompatible with human dignity, which is safeguarded by Article 17 § 3 of the Constitution.

3. Application of Article 50 of Code no. 6216

107. 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."*

108. The applicant claimed 5,000 Turkish liras ("TRY") and TRY 50,000 respectively for the pecuniary and non-pecuniary damage she sustained.

109. In the present case, it has been concluded that the substantive and procedural aspects of the prohibition of treatment incompatible with human dignity were violated.

110. The applicant did not submit to the Court any document to substantiate the pecuniary damage she had allegedly sustained. For the Constitutional Court to award pecuniary damages, a causal link must be established between the material damage alleged to be suffered by the applicant and the established violation. Therefore, the applicant's claim for pecuniary compensation must be rejected as she did not submit any document on this matter.

111. A net amount of TRY 20,000 must be awarded to the applicant for the non-pecuniary damage she sustained due to the violation of the treatment incompatible with human dignity.

112. The case file must be sent to the chief public prosecutor's office for the redress of the violation and its consequences.

113. The total court expense of TRY 2,206.90 including the court fee of TRY 226,90 and counsel fee of TRY 1,980, which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

The Constitutional Court UNANIMOUSLY held on 28 June 2018 that

A. The alleged violation of the prohibition of treatment incompatible with human dignity be DECLARED ADMISSIBLE;

B. The substantive and procedural aspects of the prohibition of treatment incompatible with human dignity safeguarded by Article 17 of the Constitution were VIOLATED;

C. A copy of the judgment be SENT to the Adana Chief Public Prosecutor's Office for the redress of the violation and its consequences;

D. A net amount of TRY 20,000 be PAID to the applicant in respect of non-pecuniary damage, and other compensation claims be REJECTED;

E. The total court expense of TRY 2,206.90 including the court fee of TRY 226.90 and counsel fee of TRY 1,980 be REIMBURSED TO THE APPLICANT;

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 PERSONAL LIBERTY AND SECURITY (ARTICLE 19)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

MEHMET HASAN ALTAN (2)

(Application no. 2016/23672)

11 January 2018

On 11 January 2018, the Plenary of the Constitutional Court found violations of the right to personal liberty and security and the freedoms of expression and press in the individual application lodged by *Mehmet Hasan Altan (2)* (no. 2016/23672).

THE FACTS

[9-79] The applicant is an academician, as well as a well-known journalist and author. On the night of 15 July 2016, Turkey faced a military coup attempt. Therefore, a state of emergency was declared countrywide on 21 July 2016. The public authorities and the investigation authorities stated that the FETÖ/PDY was the plotter/perpetrator of the coup attempt.

In this scope, investigations have been conducted against the structures of the FETÖ/PDY in various fields such as education, health, trade, civil society and media in public institutions, and many persons have been taken into custody and detained.

The İstanbul Chief Public Prosecutor's Office initiated an investigation in relation to the media structure of the FETÖ/PDY against seventeen suspects, including the applicant, many of whom were journalists, authors and academicians.

In this scope, the applicant was taken into custody on 10 September 2016 and a search warrant was issued on his house. During the search, a bank card issued by the Bank Asya in the name of the applicant and six pieces of 1 USD banknote –two of them were (F) series– were seized. The applicant was held in custody until 21 September 2016.

On 21 September 2016, the Istanbul Chief Public Prosecutor's Office took the applicant's statement. On 22 September 2016, the Magistrate Judge's Office ordered the applicant's detention on remand for attempting to overthrow the Government of the Republic of Turkey or prevent it from performing its duties and for membership of a terrorist organization.

The applicant appealed against the detention order and requested the judicial review of his appeal at a hearing. However, the Istanbul 1st

Magistrate Judge's Office reviewed the applicant's appeal without hearing and dismissed it with no further right of appeal.

On 12 April 2017, the Istanbul Chief Public Prosecutor's Office indicted the applicant for the offences of attempting to overthrow the Government of the Republic of Turkey or prevent it from performing its duties, attempting to overthrow the constitutional order and committing crime on behalf of a terrorist organization without being a member of it.

The case against the applicant is still pending before the 26th Chamber of the Istanbul Assize Court. At the hearing of 11 December 2017, the Public prosecutor submitted his opinion on the merits. He requested that the applicant be punished for attempting to overthrow the constitutional order. The applicant is still detained on remand.

V. EXAMINATION AND GROUNDS

80. The Constitutional Court, at its session of 11 January 2018, examined the application and decided as follows.

A. Alleged Violation of the Right to Personal Liberty and Security

1. The Applicant's Allegations and the Ministry's Observations

81. The applicant claimed that his right to personal liberty and security had been violated, stating that he had been taken into custody due to the accusations that were unsubstantial and fabricated, which was unlawful; that although the detention period could not exceed four days even in terms of terrorist acts and collective crimes, the thirty-day detention period applied during the state of emergency period was unacceptable; that his having been held in custody for twelve days was disproportionate; and that he had been held in custody for a long time arbitrarily during this period and therefore was not brought before a judge.

82. The Ministry, in its observations, specified that the length of the period during which the applicant had been held in custody was necessary and it proportionate to the circumstances, given the gravity of the threat of coup and in terms of the combat against terrorism, within the scope of the state of emergency.

83. The applicant, in his counter-statements, claimed that all the evidence against him within the scope of the investigation were solely his words and articles, that the investigation was not complicated and that therefore his detention period could not be regarded as reasonable.

b. The Court's Assessment

84. The last sentence of Article 148 § 3 of the Constitution provides as follows:

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

85. Article 45 § 2, titled *"Right to individual application"*, of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court 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".*

86. Pursuant to the said provisions, in order for an individual application to be lodged with the Court, ordinary legal remedies must first be exhausted. Respect for fundamental rights and freedoms is the constitutional duty of all organs of the State, and it is the duty of administrative and judicial authorities to redress the violations of rights that occur due to the neglect of this duty. For this reason, it is required that the alleged violations of fundamental rights and freedoms be first brought before the inferior courts, evaluated by these authorities and then resolved by them. Accordingly, individual application to the Constitutional Court is a remedy of subsidiary nature which may be resorted to in case of inferior courts' failure to redress the alleged violations (see *Ayşe Zıraman and Cennet Yeşilyurt*, no. 2012/403, 26 March 2013, §§ 16 and 17).

87. Article 141 § 1 of Law no. 5271 provides that individuals who; have been arrested without or with an arrest warrant against the provisions foreseen by the statutes, or for whom the period of arrest has been extended against the regulations listed in statutes; have not been taken before a judge within the period of custody, as foreseen in the statute;

even though have been arrested in conformity with the statutes, were not tried within a reasonable time before the court and did not receive a judgment within a reasonable time may claim their pecuniary and non-pecuniary damages from the State. Given this provision, there is a legal remedy in this regard. Besides, Article 142 § 2 thereof, which regulates the conditions for the claims for compensation provides, that a claim for compensation may be filed within three months after the notification of the final decisions or judgments to the related parties, or at any case within one year after the final decision or judgment (see *Zeki Orman*, no. 2014/8797, 11 January 2017, § 27).

88. As regards the allegation that the length of the period of detention prescribed by the law had been exceeded as well as the alleged unlawfulness of arrest and custody, the Court has concluded, referring to the relevant case-law of the Court of Cassation, that although the primary judicial proceedings were not concluded on the date of examination of the individual application, the action for compensation stipulated in Article 141 of Law no. 5271 was an effective legal remedy to be exhausted (see *Hikmet Kopar and Others* [Plenary], no. 2014/14061, 8 April 2015, §§ 64-72; *Hidayet Karaca* [Plenary], no. 2015/144, 14 July 2015, §§ 53-64; *Günay Dağ and Others* [Plenary], no. 2013/1631, 17 December 2015, §§ 141-150; *İbrahim Sönmez ve Nazmiye Kaya*, no. 2013/3193, 15 October 2015, §§ 34-47; and *Gülser Yıldırım (2)* [Plenary], no. 2016/40170, 16 November 2017, §§ 92-100).

89. Finding of a violation as a result of the individual application lodged by an individual who has been taken into custody and subsequently detained on the basis of a criminal charge due to alleged unlawfulness of his custody -as regards the termination of deprivation of liberty- does not have a bearing on the applicant's personal situation. That is because, even if the custody order is unlawful and the length of the custody is unreasonable, a finding of unlawfulness as well as a violation in this regard will not *per se* ensure the release of a "detainee" as his detention had been ordered by the trial judge. Therefore, a probable violation judgment to be rendered through an individual application may give rise to an award of compensation in favour of the applicant if requested (see *Günay Dağ and Others*, § 147; and *İbrahim Sönmez and Nazmiye Kaya*, § 44).

90. In the present case, the alleged unlawfulness of the decision ordering the applicant's custody as well as the reasonableness of the length of the custody may be examined through an action to be brought under Article 141 of Code no. 5271. As a matter of fact, the approach taken by the Court of Cassation (see decision of the 12th Criminal Chamber of the Court of Cassation dated 1 October 2012 and no. E.2012/21752, K.2012/20353; and *Günay Dağ and Others*, § 145) indicates that as regards such claims, there is no need to wait for a final decision on the merits of the case. If the custody order is found to be unlawful as a result of this action, the applicant may be also awarded compensation.

91. It has been accordingly concluded that the remedy provided by Article 141 of the Code of Criminal Procedure no. 5271 ("the CCP") is an effective remedy capable of offering redress for the applicant's complaints; and that the examination by the Court of the individual application lodged without exhaustion of this ordinary remedy does not comply with the "subsidiary nature" of the individual application system.

92. Besides, any individual who has been arrested or taken into custody is entitled, by virtue of Article 91 § 5 of the CCP, to file a challenge with the magistrate judge against the public prosecutor's written order for his arrest or custody in order to secure his immediate release. According to the CCP, such a challenge may be filed by not only the individual arrested, but also his defence counsel or legal representative, spouse or first-degree or second-degree relatives by blood. There is no information or document in the application form and annexes thereto, which indicates that the applicant challenged the unlawfulness of his arrest or custody before the magistrate judge and that his challenge did not lead to any outcome (for the Court's assessment in the same vein, see *Gülser Yıldırım (2)*, § 101).

93. For these reasons, this application has been declared inadmissible for *non-exhaustion of legal remedies* in so far as it relates to the alleged unlawfulness of the applicant's custody, since it has been lodged without exhausting the administrative and/or judicial legal remedies.

2. Alleged Unlawfulness of the Applicant's Detention on Remand

a. The Applicant's Allegations and the Ministry's Observations

94. The applicant claimed; that he had first been included in the lists of "journalists to be detained" in some Twitter accounts; that then some news targeting him started to appear in pro-government newspapers; that he was tried to be associated with the coup attempt in these news with the same content and nature; and that he was subsequently taken into custody and detained. According to the applicant, the impugned news stated that he had known about the coup attempt beforehand and had given messages about it on a program broadcast on 14 July. The applicant argued that his critical speeches on a program broadcast on a legal television channel did not constitute a crime and that regarding his relevant speech as a call for coup had been a strained interpretation.

95. The applicant claimed that the charges against him contained no evidence to the effect; that he had taken part in a hierarchical structure, that he had received orders or instructions from someone or given instructions to others, or that he had helped or provided support to a member of the organisation in some way. The only evidence to allegedly support his detention on remand was his words and articles.

96. The applicant argued that he had been charged on account of one of his expressions that had been taken apart from the context; that he had written the issues he expressed in the said program in his books for a long time; and that he had many critical articles about the terrorist organization he was allegedly associated with.

97. The applicant further stated that there were no grounds substantiating his detention; that all the evidence had been collected; that there were no suspicion of fleeing; that the detention order did not include any information as to why the measures regarding conditional bail would be insufficient; and that detention order as well as the decisions on dismissal of the challenges against detention lacked justifications.

98. In this regard, the applicant maintained that his right to personal liberty and security had been violated and thus claimed compensation.

99. In addition, the applicant argued that he was detained for political reasons other than those stipulated in the Constitution. The purpose of the relevant measure was to punish him due to his criticism of the Government and the President's governance. Therefore, the applicant also claimed that Article 18 of the Constitution had also been violated in conjunction with the right to personal liberty and security.

100. The Ministry, in its observations, specified that the investigation against the applicant was conducted within the scope of the investigations related to the FETÖ/PDY that staged the coup attempt of 15 July; that although the coup attempts of the said organization, through its elements within the security directorate and the judiciary, on 17 and 25 December 2013 were known to the public, the applicant voluntarily took part in the media structure of the organization in order to create public opinion in favour of the FETÖ/PDY terrorist organization; that it was understood from the content of his articles and publications subject to the investigation that he had been aware of the coup attempt of 15 July beforehand; that he had broadcast with a view to legitimizing the coup attempt before the public, thus acting in line with the objective of the organisation; and that such evidence constituted strong suspicion of guilt.

101. The Ministry, referring to the similar judgments of the Constitutional Court and the European Court of Human Rights ("the ECHR"), specified that the applicant had been detained on remand within the scope of the state of emergency measures and that it had been necessary in terms of combating terrorism and proportionate to the material fact given the gravity of the threat of coup.

102. The applicant, in his counter-statements, argued that the charges against him were based on the sole interpretation of intention and thought.

b. The Court's Assessment

103. 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."

104. Article 15 of the Constitution, titled "*Suspension of the exercise of fundamental rights and freedoms*", reads as follows:

"In times of war, mobilization, martial law or a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures which are contrary to the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated.

Even under the circumstances indicated in the first paragraph, the individual's right to life, the integrity of his/her corporeal and spiritual existence shall be inviolable except where death occurs through acts in conformity with law of war; no one shall be compelled to reveal his/her religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties shall not be made retroactive; nor shall anyone be held guilty until so proven by a court ruling."

105. Article 19 § 1 and the first sentence of Article 19 § 3 of the Constitution, titled "*Right to personal liberty and security*", read as follows:

"Everyone has the right to personal liberty and security.

...

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."

106. The applicant's allegations in this part should be examined within the scope of the right to personal liberty and security and from the standpoint of Article 19 § 3 of the Constitution. The examination of the Constitutional Court will be limited to the assessment of the lawfulness of the applicant's detention on remand, independently of the conducting

of investigation and prosecution against the applicant and the possible results of the proceedings. In addition, the issue as to whether Article 19 § 3 of the Constitution have been violated is to be examined in the particular circumstances of each application.

i. Applicability

107. The Court, in its judgment of *Aydın Yavuz and Others* (see §§ 187-191 *ibidem*), specified that in examining the individual applications against emergency measures, it would take into account the protection regime set out in Article 15 of the Constitution with respect to fundamental rights and freedoms. Accordingly, besides the existence and declaration of a state of emergency, in cases where the measure constituting an interference with the fundamental rights and freedoms –subject of the individual application– is related to the state of emergency, then the application will be examined in accordance with Article 15 of the Constitution.

108. In the aftermath of the coup attempt of 15 July 2016, the Council of Ministers, meeting under the chairmanship of the President, decided to declare a state of emergency on 21 July 2016; and then, the state of emergency was extended many times. The main reason for declaration of the state of emergency was the coup attempt (see *Aydın Yavuz and Others*, §§ 224, 226). It is seen that the declaration of state of emergency aimed at eliminating the threat and danger posed by the FETÖ/PDY, which was considered to be behind the said attempt, as well as the danger arising from the coup attempt (see *Aydın Yavuz and Others*, §§ 48, 229). As a matter of fact, the assessments of the public authorities as well as the investigation authorities to the effect that the organisation behind the coup attempt was FETÖ/PDY were based on factual grounds (see *Aydın Yavuz and Others*, § 216).

109. On the date when the applicant was detained on remand, the state of emergency was in force in Turkey. It was stated in the detention order that the applicant had committed an offence within the scope of the coup attempt and that he was a member of the FETÖ/PDY, the organisation behind the coup attempt. Therefore, it is seen that the charges underlying the applicant's detention on remand were related to the events that had led to the declaration of state of emergency.

110. In this respect, the lawfulness of the detention of the applicant, who had been held on account of an accusation related to the events leading to the declaration of a state of emergency in Turkey, will be reviewed under Article 15 of the Constitution. Prior to such review, whether the applicant's detention on remand was in breach of the guarantees set forth in Articles 13, 19 and in other Articles of the Constitution will be determined, and if there is any violation, it will be assessed whether the criteria set forth in Article 15 of the Constitution rendered such a violation lawful (see *Aydın Yavuz and Others*, §§ 193-195, 242).

ii. Admissibility

111. This part of the application must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

iii. Merits

(1) General Principles

112. It is set forth in Article 19 § 1 of the Constitution that everyone has the right to personal liberty and security. In addition to this, the circumstances in which individuals may be deprived of liberty with due process of law are laid down in Article 19 §§ 2 and 3 of the Constitution. Accordingly, the right to personal liberty and security may be restricted only in cases where one of the situations laid down in this Article exists (see *Murat Narman*, no. 2012/1137, 2 July 2013, § 42).

113. In addition, an interference with the right to personal liberty and security will lead to a violation of Article 19 of the Constitution in the event that it does not comply with the conditions prescribed in Article 13 of the Constitution where the criteria for restricting fundamental rights and freedoms are set forth. For this reason, it must be determined whether the restriction complies with the conditions set out in Article 13 of the Constitution, i.e., being prescribed by law, relying on one or more of the justified reasons provided in the relevant articles of the Constitution, and not being in breach of the principle of proportionality (see *Halas Aslan*, no. 2014/4994, 16 February 2017, §§ 53-54).

114. Article 13 of the Constitution provides that fundamental rights and freedoms may be restricted only by law. On the other hand, it is set out in Article 19 of the Constitution that the procedures and conditions under which the right to personal liberty and security may be restricted must be prescribed by law. Accordingly, it is necessary in accordance with Articles 13 and 19 of the Constitution that the detention on remand, as an interference with personal liberty, must have a legal basis (see *Murat Narman,* § 43; and *Halas Aslan*, § 55).

115. According to Article 19 § 3 of the Constitution, individuals against whom there is strong evidence of having committed an offence may be arrested by decision of a judge for the purposes of preventing escape or preventing tampering with evidence, as well as in other circumstances prescribed by law and necessitating detention (see *Halas Aslan*, § 57).

116. Accordingly, detention of a person primarily depends on the presence of a strong indication of having committed an offence. This is a *sine qua non* sought for detention. For this, it is necessary to support an allegation with plausible evidence which can be considered as strong. The nature of the facts which can be considered as convincing evidence is to a large extent based on the particular circumstances of the case (see *Mustafa Ali Balbay*, no. 2012/1272, 4 December 2013, § 72).

117. For an initial detention, it may not always be possible to present all evidence indicating that there is a strong suspicion of having committed offence. As a matter of fact, another purpose of detention is to take the criminal investigation or prosecution forward by means of verifying or refuting the suspicions against the relevant person (see *Dursun Çiçek*, no. 2012/1108, 16 July 2014, § 87; and *Halas Aslan*, § 76). Therefore, it is not absolutely necessary that the sufficient evidence have been collected in the course of arrest or detention. Thus, the facts which will form a basis for the criminal charge and hence the detention must not be assessed at the same level with the facts that will be discussed at the subsequent stages of the criminal proceedings and constitute a basis for conviction (see *Mustafa Ali Balbay*, cited above, § 73).

118. In cases where serious allegations indicate, or circumstances of the present case reveal, that the acts imputed to suspect or accused fall within

the ambit of fundamental rights and freedoms that are sine qua non for a democratic society such as the freedom of expression, the freedom of the press, the right to trade-union freedom and the right to engage in political activities, judicial authorities ordering detention must act with more diligence in determining the strong suspicion of guilt. The question as to whether due diligence has been shown is subject to the Court's review (see *Gülser Yıldırım (2)*, § 116, and for a violation judgment rendered at the end of such review, see *Erdem Gül and Can Dündar* [Plenary], no. 2015/18567, 25 February 2016, §§ 71-82; and for inadmissibility decisions, see *Mustafa Ali Balbay*, § 75; *Hidayet Karaca,* § 93; *İzzettin Alpergin* [Plenary], no. 2013/385, 14 July 2015, § 46; and *Mehmet Baransu (2)*, no. 2015/7231, 17 May 2016, §§ 124, 133 and 142).

119. Besides, it is provided in Article 19 of the Constitution that an individual may be detained for the purpose of preventing "escape" or "tampering with evidence". However, the constitution-maker, by using the expression of "…*as well as in other circumstances prescribed by law and necessitating detention*", points out that the grounds for detention are not limited to those set forth in the Constitution and sets forth that the grounds for detention other than those provided in the relevant Article can only be prescribed by law (see *Halas Aslan*, § 58).

120. Article 100 of Law no. 5271 regulates the grounds for detention and sets forth these grounds. Accordingly, detention may be ordered in cases where the suspect or accused escapes or hides or there are concrete facts which raises the suspicion of escape or where the behaviours of the suspect or accused tend to show the existence of a strong suspicion of tampering with evidence or attempting to put an unlawful pressure on witnesses, victims or other individuals. In the relevant Article, the offences regarding which the ground for arrest may be deemed to exist *ipso facto* are enlisted, provided that there exists a strong suspicion of having committed those offenses (see *Ramazan Aras*, no. 2012/239, 2 July 2013, § 46; and *Halas Aslan*, § 59). However, for an initial detention, it may not be always possible, by the very nature of the case, to present concretely all grounds for detention set forth in the Constitution and the Law (see *Selçuk Özdemir*, § 68).

121. It is also set out in Article 13 of the Constitution that the restrictions

on fundamental rights and freedoms cannot be contrary to the "principle of proportionality". The expression of "*requiring detention*" set out in Article 19 § 3 of the Constitution points out the proportionality of detention (see *Halas Aslan*, § 72).

122. The principle of proportionality consists of three sub-principles, which are "suitability", "necessity" and "proportionality *stricto sensu*". Suitability requires that the interference envisaged is suitable for achieving the aim pursued; the necessity requires that the impugned interference is necessary for achieving the aim pursued, in other words, it is not possible to achieve the pursued aim with a less severe interference; and proportionality requires that a reasonable balance is struck between the interference with the individual's right and the aim sought to be achieved by the interference (see the Court's judgment no. E.2016/13, K.2016/127, 22 June 2016, § 18; and *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 38).

123. In this scope, one of the issues to be taken into consideration is the proportionality of the detention, given the gravity of offence as well as the severity of the punishment to be imposed. As a matter of fact, it is provided in Article 100 of Law no. 5271 that no detention shall be ordered if the detention is not proportionate to the significance of the case, expected punishment or security measure (see *Halas Aslan*, § 72).

124. In addition, in order for a detention to be proportionate, other protection measures alternative to detention should not be sufficient. In this framework, in cases where the obligations imposed by virtue of conditional bail, which has less effect on fundamental rights and freedoms compared to detention, are sufficient to achieve the legitimate aim pursued, the detention measure should not be applied. This issue is set forth in Article 101 § 1 of Law no. 5271 (see *Halas Aslan*, § 79).

125. In every concrete case, it falls in the first place upon the judicial authorities deciding detention cases to determine whether the prerequisites for detention, i.e., the strong indication of guilt and other grounds exist, and whether the detention is a proportionate measure. As a matter of fact, those authorities which have direct access to the parties and evidence are in a better position than the Constitutional Court in making

such determinations (see *Gülser Yıldırım (2)* [Plenary], no. 2016/40170, 16 November 2017, § 123).

126. However, it is for the Constitutional Court to review whether the judicial authorities have exceeded the discretion conferred upon them. The Constitutional Court's review must be conducted especially over the detention process and the grounds of detention order by having regard to the circumstances of the concrete case (see *Erdem Gül and Can Dündar* [Plenary], no. 2015/18567, 25 February 2016, § 79; and *Selçuk Özdemir*, § 76; and *Gülser Yıldırım (2)*, § 124). As a matter of fact, it is set out in Article 101 § 2 of Code no. 5271 that in detention orders, evidence indicating strong suspicion of guilt, existence of grounds for detention and the proportionality of detention will be justified with concrete facts and clearly demonstrated (see *Halas Aslan*, § 75; and *Selçuk Özdemir*, § 67).

(2) Application of Principles to the Present Case

127. The applicant was taken into custody on 10 September 2016 and detained, after his inquiry, by the İstanbul 10th Magistrate Judge on 22 September 2016.

128. In the present case, it must be primarily ascertained whether the applicant's detention had a legal basis. The applicant's detention was ordered pursuant to Article 100 of Code no. 5271 for attempting to abolish the government of the Republic of Turkey or to prevent it from fulfilling its duties and membership of an armed terrorist organisation, within the scope of an investigation into the organisation of the FETÖ/PDY in the media. Accordingly, the applicant's detention on remand had a legal basis.

129. Before examining whether the detention, which has been found to have a legal basis, pursued a legitimate aim and was proportionate, it should be ascertained whether there are facts giving rise to a strong suspicion that the offence has been committed, this being a prerequisite for pre-trial detention.

130. There is no doubt that on 15 July 2016 there occurred a military coup attempt in Turkey and that the public authorities as well as investigation authorities considered on the basis of factual grounds that the FETÖ/PDY

was the plotter of the impugned attempt (see *Aydın Yavuz and Others,* §§ 12, 24, 32).

131. In this scope, it is known that investigations were carried out against the structuring of the FETÖ/PDY in different fields and that many persons were taken into custody and detained on remand. Within the scope of the investigations into the structuring of the FETÖ/PDY in the media, the applicant was also detained and a criminal case was initiated against him.

132. Referring to the facts that the applicant constantly made statements in the media outlets of the FETÖ/PDY, the perpetrator of the coup attempt of 15 July 2016, and in line with the purposes of this organization, thereby paving the way for the coup attempt, and that he explicitly made a call for coup during his speech on a television programme, the İstanbul 10th Magistrate Judge ordered the applicant's detention on remand considering the strong suspicion of guilt.

133. The articles and speeches on account of which the applicant was detained on remand consisted of his article titled "*Balyoz'un Anlamı (The Meaning of Sledgehammer)*" that was published in Star, daily newspaper, in 2010, his speech in a program broadcast on Can Erzincan TV the day before the coup attempt, and his article titled "*Türbülans (Turbulence)*" that was published on his own website on 20 July 2016.

134. It was specified in the detention order that in his speech titled "*Balyoz'un Anlamı*", the applicant aimed at creating a public opinion in accordance with the aims of the organization by making statements praising the Sledgehammer investigation that was stated by the investigation authorities to have been manipulated with fabricated documents. However, it was not explained which statements of the applicant in the said program were of that nature. As stated in the indictment; in the aforementioned programs, upon the host of the program, A.N.I., stated that many professional organizations came together regarding a lawsuit filed against A.H.A., a guest of the program, in connection with the news about the Sledgehammer case published in Taraf daily newspaper, the applicant used expressions such as "*In the world, in the whole world. International*". It is seen that the applicant has no other statement regarding the Sledgehammer case.

135. Besides, the article titled *"Balyoz'un Anlamı"* had been published in a national daily newspaper called Star. There is no claim that the aforementioned newspaper was one of the media outlets of the FETÖ/PDY. In addition, the aforementioned article was published in 2010. During this period, the investigation authorities did not have any finding or claim that the FETÖ/PDY was a criminal organization and that it was known to the public. On the contrary, the investigation authorities argued that the applicant had been in a position to know the illegal aspect of this structure after the "December 17-25 investigations" that had been carried out in the last period of 2013, where the real objective of the FETÖ/PDY had been revealed. The investigation authorities failed to put forward factual grounds leading them to conclude that the impugned article which had been written three years before the aforementioned investigations and concerned a case that had been at the top of the agenda at the material time, had been written in accordance with the aims of the FETÖ/PDY. Besides, in the same period, a large number of news, articles and comments were published in the written and visual media, which were favourable and unfavourable. There is also no information or document that an investigation had been launched against the applicant at the time when the said article was written and afterwards.

136. In the detention order against the applicant, it was maintained that in his speech in the programme broadcast on Can Erzincan TV, the applicant tried to create a public opinion to stage a coup and explicitly made a call for coup. The grounds for such an accusation were his statements *"… There is probably another structure in the Turkish State, which documents and monitors all these developments more than the outside world does. In other words, it is not clear when and how this structure will take its face out of the bag…"*.

137. A military coup attempt occurred the day after this program was broadcast. In the detention order, this situation was accepted as an indication that the applicant had been aware of the coup attempt, in advance, when he had made the statements which were the subject of the crime and regarded as a call for coup.

138. However, the applicant asserted that he did not know that a coup would be made, nor did he make a call for coup, that his abovementioned

words were distorted to be regarded as an offence and that the word "structure" in his speech had referred to the State organs.

139. It is seen that in this program named "Özgür Düşünce" which was co-hosted by the applicant and A.N.I., heavy criticisms were expressed against the Government on different issues and it was especially emphasized that the Government did not comply with the law. During the program, while A.N.I. and A.H.A. who participated in the program as a guest were talking about the fact that the speeches of some members of the Government and senior bureaucrats were recorded through illegal wiretapping and audio surveillance and broadcast on the internet by some countries, the applicant participated in the dialogue. The applicant first stated that the wiretaps might not have been made through only technological means, and that it was not possible to take control of the state by illegal methods, referring to the political governance in force, and then expressed some statements which were subject of the imputed offence.

140. Regard being had to the content and context of the applicant's words, the words of other speakers, and to the thoughts stated therein as a whole, it is difficult to regard, without hesitation, these words as a call for the coup and to acknowledge that the applicant had uttered them, being aware of the coup attempt to take place the next day, for the purpose of bracing the public for it. Otherwise, meanings beyond the one which may be attributed by an objective observer may be ascribed to the words uttered by the applicant. As a matter of fact, during the speeches delivered through the program, it was forecasted that the Government might be overthrown, at or before the elections to be held two years later, by a new political party which would be established by some of the members of parliament from the ruling part together with another politician.

141. Besides, it must be also borne in mind that the impugned words were uttered through a TV program in a live broadcast, and therefore, it is not possible to re-formulate, change or withdraw the expressions used in such an atmosphere before announcing them to the public.

142. Regard being had to these considerations, the investigation authorities failed to demonstrate the factual basis for the assertion that the applicant had uttered the words in order to pave the way for the coup attempt.

143. It was stated in the detention order that –apart from the program broadcast on Can Erzincan TV the day before the coup attempt– the applicant had also paved the way for the coup attempt by constantly making statements in the media outlets of the FETÖ/PDY in accordance with the aims of this organisation. However, neither the detention order nor the indictment contained any explanation as to which articles and statements of the applicant in which media outlets were the subject of the accusations against him.

144. Regarding the existence of a strong suspicion of guilt in the detention order, it was also indicated that the applicant had acted in line with the aim of the FETÖ/PDY with his articles in various media outlets (the impugned articles were not specified). In this scope, the article titled "Türbülans", which was published by the applicant on his own website on 20 July 2016 was referred to in the indictment.

145. In the article, the applicant expressed his doubts as to whether the coup attempt had been conducted only by the members of the FETÖ/PDY, as well as criticized the measures taken in the aftermath of the coup attempt. It is known that after the coup attempt, some groups also voiced opinions regarding the origin of the said attempt and that other factors might have acted together with the FETÖ/PDY. Opinions which are different from the public authorities' considerations and those of the majority may be considered to constitute an offence with reference to the aim of the person expressing them only when this aim is demonstrated with concrete facts other than the contents of the expressions. However, the investigation authorities failed to demonstrate the facts which would form the opinion that the applicant had acted in line with the aims of the FETÖ/PDY by writing the article.

146. In reaching the conclusions that the applicant had acted in line with the aims of the FETÖ/PDY and that he had a link with this organization, the investigation authorities relied on the abstract expression of a witness, one dollar banknote found during the search carried out in the applicant's house, non-inclusion of the applicant in any investigation conducted by the judicial structure of the FETÖ/PDY, his phone conversations —time and content of which are not specified— with certain persons, and his account in the Bank Asya. However, the investigation authorities failed to

demonstrate any concrete fact which would refute the applicant's defence submissions —that may be regarded as a reasonable version of events— about the allegations pertaining to banknote, bank account, non-inclusion in an investigation and phone conversation. Nor did the witness, in his statement, provide any information about a concrete action performed by the applicant.

147. Finally, in his opinion as to the merits, the public prosecutor also relied, as criminal evidence, on certain correspondences exchanged through "ByLock". These correspondences were exchanged among persons other than the applicant. In these correspondences, there are certain expressions with respect to the applicant. However, given the particular circumstances of the case and the content of the expressions used with respect to the applicant, such expressions cannot per se be considered as a strong indication of guilt.

148. In this respect, it has been concluded that "the strong indication of guilt" could not be sufficiently demonstrated in the present case.

149. In view of this conclusion, it is not deemed necessary to examine whether there were grounds for detention, whether the detention was proportionate and the other allegations regarding the unlawfulness of the applicant's detention.

150. Consequently, it has been concluded that the applicant's detention in the absence of strong indication of guilt was in breach of the guarantees set forth in Article 19 § 3 of the Constitution in the ordinary period regarding the right to personal liberty and security.

151. Besides, it is necessary to examine whether the relevant measure was legitimate within the scope of Article 15 of the Constitution which entails the suspension and the restriction of exercise of the fundamental rights and freedoms in times of emergency.

iv. Application of Article 15 of the Constitution

152. According to Article 15 of the Constitution, in times of war, mobilization, martial law or a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended or measures which are contrary to the guarantees embodied in the Constitution may be

taken. However, Article 15 of the Constitution does not entrust the public authorities with an unlimited power in this respect. The measures which are contrary to the guarantees embodied in other provisions of the Constitution must not infringe upon the rights and freedoms provided in Article 15 § 2 of the Constitution, must not be contrary to the obligations stemming from the international law and must be within the extent required by the exigencies of the situation. The examination to be made by the Court according to Article 15 of the Constitution will be limited to these criteria. The Court has set out the procedures and principles of this review (see *Aydın Yavuz and Others*, §§ 192-211, 344).

153. The right to liberty and security is not one of the core rights provided in Article 15 § 2 of the Constitution as inviolable even when emergency administration procedures such as war, mobilization, martial law or a state of emergency are in force. It is therefore possible in times of emergency to impose measures with respect to this right contrary to the safeguards enshrined in the Constitution (see *Aydın Yavuz and Others*, §§ 196, 345).

154. Nor is this right among the non-derogable core rights in the international conventions to which Turkey is a party, notably Article 4 § 2 of the International Covenant on Civil and Political Rights ("the ICCPR") and Article 15 § 2 of the European Convention on Human Rights ("the ECHR"), as well as the additional protocols thereto. Furthermore, it has not been found established that the interference with the applicant's right to liberty and security was in breach of any obligation (any safeguard continued to be under protection in times of emergency) stemming from the international law (see *Aydın Yavuz and Others*, §§ 199, 200, 346).

155. However, the right to liberty and security is a fundamental right which precludes the State to arbitrarily interfere with the individuals' freedom (see *Erdem Gül and Can Dündar*, § 62). Not arbitrarily depriving individuals of their liberty is among the most significant underlying safeguards of all political systems bound by the principle of rule of law. The requirement that an interference with individuals' freedoms must not be arbitrary is a fundamental guarantee that must be also applicable when emergency administration procedures are in force (see *Aydın Yavuz and Others*, §§ 347).

156. One of the primary guarantees that will prevent the arbitrary interference with the individuals' right to personal liberty and security

by detention is to demonstrate the strong indication of guilt. Since the existence of such an indication is a prerequisite for detention, the acceptance to the contrary will render meaningless all guarantees regarding the right to personal liberty and security. Accordingly, regardless of the reasons, detention of the individuals in the absence of indication of guilt, even in a state of emergency, cannot be regarded as a measure "required by the exigencies of the situation".

157. In the present case, the Court has concluded that the investigation authorities ordered the applicant's detention without putting forward concrete facts indicating the applicant's guilt. Therefore, the interference with the applicant's right to personal liberty and security, which was in breach of the safeguards provided in Article 19 § 3 of the Constitution, cannot be considered legitimate under Article 15 of the Constitution regulating the suspension and restriction of the fundamental rights and freedoms during "the state of emergency".

158. Consequently, the Constitutional Court has found a violation of the applicant's right to personal liberty and security under Article 19 § 3 of the Constitution, also in conjunction with Article 15 of the Constitution.

Mr. Burhan ÜSTÜN, Mr. Serdar ÖZGÜLDÜR, Mr. Osman Alifeyyaz PAKSÜT, Mr. Kadir ÖZKAYA, Mr. Rıdvan GÜLEÇ and Mr. Recai AKYEL did not agree with this conclusion.

159. In addition, considering the detention period and the available documents, it has been concluded that the applicant's complaint that he had allegedly been detained for political reasons other than those stipulated in the Constitution lacked sufficient grounds.

3. Alleged Lack of Independence and Impartiality of the Magistrate Judges

a. The Applicant's Allegations and the Ministry's Observations

160. The applicant claimed that the magistrate judges making decisions regarding his detention on remand did not comply with the principles of independence and impartiality of the courts/judges, and that the relevant courts acted as a means directed by the executive.

161. The applicant further claimed that the İstanbul 1st Magistrate Judge, the authority that reviewed his challenge against detention, had previously ordered the detention of his brother, and that therefore, the review of his detention by the relevant judge who made a decision about a similar case and legal matter was in breach of his right to an effective remedy.

162. The Ministry, in its observations, stated that these judges, as in all other courts, would act in compliance with the principles of independence and impartiality of judges, and that there was no element leading to the conclusion that they would not be able to act impartially.

163. The applicant, in his counter-statements, made no further explanation concerning the allegations in this regard.

b. The Court's Assessment

i. Applicability

164. The state of emergency continued on the date of the applicant's detention on remand, whom was accused within the scope of the events leading to the declaration of a state of emergency. In this respect, whether the authorities ordering the applicant's detention were independent and impartial will be reviewed under Article 15 of the Constitution. During this review, it will first be determined whether the incumbent authority ordering the applicant's detention had acted in breach of the guarantees set forth in the Constitution, especially Article 19 thereof, and if there is any violation, it will be assessed whether the criteria set forth in Article 15 of the Constitution rendered such a violation lawful (see *Aydın Yavuz and Others*, §§ 193-195, 242).

ii. Admissibility

165. It is explicitly laid down in Article 9 of the Constitution that judicial power shall be exercised by independent and impartial courts. In the same vein, Article 138 thereof explains how the independence of the courts should be interpreted. Accordingly, "*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 refers to the independence of the court in resolving a dispute from the legislature, the executive, the parties to the case, the environment

and other judicial bodies, and its not being influenced by them (see the Court's judgment no. E.2014/164, K.2015/12, 14 January 2015).

166. In determining whether a court is independent of the administration and the parties to the case, the manner in which its members are appointed and their term of office, the existence of guarantees against external pressure, and whether the court displays an appearance of independence are important (see *Yaşasın Aslan*, no. 2013/1134, 16 May 2013, § 28).

167. Although the impartiality of the courts is not explicitly mentioned in Article 36 of the Constitution, the right to have one's case heard by an impartial tribunal is an implicit element of the right to a fair trial in accordance with the Constitutional Court's case-law. In addition, considering that the impartiality and independence of the courts are two complementary elements; pursuant to the principle of the integrity of the Constitution, it is clear that Articles 138, 139 and 140 of the Constitution should also be taken into account in the assessment of the right to be heard by an impartial tribunal (see *Tahir Gökatalay*, no. 2013/1780, 20 March 2014, § 60)

168. The concept of impartiality of the courts is explained through the institutional structure of the court as well as the attitude of the judge dealing with the case. First of all, no impression of the lack of impartiality of legal and administrative regulations regarding the establishment and structuring of the courts should be created. Essentially, institutional impartiality is an issue related to the independence of the courts. For impartiality, first the precondition of independence must be fulfilled and, in addition, there should not be an institutional structure giving the impression of being a party (see the Court's judgment no. E.2014/164, K.2015/12, 14 January 2015).

169. The second element referring to the impartiality of the courts is related to the subjective attitude of the judges towards the case to be heard. The judge who will hear the case must be equal, impartial and unbiased towards the parties of the case and decide on the basis of his personal conviction within the framework of the rules of law under no suggestion or pressure. The attitudes to the contrary shall be subject to sanctions in the field of discipline and criminal law by virtue of the legal order (see the Court's judgment no. E.2014/164, K.2015/12, 14 January 2015).

170. It is understood that the magistrate judges, based on a general legal regulation and as a result of their appointment by the High Council of Judges and Prosecutors, perform the duties assigned by the law, including making decisions regarding detention during the investigation stage and evaluating the challenges against these decisions. It is known that the magistrate judges, which are claimed not to be independent and impartial, may reject the demands of the public prosecutor and make decisions in favour of the suspects. In this respect, the relevant judges cannot be said to lack independence and impartiality, relying on some abstract assumptions (for the Court's assessments in the same vein, see *Hikmet Kopar and Others* [Plenary], no. 2014/14061, 8 April 2015, § 114; *Hidayet Karaca* [Plenary], no. 2015/144, 14 July 2015, § 78; and *Mehmet Baransu (2)*, no. 2015/7231, 17 May 2016, §§ 64-78).

171. As a matter of fact, the Court dismissed the request for the annulment of the provision concerning the formation of magistrate judges, on the grounds; that magistrate judges are appointed by the High Council of Judges and Prosecutors, like all other judges, and therefore they enjoy the security of tenure of judges stipulated in Article 139 of the Constitution; that as in all other courts, they are organised in accordance with the principles of the independence of the courts and the security of tenure of judges; that there is no element leading to the conclusion that they cannot act impartial in their organisation and functioning; and that there are also procedural rules preventing the judge from hearing the case where it is revealed with concrete, objective and convincing evidence that he has failed to act impartial (see the Court's judgment no. E.2014/164, K.2015/12, 14 January 2015).

172. For these reasons, as it is clear that there has been no violation with regard to the applicant's allegation that the magistrate judges ordering his detention had not been independent and impartial, the Court has found this part of the application inadmissible for being *manifestly ill-founded*.

173. Accordingly, it is seen that the detention order issued by the magistrate judge against the applicant was not in breach of the guarantees enshrined in the Constitution, especially in Articles 19, 37, 138, 139 and 140 thereof; therefore, no separate examination is needed under the criteria laid down in Article 15 of the Constitution.

4. Alleged Restriction of Access to the Investigation File

a. The Applicant's Allegations and the Ministry's Observations

174. The applicant claimed that his right to personal liberty and security had been violated, stating that he could not be fully informed of the allegations against him due to the restriction order regarding the investigation file, and that he was therefore deprived of the opportunity to effectively challenge his detention.

175. The Ministry, in its observations, stated; that the applicant had been provided with a detailed information about the accusations against him and thus given the opportunity to defend himself in the presence of his lawyer; that the allegations underlying his detention on remand had been asked to him; and that the applicant could duly consider these allegations. According to the Ministry, the applicant could adequately consider this evidence and could also challenge them effectively. For these reasons, the Ministry noted that the applicant's relevant complaint should be declared manifestly ill-founded.

176. The applicant, in his counter-statements, made no further explanation concerning the allegations in this regard.

b. The Court's Assessment

177. Article 19 § 8 of the Constitution, titled "*Right to personal liberty and security*" 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".*

178. The Court has found it appropriate to examine the applicant's complaints in this part within the scope of the right to personal liberty and security enshrined in Article 19 § 8 of the Constitution.

i. Applicability

179. The charges against the applicant, which were included in the investigation file where the restriction order complained of by the

applicant had been issued, were related to the events leading to the declaration of a state of emergency in Turkey. Therefore, whether the impugned restriction had been lawful, in other words, its effects on the applicant's right to personal liberty and security will be reviewed within the scope of Article 15 of the Constitution. During this review, whether the impugned restriction was in breach of the guarantees set forth in Article 19 of the Constitution will be determined, and if there is any violation, it will be assessed whether the criteria set forth in Article 15 of the Constitution rendered such a violation lawful (see *Aydın Yavuz and Others*, §§ 193-195, 242).

ii. Admissibility

(1) General Principles

180. Article 19 § 4 of the Constitution provides that individuals arrested or detained shall be promptly notified, in all cases in writing, or orally when the former is not possible, of the grounds for their arrest or detention and the charges against them, and in cases of offences committed collectively, this notification shall be made, at the latest, before the individual is brought before a judge (see *Günay Dağ and Others*, § 168).

181. Besides, it is set forth in Article 19 § 8 of the Constitution that a person deprived of his liberty for any reason is entitled to apply to the competent judicial authority for speedy conclusion of proceedings regarding his situation and for his immediate release if the restriction imposed upon him is not lawful. Even if it is not possible to offer all safeguards inherent in the right to a fair trial through the procedure laid down in this provision, all the safeguards applicable to the alleged conditions of detention are to be secured through a judicial decision (see *Mehmet Haberal*, no. 2012/849, 4 December 2013, §§ 122, 123).

182. In this respect, in examining the requests for continuation of detention or for release, the principles of "equality of arms" and "adversarial proceedings" must be complied with (see *Hikmet Yayğın*, no. 2013/1279, 30 December 2014, § 30). The principle of equality of arms means that parties of the case must be subject to the same conditions in terms of procedural rights and requires that each party be afforded a reasonable

opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent. The principle of adversarial proceedings requires that the parties must be given the opportunity to have knowledge of and comment on the case file, thereby ensuring the parties to actively participate in the proceedings (see *Bülent Karataş*, no. 2013/6428, 26 June 2014, §§ 70 and 71).

183. Any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness within the scope of Article 19 § 8 of the Constitution. However, Article 19 § 4 of the Constitution does not entail that the information provided to the person arrested or detained in the course of his arrest or detention must embody a full list of imputed offences, in other words, all evidence forming a basis for the charges against him must be notified or disclosed (see *Günay Dağ and Others*, § 175).

184. If the applicant is asked, during the process when his statement or defence submissions are taken, questions about the content of documents access to which has been restricted or he makes a reference to the content of such documents in raising a challenge against his detention order, it must be accepted that the applicant has had access to the documents underlying his detention and had sufficient information about the contents, and thus he has had the opportunity to challenge the reasons of his detention in a sufficient manner. In such a case, the person concerned has sufficient knowledge about the contents of the documents underlying his detention (see *Hidayet Karaca*, § 107).

(2) Application of Principles to the Present Case

185. It was maintained in the application form that there was a confidentiality order regarding the investigation file, but there was no explanation as to the date on which this order was issued by the prosecutor's office or by which court. However, it has been understood that the applicant applied to the İstanbul Chief Public Prosecutor's Office on 11 October 2016, requesting that the restriction order be lifted. The Ministry submitted no observation to the effect that there was no restriction order regarding the investigation file; on the contrary, it stated

that the existence of such an order did not preclude the applicant's right to an effective remedy against his detention on remand.

186. There is no document or information as to whether the restriction order was subsequently lifted. However, it appears that by 3 May 2016 when the indictment was accepted by the 26th Chamber of the İstanbul Assize Court, the impugned restriction had automatically expired pursuant to Article 153 § 4 of Code no. 5271.

187. The accusations against the applicant as well as the facts underlying his detention were; his speech on a television programme that was broadcast the day before the coup attempt of July 15; his not being included in the investigation regarding a foundation that had been under surveillance, despite his being found to have visited it; his article titled "*Balyoz'un anlamı*" that was published in 2010; and that one dollar banknote with series (F) –stated to have been given by Fetullah Gülen or senior heads of the organisation in order to ensure recognition within the FETÖ/PDY– which was possessed by the applicant. The contents of these accusations had been explained to the applicant during the statement-taking process before the İstanbul Chief Public Prosecutor's Office.

188. It appears from the motion requesting the applicant's detention, which was issued by the İstanbul Chief Public Prosecutor's Office on 21 September 2016, that a comprehensive explanation as to the accusations brought against the applicant was made. In this respect, certain information and evidence concerning the imputed acts were laid down therein, and assessments concerning the legal qualification of these acts were also made. This letter was read out to the applicant also by the İstanbul 10th Magistrate Judge before his interrogation. It was also indicated in the interrogation report that the imputed acts were read out and explained to him. During his interrogation, the applicant gave information about the imputed acts and answered the questions that were put to him. In its detention order, the magistrate judge also made comprehensive assessments about the accusations (imputed acts) forming a basis for his detention. Moreover, in the applicant's seventeen-page petition whereby his detention was challenged, detailed defence submissions as to the procedural and substantive aspects were provided. It has been therefore

revealed that the applicant and his lawyers had access to the imputed acts as well as information underlying his detention both prior and subsequent to the interrogation.

189. In this respect, considering the fact that the main elements forming a basis for the accusations and the information on the basis of which the lawfulness of detention was assessed were notified to the applicant or to his lawyers and that the applicant was provided with the opportunity to make his defence accordingly, it could not be accepted that the applicant could not effectively challenge his detention due to the restriction order imposed during the investigation process that lasted a few months.

190. For the reasons explained above, as it is clear that there has been no violation in terms of the applicant's allegation that he could not effectively challenge his detention due to the restriction order, this part of the application must be declared inadmissible *for being manifestly ill-founded.*

191. Accordingly, as it is seen that the interference with the applicant's right to personal liberty and security by the restriction order within the investigation file was not in breach of the safeguards provided in the Constitution (in particular, Article 19 § 8), no further examination is required in accordance with the criteria specified in Article 15 of the Constitution.

5. Alleged Review of Detention without Hearing

a. The Applicant's Allegations and the Ministry's Observations

192. The applicant claimed that his right to personal liberty and security had been violated, stating that his challenge against detention had been reviewed without a hearing, which was in breach of his right to an effective remedy/challenge.

193. The Ministry, in its observations, stated that if each review of detention had been carried out by holding a hearing, the system would have been blocked, and that the applicant had the opportunity to make any legal evaluations regarding the grounds for detention and to challenge them.

194. The applicant, in his counter-statements, made no further explanation concerning the allegations in this regard.

b. The Court's Assessment

i. Applicability

195. The state of emergency continued at the time when the applicant's objection –who were accused within the scope of the events leading to the declaration of a state of emergency in Turkey– to his detention on remand was reviewed. In this respect, the effect of the review of the applicant's detention without holding a hearing on the right to personal liberty and security will be reviewed under Article 15 of the Constitution. During this review, whether the impugned restriction was in breach of the guarantees set forth in Article 19 of the Constitution will be determined, and if there is any violation, it will be assessed whether the criteria set forth in Article 15 of the Constitution rendered such a violation lawful (see *Aydın Yavuz and Others*, §§ 193-195, 242).

ii. Admissibility

(1) General Principles

196. One of the fundamental safeguards deriving from Article 19 § 8 is the right to request for an effective review of detention before a judge. Indeed, a very high importance must be attached to this safeguard considering that this is the primary legal means for a person deprived of his liberty to effectively challenge his or her detention. In this way, a detained person is given the opportunity to discuss the reasons led to his/her detention and the assessment of the investigation authorities in person before a judge or a court. Therefore, a detained person should be able to exercise this right by being heard before a judge at certain reasonable intervals (see *Firas Aslan and Hebat Aslan*, no. 2012/1158, 21 November 2013, § 66; and *Devran Duran*, § 88).

197. Moreover, decisions on detention that is rendered either e*x officio* or upon request within the scope of Article 101 § 5 or Article 267 of Law no. 5271 may be challenged before a court (see *Süleyman Bağrıyanık and Others*, § 269). As regards the review of detention orders, Article 271 sets

forth that the challenge shall be in principle concluded without a hearing; however, if deemed necessary, the public prosecutor and subsequently the defence counsel may be heard. Accordingly, in case that a review of detention or objection to detention is made through a hearing, the suspect, the accused or the defence counsel must be heard (see *Devran Duran*, § 89).

198. However, holding a hearing for reviewing objections to detention orders or assessing every request for release may lead to congestion of the criminal justice system. Therefore, safeguards enshrined in the Constitution as to the review procedure do not necessitate a hearing for review of every single objection to detention unless the special circumstances require otherwise (see *Firas Aslan and Hebat Aslan*, § 73; and *Devran Duran*, § 90).

(2) Application of Principles to the Present Case

199. The applicant was detained on remand by the İstanbul 10th Magistrate Judge on 22 September 2016, and he challenged this decision on 28 September 2016. In his petition, the applicant requested that the review be made with a hearing. However, the İstanbul 1st Magistrate Judge dismissed the applicant's challenge on 10 October 2016 over the case-file, without holding a hearing.

200. Accordingly, there are only eighteen days between the date on which the applicant was heard by the İstanbul 10th Magistrate Judge, the statements and requests of the applicant and his lawyers were received orally, and the detention order was read out to the applicant (22 September 2016) and the date on which the İstanbul 1st Magistrate Judge reviewed the applicant's challenge against his detention without a hearing (10 October 2016).

201. In one of its previous judgments, the Constitutional Court held that review of the challenge against detention without a hearing 1 month and 28 days later was not in breach of Article 19 § 8 of the Constitution (see *Mehmet Haberal*, § 128).

202. All decisions regarding detention, which are made *ex officio* or upon request, may be challenged before another court. In such a system; in the present case, the review of all challenges by holding hearings will mean that the proceedings regarding detention are repeated before the

appeal court. Therefore, the review of the applicant's challenge against his detention, which was carried out eighteen days after his detention had been ordered, without holding a hearing cannot be said to have been in breach of the principle of adversarial proceedings.

