Annual Report 2020

Annual Report

2020

Constitutional Court Publications

ISBN: 978-605-2378-67-0

Annual Report 2020

The Directorate of International Relations
Constitutional Court of the Republic of Turkey

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 : tcc@anayasa.gov.tr
Twitter : @aymconstcourt

Graphic Design
EPAMAT Basın Yayın Promosyon
San. Tic. Ltd. Şti. • www.epamat.com.tr

Printed by
EPAMAT Basın Yayın Promosyon San. Tic. Ltd. Şti.

Phone : +90 312 394 48 63
Fax : +90 312 394 48 65
Web : www.epamat.com.tr

Print Date: May, 2021

www.anayasa.gov.tr/en

CONTENTS

PREFACE BY THE PRESIDENT

One of the aims pursued by a democratic state of law is to ensure the public institutions and organizations to render their services in accordance with the principles of accountability and transparency.

These principles are applicable not only to the legislative and executive organs but also to the organs exercising judicial power. In this regard, annual reports play a crucial role in ensuring accountability and transparency in public services.

The first chapter of the 2020 Report, prepared to serve such function, provides brief information on the formation of the Plenary, Sections and Commissions of the Constitutional Court.

The second chapter includes information on the duties and powers of the Plenary, Sections and Commissions.

The third chapter covers the Court's structure, functioning, approach, press and public relations, publications, and changes, developments and innovations in national and international relations.

The fourth chapter includes the Message delivered on the occasion of the 58th Anniversary of the Constitutional Court, the Opening Speeches delivered on the occasions of the Swearing-in Ceremony of Justice Mr. Basri Bağcı, the 8th Summer School of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC), and the Symposium on the 8th Anniversary of the Adoption of Individual Application, and the Speech delivered at the Academic Program themed as "I am Innocent" at the 10th International Crime and Punishment Film Festival.

The fifth chapter of the report includes brief summaries of the Court's leading decisions and judgments rendered in 2020 in the context of both individual application and constitutionality review with a view to giving an insight into the case-law of the Court on various subjects. This chapter is intended for presenting the paradigm of the Court on fundamental rights and freedoms and contributing to all those showing interest in the Court's case-law, notably academicians and legal practitioners. The chapter constitutes the backbone of the report, given that the main output of the Court is its decisions and judgments.

The final chapter contains a year-by-year comparison of the Court's performance in 2020 by providing various statistical data together with graphics.

I hope that the 2020 Report prepared by the Constitutional Court will be useful for those concerned.

Prof. Dr.
Zühtü ARSLAN

President of the Turkish Constitutional Court

YEAR

JANUARY

30-31 January — Attendance by the delegation of the Turkish Constitutional Court at the official ceremony held on the occasion of the opening of the judicial year of the European Court of Human Rights (ECHR)

FEBRUARY

7-9 February — Meeting held on the Court's case-law and its assesment in Afyon

19 February — Establishment of the Directorate of Judgments

23-24 February — Attendance by the delegation of the Turkish Constitutional Court at the International Conference held on the occasion of the 30th Anniversary of the Constitutional Council of the People's Democratic Republic of Algeria

25-27 February — Attendance by the delegation of the Turkish Constitutional Court at the International Conference themed as "*High-Level Meeting of the Global Judicial Integrity Network – Past, Present, Future*" held by the Supreme Judiciary Council of Qatar

MAY

18 May — Publication of the statistics on individual application

JUNE

9 June — Swearing-in ceremony held for the recently-appointed Constitutional Court Justice Mr. Basri Bağcı

SEPTEMBER

3 September — Visit by the President of the European Court of Human Rights (ECHR) Mr. Robert Spano to the Turkish Constitutional Court

8 September — Visit by the President of the Constitutional Court of North Macedonia to the Turkish Constitutional Court

7-8 September — Organization of the 8th International Summer School event held via video conference due to the precautions of Covid-19 pandemic by the Turkish Constitutional Court under the auspieces of the Permanent Secretariat of the AACC

23 September — Organization of the Symposium themed "*The Protection of Fundamental Rights and Freedoms in the Age of the Internet*" held on the occasion of the 8th Anniversary of the Adoption of the Mechanism of Individual Application to the Constitutional Court

23-25 September — Attendance by the delegation of the Turkish Constitutional Court at the 2nd Research Conference of the AACC Permanent Secretariat for Research and Development held via video conference due to the precautions of Covid-19 by the Constitutional Court of Korea

OCTOBER

22 October — Publication of the statistics on individual application

2020

MARCH

12 March — Election of Mr. Kadir Özkaya as the Vice-President of the Constitutional Court

APRIL

3 April — Retirement of Justice Mr. Recep Kömürcü

24 April — Cancellation of the activities in celebration of the 58th Anniversary of the Constitutional Court in the scope of precautionary measures taken against the pandemic of Covid-19

JULY

7 July — Visit by the Minister of Labour and Social Security of the Turkish Republic of Northern Cyprus and the accompanying delegation to the Turkish Constitutional Court

23 July — Election of Justice Mr. Burhan Üstün by the Plenary of the Court as the President of the Court of Jurisdictional Disputes

AUGUST

26-28 August — Attendance by the delegation of the Turkish Constitutional Court at the 4th Congress of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) and the ceremony on the occasion of the 25th Anniversary of the Adoption of the Constitution of Kazakhstan held via video conference due to the precautions of Covid-19 pandemic

NOVEMBER

12 November — Publication of the Journal of Constitutional Jurisdiction no. 37/1 compiled by the Constitutional Jurisdiction Reseach Centre (AYAM)

20 November — Attendance by President Mr. Zühtü Arslan at the academic program themed "*I am Innocent*" at the 10th International Crime and Punishment Film Festival

24 November — Hearing held by the Constitutional Court acting as the Supreme Criminal Court (E.2020/3)

DECEMBER

17 December — Election of Justice Mr. Celal Mümtaz Akıncı as the President and Justice Mr. Muammer Topal as the Vice-President of the Court of Jurisdictional Disputes by the Plenary of the Court

22 December — Retirement of Justice Mr. Serdar Özgüldür

22 December — Hearing held by the Constitutional Court acting as the Supreme Criminal Court (E.2020/4)

CHAPTER 01

FORMATION OF THE COURT


T.C.
ANAYASA MAHKEMESİ

Formation of the Court

I. OVERVIEW

The Constitutional Court is comprised of fifteen members. The Grand National Assembly of Turkey shall elect, by secret ballot, two members from among three candidates to be nominated by and from among the president and members of the Court of Accounts, for each vacant position, and one member from among three candidates nominated by the heads of the bar associations from among self-employed lawyers. In this election to be held in the Grand National Assembly of Turkey, for each vacant position, two-thirds majority of the total number of members shall be required for the first ballot, and absolute majority of total number of members shall be required for the second ballot. If an absolute majority cannot be obtained in the second ballot, a third ballot shall be held between the two candidates who have received the greatest number of votes in the second ballot; the member who receives the greatest number of votes in the third ballot shall be elected.

The President of the Republic shall appoint three members from the Court of Cassation, two members from Council of State from among three candidates to be nominated, for each vacant position, by their respective general assemblies, from among their presidents and members; three members, at least two of whom being law graduates, from among three candidates to be nominated for each vacant position by the Council of Higher Education from among members of the teaching staff who are not members of the Council, in the fields of law, economics and political sciences; four members from among high level executives, self-employed lawyers, first category judges and public prosecutors or rapporteurs of the Constitutional Court having served as rapporteur at least five years.

In the elections to be held in the respective general assemblies of the Court of Cassation, Council of State, the Court of Accounts and the Council of Higher Education for nominating candidates for membership of the Constitutional Court, three persons obtaining the greatest number of votes shall be considered to be nominated for each vacant position. In the elections to be held for the three candidates nominated by the heads of bar associations from among self-employed lawyers, three persons obtaining the greatest number of votes shall be considered to be nominated.

To qualify for appointments as members of the Constitutional Court, members of the teaching staff shall be required to possess the title of professor or associate professor; lawyers shall be required to have practiced as a lawyer for at least twenty years; high level executives shall be required to have completed higher education and to have worked for at least twenty years in public service, and first category judges and public prosecutors with at least twenty years of work experience including their period of candidacy, provided that they all shall be over the age of forty five.

The Constitutional Court shall elect a president and two vice-presidents from among its members for a term of four years by secret ballot and by an absolute majority of the total number of its members, and those whose term of office ends may be re-elected.

According to Article 149 of the Constitution and Article 20 of Law no. 6216, the Constitutional Court functions in the form of the Plenary, sections and commissions.

II. FORMATION OF THE PLENARY

The Plenary shall comprise of fifteen members including the President and two Vice-Presidents. The Plenary shall convene with the participation of minimum ten members and shall be chaired by the President or a Vice-President to be designated by the President. The Plenary shall render a decision by an absolute majority. However, a two-thirds majority shall be sought for decisions on annulment of Constitutional amendments, dissolution of political parties or deprivation of political parties of state aid.

As of 31 December 2020, the Plenary is composed of the following members:

Prof. Dr. Zühtü ARSLAN | President

Mr. Arslan was born in Sorgun, Yozgat on 1 January 1964. Having completed his primary and secondary education in Sorgun, he graduated from the Faculty of Political Sciences, Ankara University, in 1987. He received his master's degree on "Human Rights and Civil Freedoms" and PhD degree on constitutional law at the Law Faculty of Leicester University (UK). He obtained the title of associate professor in 2002 and professor of constitutional law in 2007.

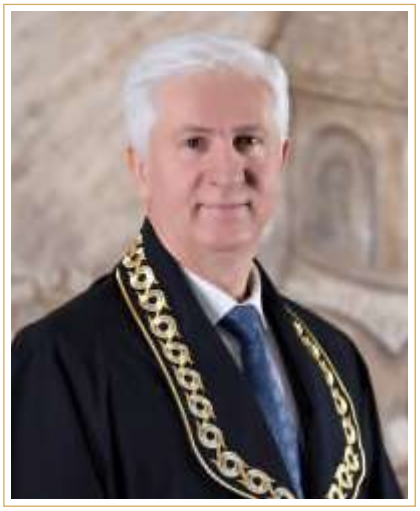
He attended lawyer traineeship program at the European Court of Human Rights in 2001. Besides, he served as a member to the Plenary of the Press Advertisement Institution. In 2009, he was appointed as the President of the Police Academy of Turkey, where he taught courses on "Constitutional Law", "Human Rights" and "Theories of State" at graduate and post-graduate levels. He also taught 'Turkish Public Law' at Bilkent University and 'Law and Politics' at Başkent University.

Mr. Arslan published three books in Turkish, Anayasa Teorisi (Constitutional Theory, 2005), Avrupa İnsan Hakları Sözleşmesinde Din Özgürlüğü (Freedom of Religion under the European Convention on Human Rights, 2005), and Türk Parlamento Tarihi 1957-1960 (History of Turkish Parliament between 1957–1960) (3 Volumes, 2013). He is the co-author of the book Constitutional Law in Turkey, (Wolters Kluwer, 2016). He also compiled a book titled ABD Yüksek Mahkemesi Kararlarında İfade Özgürlüğü (Freedom of Expression in the Judgments of the US Supreme Court, 2003). He has also published numerous articles in national and international law reviews on constitutional law, human rights, relations of freedom-security and the law of political parties.

Mr. Arslan was appointed as the Justice of the Constitutional Court by the President of the Republic of Turkey on 17 April 2012 from among three candidates nominated by the Council of Higher Education.

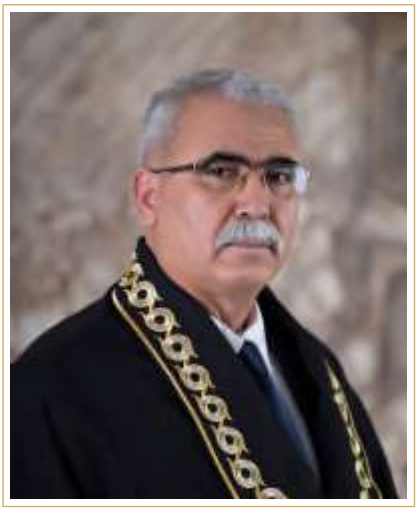
He was elected as the President of the Constitutional Court by the Plenary of the Court on 10 February 2015 and re-elected on 25 January 2019.

He is married with four children.



Hasan Tahsin GÖKCAN | Vice-President

Mr. Gökcan, holding offices as a judge in the districts of Fındıklı, Tuzluca and Bozüyük and as an investigation judge at the Court of Cassation, was appointed as a member of the Court of Cassation on 24 February 2011. He was subsequently appointed as the Justice of the Constitutional Court by the President of the Republic of Turkey on 17 March 2014 from among three candidates nominated by the General Assembly of the Court of Cassation. He was elected as the Vice-President of the Constitutional Court by the Plenary of the Court on 26 March 2019. He has been holding office as the Vice-President and the Presiding Judge of the First Section since 15 April 2019.



Kadir ÖZKAYA | Vice-President

Mr. Özkaya, holding offices as a civil servant at the Directorate General of Land Registry and Cadastre and an inspector at the Agricultural Credit Cooperative, then served as an investigation judge at the Council of State from 13 May 1993 to November 2004. He was then appointed as the rapporteur-judge of the Constitutional Court on November 2004. He then held office as a member of the Council of State by the High Council of Judges and Prosecutors. He was subsequently appointed as the Justice of the Constitutional Court by the President of the Republic of Turkey on 18 December 2014. He was elected as the Vice-President of the Constitutional Court by the Plenary of the Court on 12 March 2020. He has been holding office as the Vice-President and the Presiding Judge of the Second Section since 4 April 2020.

Burhan ÜSTÜN | Justice

Mr. Üstün held office as a judge in Sivas, Kozan, Çıldır, Oğuzeli, Pazarcık, Taşköprü, Sincan and Ankara. Appointed as a member of the Court of Cassation on 16 March 2003 and subsequently sitting as a member of the 14th Civil Chamber of the Court of Cassation, he was then appointed as the Justice of the Constitutional Court by the President of the Republic of Turkey on 30 March 2010 from among three candidates nominated by the General Assembly of the Court of Cassation. He held office as the Vice-President of the Constitutional Court from 10 April 2015 to 14 April 2019. Elected as the President of the Court of Jurisdictional Disputes by the Plenary of the Court on 23 July 2020, he assumed this office until his retirement on 10 January 2021.

Prof. Dr. Engin YILDIRIM | Justice

Mr. Yıldırım, receiving a master's degree from the Warwick University (England), Warwick Business School in 1989 and a PhD degree from the Manchester University (England), Faculty of Economics and Social Studies in 1994, held office as a faculty member at the Sakarya University, Faculty of Economics and Administrative Sciences, from 1994 to 2010. He also served as a dean at the same faculty from 2003 to 2010. He was appointed as the Justice of the Constitutional Court by the President of the Republic of Turkey on 9 April 2010 from among three candidates nominated by the General Assembly of the Council of Higher Education. He held office as the Vice-President of the Constitutional Court from 19 October 2015 to 25 October 2019.

Hicabi DURSUN | Justice

Mr. Dursun started public office as an assistant auditor candidate at the Court of Accounts in 1991. Qualified for the office in 1993, he then performed auditing activities as an auditor, chief auditor and senior auditor at the Court of Accounts from 1993 to 2008. He was appointed as a member of the Court of Accounts on 25 June 2009 by the Parliament. He was then appointed as the Justice of the Constitutional Court by the General Assembly of the Parliament on 6 October 2010 from among three candidates nominated by the Court of Accounts. He was subsequently elected as the President of the Court of Jurisdictional Disputes on 11 June 2018 and held this position until 16 July 2020. He has been holding office as the Justice of the Constitutional Court since 16 July 2020.

Celal Mümtaz AKINCI | Justice

Mr. Akıncı, becoming a lawyer in Afyonkarahisar in 1984 and completing his military service as a military judge at the Sivas 5th Infantryman Training Brigade Command, served as a member of the Executive Board of the Bar Association from 1988 to 2000. He was then elected as the Head of the Bar Association in Afyonkarahisar in 2001. He was appointed as the Justice of the Constitutional Court by the General Assembly of the Parliament on 13 October 2010 from among three candidates nominated by the Heads of the Bar Associations. He was elected as the President of the Court of Jurisdictional Disputes by the Plenary of the Court on 17 December 2020.

Muammer TOPAL | Justice

Mr. Topal, starting his career as an investigation judge at the Council of State on 3 March 1992, then became a member of the Ankara District Administrative Court. He completed a master's degree program at the Institute of Public Administration for Turkey and the Middle East with his project on "Strategic Management". He gave lectures at the Turkish Academy of Justice to candidate judges. He was then appointed as a member of the Council of State on 24 February 2011. Holding office as a member of the 7 th Chamber of the Council of State, he was appointed as the Justice of the Constitutional Court by the President of the Republic of Turkey on 29 January 2012 from among three candidates nominated by the General Assembly of the Council of State. He was elected as the Vice-President of the Court of Jurisdictional Disputes by the Plenary of the Court on 17 December 2020.

M. Emin KUZ | Justice

Mr. Kuz, starting his career as a candidate judge in Ankara in 1982, held office at the Prime Ministry as an assistant specialist, specialist, head of department, principal consultant and deputy undersecretary. He was appointed as a member of the Council of Higher Education on 18 October 2005 and held this office for 4 years. While holding office as a member of the Council of Higher Education and the Deputy Undersecretary in the Prime Ministry, he was appointed as the Deputy Secretary General of the Presidency on 7 September 2007. He was appointed as the Justice of the Constitutional Court by the President of the Republic of Turkey on 8 March 2013.

Rıdvan GÜLEÇ | Justice

Mr. Güleç, holding office at the Ministry of Transportation in 1989-1991, served as an assistant auditor at the Court of Accounts in 1991 where he served as an auditor, chief auditor and senior auditor. He was appointed as a member of the Court of Accounts by the Plenary Assembly of the Parliament on 25 June 2009. While holding this office, he was appointed as the Justice of the Constitutional Court by the General Assembly of the Parliament on 13 March 2015 from among three candidates nominated by the Court of Accounts.

Assoc. Prof. Dr. Recai AKYEL | Justice

Mr. AKYEL, starting his career as a contracted official at Yem Sanayii Turk A.Ş. Directorate General, became a local authority at the Ministry of Interior in 1989. He held office as a district governor respectively in the districts of Pozantı, İscehisar, Camoluk, Solhan, Gölyaka, İmamoğlu, Kızıltepe and Elbistan. He sat as a governor in Tokat from 2007 to 2009. He was appointed as the President of the Court of Accounts by the General Assembly of the Parliament on 26 June 2009. Upon the expiry of his presidency term, he continued to sit as a member in the Court of Accounts. He was then appointed as the Chief Advisor to the President. He was appointed as the Justice of the Constitutional Court by the President of the Republic of Turkey on 25 August 2016 from among the top executives.

Prof. Dr. Yusuf Şevki HAKYEMEZ | Justice

Mr. Hakyemez, holding office as a research assistant in the Karadeniz Technical University, Faculty of Economics and Administrative Sciences, Department of Public Administration in 1995, received a M.A. degree in law in 2005 and PhD degree in 2010. He served as the dean of the Karadeniz Technical University, Faculty of Economics and Administrative Sciences from 2010 to 2012. He then held office as the vice rector of the Karadeniz Technical University from 2012 to 2016. He sat as a member of the Right to Information Assessment Board from 2012 to 2016 and as a member of the Board of Human Rights Institution of Turkey from 2012 to 2015. He was appointed as the Justice of the Constitutional Court by the President of the Republic of Turkey on 25 August 2016 from among three candidates nominated by the Council of Higher Education.

Yıldız SEFERİNOĞLU | Justice

Mr. Seferinoğlu, a self-employed lawyer since 1993, was elected as a Member of Parliament from İstanbul in the 26th term in the general elections of 1 November 2015. He held offices as the Head of Turkey- Turkish Republic of Northern Cyprus Inter-Parliamentary Friendship Group and a member of Committee of Justice of the Turkish Grand National Assembly of Turkey. He held office as the Deputy Minister of Justice from 23 July 2018 to 25 January 2019. He was appointed as the Justice of the Constitutional Court by the President of the Republic of Turkey on 25 January 2019.

Selahaddin MENTEŞ | Justice

Mr. Menteş, starting public office as a candidate judge in Elazığ in 1995, served as a judge in Denizli-Buldan, Eskişehir-Han and Adıyaman-Gölbaşı. He sat as a member judge at the assize court in Diyarbakır. He then sat as the presiding judge of the 1st Chamber of the Diyarbakır Assize Court and the president of the Justice Commission for Penal Courts from 2010 to 2012. He held offices as the Deputy Undersecretary at the Ministry of Justice from 2014 to 2017 and as the Undersecretary at the Ministry of Justice from 18 October 2017 to 1 July 2018. He was then appointed as the Deputy Minister of Justice on 21 July 2018. He was appointed as the Justice of the Constitutional Court by the President of the Republic of Turkey on 6 July 2019.

Basri BAĞCI | Justice

Mr. Bağcı, starting public office as a candidate judge in Ankara in 1989, served as a public prosecutor in Sivas-Gürün, Siirt-Pervari, Konya-Hüyük respectively. He was appointed as Inspector at the Inspection Board at the Ministry of Justice in 1999 and as Chief Inspector at the Ministry of Justice in 2005. He held offices as the Deputy Director at the Directorate General for Prisons and Detention Houses and the Deputy Undersecretary at the Ministry of Justice. He received a master's degree in international law on human rights at the University of Exeter in the United Kingdom. He was appointed as the Justice of the Court of Cassation on 5 July 2017. He was appointed as the Justice of the Constitutional Court by the President of the Republic of Turkey on 2 April 2020.

III. FORMATION OF THE SECTIONS

There shall be two Sections of the Court in order to examine individual applications and these Sections shall be composed of the members except for the President of the Court. Each Section shall consist of seven members and a vice-president. These sections shall be named “the First Section” and “the Second Section”.

The members of the Section, except for the Vice-Presidents, shall be designated by the President taking into account their origin of appointment to the Court and a balanced distribution among the Sections. The Section where a member serves may be changed by the President upon the relevant member’s request or proposal by one of the Vice-Presidents.

Each Section convenes with four members under the chair of a vice-president. In absence of the Vice-President, the most senior member shall chair the meeting of the Section. In order to determine the formation of the Section, all members in that Section except for the Vice-President shall be listed according to their seniority. The first month’s meetings shall be attended by the Vice-President and four members of highest seniority. In the following months, it shall be ensured that each member who has not participated in the meetings serves in rotation according to their seniority ranking starting with the most senior member. The Presiding Judge of the Section shall prepare a list demonstrating the schedule for this rotation at the beginning of each year. If a new member joins the Section, the Presiding Judge of the Section shall make the necessary arrangement accordingly. The lists shall be announced to the members.

If a Section fails to achieve the quorum for meeting, the Presiding Judge of the Section shall assign the members from within the Section who do not participate in the meetings to participate in the meeting according to seniority ranking. If this is not possible, then the President of the Court shall assign members from the other Section upon the proposal of the Presiding Judge of Section.

As of 31 December 2020, pursuant to Article 29 of the Internal Regulations of the Constitutional Court, the list of the justices alternately attending the meetings of the Sections in 2020 is as follows:

FIRST SECTION

Hasan Tahsin GÖKCAN	Presiding Judge
Burhan ÜSTÜN	Member
Hicabi DURSUN	Member
Muammer TOPAL	Member
Recai AKYEL	Member
Yusuf Şevki HAKYEMEZ	Member
Selahaddin MENTEŞ	Member

SECOND SECTION

Kadir ÖZKAYA	Presiding Judge
Engin YILDIRIM	Member
Celal Mümtaz AKINCI	Member
M. Emin KUZ	Member
Rıdvan GÜLEÇ	Member
Yıldız SEFERİNOĞLU	Member
Basri BAĞCI	Member

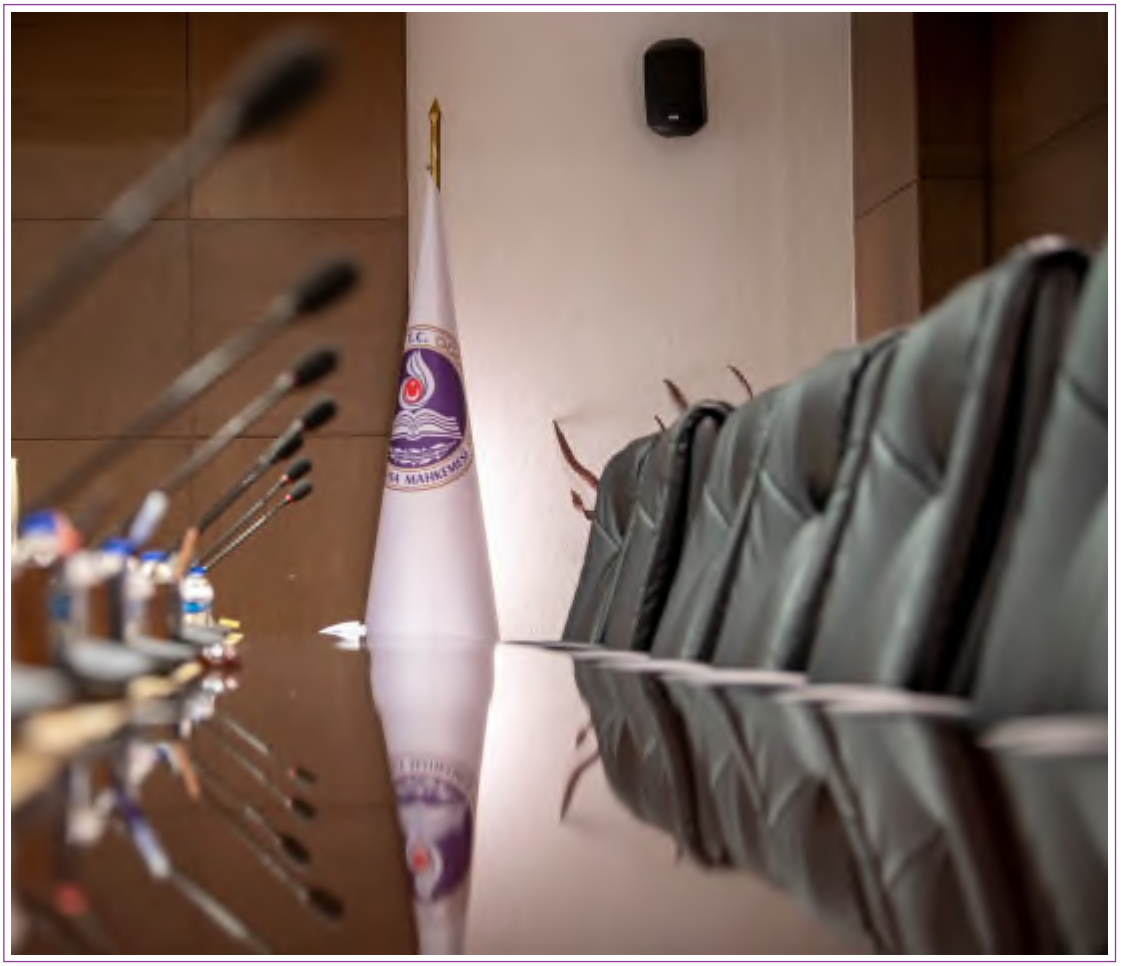
IV. FORMATION OF THE COMMISSIONS

Commissions consisting of two Justices under each Section have been set up to examine the admissibility of individual applications. Commissions have been assigned a number and named together with the number of the Section they are affiliated to. The Presiding Judge of the Section shall not take part in the Commissions and they shall be chaired by the senior member.

For the purpose of forming the Commissions, the members of a Section, except for the Vice President, shall be listed according to their seniority. The least senior member shall not participate in the first month's meetings of the Commissions. In the following months, it shall be ensured that each member who has not participated in the meetings serves in rotation according to their seniority starting with the most senior member. The Presiding Judge of the Section shall prepare the list demonstrating the schedule for this rotation at the beginning of each year. If a new member joins the Section, the Presiding Judge of the Section shall make the necessary arrangement accordingly. The lists shall be announced to the members.

In case of a vacancy in any of the Commissions, the reserve member of the Section shall substitute the absent member of that Commission.

The Plenary may change the Commissions affiliated to the Sections or alter the number of members composing the Commissions. In this case, the Commissions shall be re-formed in line with the procedure stipulated in the above paragraphs.



CHAPTER 02

DUTIES AND POWERS OF THE COURT

Duties and Powers of the Court

I. OVERVIEW

a) to make constitutionality review of laws, the Presidential decree-laws and the Rules of Procedure of the Grand National Assembly of Turkey both in form and in substance;

b) to examine and review the constitutional amendments only in form;

c) to conclude contested matters brought before the Constitutional Court by courts through concrete review pursuant to Article 152 of the Constitution;

d) to conclude individual applications filed, pursuant to Article 148 of the Constitution;

e) to try, in its capacity as the Supreme Criminal Court, the President of the Republic, the Speaker of the Grand National Assembly of Turkey, members of the Council of Ministers; the presidents and members of the Constitutional Court; the presidents, members and chief public prosecutors and deputy chief public prosecutor the Court of Cassation and the Council of State; the presidents and members of the Council of Judges and Prosecutors and the Court of Accounts, the Chief of General Staff, the Chiefs of Land, Naval and Air Forces due to offenses relating to their duties;

f) to conclude cases and notices concerning dissolution and deprivation of political parties of state aid and demands for determination of the status of dissolution;

g) to review or have reviewed lawfulness of property acquisitions by the political parties and their revenues and expenditures;

h) In case where the Grand National Assembly of Turkey resolves to remove parliamentary immunity or revoke membership of the parliamentary deputies or remove the immunity of the non-deputy ministers, to conclude the request for annulment by the concerned or any other deputies due to alleged incompatibility with the provisions of the Constitution, law or the Rules of Procedure of the Grand National Assembly of Turkey;

i) to elect the President and Vice-Presidents of the Constitutional Court and the President and Vice-President of the Court of Jurisdictional Disputes amongst members of the Court; and

j) to carry out other duties set forth in the Constitution.

The Court shall carry out these duties through the Plenary, two Sections and the Commissions operating under each Section.

II. DUTIES AND POWERS OF THE PLENARY

a) to deal with the cases filed for the alleged unlawfulness of any norm and hear the proceedings in its capacity as the Supreme Criminal Court;

b) to conduct financial audits on political parties and conclude cases and applications related to political parties;

c) to adopt or amend the Court's Internal Regulations;

d) to elect the President and Vice-Presidents as well as the President and the Deputy President of the Court of Jurisdictional Disputes;

e) to resolve the conflicts between the decisions and judgments of the Sections in dealing with the individual applications and to decide on the matters referred to the Plenary by the Sections;

f) to ensure the distribution of work between the Sections;

g) to resolve, by request of the President, the disputes arising from the distribution of work among Sections definitively;

h) to assign the other Section in case the workload of a Section increases within the year to an extent that the Section is unable to cope with in the normal course of operation, there arises an imbalance of workload among the Sections or if a Section is unable to deal with a task in its competence due to a factual or legal impossibility;

i) to decide on whether to institute disciplinary and criminal investigations against members, examination and prosecution measures and, when necessary, on disciplinary punishments to be pronounced or termination of membership;

j) to examine objections; and

k) to carry out duties assigned to the Plenary by the Law and the Court's Internal Regulations.

The Plenary shall render its decisions by an absolute majority of those attending the meeting. In case of equal division of votes, the decision shall be made in line with the side which the President has opted for. A two-thirds majority is sought for decisions on annulment of Constitutional amendments, dissolution of political parties or deprivation of political parties of state aid.

III. DUTIES AND POWERS OF THE SECTIONS

a) to carry out the examination on merits of the applications declared admissible by the Commissions; and

b) If deemed necessary by the chair of the Section, to carry out the joint examination both on admissibility and on merits of the applications in respect of which the Commissions could not render a decision as to the admissibility.

The Sections may declare an application inadmissible at any stage of the examination if they determine an obstacle to admissibility or such circumstances arise later on.

If the decision to be made by one of the Sections regarding a pending application is likely to conflict with a decision previously made by the Court or if the nature of the subject matter requires it to be resolved by the Plenary, then the relevant Section may relinquish from deciding that application. The Presiding Judge of the Section shall bring this matter to the attention of the President of the Court to refer the application to the Plenary.

The Sections shall render its decisions by an absolute majority of those attending the meeting.

Following the examination on the merits of the case, the question whether the applicant's right has been violated shall be decided by the Section. In case of a judgment finding a violation, the Court shall indicate the steps to be taken in order to redress the violation and its consequences. In this case, the following options are available for the Court:

i) If it is determined that the violation arouse from a court judgment, the file shall be sent to the concerned court for a retrial so as to ensure redress of the violation and its consequences. The relevant court shall carry out a retrial in such a way to redress the violation and its consequences as indicated by the Section's judgement finding a violation and render a speedy decision over the case-file if possible.

ii) In cases where the Section has found a violation but there is no legal interest in conduction of a retrial, the applicant may be awarded a reasonable compensation.

iii) In the event that the determination of the compensation amount requires a more detailed examination, the Section may, without making any such determination, require the applicant to bring an action before ordinary courts.

IV. DUTIES AND POWERS OF THE COMMISSIONS

The examination on admissibility of applications shall be conducted by the Commissions.

An individual application to be declared admissible shall meet the requirements stipulated under Articles 45 and 47 of Code no. 6216. The examination on admissibility of applications shall be conducted by the Commissions.

The decisions by the Commissions on admissibility or inadmissibility of an application shall be taken unanimously. If unanimity cannot be obtained, the application shall be referred to the Section to conduct the admissibility examination.

Inadmissibility decisions are final and are notified to the parties concerned.

CHAPTER 03

THE COURT IN 2020

The Court in 2020

I. DEVELOPMENTS AT THE COURT IN 2020

The pandemic of Covid-19 having an impact on the countries all over the world in 2020 has led to some precautions to be taken in our country, and the Court has also been affected by such precautions. Although the pandemic has been widespread in the society, no infection case has been reported within the Court as a result of the extensive measures taken.

The Court has continued to apply its approach which broadens the scope of protection afforded to, and increases the standards in terms of, fundamental rights and freedoms in the decisions and judgments it has rendered in 2020. In alternately assigning the rapporteur-judges dealing with individual applications to the Sections and Commissions, it has been intended to ensure formulation of more qualified decisions and judgments which are in conformity with the established case-law.

In 2020, a total of 108 decisions/judgments rendered by the Court, 78 in individual application and 30 in constitutionality review, has been made available to the public through a press release.

In accordance with the decision rendered by the Plenary of the Constitutional Court on 19 February 2020 and Article 23 § 3 of the Code on Establishment and Rules of Procedures of the Constitutional Court, the Directorate of Judgments was established so as to ensure that following the execution of the judgments and providing the Plenary with information in this respect, which fall within the scope of the tasks of the Secretary General, are fulfilled in a high-quality, efficient and operative manner.

The Financial Agreement with respect to 2019 Action Plan of the Project of Supporting the Effective Implementation of the Turkish Constitutional Court Judgments in

the field of Fundamental Rights co-funded by the European Union and the Council of Europe was published in the Official Gazete dated 19 June 2020 and numbered 31160. The pandemic of Covid-19 has caused some delays in the project schedule and it is intended to launch the relevant activities in 2021.

Due to the pandemic of Covid-19 spreading all over the world, the means of video conference was opted for during the meetings at both national and international level, and therefore, the Court took part in such meetings via video conference.

The Summer School Program of the Association of Asian Constitutional Courts and Equivalent Institutions organized by the Court every year was also held via video conference in 2020 with the participation of representatives from 28 countries.

A symposium on "*the Protection of Fundamental Rights and Freedoms in the Age of the Internet*" was held at the Constitutional Court building on 23 September 2020 with the participation of a limited number of invitees within the scope of the precautions taken against the pandemic of Covid-19, on the occasion of the 8th anniversary of the adoption of the mechanism of individual application to the Constitutional Court. While Assoc. Prof. Dr. İbrahim Şahbaz, Head of the 4th Criminal Chamber of the Court of Cassation moderated the first session, Assoc. Prof. Dr. Selami Demirkol, Judge at the Assembly of Civil Chambers of the Council of State, moderated the second session. In addition, Prof. Dr. Faruk Bilir, Head of the Board of Protection of Personal Data, Mr. Bahadır Aziz Sakin, Head of the Internet Department at the Information Technologies and Communications Authority, Dr. Mehmet Bedii Kaya, Lecturer at the Information Technology Law Department of İstanbul Bilgi University, Assoc. Prof. Dr. Mesut Serdar Çekin, Lecturer at the Civil Law Department of Turkish-German University, Mr. Özgür Duman and Ms. Ceren Sedef Eren, Rapporteur-Judges at the Constitutional Court attended the symposium and submitted their presentations.

The first Court hearings, where the Constitutional Court acted as the Supreme Criminal Court, were held concerning the accused who were former judges of the Council of State (file no E.2020/3) on 24 November 2020 and also those who were former judges of the Court of Cassation (file no E.2020/4) on 22 December 2020, for offences of misconduct in office.

A section called *"Leading Judgments related to the criteria for Individual Application"* was created on the website of the Court; and therefore, admissibility criteria in relation to individual application were defined under ten separate headings and summaries of 129 leading judgments with respect to such criteria were included in this section. The relevant links were indicated to ensure that the full judgments could be accessed and while icons were used for the criteria, visual aids were used for the judgments. The graphics on *"The Guidelines for Individual Application"* and *"Decision-Making Process in Individual Application"* were designed in order for the visitors of the website to see all the stages of individual

The symposium held on the occasion of the 8th anniversary of the adoption of individual application

application process step by step. Visual designs were used so as to increase the visibility and to improve the readibility of the relevant page. Likewise, a section on "*Statistics on Norm Review"* was designed on the website and the relevant data were introduced with live content graphics.

"*Media Bulletin on the Turkish Constitutional Court*" has been drawn up through a daily summary of the news and columns about the Turkish Constitutional Court contained in the national media and presented on the news websites. Going over the social media as well as print and visual media with respect to the judgments and developments having a broad repercussion for the public, particular bulletins have been created. The *Görünüm* Journal, a bulletin whereby news and information on the Court and its decisions/judgments as well as statistical information are provided, continues to be published on digital platform.

Streghthening the software infrastructure in 2020, the scope of the system of the Decisions/Judgments Data Base was expanded. Technological facilities with regard to remote work were increased so that the activities would not be hindered due to the pandemic of Covid-19.

An initiative to re-structure and institutionalize the Court's archive was launched in 2019 and the activities concerning this initiative continued in 2020 as well.

Necessary and related technical controls were carried out so as to ensure occupational safety at the workplace.

Under the auspices of the Constitutional Jurisdiction Research Centre (AYAM), a unit within the Court formed to establish and develop the Court's relationship with the academic world, the Court has continued to organize training programmes, ensure formation of platforms for academic negotiations and coordinate the process during which the Court's publications were issued and the book titled "*Constitutional Justice*" (Peer-reviewed Journal) was offered to the utility of the academic circle.

The Court published and distributed, at national and international level, the 56th issue of the "*Journal of Constitutional Court Decisions/Judgments*" in 2 volumes, "*Selected Judgments on Individual Applications*" in 2 volumes, "*Constitutional Justice in Asia*" in 3 volumes (the 6th, 7th and 8th summer school books), "*Selected Judgments*" in 5 volumes pertaining to the years 2014, 2015, 2016, 2017 and 2018, the "*Constitutional Justice*" Journal (Peer-reviewed Journal) no. 36/2 and 37/1, the "*2019 Annual Report*" both in Turkish and English; and also published and distributed, at national level, "*Judgment Summaries on the Right to Property*", books written by 14 assistant rapporteurs- including collection of the theses prepared to be able to be appointed as rapporteurs- and the "*2020 Introductory Booklet*".

The number of books at the library of the Turkish Constitutional Court, the digital sources of which are diversified, has increased from around 25000 to 26658.

II- INTERNATIONAL ACTIVITIES OF THE COURT

1. OVERVIEW

The Constitutional Court of the Republic of Turkey, being one of the oldest constitutional justice organs of the world, has become a centre of interest of the global constitutional justice in the recent years due to its important decisions and judgments through the interpretation of human rights and the Constitution.

Due to its many cultural and historical links to a great number of countries, the Turkish Constitutional Court is among the first members of both the Conference of the European Constitutional Courts (CECC) and the Association of Asian Constitutional Courts and Equivalent Institutions (AACC). The Turkish Constitutional Court is also one of the founding members of the World Conference on Constitutional Justice (WCCJ), which is an umbrella organization for all the constitutional justice organs and organizations from around the world. It is also the observer member of the Conference of Constitutional Jurisdictions of Africa (CCJA).

The Constitutional Court attaches utmost importance to the cooperation with foreign constitutional courts and international courts or institutions.

Presidents, justices and academicians both from our country and foreign countries are invited to the symposia organized annually within the scope of the traditional foundation anniversary activities by the Court.

Also, the Constitutional Court participates actively in international symposia, and undertakes various activities like academic studies, publishing of books, bilateral cooperation, and etc. to promote itself and the Turkish judiciary to the world.

2. COOPERATION WITH INTERNATIONAL ORGANIZATIONS

The Constitutional Court of the Republic of Turkey is member to the following international organizations in the field of constitutional justice. The Court is also in a close cooperation with the European Court of Human Rights by virtue of the individual application system.

A. World Conference on Constitutional Justice (WCCJ)

The World Conference on Constitutional Justice unites 117 Constitutional Courts/Councils and Supreme Courts from five continents (Africa, the Americas, Asia, Australia/Oceania and Europe). It promotes constitutional justice –constitutional review including human rights adjudication– as a key element for democracy, the protection of human rights and the rule of law. The World Conference pursues its objectives through organization of regular congresses, by participating in regional conferences and seminars, by orchestrating the share of experiences and best practices, and by offering good services to its members on request.

The Turkish Constitutional Court became a member of the World Conference in 2013. The Court was elected to the Bureau of the Conference at the 3rd Congress in Seoul and served in the Bureau until the 4th Congress in Vilnius (2015-2017). As for the 5th Congress of the World Conference on Constitutional Justice, it will be hosted by the Constitutional Court of Indonesia from 4-7 October 2022 under the theme of "*Constitutional Justice and Peace*."

B. Association of Asian Constitutional Courts and Equivalent Institutions (AACC)

Association of Asian Constitutional Courts and Equivalent Institutions, is an Asian regional forum for constitutional justice established in July of 2010 to promote the development of democracy, rule of law and fundamental rights in Asia by increasing the exchanges of information and experiences related to constitutional justice and enhancing cooperation and friendship between institutions exercising constitutional jurisdiction.

The Turkish Constitutional Court undertook the term presidency for the period between 2012 and 2014. The Court has been organizing annually the summer school programmes for the mid-level legal practitioners of the AACC member institutions since 2013. Guest participants from Africa, Europe and the Balkans are also invited to the summer schools. Academicians and experts, along with the representatives of the participating institutions, make presentations within the framework of a thematic issue on human rights during the summer schools. Thus, exchange of information and experience is ensured in the field of constitutional jurisdiction and human rights.

At the 3rd Congress of the AACC organized in Indonesia's Bali Island in 2016, it was decided that the Permanent Secretariat of the AACC be established, as well as the Centre for Training and Human Resources Development, one of the three pillars of the Permanent Secretariat, be established and launched in Turkey. In this context, subsequent to the 4th Summer School, the 5th Summer School, the 6th Summer School, the 7th Summer School and the 8th Summer School were also realized within the scope of the activities of this Centre.

The 4th Congress of the AACC and the ceremony on the occasion of the 25th anniversary of the adoption of the Constitution of Kazakhstan were held via video conference due to the precautions of Covid-19 pandemic. President of the Turkish Constitutional Court Mr. Zühtü Arslan, Secretary General Mr. Murat Şen and Deputy Secretary General Mr. Mücahit Aydın participated in the Congress organized between 26 – 28 August 2020 under the auspices of the Constitutional Council of Kazakhstan in its capacity of the Term-President of the AACC. The Board of Members of AACC convened at the Congress. During the meeting, the amendments on the AACC Statute

The 4th Congress of the AACC, held via video conference

were approved unanimously. In addition, the Supreme Court of Bangladesh acquired membership of the Association. Therefore, the current total number of member Courts/Councils/Institutions of the AACC is 19. Discussions were also held on the theme "*The XXI Century Constitution-the Rule of Law, the Value of Person and the Effectiveness of State*" during the Congress. After having congratulated the Constitutional Council of Kazakhstan on the occasion of the 25th anniversary of the adoption of the Constitution of Kazakhstan, President Arslan congratulated the Supreme Court of Bangladesh for the membership and expressed his appreciation for the expansion of the Association. During the Board of Members Meeting, Secretary General of the Constitutional Court Mr. Murat Şen presented the activity report of the Center for Training and Human Resources of the AACC. On the second day of the Congress, Deputy Secretary General Mr. Mücahit Aydın delivered a presentation on the case-law of the Turkish Constitutional Court with regard to the e-hearings conducted via digital technology. The 4th Congress of the AACC came to an end with the adoption of the joint Declaration.

President Mr. Zühtü Arslan, delivering his opening speech at the 8th Summer School of the AACC

Within the scope of the activities of the Permanent Secretariat of the AACC, the 8th Summer School was held by the Constitutional Court of the Republic of Turkey via video conference due to the Covid-19 pandemic between 7-8 September 2020. Among those who participated in the Summer School programme with the theme of "*Restriction of Human Rights and Freedoms in Health Emergencies: The Example of Covid-19*" are justices, rapporteur judges, researchers, speakers, legal experts and advisors from the constitutional courts or equivalent institutions of Indonesia, Korea, Afghanistan, Albania, Algeria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Cameroon, Georgia, India, Kazakhstan, Kosovo, the Kyrgyz Republic, Malaysia, the Maldives, Mongolia, Montenegro, the Union of Myanmar, North Macedonia, the Philippines, the Russian Federation, Tajikistan, Thailand, the Turkish Republic of Northern Cyprus, Ukraine and Uzbekistan. The 8th Summer School Program started with the opening speech delivered by President of the Turkish Constitutional Court, Mr. Zühtü Arslan. Then thematic discussions, moderated by Mr. Mücahit Aydın, Deputy Secretary General of the Turkish Constitutional Court, were held. The theme of the discussions at the 1st session was "*Constitutional and Legal Framework on Health Emergencies*", while the constitutional and legal bases of Covid-19 measures were discussed at the 2nd session.

Secretary General Mr. Murat Şen, delivering his closing remarks at the 8th Summer School of the AACC

The introductory video prepared for the Summer School was appreciated by the participants. The program came to an end with the closing remarks of Mr. Murat Şen, Secretary General of the Turkish Constitutional Court.

The Liaison Officers of the three Permanent Secretariats of the AACC -either the liaison officers of the AACC website or of the Association- held a meeting via video conference on 22 September 2020 to discuss about the current situation both in their own countries and at their respective institutions regarding the working methods during the pandemic of Covid-19; to decide about when, how often and among whom the regular online and/or face-to-face meetings of the Secretariats should be held; and finally to share the upcoming/ongoing/recently organized project of each Secretariat. On behalf of the Permanent Secretariat for Planning and Coordination conducted by the Constitutional Court of Indonesia, Director of the AACC Unit Mrs. Indah Apriyanti Tomas and Bilateral and Regional Cooperation Analyst Ms. Olfiziana Tri Hastuti; on behalf of the Permanent Secretariat for Research and Development conducted by the Constitutional

AACC's Secretariat for Research & Development conducted by the Constitutional Court of Korea, holding the 2nd Research Conference via video conference

Court of Korea, Assistant Director of the AACC Unit Ms. Sora Kang; and on behalf of the Centre For Training and Human Resources Development conducted by the Constitutional Court of Turkey, Deputy Director of International Relations Department Mrs. Özlem Talaslı Aydın attended the online meeting.

