THE CONSTITUTIONAL COURT OF TURKEY

SELECTED JUDGMENTS

(Individual Application)

2020

Ankara, 2022

Constitutional Court Publications
ISBN: 978-605-2378-72-4

Selected Judgments 2020

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

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Designed and 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
February, 2022

FOREWORD

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

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

Despite the relatively short time period, the Constitutional Court has built considerable case-law since the individual application started to operate in 2012. This volume of the book includes selected admissibility decisions and judgments rendered by the Constitutional Court in 2020 within the scope of individual application. These decisions and judgments, many of which attracted high public attention as well, bear significance with regards to the development of case-law. Sincerely wishing that this book will contribute to upholding the rule of law and protecting rights and liberties of individuals.

Prof. Dr. Zühtü ARSLAN
President of the Constitutional Court

INTRODUCTION

This book covers selected inadmissibility decisions and judgments which are capable of providing an insight into the case-law established in 2020 by the Plenary and Sections of the Turkish Constitutional Court through the individual application mechanism. In the selection of the decisions and judgments, several factors such as their contribution to the development of the Court's case-law, their capacity to serve as a precedent judgment in similar cases as well as the public interest that they attract are taken into consideration.

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

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

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

herein are the ones which particularly embody the unprecedented case-law of the Constitutional Court.

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

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

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RIGHT TO LIFE (ARTICLE 17 § 1)

criminal charge. The medical reports indicated that there was no sign of battery and physical coercion, while the report issued by a member of the Medical Faculty stated otherwise. The incumbent assize court acknowledged that the applicant had been subjected to ill-treatment, but acquitted the accused gendarmerie officers and 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. In the course of the appeal proceedings, the Court of Cassation 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. Finding a violation, the Constitutional Court concluded that the judicial authorities failed to swiftly complete the investigations, thereby failing to prevent its becoming time-barred; and that they remained indifferent as having tolerated the unlawful acts amounting to torture.

7. Tahir Baykuşak, no. 2016/31718, 9 July 2020 143

Violation of the prohibition of ill-treatment due to the failure to prosecute the police officers allegedly battered the applicant during identity check

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, as a result of which 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 and then to the police station. Another report issued upon the applicant's request indicated the findings of ill-treatment on his body. At the end of the investigation conducted into the incident, a decision of non-prosecution was issued with respect to the suspected police officer for intentional injury. The applicant unsuccessfully challenged the said decision. Finding a violation, the Constitutional Court concluded that the investigation into the incident was not conducted rigorously and effectively.

employer, his employment contract was terminated. His action for reinstatement was dismissed by the labour court. On appeal, the dismissal decision was upheld. Finding violations of the protection of personal data and the freedom of communication, the Constitutional Court concluded that the inferior courts had failed to conduct a rigorous trial in pursuance of the relevant constitutional safeguards and thereby to fulfil the positive obligations.

FREEDOM OF COMMUNICATION (ARTICLE 22)

No violations of the right to the protection of personal data and freedom of communication due to access to ByLock data

The applicant was holding office as a teacher at the material time. At the end of the investigation conducted against him for his alleged membership of the FETÖ/PDY, he was sentenced to imprisonment on the basis of his being a user of the ByLock application. His conviction was upheld on appeal. Finding no violations of the right to the protection of personal data and the freedom of communication, the Constitutional Court found that the necessary safeguards had been fulfilled in the applicant's case.

FREEDOMS OF EXPRESSION AND THE PRESS (ARTICLES 26 AND 28)

Violation of the freedom of expression due to removal of the banner on the premises of a political party

The applicants unfurled a banner with insulting expressions towards the ruling party before open-air meeting to be organised by that party for local elections. The police officers intervening in the incident sprayed tear gas towards them. On complaint by the applicants, a decision of non-prosecution was issued regarding the police officers concerned. The applicants' subsequent appeal was dismissed by the magistrate judge. Finding a violation of

the freedom of expression, the Constitutional Court held that the impugned interference with the applicants' freedom of expression, by resorting to force, did not meet a pressing social need and was not proportionate, thus being incompatible with the requirements of a democratic society.

RIGHT TO PROPERTY (ARTICLE 35)

sentenced to 8 years and 9 months' imprisonment for membership of an armed terrorist organization, and the relevant decision was upheld by the Court of Cassation. Finding a violation, the Constitutional Court concluded that the inferior courts had failed to justify their dismissal of the applicant's request to be present at the hearing, which rendered the impugned interference unnecessary.