203. For these reasons, since it is clear that there was no violation regarding the applicant's allegation that the review of his appeal against the detention had been made without a hearing, this part of the application must be declared inadmissible as being *manifestly ill-founded*.

204. Accordingly, as it is seen that the interference with the applicant's right to personal liberty and security through the review of his challenge against his detention on remand without a hearing was not in breach of the safeguards provided in the Constitution (in particular, Article 19 § 8), no further examination is required in accordance with the criteria specified in Article 15 of the Constitution.

B. Alleged Violations of the Freedoms of Expression and the Press

1. The Applicant's Allegations and the Ministry's Observations

205. The applicant claimed that the evidence against him within the scope of the investigation and underlying his detention on remand were only his articles and statements on a television program, and that his detention on remand for these articles and statements was in breach of the freedoms of expression and the press.

206. Referring to the decisions already rendered by the Court, the Ministry indicated in its observations; that the applicant's complaint that he had been detained due to his statements falling within the ambit of his freedom of expression fell essentially under the scope of his alleged detention in the absence of any strong suspicion of his guilt; that the applicant's detention had a legal basis; that the relevant law was clear and foreseeable; and that the said measure pursued a legitimate aim for the purposes of public order and security. The Ministry noted that the applicant had not been detained on the sole ground of his journalistic activities and that he had been taken into custody and then detained for his acts constituting offence. The Ministry also stressed that the measure

taken was necessary in a democratic society, considering that the applicant had long been consciously contributing to the aims of the organisation in directing the public opinion through the media and staging a coup.

207. The applicant, in his counter-statements, stated that his criticism of the Government and the President was considered as paving the way for the coup, which amounted to a special violation of freedom of expression.

2. The Court's Assessment

208. Article 26 of the Constitution, titled *"Freedom of expression and dissemination of thought"*, in so far as relevant, 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."*

209. Article 28 of the Constitution, titled *"Freedom of the press"*, in so far as relevant, 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.

(…)".

i. Applicability

210. The charge resulting in the applicant's detention on remand was related to an event within the scope of the coup attempt of July 15, the main incident leading to the declaration of a state of emergency in Turkey. Therefore, the effect of the applicant's detention on remand on his freedoms of expression and the press will be reviewed within the scope of Article 15 of the Constitution. During this review, whether the impugned interference was in breach of the guarantees set forth in the Constitution, especially in Articles 26 and 28 of the Constitution, will be determined, and if there is any violation, it will be assessed whether the criteria set forth in Article 15 of the Constitution rendered such a violation lawful (see *Aydın Yavuz and Others*, §§ 193-195, 242).

ii. Admissibility

211. This part of the application must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

iii. Merits

(1) General Principles

212. The freedom of expression enshrined in Article 26 of the Constitution and the freedom of press, another form of the freedom of expression which is subject to special safeguards enshrined in Article 28 of the Constitution, constitutes one of the main pillars of a democratic society and conditions sine qua non for the progress of the society and the improvement of individuals (*Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, § 69; and *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, §§ 34-36).

213. In spite of their significance in a democratic society, the freedoms of expression and press are not absolute and may be subject to certain restrictions, provided that the safeguards set out in Article 13 of the Constitution are complied with. Unless it complies with the requirements of Article 13 of the Constitution concerning the restriction of fundamental rights and freedoms, an interference with the freedoms of expression and press would be in breach of Articles 26 and 28 of the Constitution in addition to Article 13. Therefore, it must be determined whether the interference complies with the requirements of being prescribed by law, relying on one or more justified grounds specified in the relevant provisions of the Constitution, and not being contrary to the requirements of a democratic society, as well as the principle of proportionality, which are enshrined in Article 13 of the Constitution.

214. The grounds for the restriction of the freedoms of expression and the press are set out in Article 26 § 2 of the Constitution. In restricting the freedom of the press, Articles 26 and 27 of the Constitution will in principle be applicable 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).

215. Accordingly, the freedoms of expression and the press may be restricted for the purposes of "maintaining national security", "preventing offences", "punishing offenders" and "safeguarding the

indivisible integrity of the State with its territory and nation", 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 to the press the news or articles that threaten the internal and external security of the State and its indivisible integrity with its territory and nation. 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 (for the Court's assessment in the same vein, see *Erdem Gül and Can Dündar*, § 89).

216. In order for an interference with the freedoms of expression and the press to be constitutional, it is not sufficient for it to be prescribed by law and made on the grounds specified in the Constitution. The interference must comply with the requirements of the order of a democratic society as well as being proportionate.

217. Pluralism, tolerance and open-mindedness are sine qua non in a democratic social order. A social order lacking these features cannot be regarded as "democratic" (for the Court's judgments in the same vein, see *Emin Aydın*, no. 2013/2602, 23 January 2014, § 41; *Fatih Taş* [Plenary], no. 2013/1461, 12 November 2014, § 94; and *Erdem Gül and Can Dündar*, § 90). Pluralism, tolerance, and open-mindedness –above all– must manifest themselves in the free expression of any peaceful opinion. As emphasized –with reference to the judgments of the ECHR– in many judgments of the Constitutional Court, this freedom should apply not only to information or opinions that are considered favourable or regarded as harmless or trivial, but also to those which are against the State or a part of the society and disturbing for them (see *Emin Aydın*, § 42; and *Fatih Taş*, § 94).

218. Another requirement of a democratic social order is to provide a suitable environment for individuals to develop their unique personalities. Individuals can realize their unique personalities only in an environment where they can freely express and discuss their thoughts (see *Emin Aydın*, § 41; and *Bekir Coşkun*,§ 35).

219. In addition, it is indispensable for a democratic society to ensure the participation of the people, especially in debates concerning the public. In this regard, all kinds of ideas and information regarding the debates

concerning the public should be able to be disseminated and the public should have access to them. In this context, freedom of the press, which is a special aspect of freedom of expression, has a special importance in a democratic society. As a matter of fact, the aforementioned freedom not only allows the press to disseminate ideas and information, but also enables the public to reach them (see *İlhan Cihaner (2)*, no. 2013/5574, 30 June 2014, §§ 56-58, 82; *Kadir Sağdıç* [Plenary], no. 2013/6617, 8 April 2015, §§ 49-51, 61-63; *Nihat Özdemir* [Plenary], no. 2013/1997, 8 April 2015, §§ 45-47, 57-58; and *Erdem Gül and Can Dündar*, § 87).

220. Transparency as well as accountability are also requirements of a democratic society (see *İlhan Cihaner (2)*, §§ 56-58, 82; *Kadir Sağdıç*, §§ 49-51, 61-63; *Nihat Özdemir*, §§ 45-47, 57-58; and *Erdem Gül and Can Dündar,* § 87). 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)* [Plenary], no. 2013/8598, 2 July 2015, § 55). In this context, the press imparts news and ideas by fulfilling its tasks as "a public watchdog" and also contributes to ensuring transparency and accountability in a democratic society (see *İlhan Cihaner (2)*, §§ 56-58, 82; *Kadir Sağdıç*, §§ 49-51, 61-63; *Nihat Özdemir*, §§ 45-47, 57-58; and *Erdem Gül and Can Dündar*, § 87). Thus, by virtue of the freedom of the press, the public, reaching information and ideas from different sources, can form a healthier opinion on the works and actions of those holding public authority.

221. However, Article 12 § 2 of the Constitution, which provides "*The fundamental rights and freedoms also comprise the duties and responsibilities of the individual to the society, his family, and other individuals.*", refers to the fact that people have duties and responsibilities while exercising their fundamental rights and freedoms. Accordingly, there are also some "duties and responsibilities" that apply to the press in the enjoyment of the freedoms of expression and the press. (For the duties and responsibilities of the press, see *Orhan Pala*, no. 2014/2983, 15 February 2017, § 46; *Erdem Gül and Can Dündar*, § 89; *R.V.Y. A.Ş.*, no. 2013/1429, 14 October 2015, § 35; *Fatih Taş*, § 67; and *Önder Balıkçı*, no. 2014/6009,15 February 2017, § 43).

222. Any measure interfering with the freedoms of expression and the press should meet a pressing social need and be the last resort. Any measure failing to meet these conditions cannot be considered as a measure compatible with the requirements of the democratic social order (see *Bekir Coşkun*, § 51; *Mehmet Ali Aydın*, § 68; and *Tansel Çölaşan*, no. 2014/6128, 7 July 2015, § 51).

223. In this scope, in the assessment of necessity in a democratic society, it should not be ignored in which context the impugned expressions, resulting in the interference, had been used, and they should not be taken out of the context and considered separately (see *Nilgün Halloran*, no. 2012/1184, 16 July 2014, § 52; *Fatih Taş*, § 99; *Bekir Coşkun*, § 62; *Mehmet Ali Aydın*, § 76; *Ali Rıza Üçer (2)*, § 49; and *Ergün Poyraz (2)* [Plenary], no.2013/8503, 27 October 2015, § 63).

224. In addition, while establishing the responsibility of the individual concerned, the impugned expression of him should not be assigned meanings beyond the meaning that an objective observer can comprehend (see *Bekir Coşkun*, § 63). In this context, the predictions and assumptions lacking a factual basis should be avoided.

225. The means by which the expression is made as well as the features of the said means are also of importance (see *Ali Gürbüz and Hasan Bayar*, no. 2013/568, 24 June 2015, § 68; and *Cihaner*, § 72).

In this context, the expressions used in a live broadcast on a television or radio program and the expressions used in a book or newspaper article cannot be considered in the same way. As also stated in the judgments of the ECHR, the statements in a live broadcast cannot be reformulated, changed or withdrawn before they are made public.

226. Lastly, 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)* [Plenary], no. 2013/8503, 27 October 2015, § 79; and *Erdem Gül and Can Dündar*, § 99).

227. The principle of proportionality reflects the relationship between the aim of interference and the means employed to achieve this aim. In the

assessment of the proportionality of any interference with the fundamental rights and freedoms, it must be assessed whether the means chosen to achieve the aim sought is "appropriate", "necessary" and "proportionate" (see *Fatih Taş*, §§ 90, 92, 96; and *Erdem Gül and Can Dündar*, § 90).

228. It is obvious that public authorities have a margin of appreciation in respect of the requirement of being compatible with the requirements of a democratic society and the principle of proportionality. However, in interfering with the freedoms of expression and the press as a result of the exercise of this discretionary power, the public authorities must show "relevant and sufficient" grounds (see *Fatih Taş*, § 99; and *Mehmet Ali Aydın*, § 76). It is for the Constitutional Court to make the final assessment as to whether an interference to be made within this scope complies with the safeguards enshrined in the Constitution. The Constitutional Court makes such an assessment on the basis of the grounds given by the public authorities and especially by the inferior courts (see *Erdem Gül and Can Dündar*, § 91).

(2) Application of Principles to the Present Case

229. Regard being had to the questions directed to the applicant by the investigation authorities and the grounds of his detention order, it appears that the applicant was charged principally on account of his articles and speeches. Accordingly, it has been revealed that, irrespective of the content of the articles and the speeches, the applicant's detention also constituted a breach of the freedoms of expression and the press, along with the right to personal liberty and security (for the Court's assessment in the same vein, see *Erdem Gül and Can Dündar*, § 92).

230. In the assessment of the alleged unlawfulness of detention in relation to the right to personal liberty and security, it has been concluded that the impugned interference was prescribed by the law. There is no situation to depart from this conclusion in terms of the alleged violations of the freedoms of expression and the press.

231. In addition, the applicant was detained on remand for allegedly writing articles and delivering speeches in line with the aims of the FETÖ/PDY, which carried out activities against the national security and was the

organization behind the coup attempt. Therefore, it has been concluded that the interference with applicant's freedoms of expression and the press pursued a legitimate aim in accordance with the grounds specified in the Constitution.

232. Having a legal basis and achieving a legitimate aim, however, do not suffice for the interference to be in conformity with the Constitution. For an assessment as to whether the applicant's detention constituted a breach of the freedoms of expression and press, the present case must be examined also in terms of the requirement of being necessary in a democratic society and the principle of proportionality. The Constitutional Court will make this examination over the detention process and the reasoning of the detention order.

233. Regard being had to the above-mentioned findings with respect to the lawfulness of the detention and the fact that the main basis for the accusations against the applicant was his articles and speeches, a severe measure such as detention, which was already founded to have lacked the lawfulness above, cannot be regarded as a necessary and proportionate interference in a democratic society in terms of the freedoms of expression and the press.

234. Moreover, it cannot be comprehended, from the circumstances of the present case and reasoning of the detention order, for what "pressing social need" the applicant's freedoms of expression and press were interfered, considering that the applicant expressed some ideas that were embraced by certain segment of the public.

235. In addition, in making an assessment as to the requirement of being necessary in a democratic society and proportionality, possible "deterring effect" of the interferences with the freedoms of expression and press on the applicants and generally on the media must also be taken into consideration (see *Ergün Poyraz* (2), § 79; and *Erdem Gül and Can Dündar*, § 99). In the present case, it is explicit that the applicant's being detained on remand without providing any concrete fact, other than the articles published and the statement made on Can Erzincan TV, may also have a deterrent effect on the freedoms of expression and the press.

236. For these reasons, it has been concluded that resorting to detention measure in respect of the applicant mainly on the basis of his articles and speeches and without establishing strong indications of guilt was contrary to the safeguards set out in Articles 26 and 28 of the Constitution with respect to the freedoms of expression and the press.

237. Besides, it must also be examined whether the impugned measure was legitimate and proportionate pursuant to Article 15 of the Constitution, which prescribes the suspension and restriction of fundamental rights and freedoms in time of a state of emergency.

iv. Article 15 of the Constitution

238. Freedoms of expression and the press are not among the core rights provided in Article 15 § 2 of the Constitution as inviolable even when emergency administration procedures such as war, mobilization, martial law or a state of emergency are in force. It is therefore possible in times of emergency to impose measures with respect to this right contrary to the safeguards enshrined in the Constitution in time of emergency cases.

239. Nor is this right among the non-derogable rights in the international conventions to which Turkey is a party, notably Article 4 § 2 of ICCPR and Article 15 § 2 of the ECHR, as well as the additional protocols thereto. Furthermore, it has not been found established that the interference with the applicants' right to liberty and security was in breach of any obligation (any safeguard continued to be under protection in times of emergency) stemming from the international law.

240. Besides, whether the interference had been to the "extent required by the exigencies of the situation" should also be examined. In this scope, the lawfulness of the applicant's detention on remand has been assessed, and it has been concluded that the applicant's detention on remand, in the absence of an indication of his guilt, had not been an interference required by the exigencies of the situation. In the particular circumstances of the present case, there is no circumstance to depart from this conclusion in terms of the freedoms of expression and the press.

241. Therefore, it has been also concluded that Article 15 of the Constitution, which prescribes the suspension and restriction of

fundamental rights and freedoms in time of a state of emergency does not justify the impugned interference that was in breach of the guarantees set forth in Articles 26 and 28 of the Constitution, regarding the applicant's freedoms of expression and the press.

242. For the reasons explained above, it has been concluded that, taken in conjunction with Article 15 of the Constitution, the applicant's freedoms of expression and the press under Articles 26 and 28 of the Constitution had been violated.

Mr. Burhan ÜSTÜN, Mr. Serdar ÖZGÜLDÜR, Mr. Osman Alifeyyaz PAKSÜT, Mr. Kadir ÖZKAYA, Mr. Rıdvan GÜLEÇ and Mr. Recai AKYEL did not agree with this conclusion.

C. Alleged Violation of the Prohibition of Ill-treatment

1. The Applicant's Allegations and the Ministry's Observations

243. The applicant maintained that during the first 5 days of his police custody lasting for 12 days, he had not been allowed to contact with his lawyer or any other person; that during his custody, he had been held in a cell measured 3-4 meters in width -where only two beds could be placed- with 4 inmates without any opportunity to do exercise, any access to natural light and fresh air and under fluorescent lamp that was constantly switched on; that he had not been provided with any refreshments other than water; that the foodstuff provided in the prison had been inadequate; that the place he had been placed was not clean; and that he had no opportunity to meet basic human needs, such as brushing teeth. He accordingly alleged that the prohibition of treatment incompatible with human dignity had been violated.

244. He further asserted that the practices in the prison where he had been held also amounted to a treatment incompatible with human dignity; that in this context, he had been prevented from receiving or sending letters, as well as from sending his texts he had wrote as a writer to publishing firms or editors; that he had not been allowed to do physical exercise; and that his written requests for availing of the sports hall and hairdresser in the prison had been rejected. He also maintained that his requests to be

held in the same cell, or contact, with his brother, who was also detained in that prison, had not been accepted; that he had been arbitrarily restricted from interviewing with his lawyer, and confidentiality of these interviews had been breached; that the underlying aim was indeed to punish him; and that he had not been allowed to even send a message for the ceremony held on the occasion of his father's death anniversary.

245. In its observations, the Ministry indicated that as required by the subsidiarity nature of the individual application mechanism, any allegation which had not been raised before the ordinary legal remedies and general courts could not be brought before the Constitutional Court; that in the present case, the applicant had not brought his allegations of being subjected to ill-treatment before the prosecutor's office and during his interrogation; and that nor had he requested the relevant authorities to initiate an investigation against those responsible. The Ministry accordingly concluded that the applicant had failed to exhaust the available legal remedies.

246. As to the merits, the Ministry stated that some of the issues complained of by the applicant were not true, whereas some of them were the inevitable consequences of being lawfully held in custody; and that the impugned measures were proportionate to the extent strictly required by the exigencies of the situation.

247. In his counter-statements, the applicant stated that the Ministry's observations were not acceptable; and he was still subject to certain restrictions such as doing sports, receiving and sending letters, having access to books, and meeting with his relatives. He further noted that these violations had resulted from the state of emergency and that therefore, he had no opportunity to obtain redress; and that his request for the lifting of the restrictions imposed on him was dismissed.

2. The Court's Assessment

248. The ordinary legal remedies must have been exhausted before an individual application is lodged with the Constitutional Court (see *Ayşe Zıraman and Cennet Yeşilyurt*, no. 2012/403, 26 March 2013, §§ 16, 17).

249. In the present case, as regards the alleged ill-treatment during his custody period, the applicant maintained that he had been ill-treated by the public officers while being under custody and he had been intentionally held in inhuman conditions. In consideration of these allegations under this section as a whole, it has been observed that the applicant complained of being subjected to ill-treatment by the public officers from the moment of his arrest. Although the applicant mentioned the insufficiency of the conditions of his custody, he did not clearly indicate whether the alleged ill-treatment resulted from the public officers' wrongful intent and/or negligence or from merely the conditions of detention. Therefore, it has been observed that there was no sufficient information and document to ensure the examination of these allegations directly by the Constitutional Court. In this sense, the particular circumstances of the present case must be established through a judicial and/or administrative investigation to be conducted into the question whether these allegations raised by the applicant resulted from the public officers' wrongful intent and/or negligence.

250. It has been observed that as regards the applicant's complaints concerning his detention conditions in the prison, there were administrative and judicial authorities before which he could raise his allegations and file requests to immediately put an end to the alleged ill-treatment. Although it appears from the application form and annexes thereto that in his petition submitted to the Bakırköy Chief Public Prosecutor's Office, the applicant requested that the restrictions imposed on his abilities to do sports, receive and send letters, have access to books, contact with his relatives and etc. be lifted for being in breach of the human rights, there is no information or document indicating that he had filed a complaint in this respect before the incumbent magistrate judge and/or subsequently appealed the magistrate judge's decision (if any) before an assize court. Within the scope of the provisions in question, the applicant should have primarily raised his complaints -that he had been subjected to ill-treatment due to the place and conditions of his detention- before the competent judicial authorities and requested these conditions be improved within the shortest time possible (for the Court's judgment in the same vein, see *Mehmet Baransu*, no. 2015/8046, 19 November 2015, § 30). Given the applicant's complaints,

it has been observed that unlike the applicant's allegation, there is no reason to conclude that the available legal remedies were not accessible, capable of providing redress and offering reasonable prospects of success in respect of his complaints. Therefore, in the present case, there is also no ground to require an exception to the rule of exhaustion of available legal remedies (for the Court's judgment in the same vein, see *Didem Tütenk*, no. 2013/7525, 10 June 2015, §§ 40, 41).

251. It has been accordingly concluded that the applicant directly lodged an individual application with the Constitution Court without primarily raising his complaints and the related evidence, if any, before the administrative and judicial authorities within the prescribed period and thereby awaiting for the assessment and redress of these alleged violations primarily by these authorities.

252. For these reasons, the application must be declared inadmissible for *non-exhaustion of legal remedies* insofar as it relates to the alleged violation of the prohibition of ill-treatment as the applicant lodged an individual application before resorting to the available administrative and/or judicial remedies.

D. Application of Article 50 of Code no. 6216

253. 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."

254. The applicant claimed 1,000 Euro for every day of his detention in respect of non-pecuniary compensation.

255. In the present case, the Court found violations of Article 19 § 3 as well as Articles 26 and 28 of the Constitution due to the unlawfulness of the applicant's detention giving rise also to the breach of the freedoms of expression and the press. He is still detained on remand pending his trial. In this sense, a copy of the judgment must be sent to the relevant court for the redress of the consequences of the violations in question, in addition to the award of compensation.

256. The applicant must be awarded a net amount of 20,000 Turkish liras ("TRY") in respect of the non-pecuniary damages which he sustained due to the interference with his right to personal liberty and security and which could not be redressed by merely the finding of a violation.

257. The total court expense of TRY 2,219.50 including the court fee of TRY 239.50 and counsel fee of TRY 1,980, which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For the reasons explained above, the Constitutional Court held on 11 January 2018:

A. 1. UNANIMOUSLY that the alleged violation of the right to personal liberty and security due to the unlawfulness of the applicant's detention be DECLARED ADMISSIBLE;

2. UNANIMOUSLY that the alleged violations of the freedoms of expression and the press for being detained be DECLARED ADMISSIBLE;

3. UNANIMOUSLY that the alleged violation of the prohibition of ill-treatment be DECLARED INADMISSIBLE for *the non-exhaustion of legal remedies*;

4. UNANIMOUSLY that the alleged violation of the personal liberty and security due to the unlawfulness of his police custody be DECLARED INADMISSIBLE for *the non-exhaustion of legal remedies*;

5. UNANIMOUSLY that the alleged violation of the personal liberty and security due to the magistrate judges' being in breach of the principles of an independent and impartial judge be DECLARED INADMISSIBLE for *being manifestly ill-founded*;

6. UNANIMOUSLY that the alleged violation of the personal liberty and security due to the restriction on access to the investigation file be DECLARED INADMISSIBLE for *being manifestly ill-founded*;

7. UNANIMOUSLY that the alleged violation of the personal liberty and security due to the judicial review of the challenge against his detention without a hearing be DECLARED INADMISSIBLE for *being manifestly ill-founded*;

B. 1. By MAJORITY and by dissenting opinion of Mr. Burhan ÜSTÜN, Mr. Serdar ÖZGÜLDÜR, Mr. Osman Alifeyyaz PAKSÜT, Mr. Kadir ÖZKAYA, Mr. Rıdvan GÜLEÇ and Mr. Recai AKYEL, that the right to personal liberty and security safeguarded by Article 19 of the Constitution was VIOLATED;

2. By MAJORITY and by dissenting opinion of Mr. Burhan ÜSTÜN, Mr. Serdar ÖZGÜLDÜR, Mr. Osman Alifeyyaz PAKSÜT, Mr. Kadir ÖZKAYA, Mr. Rıdvan GÜLEÇ and Mr. Recai AKYEL, that the freedoms of expression and the press safeguarded respectively by Articles 26 and 28 of the Constitution were VIOLATED;

C. That a copy of the judgment be SENT to the 26th Chamber of the İstanbul Assize Court (no. E.2017/127) in order to redress the consequences of the violation;

D. That a net amount of TRY 20,000 be PAID to the applicant in respect of non-pecuniary damage, and other compensation claims be REJECTED;

E. That the total court expense of TRY 2,219.50, including the court fee of TRY 239.50 and the counsel fee of TRY 1,980, be REIMBURSED to the applicant;

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 JUSTICES BURHAN ÜSTÜN, SERDAR ÖZGÜLDÜR AND OSMAN ALİFEYYAZ PAKSÜT

1. The information and documents in the applicant's case file reveal that the investigation authorities' acknowledgement that there was strong indication of guilt on the part of the applicant was not unfounded and arbitrary; that the applicant's detention -which had been ordered as any measure other than detention would be insufficient for ensuring the proper collection of the evidence concerning the impugned incident and the safe conduct of investigations due to the conditions prevailing subsequent to the coup attempt and also given the risk of applicant's fleeing- had factual basis; and that given the length, nature and gravity of the penalty envisaged for the offence imputed to the applicant, his detention was proportionate. We accordingly conclude that there was no violation of the right to personal liberty and security, safeguarded by Article 19 § 3 of the Constitution, due to the alleged unlawfulness of the applicant's detention.

2. As a natural consequence of the above-cited consideration, it has been observed that there is no reason to justify and require a departure from the same conclusion also with respect to the applicant's allegation that he was subject to an investigation and then detained due to his acts merely falling within the scope of the freedoms of expression and the press. We have accordingly consider that there was no violation of the freedoms of expression and the press under Articles 26 and 28 of the Constitution.

Accordingly, as we have concluded that Articles 19 § 3, 26 and 28 of the Constitution were not violated, we do not agree with the conclusion reached by the Court's majority.

DISSENTING OPINION OF JUSTICES KADİR ÖZKAYA, RIDVAN GÜLEÇ AND RECAİ AKYEL

The application concerns the alleged violations of the personal liberty and security due to the unlawfulness of the custody and detention of the applicant, a journalist, the decisions ordering his detention issued by magistrate judges lacking independence and impartiality, the restriction on access to the investigation file and the judicial review of lawfulness of his detention without a hearing; of the freedoms of expression and the press for being detained on account of his journalistic activities falling into scope of the freedom of expression; as well as of the prohibition of ill-treatment due to certain practices performed during his custody and detention.

We have agreed with the conclusions reached by the majority of the Court that the alleged violations of the applicant's right to personal liberty and security due to the unlawfulness of detention as well as of his freedoms of expression and the press for being detained on remand be declared admissible; that the alleged violations of the prohibition of ill-treatment and of the right to personal liberty and security due to the unlawfulness of his police custody be declared inadmissible for the non-exhaustion of available legal remedies; that the alleged violations of the right to personal liberty and security due to the magistrate judges' being in breach of the principles of independent and impartial judges, the restriction imposed on access to the investigation file and the judicial review of the lawfulness of his detention without a hearing be declared inadmissible for being manifestly ill-founded.

However, we have disagreed, for the reasons mentioned below, with the conclusions reached by the majority to the effect that there had been violations of the applicant's right to personal liberty and security due to the unlawfulness of his detention, as well as of his freedoms of expression and the press for being detained on remand.

The applicant's detention was ordered, pursuant to Article 100 of the Code of Criminal Procedure no. 5271, within the scope of an investigation conducted into the media structure of the Fetullahist Terrorist Organisation (FETÖ) and/or the Parallel State Structure (PDY) for allegedly having attempted to overthrow the government of the Republic of Turkey or

prevent it from performing its duties, as well as for his alleged membership of an armed terrorist organisation.

Comprehensive information and assessments as to the FETÖ/PDY are provided in the judgment in the case of *Aydın Yavuz and Others* (no. 2016/22169) issued by the Plenary of the Court on 20 June 2017.

As also noted in the above-mentioned judgment, a military coup attempt was staged in Turkey on 15 July 2016. Therefore, a nation-wide state of emergency was declared on 21 July 2016, which was subsequently extended for several times. The public and investigation authorities considered -relying on the factual basis- that the perpetrator of this coup attempt is an organisation conducting activities in Turkey for long years and called in the recent years as the Fetullahist Terrorist Organisation (FETÖ) and/or the Parallel State Structure (PDY) (see *Aydın Yavuz and Others* [Plenary], no. 2016/22169, 20 June 2017, §§ 12-25).

In the decision ordering the applicant's detention, which was issued by the İstanbul 10th Magistrate Judge, the judge demonstrated -as the strong suspicion of his having committed the imputed offence- the continuous statements in favour of the FETÖ/PDY's aims expressed by him through its media organs, whereby he paved the way for the coup attempt in question, and his explicit call for a coup attempt during a TV programme.

In the detention order of 22 September 2016, the incumbent magistrate judge concluded that prior to the coup attempt of 15 July 2016, the FETÖ/PDY had constantly broadcast to pave the way for the coup attempt through the media organs under its control; that the applicant notably tried to create the impression both within the country and abroad that those governing the country must no longer hold the power in any way; that although given his knowledge, educational background and social status, the applicant was expected to know the attempt of the FETÖ/PDY to overthrow the Government and thereby to take over the administration through its operations conducted on 17-25 December 2013, he had explicitly supported the organisation during the TV programmes broadcast by the media outlets known to be controlled by the FETÖ/PDY, also acted in line with the organisation's aims through his articles published in several printed media, and he promoted the impression through his articles and

speeches during TV programmes that those ruling the country must no longer hold the power in any way. It was further stated that the applicant contributed to the propaganda to the effect that "the President was a dictator and undermined the law", thereby leading the community not to resist against the military coup; that his expressing opinions, broadcasting and unilaterally informing the public for years, with a view to paving the way for the military coup, on a constant basis cannot be considered to fall into the scope of the right to freely express and disseminate opinions; and that the similarity between these acts performed by the applicant and the expressions used in the coup manifesto read out on the Turkish Radio and Television Association ("TRT") was also an indication that his acts had been intended to pave the way for the coup. It is accordingly noted that in his speech during the programme broadcast on Can Erzincan TV on 14 July 2016, one day before the coup attempt, his statements "… Within the State of the Republic of Turkey, there is probably another structure, whose components outside Turkey are closely observing and documenting all these events. It is not clear exactly when [it] will pull its hand out of the bag or how [it] will do so" ("*Türkiye Devleti içinde de muhtemelen bütün bu gelişmeleri dış dünyada daha fazla belgeleyen, izleyen bir başka da yapı var. Onun ne zaman torbadan elini çıkaracağı, nasıl elini çıkaracağı belli değil*"). …" were an explicit call for a coup. Relying on these findings and conclusions, the magistrate judge held that there were strong indications that the applicant had committed the offences of attempting to overthrow the Turkish Government and or to prevent it from performing its duties and of being a member of an armed terrorist organisation. It accordingly concluded that given the severity of the potential sentence to be imposed on him and the risk of his fleeing, the measures of conditional bail would remain insufficient in his case.

On 28 September 2016, the applicant lodged a challenge against his detention order.

On 10 October 2016, the İstanbul 2nd Magistrate Judge conducting an examination over the case-file dismissed his challenge on the grounds that "the imputed offences were among the catalogue offences specified in Article 100 of the CCP and his detention was proportionate to the severity of the imputed offence and its corresponding penalty".

Stating that he became aware of the dismissal decision on 13 October 2016, the applicant lodged an individual application with the Court on 8 November 2016.

As is seen, in the present case, the applicant complained of not the excessive length of his pre-trial detention but of the "initial detention" order.

Following this individual application, a criminal case was filed against the applicant before the incumbent assize court, through the indictment issued by the İstanbul Chief Public Prosecutor's Office on 14 April 2017, for attempting to overthrow the Grand National Assembly of Turkey ("GNAT") or prevent it from performing its duties, to overthrow the Turkish Government or prevent it from performing its duties, to overthrow the constitution, as well as for committing offences on behalf of an armed terrorist organisation without being a member of it.

In the indictment, the public prosecutor referred to the structure of the FETÖ/PDY and the method how it had used its units within the judiciary and security directorates in line with the FETÖ/PDY's aims during the investigations such as "*17-25 Aralık* (17-25 December)", "*MİT Tırları* (MİT Trucks)", "*Selam-Tevhid-Kudüs Ordusu*", "*Tahşiye*", "*Kozmik Oda* (Cosmic Room)" and "*Balyoz* (Sledgehammer)" or during the cases filed in relation to these investigations, as well as to FETÖ/PDY's acts and actions intended for overthrowing the Government. The public prosecutor also provided information on the media structure of the FETÖ/PDY, namely Zaman, Today's Zaman, Taraf, Samanyolu TV, Can Erzincan TV and etc. considered to have links with the FETÖ/PDY and have involved in the coup attempt.

The public prosecutor considered that the applicant had involved in this attempt in consideration of his statements implying that he had acted in line with the organisational aims and purposes on a continuous basis and that the substructure necessary for the coup attempt, of which he had been already aware, had been set up.

In the meantime, referring to the statement given by N.V., who had been a senior leader within the FETÖ/PDY but was no longer a member of

it, on 24 October 2016, it was further maintained that the top of the FETÖ/PDY's media structure was A.K. during the period after N.V.; that A.K. ensured the communication between certain media members including the applicant and Fetullah Gülen, and these media members had close relationships with A.K..

Besides, it was alleged based on telephone operator's records that the applicant had been in contact with certain persons who were allegedly senior leaders of the FETÖ/PDY and against whom a criminal case was filed for offences associated with this organisation (H.K., H.T., H.E., M.Y., A.K., Ö.A., A.B., C.U. and M.M.G.). The public prosecutor also pointed to the correspondences that had been exchanged by and between certain persons stated to be the senior leaders of the FETÖ/PDY via "ByLock" and that also contained certain information about the applicant.

Within the individual application mechanism, the Court is empowered to conduct an examination, notably on the basis of the detention process and the reasons indicated in the detention order, in consideration of the particular circumstances of every concrete case. However, it primarily falls upon the judicial authorities that have ordered the detention to make an assessment, notably with respect to initial detentions, to ascertain in every concrete case whether there is strong indication of criminal guilt, a pre-requisite of detention, whether there are grounds to justify the detention and whether the detention measure is proportionate. This is why such judicial authorities which have direct access to all parties of the case and evidence are in a better position than the Court in this sense.

In the present case, the application has been lodged not for the excessive length of detention but for the "initial detention" order.

As noted in several judgments rendered by the Court, in case of an initial detention, it may not be always possible to demonstrate the existence of strong suspicion of guilt, along with all relevant evidence. This is because one of the aims of detention is to proceed with the criminal investigation and/or prosecution in order to confirm or refute the suspicions regarding the person concerned (see *Dursun Çiçek*, no. 2012/1108, 16 July 2014, § 87; and *Halas Aslan*, no. 2014/4994, 16 February 2017, § 76). It is not therefore certainly necessary that there must be sufficient evidence at the time of

arrest and detention. Accordingly, the facts underlying the suspicions to constitute a basis for the accusation and thereby for detention must not be considered to be at the same level with the facts to be discussed at the subsequent stages of the criminal proceedings and to be a basis for the conviction (see *Mustafa Ali Balbay*, no. 2012/1272, 4 December 2013, § 73).

Especially in a state of emergency, in assessing the lawfulness of a detention ordered within the scope of an investigation conducted in relation with the incidents underlying the declaration of a state of emergency, the particular circumstances of every concrete case as well as the characteristics and severity of the incidents giving rise to the declaration of state of emergency must be taken into consideration so as to ascertain whether there is a strong indication of criminal guilt.

In case of a detention ordered following the incidents having an impact on the country as a whole like a coup attempt, it may not be always possible for the investigation authorities to establish all concrete facts (indications) confirming the criminal suspicion comprehensively at the time of detention, as well as for the judicial authorities to rely on these concrete facts in their initial detention orders. In such cases, the existence of certain indications of criminal guilt, which may be considered strong under certain circumstances by the nature of the impugned incident, may be deemed sufficient in terms of an initial detention.

However, at this point, it must be borne in mind that the right to personal liberty and security is a fundamental right which provides safeguards to protect the individuals against arbitrary interference by the State with their liberty (see *Erdem Gül and Can Dündar* [Plenary], no. 2015/18567, 25 February 2016, § 62) and that not to arbitrarily deprive individuals of their liberty is among the most significant underlying safeguards of all political systems bound by the principle of rule of law. It is a basic safeguard, which is also applicable when emergency administration procedures are in force, that any interference with individuals' liberty must not be arbitrary (see *Aydın Yavuz and Others*, § 347). One of the safeguards that would prevent any arbitrary interference with the right to personal liberty and security due to the application of detention measure is first and foremost the necessity to demonstrate the indication of criminal guilt in ordering detention.

In seeking the applicant's detention, the İstanbul Chief Public Prosecutor's Office made a reference especially to his statements during a TV programme broadcast on Can Erzincan TV one day before the coup attempt of 15 July and to some of his articles, by maintaining that he had performed certain activities on a constant basis in line with the FETÖ/PDY's aims and thereby involved in the coup attempt staged by the members of this organisation.

The İstanbul 10th Magistrate Judge, ordering the applicant's detention, stated that there was concrete evidence to demonstrate the strong criminal suspicion on the applicant's part. In its order, it was stressed that the applicant with sufficient knowledge, educational background and social status was expected to know that the FETÖ/PDY's intent was to take over the administration by overthrowing the government.

The magistrate judge also noted that the applicant had expressed opinions to pave the way for a military coup on a continuous basis, which could not be considered to amount to the freedom of expression.

According to the magistrate judge, the FETÖ/PDY constantly made broadcasts via the media organs under its control with a view to paving the way for a coup. In this sense, although the applicant was expected, given his knowledge, educational background and social status, to become aware of the FETÖ/PDY's attempt to overthrow the Government and thereby to take over the administration, he had explicitly supported the organisation during the TV programmes broadcast by the organs known to be controlled by the FETÖ/PDY, also acted in line with the organisation's aims through his articles published in several printed media, and he promoted the impression through his articles and speeches during TV programmes that those ruling the country must no longer hold this power in any way. He contributed to the propaganda to the effect that "the President was a dictator and undermined the law", thereby leading the community not to resist against the military coup.

In this regard, the magistrate judge considered that the applicant had tried to influence public opinion and clearly made a call for the coup attempt through his speech broadcast on Can Erzincan TV. To that end, during the TV programme broadcast on 14 July 2016, one day before the

coup attempt, he said "…Within the State of the Republic of Turkey, there is probably another structure, whose components outside Turkey are closely observing and documenting all these events. It is not clear exactly when [it] will pull its hand out of the bag or how [it] will do so". On the next day, a military coup attempt was staged. Therefore, in the detention order, the statements expressed by him on TV was associated with the coup attempt.

In the light of the above-mentioned findings and assessments, it cannot be said that the investigation authorities and the magistrate judge ordering the applicant's detention failed to demonstrate, in a concrete manner, the indication of criminal guilt on the applicant's part and that their assessments were unfounded and arbitrary.

Besides, the gravity of the punishment envisaged in the relevant law with respect to the criminal act of "attempting to overthrow the Government of the Republic of Turkey or to prevent it from performing its duties" constitutes one of the cases where the suspicion of fleeing arises (see *Hüseyin Burçak*, no. 2014/474, 3 February 2016, § 61; and *Aydın Yavuz and Others*, § 275). Moreover, the said offence is among the offences regarding which the "ground for arrest" may be deemed to exist *ipso facto* under Article 100 § 3 of Code no. 5271.

Given also the conditions prevailing, and the incidents taking place, in the course of and following the coup attempt, the preventive measures other than detention may not be sufficient for ensuring the gathering of evidence properly and for conducting the investigations in an effective manner (see *Aydın Yavuz and Others*, § 271; and *Selçuk Özdemir* [Plenary], no. 2016/49158, 26 July 2017, § 78).

In the present case, in ordering the applicant's detention, the İstanbul 10th Magistrate Judge relied on the gravity of the sanction associated with the imputed offence, the nature of the imputed offence as a catalogue offence laid down in Article 100 § 3 of Code no. 5271 –referring to the gravity of the offence-, the risk of his fleeing and the insufficiency of the measure of conditional bail.

Therefore, regard being had to the general conditions prevailing at the time when the applicant's detention was ordered, the above-mentioned

particular circumstances of the present case, and the content of the detention order issued by the İstanbul 10th Magistrate Judge, nor can it be said that the reasons for the applicant's detention lacked factual basis.

As regards the question whether his detention was proportionate:

In determining whether a given detention is proportionate under Articles 13 and 19 of the Constitution, all circumstances of the given case must be taken into consideration (see *Gülser Yıldırım (2)*, § 151).

It should be primarily noted that conducting an investigation into terrorist offences leads public authorities to confront with significant difficulties. Therefore, the right to personal liberty and security must not be constructed in a way that would seriously hamper the judicial authorities' and security forces' effective struggle against offences -particularly organized crimes- and criminality (see, in the same vein, *Süleyman Bağrıyanık and Others*, § 214; and *Devran Duran*, § 64). Given the scope and nature of the investigations conducted especially in relation with the coup attempt or –if not related with the coup attempt, in connection with the FETÖ/PDY, as well as the characteristics of the FETÖ/PDY, it is evident that suck kinds of investigations are more difficult and complex than the other criminal investigations (see *Aydın Yavuz and Others*, § 272; and *Selçuk Özdemir*, § 350). Therefore, the preventive measures other than detention may be insufficient for ensuring the proper collection of the evidence and for conducting the investigations in an effective manner, due to the conditions prevailing in the aftermath of the coup attempt.

It has been considered that as the applicant was taken into custody and then detained on remand, within the scope of an investigation conducted into the FETÖ/PDY's media structure, about 2 months after the coup attempt had been quelled, there is no ground to reach the conclusion that his detention was not "necessary", which is an element inherent in the principle of proportionality.

Regard being had to the above-mentioned circumstances of the present case, the conclusion reached by the İstanbul 10th Magistrate Judge –to the effect that the detention measure was proportionate and conditional bail would remain insufficient on the basis of the severity of punishment

prescribed for the imputed offences and the gravity of the acts committed by the applicant- cannot be regarded as unfounded or arbitrary.

Accordingly, we consider that there was no violation of the "right to personal liberty and security" safeguarded by Article 19 § 3 of the Constitution.

On the other hand, in the examination of the alleged unlawfulness of the applicant's detention, it has been concluded that there was plausible evidence justifying the criminal suspicion on the applicant's part; that there were reasons justifying his detention; and that the detention was proportionate. Therefore, there is no ground to reach a different conclusion with respect to the applicant's allegation that he was investigated and subsequently detained due to his acts falling into the scope of the freedoms of expression and the press.

For these reasons, we consider that there were no violations of the right to personal liberty and security, as well as of the freedoms of expression and the press.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

ŞAHİN ALPAY (2)

(Application no. 2018/3007)

15 March 2018

On 15 March 2018, the Plenary of the Constitutional Court found a violation of the right to personal liberty and security safeguarded by Article 19 of the Constitution in the second individual application lodged by *Şahin Alpay* (no. 2018/3007).

THE FACTS

[9-30] After the coup attempt of 15 July 2016, within the scope of an investigation conducted against the media structure of the Fetullahist Terrorist Organization/ Parallel State Structure (FETÖ/PDY) stated to be the organization behind the coup attempt, the applicant was detained on remand for alleged membership of an armed terrorist organization.

In the first individual application lodged by the applicant, the Plenary of the Constitutional Court found on 11 January 2018 a violation of the applicant's right to personal liberty and security, as well as, his freedoms of expression and press.

Regarding the alleged unlawfulness of the applicant's detention on remand, the Court concluded that the investigation authorities could not sufficiently demonstrate a strong indication that the applicant committed an offence, which was a prerequisite for detention as set forth in Article 19 of the Constitution. In the judgment finding also violations of the applicant's freedoms of expression and press, the Court mainly relied on its determinations as to the alleged unlawfulness of the applicant's detention on remand.

The applicant's requests for release and his appeals to this end were dismissed by the inferior courts. In their decisions, the courts mainly relied on the assessments "that the Constitutional Court cannot assess the evidence or the merits of the case or the issues to be considered in appellate review, nor can it make a substantive review, that making an examination as to the merits of the case results in "usurpation of power", that the violation judgment delivered by overstepping legal mandate cannot be considered to be final nor binding, and consequently, it would not result in the applicant's release, if otherwise, it would contradict the

legal principles concerning the courts' independence and mandating that no order or instruction could be given to the courts".

The applicant submitted a request for release following the Constitutional Court's judgment. However, his request was rejected. Therefore, he lodged another individual application on 1 February 2018.

V. EXAMINATION AND GROUNDS

31. The Constitutional Court, at its session of 15 March 2018, examined the application and decided as follows.

A. The Applicant's Allegations

32. The applicant maintained that the inferior courts failed to implement the Constitutional Court's judgment finding a violation and that his appeals against the decisions ordering the continuation of his detention on remand that were rendered after the violation judgment were dismissed on insufficient grounds in the absence of a strong indication of guilt and without relying on new evidence, which were in breach of his rights safeguarded by Articles 13, 14, 17, 19, 26, 28, 36, 40 and 153 of the Constitution.

B. The Court's Assessment

33. Article 19 § 1 and the first sentence of Article 19 § 3 of the Constitution, titled "*Personal liberty and security*", reads as follows:

> *"Everyone has the right to personal liberty and security.*
>
> *...*
>
> *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."*

34. The applicant's allegations that his right to personal liberty and security was violated due to the failure to implement the violation judgment of the Constitutional Court must be examined under Article 19 § 3 of the Constitution.

1. Admissibility

35. The application is not manifestly ill-founded and there exists no ground to declare it inadmissible, therefore it is found admissible.

2. Merits

a. General Principles

36. The relevant part of Article 2 of the Constitution, titled "*Characteristics of the Republic*", is as follows:

"The Republic of Turkey is a … state governed by rule of law."

37. The second sentence of Article 6 § 3 of the Constitution, titled "*Sovereignty*", is as follows:

"No person or organ shall exercise any state authority that does not emanate from the Constitution."

38. Article 36 § 1 of the Constitution, titled "*Freedom to claim rights*", reads as follows:

"(As amended on October 3, 2001; Article 14 of Act No. 4709) Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures"

39. The relevant part of the last paragraph of Article 138 of the Constitution, titled "*Independence of the courts*", provides as follows:

"Legislative and executive organs and the administration shall comply with court decisions…"

40. The relevant part of Article 148 of the Constitution, which regulates the "*duties and powers*" of the Constitutional Court, reads as follows:

"(As amended on September 12, 2010; Article 18 of Act No. 5982) The Constitutional Court shall … decide on individual applications …

…

(Paragraph added on September 12, 2010; Article 18 of Act No. 5982) Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities. In order to make an application, ordinary legal remedies must be exhausted.

(Paragraph added on September 12, 2010; Article 18 of Act No. 5982) In the individual application, judicial review shall not be made on matters required to be taken into account during the process of legal remedies.

(Paragraph added on September 12, 2010; Article 18 of Act No. 5982) Procedures and principles concerning the individual application shall be regulated by law.

…"

41. Article 153 §§ 1 and 6 of the Constitution, titled "*Judgments of the Constitutional Court*" is as follows:

"The decisions of the Constitutional Court are final. Decisions of annulment shall not be made public without a written justification.

…

Decisions of the Constitutional Court shall be published immediately in the Official Gazette, and shall be binding on the legislative, executive, and judicial organs, on the administrative authorities, and on persons and corporate bodies."

42. The relevant part of Article 3 of Law no. 6216, titled "*Duties and powers of the Court*", reads as follows:

"(1) Duties and powers of the Court:

…

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

…"

43. Article 45 § 1 of Law no. 6216, titled "*Right of individual application*", provides as follows:

"Every person may apply to the Constitutional Court alleging that the public power has violated any one of his/her fundamental rights and freedoms secured under the Constitution which falls into the scope of the European Convention on Human Rights and supplementary protocols thereto, which Turkey is a party to."

44. The relevant part of Article 49 § 6 of Law no. 6216, titled "*Examination on the merits*", reads as follows:

"Examination … on the applications lodged against a decision of a court shall be limited with determination of existence of a violation against a fundamental right and in what way such a violation can be removed. The chambers may not examine issues that should be dealt with through legal remedies."

45. Article 50 §§ 1, 2 and 3 of Law no. 6216, titled "*Judgments*", reads as follows:

"(1) After examination on the merits, a decision on violation or non-violation of the applicant's right is rendered. In case of a decision on violation, a judgment may be rendered on the actions to be taken in order to abolish the violation and its consequences. However, expediency controls may not be carried out and decisions may not be given in a manner of administrative act and transaction.

(2) In case the violation has been caused by a court decision the file is forwarded to the concerned court in order to renew the judicial procedure so that the violation and its results will be cleared up. In cases where any legal interest is not seen with renewal of judicial proceedings, it can be decided payment of compensation in favour of the applicant or the applicant might be directed to general courts to bring lawsuits. The court which is responsible for rendering the retrial procedure renders its decision on file to a possible extent as to remove the violation and its results which have been explained in the Constitutional Court's decision determining the violation.

(3) The judgments of the Chambers on the merits together with their

reasons are notified to the concerned parties and the Ministry of Justice and published on the website of the Court. The matters concerning the selection of judgments to be promulgated in the Official Gazette are regulated in the Internal Regulation of the Court."

46. Article 66 § 1 of Law no. 6216, titled "*Court decisions*", reads as follows:

"Decisions of the Court are final. Decisions of the Court are binding on the legislative, executive and judicial bodies and administrative authorities of the State as well as real and legal persons."

47. Article 81 §§ 4 and 5 of the Internal Regulation of the Constitutional Court, titled "*Signing, notification and publication of the decision*" is as follows:

"(4) All of the decisions of the Sections and those which bear principal significance from an admissibility point of view from amongst the decisions of the Commissions shall be published on the website of the Court.

(5) The decisions which are determined by the President of Section, which bear the quality of being pilot decisions made by the Section or bear principal significance in terms of displaying case law shall be published in the Official Gazette."

48. By an amendment to Article 148 of the Constitution in 2010, the Constitutional Court has been vested with the authority to adjudicate the individual applications. The justification of this amendment was provided as follows:

"Individual application or constitutional complaint is defined as an extraordinary legal remedy resorted to by the individuals whose fundamental rights and freedoms are violated by the public force. Today, the remedy of individual application for the protection of fundamental rights is accepted as an integral part of the constitutional jurisdiction in many civilized countries …

…

While examining whether the domestic legal remedies have been exhausted or not, the European Court of Human Rights takes into consideration whether there exists any institution for individual application in the country concerned

and considers this as an effective remedy to redress the violations. Therefore, by forming an institution to facilitate individual applications, a significant part of those alleging to have been suffering from violations can be redressed at the individual application stage, namely before lodging an application with the European Court of Human Rights. Thus, the applications to be lodged against Turkey, as well as, violation judgments may also diminish. Therefore, establishing a well-functioning individual application system in Turkey will enhance the standards based on rights and the rule of law.

…

Adopting the remedy of individual application in Turkey will on the one hand ensure a better protection for the individuals' fundamental rights and freedoms and on the other hand it will force the public authorities to comply with the Constitution and the laws. By such an amendment, with a view to protecting and safeguarding individual rights and freedoms, the citizens are provided with the right to individual application, and the Constitutional Court is granted a duty to review and adjudicate these applications.

… By this amendment, the Constitutional Court has also undertaken a mission to protect and develop the freedoms by virtue of the duty imposed on it to review individual applications."

49. According to Article 148 § 3 of the Constitution and Article 45 § 1 of Law no. 6216, every person may apply to the Constitutional Court alleging that the public authorities have violated any one of her/his fundamental rights and freedoms secured under the Constitution which falls into the scope of the European Convention on Human Rights and supplementary protocols thereto, which Turkey is a party to. Pursuant to Article 148 § 1 of the Constitution, the Constitutional Court has been given authority adjudicate these applications.

50. Pursuant to Article 49 § 6 of Law no. 6216, the Constitutional Court's examination of the individual applications is limited to "whether a fundamental right is violated or not" and to "the determination of how to remedy such a violation".

51. According to Article 148 § 4 of the Constitution and Article 49 § 6 of Law no. 6216, the issues to be considered in appellate review cannot be examined in individual applications. According to Article 50 § 1 of the latter, where a violation judgment is rendered, a substantive review cannot be made while deciding on the actions to be taken in order to redress the violation and its consequences.

52. These provisions must be assessed together with the Constitutional Court's power and duty to adjudicate individual applications, which is regulated in Article 148 §§ 1 and 3 of the Constitution. Within the scope of this duty, the Constitutional Court is obliged to examine and adjudicate the individual applications lodged with the alleged violation of fundamental rights and freedoms falling into the common protection area of the Constitution and the Convention. The Constitutional Court makes this examination in accordance with the safeguards provided by the Constitution regarding fundamental rights and freedoms.

53. Accordingly, the area the examination of which is prohibited in terms of individual application, as set forth in the Constitution and the Law, cannot be considered to be related to the safeguards provided in the Constitution concerning fundamental rights and freedoms. This area relates to the allegations of unlawfulness falling outside the scope of individual applications. In this respect, as also stated in many judgments of the Constitutional Court, unless there is an interference with fundamental rights and freedoms, it falls upon the inferior courts to implement and interpret the legal rules and assess the evidence (see for example, *Ahmet Sağlam*, no. 2013/3351, 18 September 2013, § 42; *Sabahat Beğik and Others* [Plenary], no. 2014/3738, 21 December 2017, § 23). However, in cases where there is an interference with the fundamental rights and freedoms, it is the Constitutional Court that will give the final judgment on the effect of the inferior courts' decisions and assessments on the safeguards provided in the Constitution. In this respect, any examination to be made, by taking into account the safeguards provided in the Constitution, as to whether the fundamental rights and freedoms falling into the scope of individual application have been violated or not cannot be regarded as "an assessment of an issue to be considered in appellate review" or "a substantive review".