Amid the Covid-19 pandemic, the Secretariat for Research and Development of the AACC conducted by the Constitutional Court of Korea held the 2nd Research Conference via video conference between 23–25 September 2020 under the theme of "*Freedom of Expression: Experience of AACC Members*." Twenty-eight researchers from constitutional courts and equivalent institutions in Indonesia, Azerbaijan, South Korea, Maldives, Afghanistan, Malaysia, Kyrgyzstan, Kazakhstan, Mongolia, Thailand, Myanmar, Turkey, Uzbekistan, Tajikistan, Russia, the Philippines, and India participated in the conference. On behalf of the Turkish Constitutional Court, Rapporteur Judge Ms. Ceren Sedef Eren delivered a presentation on 25 September 2020.

C. The Conference of European Constitutional Courts (CECC)

The Conference of European Constitutional Courts was established in Dubrovnik/Croatia in 1972 in order to bring together European constitutional or equivalent courts conducting constitutional review. Turkish Constitutional Court (TCC) is among the first members of the Conference. TCC's membership dates back to 1987.

During the meeting of the 7th European Constitutional Courts Conference held in Lisbon between 26-30 April 1987, the Turkish Constitutional Court was admitted to membership and a resolution was made to hold the next Congress in Turkey in 1990. The preparatory meeting for the 8th Congress was held in İstanbul between 14-17 November 1988. The theme of the Congress was determined as "*Hierarchy of Constitutional Norms and its Function in the Protection of Fundamental Rights*." The Congress was held between 7-10 May 1990 in Ankara with the participation of 102 representatives/delegates from various countries and institutions.

The term presidency of the Conference for the period between 2017-2020 has been undertaken by the Constitutional Court of the Czech Republic, and the 18th Congress was held in the Czech Republic between 24-26 February 2021.

D. The Judicial Conference of the Constitutional/Supreme Courts/Councils of the Organization of Islamic Cooperation (OIC) Member/Observer States

The 1st Judicial Conference of the Constitutional/Supreme Courts/Councils of the Organization of Islamic Cooperation (OIC) Member/Observer States, hosted by the Turkish Constitutional Court, was held in İstanbul between 14-15 December 2018. At the end of the Conference, it was held that the 2nd Judicial Conference would be held in Indonesia in 2020 under the patronage of the Indonesian Constitutional Court; however, due to the Covid-19 pandemic, it was decided that the second Conference be postponed to a later date. As for the Joint Preparatory Meeting of the 2nd Judicial Conference, it was held in Bali, Indonesia between 2-7 November 2019 during the 3rd International Symposium of the Constitutional Court of the Republic of Indonesia and the Turkish Constitutional Court was represented by Secretary General Mr. Murat Şen.

E. The Conference of Constitutional Jurisdictions of Africa (CCJA)

On 7-8 May 2011, the Constitutional Courts/Councils and equivalent institutions in Africa held "the Constitutive Congress of the African Area of Constitutional Justice" in Algiers, Algeria. During the Constitutive Congress, the participants examined and adopted "*the Statute of the Conference of Constitutional Jurisdictions of Africa*" and proceeded to the election of the first Executive

Bureau and the Secretary General. The CCJA was thereby established and the headquarters of the general secretariat was set in Algiers. The Constitutional Court of Turkey acquired the status of observer to the CCJA on 5 October 2017.

The CCJA holds a Congress every two years. Since its creation, five Congresses have been held respectively in Algiers/Algeria (2011), Cotonou/Benin (2013), Libreville/Gabon (2015), Cape Town/South Africa (2017) and Luanda/Angola (2019).

In order to promote constitutional justice in Africa and to promote the exchange of experiences, the CCJA holds an international seminar between two Congresses. The first seminar took place in Cotonou in 2013 under the theme of "*The Constitutional Judge and The Political Power*". The second seminar was held in Algiers in 2017 under the theme of "*The Access of Individuals to Constitutional Justice*". The third seminar was going to be held in Mozambique between 15 – 16 June 2020 under the theme of "*Electoral Justice: Transparency, Inclusiveness and Integrity of the Process*"; however, due to the Covid-19 pandemic, it was decided that the seminar be postponed to a later date.

F. Council of Europe (CoE)

Head of the Department for the Execution of Judgments of the European Court of Human Rights, Council of Europe, Legal Experts at the Council of Europe Ms. Işık Batmaz, and Mr. Suat Uzun and Judge at the Ministry of Justice Mr. Serhat Yılmaz rendered a study visit on 8 January 2020 to the Turkish Constitutional Court to exchange their views on the violation judgments rendered by the ECHR. The delegation of the Council of Europe was received by Secretary General Mr. Murat Şen, Deputy Secretary General Mr. Mücahit Aydın, Rapportur Judge Mr. Akif Yıldırım, Expert Mr. Özcan Altay and Deputy Director of International Relations Mrs. Özlem Talaslı Aydın.

A delegation from the Venice Commission- comprised of Rapporteur for Spain Mr. Josep Maria Castella, Rapporteur for USA Mr. Paolo G. Carozza, Rapporteur for UK Mr. Timothy Otty and Officer in charge of the Secretariat Mr. Michael Janssen- paid a visit to the Turkish Constitutional Court on 6 February 2020, within the scope of the preparatory activities for the report they would present on their opinions -which the Congress of Local and Regional Authorities of Europe had asked about- with regard to the decisions that the Supreme Electoral Council and the Turkish Ministry of Interior took concerning the elected mayors in the South-eastern region of Turkey. The delegation was received by Secretary General Mr. Murat Şen, Deputy Secretary General Mr. Mücahit Aydın, Rapporteur Judge Ms. Gülsüm Gizem Gürsoy, Director Mr. Baran Kuşoğlu, Deputy Director of International Relations Mrs. Özlem Talaslı Aydın and Expert Ms. Ayça Onural.

The preparatory meeting of the Project on Implementation of Judgments was held at the Turkish Constitutional Court on 27 February 2020. The senior project officers Mr. Sergey Dikman, Ms. Pınar Başpınar and Ms. Ezgi Koçak attended the meeting on behalf of the Council of Europe whereas the Turkish Constitutional Court was represented by Secretary General Mr. Murat Şen, Deputy Secretary General Mr. Mücahit Aydın, Director of International Relations Mr. Baran Kuşoğlu, Expert Mr. Özcan Altay and Project Coordinator Mr. Korhan Pekcan.

President Mr. Zühtü Arslan, meeting with Secretary General of the Council of Europe Ms. Marija Pejčinović Burić

G. European Court of Human Rights (ECHR)

The Delegation of the Turkish Constitutional Court attended the opening ceremony of the judicial year of the ECHR. President of the Constitutional Court Mr. Zühtü Arslan and the accompanying delegation paid a visit to France on 30-31 January 2020 on the occasion of the official opening of the judicial year of the ECHR. The Constitutional Court delegation accompanying President Mr. Arslan was comprised of Vice-Presidents Mr. Hasan Tahsin Gökcan and Mr. Recep Kömürcü, Justice Mr. Selahaddin Menteş, Chief Rapporteur-Judges Mr. Hamit Yelken, Mr. Murat Azaklı, Mr. Abdullah Çelik, Mr. Ayhan Kılıç and the Head of the Office of the President Mr. Orhan Yalınız.

President Mr. Arslan and the accompanying delegation first held a meeting with the then President of the Constitutional Council of France Mr. Laurent Fabius. During the meeting, the parties agreed on the enhancement of relations and cooperation between the Turkish Constitutional Court and the French Constitutional Council. President Mr. Arslan then had a meeting with Secretary General of the Council of Europe Ms. Marija Pejčinović Burić. During the meeting, an emphasis was placed on the ongoing cooperation between these two institutions. President Mr. Arslan also paid a visit to ECHR Judge Ms. Saadet Yüksel and reiterated his sincere wishes for her success. The Constitutional Court delegation negotiated with the President and judges of the Second Section of the ECHR as well as the Turkish jurists.

President of the Turkish Constitutional Court Mr. Zühtü Arslan held a meeting with President of the ECHR Mr. Robert Spano, Judge of the ECHR Ms. Saadet Yüksel and Deputy Registrar of Section 2 of the ECHR Mr. Hasan Bakırcı on 3 September 2020 at his office. Deputy Presidents of the Turkish Constitutional Court Mr. Hasan Tahsin Gökcan and Mr. Kadir Özkaya, Deputy Secretary General Mr. Mücahit Aydın, Chief Rapporteur-Judge Mr. Ayhan Kılıç and Deputy Director of International Relations Mrs. Özlem Talaslı Aydın also attended the meeting.

President Arslan expressed, first of all, his gratitude for Mr. Spano's visit to Turkey. Then Mr. Arslan congratulated Mr. Spano on his being elected as the President of the ECHR last May, and

President Mr. Zühtü Arslan welcomed President of the ECHR Mr. Robert Spano at his office

wished him success in his new post. Underlying that the visit will reinforce the cooperation between the ECHR and Turkey, Mr. Arslan shared information on the work and the case-law of the Constitutional Court. President Arslan emphasized that dialogue and meetings, the assignment of the Constitutional Court's Rapporteurs to the ECHR and the project on Supporting the Effective Implementation of Turkish Constitutional Court Judgments in the field of Fundamental Rights jointly conducted with the Council of Europe are important for the development of the relation between the two institutions. President of the ECHR Mr. Spano also stressed the importance of the relations between the two institutions and expressed his wish to strengthen the dialogue and cooperation between the ECHR and Turkey during his term of presidency. Highlighting the importance on maintaining the effectiveness of the individual application to the Constitutional Court, Mr. Spano expressed his conviction that favourable results can be achieved through dialogue and cooperation despite the possible disagreements on some specific matters.

Visit to the ECHR by President Mr. Zühtü Arslan accompanied by the delegation comprised of the Constitutional Court's Justices and Chief Rapporteur-Judges

3. COOPERATION WITH NATIONAL CONSTITUTIONAL COURTS

The Turkish Constitutional Court has signed for the last ten years several memorandums of understanding with the other constitutional/supreme courts and institutions in order to enhance its bilateral cooperation. The total number of courts/institutions with which a memorandum of understanding –including the recent one signed with the Constitutional Council of Djibouti– has been signed is 27 (twenty-seven). In this sense, the Turkish Constitutional Court hosts with Turkish hospitability and amicably the guest delegations, members, researches and staff from the foreign constitutional courts/institutions. These memorandums of understanding enable exchange of experiences and knowledge between the courts/institutions concerned.

The Turkish Constitutional Court has signed a memorandum of understanding with the following constitutional courts or equivalent institutions:

Indonesia	
The Constitutional Court of Indonesia	24 April 2007
North Macedonia	
Constitutional Court of North Macedonia	26 April 2007
Azerbaijan	
Constitutional Court of Azerbaijan	10 May 2007
Chile	
Constitutional Court of Chile	07 June 2007
Korea	
Constitutional Court of the Republic of Korea	24 April 2009
Ukraine	
Constitutional Court of Ukraine	24 April 2009
Pakistan	
Federal Supreme Court of Pakistan	24 April 2009
Bosnia and Herzegovina	
Constitutional Court of Bosnia and Herzegovina	24 April 2009
Bulgaria	
Constitutional Court of Bulgaria	07 April 2011
Tajikistan	
Constitutional Court of Tajikistan	26 April 2012
Montenegro	
Constitutional Court of Montenegro	28 April 2012
Afghanistan	
Independent Commission for Overseeing the Implementation of Constitution of the Islamic Republic of Afghanistan	25 April 2013

Albania	
Constitutional Court of Albania	10 June 2013
Thailand	
The Constitutional Court of the Kingdom of Thailand	29 April 2014
Kyrgyzstan	
The Constitutional Chamber of the Supreme Court of the Kyrgyz Republic	28 September 2014
Romania	
Constitutional Court of Romania	17 October 2014
Algeria	
Constitutional Council of People's Democratic Republic of Algeria	26 February 2015
Turkish Republic of Northern Cyprus	
Supreme Court of Northern Cyprus	29 June 2015
Kosovo	
Constitutional Court of Kosovo	27 April 2016
Iraq	
Federal Supreme Court of Iraq	25 April 2017
Kazakhstan	
Constitutional Council of the Republic of Kazakhstan	25 April 2017
Mongolia	
Constitutional Court of Mongolia	25 April 2017
Georgia	
Constitutional Court of Georgia	28 April 2017
Russia	
Constitutional Court of the Russian Federation	30 March 2018
Bolivarian Republic of Venezuela	
The Supreme Tribunal of Justice of the Bolivarian Republic of Venezuela	10 May 2018
Somalia	
Supreme Court of Somalia	19 December 2018
Djibouti	
Constitutional Council of Djibouti	17 June 2019

4. INTERNATIONAL ACTIVITIES OF THE COURT IN 2020

The Turkish Constitutional Court maintained its mutual contacts with both the superior courts of the foreign countries and international tribunals and institutions during 2020.

Mr. Serkan Cengiz, Lawyer and Analyst in the field of IPA III Fundamental rights paid a courtesy visit to the Turkish Constitutional Court on 14 February 2020 on behalf of European Union Delegation to Turkey. Mr. Cengiz was received by Deputy Secretary General Mr. Mücahit Aydın, Raporteur Judge Dr. Abdullah Tekbaş, Director Mr. Baran Kuşoğlu and Deputy Director of International Relations Mrs. Özlem Talaslı Aydın.

The International Conference on "*Constitutional Justice and the Protection of Rights and Freedoms*" was held on the occasion of the 30th anniversary of the Constitutional Council of the People's Democratic Republic of Algeria. The Turkish Constitutional Court was represented by Justice of the Constitutional Court of the Republic of Turkey Mr. Yıldız Seferinoğlu and Secretary General of the Constitutional Court Mr. Murat Şen at the conference held between 23-24 February 2020 in Algeria. Throughout the conference and events, the delegation of the Turkish Constitutional Court negotiated and exchanged views with other delegations.

Justice Mr. Yıldız Seferinoğlu and Secretary General Mr. Murat Şen, presenting their gift to President of the Constitutional Council of Algeria Mr. Kamel Feniche

Justice Mr. Muammer Topal and Rapporteur-Judge Mr. Hüseyin Kaya, attending the international conference organized by the Supreme Judiciary Council of Qatar

The international conference themed "*High-Level Meeting of the Global Judicial Integrity Network – Past, Present, Future*" was organized by the Supreme Judiciary Council of Qatar. Justice of the Turkish Constitutional Court Mr. Muammer Topal and Rapporteur-Judge Mr. Hüseyin Kaya attended the conference held in Doha between 25-27 February 2020 on behalf of Turkey. Throughout the conference and events, the delegation of the Turkish Constitutional Court negotiated and exchanged views with other delegations.

A delegation of the Turkish Republic of Northern Cyprus presided by the Minister of Labour and Social Security Mr. Faiz Sucuoğlu and comprised of some consultants as well as the Ambassador of the Turkish Republic of Northern Cyprus to Turkey Mr. Kemal Köprülü paid a visit to the Turkish Constitutional Court on 7 July 2020 to have an exchange of opinions on the pandemic of Covid-19 and the relevant measures taken in this scope. The delegation was received by President Mr. Zühtü Arslan, Deputy Secretary General Mr. Mücahit Aydın and the Head of the Office of the President Mr. Orhan Yalınız.

President Mr. Zühtü Arslan welcomed Minister of Labour and Social Security of the Turkish Republic of Northern Cyprus Mr. Faiz Sucuoğlu at his office

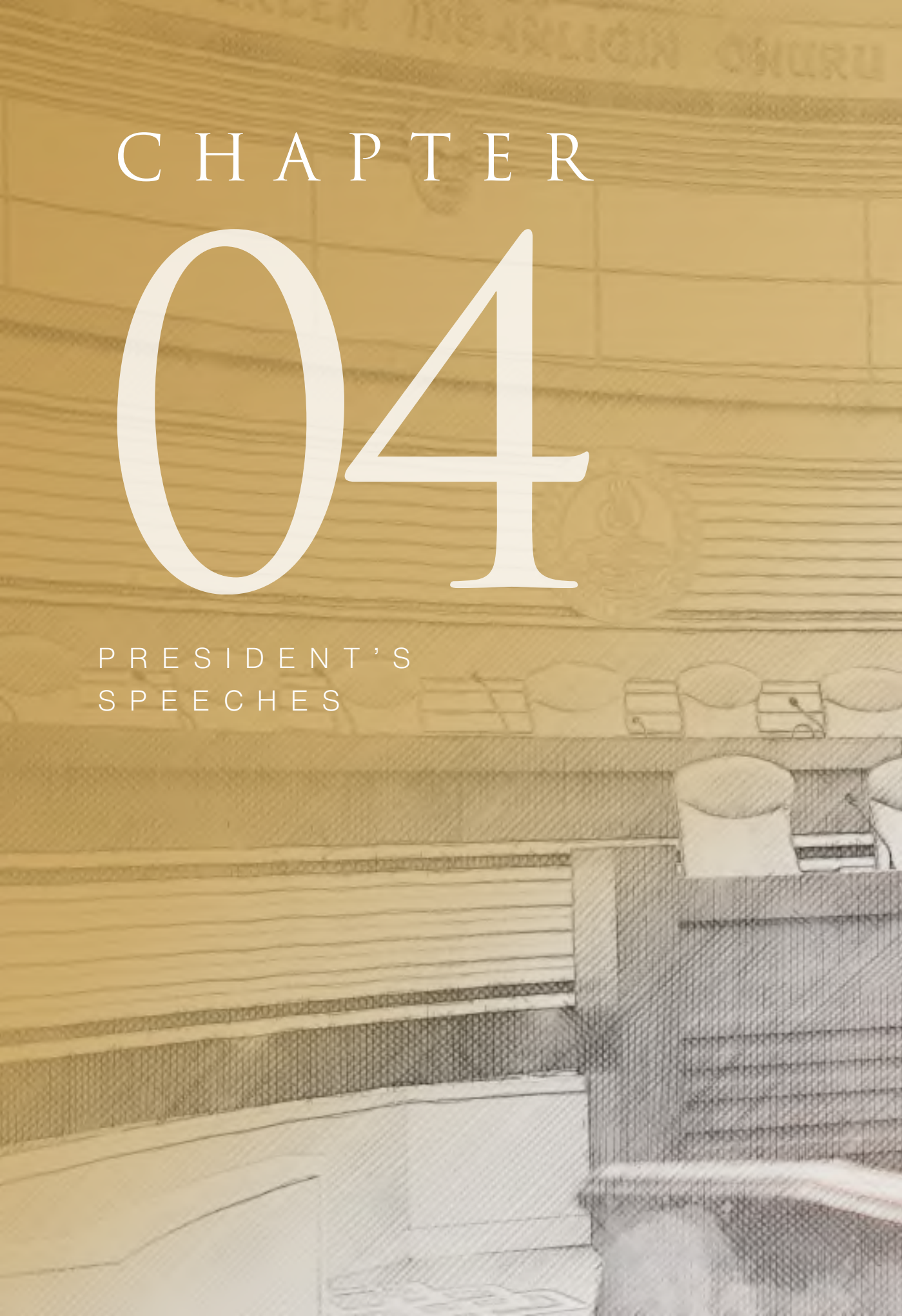
President of the Constitutional Court of North Macedonia Mr. Sali Murati and the accompanying delegation paid a visit to the Turkish Constitutional Court on 10 September 2020. Receiving Mr. Murati at his office, President Arslan expressed his satisfaction with the strong relationship between the courts of the two countries and stressed that the existing ties will continue increas-

President Mr. Zühtü Arslan welcomed President of the Constitutional Court of North Macedonia Mr. Sali Murati at his office

ingly. A delegation of the International Press Institute (IPI) paid a visit to the Turkish Constitutional Court on 8 October 2020. Some delegates attended the meeting in person whereas some attended via video conference. The Turkish Constitutional Court was represented by Secretary General Mr. Murat Şen, Deputy Secretary General Mr. Mücahit Aydın, Rapporteur Judges Mr. Yunus Heper and Mr. Fatih Hatipoğlu, Director of International Relations Mr. Baran Kuşoğlu, Translator-Interpreter Mrs. Safiye Bal Kuzucu and Project Coordinator Mr. Korhan Pekcan.

CHAPTER 04

PRESIDENT'S SPEECHES



25 April 2020 Message, the 58th Anniversary of the Turkish Constitutional Court

We had to postpone the ceremony to be held on the occasion of the anniversary of the Constitutional Court, which is held annually with great participation, due to the Covid-19 pandemic.

As is known, the world has been fighting a fast-spreading and life-threatening virus that has no boundaries. Our daily routines, habits and relationships with other people have changed radically. In short, the whole world is going through hard and critical times.

In these hard times, we need, more than ever, patience, mutual understanding and solidarity both individually and socially. Today is the day of national consolidation with the spirit of unity and solidarity.

Undoubtedly, we have witnessed throughout the history that there are heroes of hard times. In this period where we fight the pandemic, particularly healthcare professionals work with great sacrifice. Referring to a famous statement made during the Second Word War, we can say about the healthcare professionals in present-day conditions that "Never in the history of fight against pandemic was so much owed by so many to so few".

In this context, I would like to express my gratitude to the Ministry of Health, the Science Committee, all of our healthcare professionals, especially our doctors, and all those who have contributed to the fight against pandemic. I would also like to express my belief that by following the precautions suggested by the health authorities, we will overcome these hard times within the shortest time possible and with the least loss.

Besides, by placing everyone, if you will, under house-arrest, the pandemic has once again reminded us how valuable are our fundamental rights and freedoms. Fundamental rights and freedoms, such as the right to live in a healthy environment, personal freedom, freedom of movement, and notably the right to life, are sine qua non for human to live humanely.

Turkish Constitutional Court, which celebrates its 58th anniversary this year, strives to fulfil its duty of protecting constitutional rights and freedoms in all circumstances. The Court has issued decisions to protect fundamental rights and freedoms in the best way since 23 September 2012 when the individual application mechanism was introduced.

In this scope, the Constitutional Court has rendered paramount decisions/judgments with a right-based approach in the cases of both constitutionality review and individual application and made considerable contributions to raising the standards of fundamental rights and freedoms.

It should be noted that the effective implementation of the

individual application system is of vital importance for the protection of fundamental rights and freedoms in the country. The Court successfully manages the heavy workload by rendering decisions which are not only qualified in nature but also plenty in quantity. Hereby I would like to share some statistical information on individual application.

The Court has received a total of approximately 268,000 applications since the introduction of the individual application mechanism, and nearly 224,000 of them have been adjudicated. In 2019 the Court adjudicated approximately 40,000 applications. It should be noted with satisfaction that the Court has concluded 93 percent of the applications it has received in the last two years.

In these days when we are fighting the pandemic nationwide, the Court continues its activities by taking the necessary precautions as well as taking advantage of technological opportunities. The Court will also thereafter be determined, in all circumstances, to fulfill properly its duties designated by the Turkish Constitution, that is to say, to protect the supremacy of the Constitution, the democratic state of law, and the fundamental rights and freedoms of individuals as an indispensable element of such a state.

Lastly, taking this opportunity, I would like express my thanks to all my colleagues, who work devotedly by struggling to cope with the heavy workload, for their contributions. On this occasion, I would like to commemorate our late and retired justices and personnel. I also wish good health and prosperity to all members of the Court.

I wish that what we have learned from the pandemic and the steps to be taken will lead us to live in a healthier world, and I would like to extend everyone all my most sincere and respectful greetings.

9 June 2020 Opening Address, Swearing-in Ceremony of Justice Mr. Basri Bağcı

His Excellency Mr. President,

Esteemed Guests,

I would like to welcome you to the swearing-in ceremony of the newly appointed Justice of the Constitutional Court and extend you all my most sincere and respectful greetings.

First of all, I would like to congratulate our new Justice Mr. Basri Bağcı and wish that his new office bring auspiciousness to himself, his family, our Court as well as our country. I believe that Mr. Bağcı will significantly contribute to the constitutional jurisdiction with his vast professional experience and especially his profound knowledge in the field of human rights.

Today, we are having an extraordinary swearing-in ceremony with masks and social distancing rules in place. I hope this will be the last ceremony we have held in this manner.

This ceremony represents the current situation very well. The world has been fighting a dangerous pandemic for a considerable time. Maybe this is the first time in the history that we have been experiencing a global quarantine. Our daily routines and habits have been disrupted.

On the other hand, these times during which the life has slowed down led to self-examination by individuals, institutions, and even the whole society. In this regard, the current pandemic has reminded us of at least two things. First, the pandemic, which has spread all around the world and rendered helpless even the developed states, has shown how important the national and international solidarity is.

We all know that the concept of solidarity has a special place in our intellectual and spiritual roots. For example, Al-Farabi, a famous philosopher who lived eleven centuries ago, stated that the way to maintain a virtuous society and state is solidarity. According to Al-Farabi, a society in which people help each other to achieve the real happiness is a virtuous society. A nation where all cities help each other for the same purpose is a virtuous nation. Furthermore, a virtuous universal society can be achieved if all nations help each other to find the happiness.

Another point reminded by this pandemic is the indispensable nature of fundamental rights and freedoms. By placing everyone, if you will, under house-arrest for a long time, the pandemic has once again reminded us how valuable the fundamental rights and freedoms, such as personal freedom, freedom of movement and freedom of worship, and especially the right to life are.

The protection of rights and freedoms is one of the most important elements of democracy. As a matter of fact, the Constitutional Court has, in its many judgments, described

democracies as "*the regimes in which fundamental rights and freedoms are ensured and guaranteed to the greatest extent*".

The protection of fundamental rights is also a moral issue as well as a legal one. We must admit that those who are not like us, do not think or live like us are also entitled to the same rights with us. In other words, the notion of rights requires the acknowledgement of the 'other' as the subject of the rights.

His Excellency Mr. President,

As is known, racism, xenophobia and Islamophobia, which stem from a sick image of "other" especially in the West, continue to endanger the fundamental rights and freedoms. These concepts are fatal. Here we are talking about the attitude to destroy the 'other', which is, in the words of Lyotard who is a postmodernist philosopher, "to treat her/him like a garbage" that will be burned in the end.

Therefore, racism and xenophobia are much more dangerous than the current pandemic for the future of humanity. A virtuous society cannot be achieved through the mentality of killing the refugees arriving at the borders to deny their entry the country, and even showing them as the cause of the pandemic, thus making them to be perceived as demons. Likewise, a virtuous universal society cannot be built with an approach that does not allow a person to breathe because of his/her colour or belief.

The cure of this morbid mentality is a justice-based pluralist understanding that sees human as "the most honourable creature". As emphasized by the Constitutional Court in one of its judgments, in a pluralistic society, the State is under an obligation to protect the differences and those who are different against any threat.

In addition, the foundation of a virtuous society and state where individuals may co-exist without being subject to discrimination and violence is justice. The justice symbol, a blindfolded lady carrying a set of scales in one hand and a sword in the other, represents impartial justice, fair trial and enforcement of the judicial decisions, which are the three elements of justice. First of all, justice is blindfolded and treats the parties equally regardless of who they are. Undoubtedly, impartiality of a judge or a court first and foremost requires independence. As stated in Article 138 of the Constitution "*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*".

The second symbol of justice is the scale. Thanks to this scale, disputes are resolved on an equitable basis, thereby ensuring the public order. For the very reason, Jalaluddin Rumi defined the judge as "the scale of God" and stated that judge is "mercy" and "a drop from the ocean of justice

on the day of judgment." Indeed, the law embodying the principle of fair trial is a mercy for the society and state. That is why a state without law is like a patient in need of life-support.

Thirdly, justice requires implementation of judgments reached by the judge through the scale of justice. Two-edged sword symbolises the rule of law and binding authority of justice. As highlighted in the judgments of the Turkish Constitutional Court, one of the important elements inherent in the right of access to a court is the effective enforcement of the judicial decisions. Otherwise, right to access to a court and to have a trial become futile.

As a result, justice requires duly enforcement of the just decisions issued by the independent and impartial judiciary. Ensuring and maintaining public confidence in judiciary is contingent upon the realisation of the three elements of justice.

His Excellency Mr. President,

The main duty of the Constitutional Court is to protect fundamental rights and freedoms, which is one of the concrete forms of justice. Therefore, we, as the Justices of the Court, have sworn to protect the Constitution and fundamental rights and freedoms while taking the bench.

It should be noted with satisfaction that the Constitutional Court copes with the increasing workload in terms of both constitutionality review and individual application on one hand, and it renders right-based decisions/judgments on the other. The Turkish Constitutional Court has continued to discharge its functions with appropriate methods by taking the necessary precautions during the pandemic.

No country successfully implementing the individual application mechanism has received such a considerable number of applications comparable to Turkey. The Turkish Constitutional Court received nearly 43.000 individual applications only in 2019. Besides, approximately 40.000 applications were adjudicated last year. Accordingly, the Court has concluded the received applications by nearly 93% in

the last two years. Nevertheless, even such a great performance does not suffice for us. Our objective is to adjudicate, at least, as many applications as the Court receives within the year.

On this occasion, I thank all my colleagues who work devotedly despite all difficulties.

In addition, rendering decisions so as to protect fundamental rights and freedoms is not per se sufficient. In particular, it is of great importance for ensuring, as well as good administration of, justice to also revise the practice in light of the decisions and judgments rendered through the individual application mechanism.

As I expressed in the previous swearing-in ceremony, violation decisions have two consequences, one is subjective and the other is objective. In the individual applications where it has found violations, the Constitutional Court also determines how the violation will be redressed. In this scope, it may order retrial, award compensation or decide both.

The objective effect of the violation judgments, which is beyond a given application as well as its applicant, is much more important. The ultimate aim of the individual application mechanism is to prevent occurrence of violations, rather than to address and eliminate all violations afterwards one by one. To attain this aim, all administrative and judicial authorities should consider the principles laid down in the Constitutional Court's judgments in similar cases before them without awaiting further applications to be lodged. In cases where the violation results from legislation, the way to prevent new violations is undoubtedly introducing statutory amendments.

His Excellency Mr. President,

Esteemed Guests,

Before ending my speech, I would like to commemorate Mr. Mahir Can Ilıcak, one of the retired Justices of the Court, who passed away at the end of last year, and extend my condolences to his family members.

I also wish those who have lost their lives due to the pandemic rest in peace as well as I wish a quick recovery for the patients. I would also like to extend my gratitude to all healthcare professionals working devotedly during this period and to everyone who have contributed to the fight against the pandemic.

Lastly, we know that the swearing-in ceremonies lead to conflicted emotions. On the one hand, there is the sadness for those who have left us, and on the other, the happiness for those who have joined us. In any case, these ceremonies remind us that we are temporary and that the court is not a property of the judge. Hafız Ali, Judge of Afyon Province, leaving his office in 1782, wrote in the court book that "*Worldly post (title) is not everlasting for anyone on the earth*". Indeed, what remains is not the post (title), but "a *pleasant sound in the dome*".

With these feelings, I once again congratulate Mr. Bağcı and wish him success in his office. I would also like to thank our retired Deputy-president Mr. Recep Kömürcü for his contributions to our Court and I wish a joyful retirement for him and all our retired members.

I would like to once again extend my gratitude for your participation in our ceremony and extend my wishes of health and prosperity to all of you.

7 September 2020 Opening Address, the 8th Summer School on "Restriction of Human Rights and Freedoms in Health Emergencies: The Example of Covid-19"

Dear Participants,

Ladies and Gentlemen,

It is a great pleasure for me to open the 8th Summer School programme of the AACC. Unfortunately, this year we are not able to host you here in Ankara because of Covid-19. However, I am very pleased to see that a high number of courts are represented here today. Our colleagues are joining us from 28 different countries.

As you all know, the world has been fighting a dangerous pandemic for a considerable time. Maybe this is the first time in the history that we have been experiencing a global quarantine. Our daily routines and habits have been disrupted.

On the other hand, these times during which the life has slowed down led to self-examination by individuals, institutions, and even the whole society. In this regard, the current pandemic has reminded us of at least two things. First, the pandemic, which has spread all around the world and rendered helpless even the developed states, has shown how important the national and international solidarity is.

At this point let me mention the beautiful poem of "Bani Adam" (Children of Adam) written by famous Persian poem and sage Saadi Shirazi. He says:

"Human beings are limbs of each other,
For they're created of the same essence.
When one organ be troubled by pain,
The others would suffer severe strain.

If you have no sympathy for the sufferings of others!
Deserve not the name human being".[1]

Saadi's teachings make it clear that we must be in cooperation and solidarity in fighting this pandemic. This period that we have been living through is a clear indicator that mankind has the common fate, regardless of race, colour, gender, faith and nationality. Accordingly, we -as the judicial bodies- should act together with respect to protection of the rule of law and fundamental rights. Indeed, the AACC activities and the Summer School events are intended to achieve this purpose.

I must emphasize that almost all judicial systems allow for taking measures under the states of emergency such as the ongoing pandemic. In this scope, countries have adopted various measures and, owing

[1] Sadî Şirâzî, *Bostân ve Gülistân*, (İstanbul: Beyan Yayınları, 2016), *Gülistan*- First Chapter, Tenth Story, p. 246.

to these measures, the pandemic has been brought under control to a certain extent. The Turkish Constitutional Court has also swiftly implemented the in-house measures and put remote work system into action. The Court also switched to hold video conference/online meetings for a while.

This pandemic also reminded us the indispensable nature of fundamental rights and freedoms. By placing everyone, if you will, under house-arrest for a long time, the pandemic has once again reminded us the value of the fundamental rights and freedoms, such as the right to life, personal freedom, freedom of movement and freedom of worship.

Covid-19 pandemic and the related measures have brought these fundamental rights to the forefront of the constitutional justice. Within this scope, it is of great importance that the high judicial bodies in different countries exchange opinions and experiences on the judicial issues. In fact, your discussions during this Summer School will make a significant contribution to both judicial analyses and the constitutional justice literature.

Dear participants,

As Lord Acton famously said, "*power tends to corrupt, and absolute power corrupts absolutely*". This historical fact led to the idea that especially political power must be restricted to protect individual rights and liberties. The idea of limiting power may be traced back to the ancient times. Indeed the *Gilgamesh Epic*, which was written about four thousand years ago, tells us the story of how gods created Enkidu to check and control King Gilgamesh, who oppressed the people of Uruk.

Gods declared that "*let them [Enkidu and Gilgamesh] vie (compete) with each other, so Uruk may be rested!*"[2]

However, the project of ending the tyranny of Gilgamesh ended up in failure when Enkidu became the King's best friend. In today's world, four thousand years later, we still seek to resolve what is called the "*Gilgamesh problem*", that is how to control the political authority.[3]

There is no doubt that constitutional courts have been created with a view of helping to solve the problem of controlling the authority. In other words, the constitutional or supreme courts, charged with the review of constitutionality of legislative and executive acts, play significant roles in protecting rights and liberties of individuals.

This role becomes more crucial in times of emergencies. We all know that rights and freedoms are inevitably subject to more restrictions than the ordinary times during such a period. Undoubtedly, the aim pursued by these restrictions should be to ensure the return to ordinary times within the shortest time possible. The measures derogating from the rights and freedoms must be lifted once the ongoing threat is overcome. At this point, the judicial institutions are entrusted with very important duties.

Dear participants,

In fulfilling their critical roles in a state of emergency, the constitutional courts must be cautious at least in two regards.

First of all, as constituted powers the courts must be aware of the fact that they are also bound by the constitution. In other words, they may only exercise the powers defined in the provisions of "emergency constitution".[4] The courts' self-respect for constitution is crucial especially in a state of emergency because any kind of judicial activism during such times may lead to legitimation crises. The constitutional courts must protect constitutional rights by operating within the boundaries of the constitution itself.

Secondly, even though the executive is in a better position to evaluate the threats to public health and the means to eliminate them, it by no means has unlimited powers. The executive must act within the law, and a state of exception must be governed by the rule of law. Therefore, the role of the constitutional or supreme courts is to ensure that the executive fights the threats by adopting measures within the framework of the law. These measures must be necessary in a democracy and proportionate to the aim of eliminating the dangers that caused the sate of emergency.

To sum up, during emergencies the courts have a limited and circumscribed power in reviewing the acts and activities of the executive power. It is certainly beyond the power of the courts to remove

---

2 *The Epic of Gilgamesh*, trans. A. George, (London: Penguin Books, 1999), p. 5.

3 Daron Acemoglu and James A. Robinson, *The Narrow Corridor: States, Societies, and the Fate of Liberty*, (New York: Penguin Press, 2019), p. xiv.

4 On this issue *see* Bruce Ackerman, "The Emergency Constitution", *The Yale Law Journal*, Vol. 113, No. 5, (2004): 1029–1091.

the threat to the public health. Solving the problem of pandemic is the task of executive and legislative powers. The role of the courts in such process is to ensure that the state authorities act within constitutional and statutory boundaries.

Ladies and gentlemen,

There are heroes in times of crises. In this period, particularly healthcare staffs all around the world work with great sacrifice. There is a famous statement made during the Second World War. We can adapt it to the healthcare staff in present-day conditions and say that "*never in the field of pandemic fight was so much owed by so many to so few*".

To conclude my remarks, I wish successful and fruitful academic sessions for all participants. I hope that this conference will make a contribution to academic debates as well as the case laws of our respective courts regarding legal issues surrounding the ongoing pandemic.

I wish you all healthy days.

23 September 2020 Opening Address, the Symposium on the 8th Anniversary of the Adoption of Individual Application

Opening Address, the Symposium on the 8th Anniversary of the Adoption of Individual Application on "The Protection of the Fundamental Rights and Freedoms in the Age of the Internet"

Esteemed Guests,

Distinguished Colleagues,

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

As is known, the quest for the protection of fundamental rights and freedoms is as old as the history of humankind. The *Gilgamesh Epic*, known as the first written literary work, features the search for immortality on one hand, and the experiment of humankind with strength on the other. This epic, written on tablets about five thousand years ago, mythologises the events that had occurred in the region of Mesopotamia.

The events in question took place in Uruk, a city located between today's Baghdad and Basra. According to the epic, the people of Uruk complained about King Gilgamesh who had oppressed them. It was told that an equal of Gilgamesh, one mighty in strength to ward him off, must come up. In the epic, this solution is expressed as *"let them [Enkidu and Gilgamesh] vie (compete) with each other, so Uruk may be rested!"*[1]

Finally, someone named Enkidu, who was as strong as Gilgamesh and thus would balance his power, was created. However, after a while, Enkidu began to act in concert with Gilgamesh. Thus, the attempt to establish a system of checks and balances among state powers in a modern sense failed.[2]

The quest for checks and balances of power in order to protect fundamental rights and freedoms has also continued after Gilgamesh. This is also a quest to secure the rights and freedoms of people living as a society.

The constitutional justice has emerged as the product of this quest. Today, in almost all democratic countries, there are supreme courts that review, and where necessary overrule, legislative and executive acts in order to protect fundamental rights and freedoms.

---

1 *The Epic of Gilgamesh*, trans. A. George, (London: Penguin Books, 1999), p. 5.

2 Daron Acemoglu and James A. Robinson, *The Narrow Corridor: States, Societies, and the Fate of Liberty*, (New York: Penguin Press, 2019), p. xiv.

Essentially, protecting fundamental rights and freedoms by ensuring security is the *raison d'ëtre* of the State as a whole. As a matter of fact, the famous speech of Sultan Abdulaziz, dated 10 May 1868, begins with the expression of this truth. The first sentence of this speech, which is considered as the founding document of today's Court of Cassation and the Council of State, states that "*the duty of the Government is to safeguard the rights and liberties of its people under any circumstances*".

In the same speech, Sultan Abdülaziz gave the signs of the idea of separation of powers between the legislature, the executive and the judiciary by expressing "*the judiciary and legislature must be independent from any interference by the executive*".[3] Today's constitutional courts have been established in pursuance of the separation of powers, which has become an essential element of constitutional democracies.

Distinguished Guests,

Another reflection of the separation of powers can be seen in the relationship between security and freedom. Security is a prerequisite to ensure the existence of individuals and society in peace. Rights and freedoms cannot be enjoyed where there is no security. In this sense, one of the fundamental duties incumbent on the State and especially on the executive power is to ensure security.

Besides, security is not a matter of result, but of means. It is the means for a freer, more equitable and just social order. Examination and assessment of the alleged violations of fundamental rights and freedoms while ensuring security are among the primary duties of the judiciary, especially the constitutional courts. Accordingly, we have to admit that there is a delicate relationship between freedom and security, as well as that none of them can be disregarded for the sake of the other.

It is undoubtedly the law that will ensure the co-existence of the values of security and freedom and put them into practice in daily life. Accordingly, the law is a condition for the existence of these values, not their opponent. Without law, there can be neither security nor freedom.

A state where fundamental rights and freedoms are protected and those exercising public power are bound by the law is the state of law. The Constitutional Court's duty is to contribute to the functioning of the democratic state of law with all its rules and institutions, as guaranteed in Article 2 of the Constitution.

As a matter of fact, the protection of fundamental rights and freedoms is the common goal of the le-

[3] *Tasviri Efkâr*, No: 584, 18 Muharram 1285 (1868).

gislature, the executive and the judiciary. For this reason, it is incumbent on the state organs to carry the democratic state of law into the future on the basis of security, freedom and justice within the framework of cooperation and division of functions as indicated in the Preamble of the Constitution.

Distinguished Guests,

Individual application mechanism that was put into practice eight years ago today has brought the Constitutional Court's duty to protect fundamental rights and freedoms to the forefront. The Court has set the standards regarding the constitutional rights and freedoms within the scope of individual application, including but not limited to the rights to life, to hold meetings and demonstration marches, to the right to a fair trial, and the freedom of expression.

With the individual application mechanism, a novel and effective legal remedy has been provided for the individuals whose rights have been violated to apply after exhaustion of the ordinary legal remedies. Another aim of the individual application mechanism is to ensure that alleged violations of rights be examined within the country without being brought before international judicial tribunals. I would like to express with pleasure that after the eight-years of experience, this aim has been achieved to a great extent.

Despite the increasing workload and unfavourable circumstances, the Constitutional Court has maintained the effectiveness of the individual application mechanism. Taking this opportunity, I would like to extend my appreciation to the Court's deputy-presidents, justices, rapporteurs and staff who work devotedly.

At this point, I would like to share some statistics with you. The Court has received a total of approximately 285,000 applications since 23 September 2012, and nearly 243,000 of them have been concluded. In other words, since the introduction of the individual application mechanism, 85.5 percent of the applications lodged before the Court has been adjudicated.

Currently, around 42,000 applications are pending before the Constitutional Court. In over ten thousand cases it has dealt with, the Court has issued violation judgments. Given the distribution of

the violation judgments based on fundamental rights and freedoms, it appears that the top three are the right to a fair trial (54%), the right to property (26.7%) and the freedom of expression (5.7%).

Distinguished Guests,

As can be seen from these data, complaints regarding the freedom of expression occupy an important place among the applications in which the Constitutional Court has found violations. Since one of the topics of today's Symposium is *the internet and freedom of expression*, I would like to dwell on that briefly.

Humans are creatures who think and express what they think. In this sense, hindrance to expression means denying the basic characteristic of human being.

Freedom of thought and expression has been the constant issue of social, political and legal debates in these lands. The late Cemil Meriç made a big emphasis on this issue. When he was reminded, during an interview, of his famous expression regarding that we live in a country where thought is despised, he said "*Yes. The worst characteristic we have is our inability to be lenient*."[4]

The word leniency (*müsamaha*) used by Cemil Meriç is much more comprehensive than the word "tolerance". Given its etymological origin, "müsamaha" means overlooking, condoning, giving generously and forgiving. In this sense, indulging different thoughts necessitates being generous and forgiving to ideas and thoughts.

As a matter of fact, we do not have to agree with what is said, but we have to tolerate it. We may not find pleasant what is said, but we have to condone and tolerate generously the person saying it.

The scope of freedom of expression is broad. Especially, what is essential in that regard is that freedom should be the standard, and limitation is the exception. In this context, as a rule, any expression other than incitement to violence and terrorism, hate speech, threat and insult should be protected by the legal order.

Here, it is necessary to mention, briefly, that terrorism is one of the main reasons for restricting freedom of expression. As we all know, terrorism is one of the greatest threats to freedom of expression. As a matter of fact, the aim of terrorism is to paralyze the democratic state of law where fundamental rights and freedoms are guaranteed.

In this sense, the fight against crimes and terrorism is not only necessary for ensuring security that is essential for individual and social life, but also for protecting all fundamental rights and freedoms, especially the right to life and freedom of expression.

However, it is also a constitutional obligation to maintain this fight within the boundaries of law. Reviewing the lawfulness of such processes is incumbent on the judiciary, especially the constitutional courts.

---

[4] *Türkiye Kültür ve Sanat Yıllığı 1986*, intvw. Hüsamettin Aslan, (Ankara: Türkiye Yazarlar Birliği Yayınları), pp. 586-594.

In the history of the fight against terrorism, there is a trap that democratic states may sometimes fall into. It may have been said sometimes of the necessity to put the law aside or on hold to fight terrorism. In fact, this is exactly what terrorists seek. It is known that an understanding and practice that considers the law as a hindrance may overshadow the legitimate fight and thus result in heavy costs in the long run.

Distinguished Participants,

Esteemed Guests,

These principles have become much more important in the internet age we live in. As is known, the internet, which has caused radical changes in both individual and social life, entails both opportunities and risks in terms of fundamental rights and freedoms.

Thanks to the internet, we no longer have to wait for the evening news bulletins or the next day's newspapers to find out what is going on. Likewise, we do not need to be a columnist in a newspaper to share our thoughts. The internet provides an easy, cheap and accessible platform for everyone to express their opinions.

The internet also plays an important role in the political field. Heads of state convey their most important messages through social media, and phrases such as "tweetocracy" have been created to express the emerging governance models.

Despite the convenience it provides, internet may give rise to the commission of offences such as terrorist acts, gambling and child abuse, as well as to the breach of several fundamental rights and freedoms notably the right to respect for private life.

Therefore, individuals' rights and freedoms may conflict with each other. Notably a conflict may occur between the freedom of expression and the right to respect for honour and reputation. In the view of the Court, *"In case of any conflict between fundamental rights and freedoms, one of these rights and freedoms should not be allowed to override the other one, but rather a reasonable balance should be struck between them and both should be afforded the necessary protection"*.[5]

This multi-faceted aspect of internet –entailing both opportunities and serious risks– renders inevitable its arrangement in legal terms on the one hand, and makes this arrangement difficult due to its unrestrainable nature on the other.

In cases brought before it through the constitutionality review and individual application, the Court examines the alleged restrictions of the fundamental rights and freedoms relating to the internet on the basis of the criteria laid down in Article 13 of the Constitution.

In the constitutionality review, it is primarily ascertained whether such restrictions have a clear, precise and foreseeable legal basis. The Court has rendered several violation judgments as the legality

[5] The Constitutional Court's Judgment, E. 2014/101, K.2017/142, 28 September 2017, § 49.

requirement was not satisfied. If this requirement has been satisfied, it is then discussed whether the impugned restriction pursues a legitimate aim of protecting the rights and freedoms of others.

If the criterion of a legitimate aim has also been satisfied, the criterion of the necessity in a democratic society will be assessed. In this sense, the restriction must meet "a pressing social need". It is ultimately examined whether the impugned restriction complies with the principle of proportionality consisting of the sub-principles of appropriateness, necessity and commensurateness. A restriction which is not appropriate or necessary for, or commensurate to the pursued aim constitutes a breach of the principle of proportionality.

In cases where the Court finds a contradiction with any of these requirements laid down in Article 13 of the Constitution, it annuls the contested provision in the constitutionality review process, or renders a violation judgment in the individual application.

Esteemed Guests,

It goes without saying that a place without freedom of expression is devoid of also democracy. Freedom of expression is mainly the freedom to criticise. In this sense, criticism is the distinctive feature of democracy.