18. Kemal Çakır and Others [Plenary], no. 2016/13846, 5 March 2020 445

Violation of the right of access to a court due to dismissal of a case for the alleged lack of capacity to sue

The applicants, having learned that a wind power plant (WPP) would 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. The administrative court dismissed the case for the applicants' lack of capacity to sue. On appeal, the first instance decision was upheld. Finding a violation of the right of access to a court, the Constitutional Court held that the impugned interference had been disproportionate.

19. Muhsin Hükümdar (2) [Plenary], no. 2016/69274, 5 March 2020 463

Violation of the right to a fair hearing due to the law-enforcement officers' practice inducing the commission of a misdemeanour

The applicant, owner of a grocery store, was imposed an administrative fine for having sold alcoholic beverages at night time, which had been found established by a police officer in civilian clothes, who acted as a customer doing shopping. His objection to the administrative fine was dismissed by the incumbent magistrate judge. Finding a violation of the right to a fair hearing, the Constitutional Court concluded that the applicant was instigated by the public officer to commit a misdemeanour, albeit the absence of any suspicion that the said misdemeanour had been previously committed.

alleged relation or connection with the FETÖ/PDY following the coup attempt of 15 July 2016. His action for reinstatement was dismissed by the incumbent labour court. His subsequent appellate requests were also rejected. Finding a violation of the right to a court, the Constitutional Court held that the inferior courts had failed to address and adjudicate the substantive and legal matters of the impugned dispute.

RIGHT TO ELECT, STAND FOR ELECTIONS AND ENGAGE IN POLITICAL ACTIVITIES (ARTICLE 67)

23. Kadri Enis Berberoğlu (2) [Plenary], no. 2018/30030, 17 September 2020 535

Violation of the right to stand for elections and engage in political activities for denial of parliamentary immunity of the re-elected member of the parliament

An investigation was launched against the applicant, who was a Member of Parliament (MP) at the material time, for disclosing confidential information of the State for purposes of political and military espionage and aiding the FETÖ/PDY knowingly and willingly. He was sentenced to imprisonment. While the applicant was detained pending trial, he was re-elected as an MP. Stating that he was entitled to parliamentary immunity again for his having been re-elected as an MP, he requested his release. However, it was dismissed. Finding a violation of the right to stand for elections and engage in political activities, the Constitutional Court held that the applicant's being deprived of liberty after acquiring parliamentary immunity fell foul of the relevant constitutional provision setting forth the safeguards as to the parliamentary immunity.

CHAPTER ONE
ADMISSIBILITY DECISIONS

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

DECISION

YILDIRIM TURAN

(Application no. 2017/10536)

4 June 2020

On 4 June 2020, the Plenary of the Constitutional Court found inadmissible the alleged violation of the right to personal liberty and security, safeguarded by Article 19 of the Constitution, for being manifestly ill-founded in the individual application lodged by *Yıldırım Turan* (no. 2017/10536).

THE FACTS

[8-82] 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.

V. EXAMINATION AND GROUNDS

83. The Constitutional Court, at its session of 4 June 2020, examined the application and decided as follows:

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

84. The applicant maintained that his right to personal liberty and security had been violated, stating that he denied the accusations as regards membership of a terrorist organisation attributed to him; that there was no available evidence against him during the investigation process; that he had not been assigned to a superior position during the period when the organisation had been powerful; that he had not used ByLock application; and that his pre-trial detention had been ordered in breach of the procedural safeguards afforded to members of the judiciary.

85. The Ministry, in its observations, stated that the detention order had contained the grounds for detention relied on by the judicial authorities, and that given the relevant grounds, the applicant's detention on remand could not be considered as arbitrary. The Ministry further argued that the public authorities had faced serious difficulties in investigating terror crimes, therefore the right to personal liberty and security should not be

interpreted in a way that made it extremely difficult for judicial authorities and security officials to effectively combat crimes and criminality, especially the organised ones.

86. The applicant, in his counter statements, maintained that the Ministry's observations consisted of general assessments, that the witness statements did not reflect the truth, that the witness statements taken later could not be taken as a basis for detention, and that he had been detained on remand in the absence of strong suspicion of guilt.