54. Otherwise, the Constitutional Court's power and duty to adjudicate individual applications would not be functional, and this would not comply with the consideration that the individual application is an effective remedy (see above §§ 40, 48). Considering an examination to be carried out within the scope of the guarantees pertaining to fundamental rights and freedoms enshrined in the Constitution as an appellate review will result in the Constitutional Court's failure to examine and adjudicate the individual applications.

55. In this context, as the existence of "a strong indication of guilt" is considered as a prerequisite for detention in Article 19 § 3 of the Constitution, it is a constitutional requirement for the Constitutional Court to examine whether there is a strong indication of guilt in the individual applications in which the right to personal liberty and security is allegedly violated due to detention, and such an examination cannot be considered as substantive or appellate review.

56. In addition, it is provided in Article 50 § 1 of Law no. 6216 that in conclusion of an examination to be made on the merits of an individual application, it will be decided whether the applicant's right has been violated or not; and if a violation is found, the actions to be taken in order to redress the violation and its consequences will be decided.

Accordingly, the Constitutional Court's powers and duties within the scope of individual applications are not limited to the determination of whether the right has been violated or not but also include the determination of the actions to be taken in order to redress the violation and its consequences. As a matter of fact, the Constitutional Court made the following assessment in an action for annulment pertaining to Article 50 of Law no. 6216 (see the Constitutional Court, no. E.2011/59, K.2012/34, 1 March 2012).

> "…
>
> *The remedy of individual application provided in Article 148 of the Constitution … is not only an action for determination of whether a right has been violated or not, it is also an action that will have legal effects such as preventing the violation of the individuals' fundamental rights and freedoms*

by the public force, and where a violation is found, redressing the consequences of the violation or redressing the damage occurred. Therefore, it is clear that by including in the Law the necessary procedural provisions applicable to the individual applications, the legislator has enabled the Constitutional Court not only to determine the violations but also to give judgments that might redress these violations.

Furthermore … there is no rule in Article 148 of the Constitution which provides that the

Constitutional Court's power in terms of individual applications is limited to finding a violation …"

57. The Law vests the Constitutional Court with a broad discretion in determining the way to redress the violation and its consequences. The only limitation in respect thereof is the provision set out in the first paragraph of Article 50 of Law no. 6216 stating that the Constitutional Court cannot render decisions or judgments in the nature of an administrative act and action. Accordingly, such limitation implies that in determining the way to redress the violation and its consequences, the Constitutional Court cannot perform an act by substituting itself for the administration. Given the nature of the individual application mechanism, this limitation applies not only to the administration but also to the legislative and judicial bodies. The Constitutional Court adjudicates the way by which the violation and its consequences would be redressed and remits its judgment to the relevant authorities for necessary actions.

58. In this regard, the Constitutional Court, in principle, leaves a margin of appreciation to the relevant authorities in respect of the questions as to how and by which means the violation and its consequences would be redressed (see *Savaş Çetinkaya*, no. 2012/1303, 21 November 2013, § 67). Having regard to the nature of the judgment finding a violation, the relevant authority takes necessary actions with a view to redressing the violation and its consequences. In certain circumstances, the Constitutional Court taking into account the nature of the concrete case may point out the principles as to how and by which means the violation and its consequences would be redressed (see *Bizim FM Radyo Yayıncılığı ve Reklamcılık A.Ş.* [Plenary], no. 2014/11028, 18 October 2017, §§ 71 and 72).

In such case, the relevant authorities must act in line with these explicated principles. However, in exceptional cases, the relevant authorities may be left, by the very nature of the violation found, with a single choice for the redress of the consequences thereof. In such cases, the Constitutional Court clearly points out the measure required to be taken for redress of the violation and its consequences, and the relevant authority accordingly takes this measure (see *Kenan Yıldırım and Turan Yıldırım*, no. 2013/711, 3 April 2014, § 82).

59. As stated in Article 2 of the Constitution, the Republic of Turkey is a state governed by rule of law. In such state, court decisions concerning the settlement of disputes cannot be considered to be non-binding. Indeed, the last paragraph of Article 138 of the Constitution provides that the legislative and judicial bodies, as well as the administration, are to comply with the court decisions.

60. Moreover, the right to a fair trial is safeguarded by Article 36 of the Constitution. One of the elements inherent in this right is the right to access to a court which also encompasses the right to bring a dispute before a court as well as the right to request implementation of a court decision. Although implementation of court decisions does not fall into the scope of trial, it is a complementing element which ensures materialization of the outcome of the trial. In case of non-implementation of the decision, the trial would make no sense (see the Constitutional Court's judgment no. E.2014/149 K. 2014/151, 2 October 2014; and *Ahmet Yıldırım*, no. 2012/144, 2 October 2013, § 28).

61. Indeed, Article 138 of the Constitution recognizes no exception in favour of neither the legislative and judicial bodies nor the administrative authorities in complying with the court decisions and implementing these decisions without any alteration. In a state where the judicial decisions are not timely [and duly] implemented by the relevant public authorities, individuals cannot be ensured to fully enjoy rights and freedoms [shielded] through judicial decisions. Therefore, the State carries the responsibility to prevent any loss of rights likely to arise to the detriment of individuals by ensuring timely implementation of judicial decisions and to protect individuals' trust and respect for legal system. Therefore,

in a state governed by rule of law, failure to timely implement decisions of judicial authorities, which perform an essential duty for the protection of individuals' trust and respect for legal system, and thereby rendering these decisions inconclusive cannot be accepted (see *Ferda Yeşiltepe* [Plenary], no. 2014/7621, 25 July 2017, § 36). The rule of law principle cannot be realized by mere determination of unlawfulness, it also requires elimination of all consequences thereof, as well as implementation of court decisions in a timely manner (see the above-cited judgment no. E.2014/149 K. 2014/151, 2 October 2014).

62. It is explicit that non-implementation of the judgments where the Constitutional Court finds a violation of fundamental rights and freedoms within the scope of the individual application mechanism would further deepen the inconsistency with the rule of law principle within the meaning of the right to access to a court. As a matter of fact, the individual application mechanism is a means of last resort through which those alleging that their fundamental rights and freedoms have been violated seek a remedy after exhausting all available remedies. Non-implementation of judgments which are rendered through this mechanism impairs the trust of individuals and society in state of law.

63. The constitution-maker specifically sets forth the binding nature of the Constitutional Court's judgments. In Article 153 § 6 of the Constitution, it is prescribed that the Constitutional Court's judgments shall have a binding effect on the legislative, executive and judicial bodies, administrative authorities, as well as on natural and legal persons. The same provision is also set out in Article 66 § 1 of Law no. 6216. As distinct from Article 138 of the Constitution, it is indicated in that provision that the Constitutional Court's judgments shall have a binding effect also on the judicial authorities. In this respect, there is no hesitation in respect of the binding nature of the Constitutional Court's decisions including those rendered through individual application mechanism. Indeed, regard being had to the judgments rendered by the Court of Cassation and the Council of State that emphasize the binding nature of the individual application judgments of the Constitutional Court, it also appears that, in this respect, there is no practical problem in the Turkish legal system (see above §§ 22-24).

64. In addition, the Constitutional Court is empowered, by virtue of Article 148 of the Constitution, to examine the constitutionality of laws, decree laws and the Rules of Procedure of the Grand National Assembly of Turkey ("the GNAT") and, through individual application mechanism, to examine and adjudicate the alleged violation of fundamental rights and freedoms safeguarded by the Constitution only after the exhaustion of all available ordinary legal remedies.

65. In Article 153 § 1 of the Constitution, it is set forth that the Constitutional Court's judgments are final. The same provision is included also in Article 66 § 1 of Law no. 6216. Neither the Constitution nor the above-mentioned Law points out an authority to which an application may be lodged against the Constitutional Court's judgments. Accordingly, the Constitutional Court is exclusively vested with the authority to examine and to adjudicate, in a final and binding manner, the constitutionality of laws, decree laws and the Rules of Procedure of the GNAT as well as acts, actions and omissions of the public authorities.

66. In this regard, no other authority is entitled to review and monitor whether the Constitutional Court's judgment, where it finds a violation of a fundamental right and freedom through individual application mechanism, is constitutional or not. Otherwise, it would be contrary to the second sentence of Article 6 § 3 of the Constitution which reads as follows: *"No person or agency shall exercise any state authority which does not emanate from the Constitution"*.

67. Implementation of a judgment in which the Constitutional Court finds violation of a fundamental right and freedom is a necessity resulting from the Constitutional Court's authority and duty to adjudicate the individual applications. Given the rationale of the relevant constitutional amendment (see above § 48), one of the objectives sought to be achieved by introducing individual application mechanism before the Constitutional Court is to establish an effective domestic remedy for the alleged violation of fundamental rights and freedoms and, thereby, to decrease the number of applications before the ECtHR against Turkey. A judicial remedy incapable of being final and binding cannot be regarded as effective. Indeed, the ECtHR, which concludes in its *Hasan Uzun v.*

Turkey judgment that the individual application mechanism introduced by the Constitutional Court is a domestic remedy required to be exhausted before lodging an application with itself, makes a reference to Article 153 § 6 of the Constitution therein and accordingly takes into account the binding effect of the Constitutional Court's judgments over all natural and legal persons, as well as the state organs (see above § 30).

68. Besides, Article 153 § 6 of the Constitution sets forth that *"Constitutional Court's judgments shall be immediately published in the Official Gazette"*. Taken in conjunction with the other constitutional provisions, this provision cannot be interpreted that all judgments of the Constitutional Court are to be published in the Official Gazette and those which are not published in the Official Gazette would not bear any legal consequence. As a matter of fact, the Constitution explicitly indicates which judgments of the Constitutional Court would have legal effect only after being published in the Official Gazette.

69. In this respect, in Article 153 § 3 of the Constitution, it is prescribed that laws, decree laws, or the Rules of Procedure of the GNAT or provisions thereof, shall cease to have effect from the date when the annulment decisions are published in the Official Gazette. Besides, Article 69 § 9 of the Constitution sets forth that the members, including the founders of a political party whose acts or statements have caused the party to be dissolved permanently shall not be founders, members, directors or supervisors in any other party for a period of five years from the date of publication of the Constitutional Court's final judgment with its justification. Lastly, it is prescribed in Article 152 of the Constitution that no claim of unconstitutionality shall be made with regard to the same legal provision until ten years elapse after publication, in the Official Gazette, of the judgment of the Constitutional Court dismissing the application on its merits.

70. The constitutional amendment of 2010 —vesting the Constitutional with power and duty to adjudicate the individual applications— includes no provision that these judgments would bear a legal consequence only after being published in the Official Gazette. Indeed, in paragraph 5 added by this amendment to Article 153 of the Constitution, it is set forth that

procedures and principles with respect to individual application shall be regulated by law. In Article 50 § 3 of Law no. 6216 enacted after the constitutional amendment and setting out the working principles and procedures of the Constitutional Court, it is primarily set out that the individual application judgments on the merits, along with the justifications thereof, shall be remitted to those concerned and the Ministry of Justice and published on the webpage of the Constitutional Court. It is subsequently set forth that *"Issues pertaining to which of such judgments are to be published in the Official Gazette shall be indicated in the Internal Regulation"*. Accordingly, Article 81 § 5 of the Internal Regulation points out the judgments to be published in the Official Gazette at the Constitutional Court's discretion. In this respect, for the individual application judgments to bear a legal consequence, the lawmaker takes as a basis, by virtue of its power vested by the Constitution, not the publishing of the judgments in the Official Gazette but their notification to those concerned.

b. Application of Principles to the Present Case

71. In its previous judgment on the present case, the Constitutional Court found a violation of the right to personal liberty and security safeguarded by Article 19 of the Constitution, as well as the freedoms of expression and of the press respectively safeguarded by Articles 26 and 28 of the Constitution. It also held that the judgment be sent to the incumbent court in order to redress the violation and its consequences.

72. In his previous individual application, the applicant had maintained that he had been detained on remand without a strong indication of guilt on the part of him, which had been in breach of Article 19 of the Constitution (see *Şahin Alpay*, § 66).

73. The right to personal liberty and security falls into the common protection area of Article 19 of the Constitution and Article 5 of the European Convention on Human Rights. One of the issues encompassed by Article 19 of the Constitution is detention measure (see *Bekir Akkaya*, no. 2014/20387, 14 September 2017, § 32). As a matter of fact, this measure is explicitly prescribed in paragraph 3 of this Article. Therefore, there is no doubt that every person can lodge an individual application with the Constitutional Court for the alleged violation of her/his personal liberty

and security due to detention and that the Court must examine and adjudicate on such complaints.

74. In its previous judgment, the Constitutional Court examined the applicant's abovementioned allegation under Article 19 § 3 of the Constitution, which sets forth the safeguards concerning detention measure within the scope of the right to personal liberty and security. It is clearly provided therein, by the phrase "*Individuals against whom there is strong evidence of having committed an offence may be arrested…*", that one of the constitutional safeguards against detention is the existence of "a strong indication of guilt".

75. Therefore, it is a constitutional obligation for the Constitutional Court to examine whether there exists "a strong indication of guilt" concerning detentions subject to individual applications alleging violation of the right to personal liberty and security. The Constitutional Court cannot be expected to make an examination with respect to fundamental rights and freedoms by ignoring a safeguard explicitly enshrined in the Constitution. Otherwise, it would be impossible to examine individual applications complaining of violation of fundamental rights and freedoms within the framework of the criteria prescribed in the Constitution.

76. Essentially, in every concrete case, it falls in the first place upon the incumbent courts deciding detention cases to determine whether the prerequisite for detention, i.e. the strong indication of guilt, exists. This is because those authorities which have direct access to the parties and evidence are in a better position than the Constitutional Court in making such determinations (see *Gülser Yıldırım (2)* [Plenary], no. 2016/40170, 16 November 2017, § 123). However, determinations of these authorities are subject to review of the Constitutional Court. This review must be conducted especially over the detention process and the grounds of detention order by having regard to the circumstances of the concrete case (see *Erdem Gül and Can Dündar* [Plenary], no. 2015/18567, 25 February 2016, § 79; and *Selçuk Özdemir* [Plenary], no. 2016/49158, 26 July 2017, § 76; and *Gülser Yıldırım (2),* cited-above, § 124).

77. Besides, within the meaning of Article 19 § 3 of the Constitution, it is a constitutional obligation for the inferior courts deciding detention cases

to demonstrate existence of strong indication of guilt −the prerequisite for detention− on the basis of concrete facts. This cannot be regarded as premature statement of the opinion by a judge concerning the merits of the case (*ihsas-ı rey*). In this respect, it is out of question not to fulfil a constitutional obligation due to the prohibition of such premature statements. Moreover, Article 101 § 2 of the Code of Criminal Procedure no. 5271 and dated 4 December 2004 also sets forth that in detention orders, evidence which demonstrates strong indication of guilt must be explicitly demonstrated, along with the concrete facts supporting such evidence.

78. In its previous judgment, the Constitutional Court reviewed the case with the abovementioned scope and method and concluded that the investigation authorities failed to sufficiently demonstrate "the strong indication of guilt", a prerequisite for detention pursuant to Article 19 of the Constitution. Accordingly, in this judgment, the Constitutional Court made an examination as to the right to personal liberty and security, − one of the fundamental rights and freedoms falling into the scope of the individual application−, under a safeguard explicitly enshrined in Article 19 of the Constitution. Therefore, the Court's review cannot be regarded as "the assessment of the issues to be considered in appellate review" or "a substantive review" (see above §§ 53 and 55). Furthermore, as also expressed in the previous judgment, the Constitutional Court's review in this respect is limited to the assessment of the lawfulness of the applicant's detention on remand, independently of the investigation and prosecution conducted against the applicant as well as the possible results of the proceedings (see *Şahin Alpay*, § 71). Therefore, the judgment in question cannot be considered to have included an assessment as to the merits of the criminal proceedings against the applicant.

79. In addition, in its previous judgment, the Constitutional Court held that the judgment be remitted to the incumbent court in order to redress the previously found violation and its consequences. There is no doubt that the Constitutional Court's judgment finding a violation with respect to the applicant is final and binding. The Constitutional Court's judgments finding a violation cannot be subject to constitutional or legal review by another authority. The contrary assessments of the inferior courts adjudicating on the applicant's requests for release (see above § 18)

lack any constitutional or legal basis. Besides, in order for the judgment finding a violation in respect of the applicant to bear a legal consequence, its publishing in the Official Gazette is not a requisite. In this respect, its notification to the relevant authority would suffice (see above § 70).

80. In circumstances where the Constitutional Court finds a violation and orders redress of this violation and consequences thereof, the relevant authorities must act in a manner that would redress the violation and its consequences by paying due regard to the nature of the judgment finding violation (see above §§ 57 and 58). Accordingly, in the present case, the inferior courts' duty is not to assess the scope of duties and powers of the Constitutional Court but to redress the violation and its consequences. This cannot be construed as an order or instruction directed to courts within the meaning of Article 138 of the Constitution, but rather the materialization of the right of access to a court in a state of law. Indeed, as stated above, Article 153 § 6 of the Constitution, distinctively from Article 138 thereof, explicitly states that the judgments of the Constitutional Courts are binding on judicial authorities as well (see above § 63).

81. In its judgment finding a violation in respect of the applicant, the Court concluded that the investigation authorities could not sufficiently demonstrate a "strong indication" that the applicant committed an offence, which is a prerequisite for detention as set forth in Article 19 of the Constitution.

82. Following the Constitutional Court's such judgments finding a violation, the inferior courts must release the applicant against whom the prerequisite of detention could not be demonstrated. There is no other way to redress the violation and its consequences, save very exceptional cases where "a strong indication of guilt" can be demonstrated on the basis of new facts other than those that had been relied for detention and, therefore, that had not been assessed in the Constitutional Court's judgment finding a violation. It must be also stressed, however, the margin of appreciation afforded to the inferior courts in this respect is very limited compared to the initial detention order. In such cases, final assessment as to whether "a strong indication of guilt" has been demonstrated or not on the basis of new facts and evidence falls upon the Constitutional Court.

83. In the present case, the inferior courts have not released the applicant following the Constitutional Court's judgment finding a violation, nor have they demonstrated the existence of the abovementioned exceptional case.

84. Therefore, it is understood that the inferior courts have failed to redress the violation found by the Constitutional Court with respect to the applicant, as well as its consequences.

85. In this respect, in the absence of a strong indication of guilt on the part of the applicant, continuation of his detention on remand violates the safeguards provided in Article 19 of the Constitution.

86. It is concluded that the applicant's right to personal liberty and security has been violated due to non-implementation of the Constitutional Court's judgment on the applicant's detention on remand, in a manner also contradicting the safeguards inherent in the right to access to a court.

87. Besides, regard being had to the fact that the application in essence concerns the continuation of the applicant's detention on remand in spite of the Court's judgment finding a violation for non-existence of a strong indication of guilt, the Constitutional Court made no further examination on the applicant's allegations that his some other fundamental rights and freedoms were also violated due to continuation of his detention on remand.

3. Application of Article 50 of Code no. 6216

88. The applicant requested discontinuation of his detention on remand and to be awarded 100,000 Turkish Liras ("TRY") as non-pecuniary damage.

89. The applicant is still detained on remand (see above § 21). Considering the nature of the violation found, there is no other way than releasing the applicant in order to redress the violation and its consequences. Therefore, the judgment must be remanded to the trial court for release of the applicant in order to redress the violation and its consequences.

90. A net amount of TRY 20,000 must be awarded to the applicant for non-pecuniary damages that he suffered due to the interference with his right to personal liberty and security and that cannot be redressed by only finding a violation.

91. The court expense of TRY 2,274.70, including the court fee of TRY 294.70 and counsel fee of TRY 1,980, which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

The Constitutional Court unanimously held on 15 March 2018 that

A. The applicant's alleged violation of his right to personal liberty and security be DECLARED ADMISSIBLE;

B. The right to personal liberty and security safeguarded by Article 19 of the Constitution was VIOLATED;

C. A copy of the judgment be REMITTED to the 13th Chamber of the Istanbul Assize Court (E.2017/112) for redress of the violation and its consequences by means of ordering discontinuation of the applicant's detention on remand;

D. A net amount of TRY 20,000 be PAID to the applicant in respect of non-pecuniary damage, and his other compensation claims be REJECTED;

E. The total court expense of TRY 2,274.70 including the court fee of TRY 294.70 and counsel fee of TRY 1,980 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

ERDAL TERCAN

(Application no. 2016/15637)

12 April 2018

On 12 April 2018, the Plenary of the Constitutional Court declared inadmissible the alleged unlawfulness of detention for being *manifestly ill-founded*; found no violation of the right to personal liberty and security as regards the alleged unreasonable length of detention; and found a violation of the right to personal liberty and security as regards the alleged review of detention without being brought before a judge/court in the individual application lodged by *Erdal Tercan* (no. 2016/15637).

THE FACTS

[11-74] On 16 July 2016, following the coup attempt of 15 July 2016, the applicant, who was holding office as a Justice of the Constitutional Court, was taken into custody within the scope of an investigation initiated by the Ankara Chief Public Prosecutor's Office. On 20 July 2016, the applicant's detention was ordered for his alleged membership of an armed terrorist organization.

On 25 October 2017, the Ankara Chief Public Prosecutor's Office issued a motion addressed to the Chief Public Prosecutor's Office of the Court of Cassation for bringing a criminal case against the applicant alleged to be a member of an armed terrorist organization.

By the indictment of 16 January 2018 issued by the Chief Public Prosecutor's Office at the Court of Cassation, a criminal case was filed against him before the 9th Criminal Chamber of the Court of Cassation for his alleged membership of an armed terrorist organization.

The case has been pending by the examination date of the individual application, and the applicant is still detained on remand.

V. EXAMINATION AND GROUNDS

75. The Constitutional Court, at its session of 12 April 2018, examined the application and decided as follows.

A. Alleged Violation of the Presumption of Innocence

1. The Applicant's Allegations and the Ministry's Observations

76. The applicant maintained; that in a newspaper article published before the coup attempt, it had been stated that some justices of the Constitutional Court would be arrested; and that while there had been no procedures of arrest, custody or detention on remand yet, the Ankara Chief Public Prosecutor's Office had announced at the time of the coup attempt at night that investigations had been launched against some judges taking office in supreme courts, which demonstrated that the judges to be investigated had already been determined previously. In this regard, the applicant claimed that his presumption of innocence had been violated.

77. The Ministry, in its observations, made no explanation concerning the applicant's allegations in this regard.

2. The Court's Assessment

78. Presumption of innocence provides that no one shall be considered guilty until proven so before a court of law. As a result thereof, since the individual's innocence is "essential", the burden of proof rests with the prosecution and thus no one can be imposed the liability to prove her/his innocence. Moreover, nobody can be considered as guilty by neither judicial authorities nor public authorities until their guilt is found established with a court decision. In this scope, the presumption of innocence is a principle that covers those who have been charged with a criminal offence but not convicted yet (see *Kürşat Eyol*, no. 2012/665, 13 June 2013, §§ 26 and 27).

79. The said presumption provides protection against being declared guilty by public authorities until proven guilty. In addition, freedom of expression, guaranteed by Article 26 of the Constitution, also includes the freedom to receive and impart information. For this reason, the presumption of innocence safeguarded by Article 38 § of the Constitution does not prevent the authorities from informing the public about a criminal investigation being carried out. However, since the presumption of innocence must be respected, the said provision of the Constitution

requires that information be imparted with all the necessary attention and prudence (see *Nihat Özdemir* [Plenary], no. 2013/1997, 8 April 2015, § 22).

80. In the present case, in a statement issued by the Ankara Chief Public Prosecutor's Office while the coup attempt had not ended, it was announced that detention orders were given against the persons who were in contact with the FETÖ/PDY, the perpetrator of the coup attempt, and among these persons were some members of the supreme court. In the aforementioned statement, the applicant's name was not mentioned and no such case was established either.

81. The announcement made by the Ankara Chief Public Prosecutor's Office while the coup attempt was continuing, without mentioning the applicant's name, to the effect that investigation had been launched into the incident and against the members of the FETÖ/PDY, the organisation behind the coup attempt, and that some suspects were taken into custody cannot be regarded as declaring the applicant guilty or criminalising him (for the judgments of the Court in the same vein, see *Mustafa Başer and Metin Özçelik*, no. 2015/7908, 20 January 2016, §§ 115-117; *Süleyman Bağrıyanık and Others*, no. 2015/9756, 16 November 2016, §§ 180 and 181). Besides, announcement to the public of the fact that an investigation has been initiated against a person per se does not contravene the presumption of innocence.

82. For the reasons explained above, since it is clear that there is no violation of the applicant's presumption of innocence, this part of the application must be declared inadmissible for being *manifestly ill-founded*.

B. Alleged Violation of the Right to a Fair Trial

1. The Applicant's Allegations and the Ministry's Observations

83. The applicant claimed that his right to a fair trial had been violated, stating that during the statement-taking process before the prosecutor's office and the inquiry before the magistrate judge, he was asked general questions about the charges against him, as well as the concrete accusations and evidence against him were not explained, thus restricting his opportunity to defend himself against the charges and alleged grounds.

84. The Ministry, in its observations, did not make any explanation about these allegations.

2. The Court's Assessment

85. The last sentence of Article 148 § 3 of the Constitution provides as follows:

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

86. Article 45 § 2, titled *"Right to individual application"*, of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court 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".*

87. Pursuant to the said provisions, individual application to the Constitutional Court is a remedy of subsidiary nature which may be resorted to in case of inferior courts' failure to redress the alleged violations. As required by the subsidiary nature of individual application remedy, in order for an individual application to be lodged with the Court, ordinary legal remedies must first be exhausted (see *Ayşe Zıraman and Cennet Yeşilyurt*, no. 2012/403, 26 March 2013, §§ 16 and 17).

88. In the present case, the applicant lodged an individual application while the investigation process was still pending; a criminal case was filed against him afterwards. It appears that the prosecution process against the applicant has been continuing as of the date when his individual application has been adjudicated by the Constitutional Court. As a matter of fact, during the proceedings before the inferior courts as well as the subsequent appeal process, the applicant had the opportunity to put forward his complaints that he had not been informed of the facts forming bases for the charges against him as stated in the application form, which was allegedly in breach of his right to be aware of the charges (alleged offence) against him. In this context, it has been observed that the applicant

submitted in the individual application process his complaints about the violation of the right to a fair trial during the investigation process, without waiting for the outcome of the proceedings before the inferior courts and the subsequent appeal process.

89. Consequently, this part of the application must be declared inadmissible for *non-exhaustion of legal remedies* on the ground that the applicant raised the alleged violations of his fundamental rights and freedoms in the individual application process without exhausting the legal remedies pending before the inferior courts and appeal authorities.

C. Alleged Violations of the Right to Respect for Private Life and Right to Respect for Home

1. The Applicant's Allegations and the Ministry's Observations

90. The applicant, as a Justice of the Constitutional Court, claimed that his right to respect for his private life as well as his right to respect for his home had been violated, stating that the Ankara Chief Public Prosecutor's Office did not have the authority conduct an investigation against him and that therefore his home and office had been searched based on a search warrant issued by unauthorized authorities.

91. The Ministry, in its observations, did not make any explanation about these allegations.

2. The Court's Assessment

92. In order for an individual application to be able to be lodged with the Constitutional Court, the ordinary legal remedies must be exhausted (see *Ayşe Zıraman and Cennet Yeşilyurt*, §§ 16, 17).

93. Article 141 § 1 (i) of Law no. 5271 provides that individuals who were subject to a search warrant that was disproportionately executed during the investigation or prosecution processes may claim their damages.

94. As regards the alleged unlawfulness of the search conducted by the investigation or judicial authorities with respect to the suspects during the investigation or prosecution processes, the Court has concluded, referring

to the relevant case-law of the Court of Cassation, that although the primary judicial proceedings were not concluded on the date of examination of the individual application, the action for compensation stipulated in Article 141 of Law no. 5271 was an effective legal remedy to be exhausted (see *Alaaddin Akkaşoğlu and Akis Yayıncılık San. ve Tic. A.Ş.*, no. 2014/18247, 20 December 2017, §§ 18-30).

95. In the present case, in accordance with the written instruction of the Ankara Chief Public Prosecutor's Office, the applicant's home, office and car were searched on 16 July 2016. The lawfulness of these searches can be reviewed within the scope of the case to be filed under Article 141 of Law No. 5271. Compensation may also be awarded to the applicant where it is determined, through the action to be brought under this article, that the searches in question were unlawful. Accordingly, it has been concluded that the remedy of action for compensation specified in Article 141 of Law no. 5271 was an effective remedy available to the applicant and capable of redressing his damages, and that the examination of the individual application that has been lodged without exhausting this ordinary remedy is incompatible with the "subsidiary nature" of the individual application mechanism.

96. For these reasons, since it has been understood that an individual application has been lodged regarding the alleged violations of the applicant's right to respect for his private life as well as the inviolability of domicile without exhaustion of available legal remedies, this part of the application must be declared inadmissible for *non-exhaustion of legal remedies*.

D. Alleged Violation of the Right to Personal Liberty and Security

1. Alleged Unlawfulness of the Applicant's Detention on Remand

a. The Applicant's Allegations and the Ministry's Observations

97. The applicant claimed that his right to liberty and security had been violated, stating that he had been arrested despite the lack of suspicion of guilt as well as the evidence justifying it, and that there had been no risk that he would tamper with the evidence or flee.

98. The applicant also argued that he had been detained regardless of the safeguards afforded to him by virtue of his duty. According to the applicant, since he was a justice of the Constitutional Court on the date of his detention, the Plenary of the Constitutional Court should have ordered his investigation or prosecution and the investigation should have been conducted by the Court. The applicant further claimed that the investigation launched by the Ankara Chief Public Prosecutor's Office had been unlawful for lack of competence, as well as that the Ankara 5th and 6th Magistrate Judges, which ordered the applicant's detention on remand and dismissed his subsequent appeal, lacked jurisdiction.

99. The applicant, considering that the situation of discovery *in flagrante delicto* could only be the case for those who actively participated in the coup attempt or who were caught committing an offence, claimed that membership of a terrorist organisation that was a continuing offence did not require the immediate application of the provisions applicable to the cases of *in flagrante delicto*. The applicant maintained that he had no relation with the coup attempt or the organisation, and that he had not been caught *in flagrante delicto*.

100. The applicant also claimed that the detention order and the decision dismissing his objection to his detention on remand contained no concrete accusation or evidence justifying the strong suspicion of guilt; did not explain the facts regarding the suspicions of tampering with evidence and fleeing as well as the reasons why the judicial control would not be sufficient; and did not assess whether his detention on remand was proportionate, although he exercised an important jurisdiction as a justice of the Constitutional Court.

101. In addition, the applicant argued that he was detained without an investigation justifying his detention on remand in terms of whether he committed the offence of membership of an armed terrorist organisation and whether he had any relation or connection with the said organisation, and that therefore an image of his being guilty was created in the public.

102. Lastly, the applicant claimed that the Ankara Chief Public Prosecutor's Office and the Ankara 5th Magistrate Judge considered him to have belonged to a particular religious group and subsequently to have

been a member of an armed terrorist organisation and had links with this organisation without any legal basis or justification, which according to him constituted discrimination on religious grounds.

103. The Ministry, in its observations, specified that according to Article 161 § 8 of Law no. 5271, public prosecutors could directly investigate certain offences even if they had been committed during or as required by their duties, and that the membership of an armed terrorist organisation with which the applicant was charged fell within this scope; therefore, the special investigation procedures laid down in Law no. 6216 was not applicable to the impugned offence. The Ministry also pointed to the fact that the impugned offence was of continuous nature and that there was a situation of discovery *in flagrante delicto*.

104. The Ministry, noting that it had been stated by the Ankara 5th Magistrate Judge ordering the applicant's detention that there had been concrete evidence in the case file regarding the imputed offence, stated that there were sufficient indications and grounds justifying the applicant's detention on remand, which was therefore a proportionate measure.

105. Consequently, the Ministry considers that the applicant's allegations in this regard are manifestly ill-founded.

b. The Court's Assessment

106. 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."*

107. Article 19 § 1 and the first sentence of Article 19 § 3 of the Constitution read as follows:

> *"Everyone has the right to personal liberty and security.*

...

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."

108. The applicant's allegations in this part should be examined within the scope of the right to personal liberty and security and from the standpoint of Article 19 § 3 of the Constitution.

109. In addition, alleged violation of the principle of equality set forth in Article 10 of the Constitution cannot be considered in abstract terms, and it must be considered in connection with other fundamental rights and freedoms within the scope of individual application. Accordingly, the applicant's allegation that there was a difference between the treatment to the others who were in a similar situation with him and the treatment of him, and that this difference did not have a legal basis and was based on a discriminatory ground such as colour, sex, religion, language, etc., which was according to him in breach of the principle of equality, but about which he failed to provide reasonable evidence, should be dealt with within the scope of the right to personal liberty and security (for the Court's assessments in the same vein, see *Onurhan Solmaz*, no. 2012/1049, 26 March 2013, §§ 33, 34; and *İrfan Gerçek*, no. 2014/6500, 29 September 2016, § 32).

i. Applicability

110. Article 15 of the Constitution entitled "*Suspension of the exercise of fundamental rights and freedoms*" reads as follows:

"In times of war, mobilization, martial law or a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures which are contrary to the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated.

Even under the circumstances indicated in the first paragraph, the individual's right to life, the integrity of his/her corporeal and spiritual existence

shall be inviolable except where death occurs through acts in conformity with law of war; no one shall be compelled to reveal his/her religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties shall not be made retroactive; nor shall anyone be held guilty until so proven by a court ruling."

111. The Court specified that in examining the individual applications against emergency measures, it would take into account the protection regime set out in Article 15 of the Constitution with respect to fundamental rights and freedoms. Accordingly, besides the existence and declaration of a state of emergency, in cases where the measure constituting an interference with the fundamental rights and freedoms –subject of the individual application– is related to the state of emergency, then the application will be examined in accordance with Article 15 of the Constitution (see *Aydın Yavuz and Others*, §§ 187-191). The Court also concluded that the effect of the measures taken by the public authorities until the completion of the procedural processes concerning the declaration of a state of emergency after the coup attempt of 15 July, on fundamental rights and freedoms must also be examined under Article 15 of the Constitution (see *Aydın Yavuz and Others*, § 241).

112. The accusation which was brought against the applicant by the investigation authorities and for which he was detained on remand is his alleged membership of the FETÖ/PDY that was stated to be the structure behind the coup attempt. The Court considered that the impugned accusation was related to the incidents underlying the declaration of a state of emergency (see *Selçuk Özdemir*, § 57).

113. In this respect, the lawfulness of the applicant's detention will be reviewed under Article 15 of the Constitution. Prior to such review, whether the applicant's detention on remand was in breach of the guarantees set forth in Articles 13, 19 and in other Articles of the Constitution will be determined, and if there is any violation, it will be assessed whether the criteria set forth in Article 15 of the Constitution rendered such a violation lawful (see *Aydın Yavuz and Others*, §§ 193-195, 242; and *Selçuk Özdemir*, § 58).

ii. Admissibility

(1) General Principles

114. It is set forth in Article 19 § 1 of the Constitution that everyone has the right to personal liberty and security. In addition to this, the circumstances in which individuals may be deprived of liberty with due process of law are laid down in Article 19 §§ 2 and 3 of the Constitution. Accordingly, the right to personal liberty and security may be restricted only in cases where one of the situations laid down in this Article exists (see *Murat Narman*, no. 2012/1137, 2 July 2013, § 42).

115. In addition, an interference with the right to personal liberty and security will lead to a violation of Article 19 of the Constitution in the event that it does not comply with the conditions prescribed in Article 13 of the Constitution where the criteria for restricting fundamental rights and freedoms are set forth. For this reason, it must be determined whether the restriction complies with the conditions set out in Article 13 of the Constitution, i.e., being prescribed by law, relying on one or more of the justified reasons provided in the relevant articles of the Constitution, and not being in breach of the principle of proportionality (see *Halas Aslan*, no. 2014/4994, 16 February 2017, §§ 53-54).

116. Article 13 of the Constitution provides that fundamental rights and freedoms may be restricted only by law. On the other hand, it is set out in Article 19 of the Constitution that the procedures and conditions under which the right to personal liberty and security may be restricted must be prescribed by law. Accordingly, it is necessary in accordance with Articles 13 and 19 of the Constitution that the detention on remand, as an interference with personal liberty, must have a legal basis (see *Murat Narman,* § 43; and *Halas Aslan*, § 55).

117. According to Article 19 § 3 of the Constitution, individuals against whom there is strong evidence of having committed an offence may be arrested by decision of a judge for the purposes of preventing escape or preventing tampering with evidence, as well as in other circumstances prescribed by law and necessitating detention (see *Halas Aslan*, § 57).

118. Accordingly, detention of a person primarily depends on the presence of a strong indication of having committed an offence. This is a *sine qua non* sought for detention. For this, it is necessary to support an allegation with plausible evidence which can be considered as strong. The nature of the facts which can be considered as convincing evidence is to a large extent based on the particular circumstances of the case (see *Mustafa Ali Balbay*, no. 2012/1272, 4 December 2013, § 72).

119. For an initial detention, it may not always be possible to present all evidence indicating that there is a strong suspicion of having committed offence. As a matter of fact, another purpose of detention is to take the criminal investigation or prosecution forward by means of verifying or refuting the suspicions against the relevant person (see *Dursun Çiçek*, no. 2012/1108, 16 July 2014, § 87; and *Halas Aslan*, § 76). Therefore, it is not absolutely necessary that the sufficient evidence have been collected in the course of arrest or detention. Thus, the facts which will form a basis for the criminal charge and hence the detention must not be assessed at the same level with the facts that will be discussed at the subsequent stages of the criminal proceedings and constitute a basis for conviction (see *Mustafa Ali Balbay*, cited above, § 73).

120. Besides, it is provided in Article 19 of the Constitution that an individual may be detained for the purpose of preventing "escape" or "tampering with evidence". However, the constitution-maker, by using the expression of "…*as well as in other circumstances prescribed by law and necessitating detention*", points out that the grounds for detention are not limited to those set forth in the Constitution and sets forth that the grounds for detention other than those provided in the relevant Article can only be prescribed by law (see *Halas Aslan*, § 58).

121. Article 100 of Law no. 5271 regulates the grounds for detention and sets forth these grounds. Accordingly, detention may be ordered in cases where the suspect or accused escapes or hides or there are concrete facts which raises the suspicion of escape or where the behaviours of the suspect or accused tend to show the existence of a strong suspicion of tampering with evidence or attempting to put an unlawful pressure on witnesses, victims or other individuals. In the relevant Article, the offences regarding

which the ground for arrest may be deemed to exist *ipso facto* are enlisted, provided that there exists a strong suspicion of having committed those offenses (see *Ramazan Aras*, no. 2012/239, 2 July 2013, § 46; and *Halas Aslan*, cited above, § 59). However, for an initial detention, it may not be always possible, by the very nature of the case, to present concretely all grounds for detention set forth in the Constitution and the Law (see *Selçuk Özdemir*, § 68).

122. It is also set out in Article 13 of the Constitution that the restrictions on fundamental rights and freedoms cannot be contrary to the "principle of proportionality". The expression of "*requiring detention*" set out in Article 19 § 3 of the Constitution points out the proportionality of detention (see *Halas Aslan*, § 72).

123. The principle of proportionality consists of three sub-principles, which are "suitability", "necessity" and "proportionality *stricto sensu*". Suitability requires that the interference envisaged is suitable for achieving the aim pursued; the necessity requires that the impugned interference is necessary for achieving the aim pursued, in other words, it is not possible to achieve the pursued aim with a less severe interference; and proportionality requires that a reasonable balance is struck between the interference with the individual's right and the aim sought to be achieved by the interference (see the Court's judgment no. E.2016/13, K.2016/127, 22 June 2016, § 18; and *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 38).

124. In this scope, one of the issues to be taken into consideration is the proportionality of the detention, given the gravity of offence as well as the severity of the punishment to be imposed. As a matter of fact, it is provided in Article 100 of Law no. 5271 that no detention shall be ordered if the detention is not proportionate to the significance of the case, expected punishment or security measure (see *Halas Aslan*, § 72).

125. In addition, in order for a detention to be proportionate, other protection measures alternative to detention should not be sufficient. In this framework, in cases where the obligations imposed by virtue of conditional bail, which has less effect on fundamental rights and freedoms compared to detention, are sufficient to achieve the legitimate aim

pursued, the detention measure should not be applied. This issue is set forth in Article 101 § 1 of Law no. 5271 (see *Halas Aslan*, § 79).

126. In every concrete case, it falls in the first place upon the judicial authorities deciding detention cases to determine whether the prerequisites for detention, i.e., the strong indication of guilt and other grounds exist, and whether the detention is a proportionate measure. As a matter of fact, those authorities which have direct access to the parties and evidence are in a better position than the Constitutional Court in making such determinations (see *Gülser Yıldırım (2)* [Plenary], no. 2016/40170, 16 November 2017, § 123).

127. However, it is for the Constitutional Court's to review whether the judicial authorities have exceeded the discretion conferred upon them. The Constitutional Court's review must be conducted especially over the detention process and the grounds of detention order by having regard to the circumstances of the concrete case (see *Erdem Gül and Can Dündar* [Plenary], no. 2015/18567, 25 February 2016, § 79; and *Selçuk Özdemir*, § 76; and *Gülser Yıldırım (2)*, § 124). As a matter of fact, it is set out in Article 101 § 2 of Code no. 5271 that in detention orders, evidence indicating strong suspicion of guilt, existence of grounds for detention and the proportionality of detention will be justified with concrete facts and clearly demonstrated (see *Halas Aslan*, § 75; and *Selçuk Özdemir*, § 67).

(2) Application of Principles to the Present Case

128. In the present case, it must be primarily ascertained whether the applicant's detention had a legal basis.

129. The applicant's detention was ordered pursuant to Article 100 of Code no. 5271 for membership of an armed terrorist organisation, within the scope of the investigation conducted for his alleged membership of the FETÖ/PDY, the organisation behind the coup attempt.

130. The applicant also complained that he had been detained regardless of the safeguards afforded to him by virtue of his duty.

131. Article 16 § 1 of Law no. 6216 provides that opening an investigation for the offences arising from the duties of the members of the

Constitutional Court, or that were allegedly committed by them during their offices, and for their personal offences and disciplinary acts, shall depend on the decision of the Plenary, and that however, in a situation of *in flagrante delicto* that fall under the competence of the assize court, the investigation shall be conducted as per general provisions.

132. Article 17 of the same Law provides that with the exception of cases of *in flagrante delicto* relating to personal offences that fall under the jurisdiction of the assize court, protective measures concerning the members of the Constitutional Court as a result of offences arising from their duties or that were allegedly committed by them during their offices and their personal offences can be decided –upon the request of the investigation board– only by the Plenary of the Court, and in cases of *in flagrante delicto* that fall under the competence of the assize court, the investigation shall be conducted as per general provisions.

133. Accordingly, as a rule, in order for a criminal investigation to be launched against the members of the Court for their personal offences as well as the offences arising from their duties or that were allegedly committed by them during their offices, decision of the Plenary of the Court is required. It is again for the Plenary of the Court to decide on the application of the protection measures, including detention, in terms of these offences allegedly committed by the members of the Court.

134. However, in a situation of discovery *in flagrante delicto* regarding personal offences falling under the competence of the assize court, the investigation shall be conducted in accordance with general provisions, and detention may be ordered by the magistrate judge that is the competent judicial authority. In such a case, the prosecution process shall be conducted by the Court of Cassation.

135. The Ankara Chief Public Prosecutor's Office indicted the applicant for attempting to overthrow the constitutional order provided for by the Constitution or to establish a different order in its place as well as for membership of an armed terrorist organisation.

136. The challenges raised by the applicant during the interrogation that since his being a member of the Court, it was only for the Court to

conduct an investigation and prosecution and that there was no situation of discovery *in flagrante delicto*, which constituted an exception in this regard, were dismissed by the Ankara 5th Magistrate Judge on the grounds that membership of an armed terrorist organisation was a continuing offence and thus there was a situation of discovery *in flagrante delicto* and that therefore the investigation launched against the applicant was subject to general provisions.

137. The report issued by the Ankara Chief Public Prosecutor's Office, dated 25 October 2017, referring to the fact that the risk of coup could not be completely eliminated yet, stated that in the present case there was a situation of discovery *in flagrante delicto* and that accordingly, an investigation was initiated against the applicant on 16 July 2016 in accordance with the general provisions.

138. The indictment issued by the Chief Public Prosecutor's Office at the Court of Cassation stated that the offence imputed to the applicant was of continuous nature and fell under the competence of the assize court and that it was found established by the court decisions that the applicant continued committing the said offence until the date it was stopped actually and legally; and that therefore, the date on which the applicant was arrested and thus his act was stopped should be considered as the date of offence and, in other words, a situation of discovery *in flagrante delicto*; therefore, the investigation was conducted in accordance with general provisions.

139. Considering the assessments included in the arrest warrant, report and indictment issued in respect of the applicant, it appears that the investigation authorities concluded that the imputed offence was a personal offence and that there was a situation of discovery *in flagrante delicto* in respect of the applicant, and that therefore the investigation was conducted in accordance with general provisions.

140. The offence of which the applicant is accused, namely membership of an armed terrorist organisation, which is punishable under Article 314 of the Criminal Code, undoubtedly falls within the jurisdiction of the assize court, and this has not been disputed by him. Moreover, he did not contend that the alleged offence was not a personal offence, that is to

say, an offence committed in connection with or during the performance of official duties. The classification of an offence (as an ordinary offence or as an offence linked to the performance of official duties) is a matter falling within the competence of the judicial authorities. The compliance of such classification with the law may also be reviewed in the context of an ordinary appeal or an appeal on points of law. Provided that there is no arbitrary interpretation – manifestly breaching the Constitution – and [entailing], as a result, [a violation of] rights and freedoms, it is primarily the task of the courts dealing with the case to interpret and apply the law, including [the question of] the classification of an offence (for the Court's assessments in the same vein, see *Mehmet Haberal*, no. 2012/849, 4 December 2013, § 77; and *Süleyman Bağrıyanık and Others*, § 223). It cannot be concluded that the classification of the offence of which the applicant is accused as a personal offence was unjustified and arbitrary, bearing in mind the findings reached and the reasons given by the investigation authorities, and in particular, the documents concerning his pre-trial detention as well as the case-law of the 16th Criminal Chamber of the Court of Cassation which provides that the imputed offence in question cannot be regarded as an offence relating to the applicant's duty (for the Court's assessment in the same vein, see *Alparslan Altan* [Plenary], no. 2016/15586, 11 January 2018, § 123).

141. In the present case, when the investigation authorities found that this was a case of discovery *in flagrante delicto*, they based that finding on the attempted coup of 15 July 2016 and the fact that the offence of which the applicant was accused, namely membership of an armed terrorist organisation, was a continuing offence.

142. According to the Court of Cassation's consistent practice, the offence of membership of an armed terrorist organisation is a continuing offence (see in the same vein, the judgments of the 9th Criminal Chamber of the Court of Cassation, no. E.2007/2495, K.2008/1358, 6 March 2008; no. E.2010/16588, K.2011/1626, 9 March 2011; and no. E.2014/6090, K.2014/10958, 6 November 2014; and the judgment of the 5th Criminal Chamber of the Court of Cassation no. E.2010/8491, K.2010/7430, 12 October 2010).

143. As a matter of fact, the General Assembly of Criminal Chambers of the Court of Cassation indicated that within the scope of the investigations initiated after the coup attempt, in a case filed before the 23rd Criminal Chamber of the İstanbul Assize Court against a suspect holding office as a public prosecutor, for membership of an armed terrorist organisation (FETÖ/PDY), violating the Constitution, and attempting, by the use of force and violence, to abolish the government of the Republic of Turkey or to prevent it, in part or in full, from fulfilling its duties, whereby it rendered a decision on resolution of the jurisdictional dispute between the trial court and the 16th Criminal Chamber of the Court of Cassation, stated that offence the applicant was accused of was of continuous nature. Also pointing to the fact that the imputed offences fell into the category of personal offences, the General Assembly of Criminal Chambers of the Court of Cassation revoked the decision of lack of jurisdiction of the assize court (for the judgments of the General Assembly of Criminal Chambers of the Court of Cassation in the same vein, see, among others, the judgments no. E.2017/YYB-996, K.2017/403, 10 October 2017; and no. E.2017/YYB-998, K.2017/388, 10 October 2017).

144. The General Assembly of Criminal Chambers of the Court of Cassation, during the appellate review of the decision rendered by the 16th Criminal Chamber of the Court of Cassation in its capacity as the first instance court concerning the conviction of two judges (for the decisions finding inadmissible the individual application lodged by the two judges for the alleged unlawfulness of their detention on remand as being manifestly ill-founded, see *Mustafa Başer and Metin Özçelik*, §§ 134-161) before the coup attempt for their membership of the armed terrorist organisation (FETÖ/PDY) as well as professional misconduct alleged to have been committed by them due to their acts related to their office, in the examination of the alleged violation of the rule "*judges and prosecutors shall not be tried except for the cases of discovery in flagrante delicto, they shall not be interrogated or detained*" raised by the suspects, specified that "*as the current and consistent position of the Court of Cassation makes clear, regarding the offence of membership of an armed terrorist organisation, which is a continuing offence, except in cases where [its continuing nature ends with] the dissolution of the organisation or termination of membership, the continuing nature [of the*

offence] may be interrupted by the offender's arrest; that the time and place of the offence must therefore be established to that end; and that for this reason, there is a situation of discovery in flagrante delicto at the time of the arrest of judges and prosecutors suspected of the offence of membership of an armed organisation" and rejected the appeals raised in this regard (see the judgment of the General Assembly of Criminal Chambers of the Court of Cassation no. E.2017/16.MD-956, K.2017/370, 26 September 2017).

145. Having regard to the Court of Cassation judgments cited above, and to the fact that the applicant was arrested on suspicion of membership of the FETÖ/PDY –deemed by the judicial authorities to constitute an armed terrorist organisation that premeditated the attempted coup– on 16 July 2016, at a time when the authorities were taking steps to defeat the coup attempt, it cannot be concluded that there was no factual and legal basis for the finding by the investigation authorities that the offence of membership of an armed terrorist organisation, of which the applicant was accused, involved a situation of discovery *in flagrante delicto* (for the assessment of the Court in the same vein, see *Alparslan Altan*, § 128).

146. In the light of the foregoing, the allegation that the applicant, a member of the Constitutional Court, was placed in pre-trial detention in a manner not complying with law and the safeguards enshrined in the Constitution and Law no. 6216 is unfounded. Accordingly, the order for the applicant's detention had a legal basis.

147. Before examining whether the detention order –which had a legal basis– pursued a legitimate aim and was proportionate, it should be ascertained whether there are 'facts giving rise to a strong suspicion that the offence has been committed', this being a prerequisite for pre-trial detention.

148. In the detention order issued against the applicant, it was stated that the case file contained concrete evidence indicating the existence of strong criminal suspicion of his membership to an armed terrorist organisation. Similarly, in the decision dismissing the applicant's challenge to detention, with reference to the information, documents and investigation reports, search and seizure reports as well as the content of the case file as a whole, it was stated that there existed concrete evidence

indicating strong criminal suspicion of guilt on the part of the suspects, including the applicant.

149. In the report issued in respect of the applicant, statements of anonymous witnesses and suspects as well as content of conversations established through ByLock by the other persons were relied on as the evidence pointing to the applicant's having committed the imputed offence (membership of an armed terrorist organisation). In addition thereto, the applicant's cell phone signals were also cited as evidence in the indictment.

150. It has been revealed that certain issues regarding the applicant were discussed in the conversations between some persons (Ö.İ., S.E. and B.Y; S.E., B.Y. and R.Ü.) other than the applicant, via ByLock. Relying on certain evidence such as the suspects/witnesses' statements and ByLock conversations, the investigation authorities considered that Ö.İ., who was in fact a teacher, was the civilian imam (head) within FETÖ/PDY responsible for the judicial members; that S.E. who was a rapporteur was the incumbent of the FETÖ/PDY within the Constitutional Court; and B.Y. and R.Ü. were rapporteurs who were members of the FETÖ/PDY. Among these persons, an arrest warrant has been issued in respect of Ö.İ. who has been found to have been abroad. S.E., auditor at the Court of Accounts, was dismissed from public service, and an arrest warrant was issued for his having fled while the criminal investigation conducted against him was pending. B.Y. who was a judge and R.Ü who was a public prosecutor were dismissed by the Council of Judges and Prosecutors. In addition, within the scope of the investigation launched by the Ankara Chief Public Prosecutor's Office against these persons in relation to the crimes related to the FETÖ/PDY immediately after the coup attempt, an arrest warrant was issued in respect of B.Y.