The history of humanity also demonstrates that the attempts to prevent criticism are futile. This is well defined by Socrates who was sentenced to death for his thoughts perceived as ill-advised and corrupting the youth. Once his sentence was pronounced, he said: *"Rather than silencing others, the most honourable way is striving to make oneself most perfect."*[6]

Socrates' warning is applicable also to the judicial bodies. As I have previously noted several times, criticisms directed towards judicial decisions also fall under the sphere of the freedom of expression. Judicial decisions, notably those rendered by the Court, are not sacred texts. They may be, and indeed ought to be, subject to criticism, which is mostly to the advantage of the judicial body the decisions of which have been criticised. To that end, the Court has been, for years, holding symposia whereby its decisions and judgments are discussed and criticised and has compiled the presentations delivered during these events in its journal of *Constitutional Justice* ("*Anayasa Yargısı*"). Accordingly, the symposium held today is also intended for receiving the participants' feedback on the Court's decisions and judgments.

However, I consider that in order for the criticisms directed towards judicial decisions to be useful, at least the following two considerations are of importance.

First, before directing a criticism against any form of text, it should be read thoroughly and comprehended. It is also the same for the judicial decisions. Criticisms made on the basis of presumptions even before the publication of the reasoning of a given judgment, or

[6] Platon, Socrates' Defence, trans. A. Çokona, 22nd Edition (İstanbul: İş Bankası Yayınları, 2020), p. 60.

after its publication but without being read, lead to misinformation and misguidance. In consideration of certain criticisms against the Court's decisions and judgments, we have observed that they are criticised without being read, or sometimes without being sufficiently comprehended. However, a sound criticism entails reading as well as an accurate understanding of the contents read. Otherwise, expressions which are not indeed considered in the judgment may be reflected as if they were stated.

Second, the effectiveness and usefulness of the criticism for those criticised largely depends on the tone used. *"How"* you express is generally more important than *"what"* you express. Undoubtedly, the tone or style used is also under the protection of the freedom of expression. Everyone is, of course, free to use the tone of his own choice. However, it is clear that commentary directed at those rendering the judgment but not at the judgment itself and going beyond criticism would be of no avail as it would detract from the aim underlying the criticism.

As a matter of fact, the language we use is the reflection of our identity and personality. Mevlana says in the Masnavi:

"Man is concealed underneath his tongue: the tongue is the curtain over the gate of the soul. When a gust of wind has flinged the curtain, the secret of the house is revealed to us."[7]

I would like to also stress that all these remarks as to the criticism and the way it is made primarily and especially cover the expressions, posts, language used on the internet.

In conclusion, the Court strives for maintaining the democratic state governed by rule of law, a characteristic of the Turkish Republic, which safeguards the fundamental rights and freedoms, within the boundaries of the duties and powers conferred upon it by the Constitution and laws. It endeavours to perform this duty in the best possible way.

I would like to take this opportunity to issue a call to the public. If you wish to make any contribution to the Constitutional Court, I kindly invite you to criticise its decisions and judgments. We actually value and consider such criticisms.

Distinguished Guests,

I wish you all a very successful and fruitful symposium. I would like to express my gratitude to the judges, the academicians and all participants for their outstanding contribution.

In the hope of convening at further meetings where the Court's decisions and judgments are discussed, I wish you all health and welfare.

---

[7] Mevlânâ Celâleddin-i Rûmî, *Mesnevî-i Ma'nevî*, İkinci Defter, 842-843, trans. D. Örs and H. Kırlangıç, (İstanbul: Türkiye Yazma Eserler Kurumu Yayınları, 2015), p. 206.

20 November 2020 Speech, 10th International Crime and Punishment Film Festival Academic Program themed as "I am Innocent"

Presumption of Innocence as an Absolute Fundamental Right *

Distinguished Participants,

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

At the beginning of my speech, I wish that the festival held for the 10th time this year be successful, and I would like to congratulate everyone who have contributed to this organization.

I would also like to congratulate you on the topic you have chosen for this year. Especially the widespread use of the internet and social media has further enhanced the significance of the protection of the presumption of innocence today.

The presumption of innocence has undergone a long and arduous historical journey, as the other fundamental rights have. Presumption of guilt once prevailed in many lands of the world. Arthur Schopenhauer stated that in Europe, up to the fifteenth century, the innocence of the accused had to be proven by sworn witnesses, and if the accused could find no witnesses, recourse was a trial by the judgment of God, which generally meant to call for a duel.[1]

In the post-Second World War period, after a long struggle, the presumption of innocence was first worded in the universal and regional human rights instruments. In Article 11 § 2 of the Universal Declaration on Human Rights of 1948 and Article 6 § 2 of the European Convention on Human Rights of 1950, the presumption of innocence is recognized as an element inherent in the right to a fair trial.

In Turkey, the presumption of innocence dates back to the Ottoman Code of Civil Law ("*Mecelle*"), which was codified at the last era of the Ottoman Empire. In Article 8 thereof, it is enshrined that "*Everyone is free of debt unless proven otherwise*". Anyone claiming to be owed is obliged to substantiate it. In short, the plaintiff carries the burden of proof. This principle laid down in the *Mecelle* -a civil law text- is incorporated into the criminal law as the presumption of innocence.

Currently, Article 38 of the Turkish Constitution provides for the following: "*No one shall be considered*

---

* Speech via Video Conference, 20/11/2020

1 A. Schopenhauer, *Yaşam Bilgeliği Üzerine Aforizmalar*, (İstanbul: İş Bankası Yayınları, 2006), p.75.

guilty until proven so by a court decision". In addition, the constitution-maker acknowledges the presumption of innocence as an absolute principle that cannot be subject to limitation even in a state of emergency. According to Article 15 of the Constitution, "*no one can be considered guilty until proven so by a court decision*" even in times of war, mobilization and a state of emergency.

Distinguished Participants,

The Constitutional Court has delivered significant judgments on the interpretation and implementation of the principle of the presumption of innocence within the scope of both constitutionality review and individual application. The Court defines the presumption of innocence as "*a fundamental right which secures that an individual charged with a criminal offence shall be presumed innocent until a final conviction rendered at the end of a fair trial*".[2]

The Court points out two aspects of the guarantee provided by this fundamental right in individual applications. First, an individual charged with a criminal offence must be presumed innocent until proven guilty by a court decision.

The second aspect of the presumption of innocence comes into play following a court decision. In cases where the criminal proceedings are concluded with a decision other than conviction, the person concerned should not be considered guilty, and in particular, the decision of acquittal should not be questioned.

I would like to briefly explain these two aspects of the principle of the presumption of innocence with reference to two judgments of the Plenary of the Constitutional Court. First of all, it should be noted that the reasoning of, and the language used by, the courts are critical in violations of the presumption of innocence in both aspects.

As is known, criminal proceedings concerning an act, pending or concluded, do not preclude the conduct of civil or administrative proceedings into the same act. However, while the criminal proceedings are still pending or after the acquittal, in cases carried out simultaneously or initiated afterwards, referring to someone as guilty, questioning the acquittal decision rendered in respect of the concerned person or raising suspicion against him/her will be in breach of the principle of the presumption of innocence.

As regards the first aspect of this principle, the Court, in its judgment in the case of *S.M.*, examined a complaint raised by the applicant against whom a criminal investigation had been launched and an interim decision had been issued in accordance with the Law no. 6284 on the Protection of the Family and the Prevention of Violence against Women.

The Court concluded therein that the use of the phrase "*the party perpetrating violence"* in the interim decision and the decision rendered on appeal had been in breach of the applicant's right to the presumption of innocence as it created the impression that the app-

[2] Constitutional Court, E. 2018/101, K. 2019/3, 13 February 2019, §16.

licant had committed the act subject to the criminal investigation.[3]

In its recent judgment of *Barış Baş*, the Court has dealt with the second aspect of the principle of the presumption of innocence. The case concerned a teacher against whom both criminal and disciplinary investigations were launched for allegedly having slapped his student in the face.

At the end of the criminal proceedings, the applicant was acquitted since he was not found guilty as charged. However, the Regional Administrative Court failed to confine itself to examining the acts other than slapping, such as the applicant's having shouted at the student and having forcibly turned his head by grabbing him by the tie harshly, but on the contrary, further made an assessment regarding the alleged act of slapping, ultimately finding it established. The Constitutional Court has concluded that such an approach, which called into question an already rendered acquittal decision, violated the principle of the presumption of innocence.[4]

Here, it can be said that the criminal court's decision had been improper and that in fact, the redness on the child's face and the application of ice pack had proven the alleged act of slapping. Considering also this point, the Court has emphasized the importance of the principle of the presumption of innocence as follows:

"*The improperness of the criminal court's decision does not make an exception to the principle of the presumption of innocence. The public interest in respecting the principle of the presumption of innocence is so important that in some cases, it may even justify the lack of a disciplinary sanction against the perpetrator of the tortious act*."[5]

In addition, the public authorities' statements implicating persons during the ongoing criminal proceedings or after acquittal may lead to the violation of the principle of the presumption of innocence. Therefore, the responsible authorities are required to use a prudent language, especially during the trial process.

Distinguished Participants,

The effective protection of the principle of the presumption of innocence and other fundamental rights does not depend solely on rules, institutions and individuals. Culture is another factor. The protection of fundamental rights depends on development and establishment of a culture that accepts the ontological existence of the "other". As a matter of fact, the protection of fundamental rights, including the presumption of innocence, depends to a large extent on those outside of us. The main point here is to admit that the "other" is also the subject of fundamental rights.

A striking title has been chosen for the academic program of the festival, which is "*I am innocent*". However, we need to have an understanding to say "*You are innocent*" as well as "*I am innocent*". In

---

3 *S.M.* [Plenary], no. 2016/6038, 20 June 2019.
4 *Barış Baş* [Plenary], no. 2016/14253, 2 July 2020.
5 *Barış Baş*, § 66.

fact, the origins of this understanding are abundantly available in the wisdom of the East and in the spiritual roots of this land. When the discourses of Rumi, Yunus Emre and Haji Bektash Veli are analysed, it is seen that the respect for the "other" occupies a pivotal place. For example, Saadi Shirazi says "*If you've no sympathy for human pain, the name of human you cannot retain!*"

In short, effective protection of the presumption of innocence requires a social and political climate where law and justice prevail and the respect for the "other" has developed as a culture. Indeed, abandoning law and justice not only corrupts the social and political order, but also causes human to lose his humanity.

In this context, I want to leave the last word to Aristotle, who voiced this truth about 2,500 years ago. According to Aristotle, who is known as the first teacher, "*Man is the most excellent of all living beings, so without law and justice he would be the worst of all.*"[6]

I would like to express my gratitude for your attention. I extend my wishes of health and prosperity to all of you.

[6] *The Politics of Aristotle or A Treatise on Government*, Everyman's Library, trans. W. Ellis, (London: J.M. Dent & Sons Ltd., 1912), Chapter II, 1253a, p. 5.

CHAPTER 05

LEADING DECISIONS IN THE CONSTITUTIONALITY REVIEW

LEADING DECISIONS IN THE CONSTITUTIONALITY REVIEW

Press releases of the leading decisions in the constitutionality review are available at:

https://www.anayasa.gov.tr/en/news/constitutionality-review/

DECISIONS ON THE PRESIDENTIAL DECREES

(E.2018/125, E.2019/31 and E.2019/78, K.2020/4, K.2020/5 and K.2020/6, 22-23 January 2020)

One of the most significant features of the presidential government system is, *inter alia*, to authorize the President to make arrangements through "presidential decrees".

Article 148 of the Constitution sets forth that the presential decrees be subject to constitutionality review both in substance and in form and accordingly vests the Constitutional Court with the duty and power to make the judicial review of these decrees.

The President is authorized, by virtue of the Constitution, to issue presidential decrees; however, it is not an unlimited authority. Unlike the laws, the matters to be regulated through presidential decrees are delimited by the Constitution. The limitations, which are imposed on the competence *ratione materiae*, are laid down in Article 104 of the Constitution.

In Article 104 § 17 of the Constitution, it is set forth that the President may issue presidential decrees *on the matters regarding executive power*; and that *the fundamental rights*, *individual rights and duties,* and *the political rights and duties* shall not be regulated through a presidential decree. It is further envisaged therein that no presidential decree shall be issued *on the matters which are stipulated in the Constitution to be regulated exclusively by law and which have been explicitly regulated by law*.

In cases where presidential decrees are not in compliance with the above-cited rules on competence *ratione materiae*, they cannot be said to be constitutional, even if they are not, by their contents, contrary to the Constitution. If no contradiction is found as to the competence *ratione materiae*, the presidential decrees, in their contents, must be subject to the constitutionality review.

A. PROVISION STIPULATING THAT THE SUPREME MILITARY COUNCIL ("THE SMC") SECRETARIAT SERVICES SHALL BE CONDUCTED BY THE AUTHORITY TO BE DESIGNATED BY THE PRESIDENT

CONTESTED PROVISION

The contested provision sets forth that the SMC secretariat services shall be conducted by the authority to be designated by the President.

GROUND FOR THE REQUEST FOR ANNULMENT

It is maintained that empowering the President to assign the authority that would conduct the SMC secretariat services, without setting the basic principles on the performance of these services, is in breach of the Constitution.

THE COURT'S ASSESSMENT

1. As regards the Competence Ratione Materiae

The Law on the establishment and duties of the SMC was abolished by the Decree-Law no. 703, and the SMC has been re-organised through the Presidential Decree no. 8. Accordingly, the SMC secretariat services shall be conducted by the authority to be designated by the President.

It appears that the contested provision is intended for making an arrangement as to a matter regarding executive power and in no way regulates the fundamental rights, individual rights and duties as well as political rights and duties stipulated in the Constitution.

The contested provision does not allow for the establishment of an administrative structure or regulation of its duties and powers but vests the President with the power to designate the authority that would perform and conduct the SMC secretariat services. Nor is the provision concerning a matter needed to be regulated exclusively by law, pursuant to Article 123 of the Constitution which provides for *"The administration is a whole with its formation and functions and shall be regulated by law"*.

Besides, there is no statutory arrangement regarding the authority that would conduct the SMC secretariat services. In consideration of the fact that the Law no. 1612 on the establishment and duties of the SMC was abolished by the Decree-Law no. 703, there is no obstacle to the designation, through the presidential decree, of the authority to conduct the SMC secretariat services.

Therefore, the contested provision has been found constitutional insofar as it relates to the competence *ratione materiae*.

2. As regards the Content

The principle of clarity, one of the basic elements of the state of law, is also applicable to the presidential decrees which are in the form of principal regulatory acts of the executive organ. The presidential decrees are also required to be clear, precise, comprehensible, enforceable and objective to the extent that would cause no hesitation and doubt for both individuals and the administration. The authority to conduct the secretariat services of the SMC ensures the proper functioning of the internal affairs of the SMC, such as to organise meetings that are held by the SMC within the boundaries set by its duties and powers.

In the Presidential Decree in question, it is stipulated that the SMC shall convene at least once a year; and that when necessary, the President may convoke the SMC. It has been observed that it is therefore found unnecessary to form a permanent secretariat to conduct the secretariat services; and that the contested provision allows for the performance of these services by an authority to be designated by the President. In this sense, the contested provision involves no unclarity.

Consequently, the Court has found the contested provision constitutional by its content and accordingly dismissed the request for annulment.

B. PROVISION ALLOWING FOR AN ADVANCE PAYMENT IN PRODUCT AND SERVICE PROCUREMENTS ABROAD

CONTESTED PROVISION

It is stipulated in the contested provision that in product and service procurements to be performed abroad for the promotion of Turkey, an advance payment up to the total amount of the contract may be made to the contractor, as an extra-budgetary advance, upon the approval of the Minister of Culture and Tourism if it is required by the market conditions prevailing at the country where the products and services will be procured and it offers price advantage to a significant extent; that it shall be further specified whether a security will be taken against this advance payment upon the Minister's approval; and that the principles and procedures shall be determined through a directive to be issued by the Ministry.

GROUND FOR THE REQUEST FOR ANNULMENT

It is maintained that the contested provision is unconstitutional as it is intended for making an arrangement as to the matter which has been indeed regulated explicitly by law; and that the executive power has been exercised in breach of the principle of supremacy of the Constitution and the laws.

THE COURT'S ASSESSMENT

As laid down in Article 104 of the Constitution, no presidential decree shall be issued on the matters which are explicitly regulated by law. Accordingly, it must be primarily considered whether there is a law which has been previously enacted and may be taken as a basis for the comparison during the review, under the said constitutional provision, of these presidential decrees. It must be then assessed whether the contested provision regulates a matter which has been explicitly regulated by law.

In this assessment, it must be firstly ascertained whether the relevant law is enforceable in the field which is covered by the presidential decree and subsequently determined whether the statutory arrangement is clear. In this sense, it should be considered whether the relevant statutory arrangement would, in the absence of the provision embodied in the presidential degree, address the matter regulated by the presidential degree, which may be regarded as an indication to ascertain whether the presidential decree has been issued to address the matter which has been already regulated by law.

The terms and conditions of making an extrabudgetary advance payment are in general laid down in Article 35 of Law no. 5018, titled *"Advance Payment"*, where it is set forth that the amount of extrabudgetary advance payment shall not exceed thirty percent of the total contract price and shall be provided only against security. This provision sets out the terms and conditions of extrabudgetary advance payments to be provided, both in the country and abroad, by all public institutions and organisations including the Ministry to which the contested provision relates.

Accordingly, it appears that in the absence of the contested provision embodied in the presidential decree, the said statutory provision would be applicable to the product and service procurements abroad, which relates to the promotion of Turkey. It has been therefore concluded that the contested provision on the matter which has been explicitly regulated by law introduces an arrangement in breach of the fourth sentence of Article 104 § 17 of the Constitution.

On the other hand, the second sentence of Article 35 § 2 of the Law provides for *"The provisions on the extrabudgetary advance payments which are embodied in the relevant laws or the presidential decrees shall be reserved"*. Given the constitutional provision that does not grant any authority to issue presidential decree on the matters explicitly regulated by, it is impossible for the law-maker to grant such an authority. Therefore, the statutory provision -whereby the provisions in the presidential decree are reserved- does not render the above-cited contradiction constitutional.

Consequently, the contested provision has been found unconstitutional insofar as it relates to the competence *ratione materiae* and therefore annulled.

C. PROVISIONS PROVIDING FOR THE APPOINTMENT OF COORDINATOR HEAD DOCTOR FOR THE JOINT MANAGEMENT OF HOSPITALS

CONTESTED PROVISION

The contested provisions provide for that in case of the existence of several hospitals located within the same campus, a coordinator head doctor may be appointed for ensuring the joint management of these hospitals; that offices of head doctor may be founded in order to conduct medical services and training activities of each hospital, and these offices shall operate under the supervision of the coordinator head doctor; and that the administrative, financial, health-care and other support services of the hospitals shall be conducted, by the directorates affiliated to the coordinator head doctor, in collaboration with the office of head doctor of the relevant hospital.

GROUND FOR THE REQUEST FOR ANNULMENT

It is maintained that the provisions allowing for the appointment of a coordinator head doctor, in cases where there are several hospitals located within the same campus, for the joint management of these hospitals contain arrangements concerning a matter which is specified in Article 128 of the Constitution and which is to be regulated exclusively, and has been already regulated, by law. It is therefore alleged that the contested provisions are in breach of Articles 104 and 128 of the Constitution.

1. As regards the Competence Ratione Materiae

The Constitution embodies no provision to the effect that the matters specifically stipulated to be regulated by presidential decrees in ordinary period shall be exempted from the limitations on presidential decrees, which are laid down in Article 104 § 17 of the Constitution. These limitations are therefore applicable also to the matters specifically stipulated to be regulated through presidential decrees. However, the limitations are to be construed in conjunction with the other constitutional provisions regarding presidential decrees.

Undoubtedly, the contested provisions do not regulate any matters regarding executive power; nor do they contain any arrangement as to the fundamental rights, individual rights and duties, and political rights and duties set forth in the Constitution.

Pursuant to the third sentence of Article 104 § 17 of the Constitution, the provisions embodied in the presidential decrees must not address the matters which are stipulated, in the Constitution, to be regulated exclusively by law. If the constitution-maker specifically requires a matter to be regulated by law, it means that this matter needs to be regulated exclusively by law. Therefore, if a matter is specified, in the Constitution, to be regulated by law, no presidential decree shall be issued on this matter. However, presidential decrees may be issued on the matters which are clearly permitted by the constitutional provisions where the matters needed to be regulated by presidential decrees are specifically stipulated.

As set forth in Article 123 § 1 of the Constitution, "*The administration is a whole with its formation and functions and shall be regulated by law"*. However, Article 106 § 11 of the Constitution, which provides for "*The establishment, abolition, the duties and powers, the organizational structure of the ministries, and the establishment of their central and provincial organizations shall be regulated by the presidential decree*", explicitly permits to make arrangements, through the presidential decree, as to the establishment, abolition, the duties and powers, the organizational structure of the ministries, and the establishment of their central and provincial organizations.

In this sense, the matters specified in the said paragraph of Article 123 of the Constitution may be regulated through presidential decree on condition of being limited to the matters on the establishment, abolition, the duties and powers, the organizational structure of the ministries, and the establishment of their central and provincial organizations, which are specifically stipulated, in the Constitution, to be regulated by presidential decree.

As it has been observed that the contested provisions are related to the organizational structure of the ministries, one of the matters specifically envisaged, in Article 106 § 11 of the Constitution, to be regulated by presidential decree, they are not, in any aspect, contrary to the third sentence of Article 104 § 17 of the Constitution in conjunction with Article 123 thereof.

Besides, the contested provisions are designed to regulate the establishment of the office of coordinator head doctor, the affiliated offices of head doctor and the affiliated directorates, as well as their duties and powers. Therefore, the provisions do not introduce any arrangement as to the matters stipulated, in the first sentence of Article 128 § 2 of the Constitution, to be regulated by law.

Nor is there any statutory arrangement which may be taken as a basis for the comparison with respect to the office of coordinator head doctor.

In this sense, it has been concluded that the contested provisions have not been found unconstitutional insofar as they relate to the competence *ratione materiae*.

2. As regards the Content

Pursuant to the principle of the state governed by rule of law, presidential decrees shall be issued in the public interest. As indicated in the Constitutional Court's decisions, the public interest generally amounts to the social interest which is distinct from, and superior to, the individual benefits. A provision embodied in presidential decree may be considered constitutional in terms of the aim pursued only when it is issued solely for the public interest and not for any other reason. If it is explicit that the provision is intended for any purpose other than public interest, it is then considered in breach of the Constitution in terms of the aim pursued.

Given the objective meaning of, and the aim pursued by, the contested provisions, it has been observed that they are designed to ensure the proper fulfilment of the duties and responsibilities concerning the management of the hospitals and thereby the effective performance of health-care services. Therefore, the contested provisions involve no aspect that would require the Court to conclude that they are intended for any purpose other than public interest.

Consequently, the Court has found the contested provisions constitutional by their contents and accordingly dismissed the request for annulment.

D. PROVISIONS STIPULATING THAT THE MEMBERS OF THE HIGH ADVISORY BOARD OF THE PRESIDENCY AND THE PAYMENTS LIKELY TO BE MADE TO THE MEMBERS SHALL BE DESIGNATED BY THE PRESIDENT

CONTESTED PROVISION

In the contested provisions, it is envisaged that the members of the High Advisory Board of the Presidency ("Board") and the payments likely to be made to these members shall be designated by the President.

GROUND FOR THE REQUEST FOR ANNULMENT

It is maintained that the contested provisions are unconstitutional on the grounds that there is no clarity as to the qualifications, number and expertise of the Board members; that the executive organ has exercised its principal executive power, which is indeed exceptional, in breach of the Constitution; and that the financial rights of the Board members should have been designated by law.

THE COURT'S ASSESSMENT

1. As regards the Competence Ratione Materiae

It appears that the contested provisions regulate a matter regarding executive power but contain, in no aspect, any arrangement as to the fundamental rights, individual rights and duties, and political rights and duties specified in the Constitution.

According to the general administrative principles, personnel cadres and positions are essential in principal and permanent public services. Civil servants and other public officers conducting these services are granted status peculiar to them. They are subject to the status inherent in public services and maintain to hold their official capacity and powers also outside the profession. However, the Board is merely an advisory unit established under the Presidency, which has no power to take enforceable decisions and to have these decisions enforced.

It has been observed that the members serve only as a board and does not render any service alone; that they temporarily and extrinsically involve in the public services and do not exercise the State's imperative power in the performance of their duties; that no cadre and position are assigned for the members to sit in the Board, and no status-related link has been established between these members and the central administration; and that these members can also continue to hold any other office and profession along with their membership. In this sense, the duty performed

by the Board members is not in the form of a principal and permanent duty inherent in the public service which is to be conducted in accordance with the general administrative principles within the meaning of Article 128 of the Constitution. Therefore, the designation of the Board members and the payments likely to be made to these members cannot be considered as a matter needed to be regulated exclusively by law.

Besides, the contested provisions do not introduce any regulation as to the matters which have been explicitly regulated by law. Accordingly, these provisions have not been found unconstitutional insofar as they relate to the competence *ratione materiae*.

2. As regards the Content

The principle of *legal security,* which is one of the elements of the principle of the State governed by rule of law within the scope of Article 2 of the Constitution, aims to ensure the legal security of individuals, whereas the principle of clarity requires the presidential decrees along with the laws to be clear, precise, comprehensible and enforceable to the extent that would cause no hesitation and doubt for individuals and the administration. The latter principle also means that presidential decrees must involve preventive measures against the arbitrary practices of the public authorities.

The qualifications of the Board members are set forth in the first sentence of Article 4/A of the Presidential Decree according to which the members are to be appointed *among those who have served for the nation and the State and have the necessary knowledge and experience*. In consideration of the advisory nature of the Board, the number of the Board members having the said qualifications may vary by time and situation. It has been considered that the non-designation of the number of the Board members would not lead the individuals to foresee the relevant consequences of the contested provisions and render the provisions unclear, incomprehensible and unenforceable for the administration.

On the other hand, although the duty undertaken by the Board members is not a principal and permanent duty needed to be conducted according to the general administrative principles, it is a public service of an advisory nature, which is conducted as a Board under the Presidency. The members are naturally provided with payments, when necessary, by the administration for which the service is performed by them.

It has been considered that the payments to be made to the members are envisaged to be determined by the President in order to ensure flexibility which would enable the qualifications of the members, characteristics of the relevant work, the scope of the service, and the improving conditions and needs to be taken into consideration. It has been concluded that the contested provisions, taken together with the other provisions on the purpose of the Board's establishment, qualifications of the members and their assignment procedure, do not lead to any unclarity; and that they are not therefore contrary to Article 2 of the Constitution.

Consequently, the Court has found the contested provisions constitutional by their contents and accordingly dismissed the request for annulment.

DECISION ANNULLING THE PROVISION STIPULATING THAT THE UNITS ENTRUSTED WITH CONDUCTING SECURITY CLEARANCE INVESTIGATION AND ARCHIVE RESEARCH ARE AUTHORIZED TO ACCESS PERSONAL DATA

(E.2018/163, K.2020/13, 19 February 2020)

CONTESTED PROVISION

The contested provision stipulates that the units entrusted with conducting security investigation and archive research are authorized to receive information and documents from the archives and electronic data processing centres of the ministries and public institutions as well as to access the records and court decisions.

GROUND FOR THE REQUEST FOR ANNULMENT

It was maintained in brief that the contested provision granted an unlimited opportunity to access, collect, classify, process and evaluate the personal data of those wishing to enter public service, which might take away the concerned persons' chance to enter public service or the dismissal of those who had already been holding public office. In this regard, it was claimed that the impugned provision imposed an unforeseeable restriction on the right to enter public service, in breach of the Constitution.

THE COURT'S ASSESSMENT

Article 20 of the Constitution provides that "*Personal data can be processed only in cases envisaged by law or by the person's explicit consent. The principles and procedures regarding the protection of personal data shall be laid down in law.* ". Thereby, protection of personal data is safeguarded within the scope of the right to respect for private life.

The right to protection of personal data is a special aspect of the right to protection of human dignity and to free development of personality. As set out in previous decisions/judgments of the Court, "*... not only the personal identifying data such as name, surname, date and place of birth, but also any data such as phone number, motor vehicle plate number, social security number, passport number, cv, photo, footage, voice records, fingerprints, IP address, e-mail addresses, hobbies, preferences, persons interacted with, group memberships, family information and health-related information*, *which may also lead to direct or indirect identification of the person*", are classified as personal data.

In this context, the data obtained through security investigation and archive research are of personal nature. The impugned provision allows the units entrusted with conducting security investigation and archive research to obtain, within the scope of the security investigation and archive research procedures, the data related to individuals' private, business and social lives, which can be classified as personal data, to access the records of the decisions issued by the chief public prosecutor's offices, judges or courts, where the allegations

against the individuals concerned were examined, and to use these records. The contested provision therefore imposes a restriction on the right to protection of personal data.

In accordance with Article 20 of the Constitution, personal data can only be processed in cases prescribed by the law or with the explicit consent of the individual. Pursuant to Articles 13 and 20 of the Constitution, the formal existence of a legal regulation which intends to limit the right to protection of personal data is not sufficient, and the legal rules must be definite, accessible and foreseeable, preventing any arbitrariness.

In a state governed by the rule of law, the legal regulations must be clear, definite, comprehensible, applicable and objective, without creating any doubt, as well as including protective measures against any potential arbitrary practices by the public authorities. Such qualifications that must be inherent in the law are also necessary for ensuring legal certainty.

Article 129 of the Constitution provides that civil servants and other public officials are obliged to carry out their duties with loyalty to the Constitution and the laws. It is at the discretion of the legislator to introduce regulations stipulating that security investigation and archive research be conducted prior to entering into public service. However, such provisions must clearly set forth the circumstances in which the public authorities shall be granted an authority to take measures, as well as the limits of the authority to be granted, and they must also provide sufficient safeguards against any possible abuse of authority.

Although the impugned provision specifies that those who are authorised to conduct security investigation and archive research may access personal data, the Law contains no regulation regarding the use of such data, the authorities that will conduct investigation and research, how the accessed data will be stored, whether those concerned are entitled to challenge the said data, whether the data will be deleted after a while, the procedure to be followed if they are to be deleted, and the control mechanism to be applied in order to prevent any abuse of authority.

Therefore, allowing for the collection, use and processing of personal data through security investigation and archive research, in the absence of the respective legal safeguards and basic principles, is in breach of Articles 13 and 20 the Constitution.

Consequently, the contested provision has been found unconstitutional and therefore annulled.

DECISION ANNULLING CERTAIN PROVISIONS OF THE LAW NO. 7072 ON THE ADOPTION, WITH CERTAIN AMENDMENTS, OF THE DECREE-LAW ON MAKING CERTAIN ARRANGEMENTS UNDER THE STATE OF EMERGENCY

(E.2018/91, K.2020/10, 19 February 2020)

The impugned Law no. 7072 entered into force after the ratification by the Grand National Assembly of Turkey ("the GNAT") of Decree Law no. 680 issued under the state of emergency. The applicability of the impugned provisions extends beyond the state of emergency period, and thus they bear the characteristics of a general regulation that is not confined to the state of emergency period. For this reason, Article 15 of the Constitution by which the regime of suspension of fundamental rights and freedoms in times of emergency is regulated shall not be applicable in terms of the constitutionality review of the impugned provisions.

A. PROVISION ENVISAGING THE REJECTION OF THE LICENCE APPLICATIONS OF MEDIA SERVICE PROVIDERS REPORTED TO HAVE CONNECTIONS AND RELATIONS WITH TERRORIST ORGANISATIONS

CONTESTED PROVISION

The contested provision, Article 19 § 3 of Law no. 6112 added by Article 18 of Law no. 7072, stipulates that the licence applications of media service providers the shareholders, chairman and board members of which are reported by the National Intelligence Agency ("the MİT") and the Security Directorate to have connections and relations with terrorist organizations shall be rejected.

GROUND FOR THE REQUEST FOR ANNULMENT

It was maintained in brief that the restriction imposed by the contested provision was disproportionate and that the procedures and principles regarding the said interference were not set forth in the law, which was accordingly in breach of the Constitution.

THE COURT'S ASSESSMENT

Article 13 of the Constitution stipulates that any restriction on the freedoms of expression and the press shall be in conformity with the reasons specified in the relevant articles of the Constitution and be proportionate.

According to the impugned provision, in determination of whether the shareholders, chairman and board members of media service providers have connections and relations with terrorist organisations, the conclusion reached and notified by the MİT or the Security Directorate shall be based on, and therewith the licence applications of media service providers shall automatically be rejected. The effect of such a rejection is not limited to a certain period of time.

The contested provision also has a restraining effect on the effectiveness of the judicial review to be made in this regard, as the authority afforded by the contested provision to make a judicial review of the impugned administrative act is limited to the determination as to the existence of a notification by the relevant law enforcement unit.

The information and documents relied on by the Security Directorate and the MİT in their notifications are not necessarily of the nature that may form a basis for the criminal investigation. In other words, it is highly probable that the facts underlying the conclusion reached by the Security Directorate and the MİT are of an intelligence nature. Therefore, the judicial review of the actions to be taken by the administration entrusted with the evaluation of the license applications is much more important.

The automatic results of the evaluations to be made by the security institutions and the lack of authority on the part of the administration and the incumbent courts that will review the administrative act to make an assessment significantly limit the ability to check the accuracy of the said notifications and to take an administrative action according to the actual situation. It has been observed that the relevant Law provides no legal guarantee ensuring the exercise of the said authority in accordance with the legislative intent of the impugned provision and preventing any arbitrariness in this regard.

It has been concluded that the impugned regulation, which does not, as a rule, allow the administration evaluating the license applications and the courts that will review the former's actions to make an assessment, imposes a disproportionate restriction on the freedoms of expression and the press.

The determination to the effect that the contested provision is unconstitutional in the ordinary period does not include any assessment as to whether it is constitutional under the state of emergency.

Consequently, the contested provision has been found in breach of Articles 13, 26 and 28 of the Constitution and therefore annulled.

B. PROVISION AUTHORISING THE POLICE, AS REGARDS CYBERCRIMES, TO ACCESS THE IDENTITY INFORMATION OF INTERNET SUBSCRIBERS AS WELL AS TO CONDUCT INVESTIGATIONS

CONTESTED PROVISION

The contested provision, Additional Article 6 § 18 of the Law no. 2559 on the Duties and Powers of Police added by Article 26 of Law no. 7072, stipulates that as regards cybercrimes, the police shall be authorized to access the identity information of internet subscribers and to conduct inquiries on the internet, and that the access, location and content providers shall provide such requested information to the relevant law enforcement unit.

GROUND FOR THE REQUEST FOR ANNULMENT

It was maintained in brief that the impugned provision left the authority to investigate and examine cybercrimes directly to the judicial law enforcement officers, while such authorities should have been enjoyed only by the public prosecutor according to the criminal procedure system. In this regard, the provision was claimed to be in breach of the Constitution.

THE COURT'S ASSESSMENT

Protection of personal data is guaranteed within the scope of the privacy of private life under Article 20 of the Constitution whereby the right to respect for private and family life is enshrined.

As set out in previous decisions/judgments of the Court, "*... not only the personal identifying data such as name, surname, date and place of birth, but also any data such as phone number, motor vehicle plate number, social security number, passport number, cv, photo, footage, voice records, fingerprints, IP address, e-mail addresses, hobbies, preferences, persons interacted with, group memberships, family information and health-related information*, *which may also lead to direct or indirect identification of the person*" are classified as personal data.

In this regard, the identity information of internet subscribers constitutes personal data. The contested provision imposes a restriction on the right to protection of personal data under the right to respect for private life, since it allows the police to collect the identity information of internet subscribers, which is classified as personal data, and stipulates that the access, location and content providers shall be required to report such data to the relevant law enforcement unit.

Any restriction on fundamental rights and freedoms must comply with the requirements of the order of a democratic society and serve a pressing social need.

Pursuant to the Code of Criminal Procedure no. 5271, it is incumbent upon the judicial authorities to designate the competent chief public prosecutor's office to investigate crimes, including cybercrimes, as well as to resolve the related disputes. It is also specified therein that the judicial authorities shall be entrusted with the authority to access the data necessary for the criminal investigation, including the data that may ensure the fulfilment of the aforementioned duty.

It has been concluded that entrusting the law enforcement units with the impugned authority by restricting the right to protection of personal data solely for the purpose of designating the competent chief public prosecutor's office does not correspond to a pressing social need, and the said restriction does not comply with the requirements of the order of a democratic society.

The determination to the effect that the contested provision is unconstitutional in the ordinary period does not include any assessment as to whether it is constitutional under the state of emergency.

Consequently, the contested provision has been found in breach of Articles 13 and 20 of the Constitution and therefore annulled.

C. PROVISION ENVISAGING THE CONDUCT OF SECURITY CLEARANCE INVESTIGATION AND ARCHIVE RESEARCH IN RESPECT OF THE PERSONNEL TO BE EMPLOYED ON CONTRACTUAL BASIS

CONTESTED PROVISION

The contested provision, Article 7 § 1 (f) of Decree Law no. 399 added by Article 82 of Law no. 7072, stipulates that security clearance investigation and archive research shall be conducted in respect of the personnel to be employed on contractual basis.

GROUND FOR THE REQUEST FOR ANNULMENT

It was maintained in brief that entrusting the administration with the authority to prevent a person from exercising his constitutional rights based solely on the data obtained through security clearance investigation would result in arbitrariness, and that the collection, processing and use of personal data should be regulated by law. In this regard, the impugned provision was claimed to be unconstitutional.

THE COURT'S ASSESSMENT

The data obtained through security clearance investigation and archive research are of personal nature. The contested provision imposes a restriction on the right to the protection of personal data since it allows the public authorities to obtain, record and use the data related to individuals' private, business and social lives.

In accordance with Article 20 of the Constitution, personal data can only be processed in cases prescribed by the law or with the explicit consent of the individual. Article 13 of the Constitution stipulates that fundamental rights and freedoms may be restricted only by law. Pursuant to the relevant constitutional articles, the legal rules which intend to limit the right to the protection of personal data should be definite, accessible and foreseeable, preventing any arbitrariness.

It is at the discretion of the legislator to introduce regulations stipulating that security clearance investigation and archive research must be conducted prior to entering into public service. However, such provisions must clearly set forth the circumstances in which the public authorities shall be granted an authority to take measures and interfere with the privacy of private life, as well as the limits of the authority to be granted, and they must also provide sufficient safeguards against any possible abuse of authority.

The impugned provision contains no regulation regarding the nature of the data and documents accessible during the security clearance investigation and archive research, use of such data, the authorities that will conduct investigation and research, how and how long the accessed data will be stored, whether those concerned are entitled to challenge the said data, whether the data will be deleted after a while, the procedure to be followed if they are to be deleted, and the control mechanism to be applied in order to prevent any abuse of authority. In other words, no definite and foreseeable legal safeguards, preventing any arbitrariness, regarding the conduct of security investigation and archive research and use of the data collected are set forth in the said provision.

It has been concluded that allowing for the collection, use and processing of personal data through security clearance investigation and archive research, in the absence of the respective legal safeguards and basic principles, is in breach of the Constitution.

The determination to the effect that the contested provision is unconstitutional in the ordinary period does not include any assessment as to whether it is constitutional under the state of emergency.

Consequently, the contested provision has been found in breach of Articles 13 and 20 of the Constitution and therefore annulled.

DECISION ANNULLING THE DECREE LAW PROVISION THAT IS NOT BASED ON THE EMPOWERING ACT AND PRESCRIBES A REGULATION ON FUNDAMENTAL RIGHTS

(E.2018/122, K.2020/14, 19 February 2020)

CONTESTED PROVISION

The contested provision stipulates that those who will be employed in public service on a contractual basis shall be required not to have been sentenced to imprisonment for a period longer than 6 months.

GROUND FOR THE REQUEST FOR ANNULMENT

It was maintained in brief that while it is required pursuant to the Civil Servants Law that in order for an individual to be employed as a civil servant, he/she must not have been sentenced to imprisonment for one year or more, the impugned imprisonment period is prescribed as being longer than six months with regard to the personnel to be employed in public service on a contractual basis under the Decree Law. In this regard, the impugned provision was claimed to be unconstitutional for being in breach of the principle of equality.

THE COURT'S ASSESSMENT

In the constitutionality review of the contested provision, it is discussed at the outset whether the repealed Article 91 of the Constitution, which regulated the legal regime of Decree-Laws, can be relied on as the binding rule; whether, upon the rejection decision rendered by the Constitutional Court as a result of the review made in accordance with Article 91, the same provision can be reviewed again in accordance with the same article; and whether the ten-year period prescribed in Article 152 § 4 of the Constitution to elapse for filing a further claim of unconstitutionality is also applicable to the reviews to be made under the repealed Article 91 of the Constitution.

Article 91 of the Constitution, which provided that the Turkish Grand National Assembly might empower the Council of Ministers in the previous government system to issue decree laws and which regulated the legal regime of decree laws, was repealed by Article 16, which entered into force on 9 July 2018, of the Act no. 6771 on the Amendment to the Constitution of the Republic of Turkey, whereby the chance of issuing decree-laws has been removed constitutionally.

On the other hand, pursuant to the first sentence of provisional Article 21 of the Constitution, which is added by Act no. 6771, it is prescribed that the decree-laws issued until the repeal date of Article 91 of the Constitution and are still in force shall continue to be in force. While the said provision envisages the continuation of the power vested to review the decree laws, it contains no provision as to whether the repealed articles can be relied on as the binding rule during the said review. This issue should be resolved through interpretation by the Constitutional Court, and to this end, the nature of the repealed rules should be taken into consideration.

In the Constitutional jurisdiction, in terms of the constitutionality review of a rule, the rules applicable on the date of review are relied on in accordance with the supremacy and binding nature of the Constitution. However, since any rule that is subject to the constitutionality review has emerged on the basis of the *empowering* provisions applicable at the material time, a review of such a rule should be made on the basis of the provisions applicable at the material time even if they are currently repealed. As a matter of fact, even if repealed, Article 91 of the Constitution underlies the constitutional competence relating to the issuance of the decree laws that are still in force and subject to the constitutionality review in terms of competence.

Accordingly, it should be examined whether the relevant decree laws, and hence the contested provision, comply with the repealed Article 91 of the Constitution.

As a result of the review made by the Constitutional Court upon the alleged no-compliance with the repealed Article 91 of the Constitution of the contested provision through an action for annulment brought previously, it was concluded that the contested provision was not contrary to the relevant Article, on the grounds that it relied on an empowering act, that it fell within the scope of the empowering act and that it included no regulation relating to a prohibited issue. In the same decision, the content of the provision was also examined and was not found unconstitutional (see the Court's decision no. E.1990/12, K.1991/7, 4 April 1991).

It is obvious that the review of whether the decree-laws comply with the repealed Article 91 of the Constitution cannot be limited to once. Otherwise, such a limitation would mean that subsequent to its first review, the decree law shall be untouchable in the face of the said article of the Constitution. This, above all, does not comply with the intended purpose of the constitutional justice, the main purpose of which is to make the constitutionality review of the rules as well as to remove the unconstitutional ones from the legal system.

Therefore, the fact that the contested provision was previously reviewed under the repealed Article 91 of the Constitution does not prevent its review under the same article anew.

Article 152 § 4 of the Constitution provides that no claim of unconstitutionality shall be made with regard to the same legal provision until ten years have elapsed after publication in the Official Gazette of the decision of the Constitutional Court dismissing the application on its merits. The said provision prescribes a ten-year ban for the constitutionality review of a previously challenged provision. It is understood that the aim of the relevant ban is to ensure stability in court decisions.

In this context, with a view to ensuring the legal stability, it is necessary that the ten-year ban be applicable also to the reviews under the repealed Article 91 of the Constitution. The question of under which article of the Con-

stitution a review is made does not matter in terms of the application of the ban intended to ensure legal stability. On the other hand, there is no reason for separating the repealed Article 91 of the Constitution from the other articles thereof in terms of the said review ban. Accordingly, no claim of unconstitutionality under the repealed Article 91 of the Constitution shall be made with regard to the same legal provision until ten years have elapsed after publication in the Official Gazette of the decision of the Constitutional Court dismissing the application concerning a decree-law provision on its merits.

In the present case, as more than ten years have elapsed since the publication of the Constitutional Court's decision dismissing the application concerning the contested provision in the Official Gazette on 13 August 1991, the previous decision does not hinder the review of the provision under the repealed Article 91 of the Constitution.

Law no. 3479 underlying Decree-Law no. 399 was annulled by the Constitutional Court's decision no. K.1990/2, and the relevant decision was published in the Official Gazette dated 21 April 1990. Accordingly, the Decree-Law embodying the contested provision does not meet the requirement of relying on an empowering act which is a precondition for its applicability, since Act no. 3479 on which it is based has been annulled.

In addition, it is specified in the repealed Article 91 § 1 of the Constitution that the fundamental rights, individual rights and duties included in the First and Second Chapter of the Second Part of the Constitution and the political rights and duties listed in the Fourth Chapter cannot be regulated by decree-laws except during periods of martial law and states of emergency.

Right to enter public service safeguarded by Article 70 of the Constitution -in the Fourth Chapter titled "*Political Rights and Duties*" in the Second Part thereof- cannot be regulated by decree-laws. However, the contested provision concerns the qualifications required for employment on a contractual basis under Decree-Law no. 399, which is one of the ways of employment as a public official in the performance of public services; therefore, it is a regulation concerning the exercise of the right to enter public service and remains within the prohibited area which cannot be regulated by decree-laws pursuant to the repealed Article 91 of the Constitution.

Consequently, the contested provision has been found in breach of the repealed Article 91 of the Constitution and therefore annulled.

DECISION ON THE PRESIDENTIAL DECREE NO. 46

(E.2019/105, K.2020/30, 12 June 2020)

A. PROVISION ON THE ESTABLISHMENT OF THE OVERSEAS ORGANISATION OF THE MINISTRY OF HEALTH AND EMPOWERING THE MINISTRY TO ESTABLISH SUCH ORGANISATION

CONTESTED PROVISION

Amended Article 353 of the Presidential Decree no. 1 sets forth that the Ministry of Health ("the Ministry") shall be formed of the central, provincial and overseas organisations, and the phrase *"...and overseas..."* included therein constitutes the first contested issue. The provision added to the Presidential Decree no. 1 by the Presidential Decree no. 46, whereby the Ministry is empowered to establish the overseas organisation of the Ministry, is the second contested issue.

GROUND FOR THE REQUEST FOR ANNULMENT

It is maintained that the contested provisions are unconstitutional as Article 106 § 11 of the Constitution allows for the establishment of merely the central and provincial organisations of the ministries through a presidential decree and does not introduce any arrangement as to the overseas organisation, which is thus evident that the power to establish an overseas organisation is not covered by this provision; and that Article 123 § 3 of the Constitution, which allows for the establishment of a public legal entity also through presidential decrees, cannot apply to the ministries.

THE COURT'S ASSESSMENT

1. As regards the Competence Ratione Materiae

Although it was maintained in the petition that the said provisions were in breach of Articles 106 and 123 of the Constitution in so far as concerned the competence *ratione materiae*, they were examined under Article 104 § 17 of the Constitution, where the rules as to the competence *ratione materiae* with respect to presidential decrees are laid down, for their being of relevance.

It is set forth in Article 104 § 17 of the Constitution that no presidential decree shall be issued on the matters which are explicitly regulated by law. In cases where the constitution-maker specifically requires a matter to be regulated by law, it means that this matter needs to be regulated exclusively by law. Therefore, if a matter is specified, in the Constitution, to be regulated by law, no presidential decree shall be issued on this matter. However, presidential decrees may be issued with respect to the matters which are clearly permitted by the constitutional provisions specifically prescribing the matters needed to be regulated by presidential decrees.

As set forth in Article 123 § 1 of the Constitution, *"The administration is a whole with its formation and functions and shall be regulated by law"*. In Article 106 § 11 of the Constitution, it is enshrined that the establishment, abolition, the duties and powers, the organizational structure of the ministries,

and the establishment of their central and provincial organizations shall be regulated by presidential decrees. Accordingly, the matters laid down in Article 106 § 11 are the issues which are specifically stipulated, in the Constitution, to be regulated through presidential decrees.