B. The Court's Assessment

87. Article 13 of the Constitution, titled "*Restriction of fundamental rights and freedoms*", reads as follows:

> *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality."*

88. Article 19 § 1 and the first sentence of Article 19 § 3 of the Constitution, titled "*Personal liberty and security*", provide as follows:

> *"Everyone has the right to personal liberty and security.*
>
> *…*
>
> *Individuals against whom there is strong evidence of having committed an offence may be arrested by decision of a judge solely for the purposes of preventing escape, or preventing the destruction or alteration of evidence, as well as in other circumstances prescribed by law and necessitating detention."*

89. The applicant's aforementioned allegations should be examined from the standpoint of the right to personal liberty and security under Article 19 § 3 of the Constitution.

1. Applicability

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

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

91. The Court, examining the individual applications concerning the measures taken during the periods when the emergency administrative procedures were in force, specified that it would take into account the protection regime set out in Article 15 of the Constitution with respect to fundamental rights and freedoms (see *Aydın Yavuz and Others*, §§ 187-191). The criminal act imputed to the applicant by the investigation authorities and underlying his detention on remand was his alleged membership of the FETÖ/PDY. The Court considered that the impugned accusation was related to the events leading to the declaration of a state of emergency (see S*elçuk Özdemir* [Plenary], no. 2016/49158, 26 July 2017, § 57; and A*ydın Yavuz and Others*, §§ 237, 238).

92. In this regard, the lawfulness of the applicant's detention on remand will be reviewed under Article 15 of the Constitution. In the course of this examination, it will primarily be ascertained whether the applicant's detention had been in breach of the safeguards enshrined in the Constitution, notably Articles 13 and 19 thereof. In case of any breach, it will be then evaluated whether the criteria laid down in Article 15 of the Constitution justifies it (see *Aydın Yavuz and Others*, §§ 193-195, 242; and S*elçuk Özdemir*, § 58).

2. Admissibility

a. General Principles

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

94. It must be ascertained whether the detention, as an interference with the right to personal liberty and security, complies with the relevant conditions set out in Article 13 of the Constitution, i.e., being prescribed by law, relying on one or several justified reasons provided in the relevant provision of the Constitution, and not being in breach of the principle of proportionality (see *Halas Aslan*, no. 2014/4994, 16 February 2017, §§ 53-54).

95. As set forth in Article 19 § 3 of the Constitution, only those against whom *there is a strong indication of guilt* may be detained on remand. In other words, pre-condition of detention is the presence of a strong indication that the person charged with a criminal offence has committed it. To that end, it is necessary to support an allegation with plausible evidence which can be considered as strong. The nature of the facts which can be considered as plausible evidence is, to a large extent, based on the particular circumstances of the given case (see *Mustafa Ali Balbay*, no. 2012/1272, 4 December 2013, § 72).

96. Besides, one of the aims underlying detention is to proceed with the criminal investigation and/or prosecution by way of confirming or dispelling the suspicions against the suspect (see *Dursun Çiçek*, no. 2012/1108, 16 July 2014, § 87; and *Halas Aslan*, § 76). Therefore, it is not absolutely necessary that all evidence has been collected to a sufficient extent at the time of arrest or detention. In this sense, the facts underlying the criminal charge and thus the detention could not be of the same level with those which would be discussed at the subsequent stages of the criminal proceedings and serve as a basis for conviction (see *Mustafa Ali Balbay*, § 73).

97. On the other hand, all concrete evidence indicating the existence of strong criminal suspicion could not be sufficiently demonstrated in the detention order issued in respect of a suspect or an accused person considered to have involved in the coup attempt or to be in relation with the structure that is the perpetrator of the coup attempt, notably under the circumstances prevailing immediately after the coup attempt. In this sense, in handling the individual applications before it, the Constitutional Court may have access to the relevant investigation files or case-files via the National Judiciary Informatics System ("the UYAP"). Accordingly, in the examination of the individual applications involving detention-related complaints, the information and documents available in the files, access to which is ensured via the UYAP, -notably, the indictments where the contents of such evidence as well as the evidence-related assessments of the investigation authorities are explained thoroughly- are also taken into consideration so as to have a sound and better grasp of the contents of the evidence relied on, cited, or referred to in a detention order. In this regard, the facts which are not indicated in the detention order but included in the investigation file and relied on -in the indictment- as a ground for the charges are taken into account, to the extent available through the UYAP, by the Court in dealing with the individual applications involving the alleged unlawfulness of detention (see *Zafer Özer*, no. 2016/65239, 9 January 2020, § 41).