151. In this scope, it has been understood that in the conversations between Ö.İ. and S.E., they made remarks –also mentioning, in addition to the applicant, the code name of A.A. who submitted a dissenting opinion and detained for the offences related to the FETÖ/PDY– about dissenting opinions in a judgment of the Constitutional Court in an individual application lodged by a journalist detained on the basis of

charges related to the FETÖ/PDY. In the conversations between Ö.İ. and B.Y., Ö.İ. requested that A.A., another member of the Constitutional Court, would convey, to the applicant, the former's opinion as to which candidate(s) would be supported in the election of the deputy president of the Constitutional Court.

152. It has been revealed that in the conversations between S.E. and B.Y., as regards individual applications lodged by two judges detained on the basis of charges related to the FETÖ/PDY, S.E. noted by mentioning of the applicant's code name "Ertan" that the applicant was in the board to examine the application; and that as the applicant wanted to address a question, certain rapporteurs who were reported to have connection with the FETÖ/PDY –and whose code names were mentioned during the conversation– were advised to visit him. In this respect, B.Y. affirmatively replied S.E.'s message. It has been further observed that the conversations between S.E. and R.Ü. were also on the same topic.

153. In addition, R.Ü., who held office as a rapporteur at the Constitutional Court and was also accused of membership of the FETÖ/PDY, submitted in his statements taken by the investigation authorities as suspect that considering the applicant's approach in the individual applications where any members of the FETÖ/PDY was a party, as well as considering his relations with the rapporteurs who were members of this organisation, he reached the opinion that the applicant was also a member of the FETÖ/PDY; that the applicant consulted Rapporteur S.E. –reported to be the FETÖ/PDY's incumbent within the Constitutional Court– on how he should act; that S.E. (according to his own words) contacted the civil person who was the imam (head) responsible for the Constitutional Court (or the high judicial imam), and the applicant acted in accordance with the instructions he received; and that the applicant was referred to by the code name "Ertan" within the FETÖ/PDY. R.Ü. also noted that as instructed by the FETÖ/PDY, the applicant expressed dissenting opinion in the application related to the judges; and that the rapporteurs who were members of the FETÖ/PDY assisted the applicant in drawing up reasoning of his dissenting opinion.

154. Besides, one of the anonymous witnesses (Kitapçı) holding office at the Constitutional Court as a rapporteur judge stated that he reached the

conclusion that the applicant, with whom he previously got acquainted, had told that he would give a reference in favour of him in order for him to be able to be appointed as a rapporteur judge, but that however, during the appointment process, the President of the Constitutional Court would disregard his reference and that for this reason, he might be called as "cemaatçi" even if he were appointed, and therefore he stated that the applicant was a member of the FETÖ/PDY given also his social relations. The other rapporteur judge (Defne) also indicated that the applicant was a member of the FETÖ/PDY.

155. Lastly, it has been revealed that on various dates the applicant's cell phone signals were received from the same base station with those of certain persons against whom an investigation was conducted for their alleged position within the FETÖ/PDY as "civilian imams", and that on various dates these civilian imams met numerous judges from high courts who were dismissed from office for having connection with the FETÖ/PDY.

156. Therefore, it appears that the investigation file contained evidence supporting the existence of strong indication of guilt on the part of the applicant.

157. In addition, it should be considered whether the applicant's pre-trial detention, for which the pre-requisite of strong suspicion of guilt existed, pursued a legitimate aim. The general conditions at the material time when the detention order was issued should not be disregarded.

158. Considering the fear atmosphere created by the severe incidents that occurred during the coup attempt, the complexity of the structure of the FETÖ/PDY that is regarded as the perpetrator of the coup attempt and the danger posed by this organisation (see *Aydın Yavuz and Others*, §§ 15-19, 26), orchestrated criminal or violent acts committed by thousands of FETÖ/PDY members in an organised manner, the necessity to immediately launch investigations against thousands of people including public officials although they might not be directly involved in the coup attempt, the preventive measures other than detention may not be sufficient for ensuring the gathering of evidence properly and for conducting the investigations in an effective manner (For the Court's assessments in the

same vein, see *Aydın Yavuz and Others*, § 271; *Selçuk Özdemir*, § 78; and *Alparslan Altan*, § 140).

159. The possibility of escape of the persons who are involved in the coup attempt or who are in connection with FETÖ/PDY— the terror organisation behind the coup attempt— by taking advantage of the turmoil in its aftermath, and the possibility of tampering with evidence are more likely when compared to the crimes committed during the ordinary times. Besides, the fact that the FETÖ/PDY has organised in almost all public institutions and organisations within the country, that it has been carrying out activities in more than one hundred and fifty countries, and that it has many important international alliances will greatly facilitate the escape and residence abroad of the persons who are subject to investigation with respect to this organisation (for the Court's assessments in the same vein, see *Aydın Yavuz and Others*, § 272; and *Selçuk Özdemir*, § 79). In addition, it is undeniable that it will be easier for the applicant, who is a justice at the Constitutional Court, to influence the evidence –given his position– when compared to others (see *Alparslan Altan*, § 141).

160. Membership of an armed terrorist organisation for which the applicant was detained on remand is among the crimes to be punished severely within the Turkish legal system, and the severity of the punishment prescribed by the law for the imputed offence points to the risk of fleeing (for the Court's assessments in the same vein, see *Hüseyin Burçak*, no. 2014/474, 3 February 2016, § 61; *Devran Duran* [Plenary], no. 2014/10405, 25 May 2017, § 66). In addition, the imputed offence is among the crimes set forth in Article 100 § 3 of Law no. 5271 and to be punished by detention (see *Gülser Yıldırım (2)*, § 148).

161. In the present case, ordering the applicant's detention, the Ankara 5th Magistrate Judge took into consideration the risk of fleeing and tampering with evidence, inadequacy of conditional bail and proportionality of detention as a measure to the imputed offence. The Ankara 6th Magistrate Judge dismissed, relying on the same grounds, the applicant's challenge against the detention order.

162. Accordingly, considering the general circumstances at the time when the detention order was issued, the aforementioned particular

circumstances of the case, as well as the content of the decisions rendered by the Ankara 5th and 6th Magistrate Judges, it cannot be said that the grounds for the detention, such as the risk of fleeing and tampering with the evidence, lacked factual bases (for the Court's assessments in the same vein, see *Alparslan Altan*, § 144).

163. In addition, it should also be determined whether the applicant's detention on remand was proportionate. In the assessment of the proportionality of such a measure, all particular circumstances of the case should be taken into consideration (see *Gülser Yıldırım (2)*, § 151).

164. First of all, to investigate terrorist crimes poses serious difficulties for public authorities. Therefore, the right to personal liberty and security should not be interpreted in a way that would make it extremely difficult for the judicial authorities and security officers to effectively fight against crimes –especially the organised ones– and criminality (for the Court's assessments in the same vein, see *Süleyman Bağrıyanık and Others*, § 214; and *Devran Duran*, § 64). Considering the scope and nature of the investigations related to the FETÖ/PDY and the characteristics of the said organisation (i.e. secrecy, cell-type structuring, being organised in all institutions, attributing holiness to itself, acting on the basis of obedience and devotion), even if not directly related to the coup attempt, it is clear that these investigations are much more difficult and complex than other criminal investigations (see *Aydın Yavuz and Others*, § 350).

165. In addition, given the fact that the applicant was taken into custody during the suppression of the coup attempt and was subsequently detained, there is no reason to conclude that during the investigation process the applicant's detention was not "necessary" as an element of the principle of proportionality.

166. Regard being had to the aforementioned circumstances of the instant case, it cannot be said that it was arbitrary and unfounded for the Ankara 5th and 6th Magistrate Judges to conclude that the applicant's detention was a proportionate measure, given the severity of the punishment prescribed for the alleged offence as well as the nature and gravity of the imputed act and that conditional bail would be insufficient.

167. For the reasons explained above, as it is clear that there is no violation as regards the alleged unlawfulness of the applicant's detention on remand, this part of the application must be declared inadmissible for being *manifestly ill-founded*.

168. Accordingly, since it has been concluded that the interference with the applicant's right to personal liberty and security through detention was not in breach of the guarantees enshrined in the Constitution (Articles 13 and 19), no further examination is required with respect to the criteria provided in Article 15 of the Constitution.

2. Alleged Ineffectiveness of Legal Remedies against the Applicant's Detention on Remand

a. The Applicant's Allegations and the Ministry's Observations

169. The applicant maintained that his challenge against the detention order rendered by the Ankara 5th Magistrate Judge was dismissed by another magistrate judge (Ankara 6th Magistrate Judge) within a closed circuit system and that the said judicial authority lacked independence, impartiality and effectiveness. In this regard, the applicant claimed that his right to an effective legal remedy against his detention or remand had been violated.

170. The Ministry, in its observations, made no explanation concerning the applicant's allegations in this regard.

b. The Court's Assessment

i. Applicability

171. The applicant was detained on remand by the Ankara 5th Magistrate Judge within the scope of the investigation conducted into his alleged membership of the FETÖ/PDY, which was stated to be the structure behind the coup attempt of 15 July that was the main reason for declaration of a state of emergency in Turkey and which was described as an armed terrorist organisation, and his subsequent challenge against the relevant decision of the magistrate judge was dismissed by the Ankara 6th Magistrate Judge. Therefore, the examination into the alleged lack of independence, impartiality and effectiveness of the latter will be

carried out within the scope of Article 15 of the Constitution. During this examination, it will first be determined whether the relevant appellate authority operated in breach of the guarantees specified in the relevant articles of the Constitution, notably Article 19 thereof.

ii. Admissibility

172. It is explicitly laid down in Article 9 of the Constitution that judicial power shall be exercised by independent and impartial courts. In the same vein, Article 138 thereof explains how the independence of the courts should be interpreted. Accordingly, "*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 refers to the independence of the court in resolving a dispute from the legislature, the executive, the parties to the case, the environment and other judicial bodies, and its not being influenced by them (see the Court's judgment no. E.2014/164, K.2015/12, 14 January 2015).

173. In determining whether a court is independent of the administration and the parties to the case, the manner in which its members are appointed and their term of office, the existence of guarantees against external pressure, and whether the court displays an appearance of independence are important (see *Yaşasın Aslan*, no. 2013/1134, 16 May 2013, § 28).

174. Although the impartiality of the courts is not explicitly mentioned in Article 36 of the Constitution, the right to have one's case heard by an impartial tribunal is an implicit element of the right to a fair trial in accordance with the Constitutional Court's case-law. As a matter of fact, the phrase "and impartial" was added to Article 9 of the Constitution after the phrase "independent", by Article 1 of the Law no. 6771 of 21 January 2017; and thus, the text of the relevant provision has become "*Judicial power shall be exercised by independent and impartial courts on behalf of the Turkish Nation*". In addition, considering that the impartiality and independence of the courts are two complementary elements; pursuant to the principle of the integrity of the Constitution, it is clear that Articles 138, 139 and 140 of the Constitution should also be taken into account in the assessment of the right to be heard by an impartial tribunal (see *Tahir Gökatalay*, no. 2013/1780, 20 March 2014, § 60; and *Alparslan Altan*, § 157).

175. The concept of impartiality of the courts is explained through the institutional structure of the court as well as the attitude of the judge dealing with the case. First of all, no impression of the lack of impartiality of legal and administrative regulations regarding the establishment and structuring of the courts should be created. Essentially, institutional impartiality is an issue related to the independence of the courts. For impartiality, first the precondition of independence must be fulfilled and, in addition, there should not be an institutional structure giving the impression of being a party (see the Court's judgment no. E.2014/164, K.2015/12, 14 January 2015).

176. The second element referring to the impartiality of the courts is related to the subjective attitude of the judges towards the case to be heard. The judge who will hear the case must be equal, impartial and unbiased towards the parties of the case and decide on the basis of his personal conviction within the framework of the rules of law under no suggestion or pressure. The attitudes to the contrary shall be subject to sanctions in the field of discipline and criminal law by virtue of the legal order (see the Court's judgment no. E.2014/164, K.2015/12, 14 January 2015).

177. It is understood that the magistrate judges, based on a general legal regulation and as a result of their appointment by the High Council of Judges and Prosecutors, perform the duties assigned by the law, including making decisions regarding detention during the investigation stage and evaluating the challenges against these decisions. It is known that the magistrate judges, which are claimed not to be independent and impartial, may reject the demands of the public prosecutor and make decisions in favour of the suspects. In this respect, the relevant judges cannot be said to lack independence and impartiality, relying on some abstract assumptions (for the Court's assessments in the same vein, see *Hikmet Kopar and Others* [Plenary], no. 2014/14061, 8 April 2015, § 114; *Hidayet Karaca* [Plenary], no. 2015/144, 14 July 2015, § 78; and *Mehmet Baransu (2)*, no. 2015/7231, 17 May 2016, §§ 64-78).

178. As a matter of fact, the Court dismissed the request for the annulment of the provision concerning the formation of magistrate judges, on the grounds; that magistrate judges are appointed by the High Council of Judges and Prosecutors, like all other judges, and therefore

they enjoy the security of tenure of judges stipulated in Article 139 of the Constitution; that as in all other courts, they are organised in accordance with the principles of the independence of the courts and the security of tenure of judges; that there is no element leading to the conclusion that they cannot act impartial in their organisation and functioning; and that there are also procedural rules preventing the judge from hearing the case where it is revealed with concrete, objective and convincing evidence that he has failed to act impartial (see the Court's judgment no. E.2014/164, K.2015/12, 14 January 2015).

179. In addition, pursuant to Article 268 § 3 (a) of Law no. 5271, review of the challenges against the decisions of the magistrate judges shall be carried out by the subsequent numbered magistrate judge if there are several magistrate judges in the same district of jurisdiction.

180. In view of the explanations above concerning the allegation that the magistrate judges acted in breach of the principles of impartiality and independence of judge, 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 (for the Court's assessments in the same vein, see *Hikmet Kopar and Others*, § 133; and *Mehmet Baransu (2)*, § 95).

181. The Court 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).

182. For these reasons, as it is clear that there has been no violation with regard to the applicant's allegations that he could not effectively challenge the detention order issued against him, the Court has found this part of the application inadmissible for being *manifestly ill-founded*.

183. Accordingly, it is seen that the review made by the magistrate judge of the challenge against the detention order issued against the applicant was not in breach of the guarantees enshrined in the Constitution, especially in Articles 19, 138, 139 and 140 thereof; therefore, no separate examination is needed under the criteria laid down in Article 15 of the Constitution

3. Alleged Unreasonable Length of the Applicant's Detention on Remand

a. The Applicant's Allegations and the Ministry's Observations

183. The applicant claimed that his right to personal liberty and security had been violated, stating; that his requests for release had been rejected; that the decisions on the continuation of his detention on remand lacked grounds; that the reasons for his detention on remand were not explained on the basis of concrete facts; that he was not considered individually and the authorities failed to demonstrate the reasons why conditional bail would be an insufficient measure; that his challenges against the detention were rejected with no justification; that the authorities also failed to conduct a rigorous investigation; and that therefore his detention on remand without any justification –just on the basis of stereotyped grounds– exceeded the reasonable period.

185. The Ministry, in its observations, referring to the judgments of the ECHR and pointing to the density of the workload of the investigation authorities after the coup attempt as well as to the nature of the imputed offence, specified that the length of the period during which the applicant was detained on remand was reasonable. The Ministry considers that the applicant's allegations in this part are manifestly ill-founded.

b. The Court's Assessment

186. Article 19 § 7 of the Constitution provides as follows:

"Persons under detention shall have the right to request trial within a reasonable time and to be released during investigation or prosecution. Release may be conditioned by a guarantee as to ensure the presence of the person at the trial proceedings or the execution of the court sentence."

187. The applicants' allegations in this part should be examined within the scope of the right to personal liberty and security safeguarded by Article 19 § 7 of the Constitution.

i. Applicability

188. The imputed offence resulting in the applicant's detention on remand concerned his alleged membership of the FETÖ/PDY which was stated to be the structure behind the coup attempt of 15 July that was the main reason for declaration of a state of emergency in Turkey and which was described as an armed terrorist organisation. The state of emergency was in force during the period when the applicant was detained on remand. In this respect, whether the length of the applicant's detention exceeded the reasonable period is to be examined under Article 15 of the Constitution. During this examination, it will be first determined whether the length of the applicant's detention was in breach of the safeguards enshrined in Articles 13 and 19 and the other Articles of the Constitution.

ii. Admissibility

189. This part of the application must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

iii. Merits

(1) General Principles

190. According to Article 19 § 7 of the Constitution, persons detained within the scope of a criminal investigation shall have the right to request trial within a reasonable time and to the right to be released during

investigation or prosecution process. "The right to request trial within a reasonable time" and "the right to request to be released" safeguarded in the same paragraph must not be regarded as an alternative to each other but complementary (see *Murat Narman*, § 60; and *Halas Aslan*, § 66).

191. In accordance with "the right to request to be released" safeguarded in Article 19 of the Constitution, persons detained within the scope of a criminal investigation or prosecution shall have the right to request from the relevant judicial authorities to be released. As a reflection of this right, it is provided in Article 104 § 1 of Law no. 5271 that the suspect or the accused is entitled to request to be released at any stage of the investigation and the prosecution proceedings. It is also set forth in Article 108 of the same Law that detention must be examined *ex officio* during the investigation and prosecution proceedings within certain time intervals. It is also a requirement of Article 19 § 7 of the Constitution that the judicial authorities must explain the legal grounds of detention during the examinations carried out either *ex officio* or upon the request of the person to be released at any stage of detention (see *Halas Aslan*, § 67).

192. It is also stated in the relevant Article that detained persons are entitled to request a "trial within a reasonable time". In general, not concluding a trial within a reasonable time falls under the scope of the right to a fair trial safeguarded in Article 36 of the Constitution. According to Article 19 of the Constitution in which the guarantees as to the restriction of the individuals' physical liberty are set out, it is required in the first place that the length of detention must not exceed the reasonable time. The relevant Article also points out that detention pending trial must be concluded within a reasonable time. A person who is detained pending trial has much more interest, by its very nature, in the reasonable length of the proceedings when compared to others. In this connection, the "right to be tried within a reasonable time" of a detained person, which is set forth in Article 19 § 7 of the Constitution, provides a greater protection than the right to be tried within a reasonable time within the scope of the right to a fair trial guaranteed in Article 36 of the Constitution (see *Halas Aslan*, §§ 68, 69).

193. Accordingly, the investigation and prosecution proceedings carried out while the individual is being held in detention must be concluded

swiftly. In this respect, all public authorities, being in the first place the public prosecutors' offices and the courts, must act in due diligence to conclude swiftly the investigation/prosecution proceedings carried out while the suspect/accused is being held in detention, in compliance with the guarantees arising from the right to a fair trial. The obligation to act in due diligence is also necessary for not being arbitrary of the continuation of a person's detention pending trial, and thereby maintaining the legitimate aim in the interference with the personal liberty. In this respect, the required due care concerning the investigation/prosecution proceedings in respect of detained persons is guaranteed by Article 19 § 7 of the Constitution (see *Halas Aslan*, §§ 70, 71).

194. Thus, the question whether the length of detention is reasonable or not cannot be addressed under general principles. This examination must be made according to the particular circumstances of each case (see *Murat Narman*, § 61).

195. In the evaluation of the reasonable period, the beginning of the period is the date on which the applicant was arrested and taken into custody for the first time; however, in cases where the applicant was directly detained, the date of detention in question is the beginning of the period. The end of the period is, as a rule, the date on which the person is released or the date on which the judgment is rendered by the first instance court (see *Murat Narman*, § 66).

196. Whether detention during an investigation or prosecution process has exceeded the reasonable period may be determined firstly on the basis of the grounds for the detention orders. The existence of a strong indication of guilt, as a prerequisite for detention, the grounds for detention, and the proportionality of the detention must be set forth in the justifications of detention orders (see *Halas Aslan*, §§ 74, 75).

197. Strong indication of guilt is a prerequisite for detention and must exist at all stages of detention. For an initial detention, even though it may not always be possible to present all evidence indicating that there is a strong indication of guilt (see *Mustafa Ali Balbay*, § 73), the evidence that will substantiate or eliminate the suspicion of guilt will be collected in the later stages of investigation/prosecution. For this reason, in the decisions

on the continuation of detention after the passage of a certain period of time, the existence of a strong suspicion of having committed an offence must be explained with concrete facts. Where the facts showing that there is a strong suspicion of the suspects' having committed the imputed offence have disappeared at any stage of detention, then the detention cannot be said to pursue a legitimate aim (see *Halas Aslan*, § 76).

198. Although for an initial detention, it may not always be possible, by the very nature of the case, to indicate concretely the grounds for detention set forth in the Constitution and the Law (see *Selçuk Özdemir*, § 68), as the evidence is collected during investigation/prosecution processes, the possibility to tamper with evidence disappears or gets difficult. Furthermore, it can also be said that the risk of fleeing of the individual diminishes since the detention term shall be deducted from the sentence to be imposed at the end of the proceedings. For these reasons, in the decisions on the continuation of detention exceeding a certain period of time, it is not sufficient to indicate the abstract grounds for detention (see *Hanefi Avcı*, no. 2013/2814, 18 June 2014, § 70).

199. Lastly, in the decisions on the continuation of detention, the facts substantiating the proportionality of detention must be put forth, as well as it must be demonstrated why the measures of conditional bail that have less effects on fundamental rights and freedoms compared to detention have remained insufficient (see *Halas Aslan*, § 79). In addition, as the detention continues, the burden imposed on the individual increases whereas the legitimate aim of the detention weakens. Therefore, the general circumstances of the case as well as the particular situation of the detainee must be taken into account in the decisions on the continuation of detention, and, in this sense, the grounds for detention must be personalized (see *Hanefi Avcı*, § 84).

200. In the individual applications lodged on the basis of the complaints that the detention has been prolonged or exceeded a reasonable period, it is the duty of the Constitutional Court to examine the grounds explained in the decisions on detention and continuation of detention rendered by the inferior courts and to examine whether these grounds are relevant and sufficient in the particular circumstances of the case in terms of the existence of strong indication of guilt as well as the grounds for detention

and the proportionality of detention, also considering if the required due diligence —explained above— is respected during investigation/prosecution. If such review leads to conclusion that the grounds for detention are not relevant and sufficient to justify the legal grounds for the restriction of the applicants' liberty or that investigation/prosecution processes are prolonged due to the lack of due diligence on the part of public authorities, it shall be found that length of detention has exceeded the reasonable period (see *Halas Aslan*, §§ 82, 83).

(2) Application of Principles to the Present Case

201. The applicant was taken into custody during the suppression of the coup attempt on 16 July 2016 and was detained on remand by the Ankara 5th Magistrate Judge on 20 July 2016 for membership of an armed terrorist organisation. On the date of examination of the individual application, the applicant has still been detained on remand. Accordingly, the applicant has been detained for approximately 1 year and 9 months.

202. The applicant was detained within the scope of an investigation conducted for his allegedly having taken part in the structuring of the FETÖ/PDY, which was stated by the public authorities and judicial authorities to be the structure behind the coup attempt, within the supreme courts, as well as for his allegedly having acted in accordance with the instructions he had received from the heads of the organisation within the hierarchy of the organisation. It was clearly pointed out by the magistrate judges and the criminal chambers of the Court of Cassation that there was a strong suspicion of the applicant's having committed the imputed offence. In the examination of the alleged unlawfulness of the applicant's detention, the Court has concluded that there are strong indications that the applicants have committed the imputed offence. Considering the content of the evidence referred to in the decisions on detention and continuation of detention with respect to the applicant, it has been concluded that the relevant court decisions were relevant and sufficient in terms of the existence of the strong suspicion of guilt, which is a prerequisite for detention.

203. In addition, in the examination of the explanations regarding the grounds for detention and the proportionality included in the reasoning

of the decisions of the magistrate judges and the criminal chambers of the Court of Cassation for the continuation of detention, it can be seen that the relevant decisions were based on the factual and legal grounds such as the risk of fleeing, the risk of tampering with evidence, the imputed offence's being among the offences regarding which the ground for detention may be deemed to exist *ipso facto* under Article 100 § 3 of Law no. 5271, the proportionality of detention and the insufficiency of conditional bail as a measure.

204. The Turkish judicial authorities have acknowledged that the FETÖ/PDY has been organised in parallel to the current administrative system with a view to taking over the constitutional institutions of the State for re-shaping the State, society and citizens in accordance with its ideology and for managing the economy and social and political life through an oligarchic group (for some of the relevant judgments of the Court, see *Selçuk Özdemir*, §§ 20, 21; and *Alparslan Altan*, § 10).

205. While the FETÖ/PDY carried out legal activities in different social, cultural and economic areas, notably in terms of education and religion –especially in the public sphere–, it was an illegal structure sometimes hidden within these legal organisations and was sometimes completely different from the legal structure. FETÖ/PDY was illegally organised in almost all institutions and organisations within the country, including the judicial bodies. The main characteristics of this organisation were that it was made up of a hierarchical and cell-type structure; it acted in full obedience and devotion; it adopted a mentality attributing holiness to itself; and it relied on privacy. Loyalty of the public officers who were members of the FETÖ/PDY was directed to the structure rather than the State. Therefore, these persons were preferring the interests of the structure over the interests of the State and acted in line with the aims of the structure. A basic characteristic of the FETÖ/PDY's activities in the public institutions and organisations was that a public activity was apparently performed by a public officer competent to carry out this duty; however, this activity was indeed performed not with the relevant public officer's own will but with the will of his hierarchical superior ("abi/imam") to whom he was affiliated, apart from the hierarchy in the public institution (see *Aydın Yavuz and Others*, § 26).

206. It is seen that the organisation of the FETÖ/PDY within judicial bodies was also similar in that the superiors within the organisation conveyed with great confidentiality the suggestions and instructions to design all areas of the lives of judges and public prosecutors, who were member to the FETÖ/PDY, from how their social attitudes and behaviours would be to how they would decide while performing their duties, as well as from their political preferences to who they would vote for in the institutional elections.

207. Considering the nature of the imputed offence, the aforementioned organisational form and functioning of the terrorist organisation (FETÖ/PDY) of which the applicant was claimed to have been a member, as well as the circumstances of the case subject of the investigation/prosecution processes as a whole, it has been concluded that the grounds for the continuation of detention diligently demonstrated that the applicant's continued detention was lawful and thus the relevant grounds were relevant and sufficient as regards the length of detention.

208. In addition, the investigation authorities also conducted investigations, with the start of the coup attempt, into the activities related to the coup attempt or into the organisation and activities of the FETÖ/PDY in the public institutions, including the judicial bodies, as well as different areas such as education, health, trade, civil society and media, and many persons were taken into custody and detained within the scope of these investigations. It should be borne in mind that such investigations are much more difficult and complex than the other types of criminal investigations (see *Aydın Yavuz and Others*, § 52).

209. In this scope, within the scope of the investigation into the organisation of the FETÖ/PDY in supreme courts, inquiries were made regarding the identification of the civilian leaders ("imams") responsible for these courts and the relationship between the judicial members – including the applicant– who were considered to have been member to the organisation and the mentioned civilian leaders. As such, the statements of some of the rapporteur judges who had taken office at the Constitutional Court were taken as suspects and witnesses; the contents of their conversations through "ByLock" program found to have been

used between the members of the FETÖ/PDY for communication (see *Aydın Yavuz and Others*, § 106) were determined; and whether the phone signals of many supreme court members including the applicant, who were considered to have had links with the FETÖ/PDY, other judicial members and the leaders within the FETÖ/PDY ("imams") who had been responsible for the judiciary, matched have been investigated.

210. At the end of the investigation conducted by the Ankara Chief Public Prosecutor's Office against the members of the supreme courts, motions were issued in order for criminal cases to be filed before the relevant criminal chamber of the Court of Cassation, and the investigation files were sent to the Chief Public Prosecutor's Office at the Court of Cassation. The bill of indictment issued by the latter against the applicant was accepted by the 9th Criminal Chamber of the Court of Cassation, thereby initiating the prosecution process.

211. Regard being had to the characteristics of the organization of which the applicant was an alleged member; its extent within the judiciary and nature of its activities; the difficulty in conducting such investigations; the fact that findings obtained at every stage may require further inquiries; the necessity, inherent in the investigation conducted against the applicant, of establishing and assessing contents of conversations ascertained, through various means, by each of the other persons considered to have connection with the organization; and existence of evidence, which was hard to obtain, such as matching cell phone signals of many persons covering a long period of time, it has been concluded that due diligence was exercised in conducting both the investigation and prosecution processes.

212. Besides, given the fact that the grounds in the decisions ordering continuation of the applicant's detention were relevant and sufficient as legitimate reasons for deprivation of the applicant's liberty and that due diligence was shown during the investigation/prosecution processes, the applicant's detention period of about one year and nine months has been found reasonable.

213. Accordingly, the Court has found no violation of the right to personal liberty and security safeguarded by Article 19 § 7 of the Constitution.

214. Consequently, as it is seen that the interference with the applicant's right to personal liberty and security by the continuation of his detention on remand was not contrary to the safeguards provided in the Constitution (Articles 13 and 19), no further examination is required in accordance with the criteria laid down in Article 15 of the Constitution.

4. Alleged Review of the Applicant's Detention on Remand without His Appearance before the Judge/Court

a. The Applicant's Allegations and the Ministry's Observations

215. The applicant claimed that his right to a fair trial had been violated, stating that his detention was reviewed without holding hearings and his challenges against his detention on remand were also dismissed over the file.

216. The Ministry, in its observations, specified that the reviews of detention during the investigation process were conducted by either magistrate judges or the relevant criminal chamber of the Court of Cassation over the file in accordance with Article 3 of Decree Law no. 668. The Ministry considered, referring to the Court's judgment of *Aydın Yavuz and Others*, that in the particular circumstances of the state of emergency period, it had been lawful to conduct the reviews of the applicant's detention on remand over the file.

b. The Court's Assessment

217. 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".*

218. 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*, § 16). In this respect, the Court found it appropriate to examine the applicant's complaints under this heading within the scope of the right to personal liberty and security enshrined in Article 19 § 8 of the Constitution.

i. Applicability

219. The charges underlying the applicant's detention on remand was related to his alleged membership of the FETÖ/PDY which was stated to be the structure behind the coup attempt of 15 July that was the main reason for declaration of a state of emergency in Turkey and which was described as an armed terrorist organisation. The state of emergency period continued while the applicant was detained on remand. In this respect, the effect of the review of the applicant's detention on remand without his appearance before the judge/court on the right to personal liberty and security will be examined under Article 15 of the Constitution. Within this scope, it will first be established whether the manner of the said review were contrary to the guarantees provided in Article 19 of the Constitution.

ii. Admissibility

189. This part of the application must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

iii. Merits

(1) General Principles

221. Pursuant to Article 19 § 8 of the Constitution, an individual who has been deprived of his liberty is entitled to apply to the competent judicial authority for speedy conclusion of the proceedings regarding his situation and for his immediate release if the restriction imposed upon him is not lawful (see *Mehmet Haberal*, § 122).

222. As an application for release must be lodged with the competent judicial authority, this right can only be enjoyed upon a request. Accordingly, the right to apply to the competent judicial authority is a guarantee for those deprived of their liberty due to criminal charge, and this guarantee must be afforded not only in terms of the request for release but it must also be afforded during the examination of the objections against detention, the continuation of detention and dismissal of the request for release (see *Aydın Yavuz and Others*, § 328).

223. However, during an *ex officio* review of detention of the suspect or the accused without a request under Article 108 of Law no. 5271, no assessment shall be made within the scope of these persons' right to apply to the competent judicial authority. Therefore, such reviews do not fall into the scope of Article 19 § 8 of the Constitution (see *Firas Aslan and Hebat Aslan*, no. 2012/1158, 21 November 2013, § 32; and *Faik Özgür Erol and Others*, no. 2013/6160, 2 December 2015 § 24).

224. As it is set forth in Article 19 § 8 of the Constitution that the requests for release must be lodged with a judicial authority, it is, by its very nature, a judicial review. In this judicial review, safeguards of the right to a fair trial that is compatible with the nature and conditions of detention must be available. In this respect, the principles of "equality of arms" and "adversarial proceedings" must be respected in reviewing the continuation of detention or the request to be released (see *Hikmet Yayğın*, no. 2013/1279, 30 December 2014, §§ 29, 30).

225. The principle of equality of arms means that parties of a legal action shall be subject to the same conditions in terms of procedural rights and that both parties shall be afforded equal opportunities to submit allegations and arguments without any favour to any. The principle of adversarial proceedings entails affording of the opportunity to the parties to have information about the case-file and to comment in respect thereof and therefore active involvement of the parties in the proceedings in its entirety (see *Bülent Karataş,* no. 2013/6428, 26 June 2014, § 70, 71).

226. One of the fundamental safeguards deriving from Article 19 § 8 is the right to request for an effective review of detention before a judge. Indeed, a very high importance must be attached to this safeguard considering that this is the primary legal means for a person deprived of his liberty to effectively challenge his or her detention. In this way, a detained person is given the opportunity to discuss the reasons led to his/her detention and the assessment of the investigation authorities in person before a judge or a court. Therefore, a detained person should be able to exercise this right by being heard before a judge at certain reasonable intervals (see *Firas Aslan and Hebat Aslan*, § 66; *Süleyman Bağrıyanık and others,* § 267; and *Aydın Yavuz and Others*, § 333).

227. As a reflection of this safeguard, Article 105 of Law no. 5271 sets out that while deciding on the suspect's or the accused's request for release at a hearing during the investigation or prosecution phases, the suspect, the accused or the defence counsel and the public prosecutor shall be heard. Article 108 thereof also envisages that in the assessment of the question of continuation of the detention, the suspect or his defence counsel is to be heard. Moreover, decisions on detention that is rendered either e*x officio* or upon request within the scope of Article 101 § 5 or Article 267 may be challenged before a court (see *Süleyman Bağrıyanık and Others*, § 269). As regards the review of detention orders, Article 271 sets forth that the challenge shall be in principle concluded without a hearing; however, if deemed necessary, the public prosecutor and subsequently the defence counsel may be heard. Accordingly, in case that a review of detention or objection to detention is made through a hearing, the suspect, the accused or the defence counsel must be heard (see *Aydın Yavuz and Others*, § 334).

228. However, holding a hearing for reviewing objections to detention orders or assessing every request for release may lead to congestion of the criminal justice system. Therefore, safeguards enshrined in the Constitution as to the review procedure do not necessitate a hearing for review of every single objection to detention unless the special circumstances require otherwise.

(2) Application of Principles to the Present Case

229. On 20 July 2016, the applicant was heard by the Ankara 5th Magistrate Judge where the applicant, together with his defence counsel, orally submitted his defence arguments with respect to the accusations brought against him and to the detention request of the prosecutor's office.

230. It appears that following the applicant's detention on remand, the reviews of his detention —*ex officio* or upon the applicants' request— were conducted without holding a hearing and that the applicant did not appear before a judge/court during this period. The applicant's objections to the detention orders and to the continuation of detention were concluded by the competent authorities over the case-file. Nor do the observations submitted by the Ministry include any information indicating that at this stage the reviews of detention were carried out by holding a hearing.

231. Accordingly, the applicant's continued detention was ordered by the decisions rendered over the case-file without holding a hearing since 20 July 2016, the date on which the applicant was detained on remand. During this period, the applicant did not have the opportunity to orally submit, before a judge/court, his claims as to the content or qualification of evidence forming the basis for his detention, his counter-statements as to the considerations and assessments either in favour of or against him as well as requests for his release. Therefore, the applicant's continued detention for a period of 21 months without a hearing was not in conformity with the principles of "equality of arms" and "adversarial proceedings" in an ordinary time (for the Court's assessments in the same vein, see (see *Aydın Yavuz and Others*, § 341).

232. As a matter of fact, in its previous judgments, the Constitutional Court held that the continuation of the applicant's detention for 7 months and 2 days (see *Mehmet Halim Oral*, no. 2012/1221, 16 October 2014, § 53; and *Ferit Çelik*, no. 2012/1220, 10 December 2014, § 53) and for 3 months and 17 days (see *Ulaş Kaya and Adnan Ataman*, no. 2013/4128, 18 November 2015, § 61) as a result of the examinations carried out over the case-file without holding a hearing was in breach of Article 19 § 8 of the Constitution.

233. For the reasons explained above, ordering the continuation of the applicant's detention for 21 months through examinations carried out over the case-file and his not having been brought before a judge/court were in breach of the safeguards set out in Article 19 § 8 of the Constitution. It is therefore necessary to examine whether this situation was legitimate within the scope of Article 15 of the Constitution which entails the suspension and the restriction of exercise of the fundamental rights and freedoms in times of emergency.

iv. Application of Article 15 of the Constitution

234. According to Article 15 of the Constitution, in times of war, mobilization, martial law or a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended or measures which are contrary to the guarantees embodied in the Constitution may be taken. However, Article 15 of the Constitution does not entrust the public authorities with an unlimited power in this

respect. The measures which are contrary to the guarantees embodied in other provisions of the Constitution must not infringe upon the rights and freedoms provided in Article 15 § 2 of the Constitution, must not be contrary to the obligations stemming from the international law and must be within the extent required by the exigencies of the situation. The examination to be made by the Court according to Article 15 of the Constitution will be limited to these criteria. The Court has set out the procedures and principles of this review (see *Aydın Yavuz and Others*, §§ 192-211, 344).

235. The right to liberty and security is not one of the core rights provided in Article 15 § 2 of the Constitution as inviolable even when emergency administration procedures such as war, mobilization, martial law or a state of emergency are in force. It is therefore possible in times of emergency to impose measures with respect to this right contrary to the safeguards enshrined in the Constitution (see *Aydın Yavuz and Others*, §§ 196, 345).

236. Nor is this right among the non-derogable core rights in the international conventions to which Turkey is a party, notably Article 4 § 2 of the International Covenant on Civil and Political Rights ("the ICCPR") and Article 15 § 2 of the European Convention on Human Rights ("the ECHR"), as well as the additional protocols thereto. Furthermore, it has not been found established that the interference with the applicant's right to liberty and security was in breach of any obligation (any safeguard continued to be under protection in times of emergency) stemming from the international law (see *Aydın Yavuz and Others*, §§ 199, 200, 346).

237. In addition, especially whether the interference with the applicant's right to personal liberty and security by conducting the judicial review of his detention without bringing him before a judge/court is within "the extent required by the exigencies of the situation" or not, within the meaning of Article 15 of the Constitution, must be determined. In this determination, the period during which the applicant was deprived of his liberty without being brought before a judge, as well as the characteristics of the case leading to the declaration of the state of emergency in the country, and the circumstances emerging upon the declaration of the state

of emergency must also be taken into consideration (see *Aydın Yavuz and Others*, §§ 349).

238. During the state of emergency period in the aftermath of the coup attempt, certain amendments have been made to procedural rules with respect to the investigations and prosecutions for certain offences (especially offences associated with the coup-attempt, the FETÖ/PDY, and terrorism), effective throughout the state of emergency. Accordingly, Article 6 of the Decree Law no. 667 issued under the state of emergency enables that during the state of emergency, the detention reviews, examinations of objections to detention and requests for release shall be assessed and concluded over the case-file with respect to the offences defined in Parts 4, 5, 6 and 7 of the Chapter 4 of the Volume 2 of Law no. 5237, the offences falling into the scope of Law no. 3713, and the collective offences. Besides, Article 3 of the Decree Law no. 668 sets out that if the magistrate judge's office or the court shall revise its decision if it accepts the objection, otherwise, it shall refer the objection within a maximum period of ten days to the competent court to examine the objection. It is also set forth that, detention reviews and requests for release shall be assessed and concluded over the case-file within time intervals of maximum 30 days (see *Aydın Yavuz and Others*, §§ 352). Decree Laws no. 667 and 668 have subsequently become law respectively on 18 October 2016 and 8 November 2016).

239. Membership of an armed terrorist organisation imputed to the applicant is set out in the Volume II, Chapter IV, Part V of Law no. 5237 and also among the offences enumerated in Articles 6 and 3 of the Decree Laws no. 667 and 668. Accordingly, the continuation of the applicant's detention over the case-file without holding a hearing was ordered in line with the legal arrangements introduced by the above-mentioned Decree Laws.

240. The last sentence of Article 148 § 1 of the Constitution, which provides "*… presidential decrees issued during a state of emergency or in time of war shall not be brought before the Constitutional Court alleging their unconstitutionality as to form or substance*", should not be interpreted as not allowing the examination, within the individual application mechanism,

of the alleged interferences with the fundamental rights and freedoms. Nor do other articles of the Constitution or the relevant laws include any provision envisaging that an individual application cannot be lodged with the Constitutional Court during a period when emergency administration procedures are in effect, by alleging that any of the fundamental rights and freedoms falling into the scope of the individual application has been violated. Accordingly, in period of times when emergency administration procedures are in effect, the Constitutional Court has the authority to examine the applications lodged with the allegation that out of the fundamental rights and freedoms safeguarded in the Constitution, any of those falling into the scope of the ECHR or its additional protocols to which Turkey is a party has been violated by public force (see *Aydın Yavuz and Others*, §§ 180, 181). Accordingly, any interference with the fundamental rights and freedoms within the scope of individual application may be the subject of an individual application, even if it was based on decree laws issued during the state of emergency.

241. As a matter of fact, in one of its recent judgments, namely *Aydın Yavuz and Others,* the Constitutional Court examined whether the review of detentions of the applicants, who were detained on remand for having participated in activities related to the coup attempt, without a hearing for a period of 8 months and 18 days constituted a measure "proportionate to the exigencies of the situation". The Court based its judgment on many reasons such as the fact that in the aftermath of the coup attempt, investigations were launched countrywide against many persons considered to have had relations with the coup attempt and the FETÖ/PDY and a considerable part of them were detained on remand; that these investigations were far more difficult and complex than other criminal investigations; that the judicial authorities were to manage a heavy workload which was unforeseeable; that following the suppression of the coup attempt, many members of the judiciary were suspended or dismissed from office by the HCJP for having connection with the FETÖ/PDY; that the detainees' right of access to a court for their release and their opportunity to appeal against the court decisions on detention, dismissal of their request for release and continuation of their detention were safeguarded in the state of emergency, as well, and their detention

was reviewed *ex-officio* within at least thirty-day periods; and that a considerable number of staff working in courthouse, law-enforcement officers as well as gendarmerie and security officers were suspended or dismissed from their public offices due to their relations with the FETÖ/PDY. Hence, the Court concluded that in the circumstances of the state of emergency period, denial of the applicants to appear before a judge/court during 8 months and 18 days constituted a measure "required by the exigencies of the situation". Therefore, the Court found that the applicant's right to personal liberty and security had not been violated, taken in conjunction with Article 15 of the Constitution (see *Aydın Yavuz and Others*, §§350-359).

242. Besides, in the present case, the period during which the applicant was not brought before a judge/court for judicial review of his detention (21 months) was longer than twice of the period examined in the judgment of *Aydın Yavuz and Others*.

243. Certain measures were taken during the state of emergency period to increase the number of judges and prosecutors. In this regard, the internships of the candidate judges and prosecutors were terminated and they were allowed to start their profession immediately, furthermore, an administrative process was initiated for the recruitment of a large number of new judge and prosecutor candidates and the internship period of the candidates were shortened, and the retired or resigned judges and prosecutors were provided with the opportunity to return their offices. As a result of these measures, approximately 6 thousand judges and prosecutors have been appointed to office after the coup attempt. Therefore, the gap created as a result of dismissal of judges and prosecutors from office during the state of emergency has been filled by the substantial increase in the number of judges and prosecutors.

244. Furthermore, almost all of the investigations into the coup attempt have been concluded, and prosecution stage has started with respect to the suspects. In some of these processes, first instance courts made decisions, as well. Accordingly, it can be said that an important progress has been made in the investigations and cases related to the coup attempt and the FETÖ/PDY. In addition, a significant part of the investigations

against the persons who were detained on remand within the scope of the investigations into the FETÖ/PDY, although they did not have direct connection with the coup attempt, have been concluded, and even the first instance courts as well as the regional courts of appeal started to make decisions. Further, some of the suspects detained on account of the offences related to the FETÖ/PDY have been released or convicted, thereby ending their detention on remand.

245. Therefore, in the assessment of whether the judicial review of the applicant's detention without being brought before a judge/court during approximately 21 months constituted a measure "proportionate to the exigencies of the situation" or not, the changing circumstances of the state of emergency period, besides the length of detention on remand, must also be taken into account.

246. Given the circumstances of the state of emergency period, especially the initiatives to increase the number of judges and prosecutors as well as the course of the investigation and prosecution processes related to the coup attempt and the FETÖ/PDY, it has been considered that the judicial review of detentions without bringing the suspects before a judge/court and the continuation of their detention on remand without holding a hearing in the course of investigation and prosecution phases related to the coup attempt, FETÖ/PDY and terrorism can be regarded as a measure required by the exigencies of the situation in the period up to 18 months.

247. However, it must be noted that this assessment has been made by taking into consideration the circumstances prevailing from the beginning of the state of emergency that was declared on 21 July 2016 until today and the changes in this regard. Therefore, this assessment must not be regarded as an open licence allowing investigation and prosecution authorities to conduct the judicial review of detentions over case-documents for a period of 18 months.

248. Nevertheless, regard being had to the fact that the state of emergency still continued and that a large part of the cases related to the coup attempt and the FETÖ/PDY were pending, the longer detention periods without a hearing compared to non-emergency times cannot be automatically regarded as a measure not required by the exigencies of

the situation. The Court will make an assessment in each application by taking into consideration the circumstances of the case, the period during which the review of detentions was conducted without holding a hearing, and the developments in the state of emergency period.

249. Thus, the fact that the applicant, who was detained on remand for alleged membership of an armed terrorist organization (FETÖ/PDY), has not been brought before a judge/court within the scope of the judicial review of his detention for more than 18 months and that he was not provided with the opportunity to orally submit, before a judge/court, his challenges against detention, his allegations regarding the content and qualification of the evidence underlying his detention, his counter statements against the observations and considerations against him as well as his requests for release, were not regarded as a measure required by the exigencies of the situation.

250. Therefore, the interference with the applicant's personal liberty and security by the extension of his detention over the case file without being brought before a judge/court for a period of 21 months, which was in breach of the safeguards provided in Article 19 § 8 of the Constitution, cannot be considered to be justified under Article 15 of the Constitution regulating the suspension and restriction of the fundamental rights and freedoms during "the state of emergency".

251. Consequently, the Constitutional Court has found a violation of the applicant's right to personal liberty and security under Article 19 § 8 of the Constitution, also in conjunction with Article 15 of the Constitution.

Mr. Hicabi DURSUN, Mr. Kadir ÖZKAYA, Mr. Rıdvan GÜLEÇ and Mr. Recai AKYEL did not agree with this conclusion.

Mr. Serdar ÖZGÜLDÜR submitted a concurring opinion.

E. Application of Article 50 of Code no. 6216

252. Article 50 §§ 1 and 2 of the Code on Establishment and Rules of Procedures of the Constitutional Court no. 6216 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 cannotbemade.

(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."

253. The applicant claimed 1,000,000 Turkish liras (TRY) and TRY 100,000 for non-pecuniary compensation, respectively, in the applications no. 2016/15637 and no. 2017/35864.

254. It was concluded that Article 19 § 8 of the Constitution was violated for the applicant's continued detention for 21 months without holding hearings and thus not bringing him before a judge/court. This finding of a violation should not be interpreted as pointing to the applicant's release.

255. Besides, it has been observed that the applicant was not brought before a judge/court until the date of court decision within the scope of the review of his detention on remand. In order for the redress of the violation found by the Court as well as of its consequences, the applicant should be brought before a judge/court for review of his detention. Thus, the judgment should be sent to the 9th Criminal Chamber of the Court of Cassation.

256. On account of the interference with the applicant's right to personal liberty and security, he was awarded a net amount of TRY 3,000 for his non-pecuniary damage which could not be redressed by merely finding a violation.

257. The total court expense of TRY 2,477, including the court fee of TRY 497 and the counsel fee of TRY 1,980, which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For the reasons explained above, the Constitutional Court held on 12 April 2018:

A. 1. UNANIMOUSLY that the alleged violation of the presumption of innocence be DECLARED INADMISSIBLE for being *manifestly-ill founded*;

2. UNANIMOUSLY that the alleged violation of the right to a fair trial be DECLARED INADMISSIBLE for *non-exhaustion of legal remedies*;

3. UNANIMOUSLY that the alleged violations of the right to respect for private life and the right to respect for home be DECLARED INADMISSIBLE for *non-exhaustion of legal remedies*;

4. UNANIMOUSLY that the alleged violation of the right to personal liberty and security due to unlawfulness of detention on remand be DECLARED INADMISSIBLE for being *manifestly-ill founded*;

5. UNANIMOUSLY that the alleged violation of the right to personal liberty and security due to inability to exercise the right to challenge effectively the detention be DECLARED INADMISSIBLE for being *manifestly-ill founded*;

6. UNANIMOUSLY that the alleged violation of the right to personal liberty and security due to the alleged unreasonable length of detention be DECLARED ADMISSIBLE;

7. UNANIMOUSLY that the alleged violation of the right to personal liberty and security due to the alleged review of detention without being brought before a judge/court be DECLARED ADMISSIBLE;

B. 1. UNANIMOUSLY that the right to personal liberty and security under Article 19 § 7 of the Constitution, regarding the alleged unreasonable length of detention, was NOT VIOLATED;

2. By MAJORITY and by dissenting opinions of Mr. Hicabi DURSUN, Mr. Kadir ÖZKAYA, Mr. Rıdvan GÜLEÇ and Mr. Recai AKYEL, that the right to personal liberty and security under Article 19 § 8 of the Constitution, regarding the alleged review of detention without being brought before a judge/court was VIOLATED;

C. That a copy of the judgment be SENT to the 9th Criminal Chamber of the Court of Cassation in order to redress the consequences of the violation;

D. That the net amount of TRY 3,000 be PAID to the applicant as non-pecuniary compensation, and other claims for compensation be DISMISSED;

E. That the total court expense of TRY 2,477, including the court fee of TRY 497 and the counsel fee of TRY 1,980 be REIMBURSED to the applicant;

F. 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; and

G. That a copy of the judgment be SENT to the Ministry of Justice.

CONCURRING OPINION OF JUSTICE SERDAR ÖZGÜLDÜR

In Article 3 (ç), titled "Investigation and prosecution processes", of Law no. 6755 on the Adoption with Certain Amendments of the Decree Law on the Measures to be taken under the State of Emergency and on Making Arrangements concerning Certain Institutions and Organisations, which is dated 8 November 2016 (published in the Official Gazette no. 29898 and dated 24 November 2016), it is set forth that as regards the offences defined in Volume II, Chapter IV, Parts IV, V, VI and VII of the Turkish Criminal Code no. 5237 as well as the offences falling into the scope of the Anti-Terror Law no. 3713 and collective offences, **"the requests for release shall be adjudicated over the case-file, along with the judicial review of detention, within a maximum period of 30 days" so long as the state of emergency remains in force.** This provision, which is so clear as not to be subject to interpretation, leaves no room for the magistrate judges to examine the challenges against detention by holding a hearing despite the explicit requests in this respect. In other words, in practice, the competent judges cannot examine such requests with a hearing. However, as the relevant provisions of the Decree Law no. 668 was enacted through Law no. 6755, it is undoubted that these provisions may be made subject to the Constitutional Court's review and assessment. In examining the individual applications, the Court primarily takes into account the Constitution, the European Convention on Human Rights, as well as the case-law of the European Court of Human Rights ("the ECHR"). In case of any contradiction between a provision of law and the above-mentioned instruments, the Court reaches a conclusion, ignoring the contradictory provision. If there is "a violation" in such cases, which could be qualified as a "system's failure", the Court may render a violation judgment, in its capacity as the "judicial tribunal that is the highest guarantor of fundamental rights and freedoms", on the issues which could not be expected to be dealt with by the first and second instance courts (including the appeal courts and superior courts).

In the present case, there is also such a failure. Accordingly, in consideration of the clear provision of law, the relevant competent authorities (magistrate judges) cannot examine the challenges against detention "by holding a hearing" even if they wish to do so. However,

given the length of the applicant's detention, the safeguard afforded by Article 19 § 8 of the Constitution and the ECHR's consistent practice on this matter, I consider that the provision fails to satisfy the criterion "to the extent strictly required by the exigency of the situation" which allows for the restriction of fundamental rights and freedoms as specified in Article 15 of the Constitution; and that therefore, in line with the similar practices adopted by the Court, a violation must be found in the present case by ignoring the said provision of law.

For these reasons, I agree with the majority's conclusion that Article 19 § 8 of the Constitution was violated in the present case, albeit on a different ground as explained above.

DISSENTING OPINION OF JUSTICES HİCABİ DURSUN, KADİR ÖZKAYA, RIDVAN GÜLEÇ AND RECAİ AKYEL

For the following reasons, we do not agree with the conclusion reached by the Court's majority on 12 April 2018 in the individual application no. 2016/15637 to the effect that the right to personal liberty and security was VIOLATED within the meaning of Article 19 § 8 of the Constitution insofar as it relates to the "alleged conduct of the judicial reviews of the applicant's detention without being brought before a judge/court".