The notion *"...organisational structure..."*, specified in the same paragraph, points to the units -as a whole- operating under the same institution, which are of different levels and qualifications and established to ensure the fulfilment of the duties and powers undertaken by the public institutions and organisations founded to provide certain services and which play, directly or indirectly, a role in the performance of such services. In this regard, the overseas organisation of an institution, along with its central and provincial organisations of such nature, is also covered by the notion of the organisational structure.

In the contested provisions, it is envisaged that an overseas organisation be incorporated into the organisational structure of the Ministry, currently composed of the central and provincial organisations; in other words, it is set forth that the overseas organisation of the Ministry shall be established, and the Ministry shall be empowered to do so. Therefore, it appears that the contested provisions are related to the organisational structure of the ministries, which is one of the matters specifically stated, in Article 106 § 11 of the Constitution, to be regulated through a presidential decree.

In this sense, as the issue to which the contested provisions are of relevance is one of the matters to be regulated through a presidential decree, as clearly specified in Article 106 § 11 of the Constitution, making such a regulation not through a law is not, in any aspect, unconstitutional.

Article 104 § 17 of the Constitution sets forth that no presidential decree shall be issued with respect to the matters that are already and explicitly regulated by law. Undoubtedly, the arrangements introduced by the Grand National Assembly of Turkey ("the GNAT") as law by virtue of its power to enact laws under Article 87 of the Constitution fall into this scope. However, it should be assessed whether the decree-laws issued under the repealed Article 91 of the Constitution could be considered under the same scope.

As specified in the former Article 87 of the Constitution of 1982, before being amended by Law no. 6771 in 2017, it is among the GNAT's duties and powers to empower the Council of Ministers to issue decree-laws on certain matters.

In consideration of the nature of decree-laws as indicated in the repealed provisions of the Constitution, the aim underlying their issuance, the Constitutional Court's jurisprudence and the practice in respect thereof, it is evident that the decree-laws have the force of law. Accordingly, no presidential decree may be issued also with respect to the matters which have been explicitly regulated by a decree-law, pursuant to Article 104 § 17 of the Constitution. In this sense, it must be primarily considered whether there is a law which has been previously enacted and may be taken as a basis for the comparison during the review. If there is such a law, it must be then assessed whether the contested provision regulates a matter which has been explicitly regulated by this law. In this assessment, it must be firstly ascertained whether the relevant law is enforceable in the field which is regulated by the presidential decree and subsequently determined whether

the statutory arrangement is clear. In this sense, it should be considered whether the relevant statutory arrangement would, in the absence of the provision embodied in the presidential decree, address the matter regulated by the latter, which may be regarded as an indication to ascertain whether the presidential decree has been issued to address the matter that has been already regulated by law.

In Article 51 § 1, titled *"Overseas health-care service units"* of the Decree-Law no. 663, it is set forth that the Ministry and its affiliated institutions may establish and operate provisional health-care service units abroad for humanitarian and technical aid or have them established and operated, and paragraph (3) states that the Ministry may establish and operate health-care service units abroad with a view to providing such services. However, the contested provisions of the Presidential Decree embody regulations not as to the health-care service units of the Ministry, but rather its overseas organisation. Accordingly, it appears that in the absence of the contested provisions embodied in the presidential decree, the said provisions of the Decree-Law are not applicable to the same matter. As a matter of fact, the contested provisions are generally arranging an administrative organisation, whereas the provisions of the Decree-Law introduce regulations concerning the health-care units for the provision of health-care services. Therefore, it has been observed that the provisions of the Decree-Law and the contested provisions are not enforceable in the same field; in other words, do not regulate the same matter.

2. As regards the Content

As specified in Article 106 § 11 of the Constitution, it is within the President's discretion to decide whether there is any need for a ministry to form an overseas organisation also in view of the nature and characteristics of the services provided by that ministry. Therefore, the formation of an overseas organisation for the Ministry by the President, exercising the discretionary power afforded to him by the Constitution, under the first contested provision is not, in any aspect, in breach of any provisions of the Constitution.

The power to found an overseas organisation under the organisational structure of the ministries is entrusted, by virtue of Article 106 of the Constitution, to the presidential decrees. This primary power cannot be delegated to, and thereby enforced by, any other administrative act. However, the executive does not necessarily designate every kind of details concerning the matter which can be regulated through presidential decrees and by itself take the necessary actions required by these arrangements. By determining the primary principles and drawing the general framework through a presidential decree, the executive may designate the issues falling under the scope of this framework through other regulatory actions and leave the performance of necessary acts and actions under these regulations to the relevant administration.

In the second contested provision, it is set forth that the Ministry is entitled to establish its overseas organisation. It appears that taken in conjunction with the other provisions of the Presidential Decree no. 1 on the organisation of the Ministries, the phrase "establishment of the overseas organisation" included therein means that the necessary administrative acts for ensuring

the *de facto* functioning of the overseas organisation would be performed by the Ministry.

Accordingly, the Presidential Decree no. 1, which embodies also the contested provision, does not leave it to the Ministry to decide on the basic principles such as the nature of the overseas organisation, the place where it shall be established, its duties and its field of operation but entrusts the power to make such regulations to the presidential decree by virtue of Article 510/B laid down under the Common Provisions in the Presidential Decree no. 1. The question whether the power to make arrangements on these matters may be constitutionality left to the presidential decision through a presidential decree is not the subject-matter of this case. Besides, this provision demonstrates that the power to directly introduce regulations with respect to these matters is not entrusted to the Ministry. Therefore, the power specified in the contested provision cannot be said to also cover the establishment or arrangement of an overseas organisation without basic principles and general framework being set. In this sense, the second contested provision, which does not empower the Ministry to make direct arrangements concerning its overseas organisation established through a presidential decree under Article 106 § 11 of the Constitution, is not in any aspect in breach of the said paragraph.

Consequently, the Court has found the contested provisions constitutional in so far as they related to the competence *ratione materiae* and by their contents and accordingly dismissed the request for annulment.

B. PROVISION ENVISAGING THE AWARD OF SCHOLARSHIP BY THE HEALTH INSTITUTES OF TURKEY ("TÜSEB")

CONTESTED PROVISION

The contested issue in the relevant provision is the phrase *"... and scholarships..."* added by the Presidential Decree no. 46 to the relevant paragraph of Article 666 of the Presidential Decree no. 4. It is envisaged therein that TÜSEB is entrusted with the tasks*, inter alia*, of providing facilities for the raising and training of scientists and researchers, granting awards and scholarships to that end, pursuing the distinguished ones with outstanding success during and after the training process and assisting them in their training and improvement.

GROUND FOR THE REQUEST FOR ANNULMENT

It is maintained that the contested provision is unconstitutional on the ground that it relates to the budgetary right; that as enshrined in the Constitution, the public expenditures must be made in line with the budget; and that an expenditure, which is not covered by the budgetary law, is regulated through a presidential decree without a legal basis.

THE COURT'S ASSESSMENT

1. As regards the Competence Ratione Materiae

TÜSEB is a public legal entity founded through a presidential decree. Pursuant to Article 123 § 3 of the Constitution, the duties and powers of this institution, founded through a presidential decree, may be regulated also through a presidential decree.

Article 161 §§ 1 and 2 of the Constitution respectively sets forth that the expenditure of the public legal entities other than the state economic enterprises shall be determined and made by annual budgets; and that the preparation, implementation and control of the central government budget and the special periods and procedures for investments as well as works and services expected to last more than one year shall be regulated by law.

It appears that TÜSEB, which is an affiliated institution of the Ministry and a public legal entity with scientific and administrative autonomy and a special budget, is included in the List II of Law no. 5018, where special budgeted administrations are listed; and that TÜSEB is accordingly covered by the central administration budget.

The budgetary right means that the legislature shall vest the executive with the power, with pre-determined limits, with respect to the collection and spending of public revenues on behalf of the public and monitor the consequences thereof.

The budget generally indicates the forecasts of revenues and expenditures of a certain period and regulates the principles as to the implementation. State is entitled to make expenditures and collect revenues within the period of one year on condition of being specified in the budgetary law.

It has been observed that the matters envisaged, in Article 161 of the Constitution, to be prescribed by law is limited to the issues as to the exercise of the budgetary right (the preparation, implementation and control of the central government budget and the special periods and procedures for investments as well as works and services expected to last more than one year); and that Article 161 does not embody a provision to the effect that the arrangements which would by their very nature give rise to a public expenditure shall be made exclusively by law.

In this regard, it has been considered that the contested provision is a budgetary issue for embodying an arrangement of the nature that would ultimately lead to a public expenditure but is not indeed associated with the budgetary right of the legislature. As the contested provision contains no element as to the legislature's rights and powers concerning the preparation, implementation and control of budget, it has been concluded that it is not related to a matter prescribed to be regulated exclusively by law.

Given the general legislative intention of Law no. 5102, it appears that the students likely to be granted scholarship by the Higher Education Credit and Hostels Institution are the university students who are studying within the country and who are successful and in need of such scholarship. In the second paragraph of the said provision, it is set forth that the other public institutions and organisations cannot make any payment under the name of scholarship, loan and financial aid to such students. The issue sought to be achieved through this prohibitive provision is to prevent the making of any

payment to the students of the specified nature, for being in need thereof, by the public institutions and organisations other than the Higher Education Loans and Hostels Institution. By ensuring the payment of this scholarship only by an institution, it is intended to preclude the making of several payments to the same person with the same motivation, which ultimately ensures the granting of financial aid to a higher number of students.

The scholarship prescribed to be granted through the contested provision is not given to the person concerned for being in need thereof pursuant to Law no. 5102 or for having outstanding success pursuant to Law no. 278, but for the purpose of ensuring training and progress of scientists and researchers in the healthcare field that is the TÜSEB's field of activity.

Besides, the scholarships envisaged to be granted under Laws no. 5102 and 278 are non-refundable for not being paid in return for a *de facto* performance of work. However, it appears that the scholarship envisaged to be granted by TÜSEB is a project-based scholarship given to the students with B.A., M.A. and PhD degrees, who are actively taking role in projects deemed appropriate by the TÜSEB. Accordingly, this scholarship is refundable, unlike the scholarships granted under Laws no. 5102 and 278. In this sense, it cannot be said that in the absence of the contested provisions embodied in the presidential decree, the said provisions of law, taken as a basis for the comparison, would apply to the same matter.

In this regard, it has been observed that neither the provisions of law, meaning and scope of which are explained above, nor the other provisions of law specified in the petition are enforceable in the field same with that of the contested provisions. It has been therefore concluded that the contested provision is not related to a matter, which has been explicitly regulated by law.

2. As regards the Content

As a requisite of a state of law, the laws and presidential decrees must be in pursuance of the public interest, must embody general, objective and fair provisions and observe the fairness criteria. Therefore, the legislature and the executive must exercise the discretionary power, afforded to them through statutory arrangements, within the constitutional limits and in pursuance of the justice, fairness and public interest.

The contested provision envisages the award of scholarships by TÜSEB for the training and progress of scientists and researchers. The favourable effects of the raising of scientists and researchers in the health-care field on the public health by contributing to the scientific progress and improvement in the same field cannot be disregarded. It has been therefore concluded that the contested provision is in pursuance of public interest and is compatible, in every aspect, with the principles of justice and fairness.

Consequently, the Court has found the contested provision constitutional in so far as it related to the competence *ratione materiae* and by its content and accordingly dismissed the request for annulment.

DECISION ANNULLING THE PROVISION HINDERING THE APPLICATION OF SIMPLIFIED TRIAL PROCEDURE TO CASES PROCEEDED TO TRIAL BY 1 JANUARY 2020

(E.2020/16, K.2020/16, 25 June 2020)

CONTESTED PROVISION

The contested provision sets forth that the simplified trial procedure, which has a bearing on the length of sentence to the advantage of the offender in cases which are at the trial stage but have not been concluded yet by a decision, shall be applied being limited to the cases proceeded to trial after a given date.

GROUND FOR THE REQUEST FOR ANNULMENT

It is maintained that the contested provision is unconstitutional as the legal arrangements concerning the simplified trial procedure, which embody a more favourable provision, must be applied to all cases.

THE COURT'S ASSESSMENT

As a requisite of the legal certainty and legal security, Article 38 of the Constitution, which sets forth that *"... no one shall be given a heavier penalty for an offence other than the penalty applicable at the time when the offence was committed"*, precludes the retrospective application of criminal law to the detriment of the offenders. This provision concerning the *ratione temporis* application of criminal norms is described as the *prohibition of retrospective application of criminal law to the detriment of the accused,* which is a sub-principle of the principle of lawfulness. This prohibition is a safeguard introduced for the sake of personal liberty.

In cases where a law enacted subsequent to the date of offence decriminalise the same act or prescribes a more lenient sentence for the same offence, the *principle of application of a more favourable criminal law*, another sub-principle, comes into play.

The Constitution explicitly prohibits the retrospective application of a given law -prescribing a more severe sentence- to the offences committed before its effective date. This prohibition, emanating from the principles of legal certainty and legal security, also entails the application of a subsequent law that is more favourable than the one in force on the date of the offence. If the provisions of the abolished law, which are to the detriment of the accused, are allowed to be applied to cases where an act constituting an offence at the time of its commission is decriminalised by a subsequently-enacted law, or where the subsequent law prescribes a more lenient sentence than the abolished law for the same criminal act, it would lead to the individuals to face a sentence that could not be foreseeable by them, despite the principle of *nullum crimen, nulla poena sine lege* which requires the offences and corresponding penalties to be clearly defined by law. This is by no means considered to comply with the said principle intended for affording constitutional safeguard to ensure legal certainty in criminal law.

Pursuant to Article 141 of the Constitution, the State is to take effective measures so as to preclude the unnecessary prolongation of the proceed-

ings. In this sense, it is a requisite of the right to be tried within a reasonable time to organise the legal system and notably the trial procedure in a way that would ensure the conclusion of the proceedings within a reasonable time. Accordingly, it is within the legislator's discretionary power to determine the trial procedures that would ensure conclusion of the proceedings for certain offences within a shorter period of time. However, the statutory steps to be taken to that end must not undoubtedly hamper the issuance, at the end of the proceedings, of a fair and equitable decision on the merits.

In this sense, certain rules on trial procedures may have a bearing on the length of sentences prescribed for the criminal acts under prosecution. The prevention of retrospective application of the provisions having a bearing on the length of the relevant sentence to the advantage of the offender falls foul of the principle of *nullum crimen, nulla poena sine lege*.

It is set forth in the Code of Criminal Procedures that in case of a conviction decision rendered at the end of the simplified trial procedure, one-quarter of the given sentence shall be deducted. The contested provision provides for that the simplified trial procedure shall not be applied to the cases proceeded to trial before a particular date. Accordingly, the contested provision is in breach of Article 38 of the Constitution for allowing for the application of the simplified trial procedure, which has a bearing on the length of sentence and is therefore more favourable to the offender, merely to the cases proceeded to trial after a certain date.

Consequently, the contested provision has been found unconstitutional and therefore annulled.

DECISION ANNULLING THE PROVISION BANNING DEMONSTRATION MARCHES ON INTERCITY HIGHWAYS

(E.2020/12, K.2020/46, 10 September 2020)

CONTESTED PROVISION

The contested provision stipulates that demonstration marches shall not be held on intercity highways.

GROUND FOR THE REQUEST FOR ANNULMENT

It was maintained in brief that in determining the place where a demonstration march would be held, the rights and freedoms of other individuals who would use that place should also be taken into consideration; however, the impugned provision imposed a categorical ban without such consideration. In this regard, the contested provision was claimed to be unconstitutional.

THE COURT'S ASSESSMENT

The right to hold meetings and demonstration marches, safeguarded by Article 34 of the Constitution, protects the freedom of individuals to come together in open or closed places to express their thoughts. This right, taken together with the freedom of expression, forms the basis of a democratic society.

The contested provision constitutes a limitation *ratione loci* on the right to hold meetings and demonstration marches, stipulating that demonstration marches shall not be held on intercity highways.

The Court set forth its basic approach regarding the restriction *ratione loci* imposed on the right to hold meetings and demonstration marches in its judgment no. E.2014/101, K.2017/142 dated 28 September 2017, where it annulled the phrase "*Public roads ...*" included in Article 22 § 1 of Law no. 2911.

That judgment stated; that meetings and demonstration marches inevitably had an adverse effect on the daily lives of others; that the use of public roads for different purposes might result in a conflict among different freedoms, however, in case of such a conflict, a reasonable balance should be struck between freedoms, thereby affording equal protection as much as possible; and that in this regard, the hindrance of the freedom of travel of people using these roads due to the meetings organised on public roads would not automatically require a ban on holding meetings on these roads.

Disruption of vehicle traffic affects the public order as well as the others' freedom of travel. Thus, it is understood that the restriction imposed by the impugned provision pursues a legitimate aim.

In determining the route where the demonstration march will be held, granting absolute superiority to the prevention of the disruption of highway traffic will cause a disproportionate balance between the right to hold meetings and demonstration marches, and the public order as well as the rights and freedoms of others, to the detriment of the former. As pointed out in the previous judgments of the Court, meetings and demonstration marches in-

evitably have an adverse effect on the daily lives of others, which should be tolerated in a democratic society.

In cases where the rights and freedoms of others are granted absolute superiority in determining the place where the demonstration march will be held, only certain places will be allowed as the route of the march, and the remaining places will be regarded as absolutely prohibited areas. However, in some cases, the place where the marches are held and the route chosen are of great importance with a view to influencing the target group. Unless there is a pressing need in a democratic society, individuals should be able to choose the place where they will hold a demonstration march.

Where the disruption of vehicle traffic due to a demonstration march makes daily life extremely *difficult and unbearable*, then this right may be limited provided that the constitutional principles and rules are respected. The contested provision categorically bans the organisation of demonstration marches on intercity highways, without referring to the extent of the potential disruption or hardship.

Thus, it has been concluded that the restriction on the right to hold meetings and demonstration marches does not meet a pressing social need, nor does it comply with the requirements of the order of a democratic society.

Consequently, the contested provision has been found unconstitutional and therefore annulled.

DECISION ANNULLING THE PROVISIONS ON THE REVOCATION OF DEMOLITION ORDERS AND ADMINISTRATIVE FINES WITH RESPECT TO THE UNLICENSED BUILDINGS SITUATED IN THE BOSPHORUS FRONTAL VIEW AREA

(E.2019/21, K.2020/51, 24 September 2020)

CONTESTED PROVISION

The contested provisions set forth that the demolition orders issued pursuant to the Bosphorus Law no. 2960 and the administrative fines appearing to be uncollectible shall be revoked, and that the owners of the immovables located in certain parts of the Bosphorus frontal view area (*the area adjacent to the Bosphorus coastline*) shall be able to obtain a building registration certificate (*a certificate ensuring the official registration of the buildings constructed in contravention of Zoning Law*).

GROUND FOR THE REQUEST FOR ANNULMENT

It is maintained that the contested provisions are unconstitutional as they contradict the State's duty to preserve the historical, cultural and natural assets and lead to a withdrawal from the execution of the demolition orders issued with respect to the several unlicensed constructions situated in the Bosphorus Area, as well as from the collection of the administrative fines imposed on account thereof.

THE COURT'S ASSESSMENT

As set forth in Article 56 of the Constitution, it is among the State's principal duties to take measures so as to improve the natural environment, protect the environmental health and prevent environmental pollution. The notion *"a healthy and balanced environment"* specified in the Constitution entails not only an environment where natural beauties are preserved and air and water pollution resulting from urbanisation and industrialisation is prevented, but also an environment which is established and regulated in line with a particular plan and programme.

Article 63 of the Constitution embodies the duties of the State to secure the protection of the historical, cultural and natural assets and wealth and to take supportive and promotive measures to that end.

It should be noted that the legislator enjoys a margin of appreciation to make the arrangements that it deems necessary and to determine the necessary means in this respect. However, in doing so, the legislator is to observe and strike a reasonable balance between the competing public interests which necessitate the statutory arrangement, on one hand, and which serve for the protection and improvement of natural beauties as well as historical and cultural assets of the said area, on the other hand.

İstanbul, the cradle of civilisations, is a privileged city of the country that has a special place in the world thanks to its abundant historical, cultural and natural assets. As a paramount region with its natural beauties, historical, cultural and natural assets, the İstanbul Bosphorus Site has been

always given utmost importance throughout the history. This unique area, along with its natural beauty, also embraces several works of art and values which are of crucial importance in terms of national history and culture.

In İstanbul, the city of Turkey with the highest number of registered cultural assets, Bosphorus is one of the regions where the registered buildings are most commonly situated. The Bosphorus region has several outstanding cultural and natural assets that comprise the common heritage of humanity. Therefore, the preservation of the Bosphorus coastline and the frontal view area is a concern not only to those living today but also to the next generations. It is therefore evident that the preservation and improvement of the natural beauties as well as cultural and historical assets of the Bosphorus coastline and the frontal view area involve a significant public interest.

In this sense, it has been considered that the facilities, which are prescribed in the contested provisions, for the reconstruction and redevelopment of cities may be indeed provided through any other methods; and that the contested provisions, which contravene the purpose of preserving the Bosphorus Site having a precious natural beauty and cultural values, have hindered the reasonable balance to be struck between the competing interests in question.

In consideration of the damage to be caused to the environment, cultural and natural assets as well as the advantages sought to be obtained, the Court has concluded that the contested provisions upset the fair balance to be struck between the State's positive obligations to protect and improve the environment as well as the cultural and natural assets.

Consequently, the contested provisions have been found unconstitutional and therefore annulled.

DECISION ANNULLING THE PROVISION WHEREBY THE COURT DECISIONS ISSUED UPON OBJECTION TO AN ADMINISTRATIVE FINE ARE CONSIDERED FINAL

(E.2020/21, K.2020/53, 1 October 2020)

CONTESTED PROVISION

The contested provision sets forth that the decisions issued by courts upon objection to administrative fines that have been imposed on construction inspection authorities shall be final.

GROUND FOR THE REQUEST FOR ANNULMENT

It was maintained that the contested provision was unconstitutional as the administrative fines, subject-matter of the court decisions envisaged to be final in the contested provision, might be in excessive amounts and that these decisions therefore must be subject to appellate review.

THE COURT'S ASSESSMENT

In consideration of Articles 36, 154 and 155 of the Constitutions as a whole, it appears that the right to appellate review of court decisions by another judicial authority is safeguarded under the right to legal remedies enshrined in Article 36 of the Constitution, without being subject to any restriction by the subject-matter of the proceedings. Accordingly, the right to appellate review of a decision is applicable to all proceedings either based on a criminal charge or concerning civil rights and obligations.

However, in cases of criminal conviction, the need for the appellate review of court decisions is of more importance. Nevertheless, the notions such as offence, penalty and conviction are not necessarily considered, in a classic and technical meaning, to be specific merely to criminal proceedings. In other words, these notions may be given an autonomous interpretation in the constitutional context.

As a matter of fact, pursuant to the Court's case-law established in the individual application judgments, given the severity of the administrative sanctions which are not indeed prescribed as a sanction of criminal law and are not subject-matter of conventional criminal proceedings, they may also qualify as a penalty through an autonomous interpretation in the constitutional context. In this sense, certain cases that are filed with respect to administrative fines and dealt with in the administrative jurisdiction have been also examined under the scope of criminal charge in the meaning of the right to a fair trial.

The contested provision, which envisages that the court decisions issued upon objection to an administrative fine shall be final, constitutes a restriction on the right to appellate review of a decision by another court.

It appears that the administrative fines imposed pursuant to Law no. 4708 may be in excessive amounts. It is therefore clear that the administrative

fines in excessive amounts are in the form of a severe and serious sanction, given their effect on the financial situation of the concerned individual; and that they therefore amount to a punishment. In this sense, the importance attached to the appellate review of such decisions, which may cause the relevant individual to face a severe penalty in financial terms, cannot be denied.

The burden placed on individuals for not making such decisions subject to an appellate review cannot be justified even for the purpose of concluding the proceedings within a reasonable time and for reasons of judicial economy. It has been accordingly considered that the contested provision imposes a disproportionate restriction on the right to appellate review of a court decision.

Consequently, the contested provision has been found unconstitutional and therefore annulled.

DECISION ANNULLING CERTAIN PROVISIONS OF LAW NO. 6755 ON THE ADOPTION, WITH CERTAIN AMENDMENTS, OF THE DECREE-LAW ON MEASURES TO BE TAKEN UNDER THE STATE OF EMERGENCY AND MAKING ARRANGEMENTS REGARDING CERTAIN INSTITUTIONS AND ORGANISATIONS

(E.2017/21, K.2020/77, 24 December 2020)

A. PROVISION ENABLING THE CLOSURE, WITH THE APPROVAL OF THE RELEVANT MINISTER, OF MEDIA OUTLETS ASSOCIATED WITH ORGANISATIONS FOUND ESTABLISHED TO POSE A THREAT TO THE NATIONAL SECURITY AND CONFISCATION OF THEIR PROPERTIES

CONTESTED PROVISION

The contested provision, Article 2 § 4 of Law no. 6755, regulates the closure, upon the proposal of the commission to be established by the relevant Minister and with the approval of the Minister, of private radio and television outlets, newspapers and periodicals, publishing companies and distribution channels, which have been found to be a member of, or to have connection or contact with structures, organisations or groups that are found established to pose a threat to the national security or terrorist organisations, as well as the transfer of their all kinds of assets to the Treasury.

GROUND FOR THE REQUEST FOR ANNULMENT

It was maintained that the contested provision was unconstitutional as; it enabled the closure, with the approval of the Minister, of private radio and television outlets, newspapers, periodicals, and publishing companies and distribution channels -not listed in the annex-, which were found to be a member of or to have connection or contact with structures, organisations or groups that were found established to pose a threat to the national security, or terrorist organisations not limited to the terrorist organization behind the coup attempt leading to the declaration of the state of emergency, as well as the confiscation of their movable and immovable properties; the confiscation of the movable and immovable properties owned by private radio and television outlets, newspapers, periodicals, and publishing companies and distribution channels to be closed down amounted to the punishment of confiscation, which was in breach of the right to property; and it limited the freedoms of expression, the press and information as well as right to publish periodicals and non-periodicals to an extent unnecessary in a democratic society, which was in breach of the principle of the State governed by the rule of law.

THE COURT'S ASSESSMENT

As regards the First Sentence of the Contested Provision

The contested provision is intended for the elimination of threats and dangers giving rise to the declaration of the state of emergency. However, it may be applied in a way that would exceed the duration of the state of emergency. In this sense, the provision must be examined according to the provisions of the Constitution, notably the provision regulating the right allegedly restricted by the contested provision, and unquestionably, Article 13 that is the fundamental provision regarding the regime of restriction and protection of fundamental rights and freedoms in the ordinary period.

The contested provision restricts the freedoms of expression and the press, by enabling the closure, under certain conditions, of private radio and television outlets, newspapers and periodicals, publishing companies and distribution channels.

Article 13 of the Constitution provides, "*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.*". Accordingly, restrictions imposed on freedoms of expression and the press must be prescribed by the law, as well as they must comply with the grounds for restriction specified in the Constitution, requirements of the democratic order of the society and principle of proportionality.

The legal nature and objective meanings of the concepts of membership, connection, and contact stated in the contested provision can be determined through the judicial case-law. However, the said concepts may also be interpreted in different ways, given the period in which they are applicable. In this sense, in consideration of the threats and dangers giving rise to the declaration of the state of emergency, it should be accepted that the assessments to be made during the state of emergency may differ from those to be made in the ordinary period.

Adoption of the principle that the assessment, to be made in the ordinary period, on the existence of the aforementioned relation shall be based on concrete facts is a natural consequence of the requirement to interpret the laws in compliance with the Constitution. Accordingly, the contested provision clearly stipulates that the relations having a factual basis to justify the impugned closure must be considered as membership, connection and contact. Such an assessment shall be made by the relevant Minister together with the commission to be established by him, and in this process, the commission and the Minister shall freely consider all kinds of events, facts, information and findings, regardless of the notifications they receive.

Besides, membership of, and connection and contact with, such types of structures, organisations, groups or terrorist organisations may occur in different ways; therefore, such relations cannot necessarily be predetermined and exhaustively enumerated in the law by the legislator. As a matter of fact, general and abstract nature of the laws stems from the need to incorporate all solutions that may vary in the particular circumstances of each case within the relevant provision, in other words, to prevent any situation where the provision excludes a solution that may yield a proper result. Therefore, the contested provision is not unconstitutional in view of the principle that fundamental rights and freedoms shall be restricted by law.

Article 26 of the Constitution, whereby freedom of expression is regulated, also sets forth the purposes for which the said right may be limited. It is specified in Article 28 of the Constitution, whereby freedom of the press is enshrined, that the provisions of Article 26 shall also be applicable for limitation of the freedom of the press.

It is understood that the contested provision, which allows for the closure of private radio and television outlets, newspapers and periodicals, publishing

companies and distribution channels, which have been found to be a member of or to have connection or contact with structures, organisations or groups that are found established to pose a threat to the national security, or terrorist organisations, intends to maintain the national security as well as public order and security. In this sense, the provision pursues a legitimate aim in constitutional terms.

The last paragraph of Article 28 of Constitution provides, "*Periodicals published in Turkey may be temporarily suspended by court ruling if found to contain material which contravenes the indivisible integrity of the State with its territory and nation, the fundamental principles of the Republic, national security and public morals. Any publication which clearly bears the characteristics of being a continuation of a suspended periodical is prohibited; and shall be seized by decision of a judge.*". Accordingly, periodicals cannot be suspended without a court decision. Besides, it is also specified therein that the *suspension shall be temporary*. Thus, the permanent closure of newspapers and periodicals without a court decision as specified in the contested provision runs contrary to the wording of Article 28 of the Constitution.

The contested provision enables the closure of private radio and television outlets as well as publishing companies and distribution channels. It is therefore necessary to make an assessment as to the consequences of the restriction imposed on the freedoms of expression and the press for private radio and television outlets as well as publishing companies and distribution channels.

A democratic society is based on pluralism, tolerance and open-mindedness. Any restriction on this right in a democratic society depends solely on the existence of compelling reasons. In this scope, the closure of private radio and television outlets, newspapers and periodicals, publishing companies and distribution channels, which have been found to be a member of or to have connection or contact with structures, organisations or groups that are found established to pose a threat to the national security or terrorist organisations, is an appropriate means for achieving the aim of ensuring national security as well as public order and security.

Pursuant to Article 28 of the Constitution, which entails a court decision for closing periodicals, the closure is a heavy sanction and a court decision is required even for temporary suspension. The contested provision serves the same purpose by regulating the direct and permanent closure of the said private radio and television outlets, as well as publishing companies and distribution channels; however, it ignores the means that would impose less restrictions on the freedoms of expression and the press. Undoubtedly, the direct closure constitutes the most severe interference with fundamental rights and freedoms among all the means that could achieve the same goal.

In addition, the conditions sought for the closure according to the provision must be determined by the commission to be established as per the said provision. At this point, such determination and the decision ordering closure are subject to judicial review as an administrative act. However, the contested provision does not contain any guarantee that will ensure a speedy decision by the judicial authorities on the matter after the closure process. In fact, Article 28 § 7 of the Constitution prescribes certain pe-

riods even for the seizure of periodicals, which is a less severe measure than the closure. Pursuant to the relevant Article, in cases where delay is deemed prejudicial, the competent authority issuing the order to seize shall notify a competent judge of its decision within twenty-four hours at the latest, and the order to seize shall become null and void unless upheld by the judge within forty-eight hours at the latest.

In the event that the institutions and organizations covered by the contested provision are closed, employing a separate and short procedure for judicial review of the closure is an important guarantee that must be provided in terms of freedoms of expression and the press. Such a guarantee stems from the significance of the role of these institutions and organizations within the scope of freedoms of expression and the press. Accordingly, the contested provision is incompatible with the sub-principles of the principle of proportionality, which are necessity and proportionality in the narrower sense.

The contested provision is also applicable during the state of emergency. In times of emergency, the Constitution stipulates certain conditions for derogating from the safeguards enshrined in the Constitutions in terms of fundamental rights and freedoms. In this regard, the conclusion that the contested provision is unconstitutional in the ordinary period does not have any bearing on its applicability, being limited to the state of emergency.

Consequently, the contested provision has been found unconstitutional and therefore annulled.

As regards the Second Sentence of the Contested Provision

The contested provision stipulates the transfer of all kinds of assets possessed by the closed institutions and organisations to the Treasury. Since the first sentence of the provision has been annulled, its second sentence is no longer applicable. Therefore, the impugned sentence has been considered within the scope of Article 43 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, and constitutionality review of the contested provision has not been deemed necessary.

B. PROVISION ENVISAGING THE EXAMINATION OF THE DETENTION-RELATED ISSUES OVER THE CASE FILE

CONTESTED PROVISION

The contested provision envisages that as regards certain offences, the requests for release filed at the investigation and prosecution phases pending the state of emergency shall be adjudicated over the case file, which thereby restricts the right to raise the detention-related claims and submissions before courts in a reasonable manner.

GROUND FOR THE REQUEST FOR ANNULMENT

It was maintained that the contested provision was unconstitutional as the examination of the detention-related issues must be in compliance with the principles of adversarial proceedings and equality of arms; however, the contested provision fell foul of these principles and constituted a disproportionate interference with the fundamental rights and freedoms.

THE COURT'S ASSESSMENT

One of the basic safeguards afforded by Article 19 of the Constitution is the right to have the challenge against the lawfulness of a detention effectively examined by a judge at the hearings. As a matter of fact, the opportunity of the person deprived of his liberty to orally submit his counter-arguments against the opinions and assessments, either in his favour or to his detriment, before a judge/court would enable him to more effectively challenge his detention. Therefore, the person detained on remand should make use of this right on regular basis, thereby having the opportunity to be heard at reasonable intervals.

The said provision of the Constitution embodies no ground for restriction of the right to have the challenge against the lawfulness of a detention effectively examined by a judge at the hearings. However, holding a hearing for the examination of the challenges against every decision on detention or of every request for release may render the criminal justice system dysfunctional. Accordingly, as the constitutional safeguards as to the examination procedure will not entail the holding of a hearing for every challenge against detention unless there exists a particular circumstance to require a hearing, this right is subject to certain restrictions by the very nature of the process.

An important element inherent in the right to a fair trial, safeguarded by Article 36 of the Constitution, is *inter alia* the right to be tried within a reasonable time. In the last paragraph of Article 141 of the Constitution, which provides for *"It is the duty of the judiciary to conclude trials as quickly as possible and at minimum cost"*, it is explicitly indicated that proceedings are to be concluded within a reasonable period. The State has, by virtue of this right, the positive obligation to conclude the cases within a reasonable time.

The right to have the challenge against the lawfulness of a detention effectively examined by a judge at the hearings is intended to ensure the conduct of review of the lawfulness of a decision ordering detention. The contested provision nevertheless imposes a restriction on the said right for the purposes of accelerating the judicial process by conducting such examination over the case file and thereby ensuring the swift functioning of the criminal justice system. In this sense, the contested provision may be said to pursue a legitimate aim in the constitutional context. However, the restriction must not fall foul of the proportionality principle, pursuant to Article 13 of the Constitution.

Criminal proceedings aiming at revealing the material truth must be concluded within a reasonable time. The examination of every challenge against a detention order or of every request for release by holding a hearing may both lead to the inability to conclude the criminal proceedings within a reasonable time and also hinder the sound functioning of the proceedings. In this sense, the examination of detention-related issues, as well as the adjudication of challenges against detention and requests for release cannot be said to fall foul of the suitability and necessity criteria, which are the sub-principles of the proportionality principle.

However, as laid down in the contested provision, the judge shall examine and adjudicate the detention-related issues and the requests for release over the case file. It is therefore impossible for the suspect or accused to request to be heard at reasonable intervals to orally submit his detention-related arguments, which undoubtedly places an excessive and dispropor-

tionate burden on the relevant person under the conditions of an ordinary time. For this reason, the contested provision constitutes a restriction, to the extent which goes beyond the scope of the restriction and protection regime prescribed in the constitution for the ordinary times, on a detained person's rights to have lawfulness of detention decided speedily by a court as well as to file a request with the competent judicial authority to secure his immediate release if the detention is unlawful.

In Article 15 of the Constitution, which envisages that in times of emergency, the exercise of fundamental rights and freedoms may be partially or fully suspended and measures derogating from the guarantees enshrined in the Constitution may be taken, it is set forth that such restrictions must be to the extent strictly required by the exigencies of the situation. Therefore, the restriction must be examined from the standpoint of the proportionality principle.

The right to effectively challenge the lawfulness of a detention under the right to personal liberty and security, which is subject to restriction pursuant to the contested provision, is not among the fundamental rights and freedoms specified in Article 15 of the Constitution and qualified as core rights which cannot be derogated under any conditions.

In the decision no. E.2016/205, the Court has already concluded that the statutory arrangement -which allows for the examination of detention-related issues as well as the adjudication of the challenges against detention and requests for releases also over the case file during the investigations and prosecutions conducted into certain offences pending the state of emergency and which grants the practitioner the margin of appreciation to adjudicate such challenges and requests also over the case file *albeit not hindering the opportunity to have the such challenges and requests examined by holding a hearing*- has entailed a restriction, on the right to personal liberty and security, *to the extent strictly required by the exigencies of the state of emergency* and is not therefore unconstitutional.

As regards the individual applications examined from the standpoint of Article 15 of the Constitution under the state of emergency, the Court held that ordering the continued detention for 8 months and 18 days over the case file without holding a hearing amounted to a measure applied to the extent strictly required by the exigencies of the situation, whereas ordering the continued detention for 1 year and 9 months over the case file without a hearing constituted a violation of the right to personal liberty and security.

In this sense, the contested provision, which envisages that the requests for release be adjudicated over the case file without specifying any period and which grants no margin of appreciation to the incumbent judge or court in dealing with such requests by holding a hearing, constitutes a disproportionate restriction on the freedom of personal liberty and security. In other words, the provision precluding the examination of the requests for release before the judge/court prescribes a restriction that goes beyond the extent strictly required by the exigencies of the situation.

Consequently, the contested provision has been found unconstitutional and therefore annulled.

C. PROVISION ALLOWING FOR RESTRICTION OF ACCESS TO THE INVESTIGATION FILE BY VIRTUE OF THE PUBLIC PROSECUTOR'S DECISION

CONTESTED PROVISION

The contested provision allows for the imposition of restriction, by virtue of a public prosecutor's decision and under certain circumstances, on the defence counsel's ability to examine the investigation file and obtain a copy of the documents included therein, during the investigations conducted into certain offences under the state of emergency.

GROUND FOR THE REQUEST FOR ANNULMENT

It was maintained that the contested provision was unconstitutional as it fell foul of the principle of equality of arms and the restriction of the rights and powers of the defence, based on an abstract ground of endangering the purpose of the investigation and in a way that would cover the investigation stage as a whole, was in breach of the principle of the State governed by the rule of law.

THE COURT'S ASSESSMENT

It is obvious that restricting the defence counsel's right to access to the investigation file, the contested provision thereby places a restriction on the principle of equality of arms, the right of defence, as well as on the detained person's right to apply to a competent judicial authority.

On the other hand, it pursues a legitimate aim as it allows for the restriction of the defence counsel's ability to examine the investigation file and obtain a copy of the documents on the condition that there is a risk of endangering the purpose of the investigation and it is intended to ensure the proper conduct of the investigation. However, such restriction must not contravene the proportionality principle pursuant to Article 13 of the Constitution.

Article 157 of Code of Criminal Procedure no. 5271, where it is set forth that unless provided otherwise herein and without prejudice to the rights of the defence, the procedural acts and actions to be performed during the investigation phase shall be confidential, embodies the principle of the confidentiality of judicial investigations. In Article 160 of the same Code, it is set out that as soon as the public prosecutor is informed of a fact that creates an impression that an offence has been committed, either through a criminal report or any other way, he shall be authorised to investigate the factual truth and be obliged to collect all evidence, both in favour of and against the suspect, in order to decide whether there is ground to file a criminal case.

It may be necessary to impose a restriction on access to certain evidence at the investigation phase for the purposes of protecting the fundamental rights and freedoms of the third parties, preserving the public interest or securing the methods used by the judicial authorities in carrying out the investigations. Therefore, the contested provision allowing for the restriction of the defence counsel's power to examine the investigation file cannot be said to be inappropriate and unnecessary for achieving the purpose of ensuring the sound conduct of the investigation phase. However, the restriction on access to the investigation file must be proportionate to the aim sought to be attained thereby and must not impede the effective and sufficient exercise of the rights of the defence.

In this sense, the contested provision introduces an absolute obstacle, by virtue of a public prosecutor's decision, to the defence counsel's ability to examine the investigation file or obtain a copy of the documents. It may accordingly lead to the denial of access, by the defence, to all evidence obtained by the public prosecutor during the investigation phase, by virtue of the decision taken by the public prosecutor himself, which constitutes a disproportionate interference with the equality of arms, one of the principles inherent in the right to a fair trial.

The absolute denial of access, by the defence as the indispensable party of the proceedings, to the investigation file during the investigation phase pursuant to the decision issued by the prosecution imposes a restriction to the extent that goes beyond the level envisaged by the regime allowing for restriction of fundamental rights and freedoms in ordinary times. Therefore, the contested provision must be examined under Article 15 of the Constitution, which allows for the suspension and restriction of the exercise of fundamental rights and freedoms in times of emergency.

It has been observed that the contested provision does not embody a regulation as to the fundamental rights and freedoms as well as the principles, which are specified in Article 15 of the Constitution and which cannot be derogated even in times of emergency. Accordingly, it must be ascertained whether the contested provision is to the extent strictly required by the exigencies of the situation laid down in Article 15 of the Constitution.

The contested provision restricts, during the state of emergency, the defence counsel's power to examine, and obtain a copy of, the investigation file by virtue of the public prosecutor's decision in the investigations to be conducted into the offences committed against the State's security, constitutional offences, offences against national defence and against State secrets, the offences falling under the scope of Anti-Terror Law no. 3713, as well as the collective offences.

Also in the criminal investigations carried out in times of emergency, the suspect is entitled to the right to the presumption of innocence. Indeed, as enshrined in the Constitution, the presumption of innocence cannot be derogated even in times of emergency. The contested provision, however, vests the public prosecutor with the power, without any exception, to restrict the access to the investigation file and obtain a copy of the documents included therein during the investigation.

Despite the conduct of investigations in a confidential manner and the restriction of access to certain evidence are in pursuance of a legitimate aim, the absolute nature of the restriction imposed by virtue of the contested provision precludes the effective exercise of the right of defence. Besides, the contested provision affords no safeguard against the decision restricting access to the investigation file, which has been issued by the public prosecutor. It has been accordingly concluded that the contested provision imposes a restriction, which goes beyond the extent strictly required by the exigencies of the situation, on the right of defence as well as on the right to personal liberty and security.

Consequently, the contested provision has been found unconstitutional and therefore annulled.

DECISION ANNULLING THE PROVISION PRECLUDING WORKERS, NON-MEMBERS OF THE CONTRACTING LABOUR UNION, TO BENEFIT FROM THE PROVISIONS OF THE COLLECTIVE LABOUR AGREEMENT

(E.2020/57, K.2020/83, 30 December 2020)

CONTESTED PROVISION

The contested provision stipulates that the requests to benefit from the collective labour agreement before the date of signature shall become effective by this date.

GROUND FOR THE REQUEST FOR ANNULMENT

It was maintained in brief that the contested provision was unconstitutional in that it stipulated the effective date of the request for benefiting from the collective labour agreement for workers, non-members of the labour union, as the date of signature of the collective labour agreement, which thus forced the workers to be a member of the labour union concluding the collective labour agreement.

THE COURT'S ASSESSMENT

Workers who are members of the contracting labour union may benefit from the financial provisions of the agreement if they pay membership fees without a request being needed, while non-members may do so by lodging a request as well as paying the relevant dues received from the non-member workers. However, the contested provision precludes the payment of such dues by the workers, who are not members of the union, pending the processes pertaining to the preparation, negotiation and bargaining of the collective labour agreement. It is clear that the provision has consequences in favour of the workers who are already members of the contracting union by the date of its signature, thereby granting an advantage to the said union vis-à-vis the others in the race of unionisation. Such a situation may impair the competition among the unions and hence the pluralism.

It is obvious that exemption of the workers, who are not members of the contracting union but indeed fulfil the conditions to avail of the agreement, from the provisions of the collective labour agreement will urge the workers in this situation to become a member of the union.

The contested provision upsets the balance between the strong union and the right to collective agreement by precluding the workers, non-members of the contracting union, from becoming retrospectively entitled to the financial provisions of the collective labour agreement due to the prolongation of the collective negotiation and bargaining process.

Pursuant to Article 13 of the Constitution, any restriction on the rights to union and collective bargaining shall not be contrary to the requirements of the democratic order of the society. It has therefore been understood that the restriction imposed by the contested provision does not correspond to a social need within the scope of Articles 51 and 53 of the Constitution but, on the contrary, undermines the pluralism that should exist in a democratic society, and unfairly distorts the competition among the unions, in favour of the contracting union.

Consequently, the contested provision has been found unconstitutional and therefore annulled.

DECISION ANNULLING CERTAIN PROVISIONS OF THE PRESIDENTIAL DECREE ON THE ORGANISATION OF THE DIRECTORATE OF COMMUNICATIONS

(E.2019/71, K.2020/82, 30 December 2020)

CONTESTED PROVISION

AMENDED ARTICLE 14 OF THE PRESIDENTIAL DECREE NO. 14

The contested provision stipulates that the Directorate of Communications ("the Directorate") has the authority to supervise the activities, budget, organisation and human resources management of Anadolu Ajansı Türk Anonim Şirketi ("the Anadolu Agency" or "Agency"), and the principles and procedures of the said supervision shall be determined by the Directorate; and that the contract to be signed by and between the Directorate and the Anadolu Agency shall set forth the procedures as to the appointment of the executives of the Agency.

GROUND FOR THE REQUEST FOR ANNULMENT

It was maintained in brief that the contested provision was unconstitutional as there were already statutory provisions regarding the supervision of the Anadolu Agency, which was a private company; and that the supervisory authority afforded to the Directorate by virtue of the contested provision was in breach of the Agency's autonomous and impartial nature.

THE COURT'S ASSESSMENT

1. As regards the Competence Ratione Materiae

The contested provision regulates the relationship between the Agency and the State. It thereby designates the unit operating under the executive branch, which is authorised to conclude a contract with the Agency, as well as points to the effects and consequences of such authorisation.

The provision regulates a matter regarding executive power. As laid down in Article 104 § 17 of the Constitution, no presidential decree shall be issued on the matters which are specified in the Constitution to be exclusively regulated by law. However, presidential decrees may be issued on the matters that are clearly permitted by the constitutional provisions, where the matters to be regulated by presidential decrees are specifically stipulated.

In this sense, the matters specified in Article 123 of the Constitution may be regulated through a presidential decree, on condition of being limited to those which are specifically envisaged in the Constitution to be regulated through presidential decrees.

In Article 106 of the Constitution, it is set forth that the establishment, abolition, the duties and powers, the organizational structure of the ministries, and the establishment of their central and provincial organizations shall be regulated by presidential decree. It nevertheless embodies any further provision with respect to neither the central organisation of the Presidency nor its affiliated institutions and organisations.

In the legislative intention of the constitutional amendment made by Law no. 6771, it is set out that the objective of vesting the President with the authority to issue presidential decrees at first-hand is to ensure him, in the new governmental system, to introduce arrangements regarding the matters which he deems necessary for the conduct of general political affairs.

In this sense, it is evident that the President authorised to introduce arrangements regarding the establishment, abolition, the duties and powers, the organizational structure of the ministries through presidential decrees is also entitled to make arrangements, through presidential decrees, concerning the same issues with respect to the Presidency, as well as its affiliated institutions and organisations.