98. It is evident that this assessment method is a state of necessity for the detention measures applied in the aftermath the coup attempt. Notably, it is undoubtedly difficult to demonstrate in detail all concrete evidence indicating the existence of criminal suspicion in the detention orders issued in respect of those detained immediately after the coup attempt. It should be accordingly considered reasonable that under these circumstances, the strong indications of criminal guilt, which have not been specified at the time of detention, be comprehensively explained and assessed by the investigation authorities at the subsequent stage. In this respect, in the examination of the alleged unlawfulness of the detention measure applied immediately after the coup attempt, not only the facts referred to in the detention order but also those included in the file and generally specified in the indictment as the basis of the criminal charge,

access to which have been ensured through the UYAP, would be taken into consideration (see *Zafer Özer*, § 42).

99. Besides, it is also provided for in Article 19 § 3 of the Constitution that an individual may be placed under pre-trail detention for the purpose of preventing the risks of *absconding* or *removing or tampering with evidence*. As also set out in Article 100 of the Code of Criminal Procedure no. 5271 ("Code no. 5271"), detention may be ordered in cases where the suspect or accused person absconds or hides, or where there are concrete facts which raise the suspicion of absconding, or where the behaviours of the suspect or accused person indicate the existence of a strong suspicion of tampering with evidence or attempting to put an unlawful pressure on witnesses, victims or other individuals. In the relevant Article, the offences regarding which the ground for arrest may be deemed to exist *ipso facto* are enlisted, provided that there exists a strong suspicion of having committed those offenses (see *Halas Aslan*, §§ 58 and 59).

100. It is also set out in Article 13 of the Constitution that the restrictions as to fundamental rights and freedoms cannot fall foul of the "*principle of proportionality*". In this context, one of the issues to be considered is the fact that the detention must be proportionate to the gravity of the imputed offence as well as to the severity of the sanction to be imposed (see *Halas Aslan*, § 72).

101. In each concrete case, it primarily falls to the judicial authorities ordering detention to assess whether there exists a strong indication of criminal guilt, the pre-condition for detention, whether the grounds justifying detention exist, and whether the detention is proportionate. As a matter of fact, the judicial authorities, which have direct access to all parties of the case and the evidence, are better placed than the Constitutional Court in this regard (see *Gülser Yıldırım (2)* [Plenary], no. 2016/40170, 16 November 2017, § 123). However, the exercise of this discretionary power by the judicial authorities is subject to the Court's review which must be conducted especially on the basis of the detention process and the grounds of the detention order, as well as in consideration of the particular circumstances of the given case (see *Erdem Gül and Can Dündar* [Plenary], no. 2015/18567, 25 February 2016, § 79; *Selçuk Özdemir*, § 76; and *Gülser Yıldırım (2)*, § 124).

b. Application of Principles to the Present Case

102. In the present case, it must primarily be ascertained whether the applicant's detention had a legal basis.

103. The applicant was detained on remand pursuant to Article 100 of Code no. 5271 for his alleged membership of a terrorist organisation, namely the FETÖ/PDY, considered to be the perpetrator of the coup attempt, within the scope of an investigation.

104. The applicant claimed that he had been detained in breach of the special investigation procedures and guarantees envisaged for judges and prosecutors in Law no. 2802, and that his detention on remand was therefore unlawful.

105. 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.

106. In this sense, 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 cases of discovery *in flagrante delicto*. These assessments have been based on the statutory provisions whereby the safeguards related to the trial procedure of the Supreme Court members concerned have been introduced. Regarding the membership of an armed terrorist organization, on account of which the members of the Supreme Court shall be detained on remand, the Court –referring to the relevant decisions of the Court of Cassation– stated that it constituted a personal offence and that it was characterised as discovery *in flagrante delicto*. (Regarding the members of the Constitutional Court, see *Alparslan Altan*, §§ 114-129; and *Erdal Tercan* [Plenary], no. 2016/15637, 12 April 2018, §§ 130-146; regarding the members of the Court of Cassation, see *Salih Sönmez*, no. 2016/25431, 28 November 2018, §§ 106-121; *Mehmet Arı*, no.