By the examination date of the present application, the state of emergency was still in force throughout the country, and the Republic of Turkey notified its derogation from the European Convention on Human Rights ("the Convention") to the Secretary General of the Council of Europe as well as from the International Covenant on Civil and Political Rights ("the ICCPR") to the Secretary General of the United Nations. The decisions extending the state of emergency were also notified to these two Secretariats. Besides, the judges/courts dealing with the requests for release and judicial review of detention are bound by the positive provisions which read as follows: "during the state of emergency, as regards the offences defined in Volume II, Chapter IV, Parts IV, V, VI and VII of the Turkish Criminal Code no. 5237 and dated 26 September 2004, as well as the offences falling into the scope of the Anti-Terror Law no. 3713 and dated 12 April 1991 and collective offences, … c) the magistrate judge or the court detention order of which has been challenged shall revise its order if deems it necessary; and if not, it shall send the detention order to the competent authority to review the challenge within a maximum period of 10 days; and ç) the requests for release shall be adjudicated over the case-file along with the judicial review of detention within a maximum period of 30 days" so long as the state of emergency remains in force; … and i) judicial review of detention, challenges to detention and requests for release shall be adjudicated over the case-file …".

However, the Court's majority concluded that the conduct of the judicial reviews of detention in the investigations and/or prosecutions conducted with respect to the coup attempt, the FETÖ/PDY and terrorism without being brought before a judge/court and ordering the continued detention

through decisions issued over the case-file may be considered, up to 18 months, as a measure "strictly required by the exigency of the situation", given the certain measures taken during the state of emergency to increase the number of judges and prosecutors, the step taken to ensure that candidate judges and prosecutors take office immediately by terminating their internship, the administrative process initiated to recruit numerous new judges and prosecutors, the shortening of the duration of internship of the newly appointed judges and prosecutors, the ability afforded for the retired or resigned judges and prosecutors to be reinstated, the success to remedy the deficiencies resulting from the dismissal of many judges and prosecutors during the state of emergency through these measures and the significant progresses made with respect to the investigations and prosecutions as regards the coup attempt and the FETÖ/PDY. The Court's majority nevertheless indicated that the periods exceeding 18 months could not be considered reasonable and acceptable.

However, although certain measures were taken during the state of emergency to increase the number of judges and prosecutors, the conduct of judicial review of detention before a judge/court does not depend merely on the number of these officials but on several aspects and factors such as the security issue, the increased number of cases and disputes in parallel to the increase in the number of judges and prosecutors, the availability of transportation facility and staff to ensure transfer of detainees from prisons to courts and the excessive number of persons detained for the specified offences. Moreover, a significant part of the proceedings as regards the coup attempt are still pending before the first instance courts, like many of the investigations and prosecutions conducted with respect to the FETÖ/PDY, which points to the fact that the conditions of the periods following the first declaration of the state of emergency have been still prevailing.

For these reasons, we do not agree with this part of the decision as we consider that the conduct of judicial reviews of the applicant's detention without a hearing as of the date when his detention was ordered and the examination of his requests for release and challenges against detention over the case-file did not entail a violation of the right to personal liberty and security.

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

BİNALİ ÖZKARADENİZ AND OTHERS

(Application no. 2014/4686)

1 February 2018

On 1 February 2018, the Plenary of the Constitutional Court found a violation of the right to respect for private and family life safeguarded by Article 20 of the Constitution in the individual application lodged by *Binali Özkaradeniz and Others* (no. 2014/4686).

THE FACTS

[10-33] The applicants are residing in a village located near a stream in the Susuz district of Kars.

The Kars Governor's Officer carried out an inspection over the sewage system of the district municipality and consequently ascertained that sewage was disposed to the stream without being subject to any treatment.

Thereafter, the district municipality, taking into consideration the relevant legislation, prepared a "work termination plan" and submitted it to the Governor's Office. However, it was noted in the "Environmental Status Report" issued afterwards by the Provincial Directorate of Environment and Urbanization that no wastewater treatment facility had been constructed in the region.

Alleging that they were sustaining damage on account thereof, the applicants brought several actions for compensation against the municipality. However, the administrative court dismissed the actions. The applicants' appellate requests against the administrative court's decisions were also dismissed by the Council of State.

V. EXAMINATION AND GROUNDS

34. The Constitutional Court, at its session of 1 February 2018, examined the application and decided as follows:

A. As regards the Applicant Binali Özkaradeniz

35. Pursuant to Article 80 § 1 (ç) of the Internal Regulations of the Constitutional Court, an individual application may be struck out of the Court's list of cases in the absence of any reason justifying the continued examination of the application. It is also set forth in Article 80 § 2 thereof that the Court may proceed with the examination of the application if

required for the implementation and interpretation of the Constitution or the determination of the scope and boundaries of fundamental rights and freedoms or ensuring respect for human rights.

36. In cases where the heirs of an applicant who has died after lodging an individual application fail to inform the Court, within a reasonable time, of their intent to pursue the application, the Court may find no ground to justify a continued examination of the application pursuant to the above-mentioned provisions of the Internal Regulations (see *İskender Kaya and Others*, no. 2014/7674, 23 March 2017, §§ 12-22). In the present case, the applicant Binali Özkaradeniz died on 14 August 2015 after lodging his application but his heirs failed to inform the Court of their intent to pursue the application within a reasonable time. Nor is there any reason to justify a continued examination of the application or any of the reasons specified in Article 80 § 2 of the Internal Regulations.

37. Accordingly, the Court decided to strike the individual application lodged by Binali Özkaradeniz out of the Court's list of cases.

B. As regards the Other Applicants

1. The Applicants' Allegations

38. The applicants complained of the disposal by the municipality of untreated sewage to a stream running along their village. They maintained that the villagers therefore suffered from diarrhoea, jaundice and similar types of diseases due to the water pollution caused thereby. They further indicated that this pollution also endangered the human and animal health as well as the environment.

39. The applicants complained that in the action for annulment they had filed upon the dismissal of their application with the relevant administration for taking of the necessary measures, their claim for compensation on account of the damage they had sustained was rejected unjustly although the administrative court found established the issues in question. They maintained that this pollution which was not compatible with human dignity amounted to torture and was, by its effects and consequences, in breach of their right to a healthy environment.

2. The Court's Assessment

40. Article 20 § 1 of the Constitution titled *"Privacy of private life"*, insofar as relevant, reads as follows:

> *"Everyone has the right to demand respect for his/her private and family life. ."*

41. Article 5 of the Constitution titled *"Fundamental aims and duties of the State"* reads as follows:

> *"The fundamental aims and duties of the State are to safeguard …, the Republic and democracy, 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."*

42. All legal interests 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 sense, it appears 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 accordingly appears that the rights enshrined in Article 8 of the Convention are basically set out in Articles 20, 21 and 22 of the Constitution (for the Court's judgments in the same vein, see *Hüseyin Tunç Karlık and Zahide Şadan Karluk*, no. 2013/6587, 24 March 2016, § 41).

43. On the other hand, Article 17 § 1 of the Constitution enshrines the individuals' right to protect and improve their corporeal and spiritual existence. The legislative intention of this provision sets forth that *"… this provision secures the rights to life, as well as to protect and improve the corporeal and spiritual integrity. These two rights clearly form a whole and supplement one another. The State shall take the necessary measures so as to protect the right to life that is protected by law…"*. Besides, as set forth in Article 5 of the Constitution, it is among the State's positive obligations to ensure the

necessary conditions for the improvement of the individual's corporeal and spiritual existence. Therefore, the right to protect and improve the corporeal and spiritual existence laid down in these provisions must be considered as a framework regulation to be taken into consideration in terms of the safeguards pertaining to the fundamental rights and freedoms that are protected jointly by the Constitution and the Convention. However, the right to respect for private life is enshrined in Article 20 of the Constitution, and thereby afforded a special and separate safeguard. Therefore, the environmental issues that have a bearing also on the individual's corporeal and spiritual existence must be examined under the right to respect for private life laid down specifically and separately in Article 20 of the Constitution. However, in assessing the positive obligations incumbent on the State within the meaning of the right to respect for private life, the statutory arrangements pertaining to the right to protect and improve the corporeal and spiritual existence must also be taken into account.

44. Within the scope of the protection of private life, several legal interests that are compatible with 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 his right to respect for private life. One of the legal interests inherent in 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).

45. The normative basis of the right to a healthy environment, in constitutional context, is the provision that everyone has the right to live in a healthy and balanced environment, which is set forth in Article 56 of the Constitution which is under the section titled social and economic rights and duties. 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 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.

46. 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 applicants' allegations are related neither to the prohibitions of torture and ill-treatment nor to the right to life. Therefore, by the very nature of the alleged violations, the application was examined under the right to respect for private and family life.

a. Admissibility

47. It must be primarily assessed whether the environmental impact complained by the applicants attained the minimum level of severity required to trigger the safeguards inherent in Article 20 of the Constitution (for the Court's judgments in the same vein, see *Mehmet Kurt* [Plenary], no. 2013/2552, 25 February 2016, § 67; *Ahmet İsmail Onat*, no. 2013/6714, 21 April 2016, § 82; and *Hüseyin Tunç Karlık and Zahide Şadan Karluk*, § 66).

48. In order for environmental issues to be assessed within the scope of Article 20 of the Constitution, 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 it has attained a minimum level of severity. However, the threshold of minimum severity is assessed by not determining whether the relevant legal values have been violated, but finding 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 the physical or mental integrity as well as general environmental context. The most important element to be taken into consideration in the assessments is undoubtedly the proximity of the applicant to the source of environmental pollution (for the Court's judgments in the same vein, see *Mehmet Kurt* § 58; and *Fevzi Kayacan (2)*, no. 2013/2513, 21 April 2016, § 53).

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

same vein, see *Mehmet Kurt* § 69; *Ahmet İsmail Onat*, § 84; and *Hüseyin Tunç Karlık and Zahide Şadan Karluk*, § 68).

50. By virtue of the amendment made to Law no. 2872 in 2006 by the legislator with respect to the treatment of sewage, the municipalities have been held liable to establish wastewater treatment system with a view to avoiding such environmental nuisance, and it is also prescribed that if the municipalities fail to establish such facilities within the specified period, a fine shall be imposed on them. Besides, Article 43 § 4 of the Water Pollution Control Regulation sets forth that in cases where the commitments specified in the work termination plan concerning the establishment of a wastewater treatment facility are not fulfilled for any reason other than force majeure, a criminal complaint shall be filed against those concerned. It is inferred from these arrangements introduced by the legislator and the relevant administration that disposal of untreated sewage to a stream constitutes a severe environment issue which may lead to unfavourable impacts. Considering the content of these arrangements and the severe sanctions prescribed therein, the Court has also acknowledged that the impugned environmental nuisance in the present case constituted a severe problem.

51. However, the impacts of the environmental nuisance in question on the applicants' private and family lives and on their homes must be also assessed. It appears that both the applicants' testator, Bekir Erdagöz, and the applicants themselves are residing in the Porsuklu village in Susuz District of Kars where the Susuz Small Stream runs along. It was found established by the Governor's Office that the sewage was disposed to the stream in the applicants' village without being subject to any treatment process by the municipality. As a matter of fact, the inferior courts reached the same conclusion and accordingly determined that such disposal of sewage to the stream had led to pollution likely to have hazardous effects on the applicants' health.

52. Therefore, in line with the administrative and judicial authorities' findings, the impugned interference -in the form of the disposal of untreated sewage to the stream- undoubtedly has adverse effects on the individuals residing in that region. It should be also noted that as indicated

in the application form and annexes thereto, the applicants engage in agriculture and livestock. Therefore, the effects and consequences of the impugned stream pollution become much more important. In this sense, especially given the location of the stream in the present case, it must be acknowledged that the environmental impacts resulting from the disposal of untreated sewage to the stream are closely associated with the applicants' private and family lives as well as with the use of their homes. Accordingly, given the impacts of the water pollution resulting from a public deed on the applicants within the framework of their right to respect for private and family life, it has been concluded that the impugned environmental nuisance constituted an interference with the right safeguarded by Article 20 of the Constitution. Therefore, it has been considered that the environmental nuisance complained of in the present case attained the severity required to fall within the scope of Article 20 of the Constitution.

53. The Court accordingly declared the alleged violation admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

Mr. Burhan ÜSTÜN, Mr. Serdar ÖZGÜLDÜR, Mr. M. Emin KUZ, Mr. Kadir ÖZKAYA and Mr. Recai AKYEL did not agree with this conclusion.

b. Merits

i. General Principles

54. The State is under the positive obligation to effectively protect and respect for the individuals' right to respect for private and family life. In such kind of applications, it is highly difficult to distinguish between the negative and positive obligations incumbent on the State. Besides, the principles to be applied in these applications are mainly the same in terms of both the negative and positive obligations (in the same vein, see *Hüseyin Tunç Karlık and Zahide Şadan Karluk*, § 59).

55. The procedural obligations incumbent on the State in the context of environmental issues have been previously laid down in various judgments rendered by the Court. Accordingly, it is undoubted that in order to avoid or minimise any possible adverse environmental impacts,

the interests of the parties involved in the given process must be assessed meticulously, and to make such a sound assessment, the relevant parties must be enabled to effectively participate in the process (see *Mehmet Kurt* §§ 61-66; *Ahmet İsmail Onat*, § 79-81; *Fevzi Kayacan (2)*, §§ 56-61; and *Hüseyin Tunç Karlık and Zahide Şadan Karluk*, §§ 64, 65).

56. On the other hand, as regards the substantive obligations, what is important is whether the public authorities have taken the necessary steps so as to secure the effective protection of the right to respect for private and family life. In this sense, it must be assessed whether a fair balance was struck between the competing interests within the meaning of the impugned environmental impact. In this regard, given the wide margin of appreciation exercised 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 *Mehmet Kurt* § 78; *Ahmet İsmail Onat*, § 87; *Fevzi Kayacan (2)*, §§ 66, 67; and *Hüseyin Tunç Karlık and Zahide Şadan Karluk*, §§ 70, 71).

57. The State has not only a duty to establish a protective legislation which secures a healthy environment within the meaning of the right to respect for individuals' private and family life under Article 20 of the Constitution but also an obligation to supervise and perform factual acts and to take measures protecting the environment. In this sense, the State is to take the necessary measures so as to prevent the pollution as well as to preserve and develop the natural environment. Besides, the public authorities are afforded a wide margin of appreciation in determining which measures are to be taken and how they would be applied.

ii. Application of Principles to the Present Case

58. It was found established by the inferior courts at the end of the proceedings that the disposal of the sewage to the stream without any treatment by the municipality gave rise to water pollution; and that certain measures should have been taken so as to prevent this pollution.

Besides, the Governor's Office also reached the same conclusion at the end of the inspections it had carried out. Therefore, both the administration and the judicial authorities determined that the stream running along the applicants' village had been polluted.

59. In the present case, the obligation not to dispose the untreated sewage to the stream in a way that might cause adverse effects on the individuals' health within the scope of the right to respect for private and family life safeguarded by Article 20 of the Constitution is explicitly at stake. It is within the public authorities' discretion to determine the way in which this obligation is fulfilled and the measures needed to be taken to that end. However, it is requisite to apply such measures through a speedy, reasonable and appropriate means with a view to giving rise to no violation of the relevant right.

60. In this context, by Provisional Article 4, added to Law no. 2872 through Law no. 5491, the municipalities are entrusted with the duty to establish sewage treatment facilities. By its Circular of 23 June 2006, the Ministry of Environment and Urbanisation also envisaged that the municipalities of the cities with the population of between 2.000 and 10.000 would submit their work termination plans until 13 May 2007 and would put the facility into operation within 10 years. Besides, Article 43 of the Water Pollution Control Regulation sets forth that the administration is liable to dispose of the collected wastewater within the scope of the principles specified therein, and the municipalities failing to fulfil these obligations shall be subject to certain sanctions. Given the needs underlying the above-mentioned legal and administrative arrangements as well as the grounds and purposes thereof, it has been observed that the failure to establish a sewage treatment facility is not specific to the present case but constitutes a common structural environmental problem across the country.

61. The Court has observed that the public authorities have been taking the necessary measures so as to prevent water pollution across the country, as required by the State's positive obligations. As a matter of fact, the legislator has introduced a statutory arrangement on this matter, and the relevant administration has put this arrangement into operation. As

regards the present case, it has been observed that the relevant municipality submitted its work termination plan concerning the treatment facility to the Governor's Office within the prescribed statutory period.

62. Moreover, as in the present case, it is clear that the treatment facility deemed necessary to prevent environmental pollution involves a certain cost and can be established within the scope of a planning. Indeed, in the relevant statutory arrangement, the periods for putting the treatment facilities into operation are determined in consideration of the populations of the relevant settlements regard being had to the limited financial resources of the relatively small municipalities. In this sense, these periods are prescribed as 3 years for the municipalities of the cities with population of over 100.000 and as 10 years for the municipalities of the cities with population of 2.000 and 10.000. The Court acknowledges that the public authorities have a wide margin of appreciation with respect to the measures to be taken and acts to be performed accordingly.

63. The start of the implementation of these statutory and administrative measures taken with respect to the sewage treatment is of great importance for the resolution of this structural environmental issue. Also in the present case, it has been observed that a significant step has been taken to prevent the water pollution, and in case of the establishment of a treatment facility as envisaged, the impugned significant environmental problem having effects on the applicants' private and family lives would be undoubtedly resolved.

64. However, the likelihood of implementation of certain measures in future is not capable of removing the applicants' victim status given the particular circumstances of the present case. In order to remove their victim status, it is required that the reasons giving rise to the violation of the right in question be eliminated; and that the non-pecuniary damages sustained by the applicants be redressed in consideration of the period that has elapsed during the impugned violation.

65. As also mentioned above, in the present case, the disposal of the sewage to the stream, without being subject to any treatment -of which the applicants complained- resulted from a public deed and constituted a clear interference leading to the violation of the applicants' right to

respect for private and family life. In 2006, the Governor's Office found established the impugned environmental pollution, and the date specified in the work termination plan, issued by the municipality with respect to the wastewater treatment facility to avoid the pollution, was 11 October 2012. Besides, the period of 10 years envisaged, for the establishment of wastewater treatment facility, in the statutory arrangement introduced by the legislator in Law no. 2872 in 2006, as well as in the Circular of the relevant ministry in the same year, also expired. However, the incumbent inferior courts found established, at the end of the action for compensation concluded in 2014, that the treatment facility that would prevent the impugned environmental pollution had not been established yet. It has been observed that according to the "Environmental Status Report" issued by the administration in 2017, the facility had not been commissioned yet despite the period that elapsed.

66. On the other hand, in the present case, the inferior courts noted that the applicants failed to prove any pecuniary damage they had sustained on account of the impugned interference and also dismissed their claims for non-pecuniary compensation. It appears that the reasoning parts of these decisions are mainly based on the construction of the treatment facility that would be completed in future. However, affording redress for the non-pecuniary damages sustained by the applicants due to the violation of their right to respect for private and family life would not only lessen the burden incurred by them due to the breach of their constitutional rights but also is important for producing the necessary deterrent effect to prevent future violations. Therefore, given the expiry of the period prescribed in the work termination plan and the failure to eliminate the impugned environmental nuisance pending the compensatory proceedings, merely the establishment of treatment facility in future cannot be deemed sufficient for the redress of the non-pecuniary damages that have been already or are still sustained by the applicants whose constitutional rights were violated. Accordingly, as the environmental nuisance was caused by the public authorities in the present case, the inferior courts' decisions, which did not provide any reasonable explanation as to why it was not necessary to redress the non-pecuniary damages sustained by the applicants due to the infringement of their constitutional rights, cannot be considered as relevant and sufficient.

67. In the light of these findings, it has been concluded that the public authorities failed to fulfil their positive obligations with respect to the right to respect for the applicants' private and family life.

68. For these reasons, the Court found a violation of the right to respect for private and family life safeguarded by Article 20 of the Constitution.

Mr. Burhan ÜSTÜN, Mr. Serdar ÖZGÜLDÜR, Mr. Serruh KALELİ, Mr. M. Emin KUZ, Mr. Kadir ÖZKAYA and Mr. Recai AKYEL did not agree with this conclusion.

c. Application of Article 50 of Code no. 6216

69. 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."*

70. Bekir Erdagöz, testator of the applicants Memet Erdagöz and Belgüzar Çimendağ, claimed both pecuniary and non-pecuniary compensation in the application form but did not specify any amount.

71. In the present case, as regards the individual applications lodged by Memet Erdagöz and Belgüzar Çimendağ, the Court found a violation of the right to respect for private and family life safeguarded by Article 20 of the Constitution.

72. As there is a legal interest in conducting a retrial to redress the consequences of the violation of these two applicants' right to respect for private and family life, a copy of the judgment must be sent to the 1st Chamber of the Erzurum Administrative Court for a retrial.

73. As the order to send the judgment to the relevant court in order to conduct a re-trial would constitute sufficient just satisfaction for the non-pecuniary damages suffered by the applicants, their claims for compensation must be dismissed.

74. The court fee of TRY 206.10, which is calculated over the documents in the case file, must be reimbursed jointly to the applicants Memet Erdagöz and Belgüzar Çimendağ.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 1 February 2018:

A. UNANIMOUSLY that the individual application lodged by the applicant Binali Özkaradeniz be STRUCK out of the list;

B. By MAJORITY and by dissenting opinion of Mr. Burhan ÜSTÜN, Mr. Serdar ÖZGÜLDÜR, Mr. M. Emin KUZ, Mr. Kadir ÖZKAYA and Mr. Recai AKYEL, that the individual applications lodged by the applicants Memet Erdagöz and Belgüzar Çimendağ be DECLARED ADMISSIBLE;

C. By MAJORITY and by dissenting opinion of Mr. Burhan ÜSTÜN, Mr. Serdar ÖZGÜLDÜR, Mr. Serruh KALELİ, Mr. M. Emin KUZ, Mr. Kadir ÖZKAYA and Mr. Recai AKYEL, that the right to respect for private and family life safeguarded by Article 20 of the Constitution was VIOLATED;

D. That a copy of the judgment be SENT to the 1st Chamber of the Erzurum Administrative Court for a retrial in order to redress the consequences of the violation of the right to respect for private and family life (E. 2010/121, K.2011/28);

E. That the applicants' claims for compensation be DISMISSED;

F. That the court fee of TRY 206.10 be REIMBURSED JOINTLY to the applicants Memet Erdagöz and Belgüzar Çimendağ; and the court expenses incurred by Binali Özkaradeniz be COVERED by him;

G. That 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

H. That a copy of the judgment be SENT to the Ministry of Justice.

DISSENTING OPINION OF JUSTICES BURHAN ÜSTÜN, SERDAR ÖZGÜLDÜR, KADİR ÖZKAYA AND RECAİ AKYEL

The subject-matter of the individual application lodged by the two applicants is the alleged violation of Article 17 of the Constitution due to the dismissal of the actions for compensation that they had brought as one of the applicants suffered from hepatitis B while some animals of the other applicant died as a result of the disposal of their village's sewage, without being subject to any treatment by the relevant municipality, to a stream running along the village.

The examination of the decisions issued by the 1st and 2nd Chambers of the Erzurum Administrative Court clearly reveals that there is no certainty as to the transmission of Hepatitis-B virus from the stream water; that the allegation that the applicant's animals died on account of the same reason was not proven (the applicant even failed to prove that the animals were in his possession); and that therefore, the alleged fault attributed to the administration could not be substantiated.

Besides, it has been observed that as of the date when the individual application was lodged (31 October 2014), the period of 10 years envisaged for the relevant municipality to complete the treatment facility had not been expired yet. Therefore, it is not possible to attribute any fault to the administration also in this respect. Moreover, regard being had to Articles 65 and 166 of the Constitution, as the construction of treatment facilities of tens of thousands of settlements in the country would take a very long period and require financial resource, attributing fault to a small municipality merely on account thereof is devoid of a constitutional basis. As a matter of fact, both administrative courts (the Council of State upholding these decisions, as well) explained with a well-detailed reasoning that the administration had not had any fault or strict liability and accordingly dismissed the applicants' claims for pecuniary and non-pecuniary compensation.

These claims, which could not be substantiated and in respect of which no damage could be proven, amounted by their very nature to "*actio popularis*". Given the possibility that the cases to be filed, by those residing in settlements with no or insufficient electricity, water, sewage network,

road, health-care and education facilities, merely for such reasons may entail violations of several rights, as in the present case, it is impossible for the State to discharge this burden. As a matter of fact, the interpretation made through any examination under the right to a healthy environment alone without taking into consideration the other rights and by ignoring the State's financial means would not be right and reasonable.

The majority of the Court has considered that the alleged violation of the applicants' right to protect and improve their corporeal and spiritual existence was inadmissible for being manifestly ill-founded. However, we disagree with the majority finding a violation of the relevant constitutional right in the present case.

DISSENTING OPINION OF JUSTICE SERRUH KALELİ

In the present case where the applicant was residing in the Porsuklu village, Susuz district of Kars, an action was brought by the applicants for the prevention of water pollution after it had been revealed that the district sewage was disposed to the Susuz stream running along the village. The incumbent court found established that the relevant municipality had the responsibility to prevent such pollution but failed to take the necessary steps as required by the work termination plan it had issued in 2007 with respect to the wastewater treatment facility in accordance with the Ministry's circular. The court found a gross neglect of duty on the part of the municipality for having remained inactive. The other action brought against the municipality, due to its failure to comply with the administrative decision, whereby compensation was claimed for the damages sustained on account of the impugned pollution was dismissed as the prescribed period 10 years for the establishment of treatment facility had not been expired yet and there was no neglect of duty attributable to the municipality which would entail liability to compensate. The dismissal decision was ultimately upheld.

The applicants lodged an individual application with the Court as they had suffered from diseases, the environment had been put in danger and their right to a healthy environment had been violated due to the water pollution in their village.

In the present case, the Governor's Office found established that the sewage was disposed to the stream in the applicants' village, which gave rise to pollution, and it is clear that this act of public nature constituted an interference with the applicants' family lives and their right to protect and improve the corporeal and spiritual existence. The positive obligation incumbent on the State to effectively protect and respect for these rights is considered to amount to a constitutional safeguard. The application, which is not manifestly ill-founded, must be declared ADMISSIBLE and examined on the merits.

The applicant, Binali Özkaradeniz, maintained that the Susuz stream had been polluted and no step had been taken to avoid this pollution; that he had been suffered from diseases; that his damages had not been

compensated for; and that his right to a healthy environment had been violated. After his death in 2015, the application was pursed by his heirs.

In the additional petition submitted, the scope of the alleged violation raised by the testator was extended, and it was maintained that there had been also violations of Article 13 of the European Convention on Human Rights ("the Convention") as no permission for investigation against the municipal officials had been granted, as well as of the right to property for their being forced to leave their village.

No examination can be made in respect of the extended allegations of the applicant's heirs. The scope of the examination is limited to the allegations raised by the applicant within the prescribed period and their legal characterisation by the Court. Therefore, the application would be examined under the safeguards inherent in the right to respect for private and family life safeguarded by Article 20 of the Constitution, which is embodied within the general framework of the right to protect and improve the corporeal and spiritual existence enshrined in Article 17 of the Constitution, which corresponds to Article 8 of the Convention and entails the legal interests of the applicants in the present case.

In the present case, it is clearly incumbent on the State to prevent the disposal of the untreated sewage to the stream running along the applicants' village. In pursuance of this duty, the municipalities were held liable to establish a treatment facility in 2006 by virtue of Law no. 5491, and such facilities were envisaged to be put into operation within 10 years. This is undoubtedly a duty prescribed by the State to eliminate or avoid an environmental problem in accordance with the administrative principles, needs and resources.

It is also undoubted that this duty could be performed within the scope of the planning introduced by the State, and that the public authority is afforded a wide margin of appreciation in this sense.

Although it cannot be said that the damages sustained have been redressed by the fulfilment of the constitutional safeguards, inherent in the rights alleged to have been violated, through the measures applied by the State within a system and plan, it is also undoubted that that the

damage incurred and the liability to compensate are to be covered by the public authorities as a positive obligation.

The subject-matter of the present case is the dismissal of the applicants' claims for compensation for the redress of the damages allegedly sustained due to the non-execution of the decision of the 2nd Chamber of the Erzurum Administrative Court, which ordered the annulment of the implicit dismissal of their request for taking of the necessary measures for the immediate prevention of water pollution.

In other words, the applicants maintained that due to the non-execution of the annulment decision, the water pollution increased; that animal health in the region was in danger; and that cows, horses, sheep and several small cattle were destroyed. They accordingly claimed compensation for the pecuniary and non-pecuniary damages they had sustained. In the court's decision, it was indicated that the pollution in the Susuz stream fell within the scope of the termination plan introduced by the legislator; that when the prescribed period was over and the facility was established, the water pollution could be prevented; that if the judicial decision ordering an intervention with the impugned water pollution was not executed before the expiry of the prescribed period, the administration would always face the risk of prosecution; and that in case of any damage resulting from water pollution, the redress of the damage incurred must be ordered pursuant to the principles of strict liability.

As a matter of fact, it has been observed through the inquiry conducted into the complainant that there was indeed no animal registered in his name; that the cause of death of the dead animal (horse) was not the stream; and that the complainant did not submit any information and document proving his damage. For these reasons, the applicant's claims for compensation were dismissed by the incumbent court.

Given the possibility that the legal interest inherent in the rights such as the right to life and the right to a healthy environment could not be subject to human intervention, a high scrutiny and excessive delicacy are undoubtedly required in striking a balance between the risk, potential danger and damage to be incurred by the applicant and the public interest, thereby between the right interfered with and the one afforded protection.

In the present case, although the inactivity by the relevant municipality has amounted to a neglect of duty, the applicants are to explain and substantiate the effects of the alleged violation on the quality of their private life and family life, if any, rather than the steps needed to taken accordingly. In the legal system, there are means available for the redress of any damages resulting from *de facto* and thereby proven violations.

Although the needs raised by the applicants and the alleged violation of their right to a healthy life are true given the impugned water pollution, the efforts undertaken by the State to fulfil the duties incumbent on it cannot be ignored. Accordingly, the notion of damage needs to be ascertained based on the balance to be struck between the public intervention and the interests of the individual sustaining damage.

In the present case, the claims for non-pecuniary compensation raised by the applicants through individual application are to be substantiated as it was found established through the court decision that neither their claims nor their pecuniary damages had been founded.

It must be further explained how the impugned act caused the applicants suffering and distress of non-pecuniary nature despite the lack of an objective finding to the effect that they had subjected to a severe and unbearable suffering or situation having effect on their corporeal existence.

As the applicants, who failed to explain the distress, suffering and psychological breakdown, did not submit any explanations and documents which would clearly demonstrate and prove the damage allegedly sustained by them, I do not agree with the Court's majority finding a violation of Article 20 of the Constitution.

DISSENTING OPINION OF JUSTICE M. EMİN KUZ

The majority of the Court declared admissible the individual application, lodged by the applicants upon the dismissal of the action for compensation brought due to the disposal of sewage to the stream without any treatment, and found a violation of the right to respect for private and family life safeguarded by Article 20 of the Constitution.

In the judgment, the majority declared the application admissible on the grounds that the sewage had been disposed to the stream running along the applicants' village by the municipality without any treatment process; that as also found established by the official authorities, this disposal had had adverse effects on the villagers; and that the impugned environmental nuisance constituted an interference with the right safeguarded by Article 20 of the Constitution, which attained the severity to require an examination under the said provision.

In the examination on the merits of the case, the majority concluded that there had been a violation of the right to respect for private and family life, by stating that the public authorities had already started to take the necessary measures within the scope of the positive obligations incumbent on the State to prevent the water pollution; that a statutory arrangement had been introduced on the same matter; that in the present case, the construction of the treatment facility had been started within the prescribed statutory period; that however, the application of certain measures would not remove the applicants' victim status; and that to remove their victim status, the reasons giving rise to the violation in question were to be eliminated and the damages sustained by the applicants on account thereof were to be redressed in consideration of the duration of the violation found.

In the judgment, I agree with the general assessments as to the "Admissibility" (§§ 47-50) and the principles laid down in the examination on the "Merits" under the heading of "General Principles", with a reference to the previous judgments of the Court (§§ 54-57). However, I consider that the majority's conclusion declaring the application admissible, the assessments on the merits under the heading of "Application of Principles to the Present Case", the finding of a violation were not appropriate.

As also noted in the judgment, the proceedings prior to the individual application consisted of two stages, namely "the action for annulment" and "the action for compensation". The subject-matter of the individual application is the action for compensation which was dismissed and became final in 2014.

In the decision issued at the end of the action for compensation brought by the applicants seeking compensation for the damages allegedly sustained due to the non-execution of the decision issued at the end of the action for annulment, which was not subject-matter of the present application.

In the judgment, the majority of the Court indicated that "the damages sustained by the applicants for this reason must be redressed" (§ 64); and that "… merely the establishment of treatment facility in future cannot be deemed sufficient for the redress of the non-pecuniary damages that have been already or are still sustained by the applicants" and "… the inferior courts' decisions, which did not provide any reasonable explanation as to why it was not necessary to redress the non-pecuniary damages sustained by the applicants due to the infringement of their constitutional rights, cannot be considered as relevant and sufficient" (§ 66). However, it has been observed that the action for compensation brought by the first applicant, the testator of the applicants, was dismissed as the damage allegedly sustained by the applicant could not be substantiated as also noted above; and that the first instance decision, which was also upheld by the Council of State, provided sufficient and relevant grounds to justify the dismissal of the applicant's claims for pecuniary and non-pecuniary compensation by noting that the plaintiff failed to submit any information and document to prove the damage allegedly sustained by him and that no conclusion to prove the damage could be reached through the information and the documents requested by the court from the administration as well as from the relevant report. The majority's acknowledgment that "the applicants sustained damage" on which they relied in finding a violation does not have any basis other than the abstract allegations specified in the application form.

In finding a violation, the majority took into consideration the judgment rendered in the case of *Dzemyuk v. Ukraine* where the European Court of

Human Rights ("the ECHR") examined the environmental impacts of the impugned water pollution and found a violation of Article 8 of the Convention due to the failure of the public authorities to consider the environmental threats posed by the water pollution. However, this case concerns an applicant who lives in a region where a graveyard and a natural gas facility would be established (38 meters away from his house and water-well) and who has no other water supply. In the present case, it has been observed that the village where the applicants are living has other drinking and utility water other than the stream in question.

As is known, certain conditions are sought for the examination of the environmental issues under Article 20 of the Constitution. In this sense, it is required that an impugned environmental nuisance has a direct effect on the applicants' private and family life and such effect has attained a minimum level of severity; in other words, the impugned pollution has attained a severe extent (see *Mehmet Kurt* [Plenary], no. 2013/2552, 25 February 2016, § 58). The minimum level of severity necessitates an independent examination in every concrete case within the scope of certain criteria such as the intensity and duration of the nuisance, and its physical or mental effects, general environmental context, as well as the proximity of the applicant to the source of environmental pollution (see *Mehmet Kurt*, § 58).

It appears that also in the ECHR's case-law, in determining the level of gravity sought in order for the impugned environmental impact to trigger the safeguards set out in Article 8, the applicant is expected to provide concrete data revealing the level of impact (see *Mehmet Kurt*, § 68).

The Constitutional Court also acknowledges that in principle, the burden of proof rests upon the applicants who must submit evidence in support of their allegations and provide explanations as to the constitutional right that was allegedly violated (see *Veli Özdemir*, no. 2013/276, 9 January 2014, § 19) and declares inadmissible the applications failing to fulfil this condition for being manifestly ill-founded due to an unsubstantiated complaint.

In the present case, I consider that there was an interference as the stream run along the village but the alleged damage could not be proven.

In the previous judgments on the same matter, the Court has sought the existence of a material damage so as to find a violation, and it also required that the risk of damage must become concrete, be substantiated with evidence and clearly comprehended. On the other hand, it has been observed that the applicants failed to submit concrete information and documents demonstrating the gravity of the effect for the assessment of the minimum level of severity; and that the proximity between the polluted stream and the village where they were living was not even indicated in the application form, which could neither be inferred from the majority's judgment. I therefore consider that a violation was found in the present case, without the above-mentioned conditions being satisfied.

For these reasons, I disagree with the majority's conclusion declaring the application admissible and finding a violation as it should have been declared inadmissible for being manifestly ill-founded due to the applicants' failure to substantiate their allegations.

RIGHT TO PROPERTY
(ARTICLE 35)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

HÜSEYİN ÜNAL

(Application no. 2017/24715)

20 September 2018

On 20 September 2018, the Second Section of the Constitutional Court found a violation of the right to property, which is safeguarded by Article 35 of the Constitution, in the individual application lodged by *Hüseyin Ünal* (no. 2017/24715).

THE FACTS

[8-29] The applicant filed a request with the municipality for the expropriation of his immovable property that had been allocated as a road in the master development plan.

The municipality proposed exchange of the immovable; however, the applicant refused it as the proposed immovable properties were not equivalent to his immovable. Thereafter, he filed a case against the municipality before the administrative court and claimed the current market value of his immovable.

The administrative court noted that pursuant to the Provisional Article 11 of the Expropriation Law no. 2942, effective as of 7 September 2016, the five-year period for the expropriation of the immovable properties allocated by implementary development plans for public services and governmental agencies would start running as from the date of entry into force of this provision and, therefore, concluded that it could not decide on the merits of the dispute at that stage.

The applicant then appealed the decision; but the regional administrative court found the first instance decision compatible with the procedure and law and therefore dismissed the applicant's appellate request with final effect.

V. EXAMINATION AND GROUNDS

30. The Constitutional Court, at its session of 20 September 2018, examined the application and decided as follows:

A. The Applicant's Allegations and the Ministry's Observations

31. The applicant stated that the fact that his immovable property was allocated as road in the zoning plan constituted an interference with his

right to property, and that he had not been able to use the immovable property since 2004 because of the said interference. The applicant stated that the non-expropriation of his immovable property led to a violation of his right to property. He contended that the right to a fair trial, the principle of equality, and freedom to seek rights had been violated due to the retroactive implementation of legal amendments made while the proceedings had been pending.

32. In the Ministry's observations, it was stated that the applicant's immovable property was allocated as road in the zoning plan and that in the action filed by the applicant on the restriction of the right of disposition arising from the allocation of the immovable to the public service, the case was concluded against the applicant in accordance with the law article coming into force later. In this context, the Ministry emphasized that the interference satisfied the criteria of legality and public interest. The Ministry added that the Constitutional Court enjoys discretion in the assessment of proportionality to be carried out in the context of the damage caused to the property and whether a disproportionate burden was imposed upon the applicant.

33. The applicant declared in his submission against the observations of the Ministry that he had not been able to properly use the right to property over his immovable property for years due to the allocation of the property as a public service area. The applicant asserted that he would not like to be victimized again due to the resetting of the five-year period on account of the newly introduced legal regulation that came into force after the action was filed, thereby preventing him from exercising his constitutional rights. The applicant submitted that his compensation claims were still valid.

B. The Court's Assessment

34. 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.*

35. 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 argues that apart from the right to property, his right to a fair trial, principle of equality and right to seek freedom have been violated. However, the applicant failed to justify the existence of the unequal treatment that could lead to a violation of the principle of equality in the present case. Moreover, as it has been understood that the original complaint of the applicant concerned his failure to enjoy his property, and his failure to use and dispose of the property, all complaints of the applicant were examined within the scope of failure to exercise the right to property.

1. Admissibility

36. Alleged violation of the applicant's right to property must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

a. Existence of Property

37. Article 1 § 1 of the Constitution, which reads *"Everyone has the right to own and inherit property"*, protects the right to property. The right to property, which is guaranteed by the aforementioned article of the Constitution, encompasses the right to any property that carries economic value and that have a monetary value (see the Court's judgment no. E. 2015/39, K. 2015/62, 1 July 2015, § 20). The immovable property which was the subject matter of the zoning implementation is registered in the applicant's name. In this context, it is clear that the immovable property which is registered in the land registry constitutes property within the meaning of Article 35 of the Constitution.

b. Existence of an interference

38. The right to property, guaranteed as a fundamental right in Article 35 of the Constitution, authorizes the person to use his possessions as he/she wishes and to dispose of and benefit from the products that grow on it, provided that he/she does not prejudice rights of others and complies with

the restrictions provided for in the laws *(see Mehmet Akdoğan and Others, no. 2013/817, 19 December 2013, § 32).* Therefore, the restriction of any of the rights of the owner to use his property, to benefit from the products on his/her property and to dispose of his/her property constitutes an interference with the right to property (see *Recep Tarhan and Afife Tarhan*, no. 2014/1546, 2 February 2017, § 53).

39. As the immovable property has not been expropriated and not been actually confiscated yet, the allocation of the immovable property for public use in the zoning plan does not result in the deprivation of the right to property, but it significantly restricts the authorities of the owner arising from the right to property. In this regard, as the immovable is reserved as a public service area, it is not possible to construct anything on it. This also has negative effects on the procedures concerning the establishment of rights of sale, donation, mortgage, and other easement rights and on the market value of the immovable. Therefore, there is no doubt about the fact that allocating the immovable properties as "public service areas" in the zoning plan will constitute an interference with the right to property.

40. Article 35 § 1 of the Constitution describes the right to peaceful enjoyment of the property, stipulating that everyone has the right to property and the second paragraph draws a framework of interference with the right to peaceful enjoyment of property. In the second paragraph of the said article, the conditions under which the right to property may be restricted are listed and a general framework of the conditions for *deprivation of property* is provided. In the last paragraph of the said article, it is set out that as a rule, the use of the right to property cannot be contrary to the public interest. Thus, the state is allowed to control and regulate the use of property. Special provisions allowing the control of property by the state may be found also in other articles of the Constitution. It should also be noted that deprivation of property and regulation of property are special forms of interference with the right to property (see *Recep Tarhan and Afife Tarhan*, §§ 55-58).

41. The interferences with the right to property by way of zoning implementations are considered, as a rule, within the scope of control (or regulation) of the use of property for the public interest, as stated in

individual application decisions (see *Süleyman Günaydın*, no. 2014/4870, 16/6/2016, § 65). As mentioned above, it is clear that the interference in the present case did not result in deprivation of property. However, taking into account the period of time passed following the interference and the fact that the interference constituted a stage of the expropriation process, the interference cannot be considered to serve the purpose of control or regulation. Hence, the interference which is the subject matter of the application must be examined within the scope of the general rule of peaceful enjoyment of property.

c. Whether the Interference Constituted a Violation

42. 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."

43. The right to property is not regulated as an unlimited right in Article 35 of the Constitution and it was provided for that this right may be restricted by law for the public interest. In interferences with the right to property, Article 13 of the Constitution which regulates the general principles concerning the limitations on the fundamental rights and freedoms, should be taken into consideration. In accordance with the article in question, fundamental rights and freedoms may only be limited by law, on account of the reasons stated in the relevant articles of the Constitution, without violating the requirements of the democratic public order and the principle of proportionality. In order for an interference with the right to property to be in compliance with the Convention, the interference must be based on the law, must pursue public interest, and must be carried out in accordance with the principle of proportionality (see *Recep Tarhan and Afife Tarhan*, § 62).

i. Lawfulness

44. Article 35 § 2 of the Constitution, which stipulates that the right to property may only be limited by law for public interest, requires the interferences with the right to property to be prescribed by law. Furthermore, Article 13 of the Constitution that regulates general principles with regard to the restriction of the fundamental rights and freedom adopted, as a fundamental principle, the fact that *"the rights and freedoms may only be restricted by law"* (see *Ali Ekber Akyol and Others*, no. 2015/17451,16 February 2017, § 51).

45. The first criterion required to be examined in case of interferences with the right to property is whether the interference had a legal basis in law. In the event that it is found established that this criterion has not been met, it is concluded that the right to property is violated without examining other criteria. The criterion that the interference must be prescribed by law requires that there are enough accessible and foreseeable rules regarding the relevant interference in domestic law (see *Turkey İş Bankası A.Ş.* [GA], no. 2014/6192, 12 November 2014, § 44). Equally important as the existence of the law is the necessity that the text and application of the law has legal certainty to a degree that individuals may foresee the consequences of their actions. In other words, the quality of the law is also important in determining whether or not the legal requirement is met *(*see *Necmiye Çiftçi and Others*, no. 2013/1301, 30 December 2014, § 55).

46. In the present case, the applicant's immovable property was allocated as a road in the zoning implementation performed in accordance with Law no. 3194. This constitutes the basis of the interference with the right to immovable property. Having said that, the action for compensation filed by the applicant was rejected by the inferior courts which stipulated that it was not possible to render a decision on the merits of the dispute in accordance with the Provisional Article 11 added to Law no. 2942. In this context, it was considered that the interference with the applicant's right to property had satisfied the legality criterion.

47. Besides, as explained in the previous judgments, the duty of the Constitutional Court in respect of the complaints regarding the implementation of the legal rules is limited due to the subsidiary nature of

the remedy of individual application and the Constitutional Court cannot interfere with the discretionary power of the inferior courts in terms of implementing and interpreting the legal rules, except in cases of except for obvious discretionary errors or explicit arbitrariness, which constitute an interference with the rights and freedoms within the scope of individual application (see *Ahmet Sağlam*, no. 2013/3351, 18 September 2013, § 42). In determining whether the public authorities' approach to enforcing the legal rules meets the requirements of Article 35 of the Constitution, the Constitutional Court, taking account of the nature of the interference in the present case, will examine whether the interference was proportional and successful in reaching the pursued aim and subsequently render a decision.

ii. Legitimate Aim

48. Pursuant to Articles 13 and 35 of the Constitution, the right to property may only be restricted in favour of public interest. In addition to providing the possibility of restricting the right to property as deemed necessary by the public interest and being a reason for the restriction, the notion of public interest envisages that the right to property cannot be restricted except for the interest of public and effectively protects the right to property by determining limits of the restriction in this respect (see *Nusrat Külah*, no. 2013/6151, 21 April 2016, § 53).

49. Public interest is a broad notion by nature. Taking into account the needs of the public, the legislative and executive organs have a broad margin of appreciation in the determination of what is in the public interest. If there is a dispute on the public interest, it is clear that the specialized first instance courts and the courts of appeal are in a better position to resolve disputes. In examining individual applications, the Court shall not interfere with the discretion of the competent public bodies in their determination of the public interest unless such discretion is found manifestly ill-founded or arbitrary. It is for the claimant to prove that the interference does not comply with the public interest (see *Mehmet Akdoğan and Others*, §§ 34-36).

50. Article 1 of Law no. 3194 also sets out the purpose of the law as to ensuring that settlements and development therein come into being in

compliance with plans, science, hygiene, and environmental conditions. As to the allocation of some immovable properties to the public service during the arrangement of building lands and farmlands, considering that everyone can benefit from public services if some immovable properties are allocated as a road, as is the case with the present case, it has been acknowledged that the interference had a legitimate aim based on the public interest.

i. **Proportionality**

(1) General Principles

51. It must finally be assessed whether there is a proportionality between the aim of the interference with the applicant's right to property and the means employed to this end.

52. Pursuant to Article 13 of the Constitution, proportionality, one of the criteria to be taken into consideration in restricting rights and freedoms, arises from the rule of law. As the restriction of rights and freedoms in a state of law is an exceptional authority, this authority could be justified provided that it is used to the extent required by the particular circumstance. Limitation of the rights and freedoms of individuals more than the particular circumstances require is incompatible with the state of law, as it would mean exceeding the authority granted to public authorities (see the Court's Judgment, no. E. 2013/95, K. 2014/176, 13 November 2014).

53. The principle of proportionality consists of three sub-principles: *capability, necessity and proportionality. Capability* means that the envisaged interference must be capable of achieving the intended purpose, *necessity* describes that an interference must be necessary in order to achieve the intended purpose in other words, it is not possible to achieve the intended purpose by a lighter interference, and *proportionality* stands for that a reasonable balance that must be struck between the interference against the rights of the individual and the intended purpose (see Court's judgments, no. E.2011/111, K.2012/56, 11 April 2012; no. E.2014/176, K.2015/53, 27 May 2015; no. E.2016/13, K.2016/127, 22 June 2016; and *Mehmet Akdoğan and Others*, § 38).

54. Pursuant to the principle of proportionality, a fair balance must be struck between the public interest sought to be achieved in the case of a restriction on property rights of individuals and the rights of the individual. This fair balance is upset when it is established that the applicant bears an individual and excessive burden. In assessing the proportionality of the interference, the Constitutional Court will take into account the importance of the legitimate aim pursued, as well as the burden imposed on the applicant in light of the nature of the interference and the conduct of the applicant and public authorities (see *Arif Güven*, no. 2014/13966, 15 February 2017, §§ 58, 60).

55. It is natural for public authorities to have a wide range of discretion to implement their own development policies in complex and challenging subjects, especially in fields such as the development of large cities. However, it is mandatory to inspect whether the specified discretionary power is used in such a way that does not violate the right to property protected under Article 35 of the Constitution and whether the safeguard criteria specified in Article 13 of the Constitution is met (see the Court's Judgment, no. E. 2012/100, K. 2013/84, 4 July 2013). The fact that the interference with the right to property pursued public interest is not sufficient per se, but it should also be proportional. There is a public interest in allocating private property as a public service area in the zoning implementation. However, this should not impose an excessive and disproportionate burden on the owner (see the Court's judgment, no. E.2009/31, K.2011/77, 12 May 2011). The fair balance that should be struck between public interest pursued in the allocation of immovable properties to public service and the protection of the applicants' right to property can only be achieved by expropriating the immovable within a reasonable time.

56. The legislator provided for that the expropriation must be completed within a five-year period due to the fact that zoning implementations cover wide areas and in order to provide adequate funds to the budget. The legislator enjoys discretion in terms of such interferences aiming to take control of the property for the public interest. Within the framework of the said discretion, the owner may be expected to bear these obstacles in order to attain the purpose of public interest for a reasonable and definite

period of time on account of the actual and legal obstacles stated earlier. However, in the case of a delay in this period, not only the restrictions in question aggravate the burden imposed on the owner of the property but also the lack of any remedies to redress the damage sustained by the owner due to the prolongation of the restriction period constitutes an excessive burden on the owner (see the Court's judgment, no. E. 2016/196, K. 2018/34, 28 March 2018).

(2) Application of Principles to the Present Case

57. The zoning status of the property that the applicant owns is determined as road in the revised implementation zoning plan approved on 5 February 2004. The applicant complains that complains that he has not been able to use his property for many years due to the zoning restrictions and in spite of this fact, his expropriation request has not been accepted by the Municipality. Indeed, the applicant's expropriation request was rejected by the Municipality, and the full remedy action that applicant filed against the Municipality was also rejected. The Inferior courts concluded that there were no grounds to render a decision on the merits of the case, providing that the five-year period granted to the administration in respect of immovable properties, which fall under the scope of Additional Article 1, and whose right to disposition is restricted before the taking into effect of this Law, starts from the date of entry into force of the said Law in accordance with Provisional Article 11 added to Law no. 2942.

58. In the established case-law of the Supreme Administrative Court applicable prior to the entry into force of the provisional Article 11 added to Law no. 2942, it was acknowledged that the non-expropriation of an immovable property allocated for public service in the zoning plans by the relevant administrations despite the completion of the five-year period following the approval of the zoning plans leads to uncertainty in the exercise of the right to property. In the calculation of the five-year period considered reasonable in the case-law of the Supreme Administrative Court, it is observed that the date final decision is taken as a basis.

59. Moreover, it is provided for in Article 34 of Law no. 6745 and the Provisional Article 11 of Law no 2942 that the said five-year period

will start running for immovable properties falling into the scope of the Additional Article 1 whose disposal was legally restricted before the date of entry into force of this article from the date of entry into force of this article. However, the said provision in the article was annulled by the Constitutional Court on 28 March 2018 due to the fact that it imposed on the owner an excessive burden and disrupted the fair balance that must be struck between the public interest and the owner's right to property.

60. Even though the immovable property owned by the applicant was allocated as a road in the zoning implementation plan with a scale of 1/1000 approved on 5 February 2004 in the present case; to date, no expropriation has been carried out in respect of the property and no compensation has been paid to the applicant. During this period, the building restriction imposed on the immovable property remained and it was not possible for the applicant to exercise his right to property, to use his property, or to dispose of it.

61. Consequently, even though approximately fourteen years passed since the approval of the implementation zoning plan, the fact that the immovable, which was allocated for public service as a *road* in the zoning plan, was not expropriated imposed an excessive burden on the applicant. In these circumstances, it has been concluded that the fair balance between the protection of the applicant's right to property and the public interest was disturbed to the detriment of the applicant, and thus the interference was not proportionate.

62. Consequently, the Constitutional 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

63. 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 judgment finding a violation has been rendered, what is required for the resolution of the violation and the consequences thereof shall be ruled on...*

(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."

64. In the judgment of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018) of the Constitutional Court, general principles as to the determination of how to redress the violation in the event of finding a violation were set out.