The State-run news agencies also including the Anadolu Agency are regulated in Article 133 § 3 of the Constitution where there is no provision stipulating that the matters related to such agencies shall be regulated exclusively by law. Therefore, it is not in any respect unconstitutional to designate the unit operating under the executive branch, which shall be authorised to conclude contracts with the Agency, as well as regulate the effects and consequences of these authorisation through a presidential decree.

The Anadolu Agency operating as a joint-stock company, a corporate body governed by private law, since 1925 does not directly receive a share from the State budget, owing to its organisation. However, as specified in Article 133 § 3 of the Constitution, it is a news agency receiving aid from public corporate bodies. Accordingly, the payments to be made to the Agency are allocated in the central administration budget as an allowance under the Agency-related institutional budget. Therefore, the contested provision is not related to Article 161 of the Constitution and accordingly to the matters required to be regulated exclusively by law.

In the Law no. 57 on the Properties and Personnel of the Anadolu Agency, it is laid down that the properties owned by the Agency are categorised as State property; and that in cases where the criminal legislation is applicable, its personnel shall be considered as a public officer. Law no. 57 also embodies certain arrangements concerning the acquisition, pledge and public offering of the Agency's shares, as well as the usufruct right of these shares. It is thus evident that the matter, which is regulated through the contested provision, is a matter already laid down in neither this Law nor any other legislation. It has been therefore concluded that the contested provision does not address any issue which has been explicitly regulated by law.

Accordingly, the contested provision has been found constitutional insofar as it relates to the competence *ratione materiae*.

2. As regards the Content

a. First Sentence of the Contested Provision

In the first sentence of the contested provision, it is envisaged that the Directorate shall be authorised to conclude a contract with the Anadolu Agency for a maximum period of 5 years on condition of not exceeding the allowance specified in the Directorate's own budget allocated to the Agency; and that it shall have the authority to supervise the activities, budget, organisation and human resources management of the Agency.

It has been observed that the main aim of excluding the Agency from the central administration in 1925 and transforming it to a joint-stock company, thereby to a corporate body governed by private law, is to ensure its autonomy and impartiality as safeguarded by Article 133 of the Constitution. The shares owned by the State Treasury in the Agency has never been over 50% so as to preserve the autonomous nature of the Agency.

Despite being a corporate body governed by private law, the Agency's revenues are mainly comprised of the agency allowance in the Directorate's budget. Pursuant to the contested provision, one of the issues in respect of which the Directorate has supervisory power over the Agency is the budget.

In consideration of the Agency's sources of income, it appears that the conduct of the budgetary supervision of the Agency by the central administration is intended for achieving public interest. Such a budgetary supervision by the central administration does not, in any aspect, have an adverse impact on the Agency's own power to take decision regarding, and put into practice, its own acts and activities; that is to say, on its autonomy and impartiality. Accordingly, the supervision of the Agency's budget by the Directorate does not fall foul of Article 133 § 3 of the Constitution.

As envisaged in the first sentence of the provision, the central administration's supervision is not confined only to the Agency's budget, but rather covers its activities, organisation and human resources management. The main objective of the Agency, in its capacity as a company, is to report and convey information, news, photos, images and multimedia contents, which it has collected regarding the incidents within the country or abroad by adopting an accurate, swift, impartial and contemporary approach, to the media outlets. In this sense, the supervision of the Agency's acts and activities by the Directorate, an executive unit operating under the Presidency, is both incompatible with the autonomous nature of the Agency and also likely to prejudice the impartiality of its broadcasts.

On the other hand, the Directorate's authorisation to supervise the Agency's organisation and human resources management contradicts with the principle requiring the news agencies receiving aid from the public corporate bodies to be autonomous as such authorisation precludes the Agency from freely taking decisions regarding its own acts and activities and putting them into practice.

Consequently, the Court has found the first sentence of the contested provision unconstitutional by its content and annulled it insofar as it relates to the phrases *"... activities..."* and *"....organisation and human resources management..."*, whereas found constitutional the remaining part of the first sentence and accordingly dismissed the request for annulment.

b. Second Sentence of the Contested Provision

The primary power attributed by the constitution-maker to presidential decrees cannot be delegated to, and thereby enforced through, any other administrative act. Any practice to the contrary would be in breach of the guarantee envisaging that the respective matters may be regulated through presidential decrees.

The President should not hand over his power regarding the matters which are to be regulated through presidential decrees. However, the executive branch does not necessarily designate every kind of details concerning the matter which can be regulated through presidential decrees and take, by itself, the necessary actions required by these arrangements. By pointing to the primary principles and drawing the general framework through a presidential decree, the executive branch may designate the issues falling within this framework through other regulatory actions and leave the performance of necessary acts and actions pursuant to these regulations to the relevant administration.

Vesting the Directorate with a regulatory authority with no definite boundaries, as to the supervision of the Anadolu Agency, without the basic principles and general framework being set has led to the delegation of the regulatory power, which is conferred by the Constitution on the President, to the administration.

Consequently, the second sentence of the contested provision has been found unconstitutional by its content and therefore annulled.

c. Third Sentence of the Contested Provision

In the third sentence, it is set forth that the appointment procedures of the Agency executives shall be designated by the contract to be concluded by and between the Directorate and the Agency.

Although the freedom of contract also embodies the freedom to conclude a contract or not, and to choose the other contracting party, it appears that the Directorate is in a more advantageous position vis-à-vis the Agency in respect of the contract they have concluded. It cannot be therefore said that the relevant contract satisfies the necessary requirements inherent in the freedom of contract.

The autonomous nature of the news agencies, enshrined in Article 133 of the Constitution, secures that the Agency has been vested with the necessary powers to take and implement decisions regarding its management and organisation; and that it is protected against all external influences. In this sense, the designation of the appointment procedures of the Agency executives through a contract renewed every year renders meaningless the autonomous nature of the Agency that it has pursuant to the said constitutional provision.

Consequently, the third sentence of the contested provision has been found unconstitutional by its content and therefore annulled.

LEADING DECISIONS AND JUDGMENTS IN THE INDIVIDUAL APPLICATION

Press releases of the leading decisions and judgments are available at:
https://www.anayasa.gov.tr/en/news/individual-application/

A. JUDGMENTS CONCERNING THE RIGHT TO LIFE

JUDGMENT FINDING A VIOLATION OF THE RIGHT TO LIFE DUE TO INEFFECTIVE CRIMINAL INVESTIGATION INTO THE DEATHS AND INJURIES RESULTING FROM THE USE OF FIREARMS BY SECURITY FORCES

Şehmus Altındağ and Others (no. 2014/4926, 9 January 2020)

THE FACTS

The necessary security measures were taken in the Kulp district of Diyarbakır upon the information that dead bodies of three persons allegedly being a member of a terrorist organisation, namely the PKK, would be taken to the city for burial. The applicants maintained that the security officers had asked for the handing over of the bodies as they would not allow for their burial; that upon their refusal to hand over the dead bodies, the security officers had opened fire on the crowd on account of which seven persons had lost their lives and several persons had been injured.

In the incident report, it was however indicated that a group of 1000-1500 persons had marched to the district centre by chanting political and separatist slogans, with a view to protesting the killing of the members of the PKK terrorist organisation; and that necessary measures had been taken so as to control the group and maintain the security. As stated in the report, the group being informed of the unauthorised nature of their meeting and demonstration attacked the security officers with stones and sticks; and that thereafter, a military officer had been martyred owing to a shot fired by the crowd. The deaths among the crowd took place while the security officers were trying to bring the events under control.

At the end of the criminal case filed against them, the demonstrators were acquitted. The incumbent chief public prosecutor's office ("the prosecutor's office") launching an investigation into the incident leading to the death and injury of several demonstrators communicated the file to the Ministry of Justice ("the Ministry"), seeking for a leave to conduct an investigation against the provincial gendarmerie regimental commander. The Ministry returned the file to the prosecutor's office to remedy the certain deficiencies. Thereafter, the prosecutor's office issued a decision of lack of jurisdiction in respect of all suspects, save for one, and sent the investigation file to the District Administrative Board. There is no information concerning the actions conducted by these authorities.

Some of the applicants, considering that the investigation into the incident had failed, filed a request with the prosecutor's office to initiate a new investigation. At the end of this investigation, a decision of non-prosecution was issued in respect of the suspects as the security officers had acted within the limits of legitimate defence. The applicants' challenges were dismissed by the magistrate judge.

THE APPLICANTS' ALLEGATIONS

The applicants maintained that their right to life had been violated, stating that the law enforcement officers had led to death and injury of several persons by using firearms without the necessary legal conditions being satisfied; and that the investigation authorities failed to conduct an effective and prompt investigation into the impugned incident.

THE COURT'S ASSESSMENT

For an effective criminal investigation, the investigation authorities must take an *ex officio* and immediate action to secure all the evidence capable of elucidating the circumstances surrounding the impugned death and leading to the identification of those responsible. An investigation may be considered effective when the decision issued at the end of the investigation is based on thorough, objective and impartial analysis of all relevant elements, and in case of any interference with the right to life, it involves an assessment as to whether the impugned interference is proportionate and results from an exceptional circumstance specified in the Constitution.

In the present case, the prosecutor's office, separating the investigation against one of the suspects from the impugned investigation and referring the file to the Governor's Office for necessary action, issued a decision of lack of jurisdiction with respect to the other suspects and accordingly communicated the investigation file to the District Administrative Board. However, it failed to pursue the outcomes of these two investigations. It was found out upon a request lodged with the prosecutor's office that the investigation files had indeed got lost. Nevertheless, the prosecutor's office had remained inactive to launch a new investigation into the incident until the applicants filed a criminal complaint. Besides, despite being notified of the fact that the act imputed to the suspects was subject to the ordinary investigation procedure, the prosecutor's office applied to the Regional Administrative Court in order to obtain a leave for investigation, deeming it necessary. These issues are sufficient for the Court to reach the conclusion that the investigation was not conducted with reasonable speed and due diligence.

In cases where there is different and restricted information concerning the way how an incident has taken place and the identity of the perpetrators, the material findings concerning the incident must be immediately secured and examined, and those who may probably witness to, or have any knowledge about, the incident must be questioned within the shortest time possible. This is of great importance for the clarification of the cause of the impugned death or for the identification of those responsible. In the present case, despite being possible immediately after the incident, no action was taken so as to identify the security officers who had used firearms during the incident and make a ballistic examination of the firearms used. The authorities failed to exert an effort to take the statements of persons having knowledge about the incident, those injured or the witnesses.

Regard being had to the fact that what is of importance in the present case is to determine under which circumstances the security forces used firearms and whether their use of firearms amounted to a legitimate defence, it has been observed that the evidence, which has not been collected yet, has a direct bearing on the outcome of the investigation.

It has been concluded that the investigation authority, issuing a decision of non-prosecution in respect of the officers as they had acted in a legitimate defence despite the lack of any concrete evidence as to how the impugned deaths and injuries had taken place, failed to satisfy the requirement that all evidence obtained during the investigation be subject to thorough, objective and impartial analysis.

Consequently, the Court has found a violation of the procedural aspect of the right to life safeguarded by Article 17 of the Constitution.

JUDGMENT FINDING A VIOLATION OF THE RIGHT TO LIFE FOR GRANTING NO PERMISSION FOR AN INVESTIGATION AS TO THE SOMA MINE EXPLOSION AGAINST THE RESPONSIBLE PUBLIC OFFICERS

Abdülkadir Yilmaz and Others (no. 2016/13649, 29 January 2020)

THE FACTS

Many miners including the applicants' relatives lost their lives or were injured as a result of the explosion which took place in 2014 in a mine operated by a private company in Soma. As indicated by the expert report issued with respect to the incident, the explosion took place on account of several omissions and faults.

The incumbent chief public prosecutor's office requested the Ministry of Labour to grant permission for an investigation against those inspecting the mine and the relevant officers of the Ministry on suspicion of having committed neglect of duty.

The Ministry of Labour refused to grant permission for an investigation against the officers who had been subject to a preliminary inquiry by the Ministry. The Council of State ordered revocation of the Ministry's decision refusing permission for an investigation on account of the deficiency in the inquiries conducted. In the preliminary inquiry report issued by the inspectors taking office at the Inspection Board of the Prime Ministry, it was indicated that it would be appropriate to appoint a new commission of experts to conduct inquiries into the mine explosion.

Relying on the preliminary inquiry report issued by the Board of Inspectors, the Minister of Labour refused to grant permission for launching an investigation against the relevant officers. The challenge against this decision was dismissed by the Council of State as no direct causal link could be established between the acts of those who were subject to preliminary inquiry and the mine explosion taking place.

THE APPLICANTS' ALLEGATIONS

The applicants maintained that the right to life had been violated as no permission was granted for initiating an investigation against certain public officers, the suspects of the mine explosion resulting in death and injury of several persons.

THE COURT'S ASSESSMENT

In the present case, an expert report was obtained within the scope of the investigation conducted into the mine explosion, which indicated the deficiencies with regard to the occupational health and safety in the mine where the explosion took place as well as the technical relation between the explosion and these deficiencies. It was also noted in the same report that the occupational inspectors holding office at the Ministry of Labour, who inspected the mine where the explosion took place from 2010 to the explosion date but failed to indicate the deficiencies and faults, were also responsible for the impugned incident.

Upon the request by the chief public prosecutor's office for permission to initiate an investigation against the responsible officers of the Ministry of Labour, it was indicated in the preliminary inquiry report issued by the Board of Inspection that a new commission of experts should be assigned to conduct an inquiry into the mine explosion. Accordingly, the Minister of Labour refused to grant permission.

The expert report obtained by the chief public prosecutor's office was issued by those specialized in the relevant field. On the other hand, the duty incumbent on those who conducted the preliminary inquiry was only to determine whether a criminal investigation was to be initiated, with a view to protecting the public officers against unjustifiable charges and avoiding any delay in public service. Therefore, it could not be understood why those conducting the preliminary inquiry needed an expert examination and how they concluded -in spite of having no capacity to make technical assessments- that the findings in the expert report were unfounded in general and legal terms.

The challenges by the chief public prosecutor's office and the applicants against the decision granting no permission for an investigation were dismissed. Thereby, the judicial process against the public officers against whom permission for investigation had been sought was discontinued. However, the expert report obtained by the chief public prosecutor's office pointed to the deficiencies in the mine with regard to occupational health and safety since 2010 and accordingly revealed that the non-disclosure of these deficiencies during the inspections also had an impact on the occurrence of the impugned explosion. Besides, although the Council of State made an assessment as to the causal link, it is the investigation authorities which will determine, within the meaning of the criminal law, whether there is a casual link between an act and any impugned consequence.

Therefore, the discontinuation of the judicial process without allowing the investigation authorities to assess whether the omissions on the part of the public officers, which were found established through the expert reports, constituted a liability in the criminal law and whether there was a causal link, within the meaning of the criminal law, between these omissions and the incident taking place was incompatible with the principles of an effective investigation. The failure to charge the persons who have put individuals' lives at risk or to subject them to a trial may give rise to a violation of the right to life.

In the present case, the finding that an effective criminal investigation should have been conducted does not necessarily require the institution of criminal proceedings, or conclusion of the criminal proceedings by a certain decision, against the persons who were found faulty in the expert report; but rather points to the necessity that the appropriate means, which are capable of identifying those who have been responsible and holding them to account for, be applied effectively.

Besides, it should be borne in mind that as the expert report obtained within the scope of the impugned investigation involved assessments as to the occupational inspectors, but not as to the other officers of the Ministry of Labour, the judgment rendered by the Court has no bearing, either favourable or unfavourable, on the other officers.

Consequently, the Court has found a violation of the procedural aspect of the right to life safeguarded by Article 17 of the Constitution.

B. JUDGMENTS CONCERNING THE PROHIBITION OF TORTURE AND ILL-TREATMENT

JUDGMENT FINDING A VIOLATION OF THE PROHIBITION OF INHUMAN OR DEGRADING TREATMENT FOR BEING PLACED IN A SINGLE ROOM AT THE FOREIGNERS' REMOVAL CENTRE FOR A PROLONGED PERIOD OF TIME

Y.K. (no. 2016/14347, 2 June 2020)

THE FACTS

The applicant, a Kazakh national, was taken into custody in İstanbul on suspicion of possessing a false identity card. The applicant, in respect of whom deportation as well as administrative detention orders had been issued, was transferred to the Foreigners' Removal Centre ("the Centre").

The applicant filed a criminal complaint with the chief public prosecutor's office ("prosecutor's office"), claiming that he had been subjected to inhuman or degrading treatment, as well as to ill-treatment in the Centre. Thereupon, the prosecutor's office issued a decision of non-prosecution. The incumbent magistrate judge, having examined the applicant's challenge, extended the scope of the investigation and sent the file to the prosecutor's office again.

The prosecutor's office once again issued a decision of non-prosecution. The subsequent challenge of the applicant was again examined by the magistrate judge who ultimately rejected it with no right of appeal.

THE APPLICANT'S ALLEGATIONS

The applicant claimed that during his time at the Centre, he had been handcuffed by his hands and feet, he had been held in a cell without heating for ten days and his contact with the outside world had been prevented, and that no effective investigation had been conducted into his complaints, which had been in breach of the prohibition of inhuman or degrading treatment

THE COURT'S ASSESSMENT

The Foreigners' Removal Centres are institutions adopting a human-oriented approach in ensuring the shelter and control of the foreigners to be deported. In that vein, the Centres are required to provide services based on the protection of the right to life of the individuals held there as well as the strengthening of them both socially and psychologically.

In the present case, regard being had to the witness statements, there is a reasonable suspicion that those who were held in isolation rooms (*ilgi odası*) at the Centres, which are designed similar to the observation rooms in penitentiary institutions, were handcuffed by their hands and feet and that the applicant might also have been subjected to such a practice; however, no concrete evidence has been found in this regard.

The applicant's allegation that he was held in a single room without heating has been examined separately. Although there is no evidence supporting the alleged coldness of the said room, it has been concluded that there is evidence beyond reasonable doubt that the applicant was held in that room for ten days. The examination of the alleged violation of the substantive aspect of the prohibition of inhuman or degrading treatment has been carried out solely on the basis of this material fact.

There was neither a written order nor a report regarding the applicant's placement in an isolation room. There was no disciplinary investigation launched against the applicant for attempted escape, involvement in such attempt or any other improper act after he had been taken to the said room. Nor is there any allegation or evidence indicating that the applicant was taken into custody due to a criminal investigation/prosecution. Similarly, there is no evidence pointing to the risk that the applicant might have harmed himself, other persons staying at the Centre or the property there. On the contrary, all witness statements indicated that the applicant had looked calm and harmonious during his stay at the Centre. Hence, the administration of the institution failed to make an explanation as to why the applicant had been placed in an isolation room.

It has been understood that the applicant was held in an isolation room for ten days, that he was unable to contact with other persons staying at the Centre or his family or legal representative, that he was provided with no means of communication such as radio, television or telephone, that he even ate his meals in the room, and that there is no evidence indicating that he was allowed to get outdoors.

It has been concluded that the impugned interference, pursuing no legitimate aim and contravening the working principles of the Centres, may be regarded as inhuman or degrading treatment given its nature and duration.

Consequently, the Court has found a violation of the substantive aspect of the prohibition of inhuman or degrading treatment safeguarded by Article 17 of the Constitution.

In the light of this finding, it has been concluded that the decisions of non-prosecution and the decisions dismissing the applicant's challenges against these decisions were not based on a comprehensive, objective and impartial assessment of all findings obtained during the investigation process.

At the first stage of the criminal investigation launched into the applicant's allegations of inhuman/degrading treatment and ill-treatment, no crime-scene investigation was conducted, and the investigation authority did not obtain and secure the CCTV camera footage by itself, but rather confined itself to the video footage submitted by the officials at the Centre who were complained of by the applicant. No medical report on the applicant's state of health was obtained, but instead the observations of the public prosecutor taking the applicant's statement were put into record. The public officials, who were complained about, were not identified so as to take their defence submissions.

Since the signs of alleged ill-treatment on the applicant's body, the CCTV camera footages as well as the statements of the non-party witnesses could not be secured immediately, it became impossible to have access to them after a certain period of time had elapsed. Therefore, it cannot be said that a rigorous investigation capable of clarifying the applicant's allegations that his hands and feet had been handcuffed was conducted.

Consequently, the Court has also found a violation of the procedural aspect of the prohibition of inhuman or degrading treatment safeguarded by Article 17 of the Constitution.

JUDGMENT FINDING A VIOLATION OF THE PROHIBITION OF TORTURE FOR ILL-TREATMENT IN POLICE CUSTODY AND THE FAILURE TO CONDUCT AN EFFECTIVE INVESTIGATION

Feride Kaya (no. 2016/13985, 9 June 2020)

THE FACTS

The applicant filed a criminal complaint with the incumbent public prosecutor's office, maintaining that she had been subjected to torture during her detention in police custody for a criminal charge.

In her medical examinations carried out by a state hospital during her custody period, it was reported that *"No sign of battery and physical coercion was found"*. In the medical report issued by the hospital with respect to her when she was held in the penitentiary institution, it was noted that her orthopaedic examination showed no abnormality.

Upon her release, the applicant applied to the Human Rights Foundations of Turkey, and thereafter a medical report was issued in respect of her. In this report, it was concluded that the bruises on the applicant's body might have resulted from beating and electrical torture.

The report issued by the Forensic Medicine Institute indicated that no medical conclusion could be reached as to the exact time when the signs/bruises on the applicant's body occurred; and that there was no definite medical evidence to the effect that the person concerned had been tortured during her police custody.

In the report issued by a member of the Medical Faculty upon the applicant's request, it was stated that the medical reports issued with respect to the applicant during the custody period did not comply with the medical standards, gave rise to a deficiency of diagnosis and was to be therefore considered as the product of a medical malpractice; that the report issued by the Forensic Medicine Institute did not contain a thorough and complete assessment; and that the findings obtained at the end of the medical examination of the patient were highly consistent with the consequences of torture cases. Other medical reports subsequently issued by two separate medical faculties indicated that the applicant's forensic examinations had not been performed in accordance with the relevant procedure, which led to medical difficulties; and that the applicant's physical and mental findings were consistent with the torture she had been allegedly subjected to.

Within the scope of the investigation conducted into the incident, the incumbent prosecutor's office indicted two doctors for professional misconduct due to the alleged inaccuracy of the medical reports issued with respect to the applicant and two gendarmerie officers for allegedly ill-treating the applicant during custody.

The incumbent assize court ("the court") acknowledged that the applicant had been subjected to ill-treatment, but acquitted the accused gendarmerie officers as it was unable to ensure the exact identification of the persons, the perpetrators of the ill-treatment. It also ordered the discontinuation of the proceedings in respect of the doctors accused of professional misconduct due to the expiry of the statutory time-limit.

The Court of Cassation, the appellate authority, amended and upheld the first instance decision in so far as it related to the accused doctors but

quashed the decision in so far as it related to the accused officers having allegedly inflicted ill-treatment. The court, conducting a retrial, reinstated its original decision. Upon the appellate request, the General Assembly of Criminal Chambers of the Court of Cassation examined the request and ordered the discontinuation of the case.

THE APPLICANT'S ALLEGATIONS

The applicant maintained that the prohibition of torture had been violated, stating that she had been subjected to torture during her custody; that the medical reports issued by the hospital where she had been taken for compulsory forensic examination were inaccurate; and that no effective investigation had been conducted against those responsible.

THE COURT'S ASSESSMENT

Regardless of how high the significance of the grounds leading to ill-treatment is, no torture, ill-treatment or treatment incompatible with human dignity may be inflicted under the harshest conditions as the cases where the right to life is at stake.

It appears that in the present case, several medical reports were issued within the scope of the investigation conducted into the alleged ill-treatment, and many of these reports were in support of the applicant's allegations. In this case, it must be accepted that there is sufficient evidence to conclude that the applicant, who was at the material time under the State's supervision and responsibility, was exposed to attacks on physical and mental integrity. The burden of proof is upon the public authorities to prove the otherwise.

In consideration of the applicant's statements, the witness statements, the findings included in various medical reports, the first-instance decision establishing that the applicant was subjected to ill-treatment during custody and the quashing judgment of the Court of Cassation in support of the first-instance decision as a whole, the Court has concluded that the applicant was subjected to ill-treatment.

As the proceedings with respect to the accused doctors were discontinued due to the expiry of statutory time-limit and, in so far as related to the accused gendarmerie officers, the proceedings were terminated with final effect without the offender(s) of the impugned incident being identified, it has been observed that the public authorities acted in breach of the obligation to respond to the complaints of ill-treatment. It has been considered that the acts amounting to ill-treatment were performed with a special intent (*dolus specialis*) in order to obtain from the applicant information or a confession; and that the public officers acted deliberately during the impugned process.

It has been observed that the treatments, which were incompatible with human dignity, caused physical or mental suffering to the applicant, affected her capacities to perceive and to control her actions and amounted to humiliation, were inflicted with a view to obtaining information or a confession from her and were intended to arouse feelings of fear, anxiety and inferiority, by way of causing severe physical pain or mental suffering, for breaking her resistance and humiliation.

Regard being had to the underlying aim and duration of the treatment deliberately inflicted on the applicant, its physical and mental effects found established by the medical reports, as well as to the finding that the impugned acts were performed consciously by the state agents, it has been concluded that the impugned acts could be classified as torture and were in breach of the negative obligation incumbent on the State under Article 17 of the Constitution.

Besides, what is expected from the judicial authorities in such cases is to conclude the investigation in a speedy manner by paying due regard to the rights of the parties in case of a grave offence like torture due to the severe nature of the imputed acts and corresponding penalties.

It has been observed that the judicial authorities concluded the applicant's case within 13 years, 4 months and 20 days from the date of offence despite her warnings as to the statutory time-limit, and the decision ultimately issued was indeed based on the expiry of the statutory time-limit.

The Court has accordingly concluded that the judicial authorities failed to act in a particularly delicate manner as required by the State's positive obligation to swiftly complete the investigations into alleged violations of the prohibition of ill-treatment so as to prevent its becoming time-barred; and that they remained indifferent as having tolerated the unlawful acts amounting to torture.

Consequently, the Court has found violations of the substantive and procedural aspects of the prohibition of torture safeguarded by Article 17 of the Constitution.

JUDGMENT FINDING A VIOLATION OF THE PROHIBITION OF ILL-TREATMENT DUE TO THE FAILURE TO PROSECUTE THE POLICE OFFICERS ALLEGEDLY BATTERED THE APPLICANT

Tahir Baykuşak (no. 2016/31718, 9 July 2020)

THE FACTS

The applicant, a teacher, was stopped by the police officers for an identity check. Meanwhile, an argument occurred between the police officers and the applicant. The applicant was first taken by the police officers to the hospital where a temporary report was issued indicating that there was no sign of assault on his body. Afterwards, the applicant was taken to the police station where the parties complained about each other.

The applicant, claiming that the said report had been issued without his being examined, was referred to the hospital upon his own request. The report issued after his examination stated that there were bruises on various parts of his body. As for the report issued by the Forensic Medicine Institute, it stated that the applicant's injury resulting in soft tissue lesions did not put the applicant's life in danger and might be treated with simple medical intervention.

Within the scope of the investigation, the parties' statements were taken, and CCTV footages were examined; however, it was noted that no relevant images could be obtained due to the camera angle.

The law-enforcement officers, having issued a report, submitted the file to the prosecutor's office. Despite being recorded as the complainant in this report, the relevant police officer was considered as the suspect of intentional injury by the prosecutor's office. The prosecutor's office did not take the statements of the parties.

It then issued a decision of non-prosecution with respect to the suspected police officer for intentional injury. The applicant's challenge against the decision was dismissed by the magistrate judge with no right of appeal.

THE APPLICANT'S ALLEGATIONS

The applicant claimed that the prohibition of ill-treatment was violated, stating that he had been subjected to physical coercion by the law enforcement officers during an identity check and that upon his complaint in this regard, a decision of non-prosecution was issued.

THE COURT'S ASSESSMENT

The State is obliged to protect the corporeal and spiritual existence of the individuals from any danger, threat and violence. This obligation requires the State to take measures to prevent individuals from being subjected to torture and ill-treatment or to a punishment or treatment incompatible with human dignity.

The applicant claimed that after he had given his identity card to the police officers, one of them battered him after an argument. In his statement, the applicant gave the names of three persons whom he believed to have witnessed the incident; however, the prosecutor's office did not take the statements of the relevant persons.

The decision of non-prosecution issued by the public prosecutor's office contained no reasoning as to why the statements of the relevant witnesses had not been taken. The findings of injury in the forensic examination reports as well as the statements of witnesses, who had given statements before the court within the scope of the criminal case initiated against the applicant due to the same incident, support the allegations that the applicant had been subjected to physical assault by the police officers.

Given the circumstances of the incident, it has been determined that the treatment of the law enforcement officers against the applicant at the time of departure from school, which could also be witnessed by his colleagues, had attained a certain threshold of severity, and thus the minimum threshold of severity required by the Constitution had been exceeded.

In addition, although it was stated in the first medical report issued in respect of the applicant that there was no sign of assault on the applicant's body, the subsequent report that was issued on the same day upon the applicant's request stated that there were ecchymosis and abrasions on his body. There is no information or document in the investigation file indicating that an investigation was launched against the relevant doctor for the applicant's complaint in question.

Considering that the prosecutor's office failed to take the statements of the witnesses to reveal the circumstances of the incident as well as the material fact, that the contradictions in the police report could not be resolved, and that no investigation was launched against the relevant doctor, it has been concluded that the investigation into the incident was not conducted thoroughly and effectively.

Consequently, the Court has found violations of both procedural and substantive aspects of the prohibition of ill-treatment safeguarded by Article 17 of the Constitution.

C. JUDGMENTS CONCERNING THE RIGHT TO PERSONAL LIBERTY AND SECURITY

DECISION FINDING INADMISSIBLE THE ALLEGED VIOLATION OF THE RIGHT TO PERSONAL LIBERTY AND SECURITY DUE TO THE APPLICANT'S DETENTION AGAINST THE PROCEDURAL SAFEGUARDS AFFORDED TO MEMBERS OF THE JUDICIARY

Yıldırım Turan (no. 2017/10536, 4 June 2020)

THE FACTS

The applicant, a judge suspended from judicial office in the aftermath of the coup attempt of 15 July for having a link with the Fethullahist Terrorist Organisation/Parallel State Structure ("the FETÖ/PDY"), was detained on remand for his alleged membership of the said terrorist organisation. He was then released pending trial, and his case has been still pending before the incumbent assize court.

THE APPLICANT'S ALLEGATIONS

The applicant maintained that his right to personal liberty and security had been violated as his pre-trial detention had been ordered in the absence of any concrete evidence and against the procedural safeguards afforded to members of the judiciary.

THE COURT'S ASSESSMENT

In adjudicating several individual applications lodged with respect to the pre-trial detention of judicial members in the aftermath of the coup attempt of 15 July, the Court examined the question whether there was a legal obstacle -stemming from the procedural safeguards pertaining to the judicial office- to their placement in pre-trial detention. Accordingly, the Court has concluded at the end of the assessments as to the judges holding office at the Court of Cassation and the Council of State ("the Supreme Courts") that for conducting an investigation against these members even on account of any personal offence, a decision needs to be issued by the relevant boards of the Supreme Courts; and that the only exception to this necessity is the cases of *in flagrante delicto*.

The main ground underlying the inferior courts' acknowledgement that there was a situation of discovery *in flagrante delicto* in respect of the judges of the Supreme Courts placed in pre-trial detention in the aftermath of 15 July is the coup attempt itself. As also noted in several judgments rendered with a sufficient factual basis by the Turkish judicial bodies including the Court, the FETÖ/PDY is the mastermind of the coup attempt. Therefore, it is not unfounded to extend the scope of the concept of discovery *in flagrante delicto* to the individuals considered to have an organisational link with this organisation, perpetrator of the coup attempt, during a period involving the ongoing efforts to supress the coup attempt, as well as the ongoing severe threat posed to the existence of the State and national security.

The Court, also dealing with the question whether the procedural safeguards, which members of the judiciary are afforded, posed a legal obstacle to the pre-trial detention of the judicial members -detained on remand following the coup attempt- other than the judges serving at the Supreme Courts, has considered that the membership of a terrorist organisation necessitating their detention is a personal offence and characterised as a concept of *in flagrante delicto*.

"On the other hand, in its Hakan Baş v. Turkey judgment, which has not been finalised yet, the European Court of Human Rights ("the ECHR") held mainly on the basis of its findings in the Alparslan Altan v. Turkey judgment that the applicant's detention did not comply with the domestic law as he had been deprived of the procedural safeguards pertaining to judicial office. It accordingly found a violation of Article 5 § 1 (c) of the European Convention on Human Rights ("the Convention"). In this judgment, the ECHR did not accept the Government's objection to the effect that there was no special procedure for conducting an investigation against, and ordering pre-trial detention of, the applicant due to his personal offences as he was not a judge serving at the Supreme Courts. It appears that in reaching this conclusion, the ECHR reiterated its approach as to the provisions in the Turkish law regarding the concept of in flagrante delicto and as to their interpretation, adopted in its judgment Alparslan Altan v. Turkey where the applicant was serving as a judge at the Constitutional Court at the time of his pre-trial detention. From the ECHR's point of view, the Turkish judicial bodies' assessment extending the scope of the concept of in flagrante delicto to the members of the judiciary detained in the aftermath of the attempted coup is ambiguous.

This issue needs to be re-assessed comprehensively in the light of the ECHR's interpretation of the provisions in the Turkish Law where the procedures to conduct an investigation and/or prosecution against the members of the judiciary and to place them under pre-trial detention are laid down. In this sense, the procedure –within the Turkish law– regarding the pre-trial detention of the judicial members according to their respective positions, as well as the nature of the offences forming a basis for their detention must be clarified.

Accordingly, it should be primarily ascertained whether the Court's assessment in this respect would impair the binding nature of the ECHR's judgments. In interpreting the constitutional provisions, notably the ones concerning the fundamental rights and freedoms, the Court takes into consideration in particular the international conventions to which the Republic of Turkey is a party, as well as the remarks of the bodies authorised to interpret such conventions. The first and foremost of such international instruments is the Convention. That is because, the Convention is different than the other international conventions for both pertaining to human rights and being under the supervision of the ECHR, a judicial body the decisions/judgments of which are binding on Turkey.

The Court avails itself of the ECHR's case-law to a significant extent notably in its examinations and assessments as to individual applications and pays regard to the latter's approach in determining the meaning and extent of the constitutional provisions on fundamental rights and freedoms. In this sense, the Court also endeavours not to lead to any contradiction with the ECHR's case-law as a result of its interpretation of fundamental rights and freedoms. Indeed, one of the fundamental aims of the supervision/trial mechanism founded by the Convention is to ensure the establishment of a common European standard in the field of human rights. Therefore, the Court takes into account the ECHR's case-law in its assessments as to fundamental rights and freedoms, as a requisite of its role to minimise the possible contradictions between national law and international law with respect to the issues on human rights.

The ECHR's final decisions/judgments are binding; however, it is for the Turkish authorities, holder of public power, and ultimately for the national courts to interpret the provisions of domestic law relating to the pre-trial detention of the members of the judiciary. Although the ECHR is entitled to examine whether the Turkish courts' interpretation as to domestic law has been in breach of the rights and freedoms safeguarded by the Convention, it should not replace the domestic courts and interpret the national law at first hand. The Turkish courts are in a much better position than the ECHR to interpret the provisions of domestic law.

For this reason, the ECHR reiterates that it is primarily for the national judicial authorities to interpret the domestic law and that its duty is limited to determining whether the effects of such interpretation are compatible with the Convention. The ECHR also points out the fact that it cannot in principle substitute its own assessment for that of the national courts. In this regard, it notes that it is primarily incumbent on the national authorities –in particular the national courts– to resolve the issues related to the interpretation of domestic law.

In this context, it should be underlined that the finding of the ECHR, through the interpretation of the relevant provisions of the Turkish law, to the effect that the detention of the members of the judiciary did not comply with the domestic law is not related to the interpretation of the Convention. In fact, the aforementioned finding of the ECHR is just an explanation regarding the relevant provisions of the Turkish law. This is also the main reason for the Court's review of a given issue following the relevant judgments of the ECHR. As such, the fact that the Turkish judicial authorities, especially the Constitutional Court, reaches a different conclusion in their determinations and assessments related to the domestic law than the ECHR's interpretation as to the Turkish law –within the framework mentioned above– should not be regarded as contradicting the place and importance of the judgments of the ECHR in the Turkish legal system." (see *Yıldırım Turan, §§ 113-119).*

In the light of the explanations above, the Court has found it useful to examine (anew) thoroughly the statutory provisions regarding the investigation and/or prosecution as well as detention of the members of the judiciary.

The procedure for investigating and prosecuting the members of the judiciary other than the judges serving at the Supreme Courts is regulated by Law no. 2802. According to the relevant Law, as a rule, judges and prosecutors can be investigated for the offences, which are related to their profession or which they have committed while holding office, only upon the permission to be granted by the competent authorities. In the same vein, they can be prosecuted for the offences related to their profession only upon the decision of the competent authority.

On the other hand, there is no statutory provision seeking a permission or decision given by a competent authority in order for an investigation or prosecution to be conducted against judges and prosecutors for their personal offences. However, it should be borne in mind that conducting an investigation merely against the supreme court judges and elected members of the High Council of Judges and Prosecutors (HSYK), even if they are charged with a personal offence, is conditioned upon a decision/permission of certain authorities, save for the cases of *in flagrante delicto*.

Although Law no. 2802 does not stipulate that there must be a permission or decision given by a competent authority to investigate or prosecute judges and prosecutors for their personal offences –except for the cases of *in flagrante delicto*– there is a separate regulation included therein regarding the investigation and prosecution authorities. Accordingly, at the time of the applicant's detention, it was the chief public prosecutor's office at the assize court closest to the assize court having jurisdiction in respect of his place of residence which was authorised to investigate the personal offences committed by judges and prosecutors, and the said assize court was authorised to conduct the final investigation.

Therefore, these provisions regarding the determination of investigation and prosecution authorities cannot be said to require a permission or decision for the investigation or prosecution of personal offences at the time of the applicant's detention and in the subsequent period. Hence, there is no legal regulation that prevents judges and prosecutors from being investigated or prosecuted for their personal offences and thereby preventing the application of preventive measures, including detention, or seeking a permission or decision of the administrative authority.

In this case, the determination of whether the membership of an armed terrorist organisation for which the applicant was detained constitutes an individual offence or an offence related to his profession has a decisive importance in terms of the lawfulness of his detention.

As stated in the relevant statutory provisions as well as judicial decisions, the membership of a terrorist organisation imputed to the applicant is a personal offence, and therefore there is no need for a permission or decision of any administrative authority to conduct an investigation against him for the imputed offence and to order his detention as part of preventive measures. Thus, there is no legal obstacle to detain the applicant, who was serving as a judge, for his membership of a terrorist organisation, which constitutes a personal offence.

In this case, as regards the applicant, who was serving as a judge in the first instance court, it does not matter in terms of the lawfulness of his detention whether the membership of an armed terrorist organisation constitutes a case *of in flagrante delicto*.

In addition, it cannot be said that Law no. 2802 deprives judges and prosecutors from procedural safeguards in case of any personal offence. In this regard, in the absence of a certain decision of the competent judicial authority against the judge and prosecutor concerned, the law enforcement officials cannot apply any preventive measures on ground of their having committed a personal offence.

As a result, the applicant's allegation that he had been detained in contravention of the procedural safeguards afforded to him by virtue of his profession has been considered ill-founded. Thus, the applicant's detention had a legal basis.

Besides, it has been considered that the witness statements can be regarded as a strong indication of guilt on the part of the applicant. In addition, the grounds for the applicant's detention, such as the risks of tampering with the evidence and fleeing, had factual basis. Lastly, the investigation of terrorist offences poses serious difficulties for the public authorities. Considering in particular the scope and nature of the investigations related to the coup attempt or the FETÖ/PDY as well as the characteristics of the FETÖ/PDY, it is obvious that such investigations are much more difficult and complex than other criminal investigations. That being the case, considering the severity of the punishment imposed due to the imputed offence, along with the nature and gravity of the impugned act, it has been concluded that the applicant's detention was proportionate.

Consequently, the Court has found inadmissible, as being manifestly ill-founded, the alleged violation of the right to personal liberty and security due to the unlawfulness of detention.

DECISION FINDING INADMISSIBLE THE ALLEGED VIOLATION OF THE RIGHT TO PERSONAL LIBERTY AND SECURITY FOR ALLEGEDLY UNLAWFUL DETENTION OF A BYLOCK USER

M.T. (no. 2018/10424, 4 June 2020)

THE FACTS

The applicant was detained on remand for membership of the Fetullahist Terrorist Organization/Parallel State Structure (FETÖ/PDY) within the scope of the investigation launched by the chief public prosecutor's office after the coup attempt of 15 July, and a criminal case was filed against him. At the end of the proceedings carried out while he was detained on remand, the applicant was convicted of membership of an armed terrorist organization.

THE APPLICANT'S ALLEGATIONS

The applicant claimed that his right to personal liberty and security had been violated, arguing that he had been unlawfully detained on remand.

THE COURT'S ASSESSMENT

The charges against the applicant were mainly based on the fact that he had been using the application called ByLock, which was accordingly the most important ground for his detention on remand. In this case, in the examination of the lawfulness of the applicant's detention on remand, first an assessment in terms of the ByLock application should be made.

In the assessment of whether the use of the ByLock application could be taken as a strong indication of guilt, the nature and features of the application as well as the way in which the FETÖ/PDY was organized should be considered together. In addition, the content analysis carried out by the investigation authorities or judicial authorities of the communication made via the application, along with the facts in the statements of certain individuals alleged to have used the same application, should also be considered. In this context, the following assessments can be made:

It is specified in numerous court decisions that ByLock was the most important application used by the organization in order not to be uncovered, by ensuring the communication among its members privately. The ByLock application, which was created in order to provide communication over the internet, was generally installed manually by the persons having links with the FETÖ/PDY on the phones or electronic/mobile devices of the others having relations with the organization. This is an indication of the fact that the impugned application was created with a view to ensuring the non-disclosure of the secret communication about the organizational activities.

The extraordinary security measures taken to ensure the privacy of the ByLock application demonstrate that the application was not developed to provide a normal communication service. Findings regarding the use of the ByLock application have also indicated that this application was developed by a certain group under a strict control and supervision in order to ensure its use in a very confidential manner.

In addition, the measures taken to prevent the interception of the communication made via the application in any case also demonstrate that it was not an ordinary communication programme and aimed to ensure a private and secret communication platform. Such installation and usage features support the FETÖ/PDY's method of carrying out its activities secretly.

The usage features of the ByLock application were designed in a manner highly compatible with the organizational model of the FETÖ/PDY, without the need for any other communication tools for the organizational communication. One of the main attitudes of the members of the FETÖ/PDY is that they use code names to ensure confidentiality. Findings in the ByLock database regarding some users also point out the application's relation with the FETÖ/PDY.

A considerable part of the analysed content of the communication which had been made via the ByLock application was related to the organizational contacts and activities of the members of the FETÖ/PDY. A large number of persons investigated/prosecuted for the offences related to the FETÖ/PDY mentioned the ByLock application in their statements.

All in all, it has been understood that the assessments by the judicial authorities to the effect that the ByLock communication system, under the cover of a global application, had in fact been created to ensure the organizational communication among the members of the FETÖ/PDY and that the organizational communication was provided with great confidentiality through the application relied on very strong factual grounds as well as material/technical data. Therefore, the consideration of the use of ByLock application as an organizational activity cannot be regarded as an ill-founded or arbitrary approach.

Hence, considering as a whole (i) the findings of the law enforcement units and public authorities, which were also accepted by the judicial authorities, regarding the issues such as the creation, usage and method of the ByLock application, the encryption techniques in the application, the nature of the user and group names in the program and the content of the communication made via this application; (ii) the fact that the information and documents regarding the ByLock application as well as the features of the application almost completely coincide with the manner in which the FETÖ/PDY was organized; (iii) the statements of certain ByLock users; (iv) the existence of other facts and evidence pointing out the relation with the FETÖ/PDY of a significant part of the persons determined to have used the said application; and (v) the fact that the persons concerned used this application or installed it on their phones or mobile devices to make them ready for use, there is a strong indication of guilt on the part of the applicant in terms of crimes related to the FETÖ/PDY.

Consequently, the Court has found inadmissible the alleged violation of the right to personal liberty and security, as being manifestly ill-founded.

JUDGMENT FINDING A VIOLATION OF THE RIGHT TO PERSONAL LIBERTY AND SECURITY DUE TO THE UNLAWFULNESS OF DETENTION

Eren Erdem (no. 2019/9120, 9 June 2020)

THE FACTS

At the end of the investigation conducted by the chief public prosecutor's office into the events known as *17-25 December operations*, the applicant, who was a journalist and author, was detained on the basis of strong suspicion that he had knowingly and willingly aided the FETÖ/PDY armed terrorist organisation, in relation to certain publications in *Karşı* daily newspaper as well as obtaining information for these publications. The applicant was elected as an MP from the Republican People's Party (CHP) in the 25th and 26th term parliamentary elections.

The assize court released the applicant pending trial. Upon appeal by the chief public prosecutor's office, the applicant was again detained by the assize court. At the end of the proceedings, the applicant was sentenced to 4 years and 2 months' imprisonment for knowingly and willingly aiding an armed terrorist organisation, despite not being within the hierarchy of the organisation. The assize court ordered the continuation of the applicant's detention, taking into account the total sentence imposed on him. The applicant's subsequent appeal was dismissed by the assize court with final effect.

Besides, the applicant appealed the conviction decision. The regional court of appeal, having dismissed the appeals on the merits, released the applicant.

THE APPLICANT'S ALLEGATIONS

The applicant claimed that his right to personal liberty and security had been violated, stating that he had ben detained unlawfully in the absence of strong suspicion of guilt and that the risk of his fleeing, which constituted the ground for his detention, had not been justified.

THE COURT'S ASSESSMENT

It should be determined whether detention, as an interference with the right to personal liberty and security, complied with the principles –set forth in Article 13 of the Constitution and applicable to detention measure– such as being prescribed by law, being based on one or more of the justified reasons specified in the relevant articles of the Constitution, and not being contrary to the principle of proportionality.

Pursuant to Article 19 of the Constitution, an individual may only be detained on the ground that there is a strong indication of his guilt.

According to the assessments of the investigation authorities and the judicial authorities, the 17-25 December operations had been organised by the members of the judiciary and the law enforcement officers, who were

members of the FETÖ/PDY, in an attempt to overthrow the Government in accordance with the purposes of the said organisation. The Court has rendered many judgments acknowledging the lawfulness of the detention of some police officers who had taken part in these investigation processes and of the members of the judiciary who had ordered their release.

It has been observed, on the basis of the motion, bill of indictment, detention order and conviction decision issued against the applicant, that the accusations against him were mainly based on the facts related to certain publications on *Karşı* newspaper and to the manner in which the relevant information and documents were obtained. Considering the news published in the newspaper and the relevant assessments made by the investigation authorities and judicial authorities, it is neither unfounded nor arbitrary to consider that all these facts refer to the strong indication of guilt on the part of the applicant.

Besides, ordering the applicant's detention, the assize court relied on the risk of his fleeing. The detention order included no other grounds. According to the case file regarding the applicant, during the investigation launched against him in 2014, the investigation authorities did not find it necessary to order the applicant's detention or to apply any other measure against him.

Upon his not being nominated as an MP candidate in the 27th term parliamentary elections, the applicant announced on his social media account that he would continue to support his party in the election campaigns and stated "*The first destination is Maraş!*". The applicant stated that the impugned statement was related to the election campaigns and that he had been assigned by his party in Kahramanmaraş as part of the election process.