65. In brief, it was emphasized in the judgment of *Mehmet Doğan* that the source of the violation must first be determined in order to determine the appropriate way of redress. Accordingly, in cases where a court decision leads to a violation, as a rule, it is decided that a copy of the decision be sent to the relevant court for retrial in order to redress the violation and its consequences in accordance with Article 50 § (2) of Code no. 6216 and Article 79 § 1 (a) of the Internal Rules of Court of the Constitutional Court (see *Mehmet Doğan*, §§ 57, 58).

66. In the *Mehmet Doğan* judgment, the Constitutional Court made explanations regarding the obligations of the inferior courts having the duty of retrial and what should be done by the inferior courts in order to remedy the consequences of the violation. Accordingly, in cases where the Constitutional Court orders a retrial in order to remedy the violation found, the inferior courts do not have any discretionary power regarding the acceptance of the existence of the reason for retrial and the annulment of the previous decision, unlike the retrial concept regulated under the relevant procedural laws. Indeed, in case of delivery of a decision of violation, the Constitutional Court, not the inferior courts, which examines the existence of the violation has the discretion regarding the necessity of retrial. The inferior court is obliged to take the necessary actions to remedy the consequences of the violation in line with the judgment finding violation of the Constitutional Court (see *Mehmet Doğan*, § 59).

67. In this context, the inferior court must first annul the decision which is found to have violated a fundamental right or freedom or have failed to redress the violation committed against a fundamental right or freedom. The inferior court must carry out to relevant procedure to redress the consequences of the violation found in the Constitutional Court decision following the annulment. Within this framework, in the event that the violation stems from a procedural act or deficiency, the procedural act in question has to be carried out again in such a way that redresses the violation of the said right or for the first time, in case it has not carried out yet. On the other hand, in cases where the Constitutional Court determines that the violation is caused by the administrative act or action itself or the outcome of the decision or judgment of the inferior court, rather than the procedural acts performed or not performed by the court, the inferior court must redress the consequences of the violation by rendering an opposite decision directly, on the basis of the case file as far as possible without performing any procedural acts (see *Mehmet Doğan*, § 60).

68. The applicant claimed compensation in respect of pecuniary and non-pecuniary damages.

69. In the present case, the immovable property of the applicant was allocated to the public service in the zoning plan. In the action for compensation filed by the applicant, the inferior courts found that there was no ground to render a decision on the case on the basis of an article of law entered into force after the action was filed. Therefore, the allocation to the public service of the immovable property subject to the interference in the zoning plan is an administrative act. It is observed that the applicant's right to property was violated due to an administrative act.

70. In this case, there is a legal interest in retrial in order to redress the consequences of violation of the right to property. Accordingly, the retrial to be conducted aims at redressing the violation and its consequences in accordance with Article 50 § (2) of Code no. 6216. In this context, the inferior courts should award compensation that provides reasonable redress in view of the consequences of the violation. On the other hand, it is at the discretion of the inferior courts specialized in this field to determine the

amount of compensation to be awarded. For this reason, a copy of the judgment shall be sent to the 1st Chamber of the Eskişehir Administrative Court for retrial.

71. As it has been concluded that the decision to send back the case file to the competent judicial authority for re-trial provided sufficient redress in terms of the consequences of the violation, the compensation claims of the applicant were rejected.

72. The total court expense of TRY 2,242.10 including the court fee of TRY 262.10 and the counsel fee of TRY 1,980, which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 20 September 2018 that

A. The application be declared ADMISSIBLE;

B. The right to property guaranteed under Article 35 of the Constitution was VIOLATED;

C. A copy of the judgment be SENT to the 1st Chamber of the Eskişehir Administrative Court (E. 2016/82, K. 2016/1387) for a retrial to redress the consequences of the violation of the right to property;

D. The applicants' compensation claims be REJECTED;

E. The total court expense of TRY 2,242.10 including the court fee of TRY 262.10 and the counsel fee of TRY 1,980 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

HESNA FUNDA BALTALI AND BALTALI GIDA HAYVANCILIK SAN. VE TİC. LTD. ŞTİ.

(Application no. 2014/17196)

20 September 2018

On 25 October 2018, the Plenary 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 *Hesna Funda Baltalı and Baltalı Gıda Hayvancılık San. ve Tic. Ltd. Şti.* (no. 2014/17196).

THE FACTS

[8-39] The creditor commenced execution proceedings against the debtors. He then brought an action, against the defendants and the applicants, for annulment of the acts and actions performed on the ground that the debtor failed to pay the bills he had drawn up.

The case in question concerns the sale of a residence. The plaintiff maintained that after the date when the bill had been drawn, the debtor sold the residence to the applicant Hesna Funda Baltalı's husband for a price far lower than its real value; and that the residence was then donated by him to Hesna Funda Baltalı, who subsequently sold it to the applicant company Baltalı Gıda Hayvancılık San. ve Tic. Ltd. Şti. where she and her husband were a shareholder.

The plaintiff requested annulment of these acts as well as sale of the immovable by auction, arguing that its donation and sale had been malicious actions performed in order to preclude him from receiving his receivables. The incumbent court then annulled the acts performed in respect of the impugned immovable and granted the plaintiff authorization to commence compulsory execution proceedings.

Upon the plaintiff's request for levying a provisional attachment on the immovable, the court issued an order for provisional attachment. The applicants challenged this order and requested that the provisional attachment be lifted against a security. The court rejected this request.

Claiming that they had suffered from lengthy enforcement of the provisional attachment, the applicants once again requested the court to lift the order for provisional attachment. The court acknowledged that the proceedings had lasted for a long time but decided not to lift the order.

V. EXAMINATION AND GROUNDS

40. The Constitutional Court, at its session of 25 October 2018, examined the application and decided as follows.

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

41. The applicants alleged that their right to trial within a reasonable time was violated.

42. Following the individual applications, with Article 20 of Law no. 7145 dated 25 July 2018, promulgated in the Official Gazette No. 30495 of 31 July 2018, a provisional article was added to Law on the Remedying of Certain Applications Lodged with the European Court of Human Rights through Payment of Compensation.

43. With Provisional Article added to Law no. 6384, it is provided that individual applications lodged with the Court on account of excessive length of the proceedings, delayed or incomplete execution or non-execution of judicial decisions or pending before the Constitutional Court as from the date of entry into force of this article shall be examined by the Human Rights Compensation Commission of the Ministry of Justice ("the Compensation Commission"), upon the application to be filed within three months as from the notification of the inadmissibility decision issued for non-execution of the remedies.

44. The Court included in its case-law the legislation on the introduction of the opportunity to lodge an application with the Compensation Commission in relation to individual applications made before 31 July 2018 with the claim adjudication failed to conclude in a reasonable period of time or court decisions executed late or incompletely or failed to be executed (see *Ferat Yüksel,* §§ 11-14).

45. In the judgment of *Ferat Yüksel*, the Court examined the remedy of lodging an application with the Compensation Commission in relation to individual applications lodged before 31 July 2018 with the claim adjudication failed to conclude in a reasonable period of time or court decisions executed late or incompletely or failed to be executed in terms of the capacity of being accessible, offering reasonable prospects of success,

and providing adequate redress and discussed its effectiveness (see *Ferat Yüksel*, § 26).

46. In brief, the Constitutional Court held in the *Ferat Yüksel* judgment that the aforementioned remedy is accessible, as it does not put individuals under financial burden and facilitates the application; that it is capable of providing a reasonable prospect of success for alleged violations as of the way it is arranged; that it has potential to provide adequate redress on account of the fact that it offers the possibility to award compensation and/or, where this is not possible, other possibilities for redress (*Ferat Yüksel*, §§ 27-34). In accordance with these grounds, the Court concluded that the examination of the application made without exhausting the remedy of lodging an application with the Compensation Commission, which is accessible at first sight and is considered to have the capacity to offer a prospect of success and provide adequate redress, is incompatible with the *subsidiary nature* of the remedy of individual application (see *Ferat Yüksel*, §§ 35, 36).

47. In the present application, there is no circumstance which requires departure from the said judgment.

48. For the reasons explained above, the application must be declared inadmissible for *non-exhaustion of legal remedies* without being examined in terms of other admissibility criteria.

B. Alleged Violation of the Right to Property

49. In the action filed for the annulment of the act which is the subject matter of the case where the applicants were the defendants, the applicants stated that the 10th Chamber of the İzmir Civil Court of First Instance unjustly and unlawfully placed a temporary lien on the registry record of the independent section no. 3 with a land share of 2/32 of the immovable property with block no. 153, parcel no. 2 in the Bademler village of Izmir's Urla district. Moreover, the applicants expressed that the temporary lien became a punishment rather than an injunction, given that a period of approximately seven years had elapsed since the placement of the temporary lien. The applicants asserted that the claimants had sufficient guarantees to collect their receivables other than the immovable on which

there was a lien. Accordingly, the applicants argued that the temporary lien was not necessary. The applicants stated that they were not able to use their property due to the temporary lien placed and that they could not make any dispositions regarding their property. Lastly, the applicants alleged that their right to property had been violated due to the placement of temporary lien on the immovable property and the prolongation of this process.

1. As Regards the Applicant Hesna Funda Baltalı

50. In accordance with Article 46 (1) of Code no. 6216 on the Establishment and Rules of Procedure of the Constitutional Court dated 30/3/2011 entitled *"Persons entitled to individual application"*, individual applications may only be filed by those whose existing and personal rights are directly affected by the alleged proceeding, act or negligence which has caused the violation.

51. Accordingly, three fundamental preconditions must be met in order for a person to file an individual application with the Constitutional Court. These preconditions are *the violation of the applicants' existing right* on account of a public proceeding or act or negligence; the applicant's being affected from the violation that is the subject matter of the application *"personally" and "directly"* and the allegation on the applicant's part that he/she was *victimized (see Onur Doğanay,* no.2013/1977, 9 January 2014, § 42).

52. On the other hand, in order for an application to be accepted, it is not sufficient for an applicant to assert only that he/she was victimized, but he/she has to prove that he/she is directly affected by the violation or must convince the Court that he/she was victimized. In this respect, the thought or suspicion of being a victim is not sufficient for the existence of victim status (see *Ayşe Hülya Potur,* no. 2013/8479, 6 February 2014, § 24).

53. Whereas in the present case, the complaint is based on the decision placing a temporary lien on the immovable property which is the subject matter of the action for annulment of the disposition. However, the subject matter of this case is the independent section number 3 with a land share of 2/32 of the immovable property with block no. 153, parcel no. 2 in the

Bademler village of Izmir's Urla district. It has been observed that the decision on the placement in temporary lien was rendered on 10 July 2008 and concerned the immovable property in question. In the present case, the immovable property on which temporary lien was placed, which is the subject matter of the claim of violation of the right to property, was not registered in the land registry in the name of Hesna Funda Baltalı but in the name of the applicant Company. The applicant Hesna Funda Baltalı is the previous owner of the immovable property in question. As it has been held that this applicant's *existing rights* were not affected by the decision on the placement of temporary lien *personally and directly*, the applicant Hesna Funda Baltalı does not have a victim status concerning the claim that her right to property was violated.

54. For the reasons explained, this part of the application, regarding the alleged violation of Hesna Funda Baltalı's right to property, must be declared inadmissible for *being incompatible ratione personae*, without examining other conditions of admissibility.

2. As Regards the Applicant Baltalı Gıda Hayvancılık San. ve Tic. Ltd. Şti.

a. Complaint Concerning the Placement of Temporary Lien

55. Article 148 § 3 of the Constitution and Article 45 (2) of Code no. 6216 stipulate that before lodging an individual application, all the administrative and judicial remedies provided for by the law in respect of the act of or negligence which constitutes the basis of the alleged violation must be exhausted. The obligation of the inferior courts to remedy violations of fundamental rights in the first place necessitates the exhaustion of legal remedies *(Necati Gündüz ve Recep Gündüz*, no.2012/1027, 12 February 2013, §§ 19, 20; *Güner Ergun and Others,* no.2012/13,2 July 2013, § 26).

56. Pursuant to Provisional Article 7 of Law no. 2004, appeals may be filed against court decisions in accordance with Article 265 (5) of the same Law, which was in force as of the date of the placement of the temporary lien as well as the date of the lodging of the application (see §§ 26, 29, 33). In the present case, even though the applicant claims that the decision on the placement of the temporary lien was rendered unjustly and unlawfully, it

is clear that the applicant can bring forward these allegations at the appeal stage pursuant to the aforementioned provision. Therefore, in the present case, the applicant lodged an individual application without exhausting the ordinary legal remedy within the scope of which it could bring forward its claims.

57. For the explained reasons, this part of the application must be declared inadmissible for *non-exhaustion of legal remedies* without being examined in terms of other admissibility criteria.

b. The Complaint that the Temporary Lien Process Was Not Concluded within Reasonable Time

i. Admissibility

58. In the present case, the applicant complains that the temporary lien process has been continuing for more than six years. In these circumstances, it is necessary to determine whether there is a remedy during the course of which the applicant's complaint could be examined and effective and objective results could be obtained.

59. In order to call into question the necessity of the exhaustion of legal remedies, an administrative or judicial remedy to which the person claiming that his/her right has been violated could apply must be provided. Moreover, the legal remedy must be capable of redressing the alleged violation's consequences and be effective and accessible to the applicant with a reasonable effort and it should not be in theory yet be functional in practice. Not only the applicant could not be expected to exhaust a legal remedy which is non-existent, but also there is no obligation to exhaust the remedies that do not have de jure or de facto effect, do not have the capacity to remedy the consequences of the violation, or distant in practice from being accessible and usable due to the imposition of excessive and unusual formal conditions (see *Fatma Yıldırım*, no. 2014/6577, 16 February 2017, § 39).

60. Article 259 of Law no. 2004 stipulates that in the event that the temporary lien is found to be unfair, the debtor and third parties may file an action against the creditor requesting the placement of temporary lien in order to receive compensation in respect of the damages incurred.

Accordingly, in order for the relevant court to award compensation, the person requesting the placement of temporary lien must be proven to be wrong and damages must incur due to the temporary lien. However, it is also observed that the action, which can be brought on the condition that the request for the placement of the temporary lien is found to be unjust, does not cover the compensation of all damages related to the lien. Moreover, it has been assessed that this action is limited to the liabilities of the party requesting the placement of temporary lien.

61. Besides, such an action that may be brought against the creditor must be considered as an element of the positive obligations of the state in respect of the right to property insofar as the temporary lien process is concerned. Accordingly, the interference must be examined considering all aspects of the applied process, including whether other criteria required for the protection of the right to property are met. In the present case, it must be examined whether all the necessary measures for the protection of the right to property safeguarded by Article 35 of the Constitution were taken within the scope of the impugned temporary lien process.

62. As mentioned above, the action for compensation provided for in Article 259 of Law no. 2004 is a remedy that can only be applied if the party in favour of whom a measure has been implemented is proven to be wrong at the end of the trial. Therefore, within the meaning of the present case, this is not considered to be a remedy that is effective and providing redress in terms of the consequences of the alleged violation.

63. On the other hand, the Constitutional Court has taken into account the fact that the trial has not yet been concluded. Therefore, due to the ongoing trial and the subsidiary nature of the remedy of individual application, it is not possible to carry out an assessment as to whether the interim injunction was just or fair. Further, the applicant's allegation that the long duration of the ongoing interim injunction led to a violation of her right to property, does not constitute an allegation based on the outcome of the trial. Therefore, having regard to the fact that there is no effective remedy for the aforementioned complaint of the applicant, the alleged violation of the right to property must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

ii. Merits

64. Article 35 of the Constitution that will be taken as a basis in the assessment of the allegation, provides 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 5 of the Constitution, in so far as relevant, reads as follows:

"The fundamental aims and duties of the State are to safeguard … the Republic and democracy, 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."

66. 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). Even though the applicant alleges that her right to a fair trial has been violated due to the unjust and unlawful placement of temporary lien, it has been understood that the primary claim of the applicant concerns the right to property on account of the restriction of her right to use and dispose of her property as a result of the decision of a temporary lien and the long duration of the relevant process. Subsequently, it has been held that the said claim of the applicant should be examined as a whole within the scope of the alleged violation of the right to property.

67. As it is known that the immovable property which is the subject matter of the application and on which the temporary lien was placed is registered in the title deed on behalf of the applicant, it cannot be disputed that the applicant's immovable property constitutes an economic value.

(1) General Principles

68. In the present case, due to the debt relationship between private persons, the debtor's power of disposition over the immovable property

was temporarily restricted on the basis of a court decision in order to guarantee the creditor's payment on time. Accordingly, the public authorities did not directly interfere with the applicant's right to property. However, the Constitutional Court has previously acknowledged in many decisions that the state has positive obligations in some cases, even in disputes between private persons (see *Türkiye Emekliler Demeği*, no. 2012/1035, 17 July 2014, § 34; *Eyyüp Boynukara*, no. 2013/7842, 17 February 2016, §§ 39-41; *Osmanoğlu İnşaat Eğitim Gıda Temizlik Hizmetleri A.Ş.*, no. 2014/8649, 15 February 2017, § 44; and *Selahattin Turan*, no. 2014/11410, 22 June 2017, §§ 36-41).

69. Real and effective protection of the right to property, guaranteed as a fundamental right in Article 35 of the Constitution, does not only depend on the state's avoidance of interference. In accordance with Articles 5 and 35 of the Constitution, the state also has positive obligations regarding the protection of the right to property. These positive obligations occasionally, including in disputes between private persons, require specific measures to protect the right to property (see *Eyyüp Boynukara*, §§ 39-41; and *Osmanoğlu İnşaat Eğitim Gıda Temizlik Hizmetleri A.Ş.*, § 44).

70. However, it must be noted that in certain cases, it is not possible to make a distinction between the positive and negative obligations of the state. Moreover, the principles to be implemented, regardless of whether the state has positive or negative obligations, are often significantly similar.

71. Pursuant to Articles 5 and 35 of the Constitution, among its positive obligations, the state has an obligation to establish an effective enforcement system in terms of the execution of court decisions and the provision of redress for individuals' claims regardless of the existence of a dispute between private persons. In disputes between private persons, the state's positive obligations concerning the right to property are based on the balance of mutual rights and interests. This also applies for the enforcement of the receivables. As previously expressed by the Court, the *rights of enforceable receivables* fall within the scope of the right to property in accordance with Article 35 of the Constitution. Therefore, on the one hand, there is a *receivable* within the scope of the right to property of the creditor. Whereas on the other hand, there are the *assets* of the debtor within the

scope of his/her ownership right that are envisaged to be confiscated and sold in order for the creditor to secure this receivable.

72. In establishing such a system, the state is obliged to protect the rights and interests of the creditor and, when necessary, the debtor and other relevant third parties, by means of taking the necessary measures to protect the right to property of individuals. On the one hand, an effective enforcement remedy must be implemented in order for the creditor to obtain his/her receivables falling within his/her right to property; on the other hand, the debtor and other relevant persons affected by enforcement should be given the opportunity to appeal effectively so that they could claim that the interferences with their right to property have been arbitrary or unlawful.

73. On the other hand, in order for a measure that restricts the right to property to be proportionate, it must be implemented proportionally both in terms of its scope and duration. It is inevitable that the implementation of these and similar measures in relation to the property rights of individuals will give rise to damage. However, such damage must not give rise to consequences that are excessive or more severe than the inevitable and, in the event, that such damage arises, the public authorities must redress it within a reasonable time through appropriate methods and means. Accordingly, the implementation of measures that constitute an interference with the right to property and the continuation of these measures for a certain period of time can be regarded as proportionate only if it does not impose an excessive individual burden on the person concerned. In other words, in case of measures that constitute an interference with the right to property, the public authorities implementing the measure have the obligation to act promptly and diligently. Otherwise, if the measure continues for an unreasonable period, a disproportionate burden will be imposed on the owner of the property by the indefinite postponement of the exercise of the authorities conferred by the right to property.

(2) Application of Principles to the Present Case

74. In the particular circumstances of the present case, the legislator aimed, by amending Law no. 2004, to establish a system in which the rights and interests of the debtor are safeguarded and the creditor could obtain

his/her receivables without delay and without loss of monetary value. This Law provides the establishment of enforcement and bankruptcy offices, as well as enforcement courts for the enforcement of receivables and execution of judgments, so that the enforcement process operates under the supervision and responsibility of the state. The law enabled the creditor to obtain his/her receivables following the confiscation of the assets of the debtor and the conversion of the confiscated goods into money through the enforcement office at the end of the enforcement proceedings to be initiated upon the request of the creditor. The debtor, on the other hand, is provided with various ways of filing objections and actions against these procedures.

75. The Court of Cassation's case-law defines temporary lien, in brief, as the temporary restriction of the debtor's power of disposition over his/her assets by the enforcement office on the basis of a court decision in order to guarantee that the creditor's monetary receivables are paid on time. In these decisions, it is stated that the temporary lien, imposed in order to guarantee the procedures that will enable the creditor to obtain his/her monetary receivables at the end of the ultimate proceedings, is a temporary legal protection measure. The temporary lien aims to prevent the debtor from rendering the current or future enforcement proceedings ineffective and unsuccessful. The temporary lien measure, as a rule, is imposed on the debtor's assets that could be converted into monetary value.

76. As of the present stage, the applicant has not been deprived of her property as a result of the court decision to place a temporary lien annotation on the land registry record of the immovable property in question. In addition, it has been observed that the immovable property was not actually seized, and there was no obstacle for the applicant to actually use and benefit from the immovable property. In addition to this, it must also be taken into account that the said measure was limited to the immovable property which was the subject matter of the dispute. However, the applicant's economic and legal dispositions over its immovable property were significantly restricted due to the said interim injunction annotation. Moreover, it is clear that the restriction in question had a negative effect on the value of the immovable property.

77. The applicant is essentially not the principal debtor in the enforcement proceedings, which are the subject matter of the action for annulment of the proceeding. However, the creditor party filed an action for the annulment of the proceeding claiming that he sold the impugned immovable the applicant in order to prevent the debtor from obtaining his/her receivables. In the said case, taking into account the relevant provisions of Law no. 2004, the trial court decided to place a temporary lien on the applicant's immovable property in accordance with the provisions of the same Law regarding the temporary lien so that the case and enforcement would not be inconclusive. Hence, it is observed that that the temporary lien was based on clear, foreseeable and accessible provisions of law and it pursued the legitimate aim of protecting the creditor's receivable under the right to property. Furthermore, the applicant was given the opportunity to effectively challenge the imposition of temporary lien.

78. The main purpose of the placement of the temporary lien on the impugned asset is to ensure that the creditor's monetary receivable is paid on time. Accordingly, it has been held that in the present case, the placement of the temporary lien annotation, limited only to the immovable property which is the subject matter of the case, that restricts the disposition authority on the immovable in a way to ensure the payment of the receivable falls within the margin of appreciation of the public authorities. However, having regard to the fact that in the event that is the subject matter of the application, the temporary lien annotation placed on the record of the applicant's immovable property in the land registry, has been in existence for approximately 10 years and 3 months since 10 July 2008, there is no doubt that this period is not reasonable when the proceedings are considered as a whole.

79. In this respect, even though the state enjoys a wide margin of appreciation in terms of taking the necessary measures in order to guarantee a possible payment of a receivable and prevent it from becoming ineffective; and restricting the legal dispositions over the immovable property for a certain period of time within the framework of its positive obligations, as is the case with the present incident; the implementation of these measures must not impose an excessive burden on the owner of the property owner that exceeds the unavoidable level of suffering. In

this respect, the public authorities implementing the measure to protect the rights of the other party of the legal relationship must also take into account the effects of the measure in question on the applicant's right to property and must not cause excessive interference.

80. Whereas in the present case, it has been understood that the continuation of the temporary lien placed on the applicant's immovable property for more than ten years caused the applicant whose property rights were restricted more damage than reasonable. In spite of this fact, there is no remedy available for the compensation of the damage suffered by the applicant due to the excessive length of the measure due to the fault of the public authorities. Therefore, having regard to the fact that the temporary lien annotation that is the subject matter of the application, restricting the applicant's capability to carry out legal dispositions on its immovable property, has been in existence for nearly ten years and that the damage which the applicant had to endure for this reason was not compensated; it has been understood that the measure implemented put an excessive and extraordinary burden personally on the applicant. In this context, it has been held that the positive obligations of the state regarding the protection of the right to property in the present case were not fulfilled fully and effectively.

81. Consequently, the Constitutional Court has found a violation of the right to property safeguarded by Article 35 of the Constitution.

C. Application of Article 50 of Code no. 6216

82. 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 judgment finding a violation has been rendered, what is required for the resolution of the violation and the consequences thereof shall be ruled on...

(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."

83. In the judgment of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018) of the Court, general principles as to the determination of how to redress the violation in the event of finding a violation were set out.

84. Accordingly, in case of a finding of a violation of a fundamental right and freedom within the scope of an individual application, in order to consider the violation and its consequences be redressed, the basic rule is to restore the situation as much as possible, that is, to re-establish the situation before the violation. To ensure this, first of all, it is necessary to stop the ongoing violation, to remedy the decision or act subject to the violation and the consequences caused by them, to compensate pecuniary and non-pecuniary damages caused by the violation, if any, and to take other appropriate measures in this context (see *Mehmet Doğan*, § 55).

85. In deciding on how to remedy the violation and its consequences, the Court cannot act by substituting itself for the administration, legal authorities, or legislative bodies. The Court decides on how to remedy the violation and its consequences and communicates this decision to the relevant authorities for them to take the necessary actions (see *Mehmet Doğan*, § 56).

86. In order to remedy a violation and its consequences, the source of the violation must be determined in the first place. Accordingly, a violation may be caused by administrative acts and proceedings, judicial proceedings or legislative acts. Determining the source of the violation is important in determining the appropriate remedy (see *Mehmet Doğan*, § 57).

87. The applicants requested that the decision on the placement of the temporary lien be annulled and claimed pecuniary and non-pecuniary compensation.

88. The Court has concluded that the right to property was violated on account of the fact that the implementation duration of the temporary lien was excessive. For this reason, it has been understood that the violation in the present application is caused by the court decision.

89. Even though the applicant requested that the temporary lien be lifted, it has been decided that the application be declared inadmissible on account of the fact that the legal remedies had not been exhausted with regard to the complaint against the implementation of the temporary lien within the circumstances of the present case. Therefore, having regard to the fact that it was decided that the right of property was violated by determining that the temporary lien process has not been concluded within in a reasonable time, it is not possible to decide on the annulment of the temporary lien that affects the rights of a third person. Accordingly, the judgment finding violation of the Constitutional Court requires the lifting of the temporary lien.

90. Consequently, the effective remedy in terms of remedying the consequences of the violation in the incident which is the subject matter of this case is compensation. However, the applicant did not claim compensation in respect of pecuniary and non-pecuniary damages. For this reason, the finding of the violation must be sufficient and a copy of the judgment must be sent to the 10th Chamber of the İzmir Civil Court of Instance for information purposes.

91. The total court expense of TRY 2,186.10 including the court fee of TRY 206.10 and the counsel fee of TRY 1,980, which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held 25 October 2018 that

A. Alleged violation of the right to a fair trial be declared INADMISSIBLE for *non-exhaustion of legal remedies*;

2. Alleged violation of the right to property with regard to the applicant Hesna Funda Baltalı be declared INADMISSIBLE for incompatibility *ratione personae*;

3. Alleged violation of the right to property in respect of the placement of the temporary lien on the applicant Baltalı Gıda Hayvancılık San. ve Tic. Ltd. Şti. be declared INADMISSIBLE for *non-exhaustion of legal remedies*;

4. Alleged violation of the right to property be declared ADMISSIBLE on account of the fact that the temporary lien placed on the applicant Baltalı Gıda Hayvancılık San. ve Tic. Ltd. Şti was not concluded within a reasonable time;

B. The right to property guaranteed under Article 35 of the Constitution has been VIOLATED;

C. The total court expense of TRY 2,186.10 including the court fee of TRY 206.10 and the counsel fee of TRY 1,980 be REIMBURSED JOINTLY to the applicants;

D. The payments be made within four months as from the date when the applicant applies to the Treasury and 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;

E. A copy of the judgment BE SENT to the 10th Chamber of the İzmir Civil Court of First Instance (E. 2007/257); and

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

ŞEVKET KARATAŞ

(Application no. 2015/12554)

25 October 2018

On 25 October 2018, the Plenary 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 *Şevket Karataş* (no. 2015/12554).

THE FACTS

[7-33] A power transmission line was made to run through a part of the property registered in the name of the applicant, without expropriation. The applicant brought a civil action seeking compensation for the impugned confiscation without expropriation.

The incumbent court requested an expert report on the value of the property. Relying on the expert report and also considering that the value of the property decreased by 5.5 percent, the court awarded the applicant 375,129.98 Turkish liras (TRY) and held that the administration would be granted a permanent easement on the part of the property remaining under the power transmission line and that the relevant part would be registered in the name of the administration.

Upon appeal, the Court of Cassation quashed the first instance court's decision on the ground that the rate of decrease in the value due to easement could not exceed 2.5 percent of the total value of the property. The applicant's request for rectification of the decision was dismissed.

During the proceedings carried out following the quashing judgment, a new expert report was issued and the easement value was calculated as TRY 171,034.92 and it was decided that the administration would be granted a permanent easement on the part of the property remaining under the power transmission line and that the relevant part would be registered in the name of the administration.

The decision was upheld by the Court of Cassation. Besides, the applicant's request for rectification of the decision was dismissed. The applicant subsequently lodged an individual application.

V. EXAMINATION AND GROUNDS

34. The Constitutional Court, at its session of 25 October 2018, examined the application and decided as follows:

A. The Applicant's Allegations

35. The applicant claimed that his immovable property was de facto expropriated and he was unable to construct on his own property on account of the fact that an energy transmission pipeline passed through it. According to the applicant, due to this restriction imposed on the immovable property, the value of the entire immovable must be paid as compensation, not the amount corresponding to the easement right. The applicant stated that the decrease in value of the immovable property caused by the passage of the energy transmission pipeline which was allegedly 2.5% did not reflect the truth. The applicant asserted that in the calculation of compensation, the value of the whole section through which the energy transmission line was passed, as well as the decrease in the value of the remainder of the immovable property should have been taken into account. Moreover, the applicant further maintained that the value of the immovable property was not 2, 2 times lower than that of the immovable property taken as an example, that as its value was the same as that of the example, that an error was made in the calculation of the compensation, and that as a result, his rights to a fair trial and property were violated.

B. The Court's Assessment

36. Article 35 of the Constitution, titled *"Right to property"*, reads 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. 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). Even though the applicant alleges that his right to a fair trial was violated, it has been found that the

complaints of the applicant regarding the de facto expropriation should be examined, in essence, within the scope of the alleged violation of the right to property.

1. Admissibility

38. Alleged violation of the applicant's right to property must be declared admissible for being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

a. Existence of Property

39. In the present case, there is no doubt about the existence of the property to which the impugned right of easement was granted as it was registered on behalf of the applicant.

b. Existence and Nature of Interference

40. The right to property, regulated in Article 35 of the Constitution, encompasses the above and bottom of the immovable property. In this respect, the owner of the immovable property may also use his powers arising from the right to property in terms of both above and bottom of the immovable. As a matter of fact, it is clearly stated in Article 718 of the Turkish Civil Code no. 4721 dated 22 November 2001 that the ownership of the land also covers the layers of air above and the layers of supply below. Accordingly, construction of cable cars and similar transportation lines and all kinds of bridges above and subway and similar rail transport systems under private immovable property constitutes an interference with the right to property. Therefore, in the concrete case, there is no doubt that granting an administrative easement right to pass a power transmission line through a section of the applicant's immovable constitutes an interference with the right to property.

41. The first paragraph of Article 35 of the Constitution provides for the right to peaceful enjoyment of the property, stipulating that everyone has the right to property and the second paragraph draws a framework of interference with the right to peaceful enjoyment of property. In the second paragraph of the said article, the conditions under which the right

to property may be restricted are listed and a general framework of the conditions for deprivation of property is provided. In the last paragraph of the said article, it is set out as a rule that the use of the right to property cannot be contrary to the benefit of the society. Thus, the state was allowed to control and regulate the use of property. Special provisions allowing the control of property by the state may be found also in other articles of the Constitution. It should also be noted that deprivation of property and regulation of property are special forms of interference with the right to property (see *Recep Tarhan and Afife Tarhan*, no. 2014/1546, 2 February 2017, §§ 55-58).

42. In the present case, the immovable property of the applicant was confiscated without granting of an administrative right to easement, and the right of easement was registered in the title deed on behalf of the administration in the action filed by the applicant. Accordingly, the main purpose of the granting of the administrative easement is not to impose a prohibition of construction. Therefore, the confiscation of the under or above layers of the immovable property as is the case with the present dispute results in partial deprivation of the property. In this case, the owner of the immovable property has been deprived of the layers of air above or the layers of supply below it. Accordingly, the interference by means of granting easement right to the administration for the passage the energy transmission line from the applicant's immovable must be examined within the framework of the second rule on deprivation of property (For similar judgments of the ECtHR, see *Kahyaoğlu and Others v. Turkey*, no. 37203/05, 31 May 2016, § 28; and *Cinga v. Lithuanina* no. 69419/13, 31 October 2017, § 84).

c. Whether the Interference Constituted a Violation

43. 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."

44. The right to property is not regulated as an unlimited right in Article 35 of the Constitution and it was provided for that this right may be restricted by law for the public interest. While interfering with the right to property, Article 13 of the Constitution which regulates the general principles concerning the limitations on the fundamental rights and freedoms, should be taken into consideration. In accordance with the article in question, fundamental rights and freedoms may only be limited by law, on account of the reasons stated in the relevant articles of the Constitution, without violating the requirements of the democratic public order and the principle of proportionality. In order for the interference with the right to property to be in compliance with the Convention, the interference must be based on the law, must pursue the public interest, and must be carried out in accordance with the principle of proportionality (see *Recep Tarhan and Afife Tarhan*, § 62).

i. General Principles

45. In accordance with Article 46 of the Constitution which regulates expropriation, the constitutional elements of expropriation are the performance by state and public legal entities, the existence of the public interest, the compliance with the principles and procedures provided for in the decision on expropriation, and the payment of the real value of the immovable in advance and in cash as a rule. Expropriation, of which the primary element is acknowledged to be public interest, is the state's interference with private property. Expropriation is deemed to be lawful when it is compulsory to confiscate an immovable property, when the public interest prevails the right to private property and when it is performed by in compliance with the procedural safeguards set out in the Constitution (see the Court's judgment no. E. 2017/110, K. 2017/133, 26 July 2017, § 11).

46. As provided for in Article 46 of the Constitution, expropriation is a constitutional limitation imposed on the right of property guaranteed in Article 35 of the Constitution. As such, an arrangement in accordance with the constitutional elements of expropriation stipulated in Article 46 does not contradict Article 35. Expropriation is regulated in the Constitution as a method that may be used for the transfer of private property to the public and means the termination of the right to private property on an immovable by the state for the public interest without the consent of the

owner on the condition that its value is paid to the owner (see the Court's judgment no. E. 2017/110, K. 2017/133, 26 July 2017, §§ 12, 15).

47. In its various judgments, within the scope of both norm control and individual application, the Constitutional Court acknowledged that the interferences in the form of de facto expropriation violated the right to property for being unfounded.

48. The Constitutional Court annulled Article 38 of Law no. 2942, which provides for a prescription period of twenty years in terms of filing an action in respect of a de facto expropriated immovable. In the judgment in question, it was stated that the administration cannot act in breach of the principles about expropriation by confiscating the immovable property without using the means and powers granted by the Constitution in accordance with the law. It was emphasized in the judgment that the confiscations made without using the expropriation method whose limits were determined and permitted in the Constitution did not have a constitutional basis and transfer of the immovable property at the end of the 20-year prescription period to the administration without any compensation is beyond the limitation of the right to property and damages the essence of the said right (see the Court's judgment no. E. 2002/112, K. 2003/33, 10 April 2003).

49. On the other hand, Provisional Article 2 of Law no. 6111 dated 13 February 2011 on the implementation for fifteen years of Provisional Article 6 of Law no. 2942 with respect to de facto expropriations carried out after 4 November 1983 was also annulled by the Constitutional Court. In the said judgment, it was emphasized in particular that the contested provision contained more unfavourable rules than the guarantees provided for in Article 46 of the Constitution and Law no. 2942. Accordingly, enabling administrations to acquire immovable properties by way of de facto expropriation instead of properly expropriating them will not only undermine the principle of legality but also legal certainty and foreseeability. Consequently, it was decided that the impugned rule must be annulled for being in violation of Articles 2, 35 and 46 of the Constitution, noting that it is unacceptable for laws to promote illegal practices in a state of law (see the Court's judgment no. E.2010/83, K.2012/169, 1 November 2012).

50. As regards individual applications, the interferences with the right to property through de facto expropriation were discussed for the first time in the application of *Celalettin Aşçıoğlu* (no. 2013/1436, 6 March 2014). In the incident which constituted the subject matter of this application, the inferior courts accepted the applicant's action for compensation. In the said application, the Constitutional Court noted that Articles 35 and 46 of the Constitution require that the interferences that terminate the ownership of the immovable property be based on the law, and that this is indeed a requirement of being a state of law. Accordingly, as required by Article 46 of the Constitution and Law no. 2942, the administration should acquire an immovable property by expropriation. In the face of lawful expropriation in accordance with the Constitution and laws, de facto expropriation, which does not derive its basis from the Constitution and laws and is a practice that terminates the right of ownership of individuals, cannot be evaluated within the same legal framework as a legal expropriation. Such an application, which allows administrations to go beyond the official expropriation rules, carries the risk of unpredictable and illegal interference for the owners of the immovable property (see *Celalettin Aşçıoğlu*, § 58). In terms of redress in the judgment in question, it was decided that there was no need to award compensation on the grounds that the Constitutional Court found a violation and it was decided by the inferior courts to pay the expropriation compensation with the interest to the applicant (see *Celalettin Aşçıoğlu*, § 69).

51. Similarly, in the case of *İbrahim Oğuz and Others* (no. 2013/5926, 6 October 2015), the Constitutional Court ruled that the right to property was violated in terms of the legality criteria on account of de facto expropriation (see *İbrahim Oğuz and Others*, §§ 56-89). In the said judgment, the compensation awarded by the inferior courts was found to be sufficient and the finding of a violation was considered to be sufficient (see *İbrahim Oğuz and Others*, §§ 106, 107).

52. In the applications of *Mustafa Asiler* (no. 2013/3578, 25 February 2015) and *Funda İnciler and Others* (no. 2014/2582, 14 September 2017), it was decided that the right to property was violated in terms of the legality criteria due to de facto expropriation (see *Mustafa Asiler*, §§ 26-46; and *Funda İnciler and Others*, §§ 26-32). In terms of redress with regard to the

consequences of the violation, the amount of compensation in respect of pecuniary damages awarded by the inferior courts was considered to be sufficient and it was decided to pay non-pecuniary compensation to the applicants separately (see *Mustafa Asiler,* §§ 64, 65; and *Funda İnciler and Others,* §§ 52, 53).

ii. Application of Principles to the Present Case

53. In the present case, as can be understood from the relevant proceedings, the administration de facto expropriated the applicant's immovable property. It was found established by a court decision that that the immovable property owned by the applicant was de facto expropriated without following the procedure set out in Law no. 2942 in breach of Articles 13, 35 and 46 of the Constitution.

54. De facto expropriation gives the administration the opportunity to use and obtain the ownership of an immovable property without expropriation. On the other hand, this interference deprives the property owner of very important constitutional guarantees. First of all, in spite of the fact that it is stipulated in the first paragraph of Article 46 of the Constitution that the expropriation compensation corresponding to the real value of the immovable property shall be paid in advance, the in-advance payment condition is not fulfilled in case of de facto expropriation. In de facto expropriation, pecuniary compensation corresponding to the real value of the immovable property is awarded only if the applicant filed an action for compensation at the end of the proceedings, the immovable property that was de facto expropriated is registered in the name of the administration. Whereas in the ordinary expropriation procedure, appropriation is provided at the beginning of expropriation and at the end of the relevant action, it is decided to register the immovable on behalf of the administration if the expropriation compensation is secured to be paid to the owner of the property. Thus, de facto expropriation grants the administration the ownership of the property without the in-advance payment of the real value of the property. It is clear that this violates Article 46 of the Constitution as well as provisions of Law no. 2942.

55. Furthermore, the fact that the value of the immovable property is not paid in advance produces new problems in terms of the execution of

legal decisions. As a matter of fact, in the application of *Kenan Yıldırım and Turan Yıldırım* (no. 2013/711, 3 April 2014), the Constitutional Court ruled that the right to property was violated due to the non-payment of the compensation awarded in the compensation case filed on account of de facto expropriation (see *Kenan Yıldırım and Turan Yıldırım*, §§ 55-75). Following this application, the Constitutional Court held in nineteen separate applications concerning de facto expropriation that the right to property was violated due to the fact that the compensation based on the court decision was not paid for the same reason (see *Halil Afşin and Others*, no. 2013/4824, 25 February 2015; and *Nurdan Erkan and Others*, no. 2014/311, 14 September 2017 and other similar applications). Accordingly, it is clear that the in-advance payment of the expropriation compensation is a very important constitutional guarantee in terms of the right to property.

56. Undoubtedly, the main basis of the expropriation process is public interest according to Articles 13, 35 and 46 of the Constitution, and the expropriation process made by the administrations and the decision on whether this process is for the public interest or not must be subject to judicial review. As a matter of fact, it is stipulated in Article 14 of Law no. 2942 that property owners may file an action for annulment before administrative court against the expropriation procedure. In the practice of de facto expropriation, the ability of owners to file administrative actions against the expropriation procedure and the decision on public interest is eliminated.

57. Moreover, pursuant to Law no. 2942, in order to decide on expropriation, the value of the immovable must be determined by the administration in the first place, and in case of a dispute, the administration must apply to the court and request an expropriation compensation appraisal. On the other hand, in the event of de facto expropriation, the burden of reconciliation and filing an action is imposed on the owners. Lastly, it should also be noted that there is a procedure regulating seizure in matters of urgency in Law no. 2942 regarding the situations where the administrations are in an urgent need of immovable properties and where the public interest requires. In other words, while it is possible for the administration, that is in need of an immovable property for public

interest, to apply to the ordinary expropriation procedure and in urgent cases to the expropriation procedure stipulated in the Law mentioned; it is not legitimate to prefer the de facto expropriation method.

58. Consequently, de facto expropriation leads to the legal acceptance of a situation created by the administration which is against the both Constitution and the law and it gives the administration the opportunity to benefit from its unlawful behaviour. Such a practice, which allows the administration to go beyond certain rules with regard to expropriation in breach of the constitutional guarantees, causes unpredictable and arbitrary issues in terms of protecting the right to property. The practice in question which clearly does not respect the legal guarantees provided for in Articles 13, 35 and 46 of the Constitution, should not be seen as an alternative way to the expropriation procedure.

59. In the present case, there is no case that requires departure from the principles mentioned. Therefore, it has been concluded that the de facto expropriation carried out on the applicant's said immovable property was a procedure which did not comply with the principles set out in Articles 13, 35 and 46 of the Constitution and with Law no. 2942, and that the interference with the right to property was not lawful.

60. Consequently, the Constitutional Court has found a violation of the right to property safeguarded by Article 35 of the Constitution.

C. Application of Article 50 of Code no. 6216

61. 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 judgment finding a violation has been rendered, what is required for the resolution of the violation and the consequences thereof shall be ruled on…

(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."

62. The Constitutional Court has concluded that the right to property was violated due to the de facto expropriation of the applicant's immovable property by the administration. Thus, in the present case, the violation was caused by an administrative act.

63. Within the framework of the application, it must be determined in the first place whether the financial damages that the applicant suffered due to the violation have been redressed. In the present case, the inferior courts decided to establish the easement right of the de facto expropriated immovable property on behalf of the administration and awarded pecuniary compensation to the applicant. The applicant complained that the amount of pecuniary compensation awarded was not sufficient. The applicant based this claim on two different grounds:

i. Firstly, the applicant stated that the immovable property which had been qualified as a building land (arsa) lost its quality of being eligible for construction due to the passage of the energy transmission line through it, that it became completely unusable, that appraisal of the value of the easement right was incorrect, and that the value of ownership of the part of the immovable property that had been de facto expropriated must be calculated as compensation. According to the applicant, the value of ownership of the area where the easement right was established on behalf of the administration as well as the sum of the loss of value in the remaining part of the immovable property constituted the total damages and accordingly the loss of value should be calculated as 5.62 percent.

ii. Secondly, the applicant expressed that the immovable property which is the subject matter of the case was as valuable as the immovable taken as an example and complained that although the value of one square meter of the immovable property taken as an example was

TRY 389.38; the expert panel determined the value of his immovable property TRY 106.19.

64. As the Constitutional Court has noted before, the task of determining the expropriation compensation, as a rule, belongs to the inferior courts, which have the opportunity to access the evidence at first hand and which are specialized in this field. Determination of the value of the immovable property is a technical matter which requires expertise. For this reason, the determination of the value of the expropriated immovable property is within the scope of the authority and duty of the specialized courts and the specialized chambers of the Court of Cassation. The Constitutional Court is neither a specialized court in this matter, nor does it have a duty to calculate the compensation and decrease in value in individual applications made under the right to property. The finding to be made by the Constitutional court in respect to the relationship between the interference in the right to property and the compensation paid is merely an examination of proportionality (see *Mukadder Sağlam and Others,* no. 2013/2511, 22 January 2015, § 49; *Abdülkerim Çakmak and Others,* no. 2014/1964, 23 February 2017, § 52).

65. The applicant's claim that he could not completely use a part of the immovable property due to the passage of an energy transmission line from his immovable was considered to be ill-founded. Because, the passage of the energy transmission line from the immovable, per se, does not completely transfer the ownership of the immovable property to the administration. As mentioned above, the applicant is deprived of the air layer above or the supply layer below it. However, the ability of the applicant to benefit from the soil or lower layers thereof does not cease to be. In the event that the immovable was determined as a public service area as a result of a zoning application, that would be a separate interference. Therefore, as the impugned immovable property is going to be remain registered in the applicant's name in the land register, the payment of the amount of the easement as compensation instead of paying the value of the whole value of the part from which the energy transmission line passes is considered to be a reasonable redress to remedy the pecuniary damages of the applicant.

66. As a matter of fact, the inferior court declared that in accordance with Article 11 of Law no. 2942, the compensation regarding the right of easement amounts to the total loss of value in the entire immovable property due to the grant of this right. Accordingly, the value of the immovable property which is the subject matter of the case before the grant of the right of easement was established, and then the rate of decrease in value that occurred in the entire immovable due to the energy transmission line was determined. Subsequently, the compensation to be paid due to the grant of the easement was calculated by multiplying this ratio and the total value of the immovable property which is the subject matter of the case. In this context, it has been observed that the damage caused by the fact that the applicant cannot construct on the part below the energy transmission line was among the factors considered in determining the rate of decrease in the value of the immovable property. In addition, it has also been recognized that the value of the pylon area was also added to the compensation amount.

67. Moreover, the immovable property to be taken as an example and how the compensation will be calculated according to the differences between the immovable property taken as an example and the impugned immovable property could be appreciated by the experts in their fields. The applicant, on the other hand, did not submit any concrete information, document, or report indicating the opposite of the findings in the expert report and he only raised an abstract allegation that the immovable property which is the subject matter of the dispute had the same value as the immovable property taken as an example. In this regard, the inferior court concluded the compensation appraisal by carrying out on-site inspection, requesting expert reports, enabling the applicant to submit their objections at any stage and taking into account these objections. The applicant did not have any other clear complaints regarding the determined amount of compensation other than those mentioned above. When an examination limited to the applicant's complaints, the amount of compensation awarded by the inferior courts was considered sufficient to cover the pecuniary damages suffered by the applicant.

Mr. Serdar ÖZGÜLDÜR and Mr. Serruh KALELİ did not agree with this conclusion.

68. On the other hand, the practice of de facto expropriation is a very important issue that leads to a violation of the right to property directly under Article 46 as well as Articles 13 and 35 of the Constitution. Moreover, arrangements aiming at the settlement of the de facto expropriation practices conducted until 9 October 1956 were made under Article 1 of Law no. 221 on the Real Estates Allocated for Public Service by the Public Utility Bodies or Institutions dated 5 January 1961 and between 9 October 1956 and 4 November 1983 by Provisional Article 6 of Law no. 2942. Nevertheless, it is observed that even after 4 November 1983, the administrations continued carrying out de facto expropriation. Therefore, de facto expropriation, which causes a violation of the right to property, which is secured as a fundamental right, constitutes a structural issue in our country.

69. In the face of such a problem, the inferior courts award only pecuniary compensation, which only consists of the expropriation compensation, and do not impose other sanctions such as non-pecuniary compensation. This, in turn, leads administrations to prefer de facto expropriation practice rather than the ordinary expropriation procedure. Hence, since the legally unfounded de facto expropriation practice does not satisfy the requirements of the protection of the right to property stipulated in the Constitution, it cannot be considered as an alternative to the ordinary expropriation procedure. As a matter of fact, in the Action Plan on Prevention of Violations of the European Convention on Human Rights annexed to the Council of Ministers Decree which had been promulgated in the Official Gazette no. 28928 dated 1 March 2014, certain arrangements were provided for in order to prevent the administrations from carrying out de facto expropriation. The importance of implementing these measures and arrangements aiming at ending the de facto expropriation is apparent.

70. Consequently, even if the applicant's financial losses were compensated, it should be noted that the interference with the right to property de facto expropriation, which is found to be contrary to the explicit wording of the Constitution and which is not based on law, constitutes a structural issue as mentioned above. For this reason, in order to take necessary measures by the administration knowing that there is a

violation of the right to property, which is guaranteed by the Constitution, and in order not to cause new violations of a similar nature, a copy of the decision must also be sent to the Ministry of Energy and Natural Resources, to which Türkiye Elektrik Dağıtım A.Ş., the responsible administration that confiscated the immovable, is associated.

71. The total court expense of TRY 2,206.90 including the court fee of TRY 226,90 and the counsel fee of TRY 1,980, 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 20 September 2018:

A. UNANIMOUSLY that the application be declared ADMISSIBLE;

B. That the right to property guaranteed under Article 35 of the Constitution was VIOLATED;

C. BY MAJORITY and by dissenting opinion of Mr. Serdar ÖZGÜLDÜR and Mr. Serruh KALELİ, that the applicant's compensation claims be REJECTED;

D. UNANIMOUSLY that a copy of the judgment be SENT to the Ministry of Energy and Natural Resources;

E. That the total court expense of TRY 2,206.90 including the court fee of TRY 226.90 and the counsel fee of TRY 1,980 be REIMBURSED to the applicant;

F. That the payments be made within four months as from the date when the applicant applies to the Treasury and 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. That a copy of the judgment be SENT to the Hilvan Civil Court of First Instance (E. 2014/58, K. 2014/85); and

H. That a copy of the judgment be SENT to the Ministry of Justice.

CONCURRING AND DISSENTING OPINIONS OF JUSTICES SERDAR ÖZGÜLDÜR AND SERRUH KALELİ

1. In the grounds advanced in the majority opinion, it was stated that even though the amount of compensation awarded by the inferior courts was sufficient to cover the pecuniary damages suffered by the applicant, the payment of the value of the immovable property as pecuniary compensation does not, per se, provide redress for damages incurred due to the violation of the applicant's constitutional right and consequently, it was held that the applicant's right to property, guaranteed by Article 35 of the Constitution, has been violated. However, we agree with the conclusion in question with the grounds we had previously stated as we held, in the examination of the case file, that the applicant's immovable property, which was classified as a "building land"(arsa), was treated as if it had been farmland (tarım arazisi) during the calculation of the pecuniary compensation arising from de facto expropriation; that the limit of 2.5% value depreciation was unfounded; that therefore the allegations in question were not addressed in the grounds stated by the inferior courts; that hence the judgment was rendered without providing a relevant and sufficient grounds in respect of the for the claims that amount of pecuniary compensation which was determined as the expropriation compensation was calculated faultily; that in view of those, the applicant's right to property was violated.

2. In view of the grounds indicated above, as we deem it appropriate to send the case file back to the relevant inferior court, we do not agree with the judgment that only requires one copy of the decision to be sent to the institution that performed de facto expropriation.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

İSKENDERUN DEMİR VE ÇELİK A.Ş.

(Application no. 2015/941)

25 October 2018

On 25 October 2018, the Plenary 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 *İskenderun Demir ve Çelik A.Ş.* (no. 2015/941).

THE FACTS

[10-34] The applicant, a company engaging in steel production, obtains coking coal and coke-oven gas by itself and uses them in the production process.

Due to the applicant's consumption of electricity and coal gas, the Municipality requested it to pay electricity and coal gas consumption taxes in accordance with Law no. 2464 on Municipal Revenues.

Upon the Municipality's request in question, the applicant submitted declarations to the Municipality on various dates concerning the taxation of electricity and coke-oven gas consumption. The Municipality, in accordance with these declarations, calculated the taxes on electricity and coal gas pertaining to various periods. While some of these amounts were related to electricity consumption, the others were related to coke-oven gas consumption. The applicant paid these amounts to the Municipality on various dates.

The applicant brought actions before the tax court requesting the waiver of its electricity and coal gas consumption tax debts and the reimbursement of the taxes already paid.

The court rejected the cases concerning various periods when the taxes had accrued. Upon the applicant's appeal, the Council of State upheld the first instance court's decision. Besides, the applicant's request for rectification of the decision was dismissed. The applicant subsequently lodged an individual application.

V. EXAMINATION AND GROUNDS

35. The Constitutional Court, at its session of 25 October 2018, examined the application and decided as follows.

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

36. The applicant asserted that the electricity and coke gas that it consumed should not be subject to an electricity and gas tax, since it produced them. In this context, the applicant expressed that there was no need to discuss the extraordinary provision in Article 36 of Law no. 2464, as its consuming electricity and coke gas produced by itself did not fall within the scope of the tax in question. The applicant also complained of the fact that even though the taxpayer, tax base, return, and payment procedures were supposed to be regulated by law, these substantive matters were not regulated by Law No. 2464. For these reasons, the applicant stated that the interference with his right to property was not based on law, that it had a deterrent effect on energy production of it as an autoproducer and on public interest; and that the interference was not proportional on account of the fact that it was not necessary and compulsory to request the payment of the said tax from the applicant company.

37. In addition, the applicant alleged that the right to a fair trial, safeguarded under Article 36 of the Constitution, was violated in terms of the right to a reasoned decision due to the lack of sufficient and reasonable justification to address the fundamental claims in the decisions rendered by the inferior courts in the actions filed for the cancellation and refund of the said tax; and in terms of the principle of legal security due to the fact that the inferior courts committed an obvious discretion error in the interpretation of the legal rules.

38. In its observations, the Ministry provided that electricity and gas consumption within the municipal boundaries and adjacent areas were subject to tax according to Article 34 *et seq.* of Law No. 2464, and that the applicant had no hesitation about using electricity and gas in its own facilities. According to the Ministry, no exception or exemption is stipulated in the relevant Law articles. The Ministry indicated that the applicant's allegations were thoroughly discussed in detail by the inferior courts and that it was lawful for electricity consumption to be subject to taxation in line with these decisions.

39. In its petition of reply, the applicant stated that it was not similar to other electricity and gas consumers who buy and consume electricity

and gas from production and distribution organizations. The applicant reiterated that the electricity it produced was not subject to taxation, as well as that the fact that the taxpayer, basis, return, and payment procedures were not regulated by law.

B. The Court's Assessment

40. Relevant part of Article 35 of the Constitution, titled "*Right to Property*", provides 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."*

41. 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."*

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). Besides the allegation of violation of his right to property, the applicant alleged that his right to a fair trial was violated on the same grounds. Considering that the essence of the applicant's complaint was the taxation's not having a legal basis, it was deemed appropriate to examine the applicant's allegations of violation within the scope of the right to property.

1. Admissibility

43. Alleged violation of the applicant's right to property must be declared admissible for not being manifestly ill-founded, and there being no other grounds for its inadmissibility.

2. Merits

a. Existence of Property

44. In the present case, there is no doubt about the existence of an economic interest worth protecting within the meaning of Article 35 of

the Constitution in view of the applicant who paid electricity and gas consumption tax.

b. Existence and Nature of Interference

45. In the present case, on various dates, the applicant submitted declarations containing reservations to the Municipality with respect to the taxation of electricity and coke gas consumption for the periods 2012, 2013, and 2014. The municipality has accrued electricity and gas taxes for different periods on the basis of the said declarations. While some of the accrual amounts are related to electricity consumption, some of them are related to coke gas consumption and the aforementioned accrual amounts were paid to the Municipality by the Company on different dates. There is no doubt that the taxation procedure constitutes an interference with the right to property.

46. In the precedent decisions of the Constitutional Court, it was established that, on account of the purposes they carry, the interferences aimed at determining, amending and securing the payment of taxes and similar liabilities as well as social security premiums and contributions must be examined within the scope of the state's authority to control or regulate the use of property for the public interest (see *Ahmet Uğur Balkaner* [Plenary], no. 2014/15237, 25 July 2017, § 49; *Arif Sarıgül,* no. 2013/8324, 23 February 2016, § 50; and *Narsan Plastik San. ve Tic. Ltd. Şti.*, no. 2013/6842, 20 April 2016, § 71).

c. Whether the Interference Constituted a Violation

47. 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."

48. In Article 35 of the Constitution, the right to property is not defined as an unlimited right, and it was provided that this right may be restricted

by law for the public interest. As regards interferences with the right to property, Article 13 of the Constitution, which regulates the general principles concerning the limitations on the fundamental rights and freedoms, should be taken into consideration. In order for the interference with the right to property to be in compliance with the Convention, the interference must be based on the law, must pursue public interest, and must be carried out in accordance with the principle of proportionality (see *Recep Tarhan and Afife Tarhan*, no. 2014/1546, 2 February 2017, § 62).

i. General Principles

(1) Lawfulness

49. Article 35 § 2 of the Constitution, which stipulates that the right to property may only be limited by law for public interest, requires that interferences with the right to property must be prescribed by law. Furthermore, Article 13 of the Constitution which regulates general principles with regard to the restriction of the fundamental rights and freedom adopted, as a fundamental principle, the fact that *the rights and freedoms may only be restricted by law*. Accordingly, the primary criterion to be taken into account in interferences with the right to property is whether the interference is based on the law (see *Ford Motor Company,* no. 2014/13518, 26 October 2017, § 49).

50. Regulation of rights and freedoms, interferences, and restrictions on these by law is one of the most important elements of the democratic constitutional state that prevents arbitrary interference with these rights and freedoms, and that ensures legal security (see *Tahsin Erdoğan,* no. 2012/1246, 6 February 2014, § 60).

51. Principles of legal security and legal certainty are among the preconditions of the rule of law. The principle of legal security, which aims to ensure the legal security of individuals, requires the legal norms to be foreseeable, individuals to be able to trust the state in all their actions and acts, and the state to avoid adopting methods that damage this sense of trust in its legal regulations (see the Court's judgment, no. E. 2013/39, K. 2013/65, 22 May 2013; and no. E. 2014/183, K. 2015/122, 30 December 2015, § 5). Whereas, the principle of certainty signifies that the legal regulations

must be clear, understandable and applicable without any hesitation and doubt in terms of both individuals and administrations and include protective measures against arbitrary practices of public authorities (see the Court's judgment, no. E. 2013/39, K. 2013/65, 22 May 2013; and no. E. 2010/80, K. 2011/178, 29 December 2011).

52. In matters that are exclusively regulated by the law in the Constitution, the law must determine the fundamental rules, principles, and framework (see the Court's judgment no. E. 2016/150, K.2017/179, 28 December 2017, § 57).

53. Decision as to how the legal rules are interpreted and which interpretation is adopted where more than one interpretation is possible is within the jurisdiction of the inferior courts. The Constitutional Court's granting superiority to one of the interpretations adopted by the courts of instance or interpreting the rules of law by substituting itself for the inferior courts in the remedy of individual application is incompatible with the purpose of the individual application (see *Mehmet Arif Madenci*, no.2014/13916, 12 January 2017, § 81).

54. In order for an interference to be based on law, a law must exist in the first place in a formal sense. The law in a formal sense means the legislative regulatory process named law-making carried out by the Turkish Grand National Assembly (TGNA) in accordance with the procedure set out in the Constitution. The right to property may only be interfered with provided that there is a provision allowing interference with the regulatory process introduced by the legislation under the name of law. The absence of a law provision adopted by the Turkish Grand National Assembly in a formal sense deprives the interference with the right to property of the constitutional basis (see *Ali Hıdır Akyol and Others* [Plenary], no.2015/17510, 18 October 2017, § 56).

55. Equally important as the existence of the law is the necessity that the text and application of the law has legal certainty to a degree that individuals may foresee the consequences of their actions. In other words, the quality of the law is also important in determining whether or not the legal requirement is met (see *Necmiye Çiftçi and Others*, no.2013/1301, 30 December 2014, § 55). In this context, the criterion that the interference

must be prescribed by law requires that there are enough accessible and foreseeable rules regarding the relevant interference in domestic law (see *Türkiye İş Bankası A.Ş.* [Plenary], no.2014/6192, 12 November 2014, § 44).

(2) Admissibility as to the Interference Made through Taxation

(a) Taxation in General

56. Authority to impose taxes stems from the de jure and de facto power that the state has in collecting taxes depending on the sovereignty of the country. Authority to impose taxes, exercised to provide financial resources needed to fulfil public services, only cover the authority of the state to impose taxes on public revenues in a narrow sense. Whereas in a broad sense, it encompasses any financial obligation imposed on natural and legal persons in order for the modern state to fulfil its traditional duties such as security, justice, and education, as well as to finance the expenses required by its contribution to economic, social, cultural life and other fields. Pursuant to Article 73 of the Constitution, the tax levied on the basis of this authority in order to finance public expenditures is an obligation that natural and legal persons have to fulfil depending on their financial power, provided that it is prescribed in the laws. In this way, the state transfers revenue from the market economy to the budget in order to meet finance expenditures or as a requirement of its fiscal policy (see the Court's judgment no. K. 1997/62, no. E. 1998/52, 16 September 1998).

57. It is clear that the tax manifesting as a public receivable that the state imposes on individuals unilaterally on the basis of the power of sovereignty to meet public needs must be imposed and collected within constitutional limits. (see the Court's judgment, no. E. 2003/33, K.2004/101, 15 July 2004; and no. E. 2010/62, K. 2011/175, 29 December 2011). The legal provisions that constitute the basis of a tax must take account of the principles set out in the Constitutional Court in this matter (see the Court's judgment, no. E. 2003/33, K. 2004/101, 15 July 2004).

58. Article 73 § 1 of the Constitution stipulates that everyone is obliged to pay taxes depending on their financial power to meet public expenses and the other paragraphs of the same article set out the principles in relation to this obligation (see the Court's judgment, no. E. 2005/73, K. 2008/59, 21 February 2008). The authority of the state to impose taxes is

limited by the general principles of Constitution as well as the principles of legality of the tax, payment depending on financial power, generality, fair and balanced distribution of the tax burden provided for in Article 73 of the Constitution (see the Court's judgment, no. E. 2003/33, K. 2004/101, 15 July 2004). Thus, the principles of the social state and the rule of law, whose nature is specified in Article 2 of the Constitution, are expressed concretely in terms of taxation principles (see the Court's judgment, no. E. 2014/72, K. 2014/141, 11 September 2014; no. E. 2010/62, K.2011/175, 29 December 2011; no. E. 2012/158, K. 2013/55, 10 April 2013).

(b) Legality of Taxes

59. Article 73 of the Constitution that regulates the fundamental principles in respect of the state's authority to impose taxes, specifically regulates the principle of legality in the interferences to be made with the right to property through taxation. In accordance with paragraph three of the said article, taxes, charges and levies similar financial obligations are imposed, removed, and changed by law. This constitutional principle, *named the principle of legality of taxes,* is based on the principle of *no taxation without representation.* Notions such as *the chorus of approval, approval of the parliament, approval of representatives* in the Magna Carta Libertatum of 1215, the Petition of Right of 1628, the Bill of Rights of 1689 and the Declaration of the Rights of Man and of the Citizen of 1789 demonstrate that taxes can only be collected based on the consent of the people's representatives. Whereas, in our constitutional history, it is observed that the way the relevant body embodies the will of taxation is of great importance. Article 96 of the Ottoman Constitution of 1876 read, "*Taxes to the profit of the State can only be established, assessed, or collected in virtue of a law"* and Article 85 of the Constitution of 1924 provided *"Taxes are levied in conformity with the law"*. Article 61 § 2 of the Constitution of 1961 contained the rule that *"taxes, charges and levies other such financial obligations shall only be imposed by law"* whereas of Article 73 § 3 of the Constitution of 1981 stipulated that "*Taxes, fees, duties, and other such financial obligations shall be imposed, amended, or revoked by law.*". The principle of *legality of taxes* mentioned in these rules, together with the principle of *no taxation without representation*, stipulates that the taxation authority may only be used on condition that it conforms with the condition of being prescribed by law.

60. The principle of legality of tax requires that restrictions that prevent discretionary arbitrary practices be included in the law and that the introduction, amendment or revocation of regulations on tax liability only be made by law (see the Court's judgment, no. E. 2001/36, K. 2003/3, 16 January 2003; no. E. 2003/33, K.2004/101, 15 July 2004; no. E. 2004/14, K. 2004/84, 23 June 2004; no. E. 2005/73, K.2008/59, 21 February 2008; no. E.2009/63, K. 2011/66, 14 April 2011; and no. E. 2014/183, K. 2015/122, 30 December 2015, § 6). Article 73 of the Constitution, which provides for the imposition of tax and financial obligations by law, stipulates that the financial liability may only be imposed by law and the law cannot authorize the executive body and the administration in this regard (see the Court's judgment, no. E. 2014/183, K. 2015/122, 30 December 2015, § 7).

61. However, as regards the regulations regarding taxes, charges, levies or similar financial obligations, it is not obligatory to regulate all the elements related to these obligations within the same law, article or paragraph. In this context, the elements that must be determined by law may be regulated by different provisions of the same law, as well as by different laws. Hence, a rule does not violate the principle of legality for the mere reason that it does not contain certain of the elements that must be regulated by law (see the Court's judgment, no. E. 2011/16, K. 2012/129, 27 September 2012).

62. As clearly mentioned in the established case-law of the Court, while providing for the introduction of all kinds of financial obligations by law, the constitutioner aimed to prevent arbitrary and discretionary practices. The legislator's allowing financial liability to be imposed on those concerned by referring only to its subject is not sufficient for the relevant financial liability to be considered as imposed by law (see the Court's judgment, no. E. 1986/20, K. 1987/9, 31 March 1987; no. E. 2010/80, K. 2011/178, 29 December 2011; and no. E. 2011/16, K. 2012/129, 27 September 2012).

63. In order not to allow arbitrary practices that will affect the social and economic status of individuals, certain fundamental elements in taxation such as the tax-generating event, the liable, the upper and lower limits of the tax base and rates, dates and accruals, collection procedures, sanctions and statute of limitations must be determined by law (see the Court's

judgment, no. E. 2001/36, K. 2003/3, 16 January 2003; no. E. 2003/33, K. 2004/101, 15 July 2004; no. E. 2005/73, K. 2008/59, 21 February 2008; no. E. 2009/63, K. 2011/66, 14 April 2011; no. E. 2010/62, K. 2011/175, 29 December 2011; no. E. 2010/80, K. 2011/178, 29 December 2011; no. E. 2011/16, K. 2012/129, 27 September 2012; no. E. 2012/158, K. 2013/55, 10 April 2013; no. E. 2014/72, K. 2014/141, 11 September 2014; and no. E. 2014/183, K. 2015/122, 30 December 2015, § 7). If a financial obligation is not sufficiently framed by law in these aspects, it is possible that it may lead to arbitrary practices that will affect the social and economic situations and even fundamental rights of individuals. In this regard, the major components of financial liabilities must be explained and their legal frameworks should be indicated distinctively in laws (see the Court's judgment, no. E.1986/20, K.1987/9, 31 March 1987).

64. On the other hand, in cases where it is not possible to regulate every subject in full scope and details by law, the executive body may be authorized to perform explanatory and complementary regulatory administrative action in matters concerning the execution provided that it remains within the specified framework (see the Court's judgment, no. E. 2001/36, K. 2003/3, 16 January 2003; no. E. 2003/33, K. 2004/101, 15 July 2004; no. E. 2004/14, K. 2004/84, 23 June 2004; no. E. 2010/62, K. 2011/175, 29 December 2011; no. E. 2012/158, K. 2013/55, 10 April 2013; no. E. 2014/72, K. 2014/141, 11 September 2014; and no. E. 2014/183, K. 2015/122, 30 December 2015, § 7).

65. Most of the municipalities' sources of income are based on public law for the payment of the expenditures required by the public services they provide. For this reason, the taxes, charges, levies and similar obligations to be received by the municipalities, as well as the lower and upper limits thereof, must be determined by law within the framework of the principles stipulated in Article 73 of the Constitution (see the Court's judgment, no. E. 1986/20, K. 1987/9, 31 March 1987).

66. Article 73 § 3 of the Constitution aims to ensure the *certainty* and *foreseeability* of tax obligations for the taxpayer and thus, the legal security of taxpayers. These criteria are also accepted as the sub-criteria of the obligation to perform an interference with the right to property by law (see *Türkiye İş Bankası A.Ş.*, § 42).

67. In case of an interference with the property right through taxation as a result of an assessment of Articles 13, 35 and 73 of the Constitution in conjunction, in order to avoid being discretionary and arbitrary, the interference must be imposed on the basis of a law provision that regulates accessibly, clearly, and foreseeably the fundamental elements of the tax such as the tax-generating event, the liable, the responsible, the base tax, the upper and lower limits of the amounts and rates, the imposition, the accrual and collection procedure, the sanction and the statute of limitations.

ii. Application of Principles to the Present Case

68. The applicant argues that the interference with its right to property through taxation of electricity and gas consumption was not prescribed by law on account of the fact that Law no. 2464 did not include a clear regulation on the subject matter of the tax, taxpayer, responsible, tax base, tax rate and return and payment procedure with regard to those who consume the electricity and coke gas produced by themselves.

69. Law no. 2464 regulates the municipal income under four separate sections. The first section covers taxes, the second charges and the third participation shares of expenditures. Whereas the fourth section of the law sets out various provisions, including regulations on the determination of tax and charge tariffs. The financial responsibility was first introduced by the Additional Law to the Municipal Taxes and Taxes Law no. 4375 dated 14 January 1943 in order to find sources of income that are easy to accrue and collect due to the urgency of the economic and financial situation in the face of increasing municipal services and on the grounds that it would impose a relatively light financial burden on taxpayers. Whereas this obligation was expressed as a municipal share in electricity and gas in the Municipal Revenues Law no. 5237, dated 1 July 1948, Law no. 2464 provides for the fulfilment of this obligation as a tax payment.

70. Law no. 2464 specifies the electricity and gas consumption within the municipal boundaries and adjacent areas as the subject of the electricity and gas tax, and the consumers of electricity and gas as the relevant taxpayers. The same Law bases the collection of the tax on tax liability and stipulates that organizations that supply electricity and distribute gas are

responsible for the collection and deposit of this tax included in the sales price to the relevant municipality.

71. The Constitutional Court does not have a duty to interpret the legal rules on taxation or to evaluate tax-related incidents and facts within the scope of an individual application. Nevertheless, as mentioned above, there is no doubt that in the present case there was an interference with the applicant's right to property through taxation. An interference with the right to property through taxation, however, must have a certain, accessible and predictable legal basis as addressed above. In other words, with respect to the present application, the Constitutional Court must first determine whether the taxation that interferes with the right to property has a legal basis as stated.

72. On the other hand, it should be noted at this stage that the fact that the public authorities have a wide discretionary power in terms of the type of interference in the control or regulation of the use of property for the public interest does not change the fact that the interference must be based on the law. That is to say, regardless of the type of interference, there is no doubt that the right to property can only be intervened through an accessible, certain and predictable law, and the differentiation between the types of interference is significant in terms of proportionality.

73. Electricity and gas consumption tax is regulated in Article 34 et seq. of Law no. 2464. Since the law and all the amendments that it has undergone since its entry into force are published in the Official Gazette, they have been accessible for the applicant.

74. On the other hand, in the circumstances giving rise to the application, it is accepted by the inferior courts that the applicant consumed electricity and gas, even if they were produced by him, and that the action of the applicant was not covered by the exceptions listed in Article 36 of Law no. 2464, and therefore the applicant, who carried out an activity within the scope of the tax, was liable to the tax. Accordingly, it is certain and foreseeable that the applicant's action falls within the scope of the tax and that he is liable to the tax, in view of Articles 34, 35 and 36 of Law no. 2464 and the interpretations of the courts of instance based on these provisions.

75. In the present case, the applicant consumes his own electricity and coke gas instead of obtaining it from an establishment that supplies electricity and distributes gas. The dispute arises from the determination of the tax base in the payment of the electricity and gas tax and whether the return and collection of the tax to be paid is certain and predictable for the applicant.

76. In Article 20 of the Tax Procedure Law no. 213 of 4 January 1961, the tax assessment is explained as an administrative act that determines the amount of tax claim through its calculation by the tax office on the tax base and rates set down by the law. Therefore, the capacity to levy a tax depends on the certainty and predictability of the tax base on which it will be calculated. This allows the taxpayer to foresee the extent of the interference with their right to property. Therefore, the tax base is one of the essential elements of tax and it must be regulated by law.

77. In Article 37 of Law no. 2464, the sales price of electricity excluding the costs related to the transmission, distribution and retail sale services and the sales price of gas are determined as the tax base; and in Article 38, the rates to be applied to this base are explained. The law requires the existence of a sales price for the tax to be calculated due to the way it has been regulated. In the present case, since the applicant consumes the electricity and coke gas he produces, there is no purchase-sale relationship and sales price through which the tax base can be determined.

78. In the aforementioned decision of the 9th Chamber of the Supreme Administrative Court, no. E.2006/1348, K.2007/2214, dated 6 June 2007, the subject matter of the dispute is how to determine the tax base for the Company which uses the electricity it generates for the purpose of production. The Chamber clearly acknowledged that there is no regulation in this regard. In the decision, it was discussed whether to use the energy sales price for autoproducers determined by the Ministry of Energy and Natural Resources or the sales price imposed on third parties by Türkiye Elektrik Dağıtım A.Ş. (TEDAŞ) in determining the tax base. According to the Chamber, in such a case, the purchase price for the defendant corresponds to the unit cost of the electricity produced. The Chamber, based on the provision of the relevant Regulation, stated that the tax

base for the taxation should be the price determined by the Ministry of Energy and Natural Resources as the autoproducer's energy sales price of companies to TEDAŞ, which is the closest value to the cost price of the electricity produced by the liable company and assessed the tax base through interpretation.

79. This reveals that, as acknowledged by the Chamber, there is no legal clarity in the determination of the tax base and, therefore, there is an uncertainty in the determination of the tax base for taxpayers who consume their own electricity, and allows discretionary practices.

80. On the other hand, according to Article 8 of Law no. 213, real and legal persons to whom a tax debt is incurred in accordance with tax laws are defined as the taxpayers, while the person concerned with regard to the payment of the tax to the tax office is defined as the tax responsible. It is observed that Law no. 2464 is based on tax liability principle in terms of payment of electricity and gas consumption tax. Accordingly, the tax responsible calculates the tax over the sales price invoiced to the taxpayer, collects the tax and deposits it in the relevant municipality. In the event giving rise to the application, there is no sales relationship and therefore no supplier and distributor that can be considered as the tax responsible for the taxpayers who consume their own product. Although the law bases the tax collection method on tax liability, it is unclear how the tax will be collected in cases where there is no tax responsible, in other words, whether the tax should be declared by the taxpayer in this case. This uncertainty regarding the collection procedure is of a nature that may cause the taxpayer to face administrative sanctions in the case of failure to a declaration.

81. However, since both the method of determining the tax base and the method of tax collection are essential elements of taxation, they should be regulated in a certain and predictable manner in the law. In cases where a financial obligation is not sufficiently framed by the law in such aspects, it may lead to practices based on administrative or judicial discretion that will affect the property rights of individuals.

82. In the present case, the uncertainty of the tax base and the method of tax collection, and the ongoing administrative practice and

judicial interpretations on the issue have deprived the applicant of the constitutional guarantees provided to taxpayers, contrary to the purpose of the emergence and regulation of the legality of taxes with regard to the interference with the right to property through taxation.

83. In this case, it has been concluded that the interference with the right to property violated the principle of legality stipulated in Articles 13, 35 and 73 of the Constitution, as the essential elements of the consumption tax on electricity and gas, which the applicant produced himself, were not regulated by law in a certain and predictable manner.

84. Since it was determined that the interference did not meet the requirement of legality, it has not been deemed necessary make a separate examination as to whether the legitimate aim and proportionality criteria, which are other elements provided for in Articles 13 and 35 of the Constitution, were complied with.

85. Consequently, the Constitutional Court has found a violation of the right to property safeguarded by Article 35 of the Constitution.

Kadir ÖZKAYA did not agree with this conclusion

3. Application of Article 50 of Code no. 6216

86. 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 judgment finding a violation has been rendered, what is required for the resolution of the violation and the consequences thereof shall be ruled on…

(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."

87. The applicant requested finding of a violation, pecuniary compensation, and retrial.

88. In its judgment of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court set out general principles as to the determination of how to redress the violation in the event of finding a violation.

89. In brief, it was emphasized in the judgment of *Mehmet Doğan* that the source of the violation must first be determined in order to identify the appropriate way of redress. Accordingly, in cases where a court decision leads to a violation, as a rule, it is decided that a copy of the decision be sent to the relevant court for retrial in order to redress the violation and its consequences in accordance with Article 50 § (2) of Code no. 6216 and Article 79 § 1 (a) of the Internal Rules of Court of the Constitutional Court (see *Mehmet Doğan*, §§ 57, 58).

90. In cases where the Constitutional Court orders a retrial in order to remedy the violation found, the inferior courts do not have any discretionary power regarding the acceptance of the existence of the reason for retrial and the annulment of the previous decision, unlike the retrial concept regulated under the relevant procedural laws. Indeed, in case of delivery of a decision finding violation, the Constitutional Court, not the inferior courts, which examines the existence of the violation has the discretion regarding the necessity of retrial. The inferior courts are obliged to take the necessary actions to remedy the consequences of the violation in line with the judgment finding violation of the Constitutional Court (see *Mehmet Doğan*, § 59).

91. The Constitutional Court concluded that the applicant's right to property was violated as the legal basis of the tax assessment subject to the collection of electricity and gas consumption tax did not meet the conditions of certainty and foreseeability. It may be said that the violation stems from the administrative act in relation to the obligation to rely on a certain and predictable legal reason in the legal steps taken by the administration. However, in the action for annulment, which is a mechanism created for

the purpose of finding and rectifying the violation arising from this act of the administration, it is understood that the violation is also caused by the decision of the court since no investigation was opened for this purpose.

92. In this case, there is a legal interest in retrial in order to redress the consequences of violation of the right to property. Accordingly, the retrial to be conducted aims at redressing the violation and its consequences in accordance with Article 50 (2) of Code no. 6216. In this context, the inferior courts must dismiss the court decision that caused the violation and render a new decision in accordance with the consequences of the violation. For this reason, a copy of the decision should be sent to the 1st Chamber of the Hatay Tax Court for retrial.

93. The total court expense of TRY 6,971.80 including the court fee of TRY 4,991.80 and the counsel fee of TRY 1,980, 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 25 October 2018:

A. UNANIMOUSLY that the alleged violation of the right to property be declared ADMISSIBLE;

B. BY MAJORITY and by dissenting opinion of Mr. Kadir ÖZKAYA, that the right to property safeguarded by Article 35 of the Constitution was VIOLATED;

C. That a copy of the judgment be SENT to the 1st Chamber of the Hatay Tax Court (docket nos. 2012/588, 2012/658, 2012/677, 2012/711, 2012/967, 2012/917, 2012/1062, 2012/1227, 2013/134, 2013/297, 2013/398, 2013/595, 2013/764, 2013/816, 2013/854, 2013/954, 2014/464, 2014/337, 2014/245);

D. That the total court expense of TRY 6,971.80 including the court fee of TRY 4,991.80 and the counsel fee of TRY 1,980 be REIMBURSED to the applicant;

E. That the payments be made within four months as from the date when the applicant applies to the Treasury and 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. That a copy of the judgment be SENT to the Ministry of Justice.

DISSENTING OPINION OF JUSTICE KADİR ÖZKAYA

1. In the present case, the applicant alleged that although he consumed the electricity and gas he produced, an electricity and gas consumption tax was imposed on him, in breach of his right to property.

2. The majority of our Court has reached the conclusion that the said electricity and gas consumption tax does not meet the legality requirement with regard to the determination of the tax base and the method of collection (payment). According to the majority opinion, since the regulations on the determination of the tax base and the method of collection did not satisfy the certainty and foreseeability conditions, the accrual of a tax that did not meet these conditions leads to the violation of the applicant's right to property. For the reasons explained below, we could not agree with the violation conclusion reached by the majority of our court.

3. The purpose of the principle of *legality of tax* stipulated in Article 73 of the Constitution, is to adopt the principle of *no taxation without representation*, that is, taxes may only be collected from the persons with the will of the parliaments consisting of the representatives of the people, not the executive body. The general provisions of the Constitution are applied regarding the nature of a tax law (a law that imposes taxes) that interferes with the right to property. The necessity of the tax law, which interferes with the right to property, to be foreseeable and certain is now a requirement of the principle of rule of law regulated in Article 2 of the Constitution rather than Article 73 of the Constitution.

4. Generally, in order for a tax to satisfy the legality requirement, it is considered that *the subject, the incident giving rise to tax, the tax base, the imposition, the accrual, and the collection procedure must be determined by law*. It is obvious that it is beneficial to deal with the legality of tax in this way by separating it into its elements in terms of providing a certain discipline. However, focusing on these factors one by one may lead to missing the essence of the issue. The essence of the issue of certainty and foreseeability of tax laws is that *whether a person can foresee whether he/she has to pay taxes because of a certain income, expenditure, or wealth, and if so, how much tax he or she will pay*. If a person may foresee that he/she will pay a certain amount

of tax for his income, expenditure, or wealth, it must be accepted that the relevant law is required by the rule of law.

5. Electricity and gas consumption tax is regulated in Article 34 et seq. of Law No. 2464. The subject matter of the tax in question is clearly defined in the Law as the consumption of electricity and gas within the municipality boundaries and adjacent areas. Accordingly, if electricity or gas is consumed within the boundaries of the municipality or adjacent areas, a tax-generating event occurs. According to the law, the payers of this tax are those who consume electricity or gas. The legislator did not make a distinction between the taxpayer's consumption of electricity or gas produced by himself and consumption of electricity or gas purchased from someone else. The both cases require taxation. Therefore, it is clear that the subject and the taxpayer of the electricity and gas consumption tax are regulated by law and there is no uncertainty in these matters. As a matter of fact, the majority opinion did not identify a problem in terms of these factors.

6. On the other hand, the base of the electricity and gas consumption tax is determined by the law. According to Article 37 of Law No. 2464, the tax base is the sale price of electricity or gas. In Article 35 of the said Law, the rates to be applied to this base are explained.

7. In the present case, since the applicant consumes the electricity or gas produced by itself, there is no sales price that can be taken as a tax base. In the majority decision, it was accepted that the lack of clarity in the law on how to determine the tax base in case of consumption of self-products caused uncertainty. As a result, due to the uncertainty in the determination method of the tax base, it has been concluded that the interference with the right to property by way of taxation did not have a legal basis.

8. As to the determination of the tax base, I would like to express that I agree with the conclusion reached in the majority opinion that the consumption of self-products is not regulated in the Law. However, I do not agree with the view that the accrual made in the present case did not meet the conditions of foreseeability and certainty.

9. The absence of a sale does not mean that the tax-generating event will not occur if self-products are consumed. The occurrence of the tax-generating event is independent of the issue of determination of the tax base. In a case where the tax-generating event has occurred, and the taxpayer is certain, claiming that no tax will be collected in any way just because there is partial uncertainty in the determination of the tax base, decontextualizes the principles of foreseeability and certainty. In this context, it must also be examined whether the method of determining the tax base is foreseeable within the circumstances of the present case. In the examination to be carried out within this framework, it is important to consider whether the uncertainty of the tax concerns the payment of the tax as a whole or the amount of the tax to be paid. In a situation where the applicant could foresee that it would pay a certain amount of tax but could not foresee that the relevant amount could be equal to the administration's accrual, a judgment finding violation cannot and must not be issued in a way that would result in no tax being levied on the applicant. In such a context, what needs to be done is not to lift to accrual altogether but to conclude that the part leading to uncertainty is uncertain.

10. Having regard to the relevant legislation, it is foreseeable for the applicant to pay an electricity and gas consumption tax if it consumes the electricity or gas that it produces. However, since there is no sales relationship, it is not clear how to determine the tax base to which the rate stipulated in the law is to be applied. This situation leads to uncertainty in terms of the amount of the tax to be paid by the applicant. However, it must not be overlooked that this uncertainty does not concern whether the applicant has to pay taxes or not but it concerns the amount of the tax to be paid by the applicant. In this situation, what needs to be done is not to conclude that no tax will be levied from the applicant, but to make an interpretation regarding the determination of the tax base in such a way that favours the applicant the most.

11. The Council of State interpreted the concept of *the sales price* and reached the conclusion that this concept amounts to the *cost price* within the context of the consumption of self-produced products. It is clear that this interpretation of the Council of State is in favour of the applicant insofar as the determination of the tax base is concerned. In this case,

the tax accrual made on the basis of cost price on behalf of the applicant, which could foresee that it would pay electricity and gas consumption tax, is cannot be defined as unpredictable within the particular circumstances of the present case.

12. Moreover, as a rule, declaration-based taxes are declared by the taxpayer, and in cases where the laws confer on a responsibility, by the responsible persons. Therefore, according to the general rule, taxes must be declared by the taxpayer in all cases unless the law provides for a declaration by a responsible person. There is no need for an explicit regulation in the legislation for the tax to be declared by the taxpayer. The need for an explicit provision on the declaration liability arises in cases where the law provides for tax liability. In this context, in the case of consumption of the self-products, where there is no liability, it is acknowledged that the electricity and gas consumption tax must be declared by the taxpayer, that is, the person or company consuming the electricity or gas.

13. Consequently, I depart from the majority opinion, holding that the base tax and method of payment of the electricity and gas consumption tax accrued on behalf of the applicant were foreseeable within the circumstances of the present case.

RIGHT TO A FAIR TRIAL (ARTICLE 36)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

GALİP ŞAHİN

(Application no. 2015/6075)

11 June 2018

On 11 June 2018, the First Section of the Constitutional Court found no violation of the presumption of innocence safeguarded by Articles 36 and 38 of the Constitution in the individual application lodged by *Galip Şahin* (no. 2015/6075).

THE FACTS

[7-30] The applicant, serving as a lieutenant colonel at the Turkish Naval Forces Command at the relevant time, was questioned as a suspect within the scope of an investigation conducted by the incumbent chief public prosecutor's office into the alleged bid rigging committed by a criminal organisation. On 5 August 2013, the applicant was indicted before the relevant assize court for having aided a criminal organisation knowingly and willingly without being involved in its hierarchical structure, and accordingly, a criminal case was filed against him. The criminal proceeding conducted against him is still pending.

Thereupon, the Turkish Naval Forces Command also initiated an administrative investigation against him. In the report issued at the end of this investigation, it was indicated that the applicant had had a very close relation with one of the members of this criminal organisation so as to gain several profits. At the end of the administrative investigation, the applicant was dismissed from his office on 13 March 2014.

On 6 May 2014, he filed an action for annulment of his dismissal before the Supreme Military Administrative Court which unanimously dismissed the action, finding the applicant's dismissal by the defendant administration lawful. The decision was served on the applicant on 16 March 2015. He did not file a request for rectification of this decision. On 7 April 2015, he lodged an individual application.

V. EXAMINATION AND GROUNDS

31. The Constitutional Court, at its session of 11 June 2018, examined the application and decided as follows:

A. The Applicant's Allegations

32. The applicant firstly reminded that the criminal proceeding against him was still pending and complained that in spite of being charged with no concrete act with respect to the offences that had been, as specified in the bill of indictment, committed by a criminal organisation, he was subjected to a punitive action by the administration acknowledging that the imputed acts had been committed, without even taking his defence submissions. He maintained that the presumption of innocence had been violated on the ground that in its decision concerning the applicant's request for annulment of his dismissal from the Turkish Armed Forces ("the TAF"), the incumbent court found the acts and charges against him, which were imputed subjectively by the administration to him, established and made assessments as if the allegations had been proven to be true.

B. The Court's Assessment

33. Article 36 § 1 of the Constitution 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."

34. Article 38 § 4 of the Constitution reads as follows:

"No one shall be considered guilty until proven guilty in a court of law."

1. Admissibility

35. Pursuant to Article 148 § 3 of the Constitution and Article 45 § 1 of the Code no. 6216 on the Establishment and Rules of Procedures of the Constitutional Court, which is dated 30 October 2011, the Constitutional Court may examine an individual application on its 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 involving an alleged violation of a right which is outside the common protection realm of the Constitution and Convention to be declared admissible (see *Onurhan Solmaz*, no. 2012/1049, 26 March 2013, § 18).

36. The right to a fair trial is safeguarded in Article 36 § 1 of the Constitution. In the legislative intention of Article 14 of Law no. 4709 and dated 3 October 2001, whereby the notion of *"the right to a fair trial"* was added to Article 36 § 1 of the Constitution, it is indicated that *"the right to a fair trial, which is also safeguarded by the international conventions to which the Republic of Turkey is a party, has been incorporated into the provision"*. It is thereby understood that the purpose of adding this notion to Article 36 of the Constitution is to safeguard the right to a fair trial which is enshrined in the European Convention on Human Rights ("the Convention") (see *Yaşar Çoban* [Plenary], no. 2014/6673, 25 July 2017, § 54). In this regard, in determining the scope and context of the right to a fair trial safeguarded by the Constitution, Article 6 of the Convention titled *"Right to a fair trial"* must be taken into consideration (see *Onurhan Solmaz*, § 22).

37. Article 6 § 2 of the Convention provides for that everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law. In this sense, the presumption of innocence is an element inherent in the right to a fair trial safeguarded by Article 36 of the Constitution. It is also enshrined in Article 38 § 4 of the Constitution where it is set forth that no one shall be considered guilty until proven guilty in a court of law.

38. The protection afforded by the presumption of innocence, an element inherent in the right to a fair trial, has two aspects, as also noted in the judgments rendered by the European Court of Human Rights ("the ECHR").

39. The first aspect of such protection relates to the period to elapse until the conclusion of the criminal proceedings conducted against a person, that is to say, the period during which the person is charged with a criminal offence (under a criminal charge). It restrains premature explanations as to the suspect's guilt and acts until a decision is given. The scope of this aspect of the protection is not limited merely to the court conducting the criminal trial. The protection also entails that all other administrative and judicial authorities abstain from implying, or making explanation as to, the suspect's guilt until proven otherwise according to law. Therefore, the presumption of innocence may be violated not only within the scope of the criminal proceedings but also during the civil

process and proceedings (such as administrative, civil and disciplinary) conducted simultaneously with the criminal proceedings.

40. The second aspect of the protection comes into play when the suspect has been acquitted of a criminal charge and protects him against any doubt on his innocence due to this criminal charge during the subsequent proceedings, as well as against any treatment by public authorities that would give the impression before the public that he is guilty.

41. Upon the determination of the scope of the protections afforded by the presumption of innocence, it must be then ascertained whether these protections are applicable to a given case, which is important for deciding on the applicability of Article 36 of the Constitution to the given case and thereby the admissibility of the application.

42. In the present case, the criminal and disciplinary proceedings against the applicant were conducted simultaneously; however, the administrative action filed by him for the revocation of the disciplinary sanction was concluded pending the outcome of the criminal proceedings. The applicant's complaint that the presumption of innocence was violated in the administrative action filed for the annulment of his dismissal from the TAF concerns the manner how the incumbent court handled the case as well as the expressions used in the reasoned decision. Therefore, the first aspect of the protection afforded by the presumption of innocence is in play in the present case where the expressions used by the administration imposing the disciplinary sanction on the applicant pending the criminal proceedings and by the judicial body reviewing the lawfulness of this sanction were complained of. It has been accordingly concluded that the protection afforded by the presumption of innocence, that is to say, Article 36 of the Constitution was applicable to the present case. In this sense, it appears that the applicant's allegations fell within the joint protection realm of the Constitution and the Convention; and that the application was compatible *ratione materiae* with the provisions of the Constitution and the Convention.

43. The Court accordingly declared the alleged violation of the presumption of innocence admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

a. General Principles

44. The presumption of innocence, which is a requisite of the principle of the rule of law, entails that a person who is under a criminal charge be presumed innocent until proven guilty through a final decision issued at the end of a fair trial (see the Court's judgment no. E.2013/133, K.2013/169, 26 December 2013). This presumption guarantees that a person cannot be presumed guilty without a finalised judicial decision which has found established his having committed of the imputed offence. Besides, no one can be declared guilty of an offence and treated as a criminal by judicial and public authorities until he is found guilty by a court (see *Kürşat Eyol*, no. 2012/665, 13 June 2013, § 26).

45. As is known, criminal-procedure law and disciplinary law are the disciplines governed by different rules and principles. Disciplinary law is a field of law which aims at maintaining internal order of the institutions and which, to that end, regulates the sanctions to be imposed due to the acts performed by public officers in breach of the legislation, working procedure and requirements of the service, as well as the principles and procedures as to the application of these sanctions. In certain cases, the act of the public officer may fall into the scope of criminal law and involve liability also in terms of disciplinary law (in the same vein, see *Özcan Pektaş*, no. 2013/6879, 2 December 2015, § 25; and *Kürşat Eyol*, § 30). In this respect, it should be noted that in such a case, the presumption of innocence safeguarded by the Constitution does not preclude the conduct of both criminal and disciplinary proceedings against the relevant person on account of his act; nor does it pose an obstacle to the simultaneous conduct of these two proceedings.

46. On the other hand, the decision rendered at the end of the criminal proceedings by the criminal court, other than the one acquitting the relevant person of the imputed offence, is not directly binding for the disciplinary authorities. However, even if the person has been released from criminal liability, there is no obstacle to establishing any other kind of liability in respect of him on the basis of a more lenient burden of proof (in the same vein, see *Özcan Pektaş*, § 25; and *Kürşat Eyol*, § 30).

47. In the disciplinary investigations and proceedings conducted simultaneously with the criminal proceedings, in other words, conducted during the period when the relevant person is under a criminal charge and no decision has not been rendered yet in respect of him by the criminal tribunals, what is important in terms of the presumption of innocence is to ensure that the public authorities abstain from imputing criminal liability to the person concerned due to the reasons specified, or language used, in the actions or decisions taken by them as well as from acting in a way that would cause doubt as to the innocence of the person who has not found guilty yet by the criminal courts.

48. However, it is possible for the other public (administrative/judicial) authorities to separately assess the material facts, which have been subject-matter of the criminal proceedings, within the framework of the principles of disciplinary law and to take an action/decision in line with the conclusion reached at the end of this assessment. In this regard, the reliance on any evidence obtained during the criminal proceedings or referral to the criminal proceedings in the course of the disciplinary actions and proceedings does not *per se* constitute a breach of the guarantees afforded by the presumption of innocence. However, in cases where the judicial and administrative authorities declare the person as *guilty*, exceeding the limits of their competence, or make certain inferences in this respect may lead to the violation of the presumption of innocence. In assessing whether the guarantees inherent in the presumption of innocence have been fulfilled, the reasoning of the decision in question must be considered as a whole.

b. Application of Principles to the Present Case

49. In the present case, it has been observed that the criminal and disciplinary processes against the applicant were conducted simultaneously; however, the administrative action filed against the disciplinary sanction imposed on him was concluded pending the outcome of the criminal proceedings; that his criminal case is still pending, in other words, the applicant's guilt has not been found established yet by a court decision. In this regard, it must be ascertained whether the grounds specified, or the language used, by the public authorities in the

decisions rendered during the disciplinary investigation and prosecution have casted doubt on the innocence of the applicant, who has not found *guilty* yet by a criminal court.

50. In the present case, a piece of evidence (audio files obtained from tape records) obtained during the criminal investigation was relied on both in the report of the Administrative Inquiry Commission, which was issued in the course of the applicant's dismissal from the TAF, and in the reasoned decision issued by the court which conducted the judicial review of the administrative act. It should be primarily reminded that pursuant to the above-cited general principles, this situation does not *per se* lead to the violation of the presumption of innocence.

51. It has been observed that the public authorities that examined the disciplinary process as well as the data available on the tape records, which were obtained during the criminal investigation, in the course of the administrative proceedings reached the conclusion on the basis of a more lenient burden of proof that the applicant's acts and conducts were, in moral terms, of the nature that would impair the TAF's dignity and would not be compatible with the requirements of the military service.

52. It appears that the decisions -where the above-mentioned conclusion was reached- in essence involve findings and assessments as to the applicant's relation with a person, whom he got acquainted with due to his profession and who engaged in professional relationship with the applicant's institution and was responsible for supervising his activities, based on mutual interest, as well as to the immoral nature/content of these interests. It should be underlined that the expression *"his acts that have been found established"*, which is included in the court's decision, is also used in this context. The decisions in question do not apparently involve any comment or consideration as to the question whether the acts imputed to the applicant, which were dealt with in terms of merely disciplinary law, would be classified within the scope of criminal law as the offence of *"membership of a criminal organisation/aiding knowingly and willingly to a criminal organisation"*. In other words, it has been observed that in these decisions, there are no inference as to the applicant's having committed of the imputed acts and his *guilt* in the criminal proceedings; and that the

expressions used in the impugned decisions, due to the language used or their contexts, did not point to the imputed offence or its commission within the meaning of criminal law.

53. In the light of these findings, it has been concluded that the public authorities did not exceed the limits of the powers conferred upon them within the scope of the disciplinary investigation and proceedings to the extent that would infringe the right to be presumed innocent during the criminal proceeding which was simultaneously conducted against the applicant.

54. It has been accordingly observed that the language used and the reasoning relied on both in the disciplinary and the administrative proceedings did not constitute a breach of the presumption of innocence.

55. For these reasons, the Court found no violation of the presumption of innocence safeguarded by Articles 36 and 38 of the Constitution.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 11 June 2018 that

A. The alleged violation of the presumption of innocence be DECLARED ADMISSIBLE;

B. The presumption of innocence safeguarded by Articles 36 and 38 of the Constitution was NOT VIOLATED;

C. The court expenses be COVERED by the applicant; and

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

ABDULLAH ALTUN

(Application no. 2014/2894)

17 July 2018

On 17 July 2018, the First Section of the Constitutional Court found a violation of the right to be tried by an independent and impartial tribunal safeguarded by Article 36 of the Constitution in the individual application lodged by *Abdullah Altun* (no. 2014/2894).

THE FACTS

[8-26] The applicant was sentenced to life imprisonment by the State Security Court (the SSC), and the sentence became final upon the appellate review of the Court of Cassation.

The applicant lodged an application with the European Court of Human Rights ("the ECHR"), stating that he had not been tried by an independent and impartial tribunal due to the sitting of a military judge on the bench of the SSC.

Having found a violation of the right to be tried by an independent and impartial court, the ECHR indicated that a re-trial, if requested, would be an appropriate means of the redress of the violation.

The applicant requested a re-trial, relying on the violation judgment rendered by the ECHR. However, the incumbent assize court dismissed this request on the ground that the legal conditions sought for a re-trial were not satisfied.

The applicant appealed against the decision dismissing his re-trial request that had been filed by virtue of the ECHR's judgment finding a violation of his right to be tried by an independent and impartial tribunal. Upon the dismissal of his appellate request, he lodged an individual application with the Court.

V. EXAMINATION AND GROUNDS

27. The Constitutional Court, at its session of 17 June 2018, examined the application and decided as follows:

A. The Applicant's Allegations and the Ministry's Observations

28. The applicant maintained that his request for a retiral, in pursuance of the violation judgment rendered by the ECHR, had been dismissed

unlawfully; that the dismissal had been manifestly in contravention of law and the ECHR's judgment; and that the ECHR's judgment had not been therefore executed. He accordingly alleged that his constitutional rights had been violated and requested a retrial.

29. The Ministry, in its observations, noted that the applicant's request for a retrial had been dismissed in accordance with the conclusion reached by the judicial bodies examining the request. Making a reference to the ECHR's case-law to the effect that Article 6 of the European Convention on Human Rights ("the Convention") did not guarantee the right to the re-opening of the terminated proceedings, as in the requests for a retrial, the Ministry indicated that it was within the Constitutional Court's discretion to consider these issues.

30. In his counter-statements against the Ministry's observations, the applicant reiterated his allegations that he had already specified in the application form.

B. The Court's Assessment

31. 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."*

32. 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 this sense, the applicant's allegations were examined from the standpoint of the right to be tried by an independent and impartial tribunal.

1. Admissibility

33. The applicant's complaint in this part must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

a. General Principles

34. Article 36 of the Constitution does not include any explicit indication as to the independence and impartiality of tribunals. However, pursuant to the Court's case-law, this is an implicit element inherent in the right to a fair trial. Besides, in the legislative intention for adding the notion *"the right to a fair trial"* to Article 36 of the Constitution, it is underlined that the right to a fair trial, which is also enshrined in the international convention to which Turkey is a party, has been incorporated into the said Article. As a matter of fact, Article 6 of the Convention explicitly sets forth the right to be tried by an impartial tribunal, as an element inherent in the right to a fair trial.

35. 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 constitutional holism, Articles 138, 139 and 140 of the Constitution must also be taken into consideration in making an assessment as to the right to be tried by an impartial tribunal (see the Court's judgments no. E.2005/55, K.2006/4, 5 January 2006; and no. E.1992/39, K. 1993/19, 29 April 1993).

36. In deciding whether a tribunal is independence, the way in which its members are appointed and their terms of office, the security of tenure afforded to judges and their appearance of independence are of importance. 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 *Hikmet Kopar and Others* [Plenary], no. 2014/14061, 8 April 2015, §§ 109 and 110).

37. The ECHR considered the status of the military judge sitting on the bench of the State Security Courts ("the SSC") and concluded that these courts lacked independence and impartiality. Following its judgment in

the case of *Incal v. Turkey*, the ECHR found a violation of the right to be tried by an independent and impartial tribunal also in several cases involving the alleged lack of independence and impartiality of these courts. In line with these judgments, the provision which allowed the military judges to sit on the bench of the SSC was annulled, and the SSCs were abolished.

38. 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 through 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 introduced, and by virtue of the resolution dated 25 September 1989 and no. 89/14563, the compulsory jurisdiction of the ECHR was recognised by Turkey. 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 (see *Sıddıka Dülek and Others*, no. 2013/2750, 17 February 2016, § 68).

39. 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 (see *Sıddıka Dülek and Others*, § 69). In this regard, a violation judgment rendered by the ECHR is accepted, by virtue of the Code no. 5271, as a ground for a retrial with a view to ensuring effective protection of the fundamental rights and freedoms both in theory and in practice.

40. It is for the Constitutional Court, which is empowered to deal with individual applications, to examine any alleged violation of the fundamental rights and freedoms under the joint protection realm of both the Constitution and the Convention. Any consideration to the contrary would be incompatible with the constitutional objective which envisages

the effective protection, through individual application mechanism, of the fundamental rights and freedoms which are safeguarded jointly by 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 involve a 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 (see *Sıddıka Dülek and Others*, § 70).

41. As a requisite of the subsidiary nature of the individual application mechanism, it is in principle for the inferior courts to interpret and implement the legislation; however, it is naturally within the Court's jurisdiction to assess whether the impacts of such interpretation and practices are compatible with the fundamental rights and freedoms which are jointly safeguarded by the Constitution and the Convention (see *Kemal İnan*, no. 2013/1524, 6 October 2015, § 49).

b. Application of Principles to the Present Case

42. The applicant requested a retrial, relying on the ECHR's judgment finding a violation of the right to be tried by an independent and impartial tribunal. His request was dismissed on the grounds that the violation found by the ECHR to the effect that the SSC had not been independent and impartial was not the basis underlying his conviction and that the condition specified in Article 311 § 1 (f) of the Code of Criminal Procedures no. 5271 was not satisfied. The 4th Chamber of the Diyarbakır Assize Court, dealing with the applicant's challenge, found the dismissal decision lawful on similar grounds.

43. In the present case, what would be discussed by the Court is the questions whether the allegations raised by the applicant, who requested the inferior court to conduct a retrial in pursuance of the ECHR's violation judgment, within the scope of the right to be tried by an independent and impartial tribunal were examined in an effective and sufficient manner, and whether the ECHR's judgment finding a violation was duly executed. In other words, the question whether the inferior courts redressed the violation found by the ECHR in its judgment as to the applicant's case as well as the consequences thereof is of importance.

44. It has been observed that the applicant's case, which is the subject-matter of the ECHR's violation judgment, was heard by the SSC's jury consisting of one military judge. The violation found by the ECHR in the applicant's case could be redressed only by conducting a retrial by a court consisting of no military judge on its bench. However, the incumbent inferior court dismissed the applicant's request for a retrial, stating that sitting of a military judge on the trial bench was indeed related to the procedure. Whereas, in its judgment, the ECHR pointed to the presence of a military judge on the trial bench as a reason giving rise to the violation, regardless of the conclusion reached. It was further indicated that if requested, to conduct a retrial would be an appropriate means of redressing the violation in question.