The incumbent chief public prosecutor's office, in its letter sent to the assize court, requesting that an arrest warrant would be issued against the applicant, specified that since he had not been nominated as an MP again, he was trying to go abroad in order to avoid the proceedings pending against him. The prosecutor's office also stressed that the security units had received a notification by e-mail that the applicant would flee abroad after the election.

It has been understood that the applicant, being unaware of the international travel ban imposed on him, arrived at the airport together with his family in order to go to Germany on the date when the decision was issued against him, but could not leave the country due to the aforementioned measure. The applicant cannot be said to have failed to comply with the conditional bail measures imposed on him, since he had not been aware of the international travel ban. Moreover, it is unreasonable to assume that someone who was aware of the international travel ban imposed on him would attempt to go abroad from the airport.

In addition, although it was claimed on the basis of the e-mail notification received by the security units that there was a concrete suspicion that the applicant would go abroad illegally, such a notification, the sender and the basis of which are unknown, cannot be regarded as a fact constituting a strong suspicion. Nor was there an indication that the applicant had made such a plan or attempt. Besides, the applicant stated that in the course of the investigation and prosecution processes against him, he had travelled abroad dozens of times.

Therefore, the statements included in the decisions on the applicant's detention and in other documents cannot be said to prove that there had been a risk of the applicant's fleeing on the basis of concrete facts. In addition, it has been observed that the applicant had had no behaviour that would cause the public authorities to have a suspicion that the applicant would flee abroad illegally.

Besides, the applicant was detained approximately two years after the constitutional amendment, which introduced an exception to the legislative immunity, and at the prosecution phase. During the investigation launched in 2014, it was not deemed necessary by the investigation authorities to detain, or apply any other measure against, the applicant until 7 June 2015, when he was elected as an MP for the first time. No new facts other than the evidence collected at the investigation stage were relied on to substantiate the applicant's detention. Moreover, the applicant was detained about one month after his denial to travel to Germany and his having had to return from the airport due to the international travel ban imposed on him.

As a result, the applicant's detention was not found necessary, and thus not proportionate in the circumstances of the case.

Consequently, the Court has found a violation of the right to personal liberty and security safeguarded by Article 19 of the Constitution.

JUDGMENT FINDING A VIOLATION OF THE RIGHT TO PERSONAL LIBERTY AND SECURITY DUE TO THE UNLAWFULNESS OF THE MEASURE ENTAILING THE OBLIGATION NOT TO LEAVE RESIDENCE

Esra Özkan Özakça (no. 2017/32052, 8 October 2020)

THE FACTS

The applicant's husband, holding office as a teacher, was dismissed from public office through a Decree-law issued during the state of emergency. Thereupon, he embarked on a sit-down strike and subsequently a hunger strike before the Human Rights Monument on Yüksel Street in Ankara, together with his friend who had been also dismissed from public office. An investigation was initiated into these protests by the applicant's husband and his friend for their alleged membership of a terrorist organisation, namely the DHKP/C, and they were accordingly detained on remand.

The applicant, who was also a teacher, was dismissed from public office through another Decree-law issued within the same period. She participated in her husband's sit-down strike when the latter went on a hunger strike and then embarked on a hunger strike after her husband had been detained. Thereafter, an investigation was initiated against her, in connection with the impugned acts, for her alleged membership of the DHKP/C and dissemination of terrorist propaganda. The applicant was then granted, by the incumbent magistrate judge, a conditional bail requiring her not to leave residence (house arrest).

At the end of the criminal proceedings conducted against her for the very same offences, the incumbent court granted a conditional bail requiring the applicant to report to the police station for signature, lifting the former measure entailing the requirement not to leave residence.

THE APPLICANT'S ALLEGATIONS

The applicant maintained that her right to personal liberty and security had been violated, stating that the measure entailing the obligation not to leave residence, which had been imposed on her, lacked legal basis.

THE COURT'S ASSESSMENT

The Court examined, in the first place, whether the measure entailing the obligation not to leave residence had constituted an interference with the right to personal liberty and security.

In the Court's view, in ascertaining whether a measure imposing a restriction on the individuals' freedom of physical mobility has constituted an interference either with the right to personal liberty and security safeguarded by Article 19 of the Constitution or with the freedom of movement enshrined in Article 23 thereof, what is of importance is not the nature or essence of the restriction; but rather the extent and intensity of the given restriction should be taken into

consideration. In determining the extent and intensity thereof, factors such as the type and duration of the imposed measure, the way how it is applied and the extent of the disruption caused by the measure to daily life are of importance.

In this sense, the obligation not to leave residence is a measure of conditional bail, which delimits the individual's physical freedom merely to the inside of the domicile he resides, which may be executed by way of electronic ankle bracelet, and which is applied uninterruptedly until being lifted and which, in case of any breach, may lead to the detention of the suspect or the accused person. Having regard to the nature, the way of its application and features of the impugned measure, the Court has concluded that given their respective effects, such a restriction on the freedom of physical mobility has more unfavourable results than any restriction on the freedom of movement; and that it therefore constituted an interference with the right to personal liberty and security.

The Court has, in the second place, found it necessary to make an assessment pursuant to the requirements of being prescribed by law, being based on the existence of a strong indication of criminal guilt, relying on one or more of the justified reasons provided in the relevant provisions of the Constitution and not being in breach of the principle of proportionality in deciding on the lawfulness of the measure entailing the obligation not to leave residence, one of the measures envisaged, as an alternative to detention, in Article 109 of the Code of Criminal Procedure.

In this respect, given the particular circumstances of the present case, it appears that the accusations leading to the application of the impugned measure are mainly the sit-down strike before the Human Rights Monument and subsequent hunger strike. The investigation authorities asserted that these acts had been indeed performed, in line with the instructions and orders of the DHKP/C terrorist organisation, for the purposes of achieving the aims of the organisation and disseminating its propaganda. In this sense, the investigation authorities referred to the activities performed by the formations considered to be in connection with the DHKP/C, the embracement of the impugned acts by the media outlets owned by this terrorist organisation, the release of the relevant explanations and messages through a journal, an online TV channel and social media accounts, as well as to the banners held during certain demonstrations. They also attracted attention to the posting of certain expressions, which were uttered by the applicant when she was taken into custody, via a social media account considered to be in connection with the said terrorist organisation.

It is evident that the acts of going on a sit-down or a hunger strike, which may be under certain circumstances regarded as a special aspect of the freedom of expression, should not be considered *per se* to constitute an offence. However, in case of any findings to the effect that these acts have been performed in relation with terrorism or in case of any conduct, which has praised, legitimised or encouraged the use of the terrorist organisation's methods involving coercion, violence and threat, such kinds of acts may be then considered to constitute an offence.

In this regard, in the present case, there is no document or finding in the investigation file to demonstrate that the applicant had embarked on sit-down and hunger strikes for an organisational purpose or she had engaged in such acts as a stance in favour of the terrorist organisation. Nor did the investigation authorities explain how the applicant had been involved in the release of the broadcasts and expressions relied on as a ground for the charges against her.

The applicant noted that she had gone on a sit-down strike due to both her and her husband's dismissal from public office; that she had participated in these acts mainly for providing support for her husband; that she had preferred to do so as a way to claim their rights; and that following her husband's detention, she had embarked on a hunger-strike. In the assessment of the applicant's acts in the particular circumstances of the present case, the chain of events indicated in the applicant's statement and referred to by the investigation authorities should not be disregarded. In this framework, also according to the findings reached by the investigation authorities, the applicant participated in the sit-down strike subsequent to the hunger strike of her husband and went on a hunger strike after her husband had been detained on remand.

Besides, the expressions uttered by the applicant when she was taken into custody, *"I was taken into custody for my being on a hunger strike; I was taken into custody when I was walking on the street. I would not give in to these pressures. I would continue to resist"*, cannot be said, by their very nature, to have legitimised or praised violence, terrorism or insurrection. Nor was it explained in the investigation documents how the applicant had a responsibility that her words were cited on a social media account stated to be in relation with the DHKP/C.

Consequently, the Court has concluded, on the basis of the documents before it, that the applicant was subjected to the measure entailing the obligation not to leave residence in the absence of strong indication of guilt and accordingly found a violation of the right to personal liberty and security safeguarded by Article 19 of the Constitution.

D. JUDGMENTS CONCERNING THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

JUDGMENT FINDING A VIOLATION OF THE RIGHT TO RESPECT FOR PRIVATE LIFE DUE TO THE ANNULMENT OF THE REGISTRATION WITH THE BAR ASSOCIATION FOR BEING DISMISSED FROM PUBLIC OFFICE

Tamer Mahmutoğlu (no. 2017/38953, 23 July 2020)

THE FACTS

The applicant, a bachelor of laws, was dismissed from his public office due to his involvement, relation or link with the Fetullahist Terrorist Organisation/Parallel State Structure ("the FETÖ/PDY").

He then filed a request with a Bar Association to enter on its registry; however, the Bar Association refused the request. Thereafter, he challenged the refusal before the Union of Turkish Bar Associations ("the TBB"). The TBB accepted the applicant's challenge, considering that the profession of lawyer was not a public office and the applicant's registration with the Bar Association could not be qualified as a type of employment. It accordingly annulled the Bar Association's decision refusing the applicant's request. However, the Ministry of Justice ("the Ministry") did not find the TBB's decision appropriate and remitted it for re-consideration.

Upholding its original decision, the TBB allowed for the applicant's registration with the Bar Association. After the decision had been finalised, the Ministry brought an action for annulment before the incumbent administrative court ("the court"). The court annulled the decision issued by the TBB, stating that the profession of lawyer had been attributed with further characteristics of public service and that those who had been dismissed from public office by virtue of the decree-laws issued under the state of emergency could not be allowed to register with the bar association as, and to use the title of, a lawyer. The appeal against the court's decision was dismissed by the Regional Administrative Court.

On the other hand, the applicant was acquitted at the end of the criminal proceedings conducted against him for his alleged membership of the FETÖ/PDY.

THE APPLICANT'S ALLEGATIONS

The applicant maintained that his right to respect for private life had been violated as his dismissal from public office did not pose an obstacle to his practising as a self-employed lawyer.

THE COURT'S ASSESSMENT

It has been concluded that there was an interference with the applicant's right to respect for private life as he had been precluded from practising as a self-employed lawyer after the TBB's decision -whereby the applicant was allowed to enter on the registry of the Bar Association- had been annulled by the court's decision which had been finalised upon the Regional Administrative Court's decision.

The first and basic condition for finding an interference with the right to

respect for private life compatible with the constitutional safeguards is the existence of a legal basis for the interference.

The decree-laws issued under the state of emergency, which formed the basis of the annulment decision rendered by the inferior court, were enacted pending the proceedings in the applicant's case. However, the mere existence of laws -relied on as a ground for restricting the fundamental rights and freedoms- in form is not *per se* deemed sufficient to acknowledge that the lawfulness requirement has been satisfied. Besides, the relevant law must have a substantive content to the extent that would justify a given interference and ensure accessibility, foreseeability and certainty of a given restriction. The judicial bodies are liable to examine whether the statutory arrangements relied on as a ground for impugned interferences are accessible, foreseeable and certain and, first and foremost, to implement the given statutory arrangements within the prescribed framework in dealing with cases before them.

In the present case, the statutory arrangements relied on in the inferior courts' decisions set forth that those who have been dismissed from their public offices would no longer hold a public office and can no longer use their titles. However, given that the applicant did not get the title of lawyer by virtue of the public office he held as an expert but had already obtained it before holding his public office, it is difficult to say that the provisions, which preclude entrance to public service, pose an obstacle to the re-use of his title as a lawyer and the exercise of this profession as self-employed. The inferior courts did not provide any explanation as to why the provision in question was applied to the present case.

Besides, in the present case, the profession of lawyer, which is clearly a public service, must be examined also in terms of type of employment, with a view to ascertaining whether the impugned interference had a legal basis. It is undoubted that the notion of employment in public service covers the public officers; however, it is possible to employ officers in public services through a contract governed by private law. Nevertheless, it cannot be considered that lawyers -who are not public officers and who practise the profession as self-employed- are holding a public office. That is because, unless the said circumstances exist, the profession of lawyer is, in principle, a self-employed profession which is not subject to an administrative hierarchy.

Moreover, the self-employed lawyers do not practise for and on behalf of the State. They are in principle free to continue practising their profession after being registered with the bar association and to choose their clients. They do not receive a salary from the state, and their incomes are mainly composed of counsel fees paid by clients. No financial contribution, save for the assignments such as compulsory advocacy or arbitration, is provided by the State for self-employed lawyers. No financial or legal liability can be attributed to the State on account of the acts and actions performed by them. All rights emanating from the contract signed by the self-employed lawyers and their clients are enjoyed by, and the liabilities resulting therefrom are binding for, them. These issues are also in support of the above-mentioned findings and considerations.

In the present case, the act performed by the TBB does not fall within the scope of the ban on holding a public office, which is prescribed in the given statutory arrangements. Any interpretation to the contrary may give rise to the application of the given arrangements not only for the profession of lawyer but also for the other self-employed professions likely to be regarded as a public office, namely professions of doctor and engineer.

The applicant is not employed in a public office through an administrative, commercial or industrial contract. Nor is there an employment relationship in the particular circumstances of the present case. Accordingly, it has been considered that in considering that the practice of self-employed lawyer was within the scope of the ban on holding a public office, the inferior courts interpreted the said statutory arrangements in an unreasonably broad and unforeseeable manner.

Accordingly, it has been concluded that the interference whereby the applicant was precluded from entering on the registry of bar association had no legal basis.

Consequently, the Court has found a violation of the right to respect for private life safeguarded by Article 20 of the Constitution.

JUDGMENT FINDING A VIOLATION OF THE RIGHT TO MARRY DUE TO THE FAILURE TO NOTIFY THE DIVORCE DECREE TO THE SPOUSE ABROAD

S.A. (no. 2017/40199, 8 September 2020)

THE FACTS

The applicant filed for divorce from her Tanzanian husband as they had been already separated for so long and could not maintain their conjugal life. On 21 February 2003, the incumbent civil court granted the divorce.

The civil court issued a writ to the Ministry of Justice ("the Ministry"), seeking the notification of the divorce decree to the defendant who was in his country of origin. The applicant submitted petition to the civil court several times and asked for the outcome of the notification process. In the letter of 27 March 2007, which was sent by the Ministry of Foreign Affairs to the Ministry, it was stated that the relevant document was to be re-sent for not being available in the records. Thereafter, the applicant requested re-submission of the relevant document to the Ministry of Foreign Affairs.

She also provided all information requested from her in the subsequent period to the relevant authorities. In the letter issued by the Ministry of Foreign Affairs on 15 January 2016, it was informed that although the request had been submitted several times to the relevant ministry of the respondent country, any reply had not been taken and was no longer expected due to systemic problems in the country. The applicant then lodged an individual application with the Court as the divorce decree could not be finalised.

THE APPLICANT'S ALLEGATIONS

The applicant maintained that her right to marry had been violated due to the failure by the authorities to notify the divorce decree to her husband abroad and thereby to revise her civil registries in line therewith.

THE COURT'S ASSESSMENT

In cases where the administrative and judicial authorities fail to take the steps reasonably expected from them to conclude the divorce proceedings within a reasonable time and to eliminate the reasons posing an obstacle to the marriage of individuals, the very essence of the right to marry would be impaired, which would thereby entail the violation of the said right.

In the present case, the outcome of divorce proceedings could not be notified to the defendant for his not being in Turkey. Therefore, the applicant's marital status could not be changed, despite 17 years having elapsed since the date of divorce decree, due to the non-completion of the finalisation process.

The applicant performed the actions requested by the civil court in a swift and complete manner and pursued the process rigorously.

The attempts by the Ministry of Foreign Affairs in the applicant's case remained inconclusive due to the system operating in Tanzania and the deficiency in the defendant's address. However, regard being had to the official

correspondences issued within the impugned process, it has been observed that these attempts dated back not to 2004, the date when the divorce decree to be notified was submitted, but to 2007.

It has been also observed that the applicant's requests for the application of alternative legal means, namely notice by publication -which is explicitly laid down in Law no. 7201 and the relevant Regulation- with a view to ensuring finalisation of the divorce decree issued in 2003 were not taken into consideration by the inferior courts. Besides, no assessment was made as to the petitions of 2010 and 2015, which had been submitted to the same end.

In this sense, the Court has considered that there was procrastination in the processes needed to be completed for the finalisation of the decree issued at the end of the divorce proceedings; and that the inferior courts failed to show due diligence and attention in applying the practice of notice by publication, a substantial legal means. Therefore, in the processes regarding the finalisation of the divorce decree, the due diligence obligation was disregarded to the extent that would impair the very essence of the right to marry, and the necessary steps could not be taken within a reasonable time.

Consequently, the Court has found a violation of the right to marry.

JUDGMENT FINDING A VIOLATION OF THE RIGHT TO RESPECT FOR PRIVATE LIFE DUE TO DISCLOSURE OF PERSONAL DATA BY THE ADMINISTRATION TO A THIRD PARTY

Arif Ali Cangı (no. 2016/4060, 17 September 2020)

THE FACTS

The applicant, a lawyer, was the plaintiff in the proceedings instituted for the annulment of the zoning plan of the area where the Bergama Gold Mine facility is also located.

The lawyer representing Koza Altın İşletmeleri Anonim Şirketi, the company conducting the gold mining activities in the region and an intervening party of the said proceedings ("the company"), requested information in 2006 from the Ministry of Interior ("the Ministry") to use during the judicial proceedings. In its reply, the Ministry provided the company with certain private information about the applicant. Thereafter, some charges were directed against the applicant in a column published in a daily national newspaper owned by Koza İpek Group. As the applicant sued the columnist for the said column, the columnist submitted the letter containing the applicant's personal information, which had been delivered by the Ministry to the company's lawyer, for being included the investigation file.

The applicant claimed non-pecuniary compensation, maintaining that the letter submitted by the Ministry involved several information and findings about him, which did not reflect the truth; and that the delivery of the letter to third parties impaired his personal rights. After the applicant's claim had been dismissed by the Ministry, he brought an action for compensation before the incumbent administrative court; however, it was also dismissed. The dismissal decision issued by the administrative court was ultimately upheld by the Council of State.

As is known, a trustee was appointed to Koza İpek Group companies on 26 October 2015 for having assisted the activities of the Fetullahist Terrorist Organisation/Parallel State Structure ("FETÖ/PDY").

THE COURT'S ASSESSMENT

The applicant maintained that his right to respect for private life had been violated due to the submission of the information, which could be requested only by judicial authorities, to the company's lawyer without taking into consideration the conditions specified in the relevant legislation.

THE COURT'S ASSESSMENT

It is set forth, as a basic principle, in Article 13 of the Constitution that fundamental rights and freedoms may be restricted only by law. Article 20 thereof also provides for that personal data may be processed "*only in cases envisaged by law or by the relevant person's explicit consent*".

In the present case, the applicant's personal data were disclosed, in the absence of his explicit consent, to a third person upon the request of the company's lawyer in his capacity as a party to the action for annulment of the zoning plan. Neither the administration nor the judicial authorities proved a public interest in the disclosure of the information about the applicant.

Besides, there is no information to the effect that a criminal investigation has been conducted against the applicant. In this sense, it has been observed that the disclosure of the impugned data, collection of which may be justified only for intelligence purposes, to third persons did not fall into the scope of Laws no. 4982 and 1136 on which the administration and the inferior courts relied in their decisions; and that the interference with the applicant's right to the protection of his personal data lacked any legal basis.

The disclosure of the applicant's personal data served the private interest of a third person, who was a party to the dispute falling under the scope of private law. The disclosure of the personal information, which was not linked to the merits of the proceedings in question, to a third person cannot be said to pursue a legitimate aim.

Given the absence of any inquiry conducted with respect to the applicant by the Ministry, the administration failed to demonstrate the grounds and the scope for which the relevant personal data had been collected. Nor did the inferior courts provide any relevant and sufficient reasons to demonstrate that the collection and disclosure of these data met a pressing social need.

It has been accordingly concluded that the collection of the applicant's personal data and their disclosure to a third person in the absence of his explicit consent did not meet a pressing social need and were incompatible with the requirements of a democratic society.

Consequently, the Court has found a violation of the right to the protection of personal data under the right to respect for private life safeguarded by Article 20 of the Constitution.

JUDGMENT FINDING NO VIOLATION OF THE RIGHT TO THE PROTECTION OF PERSONAL DATA AND FREEDOM OF COMMUNICATION DUE TO ACCESS TO BYLOCK DATA

Bestami Eroğlu (no. 2018/23077, 17 September 2020)

THE FACTS

An investigation was initiated against the applicant following the coup attempt of 15 July for his alleged membership of the Fetullahist Terrorist Organisation/Parallel State Structure ("the FETÖ/PDY"). The incumbent chief public prosecutor's office indicted him before the assize court ("the court"). The indictment issued with respect to him referred to the finding that the applicant was the user of the ByLock application, the communication means of the said organisation. At the end of the criminal proceedings, the court sentenced him to 7 years and 6 months' imprisonment for his membership of the said terrorist organisation, taking into consideration his being a user of the ByLock. The applicant's appeal on points of fact and law (*"istinaf başvurusu"*) was dismissed by the Regional Court of Appeal. At the end of the appeal proceedings before it, the Court of Cassation upheld the applicant's conviction.

THE COURT'S ASSESSMENT

The applicant maintained that his right to the protection of personal data and freedom of communication had been violated due to the unlawful acquisition of his ByLock communication and personal data.

THE COURT'S ASSESSMENT

The underlying aim of the impugned interference with the applicant's right to the protection of personal data and freedom of communication is to uncover the FETÖ/PDY terrorist organisation and its activities, thereby to prevent the commission of offence. It is evident that the acquisition and analysis of the data available on the ByLock communication programme, the submission of such data to the investigation authorities, as well as the acquisition of the applicant's communication records and the identification of the base station providing service to ascertain whether the applicant had been a user of this application are the appropriate means to achieve the aim pursued.

In the second place, it was examined whether the impugned interference met a pressing social need and, in this sense, whether the acquisition of the applicant's ByLock data, communication records and the base station information were a measure used as a last resort.

The FETÖ/PDY, with its peculiar structure and its functioning based on confidentiality, is one of the most organised and dangerous terrorist organisations, which carry out activities in several countries. Therefore, the use of clandestine intelligence methods so as to ensure the uncovering of the organisational activities and identification of its members is inevitable. No democratic state may remain inactive in case of any threat to its existence. As a matter of fact, the data obtained from the ByLock server has played a significant role in the disclosure of the activities performed by the

organisation as well as identification of its members. In this sense, several high-level members of the FETÖ/PDY were identified through the analysis of the ByLock data.

In this respect, the acquisition of the data available on the ByLock server through intelligence methods and the submission of these data to the judicial authorities satisfy the condition of being compatible with the requirements of a democratic society. Besides, the data obtained from the ByLock server has not produced an automatic consequence with respect to the applicant. The impugned interference resulting from the acquisition of the applicant's communication data on the ByLock application was made pursuant to Articles 134 and 135 of the Code of Criminal Procedures and on the basis of a judge's decision. It has been accordingly concluded that the interference was necessary in a democratic society and proportionate to the aims sought to be attained.

In the third place, it must be ascertained whether the special safeguards inherent in the right to the protection of personal data have been afforded to the applicant. However, it must be primarily discussed whether in the present case, there was any situation necessitating an exception to the special safeguards that have come into play in case of any restriction on, and interference with, the right to the protection of personal data.

As required by the criteria set forth in Article 13 of the Constitution as well as by Article 14, which provides *"None of the rights and freedoms embodied in the Constitution shall be exercised in the form of activities aiming to violate the indivisible integrity of the State with its territory and nation, and to endanger the existence of the democratic and secular order of the Republic based on human rights"*, an exception may be introduced to the special safeguards inherent in the right to the protection of personal data for the purposes of maintaining the order of democratic state and the national security, as well as of fighting against terrorism. It is also acknowledged in the international legal instruments that special safeguards of the right to the protection of personal data may be subject to an exemption with a view to maintaining national security and fighting against terrorism.

In the present case, it is evident that the interference with the applicant's right to the protection of personal data and freedom of communication is closely associated with the purposes of maintaining national security and preventing the commission of any offence. The public authorities considered that it would be insufficient to merely conduct a judicial investigation with a view to uncovering the organisational activities, identifying members of the organisation and preventing the risks caused by the organisation to the public order and national security. Therefore, certain clandestine intelligence methods, which are not indeed a means applicable to every criminal investigation, were applied in the applicant's case. In the use of such methods, the severity of the threat caused by the said organisation to the

sovereignty of the Turkish Republic, which was manifested on 15 July 2016, had an unequivocal effect. Therefore, it is undoubted that the interference in the present case was of the nature that necessitated an exception to the special safeguards inherent in the right to the protection of personal data.

However, the existence of an exception does not necessarily entail the setting aside of all special safeguards. In consideration of the particular circumstances of the present case, it has been concluded that the safeguards of (1) being restricted, (2) not being stored for a long period of time, (3) not bearing an automatic consequence in terms of the data subject and (4) being subject to an effective judicial review must be afforded.

There is no information to the effect that the acquisition of ByLock data by use of intelligence methods went beyond the aim of uncovering the activities, and identifying the members, of the said organisation. Nor did the applicant raise a complaint that the obtained data had been misused. The data obtained from the ByLock application were used merely in the criminal proceedings conducted into the applicant's alleged membership of the FETÖ/PDY.

It is envisaged that the data proving that the applicant was a user of the ByLock and the information supplied by the Information and Communication Technologies Authority be stored throughout the criminal proceedings. Indeed, the applicant did not complain of the period during which the relevant data would be stored. Accordingly, it has been considered that the storage period was not excessive.

The data obtained through the ByLock server did not automatically yield a consequence with respect to the applicant and were dealt with during an investigation upon being assessed and analysed primarily by the law enforcement units and then by the judicial authorities. Finally, the applicant had the opportunity to raise his challenges before the inferior courts, which conducted a comprehensive examination as to these challenges. The applicant did not raise any complaint with respect to the special safeguards inherent in the right to the protection of personal data. Nor was any deficiency found in this respect. The Court has also considered that the applicant was afforded the relevant judicial safeguards.

Consequently, the Court has found no violation of the right to the protection of personal data and the freedom of communication.

JUDGMENT FINDING VIOLATIONS OF THE RIGHT TO THE PROTECTION OF PERSONAL DATA AND THE FREEDOM OF COMMUNICATION FOR TERMINATION OF THE EMPLOYMENT CONTRACT ON THE BASIS OF E-MAIL CORRESPONDENCE

E.Ü. (no. 2016/13010, 17 September 2020)

THE FACTS

The applicant, who had been working as a lawyer in a law office, was subjected to a disciplinary investigation due to the problems in the office. At the end of the investigation, the applicant's employment contract was terminated on the basis of the contents of his correspondence via his corporate e-mail account which had been examined by his employer. The applicant unsuccessfully brought a declaratory action before the labour court, seeking to be reinstated. Following the applicant's subsequent appeal, the Court of Cassation upheld the decision of the labour court.

THE APPLICANT'S ALLEGATIONS

The applicant claimed that his right to the protection of personal data and freedom of communication had been violated due to the examination of the content of his corporate e-mails by his employer and the termination of his employment contract on the basis of his correspondences.

THE COURT'S ASSESSMENT

In its previous judgments, the Court has generally determined the issues to be considered in disputes related to the monitoring of the means of communication by the employer. Accordingly, in the circumstances of the present case, such issues as to how the restrictive and obligatory regulations were determined in the employment contracts, whether the parties were informed of these regulations, whether the legitimate aim pursued by the interference with the fundamental rights of the employees was proportionate to the said interference, and whether the termination of the employment contract was reasonable and proportionate to the acts or inactiveness of the employees should be considered in the resolution of the dispute.

Given these issues, the employer's authority to monitor the communication of the employee must be examined within the scope of the State's positive obligations under the right to the protection of personal data and freedom of communication. Within this framework, the present case has been evaluated within the scope of the general principles set as regards the employer's monitoring of the employee's corporate e-mail account.

In the present case, first of all, it should be examined whether there were legitimate reasons justifying the monitoring, by the employer, of the means of communication made available to the employee as well as of the content of his correspondence. In this case, the legitimacy of the reasons submitted by the employer should be examined also considering the characteristics of the work and the workplace. In

such an examination, a distinction should be made between the examination of the communication flow and of the contents thereof, and more justified grounds should be sought to necessitate the examination of the latter.

In cases where there is no full and explicit prior notification that the communications made through e-mail accounts may be monitored, the employer is to foresee that the employee may make personal correspondence via his corporate e-mail account. Therefore, employees may have a reasonable expectation that there will be no interference with their rights and freedoms in the absence of an explicit notification.

In the present case, the employer had not made an explicit notification that the applicant's correspondence via his corporate e-mail account might be monitored. In addition, the applicant's employment contract had been terminated on the basis of the contents of his correspondence via his e-mail account. However, during the proceedings, the employer, in his capacity as the defendant, failed to demonstrate that a notification had been made to the applicant to inform him of the legal ground of the processing of his personal data and the purpose of such processing. In this scope, the inferior courts did not discuss whether such notification had been made, and therefore they failed to address the applicant's substantial allegations that the content of his e-mails had been accessed without his consent and without a prior notification.

In addition, it has been observed that the employer did not provide any explanation as to the existence of a situation requiring access to the content of the applicant's e-mail account, and that the termination notice only stated the phrase "*to investigate the allegations and to understand the relations between the team members*" as the purpose of the access to the relevant data. However, although there had been different means in terms of achieving the same purpose, it was not clearly stated by the employer why the monitoring of e-mail contents had been deemed compulsory and necessary. The inferior courts also failed to discuss this aspect of the case.

Besides, the extent of the interference made by the employer must be discussed. In this context, it has been observed that the employer had accessed the contents of the applicant's correspondences without the team leader's and his consent, that the correspondences with third parties apart from the correspondences between the team leader and the applicant had also been examined, and that the contents –relevant or irrelevant– had also been accessed, which were all based on in the termination of the applicant's employment contract. Therefore, it has been understood that the contents of the applicant's e-mail correspondences, which was his personal data, had been accessed and used, their scope being uncertain.

For the reasons explained above, the inferior courts that are authorised to settle the disputes arising from the labour relations under private law failed to observe the relevant constitutional safeguards and conduct the proceedings diligently, thereby to fulfil the relevant positive obligations.

Consequently, the Court has found violations of the right to the protection of personal data and the freedom of communication.

JUDGMENT FINDING A VIOLATION OF THE RIGHT TO RESPECT FOR PRIVATE LIFE DUE TO TERMINATION OF THE EMPLOYMENT CONTRACT FOR BREACH OF CONFIDENCE

Ayla Demir İşat (no. 2018/24245, 8 October 2020)

THE FACTS

The employment contract of the applicant, an employee serving at the Central Union of the Turkish Agricultural Credit Cooperatives, was terminated -without notice and compensation- by the Board of Directors following the coup attempt of 15 July by virtue of the Decree-law no. 667. The applicant brought an action for her reinstatement in the relevant post before the incumbent labour court which subsequently dismissed it. Her challenge against the dismissal decision was also rejected by the regional administrative court. She then appealed against the decision; however, it was ultimately upheld by the Court of Cassation.

THE APPLICANT'S ALLEGATIONS

The applicant maintained that her right to respect for private life had been violated due to the termination of her employment contract by the employer, based on breach of confidence.

THE COURT'S ASSESSMENT

The application was examined under the right to respect for private life as the impugned interference with the professional life had a severe effect on the applicant's private life, which attained a certain level of gravity.

The reason for the termination of the applicant's employment contract in the present case is the suspicion on the part of the applicant that she had a link or relation with the Fetullahist Terrorist Organisation/Parallel State Structure ("the FETÖ/PDY"), which was found established to have engaged in activities against the State's national security, as well as the breach of confidence arising from this suspicion. It appears that the suspicion against the applicant was based on the bank account opened by her in Asya Katılım Bankası A.Ş. (Bank Asya) in 2009. It was found established by the judicial decisions that Bank Asya had obtained income from the amounts deposited by the organisation members upon the call by the leader and heads of the FETÖ/PDY; that it had thereby provided financial resources for the organisational activities and had operated as the financial centre of the FETÖ/PDY.

Given the documents included in the case-file before the trial court and demonstrating the transactions performed by the applicant through her account in Bank Asya since 2010, it has been observed that the reasons underlying the suspicion to the effect that she was in relation or connection with the FETÖ/PDY were not capable of proving the breach of confidence between the employee and the employer. It has been observed that the applicant's transactions via her account in Bank Asya prior to the instruction to deposit money

into Bank Asya accounts, which had been given to the organisation members by the FETÖ/PDY's leader, were similar to those performed by her following the instruction in question.

Besides, it has been revealed that the transactions following the instruction were not always performed for increasing the balance at her bank account but there were also several transactions which reduced the balance. Given that the parties of these transactions and the applicant herself were a regular income earner, the reasons as to why the increase in the applicant's balance was not considered as a routine account activity must be also put forth.

It has been observed that in the present case, no examination was conducted in this respect, and neither the employer nor the inferior courts provided strong and plausible grounds in their decisions. Therefore, the Court has considered that the impugned interference was in excess of the limits of the discretionary power conferred upon these authorities. Besides, the inferior courts failed to make any assessment as to the applicant's argument that the impugned increase in the balance of her bank account was indeed within the scope of routine banking activities. These issues should have been clarified by the inferior courts through an adversarial trial.

It has been concluded that the administrative and judicial decisions, which found established that the confidence relationship between the employer and the employee had been impaired on account of the applicant, did not demonstrate any plausible, relevant and sufficient grounds to justify that the impugned interference met a pressing social need.

Consequently, the Court has found a violation of the right to respect for private life safeguarded by Article 20 of the Constitution.

In the present case, it was also examined whether the impugned interference had been lawful within the meaning of Article 15 of the Constitution, which allows for the suspension and restriction of the exercise of fundamental rights and freedoms in times of emergency.

The obligations in exercising the discretionary power within the foreseeable limits and demonstrating the underlying grounds in a plausible manner are applicable also under the conditions of the state of emergency. It has been considered that the measure taken with respect to the applicant, in the absence of any serious, strong and objective grounds which could plausibly justify the suspicion against her, was in breach of these obligations. The Court has therefore concluded that the impugned measure fell foul of the criteria laid down in Article 15 of the Constitution allowing for the suspension and restriction of the exercise of the fundamental rights and freedoms during the state of emergency.

E. JUDGMENTS CONCERNING THE FREEDOMS OF EXPRESSION AND THE PRESS

JUDGMENT FINDING A VIOLATION OF THE FREEDOM OF EXPRESSION DUE TO REMOVAL OF THE BANNER ON THE POLITICAL PARTY BUILDING

Deniz Karadeniz and Others (no. 2014/18001, 6 February 2020)

THE FACTS

A banner reading "*Katil, Hırsız AKP (Murderer and Thief AKP)*" had been hung on the premises of the Freedom and Solidarity Party (Özgürlük ve Dayanışma Partisi) before the open-air meeting organised by the Justice and Development Party (AKP) in Edirne for local elections.

The police officers attempted to enter the building in order to remove the banner and arrest the applicants in accordance with the instructions of the public prosecutor. However, the applicants inside the building refused to open the door, which resulted in the use of force by the security forces.

The applicants complained about the police officers. The chief public prosecutor's office, having issued a bill of indictment against the applicants, additionally issued a decision of non-prosecution regarding the law-enforcement officers concerned. The applicants' subsequent appeal was dismissed by the magistrate judge.

THE APPLICANTS' ALLEGATIONS

The applicants claimed that the prohibition of ill-treatment as well as the freedom of expression had been violated on the respective grounds that they had been battered and insulted by the security forces and that the banner, in its content, had not constituted an offence.

THE COURT'S ASSESSMENT

1. Alleged Violation of the Prohibition of Treatment Incompatible with Human Dignity

Law enforcement officers are authorised to use force in order to, and to the extent necessary to, break any resistance encountered while performing their duties.

In the present case, the police officers attempted to enter the building in accordance with the instructions of the public prosecutor; however, the applicants did not open the door. Thus, the use of force by the officers to enter the building had a legitimate basis.

The physical force resorted to by the police officers to arrest a resisting person should be limited to the extent sufficient to break the resistance of the person. The use of force should in no way go beyond the purpose of breaking the resistance and should not amount to torture.

The police officers directly used tear gas against the applicants who were in a room inside the building. The use of such gases may be deemed lawful, provided that other appropriate means for breaking the resistance were employed in the first place but yielded no result. In the present case, tear gas was sprayed in an indoor area where there was no escape from the negative effects of the gas, and it was not considered whether it was possible to use any alternative means.

The use of tear gas in an indoor area despite the sufficient precautions taken to prevent the applicants' escape has not been considered to correspond to a proportionate use of force.

It has been concluded that the use of physical force was not proportionate, the treatment inflicted on the applicants caused distress and humiliation, damaging their values as human beings as well as their dignity, and that therefore the substantive aspect of the prohibition of treatment incompatible with human dignity was violated.

In addition, it has been observed that the applicants' complaints against the police officers were not examined within the scope of a separate investigation, but concluded with an additional decision issued within the scope of the same investigation against the applicants, which was based on the report issued by the police officers. The chief public prosecutor's office reached a conclusion without conducting an incident scene examination, without examining the use of tear gas in an indoor area, and without taking the statements of the police officers involved in the incident. An investigation conducted in this manner lacks due diligence and seriousness required by Article 17 of the Constitution.

The written instructions given by the authorities to the police officers stated that a visual recording was required to prevent unrealistic complaints regarding the use of allegedly disproportionate force during the use of tear gas. The applicants claimed that such a recording had been made in the course of the incident; however, that the recording had been interrupted when the police officers had started to use force. The investigation authorities failed to investigate whether these allegations were true. These shortcomings in collecting evidence within the scope of the investigation had an adverse impact on its effectiveness. Hence, no effective criminal investigation was conducted against the police officers, and therefore the procedural aspect of the prohibition of treatment incompatible with human dignity was violated.

Consequently, the Court has found a violation of the prohibition of treatment incompatible with human dignity safeguarded by Article 17 of the Constitution.

2. Alleged Violation of the Freedom of Expression

In order for any interference with the freedom of expression that is of vital importance for the functioning of democracy to comply with the requirements of the order of the democratic society, the reasons put forth by the public authorities must be relevant and sufficient.

The banner, giving rise to the impugned events, contained two harsh statements against the AKP, the ruling party. One of the said statements was "*thief*" which implied that the ruling party was involved in corruption, and the other was "*murderer*" which reflected the dissatisfaction with the security policies implemented within the scope of the fight against the PKK terrorist organisation.

It is possible only in democratic regimes, where ideas can be expressed without any obstacles, that individuals and groups can speak out their discomforts ranging from the failure of the mechanisms regulating the economy to the claims of unearned income and corruption, as well as they can demand the Government to be held accountable and the administration to be transparent.

The fine line between criticizing the State's anti-terrorism policies and supporting and legitimising the activities of the terrorist organization should always be observed. In the circumstances of the present case, there was no evidence that the word "murderer" had been expressed to justify the acts of violence committed by the PKK terrorist organization.

It can be assumed that the statements on the banner might hurt, to a certain extent, the supporters of the AKP. The impugned statements used by those hanging the banner were the reflection of their endeavours to cause a polemic and violent reactions. Freedom of expression applies not only to information and ideas acceptable by the society, but also to information and thoughts that are offensive, shocking or worrying. The Constitutional Court has acknowledged in its many judgments that the freedom of expression should be interpreted broadly so that it may allow for exaggeration and even provocation to some extent. As being indispensably important in contemporary democracies, any effort to express and disseminate ideas that do not pose a threat to the public order and do not incite violence should be tolerated.

In the present case, the police, the public prosecutor's office as well as the first instance court that ordered the seizure of the impugned banner failed to demonstrate that the said banner had provoked the people who had gathered at the material time or that the content of the banner had been provocative and might have escalated the conflict, thereby disturbing the public order. Nor was there an element indicating that the banner had posed a threat to the public order or had had an offensive content.

The ruling party has a very broad obligation to endure criticism, no matter how unacceptable the views and statements directed against it are, as it forms public policies to a considerable extent. Regardless of the severity of the views and thoughts criticizing the policies of the ruling party, no sanction should be imposed on the people for expressing these.

It has been concluded that the impugned interference with the freedom of expression did not meet a pressing social need. Nor was it proportionate or necessary in a democratic society.

Consequently, the Court has found a violation of the freedom of expression safeguarded by Article 26 of the Constitution.

PRESS RELEASE CONCERNING THE JUDGMENT FINDING A VIOLATION OF THE RIGHT TO BE ELECTED AND ENGAGE IN POLITICAL ACTIVITIES FOR DENIAL OF PARLIAMENTARY IMMUNITY OF THE RE-ELECTED MEMBER OF THE PARLIAMENT

Kadri Enis Berberoğlu (no. 2018/30030, 17 September 2020)

THE FACTS

An investigation was launched against the applicant, who was a Member of Parliament (MP) at the material time, for disclosing certain information to a journalist, which was subsequently reported in a newspaper, namely disclosing confidential information of the State for purposes of political and military espionage and aiding the Fetullahist Terrorist Organisation/Parallel State Structure ("FETÖ/PDY") knowingly and willingly.

A motion (fezleke) was prepared in order to lift the applicant's parliamentary immunity, and shortly afterwards, a law was adopted by the General Assembly of the Grand National Assembly of Turkey ("GNAT") to add Provisional Article 20 to the Constitution, which rendered the parliamentary immunity inapplicable for the pending cases/investigations against MPs. Following the entry into force of the aforementioned article, the chief public prosecutor's office indicted the applicant before the assize court. On 14 June 2017, the first instance court sentenced the applicant to 25 years' imprisonment for disclosing confidential information, and ordered his detention.

Subsequently, on 18 July 2017, the applicant appealed the judgment, requesting the quashing of his conviction as well as his release. On 13 February 2018, the regional court of appeal quashed the first instance court's decision, and sentenced the applicant to 5 years and 10 months' imprisonment for disclosing confidential information within the scope of the security of the state or its domestic or foreign political interests, also ordering the continuation of his detention. On 9 March 2018, the applicant, appealing against the regional court of appeal's decision, requested to be released.

While the applicant was detained pending trial, he was re-elected as an MP. Thereupon, the applicant, applying to the Court of Cassation where the appellate review of his case was still pending, requested his release, stating that he was entitled to parliamentary immunity again for his having been re-elected as an MP. The Court of Cassation, relying on Provisional Article 20 of the Constitution, held that the applicant was not entitled to parliamentary immunity, and thus dismissed his request for the stay of proceedings. As for the applicant's detention on remand, the Court of Cassation, without relying on any grounds, held that the applicant's request in this regard be evaluated concurrently with the merits of the appellate request. The Court of Cassation, having examined the applicant's subsequent appeal, held that there was no ground to decide on the stay of proceedings as well as the applicant's detention. Thereupon, the applicant filed an individual application.

Meanwhile, on 20 September 2018, the Court of Cassation upheld the decision of the regional court of appeal. It was also stated therein that a copy of the final judgment would be sent to the GNAT for the necessary action to be taken in accordance with Article 84 § 2 of the Constitution

and that the applicant would be released pursuant to Article 83 § 3 of the Constitution on the ground that a criminal sentence imposed on a member of the parliament either before or after his election could be executed only after he ceased to be a member.

The applicant lodged an individual application for the second time upon the final assessment of the Court of Cassation. The applications were joined since they were interrelated both ratione personae and ratione materiae.

The applicant's status as an MP ended after his conviction decision was read out at the GNAT on 4 June 2020.

THE APPLICANT'S ALLEGATIONS

The applicant claimed that his right to be elected and engage in political activities as well as his right to personal liberty and security had been violated, stating that the proceedings against him were continued and he was held in detention on remand even after he was entitled to parliamentary immunity following his re-election.

THE COURT'S ASSESSMENT

A. Alleged Violation of the Right to be Elected and Engage in Political Activities

It is understood that in the present case, the first sentence of Article 83 § 2 of the Constitution, which provides "A deputy who is alleged to have committed an offence before or after election shall not be detained, interrogated, arrested or tried unless the Assembly decides otherwise" is a general rule, while Provisional Article 20 thereof introduces an exception to the relevant general rule.

Pursuant to Article 83 § 4 of the Constitution, which stipulates that parliamentary immunity shall be granted throughout a legislative session and lifted at the end of the session, a re-elected MP shall be, as a rule, entitled to parliamentary immunity again.

Since Provisional Article 20 explicitly constitutes an exception to Article 83 § 2, there is no exceptional provision that precludes the parliamentary immunity of a re-elected MP under Article 83 § 4. Since such an exceptional provision has not been introduced separately and explicitly by the constitution-maker, newly elected MPs shall fully enjoy the immunity granted by Article 83. In that vein, unless the GNAT lifts their immunity again, they cannot be investigated and prosecuted.

In the present case, Article 83 of the Constitution, which is the general rule, was interpreted in narrow sense, while Provisional Article 20, which is the exceptional rule, was interpreted in broad sense. An exception cannot be interpreted broadly, and its scope cannot be extended as well. As a natural consequence of this principle, in case of any doubt as to whether the applicant's status after his re-election as an MP falls within the scope of the exception introduced by Provisional Article 20, then it should be acknowledged that the applicant's situation falls outside the said exception and is therefore covered by the general rule.

Parliamentary immunity, as a constitutional institution, is a protection mechanism employed to ensure that MPs can freely participate in legislative

activities without encountering any obstacle. Thus, parliamentary immunity has an important role in the functioning of representative democracy. The rights-based approach that should prevail over the constitutional jurisdiction is also applicable to the interpretation of the constitutional rules regarding parliamentary immunity. After the applicant's re-election as an MP, the ongoing proceedings against him were not stayed and continued while he was still detained on remand, as well as the regional court of appeal's decision against him was upheld. All these were made possible through the broad interpretation of the exceptional rule introduced by Provisional Article 20 of the Constitution in a way contrary to its wording and legislative intent, as well as in a way contrary to the applicant's right to be elected and engage in political activities safeguarded by Article 67 of the Constitution.

As a result, the exceptional rule introduced by Provisional Article 20 of the Constitution cannot be applied with respect to the applicant who was re-elected as an MP. The denial of the applicant's re-entitlement to parliamentary immunity, despite his being re-elected as an MP, pursuant to the imperative provision of Article 83 § 4, which is a general rule, as considered to fall into the scope of Provisional Article 20 of the Constitution runs contrary to the wording of the relevant article as well as the will of the constitution-maker.

Consequently, the Court has found a violation of the applicant's right to be elected and engage in political activities safeguarded by Article 67 of the Constitution on the ground that the applicant, despite his having been re-elected as an MP, was detained pending the proceedings against him as well as his sentence was proceeded to be executed, which was in breach of Article 83 of the Constitution guaranteeing the parliamentary immunity of the applicant.