45. In this sense, it has been observed that the ECHR's violation judgment has a bearing on the soundness of the final decision in the domestic law and thereby constitutes a significant ground for the conduct of a retrial; and that however, the interpretation by the inferior court of the relevant provision of Code no. 5271 did not comply with the ECHR's judgment and did not involve an examination to the extent, and with due diligence, as required by Article 36 of the Constitution; that the ECHR's judgment was not fully executed; and that the violation of the right to be tried by an independent and impartial tribunal could not be redressed.

46. Consequently, the Court has found a violation of the right to be tried by an independent and impartial tribunal due to the failure to execute the ECHR's violation judgment, which was contrary to the safeguards inherent in the said right.

3. Application of Article 50 of Code no. 6216

47. 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."

a. General Principles

48. Pursuant to Article 49 § 6 of Code no. 6216, during an examination on the merits, it is determined whether any fundamental right has been violated, and if any, how the violation would be redressed. According to Article 50 § 1 of the same Code, in cases where a violation judgment is rendered, the steps required to be taken for the redress of the violation and its consequences shall be indicated. Accordingly, in case of any violation, not only a violation of a given fundamental right or freedom is found, but also *"it must be determined how the established violation would be redressed"*, in other words, *"the steps required to be taken in order to redress the violation and consequences thereof must be indicated"*.

49. In cases where a violation of any fundamental right and freedom is found within the scope of the individual application, the basic rule for redressing the violation and its consequences is to ensure restitution as much as possible, that is to say, to ensure restoring to the former state prior to the violation. To that end, it must be primarily required to end the continuing violation, to eliminate the decision or the act giving rise to the violation or their consequences, to compensate the pecuniary and non-pecuniary damages resulting from the violation, as well as to take the other measures deemed necessary in this respect.

50. However, as required by Article 50 § 1 of Code no. 6216, in indicating the steps required to be taken for the redress of the violation and consequences thereof, no decision can be issued in the form of an administrative act and action. Accordingly, the Court cannot perform an action by replacing the administration or the judicial organs or the

legislative body in ordering how the violation and its consequences would be redressed. It indicates the way in which the violation and its consequences would be redressed and sends its judgment to the relevant authorities in order to ensure the necessary actions to be taken (see *Şahin Alpay (2)* [Plenary], no. 2018/3007, 15 March 2018, § 57).

51. Before indicating the steps required to be taken for redressing the violation and its consequences, the reason giving rise to the violation must be identified. Accordingly, the violation may be caused by an administrative act and actions, judicial processes, or the actions of the legislative body. The identification of the underlying reason of the violation is of importance for determining the appropriate means of redress.

52. In cases where the violation is resulted from a court decision, it is in principle held that a copy of the judgment be sent to the relevant court to conduct a retrial, with a view to redressing the violation and its consequences, pursuant to Article 50 § 2 of Code no. 6216 and Article 79 § 1 (a) of the Internal Regulations of the Constitutional Court.

53. The notion of *retrial*, which is indicated in Article 50 of Code no. 6216, involves differences in certain aspects from the *reopening of the proceedings*, which is set forth in the relevant procedural laws. Undoubtedly, also in cases where the Constitutional Court orders a retrial, the inferior court re-handles the proceedings which have been already ended with a final decision. In this sense, there is no difference between the practice of reopening of the proceedings set out in the relevant procedural laws and the retrial ordered by the Court. However, in cases where the Court orders a retrial for the redress of the violation found, no discretion is left to the inferior court in acknowledging the ground necessitating the retrial and revoking its initial decision, which is different from the practice of reopening of the proceedings set out in the relevant procedural laws. The inferior court is obliged to take the necessary steps as indicated in the Court's judgment finding a violation, with a view to redressing the violation and consequences thereof.

54. In this regard, the first step to be taken by the inferior court is to revoke its initial decision which has been found to be in breach of a fundamental right or freedom or to have failed to redress the violation

of a fundamental right or freedom. At the subsequent stage following the revocation of the initial decision, the inferior court would take the necessary actions to redress the consequences of the violation found in the Court's judgment. In this regard, if the violation has been caused by a procedural action performed during the proceedings or a procedural deficiency, it is required that the procedural action in question be re-performed (or if not performed yet, be performed for the first time) in a way that would not give rise to a violation. On the other hand, if the Court finds that the violation is resulted from an administrative action or practice itself or the outcome of the inferior court's decision, the inferior court is then required to redress the consequences of the said violation without performing any procedural action but by merely issuing a decision over the case-file, which is contrary to its former decision.

b. Application of Principles to the Present Case

55. The applicant requested a retrial.

56. In the present case, the Court found a violation of the right to be tried by an independent and impartial tribunal. It has been therefore observed that the violation resulted from the court decision.

57. In this regard, there is a legal interest in conducting a retrial with a view to redressing the consequences of the violation of the right to be tried by an independent and impartial tribunal. The retrial to be conducted accordingly is for redressing the violation and its consequences pursuant to Article 50 § 2 of Code no. 6216. Within this framework, the inferior courts must firstly revoke the impugned decision which has led to the violation and ultimately issue a fresh decision in accordance with the judgment finding a violation. A copy of the judgment must be therefore sent to the relevant court for a retrial.

58. The court fee of 206.10 Turkish liras ("TRY"), which is calculated over the documents in the case-file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 17 June 2018 that

A. The alleged violation of the right to be tried by an independent and impartial tribunal be DECLARED ADMISSIBLE;

B. The right to be tried by an independent and impartial tribunal safeguarded by Article 36 of the Constitution be DECLARED ADMISSIBLE;

C. A copy of the judgment be SENT to the 6th Chamber of the Diyarbakır Assize Court (file no. 2013/422) for a retrial in order to redress the consequences of the violation of the right to be tried by an independent and impartial tribunal;

D. The court expense including the court fee of TRY 206.10 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; and

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

YILDIZ EKER

(Application no. 2015/18872)

22 November 2018

On 22 November 2018, the Plenary of the Constitutional Court found a violation of the right of access to court under the right to a fair trial safeguarded by Article 36 of the Constitution in the individual application lodged by *Yıldız Eker* (no. 2015/18872).

THE FACTS

[9-23] The applicant was the wife of A.E.E. who died in 2017. In 2009, A.E.E. issued a bond in the value of 200,000 Turkish liras (TRY), maturity date of which was 2011, in favour of S.M.. In 2013, the creditor S.M. initiated attachment proceedings pertaining to the bills of exchange amounting to TRY 277,908.33 against the applicant's husband. Upon the finalization of the proceedings, the residence owned by the applicant's husband A.E.E. was attached by the creditor S.M..

The applicant lodged a complaint with the incumbent enforcement court, arguing that the immovable could not be attached for being a residence where she lived together with her husband and children. However, the enforcement court rejected her complaint due to lack of capacity to be a party to the proceedings.

As the creditor S.M. claimed sale of the attached immovable, the enforcement office determined the value of the immovable as TRY 3,500,000 according to the expert examination. At the end of the tender made by auction, it was sold to a third party in return for TRY 1,758,000.

Maintaining that sale of the immovable was unlawful, the applicant requested termination (annulment) of the tender. The enforcement court dismissed the case as there was no irregularity in the tender and imposed, on the applicant, an administrative fine (TRY 175,800) amounting to 10% of the tender price of TRY 1,758,000 for being recorded as revenue.

The first instance decision was appealed before the Court of Cassation which however upheld the decision. After the applicant's request for rectification of the judgment had been dismissed, she lodged an individual application with the Court.

V. EXAMINATION AND GROUNDS

24. The Constitutional Court, at its session of 22 November 2018, examined the application and decided as follows:

A. Alleged Violation of the Right to Respect for Family Life

1. The Applicant's Allegations and the Ministry's Observations

25. The applicant maintained that both the Debt Enforcement Office and the inferior courts failed to consider that the immovable that had been sold by auction and registered in her spouse's name was their family home, which gave rise to the violation of the right to respect for family life.

26. In its observations, the Ministry indicated that the inferior courts must act in a way that would ensure sustainability and effectiveness of the relationships within the scope of family life; that it was for the Constitutional Court to assess whether these courts had exercised their discretion and powers in a reasonable and sound manner; that the claim of family home could be raised only by the debtor, the party to the execution proceedings, and that in the present case, the applicant, who had no such capacity, had not indeed raised any such claim.

27. In her counter-statements against the Ministry's observations, the applicant stated that her husband tried to sell the home, where they were living together, with malicious intent; and that as she was not a party to the execution proceedings, she could not raise the claim that the home could not be attached.

2. The Court's Assessment

28. Article 20 § 1 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."

29. Article 41 of the Constitution, insofar as relevant, reads as follows:

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

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

30. In Article 48 § 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, it is set forth that the individual applications which are manifestly ill-founded may be declared inadmissible by the Court. In this sense, the individual applications where the applicant fails to substantiate the alleged violations, or where there is no interference with fundamental rights and freedoms, or where the interference is manifestly legitimate, as well as the applications consisting of complex or contrived complaints may be declared manifestly ill-founded (see *Hikmet Balabanoğlu*, no. 2012/1334, 17 September 2013, § 24).

31. The obligation incumbent on the State within the scope of the right to respect for family life is not merely limited to avoiding arbitrary interferences with the said right. In addition to this negative obligation, it also involves positive obligations which would ensure effective respect for family life. These positive obligations entail taking of measures so as to ensure respect for family life even between the individuals concerned (see *Murat Atılgan*, no. 2013/9047, 7 May 2015, § 26).

32. It appears that the provisions embodied in Article 194 of the Turkish Civil Code no. 4721 and dated 22 November 2001, which make the family centre of life and which introduce certain protective arrangements with respect to home -loss of which would endanger the family members' housing rights and sustainability of family relations- are intended for protecting family life. It has been observed that through this statutory arrangement, which has been introduced in pursuance of the positive obligation to ensure effective exercise and protection of the right to respect for family life, the legal foundation necessary for the effective protection of this right as well as for ensuring the sustainability of the family relations has been established (see *Melahat Karkin* [Plenary], no. 2014/17751, 13 October 2016, § 59).

33. Besides, as these obligations would be satisfied only through the implementation of these arrangements, the fundamental rights must be

taken into consideration also in interpretation of such relations notably in case of disputes among the individuals governed by private law, a trial affording the necessary procedural safeguards must be conducted, and the judicial authorities must consider the rights and freedoms enshrined in the Constitution in interpreting the provisions and notions of private law (see *Melahat Karkin*, § 60).

34. The matters as to the interpretation of the legal provisions fall primarily within the inferior courts' discretionary power and jurisdiction. It is also undisputed that the inferior courts which have direct access to all parties of the case are in a better position than the Court in assessing the particular circumstances of the case. The Court's role is confined to assessing the effects of the interpretation of these provisions on fundamental rights and freedoms. Accordingly, the Court is empowered to review the procedure followed by the inferior courts and notably to ascertain whether, in interpreting and applying the provisions of the relevant legislation, the inferior courts observed the safeguards set out in Articles 20 and 41 of the Constitution. In this sense, the Court's role is not to replace the inferior courts as to the interpretation and application of the provisions concerning family home and its protection, but to assess the decisions taken by public authorities within the limits of their discretionary powers from the standpoint of the safeguards inherent in the right to respect for family life (see *Melahat Karkin*, § 61).

35. It is requisite that the inferior courts act in a manner which would ensure the sustainability and effectiveness of the relationships within the scope of family life. The Court, which deals with notably the question whether the inferior courts have exercised their discretionary power in a reasonable and sound manner, examines whether the grounds raised to justify their discretion are relevant and sufficient (see *Murat Atılgan*, § 44; and *N.Ö.*, no. 2014/19725, 19 November 2015, § 55).

36. In the present case, the immovable, owned by the applicant's husband and in the form of a family home, was sold to a third party by auction at the end of the execution proceedings peculiar to the bill of exchange, which was conducted against her husband. The applicant then filed an action for annulment of tender, complaining that the preparatory

process prior to the impugned tender and the sale process were contrary to Enforcement and Bankruptcy Law no. 2004 ("Law no. 2004") and that the immovable *was in the form of a family home*. At the end of the proceedings, as the said processes were found lawful, the applicant's action was dismissed. The incumbent court failed to make any assessment as to her claims arising from the safeguard peculiar to family home.

37. Although the State has the positive obligation to protect the house where the family lives against the deeds of the spouses and third persons (for a detailed explanation on this matter, see *Melahat Karkin*, §§ 48-57), this does not mean that the rights with respect to family home must be granted an absolute advantage. The State also has the liability to strike a fair balance between different interests. When the rights of third persons are at stake, the State is liable to establish mechanisms so as to ensure a reasonable balance between the rights and interests of these two parties.

38. As explained in detail below, in the present case, the aim underlying the sale of the immovable, which was a family home, is to protect the creditor's right to property. In this respect, what is expected from the public authorities is to strike a reasonable balance between the third person's right to property and the applicant's right to respect for family life.

39. Undoubtedly, the applicant must have the opportunity to raise her claims regarding the safeguard afforded to family home and bring them before the judicial authorities, in the face of the deeds of her husband or third persons with respect to the family home. Otherwise, protecting the house where the individuals maintain their lives, as a requisite of the safeguard afforded to family home, becomes dysfunctional. However, this should not be construed to the effect that the claims arising from the guarantee afforded to family home are to be examined in every case. It must be therefore considered ordinary for the law-maker, considering the very nature of certain cases, to limit the judge's power to examine in these cases and to thereby introduce arrangements so as to preclude an examination as to the rights related to the guarantee afforded to family home.

40. In the present case, the applicant raised her claims as to the family home during the action she brought for annulment of tender where the

impugned act was the sale by auction of the debtor's immovable by the enforcement office. Tender is a compulsory enforcement process which is performed following a certain set of procedures and intended for the sale of the debtor's asset(s). The amount obtained through sale after this stage is paid to the creditor, and thereby the compulsory enforcement process ends. The creditor is thereby enabled to rapidly receive the amount receivable. Taking into consideration this nature of the tender process, the law-maker limits the court's power to examine to assessing whether the preparatory process prior to the sale and the sale process were conducted in accordance with the procedure specified in Article 134 of Law no. 2004. In the action for annulment of tender, the claims as to the substance of the impugned debt cannot be examined; and nor is the incumbent court entitled to make an assessment as to the rights resulting from the notion of family home.

41. Given the nature and subject-matter of the action for annulment of tender, limiting the judge's power to examine as well as the inability to examine the applicant's rights resulting from the guarantee afforded to family home in this action must be considered reasonable. Accordingly, it has been concluded that there is undoubtedly no violation of the right to respect for family life due to the incumbent court's limited examination as to the review of the tender processes.

42. On the other hand, although the applicant's complaint of 6 March 2014 whereby she claimed that the immovable in question could not be attached for being a family home was dismissed by the court as she was not a party to the enforcement process, it appears that her individual application does not concern this dismissal.

43. For these reasons, this part of the application must be declared inadmissible *for being manifestly ill-founded*, without any further examination as to the other admissibility criteria.

B. Alleged Unconstitutionality of the Relevant Statutory Provision

44. The applicant requested the annulment of Article 134 § 2 of Law no. 2004, stating that it precluded her right to legal remedies.

45. In Article 45 § 3 of Code no. 6216, it is set forth that no individual application can be filed against the legislative acts and regulatory administrative acts. In cases where a given legislative act gives rise to violation of any fundamental right or freedom, an individual application may be lodged not directly against a legislative act but against any act, action or negligence whereby the said legislative act has been implemented (see *Süleyman Erte*, no. 2013/469, 16 April 2013, § 17; and *Serkan Acar*, no. 2013/1613, 2 October 2013, § 37).

46. In the present case, the applicant lodged her application also directly for the annulment of the impugned legislative act for being unconstitutional.

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

C. Alleged Violation of the Right to a Fair Trial

1. The Applicant's Allegations and the Ministry's Observations

48. The applicant maintained that her right of access to a court had been violated for being held liable to pay an amount corresponding to 10% of the tender price to the State Treasury due to the dismissal of her action for annulment of tender.

49. In its observations, the Ministry noted that the applicant had filed an action for annulment of tender due to the alleged irregularity at the tender stage upon the sale of the immovable at the end of the enforcement proceedings conducted against her husband; that the incumbent court dismissed her request as well as imposed a fine amounting to 10% of the tender price by virtue of Law no. 2004; and that the statutory provision on the basis of which the fine was imposed had been brought before the Constitutional Court through the constitutionality review procedure; however, by its decision no. E.2012/68 K.2012/182 and dated 22 November 2012, the Court found the contested provision constitutional. The Ministry further indicated that on 15 January 2015, the applicant filed an action for annulment of the tender of 24 June 2014; and that this action was still pending.

50. In her counter-statements against the Ministry, the applicant stated that her sole aim was to save their family home, amounting to 4,000,000 Turkish liras ("TRY"), against the debt in the amount of TRY 200,000.

2. The Court's Assessment

51. 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."*

52. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). It has been considered that the applicant's allegations must be examined from the standpoint of the right of access to a court.

a. Admissibility

53. The Court found admissible the alleged violation of the right of access to a court for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

i. Scope of the Right and Existence of an Interference

54. Article 36 § 1 of the Constitution sets forth that everyone has the right of litigation either as plaintiff or defendant before the courts. Therefore, the right of access of to a court is an element inherent in the right to legal remedies safeguarded by Article 36 of the Constitution. Besides, in the legislative intention of adding the notion of *"the right to a fair trial"* to Article 36 of the Constitution, it is underlined that the right to a fair trial which is also enshrined in the international conventions to which Turkey is a party has been incorporated into the said Article. The European Court of Human Rights ("the ECHR"), interpreting the European Convention on Human Rights ("the Convention"), notes that Article 6 § 1 of the Convention embodies the right of access to a court (see

Özbakım Özel Sağlık Hiz. İnş. Tur. San. ve Tic. Ltd. Şti., no. 2014/13156, 20 April 2017, § 34).

55. In its assessments within the scope of the individual application, the Court notes that the right of access to a court means the ability to bring a dispute before a tribunal and to request the resolution of the dispute in an effective manner (see *Özkan Şen*, no. 2012/731, 7 November 2013, § 52).

56. The probability or the fact that the applicants, who have brought a dispute before a tribunal, would be subject to a fee calculated over the amount, which was the subject-matter of the dismissed action, or to any similar financial liability involves the risk of precluding them from accessing to a court or rendering dysfunctional the access to a court (see, in the same vein, *Ali Şimşek and Others*, no. 2014/2073, 6 July 2017, § 83).

57. It has been observed that imposition of a fine, which would place a financial burden on the applicant, at the end of the proceedings constituted an interference with the right of access to a court.

ii. Whether the Interference Constituted a Violation

58. Article 13 of the Constitution, titled *"Restriction of fundamental rights and freedoms"*, insofar as relevant, 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 ... These restrictions shall not be contrary to … and the principle of proportionality."*

59. The above-mentioned interference would constitute a breach of Article 36 of the Constitution unless it satisfied the requirements laid down in Article 13 of the Constitution. Therefore, it must be determined whether the interference complied with the requirements set out in Article 13 of the Constitution and applicable to the present case, namely being prescribed by law, relying on a justified reason as well as not being contrary to the principle of proportionality.

(1) Lawfulness

60. It appears that the fine was imposed on the applicant on the basis of Article 134 § 2 of Law no. 2004. It has been therefore concluded that the

interference with the applicant's right of access to a court in the present case had a legal basis.

(2) Legitimate Aim

61. The right to legal remedies is enshrined in Article 36 of the Constitution. Although this provision sets forth no ground for the restriction of this right, it cannot be said to be an absolute right which could be restricted by no means. It is acknowledged that the rights in respect of which no special ground for restriction is prescribed nevertheless have certain boundaries by their very nature. Moreover, even if the provisions embodying the relevant rights introduce no ground for restriction, these rights may be nevertheless subject to restriction on the basis of the provisions specified in the other provisions of the Constitution. It is clear that certain arrangements as to the scope, and the conditions for the exercise, of right of litigation are the rules that set forth the limitations arising from the very nature of the right to legal remedies and determines the coverage of the right. However, these restrictions cannot be contrary to the safeguards set forth in Article 13 of the Constitution (see the Court's judgment no. E.2015/96 K.2016/9, § 10).

62. Imposing an additional sanction leading to a financial burden, along with the dismissal of the action for the prevention of any delay likely to occur in the payment of a debt, ensuring the creditor to receive the receivable in a timely manner as well as for the protection of the successful tenderer, is intended for protecting the amounts owed to the creditors which are found established by the judicial authorities as well as the right having material value that the successful tenderer has obtained through making a payment. As the impugned interference was in pursuit of protecting the right to property, it pursued a constitutionality legitimate aim.

(3) Proportionality

(a) General Principles

63. Proportionality, which is one of the criteria to be taken into account in restricting the rights and freedoms under Article 13 of the Constitution, stems from the principle of state of law. Since the restriction of rights and

freedoms in a state of law is an exceptional power, it may be justified only on the condition of being applied as required by the exigency of the situation. Imposing restrictions on individuals' rights and freedoms to a degree that is more than what is required by the circumstances of the case would amount to excess of power afforded to the public authorities, which is therefore incompatible with the state of law (see the Court's judgment no. E.2013/95, K.2014/176, 13 November 2014).

64. The principle of proportionality entails that the prescribed interference is suitable for achieving the aim sought to be attained; that the interference is absolutely necessary for the aim pursued; and that a reasonable balance must be struck between the interference with the individual's right and the aim sought. In the event that the prescribed measure places an extraordinary and excessive burden on the individual, the interference cannot be said to be proportionate (see the Court's judgments no. E.2012/102, K.2012/207, 27 December 2012; no. E.2014/176, K.2015/53, 27 May 2015; E.2015/43, K.2015/101, 12 November 2015; no. E.2016/16, K.2016/37, 5 May 2016; no. E.2016/13, K.2016/127, 22 June 2016; and *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 38). In making an assessment as to the proportionality of an impugned interference, the relevant statutory arrangements as well as the particular circumstances of the present case and the applicant's conduct must be taken into consideration (see *Ahmet Ersoy and Others*, no. 2014/4212, 5 April 2017, § 50).

65. It primarily falls upon the public authorities to assess the necessity of the means of interference employed. The authorised administrations are responsible for the achievement of the public interest sought to be attained by the impugned interference, and the administrations are afforded a certain degree of discretionary power in choosing the means to be employed for the aim pursued. However, the discretionary power granted to the administrations as to the necessity of the means employed is not unlimited. In cases where the means employed explicitly make the aim sought to be attained overridden by the interference, the Constitutional Court may conclude that the interference was unnecessary. However, the Constitutional Court's examination in this context is directed towards not the degree of appropriateness of the means chosen, but the gravity of its

interference with rights and freedoms (see *Recep Tarhan and Afife Tarhan*, no. 2014/1546, 2 February 2017, § 70).

66. The action for annulment of a tender, whereby the sale of an attached property by way of compulsory enforcement proceedings is requested to be annulled due to certain irregularities at the preparatory stage of the tender or in the tender itself, is a case peculiar to the enforcement law. Certain additional arrangements may be introduced, in the enforcement law, by departing from the general provisions, with a view to protecting the creditor's right to property and enabling him to receive the relevant amount within a reasonable time. In this sense, placing an additional pecuniary liability -along with the decision on dismissal of the action for annulment of tender- on the party requesting the annulment for ensuring the legal consequences of the tender to take effect immediately as well as for hindering the unnecessary applications likely to pose an obstacle thereto would not thwart the right of access to a court. However, this additional burden must not be of the nature and gravity that would restrict, to a significant extent, those who would raise an alleged infringement of their rights and interests during the tender process from filing an action.

67. A fair balance must be struck between the aim pursued by placing a financial burden and the applicant's interests. It must be considered whether the parties filing an action for annulment of the tender had the opportunity to interfere with the enforcement proceedings and the sale prior to that stage. The judicial bodies to make such assessments must be afforded a certain degree of flexibility that vest in them a discretionary power by the particular circumstances of the given case.

(b) Application of Principles to the Present Case

68. The action for the annulment of tender, which was brought by the applicant, was dismissed by the incumbent court as the grounds of alleged unlawfulness were not found justified. She was also imposed a fine of TRY 175,800, amounting to 10% of the tender price of TRY 1,758,000, which would be paid to the State Treasury. The said fine is not, as also indicated by the applicant, an amount that would be paid to the creditor and would be therefore deducted from the amount receivable by the creditor; but rather an amount that is recorded as revenue in the State Treasury.

69. It has been accordingly understood that the imposition of a fine amounting to 10% of the tender price in case of dismissal of the action brought for annulment of the tender is a suitable means for the protection of the creditor's right to property by preventing the procrastination of the enforcement proceedings and facilitating the collection of the specified receivable.

70. It is one of the State's positive obligations to set up the compulsory enforcement system so as to ensure, in the private debt relations, the payment of the debts which have not been paid with consent as well as to enable the creditor to receive the relevant amount within a reasonable time by ensuring effective functioning of the system. Disruptions in the compulsory enforcement system and unreasonable delays during this process may fall foul of this positive obligation. In this regard, it may be said that it is requisite to take measures for the prevention of the unnecessary prolongation of the compulsory enforcement proceedings and its remaining inconclusive. An action for annulment of a tender without a justified ground may lead to the procrastination of the compulsory enforcement proceedings which have indeed reached the final stages. Accordingly, the introduction, by the law-maker, of various mechanisms capable of having a deterrent effect on filing an action for annulment of tender without any justified reason must be considered reasonable. In this sense, it cannot be concluded that the imposition of an additional financial burden on the litigant in case of dismissal of the action for annulment of tender is not a necessary means for avoiding unnecessary actions to be brought.

71. However, it must be assessed whether this interference was proportionate. In assessing the proportionality of the interference, it is taken into consideration whether a reasonable balance has been struck between the interests of the creditor, who has sought the State's assistance to collect the amounts receivable and accordingly resorted to the State's compulsory enforcement mechanism, and those of the applicant, who requested annulment of the tender. In this connection, the type of the asset that was put on sale by auction as well as the questions whether this asset had a bearing on a special safeguard within the context of the other individuals, whether the applicant had any opportunity, at earlier stages, to bring an action through which she could obtain the same result

with that of the action for annulment of tender are ascertained. Besides, amount of the fine imposed and the applicant's ability to pay that amount are also considered under the particular circumstances of the present case.

72. The immovable, subject-matter of the tender, is a family home as maintained by the applicant. As a requirement inherent in the duty to protect family, a positive obligation set out in Article 41 of the Constitution, family home is subject to a special protection mechanism by virtue of Article 194 of Law no. 4721. It must be also borne in mind that in her action for annulment of the tender, the applicant relied on these safeguards concerning the family home.

73. It has been observed that the applicant resorted to all available judicial remedies so as to prevent the sale of the immovable, which was -according to her- a family home and of great value for her and her family in both pecuniary and non-pecuniary terms. Given the amount of the debt amount, which was subject to enforcement proceedings and extremely low in comparison to the price estimated for the immovable in question at the end of the appraisal, it must be underlined that preventing the sale of the immovable was of considerable personal significance to the applicant. As a matter of fact, although the applicant claimed that the impugned immovable could not be attached for being a family home, relying on Article 82 § 12 of the Law no. 2004 when she became aware of the enforcement proceedings, the incumbent court dismissed her claim on the ground that she was not a party to the proceedings.

74. Besides, it must be further emphasised that the applicant stated that she was a housewife and therefore had no income; and that the inferior courts did not make any finding or assessment to the contrary. In the light of these explanations, the fine at the amount of TRY 175,800 would undoubtedly place a significant financial burden on her and may cause her to have financial difficulties.

75. On the other hand, the fine prescribed in Article 134 § 2 of Law no. 2004 is imposed directly in cases where the request for annulment of tender is dismissed on the merits. The Law does not set an upper limit for the amount of the fine. Nor does it provide a certain degree of flexibility that would enable the inferior courts to take into account the circumstances

of a given case and afford discretionary power to the judge. On account of this situation, the applicant, who did not have any opportunity to raise her claim of family home at the earlier stages as well as any income, was imposed a fine of TRY 175,800, which was quite high according to the conditions in the country.

76. Regard being had to all these considerations, it has been concluded that no fair balance could be struck between the interest of protecting the creditor's rights and the applicant's interest of bringing an action for annulment of the tender; that the fine imposed on the applicant placed an extraordinary burden on her; and that it therefore rendered the interference with the applicant's right of access to a court disproportionate.

77. For these reasons, the Court found a violation of the right of access to a court under the right to a fair trial safeguarded by Article 36 of the Constitution.

Mr. Hicabi DURSUN did not agree with this conclusion.

D. Application of Article 50 of Code no. 6216

78. 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."

79. The applicant requested the Court to find a violation, order a retrial or to award her compensation.

80. Pursuant to Article 49 § 6 of Code no. 6216, during an examination on the merits, it is determined whether any fundamental right has been violated, and if any, how the violation would be redressed. In Article 50 § 1 of the same Code, in cases where a violation judgment is rendered, the steps needed to be taken for the redress of the violation and its consequences shall be indicated. Accordingly, if a violation is found, not only the violation of a fundamental rights and freedom is established, but also *it must be determined how the found violation would be redressed*, in other words, *the steps needed to be taken in order to redress the violation and consequences thereof must be indicated* (see *Mehmet Doğan* [Plenary], no. 2014/8875, 7 June 2018, § 54).

81. In cases where it is established through individual application mechanism that a fundamental right or freedom has been violated, the main rule, for redressing the violation and its consequences, is to ensure restitution as much as possible, that is to say, to ensure restoring to the former state prior to the violation. To that end, it must be primarily required to end the continuing violation, to revoke the decision or the act giving rise to the violation or to eliminate their consequences, to compensate the pecuniary and non-pecuniary damages resulting therefrom, as well as to take the other measures deemed necessary in this respect (*Mehmet Doğan*, § 55).

82. Before indicating the steps to be taken for redressing the violation and its consequences, the reason giving rise to the violation must be identified. The violation may be caused by administrative acts and actions, judicial processes or the actions of the legislative body. Therefore, the identification of the underlying reason of the violation is of importance for determining the appropriate means of redress (*Mehmet Doğan*, § 57).

83. If the violation is caused by the implementation of a provision of law, which is not clear enough to enable the administrative authorities or the judicial courts to make an interpretation in accordance with the Constitution, this violation is resulted not from its implementation but directly from the law itself. In such a case, the violation along with all

consequences thereof may be redressed only when a fresh decision eliminating the ground giving rise to the violation is taken through a retrial, and if it is not possible, only when certain compensatory measures capable of affording a sufficient redress and suitable to the particular circumstances of the given case are taken.

84. In the present case, it has been concluded that the right of access to a court falling under the scope of the right to a fair trial, which is safeguarded by Article 36 of the Constitution, was violated; and that the violation was resulted directly from Article 134 of Law no. 2004. In other words, the said provision of law does not allow the judge to make an assessment or use discretion in consideration of the particular circumstances of the dispute in question. This provision entails the imposition of a fine at a proportional amount in case of dismissal of the action, and this proportional rate is absolutely applied to each case in the same way.

85. In the present case, there is no opportunity for a retrial. In that case, as required by the rule of *restoring to the former state*, the pecuniary damage sustained by the applicant must be redressed in order to eliminate the consequences of the impugned court decision. A fine of TRY 175,800 was imposed on the applicant, and upon the finalisation of the court decision, a writ for the collection of the fee was issued and submitted to the tax office. There is not ny information or document in the file to the effect that the impugned fine was collected. Nor is there any notification by the applicant in this regard. Accordingly, the revocation of the said writ of 2 November 2015, which was issued by the incumbent court, in a way that would preclude its being put into force by the relevant tax office, as well as its return to the relevant court would constitute a sufficient redress, also in consideration of the fact that the applicant did not claim non-pecuniary compensation.

86. The total court expense of TRY 2,206.90 including the court fee of TRY 226.90 and the counsel fee of TRY 1,980, which is calculated over the documents in the case file, must be reimbursed to the applicant.

Mr. Hicabi DURSUN did not agree with this conclusion.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 22 November 2018:

A. 1. UNANIMOUSLY that the alleged violation of the right to respect for family life be DECLARED INADMISSIBLE *for being manifestly ill-founded*;

2. UNANIMOUSLY that the alleged unconstitutionality of the provision of law applied in the present case and the request for its annulment be DECLARED INADMISSIBLE for *lack of competence ratione materiae*;

3. UNANIMOUSLY that the alleged violation of the right of access to a court be DECLARED ADMISSIBLE;

B. By MAJORITY and by dissenting opinion of Mr. Hicabi Dursun, that the right to access of a court under the scope of the right to a fair trial, safeguarded by Article 36 of the Constitution, was VIOLATED;

C. By MAJORITY and by dissenting opinion of Mr. Hicabi Dursun, that a copy of the judgment be SENT to the 19th Chamber of the İstanbul Civil Enforcement Court (file no. 2014/893, K.2014/1202) for the revocation of the writ of collection as well as its withdrawal by the enforcement court so as to redress the consequences of the violation of the right of access to a court;

D. That the total court expense of TRY 2,206.90 including the court fee of TRY 226.90 and the counsel fee of TRY 1,980 be REIMBURSED to the applicant;

E. 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; and

F. That a copy of the judgment be SENT to the Ministry of Justice.

DISSENTING OPINION OF JUSTICE HİCABİ DURSUN

1. The application concerns the alleged violation of the right of access to a court due to the imposition of a fine, amounting to 10% of the tender price, on the applicant upon the dismissal of the action for annulment of the tender brought against the sale of the immovable, which was a family home, by auction.

2. Article 36 § 1 of the Constitution sets forth that everyone has the right of litigation either as plaintiff or defendant before the courts. Therefore, the right of access of to a court is an element inherent in the right to legal remedies safeguarded by Article 36 of the Constitution (see *Özbakım Özel Sağlık Hiz. İnş. Tur. San. ve Tic. Ltd. Şti.*, no. 2014/13156, 20 April 2017, § 34). In its assessments within the scope of the individual application, the Court notes that the right of access to a court means the ability to bring a dispute before a tribunal and to request the resolution of the dispute in an effective manner (see *Özkan Şen*, no. 2012/731, 7 November 2013, § 52).

3. By imposing a fine at the rate of 10% of tender price in case of dismissal of the action for annulment of tender, it is aimed at preventing the procrastination of the finalisation of tender process by means of precluding unnecessary and unfounded applications, completing tender process within the shortest time possible, as well as at ensuring maintenance and increase of confidence in tender process, which is of public nature. It is prescribed that in case of dismissal of the action for annulment of tender, a fine shall be automatically imposed, and the tender process, which is public act, is subject to judicial review. As regards the tender process, the creditor seeking the sale of the immovable, the debtor, the relevant parties in the register of title deeds as well as the bidders are entitled resort to judicial remedies within 7 days as from the tender date. They may also request the annulment of a given tender, relying on any ground. Thus, the constitutional rights that the parties to the tender process have in their capacity either as a plaintiff or defendant before the enforcement courts are not impaired. The relevant parties have access to the prescribed judicial remedy in case of a disputed tender, which is a process of the enforcement law, and the incumbent courts are not thereby precluded from issuing necessary decisions by dealing with the actions

brought with respect to this process. Therefore, the imposition of a fine at the rate of 10% of tender price in case of dismissal of the action brought for annulment of tender does not, in any aspect, hinder the right to legal remedies.

4. The fine to be imposed, in cases where the action for annulment of tender has been dismissed, is determined proportionally by considering that tender prices as well as the amount of loss –that would incur as a result of the prevention of the finalisation of tender process through the action for annulment of tender which is unfounded– may vary by the particular circumstances of a given case. It thus appears that the aim of this fine is to ensure that those concerned bring an action for annulment of tender in good faith whereby their real intent is to claim rights on justified grounds, as well as to ensure the conduct of the tender process in a rapid and effective way. The imposition of a fine in case of dismissal of an action for annulment of tender and determination of this fine proportionally to the tender price demonstrate the reasonable and appropriate relation between the aim pursued and the means employed.

5. Therefore, in the present case, it cannot be concluded that the imposition of a fine, amounting to 10% of the tender price, on the applicant due to the dismissal of her action for annulment of the tender was not proportionate; and that therefore, the right to access of court has been violated.

6. For these reasons, I disagree with the majority's conclusion that there was a violation of the applicant's right of access to a court. In the same vein, I do not agree with the award of compensation to the applicant.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

YASEMİN BODUR

(Application no. 2017/29896)

25 December 2018

On 25 December 2018, the First Section of the Constitutional Court found a violation of the right to a fair hearing safeguarded by Article 36 of the Constitution in the individual application lodged by *Yasemin Bodur* (no. 2017/29896).

THE FACTS

[7-32] The applicant works as an office staff in a social assistance and solidarity foundation ("the Foundation") on a contractual basis.

Stating that the Foundation had the characteristics of a public institution affiliated to a general directorate under a ministry, the applicant requested an additional payment (bonus payable to the workers in State enterprises) to which she was entitled under the Act no. 6772 on the Payment of Additional Salary for Employees Working for the State and State Institutions.

Upon rejection of her request by the Foundation, the applicant brought an action against it. The civil court, in its capacity as the labour court, awarded the applicant the amount calculated by an expert at the end of the proceedings. Upon the appeal of the Foundation, the Regional Court of Appeal quashed the first instance court's decision and dismissed the case.

The final decision was served on the applicant on 9 June 2017. Thereafter, she lodged an individual application with the Court on 6 July 2017.

V. EXAMINATION AND GROUNDS

33. The Constitutional Court ("the Court"), at its session of 25 December 2018, examined the application and decided as follows:

A. The Applicant's Allegations and the Ministry's Observations

34. The applicant asserted that fourteen workers employed at the same workplace under similar conditions brought separate actions to claim additional pay (a certain bonus payable to the workers in State enterprises), upon which the first-instance court ruled in favour of the

workers and decided that she was to be paid 26,843.45 Turkish liras ("TRY"). During the proceedings, the remedy of appeal on points of fact and law (*istinaf*) became operational. Upon the respondent Foundation's requests for appeal, the case files were assigned to the 5th, 6th, 7th, 8th and 9th Civil Chambers of the Regional Court of Appeal. Although the case files assigned to the other chambers resulted in favour of the workers, the 7th Civil Chamber dismissed her case, as well as those of three others, by reaching a different conclusion. The applicant argued that the conclusion of similar disputes with different outcomes was caused by the difference of opinion among the chambers of the Court of Cassation, which had held the appellate reviews on points of law on such disputes in the past. In this connection, despite the decisions of the 7th and 9th Civil Chambers of the Court of Cassation recognising persons in the same status with her as a public worker (i.e. worker employed in State enterprise) and granting their additional pay claims, the applicant's claims for additional pay were dismissed on the ground that the 22nd Civil Chamber of the Court of Cassation had not recognised those persons as public workers. The applicant alleged that this difference of opinion among the jurisprudence of chambers of the Court of Cassation had undermined the confidence in the judiciary; and that there had been a violation of her right to a fair trial.

B. The Court's Assessment

35. Article 36 § 1 of the Constitution provides 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."

36. 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 Court has considered that the essence of the applicant's allegations pertains to the right to be tried on a fair and equitable basis, which is one of the guarantees of the right to a fair trial, and that the examination must be made under this scope.

1. Admissibility

37. The Court found admissible the alleged violation of the right to fair a trial for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

a. General Principles

38. Article 36 § 1 of the Constitution guarantees everyone's right to apply to judicial bodies either as a plaintiff/claimant or a defendant/respondent and, as a natural consequence thereof, the right to contention, defence, and a fair trial. According to the legislative intention of Article 14 of the Law no. 4709 dated 3 October 2001 whereby the term of "*fair trial*" was added to Article 36 § 1 of the Constitution, "*the term 'right to a fair trial' was added to the text as it has also been guaranteed by international conventions to which the Republic of Turkey is a party*". Thus, it is understood that the purpose of adding the phrase that everyone has the right to a fair trial to Article 36 of the Constitution was placing the right to a fair trial enshrined in the Convention under a constitutional guarantee (see *Yaşar Çoban* [Plenary], no. 2014/6673, 25 July 2017, § 54).

39. The right to a fair trial requires upholding the principle of a state governed by rule of law in the resolution of disputes. The principle of a state governed by rule of law, one of the characteristics of the Republic listed under Article 2 of the Constitution, must be borne in mind in the interpretation and application of all articles of the Constitution.

40. In this regard, one of the requirements of a state governed by rule of law is the principle of legal certainty (see the judgments nos. E.2008/50, K.2010/84, 24 June 2010; and E.2012/65, K.2012/128, 20 September 2012). Aimed at ensuring the legal safety of persons, the principle of legal certainty requires that legal norms are foreseeable, that individuals can trust the state in all of their acts and actions, and that the state avoids using any methods which would undermine this trust in their legislative acts. The certainty principle means that legislative acts must be sufficiently clear, precise, understandable and applicable to the extent not to cause any hesitation or doubt on the part of both the administration and individuals and they must afford safeguards against arbitrary practices of public authorities (see the judgment no. E.2013/39, K.2013/65, 22 May 2013).

41. It is within the within the jurisdiction of the inferior courts to decide how legal rules are to be interpreted and which interpretation is

to be adopted where more than one interpretation is possible. It would be incompatible with the purpose of the individual application if the Court gives more weight to one of the interpretations adopted by the inferior courts within the scope of the individual application or interprets legal rules by substituting itself for the inferior courts. The Court is entrusted, within the scope of the principle of legality, with the duty to determine whether non-existence of a sole interpretation of legal rules affects legal certainty and foreseeability (see *Mehmet Arif Madenci,* no. 2014/13916, 12 January 2017, § 81).

42. Changes in judicial decisions are positive in the sense that they reflect the dynamism of the law and the courts' capability to adapt their approach according to new developments. However, different conclusions reached in similar cases without satisfactory reasons by different chambers of supreme courts, which are expected to ensure a coherence in practice, will lead to contradicting and coincidental outcomes whereby a decision upheld by a certain chamber might be quashed if examined by another chamber. This falls foul of the principles of legal certainty and foreseeability. In addition, in the event that such a perception takes root in the society, the individuals' confidence in the judicial system and court decisions may be undermined (see *Türkan Bal* [Plenary], no. 2013/6932, 6 January2015, § 64).

43. In this connection, the Court draws attention to the importance of measures oriented at eliminating the inconsistencies in the practice in cases where differences in case-law stemming from the interpretation of legal rules by inferior courts become deep-rooted, i.e. where the coherence of practice has not been ensured within a not-so-short period of time.

44. Being responsible for ensuring and maintaining the confidence in the judicial system in pursuit of the principle of the rule of law, the state is under an obligation to establish a mechanism capable of eliminating the deep and continuous differences in the case-law of the courts functioning within the same branch of the judiciary and to make arrangements to ensure the effective functioning of this mechanism. This obligation must be regarded as one of the safeguards inherent in the right to a fair trial (see *Engin Selek,* no. 2015/19816, 8 November 2017, § 58).

45. In a case in which it made an assessment on the differences in case-law, the Court has pointed out that, if the Court of Cassation departed from the established case-law and adopted a new approach, this new approach would need to be implemented consistently from that point on in order to preserve the public confidence in the judiciary. The Court has followed that the failure of the supreme courts, which are entrusted with ensuring the coherence in practice, to implement consistently the approach adopted after the change in case-law might lead to a violation of the right to a fair trial (see *Hakan Altıncan* [Plenary], no. 2016/13021, 17May 2018, § 48).

b. Application of Principles to the Present Case

46. The subject matter of the present case concerns the alleged unfairness of proceedings, in that the actions brought by workers working under similar conditions were concluded differently due to the difference of opinion among the chambers of the Court of Cassation.

47. The applicant works under a service contract for the Foundation which pursues the aims of aiding citizens in need or such persons who are in the country for any reason, taking measures to promote social justice, and achieving social assistance and solidarity pursuant to Article 7 of the Law no. 3294. The applicant, stating that she qualified as a public (State) worker on account of the Foundation's characteristics, purpose and administration regime, brought an action to be able to benefit from the additional pay bonus, which is payable to public staff under certain conditions.

48. It has been understood from the copies of court rulings submitted by the applicant into the case file that a part of the cases filed by workers of the same workplace on the basis of the same claims resulted in favour of the workers whereas some other cases resulted against the workers. It has further been observed from the documents and information obtained over the UYAP (National Judicial Network System) that the 9th Civil Chamber of the Court of Cassation, which had long been the appellate authority for such disputes, and the (now-closed) 7th Civil Chamber of the Court of Cassation, which had subsequently been assigned with this duty, typically accepted the claims brought by the personnel working

for similar foundations in various parts of the country. Both Chambers rendered decisions in which they recognised the Foundation staff as public workers and thereby enabled them to benefit from the additional pay bonus decided by the administration, provided they met the conditions. Nevertheless, the 22nd Civil Chamber of the Court of Cassation, set up in 2011, has consistently held that the aforementioned foundations had the status of legal entities of private law; therefore, their staff who do not have the status of public personnel could not benefit from the additional pay. Despite the existence of a decision on case-law unification which discussed the nature of the Foundation for which the applicant has been working under a service contract, the chambers of the Court of Cassation continued to rule on cases in accordance with their earlier views because, though the said decision ascertained the characteristic of the foundations, it did not contain any finding as to the status of their staff.

49. From this standpoint, the Court has pointed out that the present case is different than the above-cited case of *Hakan Altıncan* since there has been no departure from a piece of case-law that has been followed consistently by the relevant Chambers and Assemblies (Plenary, etc.) of the Court of Cassation.

50. The Court has noted that the deep-rooted and long-standing difference in case-law among the chambers of the Court of Cassation has also been resumed among the chambers of Regional Courts of Appeal, authorities of appellate review on points of fact and law which have recently been put into operation. On the other hand, the Court of Cassation conducted a practice of case-law unification with a view to ascertaining the legal status of foundations in their capacity as employers. However, although this decision established that the foundations were legal entities subject to private law, it did not include any assessment with regard to their staff. Indeed, the 22nd Civil Chamber of the Court of Cassation considered that the above-mentioned finding was in line with its own opinion, whereas the 9th Civil Chamber of the Court of Cassation did not make any changes to its opinion as the decision on case-law unification did not affect the legal status of the staff.

51. In their conflicting decisions, the chambers of the Court of Cassation and the Regional Court of Appeal present sufficient reasons capable of

allowing the applicant and third parties to objectively understand how they have reached the conclusions therein.

52. In the present case, the difference in case-law concerning the question of whether the staff working for a social assistance and solidarity foundation are entitled to additional pay bonus went on for seven years, thereby becoming a deep-rooted and continuous issue. The conclusion reached by the Chambers and, in this connection, the inferior courts did not stem from the particular characteristic of the cases. Moreover, despite the availability of such a mechanism as the case-law unification that is capable of eliminating this issue causing legal uncertainty, it has not been operated. As a result, different and conflicting decisions have emerged depending on the Chamber or Assembly. In other words, the Court has concluded that the conclusion reached at the end of the proceedings was unforeseeable for the applicant due to the failure to operate the mechanism of case-law unification, which is capable of eliminating the deep-rooted and long-standing differences. This has prejudiced the fairness of the proceedings, regardless of the ruling.

53. For these reasons, it must be held that there has been a violation of the applicant's right to a fair trial safeguarded by Article 36 of the Constitution.

C. Application of Article 50 of Code no. 6216

54. Article 50 §§ 1 and 2 of the Code on the 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."

55. The applicant requested a retrial and claimed compensation.

56. According to Article 49 § 6 of Code no. 6216, the examination on the merits determines whether there has been a violation of a fundamental right and, if so, how it can be removed. Further, as per Article 50 § 1 of the same Code and Article 79 § 2 of the Internal Regulations of the Constitutional Court, where a violation is found, the Court rules on what needs to be done to redress the violation and its consequences. Accordingly, in case of a violation, the Court will not only find that the fundamental right or freedom concerned has been violated but also determine the matter of *how to remove the violation*, in other words *decide on what needs to be done so that the violation and its consequences can be redressed* (see *Mehmet Doğan* [Plenary], no. 2014/8875, 7 June 2018, § 54).

57. If the Court finds a violation of a fundamental right or freedom within the scope of an individual application, the main requirement which needs to be satisfied to be able to consider that the violation and its consequences have been redressed is to ensure restitution to the extent possible, that is to restore the situation to the state it was in prior to the violation. For this to happen, the continuing violation needs to be ceased, the decision or act giving rise to the violation as well as the consequences thereof need to be redressed, where applicable the pecuniary and non-pecuniary damages caused by the violation need to be indemnified, and any other measures deemed appropriate in that scope need to be taken (see *Mehmet Doğan*, § 55).

58. On the other hand, Article 50 § 1 of the Code no. 6216 precludes the Court from rendering decisions or judgments in the nature of an administrative act or action when determining the way to remove the violation and its consequences. Accordingly, in determining the way to redress the violation and its consequences, the Court cannot issue an act

by substituting itself for the administration, the judicial authorities or the legislative branch. The Court adjudicates the way by which the violation and its consequences would be removed and remits its judgment to the relevant authorities for the necessary action to be taken (see *Şahin Alpay (2)* [Plenary], no. 2018/3007, 15/3/2018, § 57).

59. Before ruling on what needs to be done to redress the violation and its consequences, the source of the violation must first be ascertained. In this respect, a violation may stem from administrative acts and actions, judicial acts, or legislative acts. Determining the source of the violation plays a significant role in the determination of the appropriate way of redress (see *Mehmet Doğan*, § 57).

60. In cases where the violation stems from the inferior courts' interpretation of the applicable law, it may sometimes be sufficient to award compensation in order to provide redress for the violation along with all of its consequences. However, with due regard to the purpose of the individual application, the highest judicial authority within the same branch of the judiciary should also address the impugned interpretation giving rise to similar violations and ensure that a set of measures be taken in a fashion that will prevent the discord in case-law.

61. The Court has concluded that there has been a violation of the right to be tried on a fair and equitable basis within the scope of the right to a fair trial, safeguarded under Article 36 of the Constitution. It is understood that the violation found in the present case has stemmed from the failure to ensure coherence and unity in the case-law through elimination of the difference of opinion among the chambers of the Court of Cassation, despite the considerable length of time elapsed since the emergence of that difference, in cases brought by individuals in similar circumstances on the basis of the same legal reason. In other words, the source of the violation is the application, to the applicant's case, of a legal rule which does not satisfy the certainty requirement as there are two different interpretations of the rule in force at the same time.

62. It should be underlined that the finding of a violation by the Court is not oriented at the outcome of the inferior court and independent from the conclusion reached by the inferior court. Under these circumstances,

there is no legal in conducting a retrial. In the contrary case, in other words when a retrial is ordered, it may mean that a preference has been made in favour of the parties by upholding one of these interpretations, which would not redress the violation in question and may also give rise to new violations to the detriment of the other party of the dispute dealt with by the inferior court. Therefore, since retrial cannot be regarded as a means capable of redressing the consequences of the violation, an award of appropriate compensation would offer adequate redress for the applicant.

63. In this scope, as regards the non-pecuniary damages sustained by the applicant due to the violation of her right to a fair trial, which cannot be redressed by a mere finding of a violation, the Court awards a net amount of TRY 7,000 in favour of the applicant as non-pecuniary compensation.

64. Furthermore, in addition to an award of compensation, a communication must be made to the First Presidency Board of the Court of Cassation pursuant to Article 45 § 2 of the Law on the Court of Cassation (Law no. 2797 dated 4 February 1983) regarding the review of the issue giving rise to the violation. Thus, it will be possible to prevent a practice, which might cause new violations, by means of eliminating through the case-law unification mechanism the deep-rooted and long-standing differences in case-law among the courts of the same branch of the judiciary.

65. The total court of expense of TRY 2,237.50 including the court fee of TRY 257.50 and counsel fee of TRY 1,980, 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 UNANIMOUSLY on 25 December 2018 that

A. The alleged violation of the right to be tried on a fair and equitable basis be DECLARED ADMISSIBLE;

B. The right to be tried on a fair and equitable basis within the scope of the right to a fair trial safeguarded by Article 36 of the Constitution was VIOLATED;

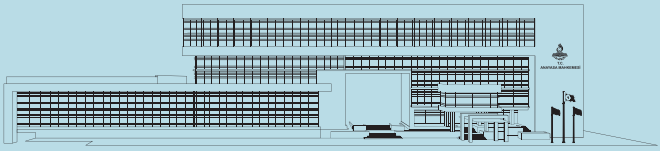
C. A net amount of TRY 7,000 be PAID to the applicant in respect of non-pecuniary damage, and other compensation claims be DISMISSED;

D. One copy of the judgment be SENT to the First Presidency Board of the Court of Cassation for the latter to become informed and assess whether there is need for a decision on case-law unification in order to redress the consequences of the violation of the right to be tried on a fair and equitable basis;

E. The total court expense of TRY 2,237.50 including the court fee of TRY 257.50 and counsel fee of TRY 1,980 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 Treasury and Finance following the notification of the judgment; in case of any default in payment, statutory 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.



İncek Şehit Savcı Mehmet Selim Kiraz Bulvarı No: 4
06805 Çankaya / Ankara / TURKEY
Phone: +90 312 463 73 00 • Fax: +90 312 463 74 00
E-mail: tcc@anayasa.gov.tr
twitter.com/aymconstcourt

www.anayasa.gov.tr/en

9 786052 378540