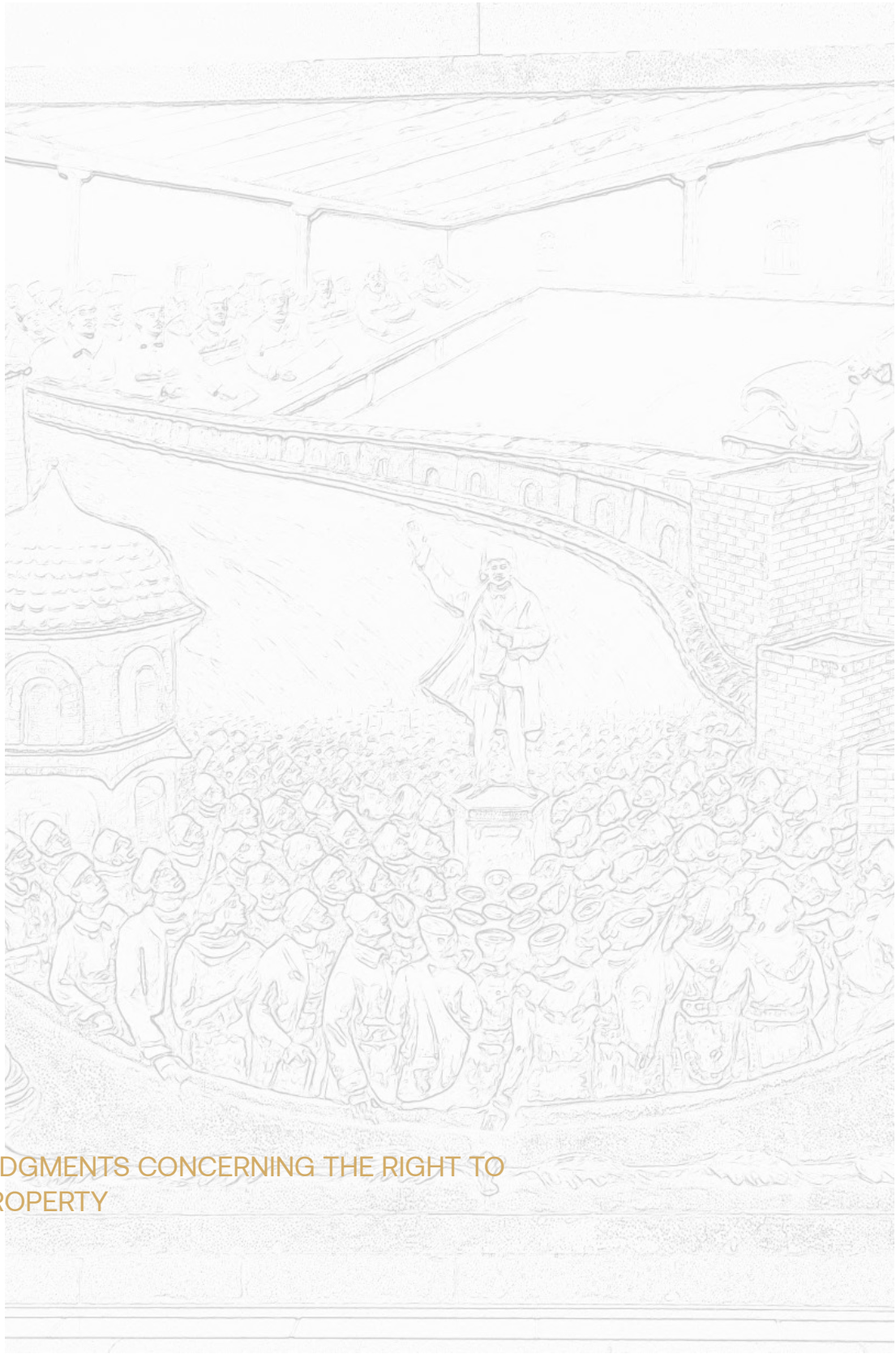
B. Alleged Violation of the Right to Personal Liberty and Security

The Court, having examined the alleged violation of the applicant's right to be elected and engage in political activities, has considered that the applicant was re-entitled to parliamentary immunity in accordance with Article 83 of the Constitution for his having been re-elected as an MP –also in terms of the case concerning his detention after conviction– and hence concluded that the considerations to the contrary would contradict the wording of the Constitution.

It is clear that the aforementioned considerations and assessments are applicable also in terms of the right to personal liberty and security. Accordingly, it should be accepted that the applicant was re-entitled to parliamentary immunity as of the date of his re-election as an MP in the general elections held on 24 June 2018 and that therefore; his continued detention after the relevant date was incompatible with Article 83 of the Constitution.

Despite the existence of a constitutional obstacle in terms of the continuation of the applicant's detention on remand, namely the parliamentary immunity he was re-entitled to for having been re-elected as an MP at the general elections held on 24 June 2018, the applicant's request for release –relying on his parliamentary immunity– was not examined on the merits from 29 June 2018 until 20 September 2018, and the applicant's detention after conviction continued throughout this period. Thus, deprivation of the applicant's liberty between the aforementioned dates has been incompatible with Article 83 of the Constitution, where the guarantees related to parliamentary immunity are laid down.

Consequently, the Court has found a violation of the applicant's right to personal liberty and security.



F. JUDGMENTS CONCERNING THE RIGHT TO PROPERTY

JUDGMENT FINDING A VIOLATION OF THE RIGHT TO PROPERTY DUE TO NON-REIMBURSEMENT OF THE OBJECTION FEE DESPITE THE DECISION IN THE APPLICANT'S FAVOUR

Farmasol Tıbbi Ürünler San. ve Tic. A.Ş. (2) (no. 2017/37300, 15 January 2020)

THE FACTS

The applicant company engaged in the trade of medicinal products (the applicant) was excluded, by the tender commission, from the tender made by the Public Hospital Association. The administration dismissed the applicant's complaint against its exclusion from the tender. Thereafter, the applicant filed with the Public Procurement Authority ("Authority") an objection by paying the objection fee of 6,831 Turkish Liras. The Authority decided in favour of the applicant.

The applicant's request for reimbursement of the objection fee that it had paid was dismissed by the Authority. Thereupon, the applicant brought an action against the Authority before the incumbent administrative court, seeking the annulment of the impugned administrative act. Stressing that the impugned fee was among the incomes of the administration and also noting that the provision of law providing for the receiving of the relevant objection fee was not annulled by the Constitutional Court, the administrative court dismissed the applicant's action. The applicant's appeal against the dismissal decision was also dismissed by the regional court of appeal.

THE APPLICANT'S ALLEGATIONS

The applicant maintained that its right to property had been violated due to non-reimbursement of the fee, which it had paid to file an objection, despite the decision in his favour.

THE COURT'S ASSESSMENT

In the present case, the Authority examining the applicant's objection decided in favour of the applicant and accordingly decided to indicate a remedial action. The reason why the Authority decided to indicate a remedial action is the unlawful act performed by the administration making the tender.

By virtue of Law no. 4734, the bidders cannot bring an action without raising a complaint and subsequently filing an objection. The applicant had to pay the relevant fee to file an objection in order to ensure the establishment of the unlawfulness of the act performed by the administration. The Authority decided in favour of the applicant and found the impugned act unlawful. However, the relevant fee initially paid by the applicant was not reimbursed to it.

Although receiving a fee from the applicant for an objection pursued the aim of public interest, the interference with the applicant's right to property due to the failure to reimburse the relevant fee in spite of the decision in its favour must not place an excessive burden on it.

The applicant cannot bring an action without primarily exhausting the administrative remedies prescribed in the legislation. If the applicant could directly bring an action, it would not have paid the relevant fee to file an objection, and if a decision in its favour had been issued at the end of the proceedings, the court expenses would have been covered by the other party. On the other hand, the fee to be paid for filing an objection is much higher than the court expenses to be incurred in bringing an administrative action. If the bidders are aware that the objection fee would not be reimbursed to them even if their claim is found justified, they may refrain from having recourse to this remedy.

In the present case, the impugned interference with the right to property due to non-reimbursement of the relevant fee to the applicant despite the decision in its favour was disproportionate as the applicant's interests were disregarded. As the applicant, whose claim was found justified, had to bring a separate action for reimbursement of the relevant fee instead of receiving it directly from the Authority to which the fee had been paid, an excessive burden was placed on the applicant. Indeed, the impugned fee should have been ensured to be reimbursed directly by the relevant administration. It was incompatible with the procedural safeguards inherent in the right to property to have the applicant undertaken this burden.

Besides, although the applicant's action was dismissed by the inferior court on the ground that the provision of law stipulating the relevant fee had not been annulled by the Court through its decision no. E.2009/9, the Court's decision which was referenced by the inferior court is not related to the reimbursement of the impugned fee. In its decision, the Court discussed whether the receiving of the objection fee was lawful.

Consequently, the Court has found a violation of the right to property safeguarded by Article 35 of the Constitution.

JUDGMENT FINDING NO VIOLATION OF THE RIGHT TO PROPERTY DUE TO IMPOSITION OF AN ADMINISTRATIVE FINE FOR THE FAILURE TO DISPOSE OF HAZARDOUS WASTES

Aslan Avcı Döküm Sanayı ve Ticaret A.Ş. (no. 2017/39159, 28 January 2020)

THE FACTS

The public authorities, having conducted a survey on the factory site of the applicant company, found that the slag wastes were had been in the area where the factory operated. The technical analyses concluded that the wastes were hazardous, and therefore the applicant was imposed an administrative fine. The action for annulment brought by the applicant before the administrative court was dismissed. The applicant's subsequent appeal was also dismissed, and ultimately the decision became final.

In the subsequent inspections conducted on the factory site, it was discovered that the company failed to dispose of the hazardous wastes within the allowed period of time, as well as there was a high percentage of heavy metals in the nearby water wells. Thereupon, the applicant company was imposed an administrative fine again. The administrative action for annulment brought by the applicant as well as his subsequent appeal were dismissed. The Council of State ultimately upheld the decision. The applicant's request for the rectification of the decision was also rejected.

THE APPLICANT'S ALLEGATIONS

The applicant claimed that its right to property had been violated, stating that it was both legally and practically impossible to dispose of hazardous wastes, and that it had been imposed a disproportionate penalty despite its bearing no criminal liability.

THE COURT'S ASSESSMENT

Disposal of hazardous wastes is of great importance for the protection of environment and in terms of the right to live in a healthy environment.

As a result of the analysis of the samples taken from the factory site during the survey underlying the penalty imposed on the applicant company, it was found established that the said wastes polluted the environment. The impugned interference with the applicant's right to property through the imposition of administrative fine was intended to serve the public interest and to protect the environment.

It has been observed that there had been no factual obstacle to the disposal of the hazardous wastes and that the applicant had the opportunity to effectively challenge the impugned interference with its right to property.

Although the applicant claimed that it had been imposed administrative fine on the basis of a legal provision that was not in force at the material time, the impugned administrative fine had been imposed pursuant to Law no. 2872 for the applicant's failure to dispose of the hazardous wastes. The said legal provision was actually in force at the material time.

Apart from the administrative fine, no judicial or administrative sanction was imposed on the applicant, nor was a measure taken, such as confiscation or expropriation or prevention of the applicant company's activities. It has also been observed that the act requiring the imposition of an administrative fine resulted from the applicant's own fault and that there was no negligence on the part of the public authorities.

It has been concluded that the fair balance between the applicant's right to property and the public interest was not upset and that the impugned interference was proportionate.

Consequently, the Court has found no violation of the right to property safeguarded by Article 35 of the Constitution.

JUDGMENT FINDING A VIOLATION OF THE RIGHT TO PROPERTY DUE TO THE AMOUNT RECEIVED BY THE ADMINISTRATION OUT OF THE ADVERTISEMENT REVENUE OF A SPORTS CLUB

Fenerbahçe Spor Kulübü Derneği (no. 2017/4483, 13 February 2020)

THE FACTS

The applicant, Fenerbahçe Spor Kulubü Derneği ("*Fenerbahçe Sports Club Association*"), executed a contract with a company concerning taking advertisement through its uniforms of the Women's Volleyball League of the 2012-2013 season.

The Department of Sports Services ("the administration") filed an action before the incumbent civil court ("the court"), maintaining that 5% of the total price of the advertisement contract be paid to it pursuant to the relevant regulation. The regulation on which the administration based its claim was abolished in 2014.

The court ordered the payment of the relevant portion of the advertisement revenue to the administration. The first-instance decision, appealed by the applicant, was upheld by the Court of Cassation, which also dismissed the applicant's subsequent request for rectification of the judgment.

THE APPLICANT'S ALLEGATIONS

The applicant maintained that its right to property had been violated, stating that the regulation forming a basis for the administration's action had been already abolished prior to the first instance decision.

THE COURT'S ASSESSMENT

Any interference with the right to property must primarily have a precise, accessible and foreseeable legal basis.

The public authorities may introduce regulatory provisions with a view to covering the expenses of the youth and sports organisations. In this sense, they may impose certain financial obligations on the basis of advertisement revenues earned by the clubs that attend the sports organisations to be held under the supervision and control of the administration. However, any interference with the right to property due to receiving a share out of advertisement revenues must be based on law. In cases where a financial obligation, which is not prescribed in law, is introduced directly through a regulation or any other similar process, it would give rise to a breach of the requirement of being prescribed by law.

As specified in Law no. 3289, the advertisement revenues to be earned through the sports organisations are among the administration's income. However, there is a lack of legal clarity as to whether these revenues are the ones that would be earned as a result of the contracts to which the administration is a direct party, or those which are determined through advertisement contracts signed between sports clubs along with players and advertisers, as specified in the Regulation issued on the basis of this Law.

The Law does not embody any provision concerning the ratio of the relevant payment to be made by the applicant club to the administration on the basis of the former's advertisement revenue. Nor is there any arrangement in the relevant Law to demonstrate the lower and upper limits of the relevant share to be received from the advertisement revenues. In the present case, the impugned share, which is 5%, was prescribed directly through a Regulation. Therefore, imposing a financial obligation directly through the Regulation without a legal basis and thereby interfering with the right to property falls foul of the lawfulness requirement.

It has been accordingly concluded that the substantial elements of the relevant share of the advertisement revenue taken from the applicant club were not regulated by law in a precise and foreseeable manner; and that the interference with the applicant's right to property was in breach of the lawfulness requirement enshrined in the Constitution.

Consequently, the Court has found a violation of the right to property safeguarded by Article 35 of the Constitution.

JUDGMENT FINDING A VIOLATION OF THE PROHIBITION OF DISCRIMINATION DUE TO DEPRIVAL OF THE OPPORTUNITY TO FILL PENSION CONTRIBUTION GAPS INCURRED FOR THE PERIOD OF SERVICE ABROAD PRIOR TO ACQUIREMENT OF CITIZENSHIP

Bedrettin Morina (no. 2017/40089, 5 March 2020)

THE FACTS

The applicant, who subsequently acquired Turkish citizenship, was entitled to receive old age pension from the Social Insurance Institution ("the SSI") as of 1 July 2009 by filling the pension contribution gaps incurred for the periods he worked abroad. However, the SSI cut the applicant's old age pension on 22 January 2015 and requested the return of the amounts paid. Relying on the Law no. 3201 on the Evaluation of Periods Spent by Turkish Citizens Abroad in terms of their Social Insurance, the SSI noted that it was impossible for the applicant to be entitled to old age pension by filling the pension contribution gaps for the period of his service abroad before he acquired Turkish citizenship; and that accordingly, the remaining period of his service did not meet the minimum period required for his entitlement to old age pension. The applicant's challenge against this decision was dismissed by the SSI.

Thereafter, the applicant filed a case with the relevant labour court which ordered payment of old age pension to the applicant on the basis of the period of his service following his acquirement of Turkish citizenship (3600 days). The decision was appealed by the parties before the Court of Cassation which ultimately quashed it. The Court of Cassation dismissed the case, finding that the applicant acquiring Turkish citizenship was not entitled to old age pension by filling the pension contribution gaps incurred for working abroad; and that nor did he seek protection afforded by voluntary insurance. The labour court, making a reference to grounds indicated in the Court of Cassation's judgment, dismissed the applicant's case. The appealed first-instance decision was upheld and thereby became final.

THE APPLICANT'S ALLEGATIONS

The applicant maintained that he had been provided with the opportunity to fill the pension contribution gaps incurred for working abroad only for the period following his acquirement of Turkish citizenship, which was in breach of the prohibition of discrimination taken in conjunction with the right to property.

THE COURT'S ASSESSMENT

In the present case, the impugned old age pension constitutes a property within the meaning of Article 35 of the Constitution. Therefore, the applicant's complaint was examined from the standpoint of the prohibition of discrimination under the right to property. In the examination of the alleged discrimination within the meaning of the right to property, it would be primarily ascertained whether there was a different treatment, under Article 10 of the Constitution, in terms of the alleged interference with the said right among the persons in the same or similar situation. It would be then

addressed and concluded whether the different treatment had an objective and reasonable basis and whether the interference was proportionate.

Working conditions of natural-born citizens and naturalised citizens, as well as the remuneration for these works within the social insurance system, bear similar characteristics. In this sense, the natural-born Turkish citizens and the naturalised Turkish citizens are in a comparable situation in terms of entitlement to old age pension by filling the pension contribution gaps incurred for the periods of service abroad.

Law no. 3201 allows the natural-born citizens to fill pension contribution gaps while granting no such opportunity for those who subsequently acquire citizenship for the periods of service abroad prior to their citizenship.

A natural-born Turkish citizen is entitled to old age pension by filling insurance premium gap for the whole period of service abroad. However, the applicant, who subsequently acquired Turkish citizenship, has been deprived of such opportunity for the period of service abroad spent before he acquired citizenship and thereby of his old age pension, in the absence of any objective and reasonable ground justifying such a difference in treatment by the type of acquirement of citizenship.

The public authorities enjoy a certain margin of appreciation in granting an entitlement to old age pension by way of filling pension contribution gaps incurred for the period of service abroad. In the present case, the applicant's being deprived of his old age pension as the period of his service abroad prior to acquirement of citizenship was not taken into consideration without any just and objective justification constituted a different treatment within the meaning of the right to property. As a result of this discriminatory interference, the applicant, who could no longer work, had to bear an excessive burden for being left outside the social insurance coverage.

Consequently, the Court has found a violation of the prohibition of discrimination taken in conjunction with the right to property safeguarded by Article 35 of the Constitution.

JUDGMENT FINDING A VIOLATION OF THE RIGHT TO PROPERTY DUE TO THE NON-PAYMENT OF SALARY DURING DETENTION

Doğan Depişgen (no. 2016/12233, 11 March 2020)

THE FACTS

The applicant, a mukhtar, who had been detained within the scope of an investigation, was acquitted at the end of the proceedings. The acquittal decision became final without appeal. The applicant filed a claim for damages against the State Treasury. The assize court awarded compensation to the applicant. During the subsequent appeal proceedings, the Court of Cassation stated that the applicant should apply to the administration and then to the administrative courts for the loss of income sustained by him due to the alleged non-payment of his salary for the period when he was held in detention.

The applicant applied to the Local Administrations Office, seeking the payment of his unpaid salaries. The Special Provincial Administration dismissed the applicant's request on the ground that it was not possible to make payment for the period spent in detention pursuant to the Regulation on the Payment of Allowances to the Mukhtars ("the Regulation").

The applicant brought an action against the Special Provincial Administration. The administrative court, dismissing the applicant's case, noted that the applicant was not entitled to the said salary since another person had substituted him as mukhtar. The applicant's appeal as well as his subsequent request for rectification were rejected.

THE APPLICANT'S ALLEGATIONS

The applicant claimed that his right to property had been violated due to the non-payment of his salary as a mukhtar for the period when he was held in detention.

THE COURT'S ASSESSMENT

Following the finalisation of the acquittal decision, the applicant successfully brought an action for compensation for the pecuniary and non-pecuniary damages he had sustained pursuant to Law no 5271. However, the applicant was denied to receive his salary as a mukhtar for the period when he was held in detention. Thereupon, the applicant brought an administrative action.

The applicant, who had been elected as a mukhtar, was entitled to receive salary as a mukhtar in accordance with Law no. 2108. It has also been found that since the applicant was acquitted, the losses he had sustained during his detention must be compensated. Accordingly, it has been accepted that the applicant had a legitimate expectation that the said damages would be compensated and that thus he would receive his unpaid salaries.

The administrative courts, interpreting the relevant Regulation, but in the absence of a provision of law, dismissed the applicant's request. However,

the applicant had not left the office on his own accord for such reasons as a health problem or leave, as stated in the relevant Regulation.

The inferior courts, interpreting the relevant provisions, failed to consider the reason why the applicant had had to leave the office. It was legally obligatory to pay the applicant's salary, and in this regard, there was no restriction to the contrary. Even if the relevant Regulation is taken into consideration, it should not be ignored that the applicant had been forced to leave his office against his will.

Although it was accepted that the damages sustained by the applicant due to his detention should be compensated in accordance with the relevant legal provisions, the authorities failed to submit reasonable grounds for denial of the payment of the said salaries to the applicant. Non-payment of the unpaid salaries to the applicant due to the strict interpretation of the relevant provisions of the Regulation as well as the relevant legal provisions by the inferior courts placed an excessive burden on the applicant. The fair balance to be struck between the protection of the right to property and the public interest pursued by the interference was upset to the detriment of the applicant. Hence, the impugned interference had been disproportionate.

Consequently, the Court has found a violation of the right to property safeguarded by Article 35 of the Constitution.

G. JUDGMENTS CONCERNING THE RIGHT TO A FAIR TRIAL

JUDGMENT FINDING A VIOLATION OF THE RIGHT TO A FAIR TRIAL DUE TO COMMUNICATION OF THE CASE-FILE TO THE APPELLATE AUTHORITY WITHOUT THE REASONED DECISION BEING NOTIFIED

İbrahim Kaya (no. 2017/29474, 28 January 2020)

THE FACTS

The applicant lodged an appeal after the *pronouncement* of his conviction decision (oral pronouncement of the decision to the parties during the hearing), stating that the first instance decision was unlawful and that he would provide a detailed explanation as to the reasons for his appeal request upon the *notification* of the reasoned decision. The first instance court, despite being aware of the applicant's request for an appeal, communicated the case-file to the Regional Court of Appeal without the reasoned decision being notified to the applicant. Thereby, the applicant, the accused of the proceedings, was deprived of the opportunity to submit the justified reasons underlying his appeal request. The Regional Court of Appeal dismissed the applicant's appeal on the merits.

THE APPLICANT'S ALLEGATIONS

The applicant claimed that his right to have the necessary time and facilities for his defence had been violated as his case file had been communicated to the appellate authority without the reasoned decision being notified to him.

THE COURT'S ASSESSMENT

The applicant was convicted of fraud, and the succinct decision was pronounced during the hearing in his presence. He was not provided with any explanation as to the reasoning of his conviction decision.

In the present case, the case-file was communicated to the Regional Court of Appeal without the reasoned decision being notified to the applicant, as well as any detailed reason for the appeal request being submitted by him. Therefore, the applicant could not raise his reasons for lodging an appeal.

The applicant, in respect of whom the prescribed time-limit for an appeal started running from the date of pronouncement of the decision, could not duly exercise the right to file an appeal on points of fact and law against his conviction decision for not knowing its reasoning. He should necessarily have been aware of the grounds underlying his punishment in order to adduce evidence capable of ensuring his acquittal or granting a remission of sentence. Therefore, the failure to notify the reasoned decision, one of the essential documents of the proceedings, to the applicant gave rise to a violation in the present case.

Consequently, the Court has found a violation of the right to have the necessary time and facilities for defence safeguarded by Article 36 of the Constitution.

JUDGMENT FINDING A VIOLATION OF THE RIGHT TO BE PRESENT AT THE HEARING DUE TO THE USE OF AUDIO-VISUAL INFORMATION SYSTEM

Emrah Yayla (no. 2017/38732, 6. February 2020) and *Şehrivan Çoban* (no. 2017/22672, 6 February 2020)

THE FACTS

A disciplinary investigation was launched against the applicant Emrah Yayla for his acts in the penitentiary institution. The Disciplinary Board held that he would not be allowed to receive visitors and that he would be placed in a cell. The applicant challenged the Disciplinary Board's decision before the enforcement judge. The latter ordered that a hearing would be held, where the applicant would be able to make his defence through the audio-visual information system ("the SEGBIS"). The applicant, being present in the SEGBIS room, stated that he wanted to make a defence before the court. The enforcement judge rejected the applicant's challenge against the Disciplinary Board's decision, stating that his attendance at the hearing through the SEGBIS was in accordance with the principles of criminal procedure and that there were decisions of the Constitutional Court in this respect. The applicant's subsequent appeal whereby he claimed that he had been forced to attend the hearing through the SEGBIS, that he had not been allowed to enjoy his right to make a defence in the hearing room and that he had not been provided with the opportunity to cross-examine the witnesses was rejected by the assize court.

The applicant Şehrivan Çoban against whom a criminal case was filed for membership of an armed terrorist organization, attended the first hearing where she was able to make a defence in person before the assize court. The applicant was subsequently transferred to a penitentiary institution located in another city, for security reasons. The assize court sent a writ to the penitentiary institution, ordering the applicant's attendance to the next hearing through the SEGBIS. The applicant submitted a petition to the court whereby she expressed that she did not want to attend the hearing through the SEGBIS and that she wanted to defend herself by being present at the hearing. At the last hearing, the court evaluated the applicant's request for being present at the hearing in person but dismissed it on the ground that it was in accordance with the relevant legislation to hear defence submissions through video conferencing. At the end of the trial, the assize court sentenced the applicant to 8 years and 9 months' imprisonment for membership of an armed terrorist organization. Upon the applicant's subsequent appeal, the Court of Cassation upheld the assize court's decision.

THE APPLICANTS' ALLEGATIONS

The applicants claimed that their right to be present at the hearing had been violated due to the fact that their requests to be present at the hearing had been dismissed and they were made to attend the hearing through the audio-visual information system instead.

THE COURT'S ASSESSMENT

The advantages, in terms of the right to a fair trial, of the National Judiciary Informatics System ("the UYAP"), which has been introduced recently and is one of the most important projects in the practice of law in Turkey, and of the SEGBIS, a part of the former, as well as the importance of using these systems that are continuously improved are undeniable.

The parties' right to be present at the hearing not only ensures the effective exercise of the right to defence, but also renders the principles of equality of arms and adversarial proceedings operational. It is necessary to determine whether the attempt to provide the attendance of the person concerned to the hearing through the SEGBIS, which is an application that limits to a certain extent the right to be present at the hearing in person, complies with the principles of legality, existence of justified grounds and proportionality.

Referring to the importance of being present at the hearing, the legislator stipulates that in cases where Law no. 5271 is applicable, the audio-visual communication technique may be used in order to attend the hearings, if considered necessary by the judge or the court. It has been concluded that the alleged interference with the right to be present at the hearing complied with the principle of legality.

The principle of proportionality consists of three sub-principles, which are suitability, necessity and proportionality in the narrower sense. The suitability test requires that the interference must be suitable to achieve the aim pursued; the proportionality test requires that a reasonable balance must be struck between the interference with the individual's right and the aim sought to be achieved by the interference; and lastly, the necessity test requires that the less restrictive means must be preferred among the means resulting in an interference with the individual's right.

Application of the SEGBIS in the disputes which are related to criminal charges as well as civil rights and obligations is not categorically contrary to the Constitution. However, it should be put forth by the inferior courts why it is necessary to have the individual attend the hearing through the SEGBIS which is an application that limits to a certain extent the right to be present at the hearing in person.

As regards the applicant Emrah Yayla

In the present case, it has been concluded that the interference with the right to be present at the hearing with a view to preventing delays arising from the prisoners' transfer from the penitentiary institution to the hearing room and accelerating the proceedings pursued the legitimate aim to achieve the procedural economy. The interference with the applicant's right to be present at the hearing had been a suitable means for achieving the objective of concluding the proceedings within a reasonable time.

The acts for which the applicant was imposed disciplinary penalty mainly resulted from his disobedience to the practices of the prison administration. He asserted that his personal presence at the hearing had been necessary as he would not be able to effectively present his claims and defence submissions at the penitentiary institution for having filed a criminal charge against the guardians inflicting violence on him. It has been nevertheless observed that despite the applicant's request, the incumbent magistrate judge ordered the applicant's being heard through SEGBIS without specifying the conditions preventing his personal presence at the hearing.

In its decision, the magistrate judge did not consider the applicant's assertion that he had been under duress at the penitentiary institution as he had already filed a criminal complaint against the penitentiary officers for having ill-treated him.

Dismissing his request for being present in person at the hearing, the magistrate judge relied on a categorical ground that "SEGBIS method was capable of satisfying the principle of personal attendance ("yüz yüzelik ilkesi").

In the present case, no effort was made to ensure the applicant's personal attendance at the hearing. Nor was any explanation provided as to the grounds preventing his transfer from the penitentiary institution, situated within the same city centre, to the court so as to ensure his presence at the hearing. In this sense, it has been concluded that the magistrate judge dismissed the applicant's request for being present in person at the hearing, without considering any other alternative method and submitting concrete reasons under the particular circumstances of the case.

The holding of a hearing in the applicant's absence on the basis of a general and categorical reason without any assessment by the magistrate judge as to whether the dispute was of the nature that would entail the personal presence in the courtroom, as well as the failure to employ the most appropriate means of interfering with the right to be present at the hearing rendered the impugned interference unnecessary.

As regards the applicant Şehrivan Çoban

The objective in ordering the applicant's attendance to the hearing through the SEGBIS was to ensure that there would be no difficulty in providing the security of the applicant and the officers during the applicant's transfer to the hearing room due to the terrorist incidents occurring in and around the province where the court building was located, and thus to ensure that the trial be carried out within a reasonable time. Accordingly, the impugned interference pursued a legitimate aim.

The alleged interference with the right to be present at the hearing was suitable for the protection of the applicant's and public officials' right to life as well as for ensuring the conduct of the trial within a reasonable time.

The applicant, who was on trial for a major crime such as membership of a terrorist organization, was transferred to a penitentiary institution located outside the judicial locality of the trial court for the other reasons such as exceeding the capacity of the penitentiary institution as well as the security concerns. However, such reasons were not stated in the relevant decision.

The first instance court dismissed applicant's request for being present at the hearing, pointing out, generally, the existence of a security problem and made no effort to provide the applicant's attendance to the hearing as she requested. While the security matter put forth by the first instance court may be considered reasonable, the trial court failed to examine, for example, whether the hearing would be able to be held on a more suitable day. The particular circumstances hindering the applicant's being present at the hearing were not indicated. Besides, it was not demonstrated that other alternatives such as planning a new hearing date had been inconclusive. Nor did the applicant waive her right to this end. It has been observed that the assize court dismissed the applicant's request without trying an alternative method to ensure her being present at the hearing as well as without demonstrating that the use of the SEGBIS method had been mandatory, former alternative being not possible.

Hence, it has been concluded that the inferior courts failed to demonstrate in concrete terms that the dismissal of the applicant's request to be present at the hearing, where an examination on the merits had been made, had really been necessary. As such, the impugned interference had not been necessary.

Consequently, the Court has found, in both applications, a violation of the right to be present at the hearing within the scope of the right to a fair trial safeguarded by Article 36 of the Constitution.

JUDGMENT FINDING A VIOLATION OF THE RIGHT TO A REASONED DECISION FOR DISREGARDING THE CLAIM HAVING THE PROSPECT OF CHANGING THE OUTCOME OF THE PROCEEDINGS

Mehmet Okyar (no. 2017/38342, 13 February 2020)

THE FACTS

As a result of the audit conducted by the finance experts at a university, some irregular transactions were discovered in the bank accounts. At the end of the investigation conducted into the case, the individual working as a specialist at the revenue office of the university was accused of having been engaged in embezzlement.

At the material time, a criminal case was instituted before the assize court also against the applicant, who was working as a director of the revolving fund at the university in question, on the ground that he had connived at the impugned act despite being aware of it and being in charge of the supervision.

The applicant, stating that he had not been found responsible for the impugned irregular transactions at the end of the examination made by the Court of Accounts, submitted the latter's decision to the file.

At the end of the proceedings before the assize court, the applicant was sentenced to 2 years and 6 months' imprisonment for facilitating the commission of embezzlement. During the subsequent proceedings before the regional court of appeal, although the applicant stated that the Court of Account's decision had not been taken into consideration, the regional court of appeal upheld the assize court's decision.

THE APPLICANT'S ALLEGATIONS

The applicant claimed that his right to a reasoned decision had been violated due to the trial courts' failure to consider the Court of Accounts' decision that was in his favour.

THE COURT'S ASSESSMENT

The right to a reasoned decision, which aims to ensure that individuals are subject to a fair trial, is enshrined under Article 36 of the Constitution safeguarding the right to a fair trial.

In the present case, prior to the applicant's conviction, the Court of Accounts had concluded that the applicant had not been responsible for the irregular transactions in question. However, the assize court convicted the applicant on the ground that he had been negligent or delayed in duly performing his duties.

In determining the lack of any financial responsibility attributable to the applicant, the Court of Accounts concluded that the operations managers did not have an authority to supervise and control the accounting managers. However, the assize court decided to the contrary. The court failed to justify why it had reached such a conclusion despite being aware of the Court of Accounts' decision.

In determining whether there had been a neglect of duty, it should be examined whether the operations managers (the applicant) had a duty to supervise and control the accounting office. The applicant's claim that he did not have such an authority over the accounting office were not examined by the court.

The principle of state of law is a basic principle required to be observed in the interpretation of the fundamental rights and freedoms enshrined in the Constitution. It also necessitates that the judicial authorities, as much as possible, refrain from making contradictory decisions regarding the same material or legal facts. Otherwise, the principle of state of law, as well as the people's confidence in the law may be undermined.

The assize court failed to make an assessment as regards the scope and content of the applicant's supervising authority. Besides, the applicant's request for appeal whereby he clearly referred to the Court of Accounts' decision was dismissed without any justification.

Consequently, the Court has found a violation of the right to a reasoned decision within the scope of the right to a fair trial safeguarded by Article 36 of the Constitution.

JUDGMENT FINDING A VIOLATION DUE TO DISMISSAL OF THE ACTION BROUGHT BY A TRADE UNION ON BEHALF OF THE APPLICANT

Mustafa Berberoğlu (no. 2015/3324, 26 February 2020)

THE FACTS

The applicant, a trade-union representative at his workplace, was given disciplinary punishments by the institution where he was holding office. For failing to adapt himself to his office, the applicant was then appointed to another institution. The trade union of which the applicant was a member brought an action, on behalf of him, against the appointment. The incumbent administrative court dismissed the action. In upholding the first instance decision during the appeal process, the Council of State noted that the file contained no document whereby the trade union was authorised by the applicant to bring an action on his behalf. It also dismissed the applicant's request for rectification of the dismissal decision.

THE APPLICANT'S ALLEGATIONS

The applicant maintained that his right of access to a court had been violated due to dismissal of the action brought by the relevant trade union against his appointment for lack of litigation capacity.

THE COURT'S ASSESSMENT

In its examinations as to the individual applications before it, the Court has noted that the restrictions whereby individuals have been denied access to a court may infringe the right of access to a court.

In the present case, an action was brought against the applicant's appointment by the trade union acting on behalf of the former. The Council of State acknowledged that the trade union was entitled to bring an administrative action on behalf of the applicant on condition of being authorised with a power of attorney pursuant to the Law no. 4688 on Civil Servants' Trade Unions and Collective Bargaining. It however noted that the trade union had no litigation capacity as the applicant did not grant an explicit authorisation and accordingly dismissed the action. Thereafter, the applicant requested rectification of the dismissal decision, stating that the document authorising the trade union to bring an action on his behalf was indeed included in the file and that any deficiency, if found, could be easily remedied. His request was also rejected by the Council of State.

Regard being had to the fact that in cases where an action is dismissed for lack of litigation capacity, it is almost impossible to bring a fresh action, this procedure must be applied only as a last resort. If an administrative action is dismissed for lack of litigation capacity, it is all but impossible to bring a fresh action in due course. The dismissal of an administrative action for lack of litigation capacity constitutes a particularly severe interference with the right of access to a court. Therefore, this procedure is to be applied only in the absence of any alternative means of a less severe nature.

The Code of Civil Procedures no. 6100 ("the Code") has introduced mechanisms so as to preclude immediate dismissal of an action in case of any

deficiency in documents, namely power of attorney and authorisation certificate. It is accordingly ensured that any deficiency found in this respect may be subsequently remedied by the relevant party. The judgments rendered by the Council of State also reveal that such deficiencies may be remedied through interlocutory decisions. This procedure is undoubtedly more appropriate for the approach according to which the exercise of fundamental rights is essential, but their restriction is exceptional. However, in the present case, the Council of State failed to provide the trade union with the opportunity to remedy the deficiency. It did not also explain why it had not resorted to this procedure, which was a less severe means of interference, or why this procedure was considered not to be capable of achieving the legitimate aim pursued.

Nor was it discussed why the relevant provisions of the Code, which would preclude the immediate dismissal of the action, had not been applied in the present case. The interpretation adopted by the Council of State rendered the applicant's access to a court impossible.

In resorting to a more severe means, which precluded the applicant's access to a court, despite the existence of a less severe means of interference to achieve the pursued aim, the Council of State acted in breach of the principle of necessity.

Consequently, the Court has found a violation of the right of access to a court falling within the scope of the right to a fair trial safeguarded by Article 36 of the Constitution.

JUDGMENT FINDING A VIOLATION OF THE RIGHT OF ACCESS TO A COURT DUE TO DISMISSAL OF A CASE FILED AGAINST AN "ENVIRONMENTAL IMPACT ASSESSMENT NOT NECESSARY" DECISION FOR THE ALLEGED LACK OF CAPACITY TO SUE

Kemal Çakır and Others (no. 2016/13846, 5 March 2020)

THE FACTS

The applicants, having learned that a wind power plant (WPP) was being planned to be built in an area close to the neighbourhood where their properties were located, brought an action seeking the annulment of the decision regarding the relevant project, which stated that an environmental impact assessment (EIA) was not required.

The administrative court dismissed the case for the applicants' lack of capacity to sue. In its reasoning, the court specified that as the applicants' properties were not within the scope of the impugned project, there was no dispute affecting their personal and daily interests. Following the applicants' subsequent appeal, the Council of State upheld the administrative court's decision.

THE APPLICANTS' ALLEGATIONS

The applicants maintained that their right of access to a court had been violated due to dismissal, without an examination on the merits, of the action they had brought seeking the annulment of the decision whereby it was concluded that an EIA was not required for the impugned project.

THE COURT'S ASSESSMENT

In the present case, various WPP projects have been carried out in and around the area where the applicants' properties are located.

The subject matter of the dispute is related to the decision whereby it was concluded that an EIA was not required for the project related to a WPP to be built in an area close to the place where the applicants' properties were located. The administrative court denied the examination of the merits of the dispute on the grounds that the applicants' interests had not been violated due to the said project and that their only being citizens or individuals would not grant them a capacity to sue. The appellate authority upheld the administrative court's decision in so far as it was related to the dismissal of the case for the applicants' lack of capacity to sue.

The impugned decisions of the interior courts included a categorical approach that those who did not have a property in the project area would not be able to challenge against the impugned project under any circumstances, regardless of their subjective conditions such as the closeness of their properties to the project area as well as their intended use. Since such an approach made it impossible for the people, who were likely to be affected by the project, to bring an action, the said interference with the applicants' right of access to a court was disproportionate.

The administrative court's assessment on the applicants' interest in terms of their action for annulment of the decision related to the impugned project and the manner it applied the relevant procedural rules was a strict interpretation of the right to access the court. Such an interpretation rendered the applicants' right of access to a court almost impossible. Accordingly, the dismissal of the applicants' action due to their alleged lack of capacity to sue constituted a disproportionate interference with their right of access to a court.

Consequently, the Court has found a violation of the right of access to a court within the scope of the right to a fair trial safeguarded by Article 36 of the Constitution.

JUDGMENT FINDING A VIOLATION OF THE RIGHT TO A FAIR HEARING DUE TO THE LAW-ENFORCEMENT OFFICERS' PRACTICE INDUCING THE COMMISSION OF A MISDEMEANOUR

Muhsin Hükümdar (no. 2016/69274, 5 March 2020)

THE FACTS

A report was issued by the police officers to the effect that a grocery store was selling alcoholic beverages after 10:00 p.m. despite the general ban introduced through a law. In the report, it was noted that a police officer in civilian clothes, who acted as a customer doing shopping, purchased alcoholic beverage at the store, and the misdemeanour was thereby found established.

The Tobacco and Alcohol Market Regulatory Authority ("the Authority") imposed an administrative fine on the applicant, owner of the store, for having sold alcoholic beverages at night time. The applicant's challenges to the effect that the collection of evidence through the method of undercover investigator had been unlawful were dismissed by the incumbent magistrate judge.

THE APPLICANT'S ALLEGATIONS

The applicant claimed that his right to a fair hearing had been violated, stating that the authorities had failed to take into consideration the police officers' having acted as an undercover investigator.

THE COURT'S ASSESSMENT

Pursuant to the relevant law, the retail sale of alcoholic beverages between the hours of 10.00 p.m. and 06.00 a.m. is forbidden.

In the present case, a police officer purchased an alcoholic beverage from the applicant's store, which he visited as a customer, late in the evening in return for money with pre-determined serial numbers. He subsequently showed his identity card in his capacity as a police officer and issued a report on the basis of which the Authority subsequently imposed an administrative fine on the applicant.

In the Court's view, in the absence of any suspicion with respect to an alleged offence that has been previously committed, it is not acceptable for the State to pave the way, through its agents, for the commission of an offence by those who are a potential offender and thereby to incite persons to commit an offence. Besides, even in case of any suspicion with respect to an allegedly committed offence, methods of special investigation may be employed only on a legal basis, which envisages that these methods may be applied in exceptional circumstances and within certain boundaries and which also affords adequate safeguards to those concerned.

It has been observed that in the present case, the police officer did not confine himself to investigate the act constituting a misdemeanour, acting in a passive manner during the commission of the misdemeanour, but played an active role in its commission. Moreover, it could not be concretely demonstrated that there was a suspicion, before the impugned interference by the police officer, as to the selling of alcoholic beverages at the applicant's store during the hours when it was indeed forbidden to do so. Therefore, it has been concluded that the applicant was induced to commit a misdemeanour by the public officer.

Despite the clear challenges that were raised by the applicant on this matter in his petition, the inferior courts failed to make any assessment in this respect. The magistrate judge dealing with the applicant's challenges relied on the report issued by the police officer without discussing whether the impugned interference was compatible with the constitutional safeguards.

Besides, the Misdemeanours Act no. 5326 embodies no arrangement allowing for the employment of the undercover investigator procedure. Nor does it contain any implication that enables the application of the provisions of the Code of Criminal Procedure no. 5271.

It has been accordingly concluded that despite the significance -with regard to public interest- of, and the difficulties inherent in, the duty of investigating offences and uncovering misdemeanours, the applicant was deprived of a fair hearing as required by the Constitution under the particular circumstances of the present case, when interpreted in line with the principle of state of law.

Consequently, the Court has found a violation of the right to a fair hearing inherent in the right to a fair trial safeguarded by Article 36 of the Constitution.

JUDGMENT FINDING A VIOLATION OF THE RIGHT TO EXAMINE A WITNESS DURING TRIAL DUE TO THE INABILITY TO EXAMINE THE WITNESS WHOSE TESTIMONY CONSTITUTED THE DECISIVE EVIDENCE FOR CONVICTION

Hasan Ballı (no. 2017/21825, 2 June 2020)

THE FACTS

The complainant H.B. filed a criminal complaint against several persons including the applicant, alleging that they had forced him to sign a promissory note by tying him up by the wrists and ankles. At the end of the proceedings, the applicant was sentenced to imprisonment by the incumbent assize court for plundering and depriving the complainant of his liberty. Arguing that he did not have the opportunity to examine the witness charging him with the said criminal offences, the applicant appealed the first instance decision which was ultimately upheld by the Court of Cassation.

THE APPLICANT'S ALLEGATIONS

The applicant maintained that his right to examine a witness had been violated as he could not examine, at the hearing, the witness whose statements constituted a main basis for his conviction.

THE COURT'S ASSESSMENT

In the present case, S.K., a co-accused of the applicant, was heard by the court through the Audio-Visual Information System ("SEGBİS"). In his defence submissions, S.K. gave testimony against the applicant. It is explicit that the applicant must be afforded the safeguards inherent in the right to examine a witness in the face of S.K.'s testimony.

The first instance court did not indicate any justified reason for the failure to examine S.K. -whose arrest had been ordered- at the hearing. Therefore, in the present case, the relevant public authorities failed to fulfil their obligation to justify the applicant's being deprived of his right to examine a witness. Given the relevant information and documents concerning the applicant's case as well as the reasoning of the decision, it has been observed that S.K.'s testimony constituted the decisive evidence for the applicant's conviction.

At the hearing when the applicant's defence submissions were taken, the first instance court read out S.K.'s testimony against the applicant who was given the opportunity to submit his challenges and defence submissions against it both in writing and orally. These processes may be considered as a reparatory opportunity. However, in his subsequent statements before the first instance court, the complainant H.B. noted that the applicant had not been present at the incident scene and among those who had committed the imputed offences.

Regard being had also to the complainant's subsequent statements, it has been considered that the reparatory opportunity afforded to the applicant was not indeed capable of remedying the impugned restriction imposed on his right of defence. The Court has accordingly concluded that in the present case, the incumbent court's reliance on the testimony of the witness, who had not been examined at the hearing, in convicting the applicant had undermined the overall fairness of the proceedings.

Consequently, the Court has found a violation of the right to examine a witness.

JUDGMENT FINDING VIOLATIONS OF THE PRINCIPLES OF EQUALITY OF ARMS AND ADVERSARIAL PROCEEDINGS FOR THE FAILURE TO BE INFORMED OF THE CONFIDENTIAL INFORMATION AND DOCUMENTS USED AS EVIDENCE

Bünyamin Uçar (no. 2017/32004, 3 June 2020)

THE FACTS

The applicant had successfully passed the personnel recruitment examination. However, the recruitment process was terminated for the allegedly unfavourable results of the security investigation conducted against him as part of the procedures for recruitment. The applicant's challenge before the administrative court as well as his subsequent appeal were dismissed.

THE APPLICANT'S ALLEGATIONS

The applicant claimed that his right to a fair trial had been violated due to the authorities' failure to inform him of the confidential information and documents used as evidence against him during the proceedings within the scope of the action for annulment he had brought.

THE COURT'S ASSESSMENT

The applicant had brought an action for annulment of the termination of his recruitment process for the allegedly unfavourable results of the security investigation, although he had successfully passed the examination to be recruited as contracted military officer and regular non-commissioned officer.

The impugned termination had been based on the content of the security investigation. It was of great importance for the applicant to be aware of the content of the security investigation in order to be able to defend himself and make claims. Otherwise, he would be in a weak and disadvantaged position in the face of the acts and defence of the administrations (General Command of Gendarmerie and Ministry of National Defence) which had relied on the content of the security investigation.

It is clear that the applicant had been subjected to a procedure falling foul of the principles of equality of arms and adversarial proceedings. However, in order for such a contradiction to be in breach of the right to a fair trial, it should be evaluated whether the fairness of the proceedings had been impaired as a whole.

In the present case, the administrative court had requested the relevant information and documents from the defendant administrations. Thereupon, the latter submitted the requested information and documents with regard to the applicant, which were classified as confidential. The court, relying on these materials, dismissed the applicant's case.

As a result of the examination of the case file through the National Judiciary Informatics System (UYAP), no information or document had been found indicating that the impugned documents that were classified as confidential had been notified to the applicant or that he had been provided with the opportunity to examine them.

It has been found that there was no justification as to why the applicant had not been allowed to access the relevant documents and that the applicant had not been informed of these documents. Accordingly, the applicant had not been provided with the opportunity to make a defence against the confidential documents that had been submitted by the defendant administrations and relied on by the administrative court.

Consequently, the Court has found violations of the principles of equality of arms and adversarial proceedings safeguarded by Article 36 of the Constitution.

JUDGMENT FINDING NO VIOLATION OF THE RIGHT TO A FAIR TRIAL DUE TO THE APPLICANT'S CONVICTION BASED SOLELY ON BYLOCK DATA

Ferhat Kara (no. 2018/15231, 4 June 2020)

THE FACTS

Before dealing with the facts and particular circumstances of the present case, the Court made determinations and assessments concerning the activities performed by, and specific characteristics of, the Fetullahist Terrorist Organisation/Parallel State Structure ("the FETÖ/PDY"). In this sense, the Court provided general explanations as to the technical concepts of the ByLock application, how this application was found out, its notification to the judicial authorities and the judicial process conducted thereafter, as well as general and organisational features of the ByLock application.

The applicant, who was a guardian at the time when the impugned incidents took place, was sentenced to 7 years and 6 months' imprisonment for his membership of an armed terrorist organisation by the relevant court's decision issued at the end of the criminal investigation conducted by the incumbent chief public prosecutor's office in the aftermath of the attempted coup-d'état of 15 July 2016.

The applicant's conviction was based solely on his use of ByLock communication program which was provided for the use of the FETÖ/PDY members. The applicant's challenge against his conviction decision before the regional court of appeal was dismissed on the merits. The dismissal decision was also appealed by him; however, the appellate request was also dismissed by the Court of Cassation.

THE APPLICANT'S ALLEGATIONS

The applicant maintained that the data obtained from the ByLock application had been collected illegally and were relied on as a principal ground in his conviction; that the use of ByLock data as a sole or decisive evidence was unlawful; and that the digital data underlying his conviction were not brought before the court. He accordingly alleged that his right to a fair trial had been violated.

THE COURT'S ASSESSMENT

A. Alleged Violation of the Right to a Fair Hearing

1. As regards the data obtained from the ByLock server

In the course of the period during which the investigation authorities and the State's security agencies started to perceive the FETÖ/PDY's staffing within the public institution and organisations along with its activities within the different social, cultural and economic areas, notably education and religion, as a threat to the national security, the National Intelligence Organisation ("the MİT") also conducted inspections, within the boundaries of its own field of work, into the FETÖ/PDY's activities.

During these inspections and inquiries, a foreign-based mobile application, namely ByLock, which was apparently developed to ensure organisational communication among the FETÖ/PDY members was discovered, and it was

also found out that there were servers with which this application was in contact.

It is inevitable, in democratic societies for the protection of fundamental rights and freedoms, to need intelligence agencies and the methods employed by them for the purposes of effectively fighting against very complex structures such as terrorist organisations and tracking such organisations through covered methods. Therefore, to collect and analyse information about terrorist organisations, with an aim of collapsing them through covered intelligence methods, meet a significant need in democratic societies.

The MİT delivered to judicial/investigation authorities the FETÖ/PDY-related information of which it had become aware while performing its duties under Law no. 2937. This act -whereby the MİT merely informed the competent judicial authorities of concrete information which was related to an issue falling into the scope of its own field of work (fight against terrorism) and which was found out on a legal basis- cannot be construed to the effect that the MİT had performed law-enforcement activities. In this sense, it has been observed that the MİT had found out the impugned digital materials not as a result of its inquiries to collect evidence but within the scope of the intelligence activities conducted to reveal the activities of the FETÖ/PDY during a period when the public authorities, notably the National Security Council, started to perceive the FETÖ/PDY as a threat to the national security.

Besides, it must be borne in mind that the incumbent chief public prosecutor's office was not provided with hearsay intelligence information which was of abstract and general nature, but rather with digital data regarding an application which was considered to be the covered communication means used by the FETÖ/PDY's members and heads. The MİT's delivery of the digital materials -found out during an inspection within the scope of its own field of work- to the relevant judicial/investigation authorities in order to have them examined so as to ascertain whether these materials involved any criminal element does not render them unlawful.

Consequently, the delivery of the data concerning the ByLock application, which were found out during the intelligence inquiries conducted into a terrorist organization aiming at overthrowing the constitutional order, to the chief public prosecutor's office for making contribution to revealing the material truth during the investigation and prosecution against this organisation does not involve any unlawfulness. The submission, to the chief public prosecutor's office, of the digital materials concerning the ByLock communication system, which were obtained by the MİT within the scope of its legal powers, as well as of the technical report issued in this respect cannot be considered to constitute a manifest error of judgment or manifest arbitrariness.

(2) As regards the process following the submission of ByLock data to the judicial authorities

Upon the submission of the digital materials obtained from the ByLock server, the investigation process was thereafter conducted in accordance with Law no. 5271. The judicial authorities made the necessary inquiries, examinations and assessments as to the authenticity or reliability of the

digital materials. In pursuance of the relevant court decisions, the available materials were subjected to technical examinations. The defence was also provided, as required by the principles of equality of arms and adversarial proceedings, with the opportunity to challenge the authenticity, as well as to object to the use, of the evidence indicating that the applicant was a ByLock user.

Consequently, in the present case, no violation was found in terms of the allegation that the data obtained through ByLock had been obtained without a legal basis or unlawfully.

Consequently, the Court has found no violation of the right to a fair hearing inherent in the right to a fair trial safeguarded by Article 36 of the Constitution.

B. Allegation that ByLock Data cannot be the sole or decisive evidence for conviction

The investigation authorities issued, addressing to the judicial authorities, technical and chronological reports including comprehensive information about the technical features of the ByLock application which ensure confidentiality, its use, its encryption, the method how it is downloaded to a device as well as for which purposes it is used. In these reports, the differences between the ByLock application and the other most common instant messaging programs as well as organisational features of the impugned application are mentioned.

The messages and e-mails, which were obtained from the ByLock, contained certain abbreviations about which the organisation members gave information in their statements and the literature peculiar to the organisation. The necessity, for enabling two users to get in contact, to add each other was regarded as an indication that the ByLock application was developed in pursuance of the clandestine cell-type structure of the organisation. It was further indicated in the statements given by the organisation members within the scope of the investigations conducted in the aftermath of the coup attempt that the ByLock application was a communication program designed to ensure organisational communication through the messages and e-mails sent and received by the organisation members and was used to that end.

As noted in the court decisions as well as in the judicial and technical reports, merely the download of the ByLock application to a device is not sufficient for messaging/communication. For sending/receiving messages and ensuring communication, the username/user-code which was created by the users in the course of registration and which is specific to each user is to be known, and mutual consent is sought for adding a friend. It is not possible to get in contact with any person without two persons' mutual consent to add each other. In the same vein, as also noted in the court decisions, any person -who has no relation with the organisation but has downloaded the impugned application -designed to be used for organisational purposes- by change through general application stores and certain websites- cannot use it and get in contact with organisation members by adding them as a friend without the assistance of any member of the organisation. In the judicial processes, not download of the impugned applica-

tion but signing up to it and its use for organisational purposes were relied on. Accordingly, the determinations and assessments made by the Court of Cassation and inferior courts as to the ByLock application cannot be said to be devoid of factual basis.

In the present case, the incumbent court relied on the applicant's signing up and registry to the ByLock server by obtaining a user-ID, through his own devices and his GSM subscription, and his use of the application for ensuring the confidentiality of organisational communication as evidence demonstrating his relation with the organisation. In making this assessment, the court referred to the data obtained from the ByLock server and discovered by the technical units, as well as to Carrier Grade NAT (CGNAT) records. The applicant's conviction for his membership of a terrorist organisation based solely on the use of an encrypted communication network, which was apparently used -by its structure, way of use and technical features- merely by the FETÖ/PDY members to ensure organisational confidentiality, cannot be considered as a manifestly arbitrary approach which has completely rendered dysfunctional the procedural safeguards inherent in the right to a fair trial.

Consequently, the Court has declared this part of the application inadmissible for being manifestly ill-founded.

C. Alleged failure to bring the relevant digital data before the court

The applicant did neither provide a sufficient explanation concerning this allegation nor substantiated it in the application form. Besides, there is no information or document to the effect that although he raised, before the inferior courts, the concrete issues as to the use of the relevant data obtained from the ByLock application during his proceedings and requested the courts to make the necessary inquiries and inspections, the inferior courts remained inactive.

Consequently, the Court has declared this part of the application inadmissible for being manifestly ill-founded.

JUDGMENT FINDING A VIOLATION OF THE RIGHT TO A COURT DUE TO DISMISSAL OF REINSTATEMENT CASES WITHOUT AN EXAMINATION ON THE MERITS

Emin Arda Büyük (no. 2017/28079, 2 July 2020) and *Berrin Baran Eker* (no. 2018/23568, 2 July 2020)

THE FACTS

The applicants had been working, respectively, as a subcontracted medical secretary at a university and as a cleaning worker in a nursery operated by the municipality. Their employment contracts had been terminated within the scope of the Decree Law no. 667 issued after the coup attempt of 15 July 2016. Thereupon, the applicants brought actions before the labour courts for their reinstatement. Upon the courts' dismissal, the applicants' subsequent appellate requests were also rejected by the regional courts of appeal.

THE APPLICANT'S ALLEGATIONS

The applicants claimed that their right to a court had been violated, arguing that their actions for reinstatement, which they had brought challenging the termination of their employment contracts for the alleged breach of the trust relationship, had been dismissed without an examination on the merits.

THE COURT'S ASSESSMENT

The right to a court, one of the guarantees of the right to a fair trial that is an indispensable right in a democratic society, requires that the substantial claims and defences related to the dispute at issue be examined, assessed and adjudicated by the incumbent judicial authority. The right to a court not only guarantees that the individuals obtain a formal decision at the end of the proceedings, but it also requires the incumbent judicial authority to deal with the substantial requests regarding the dispute.

In cases where the court, while settling a dispute before it, concludes the trial by relying on the claims and defence put forth by one of the parties but without discussing the substantial objections raised by the other party, then there has not been an actual trial, even if there is a formal decision.

In this case, it will not make any sense in practice that the judicial remedy for the dispute at issue is accessible in theory, and therefore the right to a court and thus the right to a fair trial will remain an illusion. It is the constitutional obligation of the judicial authorities to respond to the demands of individuals for judicial protection, and in this regard, to adjudicate a given case after examining the merits of the dispute and evaluating the claims and defences.

In the present cases, it was specified in the reasoned judgments of the incumbent courts that the applicants' cases were dismissed on the merits. However, the courts' mere expression of this fact does not actually mean that the merits of the dispute have been resolved.

In order for a dispute to have actually been resolved, the incumbent courts should have examined whether the termination was based on a valid ground within the framework of the provisions of the Labour Law. While dismissing the cases, the courts stated that the applicants' employment contracts had been terminated in accordance with the relevant provisions of the Decree Law no. 667 and that therefore it was not for the judicial authority to review the expediency of the assessments made and decisions given by the public institution. Considering that the courts dismissed the applicants' cases by making such a statement, it is clear that they did not decide on the merits of the dispute.

In the present cases, the actions for reinstatement brought by the applicants were based on Article 20 of the Labour Law no. 4857. The essence of the dispute subject matter of the case filed under the relevant article is whether the termination of the applicants' employment contracts had been based on valid grounds. Therefore, it is clear that within the scope of the examinations of the cases filed against the termination process carried out by the employer in accordance with Article 4 of the Decree Law No. 667, it will essentially be determined whether the termination of the applicants' employment contracts had been based on valid grounds.

The relevant provision stipulates that the employment contracts of those who are considered to be a member of, or have relation, connection or contact with terrorist organisations or structures/entities, organisations or groups, which have been determined by the National Security Council to have been engaging in activities against the national security of the State, shall be terminated. However, the said provision does not contain any clause restricting the judicial authorities' power to make a review. As such, there is no regulation that prevents the review of the merits of the reinstatement cases filed by the employees whose employment contracts have been terminated under Article 4 of the Decree Law no. 667.

In the present cases, the incumbent courts failed to examine whether the conditions for valid termination had been fulfilled. In other words, the courts failed to fulfill their duty of addressing and adjudicating the material and legal matters of dispute, which constitutes the basis of their judicial function, and thus failed to perform an actual judicial activity. Therefore, the judicial remedy available to the applicants enabling them to challenge the termination process at issue was accessible for them only in theory.

Consequently, the Court has found a violation of the right to a court in both applications.

JUDGMENT FINDING A VIOLATION OF THE RIGHT TO LEGAL ASSISTANCE DUE TO THE FAILURE TO COMPLY WITH THE VIOLATION JUDGMENT BY THE EUROPEAN COURT OF HUMAN RIGHTS

Mehmet Ali Ayhan (no. 2016/7967, 22 July 2020)

THE FACTS

The applicant, taken into custody by the anti-terror branch and subsequently detained on remand in 1993, was not provided with legal assistance at the investigation stage. In 2004, the State Security Court ("the SSC") sentenced him to aggravated life imprisonment, which became final following the Court of Cassation's appellate review.

The applicant then lodged an application with the European Court of Human Rights ("the ECHR"). In its judgment of 2009, the ECHR found violations of the right to legal assistance due to his lack of legal assistance at the investigation stage, as well as of the right to a trial within reasonable time. Relying on the ECHR's judgment finding a violation in his case, the applicant filed a request with the incumbent assize court ("the court") for a stay of execution of his sentence and for a retrial.

However, the court dismissed the applicant's request for a retrial in 2011. He appealed the dismissal decision before the Court of Cassation, which referred the case-file to the relevant assize court, the authority for challenge, as the impugned decision was subject to a challenge procedure. The authority reviewing the applicant's challenge annulled the dismissal decision of 2011. Thereafter, the court upheld the decision of 2004, issued by the SSC with respect to the applicant, in 2015. The Court of Cassation upheld the decision, appealed by the applicant, with minor changes.

It appears that the ECHR's violation judgment was among the judgments, execution of which was supervised by the Committee of Ministers of the Council of Europe; but the case in question has been closed.

THE APPLICANT'S ALLEGATIONS

The applicant maintained that his right to legal assistance had been violated due to the dismissal of the request for a retrial he filed in accordance with the ECHR's violation judgment.

THE COURT'S ASSESSMENT

It falls within the jurisdiction of the Constitutional Court, empowered to examine alleged human right violations through individual application mechanism, to deal with an alleged violation of any fundamental rights and freedoms, which are enshrined in the Constitution and also safeguarded by the European Convention on Human Rights. In this sense, it is also the Court to examine the compliance with the ECHR's violation judgments. However, the Court's examination in this respect does not include a re-assessment of the particular circumstances of the given case from the very beginning, but is limited to the question whether the ECHR's violation judgment has been properly executed.

In cases where the ECHR issues a judgment finding a violation, the relevant judicial bodies must act in a way that would redress the violation and its consequences, given the nature of the relevant judgment. However, in the present case, the first instance court conducted a re-trial and accordingly heard the applicant and his defence counsel. It ultimately upheld the SSC's decision on the basis that there was still sufficient evidence for his conviction even if the accused person's impugned statements obtained at the preliminary stage of the proceedings were not taken into consideration. However, it cannot be fully comprehended whether the applicant's statements, obtained at the investigation stage in the absence of his defence counsel and forming the subject matter of the ECHR's violation judgment, was relied on as a ground in his conviction ordered at the end of the re-trial.

Besides, the other evidence underlying the applicant's conviction was not discussed in the reasoned decision. Finally, it cannot be comprehended from the reasoned decision whether the defence had been provided with the opportunity to challenge the available evidence and to put forward their counter-arguments. Accordingly, the Court has concluded that the incumbent assize court's assessments failed to comply with the ECHR's violation judgment, to involve a meticulous examination to the extent required by Article 36 of the Constitution, as well as to redress the violation found by the ECHR and the consequences thereof.

Consequently, the Court has found a violation of the right to legal assistance.

JUDGMENT FINDING A VIOLATION OF THE RIGHT TO FAIR PROCEEDINGS DUE TO THE UNFORESEEABLE INTERPRETATION OF THE RELEVANT PROVISIONS OF LAW IN THE PROCEEDINGS FOR ANNULMENT OF THE REGISTRATION WITH THE BAR ASSOCIATION

M.B. (no. 2018/37392, 23 July 2020)

THE FACTS

The applicant, holding office as a public prosecutor, was dismissed from his public office following the coup attempt of 15 July by the decision of the High Council of Judges and Prosecutors on the basis of the Decree-Law no. 667. Following his dismissal from public office, the applicant filed a request with a Bar Association to enter on its registry. The Bar Association accepted the request and referred it for the consideration of the Union of Turkish Bar Associations ("the TBB"). The TBB approved the bar association's decision. However, the Ministry of Justice ("the Ministry") did not find the TBB's decision appropriate and remitted it for re-consideration. Upholding its original decision, the TBB allowed for the applicant's registration with the Bar Association. After the TBB's decision had been finalised, the Ministry brought an action for annulment of the registration before the incumbent administrative court ("the court") which ordered the stay of execution and also annulled the TBB's decision. The TBB's and the applicant's appeals against the court's decision were rejected.

On the other hand, a decision of non-prosecution was issued at the end of the criminal investigation conducted against the applicant.

THE APPLICANT'S ALLEGATIONS

The applicant maintained that his right to fair proceedings had been violated due to the unforeseeable interpretation of the relevant provisions in the action brought for the annulment of the applicant's registration with the bar association.

THE COURT'S ASSESSMENT

In the present case, the action for annulment was brought due to the applicant's registration with the Bar Association. The basic question to be resolved in this case is whether the applicant met the necessary conditions sought for practising as a lawyer.

In the court's annulment decision, the applicant was found not to have satisfied the conditions sought for practising as a lawyer on the basis of the relevant provisions of the Decree-Law no. 667 (enacted through Law no. 6749) and this profession was considered to fall into the scope of the ban on holding a public office.

It is principally for the inferior courts to assess whether the relevant provision in Law no. 6749, which sets forth that those who have been dismissed from public office can no longer hold a public office, also covers the profession of lawyer. However, in cases where the inferior courts' interpretation has been found to be manifestly unforeseeable or erroneous and where the procedural safeguards have thereby become dysfunctional, it is the Constitutional Court's duty to assess the effects thereof.

Despite being defined as a public service in Article 1 of Law no. 1136, the profession of self-employed lawyer is not undoubtedly a public service in form. That is because the lawyers registered with a bar association, save for those practising this profession in public institutions and organisations, do not have any direct or indirect affiliation with the State. Lawyers have their own offices and they do not receive any instruction from the State in choosing their clients and conducting their actions but act of their own free will. Lawyers undertake all responsibilities resulting from their own acts and actions. They themselves enjoy the rights, and bear the obligations, resulting from the contracts signed between them and their clients. Their incomes are composed of counsel fees paid by their clients. The fees they will receive are designated through the contracts signed between them and their clients within the boundaries set in Law no. 1136.

Besides, in its decisions, the Court has stated that although the profession of lawyer is defined as a public service in the relevant law, lawyer is not indeed a public officer; and that the definition by the legislator of a self-employed profession as a public service would not render it a public service within the meaning of Article 70 of the Constitution.

It has been considered that in the present case, the court qualified every kind of the profession of lawyer, a self-employed practice, as a profession performed within an employment relationship, which is an incomprehensible interpretation straying from the substance of the law. As a matter of fact, the employment relationship clearly requires working in an affiliated way. The grounds submitted by the court are not plausible to reach a conclusion to the contrary.

Moreover, seeking a relationship of confidence and trust between a self-employed lawyer and the State similar to that of the public officers is not reasonable within the democratic legal order established by the Constitution. Democracy, which is safeguarded by the Constitution and based on pluralism, rejects the understanding that requires a hierarchical relationship between the professional organisations -an element of civil society- as well as the professionals, and the State.

The broad interpretation by the public authorities of the provisions restricting rights and freedoms may lead to unforeseeable consequences for individuals, which is both contrary to the state of law and impairs the right to a fair trial.

In the Turkish constitutional system, it is the legislator that is vested with the power to introduce regulations imposing restrictions on rights and freedoms. Any interpretation and practice which extends the scope of a given law restricting a right or freedom may give rise to the imposition of a restriction, which has not indeed introduced by the legislator, by administrative and judicial authorities.

In the light of these explanations, the Court has considered that the conclusion to the effect that the applicant did not meet the necessary conditions to practise as a lawyer was reached as a result of the broad and unforeseeable interpretation of the relevant provision of law. Such interpretation rendered dysfunctional the procedural safeguards in the proceedings concerning the applicant's civil right and played a decisive role in the court's ruling against him. Therefore, it has been concluded that these factors undermined the fairness of the proceedings as a whole.

Consequently, the Court has found a violation of the right to fair proceedings.

CHAPTER 06

STATISTICS

STATISTICS ON CONSTITUTIONALITY REVIEW

Table 1

Number of Abstract and Concrete Review Applications Received Per Years

	NUMBER OF ABSTRACT & CONCRETE REVIEW APPLICATIONS
2012	159
2013	160
2014	199
2015	111
2016	135
2017	177
2018	164
2019	116
2020	101

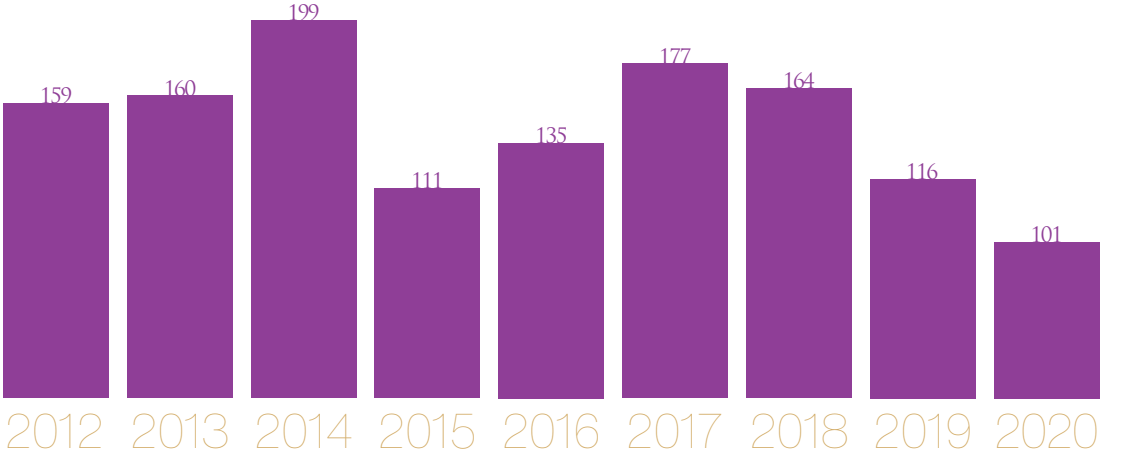


Table 2

Number of Abstract & Concrete Review Applications from Previous Years

	NUMBER OF PENDING ABSTRACT & CONCRETE REVIEW APPLICATIONS
2012	108
2013	60
2014	51
2015	46
2016	34
2017	39
2018	40
2019	85
2020	100

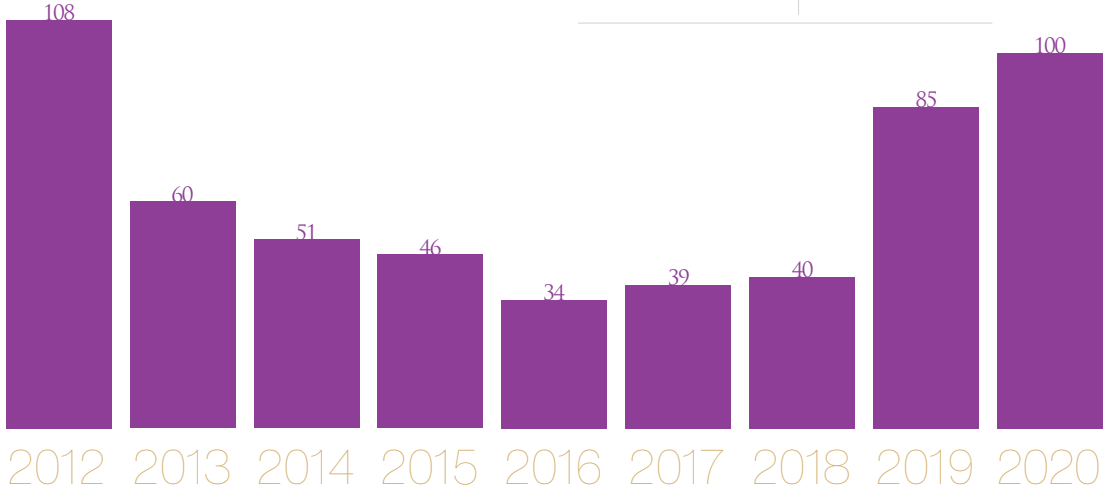


Table 3

Number of Total Abstract & Concrete Review Applications Received and Decided in 2020

	ABSTRACT & CONCRETE REVIEW APPLICATIONS
TOTAL RECEIVED / PENDING FROM PREVIOUS YEAR	201
DECIDED	81
PENDING FOR THE NEXT YEAR	120

Table 4

Number of Abstract & Concrete Review Applications Pending for the Next Year

	NUMBER OF ABSTRACT & CONCRETE REVIEW APPLICATIONS PENDING FOR THE NEXT YEAR
2012	60
2013	51
2014	46
2015	34
2016	39
2017	40
2018	85
2019	100
2020	120

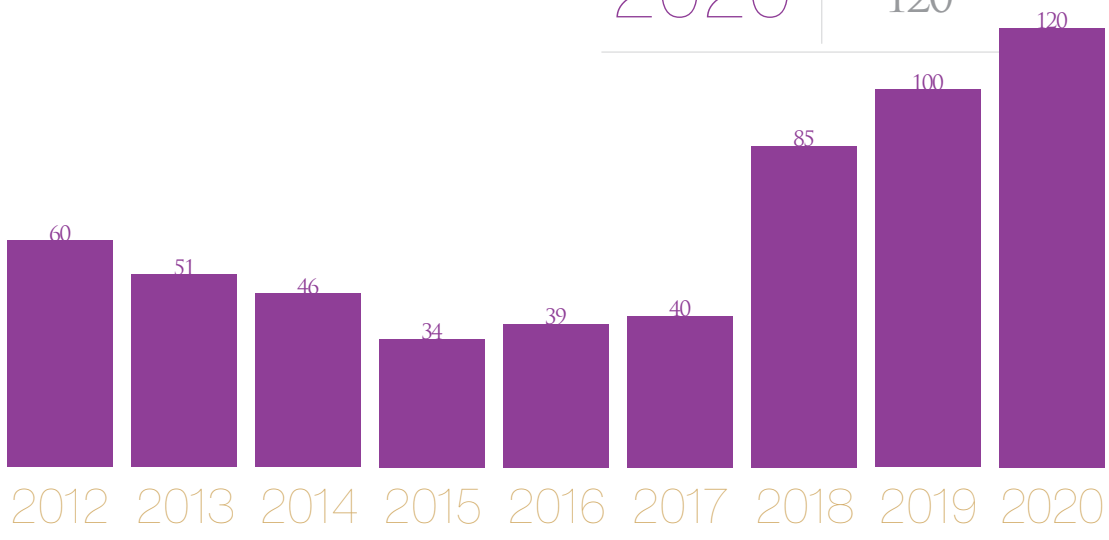


Table 5

Abstract & Concrete Review Applications Received per Years

	ABSTRACT REVIEW APPLICATIONS RECEIVED	CONCRETE REVIEW APPLICATIONS RECEIVED
2012	20	139
2013	17	143
2014	19	180
2015	13	98
2016	21	114
2017	20	157
2018	87	77
2019	33	83
2020	45	56

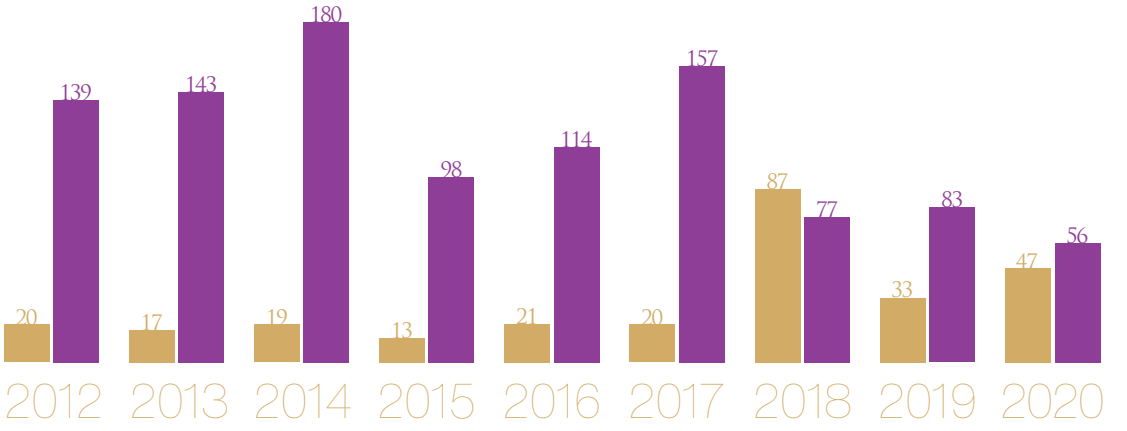


Table 6

Abstract & Concrete Review Applications Adjudicated per Years

	ABSTRACT REVIEW APPLICATIONS ADJUDICATED	CONCRETE REVIEW APPLICATIONS ADJUDICATED
2012	47	160
2013	36	133
2014	17	187
2015	16	107
2016	11	119
2017	15	161
2018	48	71
2019	17	84
2020	29	52

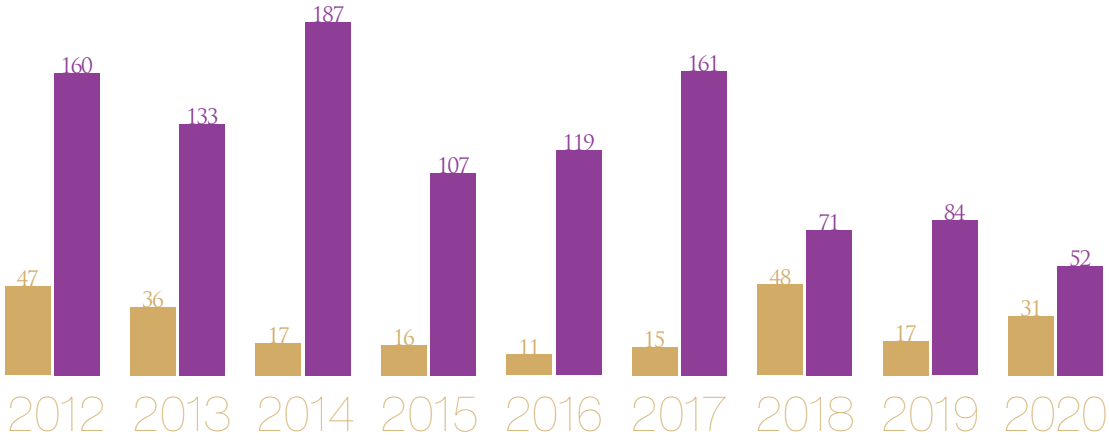


Table 7

Decisions in Abstract Review Cases in 2020

	DECISIONS
ANNULMENT	13
REJECTION	14
JOINDER	2

Table 8

Decisions in Concrete Review Cases in 2020

	DECISIONS
ANNULMENT	11
REJECTION	30
JOINDER	11

Table 9

Statistics on Constitutionality Review (2012-2020) Overview

			2012	2013	2014	2015	2016	2017	2018	2019	2020	TOPLAM
RECENTLY-RECEIVED AND PENDING ABSTRACT AND CONCRETE REVIEW APPLICATIONS	RECENTLY-RECEIVED ABSTRACT AND CONCRETE REVIEW APPLICATIONS	ABSTRACT REVIEW APPLICATIONS RECEIVED	20	17	19	13	21	20	87	33	45	275
		CONCRETE REVIEW APPLICATIONS RECEIVED	139	143	180	98	114	157	77	83	56	1.047
		TOTAL	159	160	199	111	135	177	164	116	101	1.322
	ABSTRACT AND CONCRETE REVIEW APPLICATIONS PENDING FROM PREVIOUS YEAR	ABSTRACT REVIEW APPLICATIONS PENDING FROM PREVIOUS YEAR					9	19	24	63	79	
		CONCRETE REVIEW APPLICATIONS PENDING FROM PREVIOUS YEAR					25	20	16	22	21	
		TOTAL	108	60	51	46	34	39	40	85	100	563
	FINAL TOTAL		267	220	250	157	169	216	204	201	201	1.885
ABSTRACT AND CONCRETE REVIEW APPLICATIONS ADJUDICATED	ABTSRACT REVIEW APPLICATIONS	ANNULMENT				8	3	4	7	9	13	
		REJECTION				6	8	10	40	7	14	
		JOINDER				2		1	1	1	2	
		TOTAL	47	36	17	16	11	15	48	17	29	236
	CONCRETE REVIEW APPLICATIONS	ANNULMENT				19	15	11	11	13	11	
		REJECTION				81	89	115	54	59	30	
		JOINDER				7	15	35	6	12	11	
		TOTAL	160	133	187	107	119	161	71	84	52	1.074
	FINAL TOTAL		207	169	204	123	130	176	119	101	81	1.310
ABSTRACT AND CONCRETE REVIEW APPLICATIONS PENDING FOR THE NEXT YEAR (PER YEARS)		ABSTRACT REVIEW APPLICATIONS				9	19	24	63	79	95	
		CONCRETE REVIEW APPLICATIONS				25	20	16	22	21	25	
	FINAL TOTAL		60	51	46	34	39	40	85	100	120	575

STATISTICS ON INDIVIDUAL APPLICATION

I. GENERAL STATISTICS

Table 1

Number of Individual Applications Filed and Adjudicated by Years

	RECEIVED APPLICATIONS	ADJUDICATED APPLICATIONS	RATIO OF ADJUDICATION
2012	1342 0.5% OUT OF THE TOTAL	4 0% OUT OF THE TOTAL	0%
2013	9.897 3.9% OUT OF THE TOTAL	4.924 2.3% OUT OF THE TOTAL	50%
2014	20.578 8.1% OUT OF THE TOTAL	10.926 5.2% OUT OF THE TOTAL	53%
2015	20.376 8% OUT OF THE TOTAL	15.368 7.3% OUT OF THE TOTAL	75%
2016	80.756 31.7% OUT OF THE TOTAL	16.089 7.6% OUT OF THE TOTAL	20%
2017	40.530 15.9% OUT OF THE TOTAL	89.651 42.3% OUT OF THE TOTAL	221%
2018	38.186 15% OUT OF THE TOTAL	35.356 16.7% OUT OF THE TOTAL	93%
2019	42.971 16.9% OUT OF THE TOTAL	39.376 18.6% OUT OF THE TOTAL	92%
2020	40.402 13.6% OUT OF THE TOTAL	45.414 17.6% OUT OF THE TOTAL	112%
TOTAL	295.038 RECEIVED APPLICATIONS	257.108 ADJUDICATED APPLICATIONS	87,14% RATIO

* There may be a little change, compared to the previous statistics, in the number of the adjudicated applications as the file is closed in case of an inadmissibility decision on administrative grounds and reopened if the challenge against the inadmissibility decision is accepted.

** The ratio of adjudication of the applications filed in 2016, save for those lodged under the state of emergency, is 85%.

*** The ratio of adjudication of the applications filed in 2017, save for 72.134 applications that were declared inadmissible for non-exhaustion of available remedies due to the establishment of the Commission for the Examination of the Proceedings under the State of Emergency, is 90%.

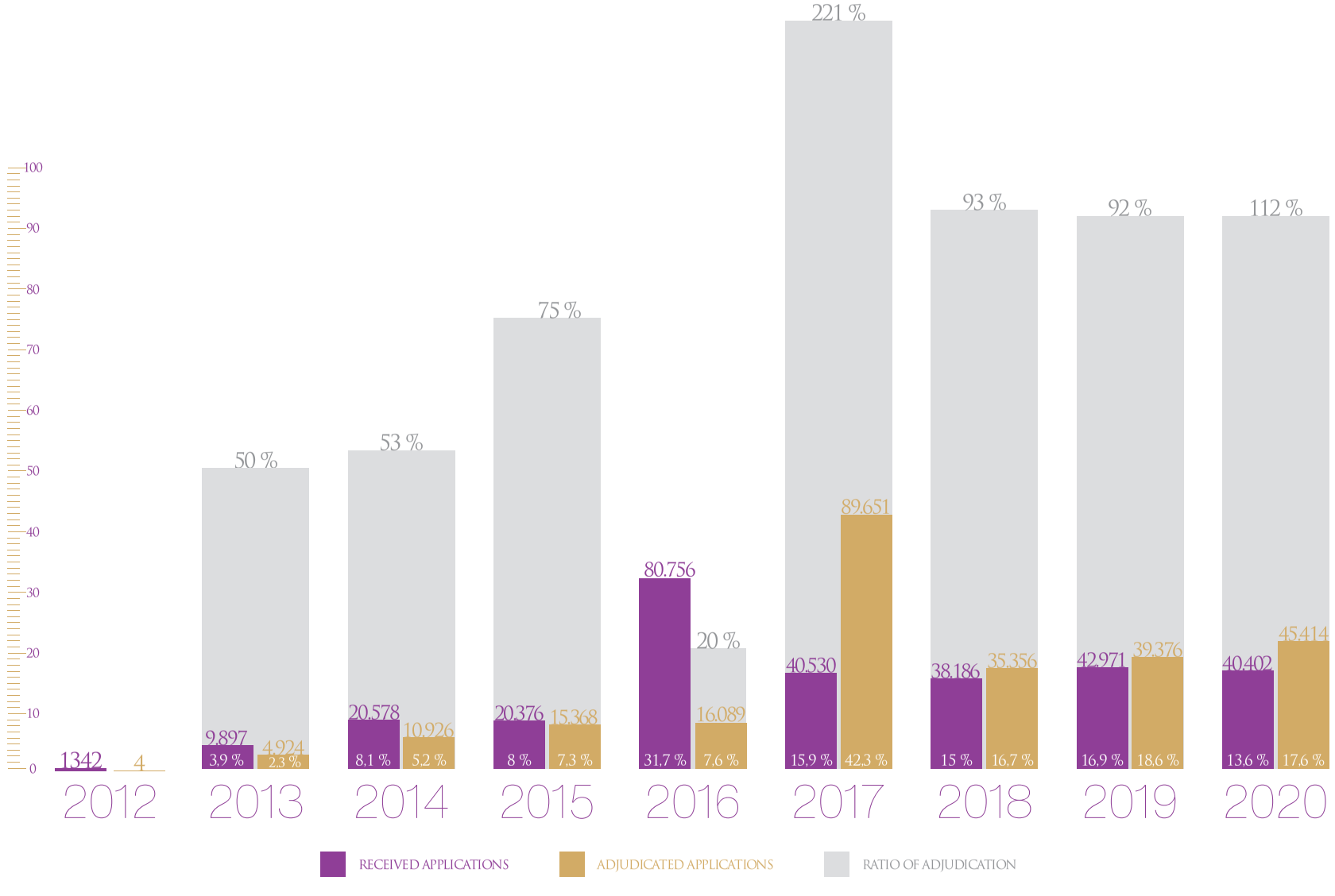

100
90
80
70
60
50
40
30
20
10
0
1342
4
50 %
9.897
3,9 %
4.924
2,3 %
53 %
20.578
8,1 %
10.926
5,2 %
75 %
20.376
8 %
15.368
7,3 %
80.756
31,7 %
20 %
16.089
7,6 %
221 %
40.530
15,9 %
89.651
42,3 %
93 %
38.186
15 %
35.356
16,7 %
92 %
42.971
16,9 %
39.376
18,6 %
112 %
40.402
13,6 %
45.414
17,6 %
2012
2013
2014
2015
2016
2017
2018
2019
2020
RECEIVED APPLICATIONS
ADJUDICATED APPLICATIONS
RATIO OF ADJUDICATION

Table 2

Number of Pending Individual Applications

	PENDING INDIVIDUAL APPLICATIONS	RATIO TO THE TOTAL NUMBER OF APPLICATIONS
2013	6	0%
2014	44	0,1%
2015	80	0,2%
2016	298	0,8%
2017	610	1,6%
2018	3.442	9,1%
2019	7.776	20,5%
2020	25.674	67,7%

TOTAL

295.038
APPLICATIONS

37.930
TOTAL PENDING APPLICATIONS

12,8%
RATIO TO THE TOTAL NUMBER OF APPLICATIONS

* Shows the number of pending applications by years as of 31 December 2020.

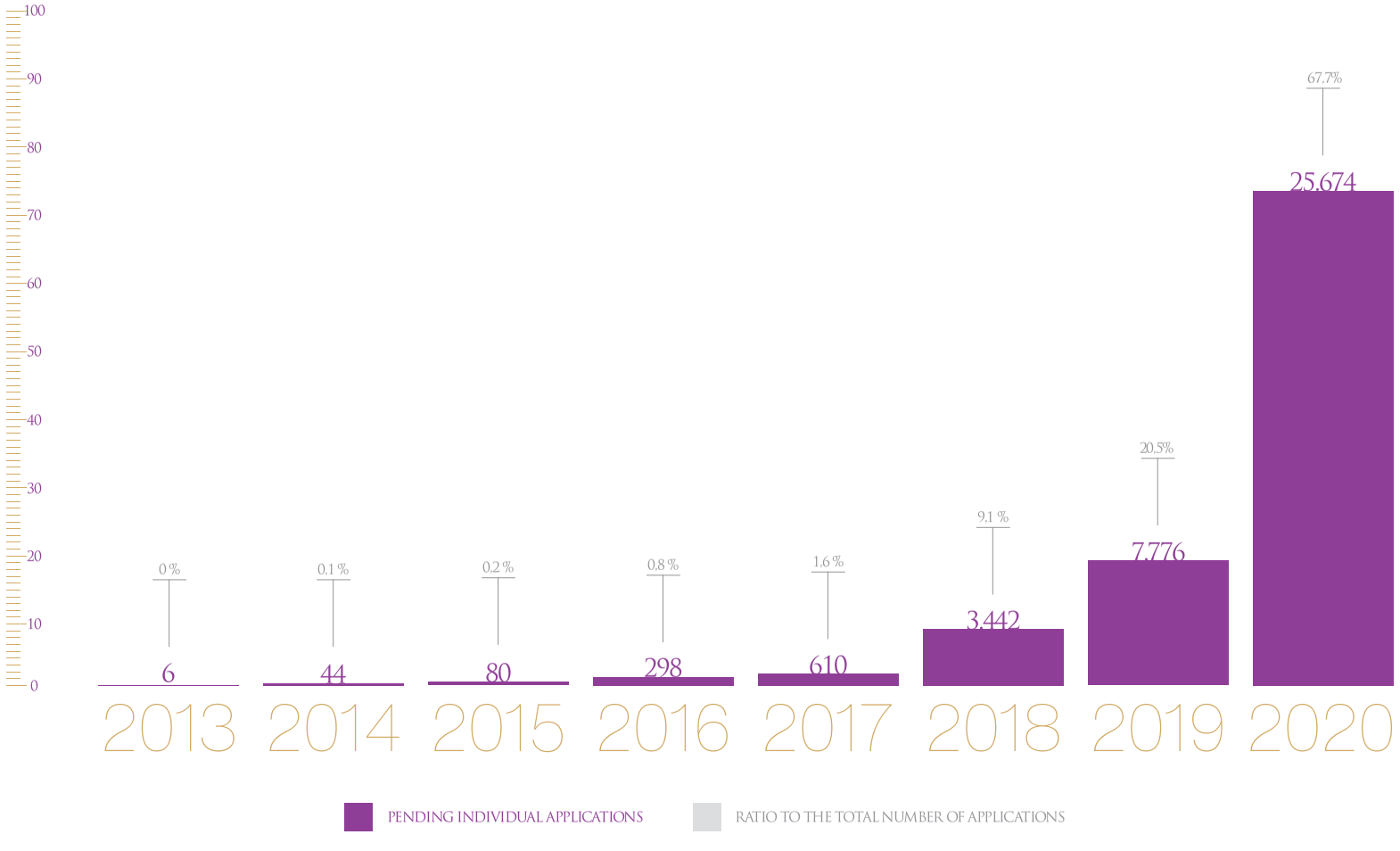

100
90
80
70
60
50
40
30
20
10
0
0 %
0.1 %
0.2 %
0.8 %
1.6 %
9.1 %
20.5%
67.7%
6
44
80
298
610
3.442
7.776
25.674
2013
2014
2015
2016
2017
2018
2019
2020
PENDING INDIVIDUAL APPLICATIONS
RATIO TO THE TOTAL NUMBER OF APPLICATIONS

Table 3

Adjudicated Applications
by Judgment Types

	TOTAL	RATIO
REJECTION ON ADMINISTRATIVE GROUNDS*	12.223	4,8%
INADMISSIBILITY	228.855	89%
VIOLATION OF AT LEAST ONE RIGHT	14.027	5,5%
NON-VIOLATION	738	0,3%
OTHER**	1.265	0,6%

TOTAL
257.108
DECISION

100%
TOTAL RATIO

* There may be a little change, compared to the previous statistics, in the number of the adjudicated applications as the file is closed in case of an inadmissibility decision on administrative grounds and reopened if the challenge against the inadmissibility decision is accepted.

** Strike-out, closing of applications, rejection.

II. STATISTICS ON THE APPLICATIONS EXAMINED ON THE MERITS
A. STATISTICS ON THE MERITS BY NUMBER OF ADJUDICATED APPLICATIONS

Table 4

Ratio of Violation Judgments

BASED ON THE CONCLUDED APPLICATIONS

	DECIDED	CONCLUDED*	RATIO
NUMBER OF FILES INVOLVING A VIOLATION	14.027	257.108	5,5%

BASED ON THE FILES EXAMINED ON THE MERITS

	DECIDED	FILES EXAMINED ON THE MERITS	RATIO
NUMBER OF FILES INVOLVING A VIOLATION	14.027	14.765	95%

* Number of files decided is 4.662, and the number of joinder of applications is 9.365.

Table 5

Number of Individual Applications in which at least One Right was Decided to Have Been Violated
(Including the Right to a Trial within a Reasonable Time and Joinder of Applications)

	TOTAL	RATIO
2013	75	0,5%
2014	768	5,5%
2015	1.827	13,0%
2016	1.282	9,1%
2017	1.025	7,3%
2018	2.167	15,4%
2019	1.225	8,7%
2020	5.658	40,3%

TOTAL
14.027

B. STATISTICS ON THE APPLICATIONS EXAMINED ON THE MERITS BY RIGHTS AND FREEDOMS

1. INCLUDING JOINDER OF APPLICATIONS

Table 6

Violation Judgments by Rights and Freedoms (Including the Right to a Trial within a Reasonable Time and Joinder of Applications)*

	TOTAL	RATIO
Right to life	128	0,9 %
Prohibition of ill-treatment	381	2,7 %
Right to personal liberty and security	237	1,7 %
Right to a fair trial*	9.039	63,3 %
Freedom of expression	605	4,2 %
Right to education	3	0,0%
Prohibition of discrimination	111	0,8 %
Freedom of religion and conscience	8	0,1 %
Right to protect one's material and spiritual existence	53	0,4 %
Right to respect for private and family life	442	3,1 %
Right to property	2.764	19,4 %
Right to elect, stand for elections and engage in political activities	8	0,1 %
Right to assembly and demonstration	123	0,9 %
Freedom of association	68	0,5 %
Principle of legality in crimes and punishment	14	0,1 %
Presumption of innocence	22	0,2 %
Right to an effective remedy	265	1,9 %
Prohibition of slavery and forced labour	0	0 %
Right to an individual application	2	0 %
Right to appellate review	0	0 %
Other rights	0	0 %

TOTAL
14.273

* Number of individual applications involving a violation only of the right to a trial within a reasonable time is 6.204.

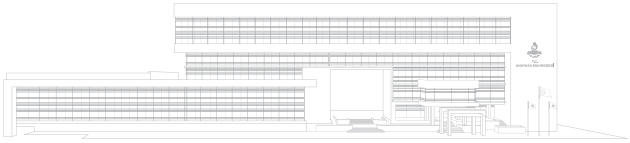
Table 7

Violation Judgments by Years
(Based on Rights and Freedoms) (Including the Right to a Trial within a Reasonable Time and Joinder of Applications)*

	TOTAL	RATIO
2013	78	0,5%
2014	782	5,5%
2015	1.854	13,0%
2016	1.315	9,2%
2017	1.083	7,6%
2018	2.221	15,6%
2019	1.250	8,8%
2020	5.690	39,9%

TOTAL
14.273

* More than one right may be decided to have been violation in one application.



İncek Şehit Savcı Mehmet Selim Kiraz Bulvarı No: 4
06805 Çankaya / Ankara / TURKEY

Telefon: +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