2016/22732, 10 January 2019, §§ 61-77; and *Ramazan Bayrak*, no. 2016/22901, 7 February 2019, §§ 70-86; and regarding the members of the Council of State, see *Hannan Yılbaşı*, no. 2016/37380, 17 July 2019, §§ 61-63; and *Resul Çomoğlu*, no. 2017/8756, 26 September 2019, §§ 55-65).

107. The Court, in its judgment of *A.B.*, developed its case-law as regards the fact that a case of discovery *in flagrante delicto* may be deemed to have existed in respect of the members of the Supreme Courts placed in pre-trial detention for membership of a terrorist organisation (FETÖ/PDY) shortly after the coup attempt. It was primarily reiterated in the relevant decision that with reference to the pertinent laws and the case-law of the Court of Cassation, membership of a terrorist organisation was found to be a personal offence falling within the jurisdiction of assize courts (see *A.B.* [Plenary], no. 2016/22702, 31 October 2019, § 89). In its examination as to the concept of *in flagrante delicto,* the Court particularly pointed to the fact that the applicant -like other supreme court members- had been arrested, taken into custody and then detained on remand during a period involving the ongoing efforts to supress the coup attempt as well as the severe threat posed by such an attempt to the national security and the public order, and that the investigation authorities, in their requests for detention, and the judge's offices, in their detention orders, had emphasised this situation (see *A.B.*, § 91).

108. The main ground underlying the inferior courts' acknowledgement that there was a case of discovery *in flagrante delicto* in respect of the members 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 on a sufficient factual basis by the Turkish judicial bodies including the Court, the FETÖ/PDY was the mastermind of the coup attempt. Therefore, it is not unfounded to extend the scope of the concept of *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 (see *A.B.*, § 94).

109. The Court, in its judgment of *A.B.*, relying on its assessment within the framework of the facts related to the coup attempt, and having regard

to the Court of Cassation's consideration to the effect that *(continuous) membership of an armed terrorist organisation constituted a case of discovery in flagrante delicto by its very nature*, concluded that the investigation authorities' finding that there was a case of discovery *in flagrante delicto* regarding the membership of an armed terrorist organisation imputed to the applicant was neither devoid of factual and legal basis nor was it arbitrary (see *A.B.*, § 94).

110. In addition, the Court, while examining whether the guarantees arising from the professions of the members of the judiciary other than the supreme court members, who were detained on remand after the coup attempt, constituted a legal impediment to their detention, considered that membership of a terrorist organisation, constituting a ground for detention, was a personal offence and characterised as discovery *in flagrante delicto* (with regard to the judges taking office at the inferior courts, see *Adem Türkel*, no. 2017/632, 23 January 2019, §§ 52-59; and *Erdem Doğan*, no. 2017/25955, 7 March 2019 §§ 50-57; with regard to investigation judges, see *Selim Öztürk*, no. 2017/4834, 8 May2019, §§ 52-59; and with regard to public prosecutors, see *Hasan Hendek*, no. 2016/69748, 29 May 2019, §§ 62-69; and *Uğur Gürses*, no. 2016/16201, 3 July 2019, §§ 62-65).

111. The Court also updated its case-law in the judgment of *Mustafa Özterzi* ([Plenary], no. 2016/14597, 31 October 2019), which stated that members of the judiciary other than the supreme court members, who were detained for membership of an armed terrorist organisation (FETÖ/PDY) immediately after the coup attempt, might be regarded to have been discovered *in flagrante delicto*. The Court stated in the relevant decision: "*Regard being had to the fact that the applicant was arrested and taken into custody in accordance with the arrest warrant issued after the coup attempt, which had started on 15 July 2016 and continued on the next day, had been supressed, and to the fact that he was detained on remand for membership of the FETÖ/PDY found to have been the organisation staging the coup attempt and classified as an armed terrorist organisation by the judicial authorities, the assessments made by the investigation authorities indicating that there was a case of discovery in flagrante delicto regarding the membership of an armed terrorist organisation imputed to the applicant were neither devoid of factual and legal basis nor were they arbitrary* (see *Mustafa Özterzi*, § 94).

112. In addition, judgments of the Assembly of Criminal Chambers of the Court of Cassation indicating that unlike the supreme court members, although there was no case of discovery *in flagrante delicto*, which fell within the jurisdiction of assize court, regarding judges and public prosecutors, there was no requirement for a permission to conduct an investigation into their personal crimes were also referred to in the judgment of *Mustafa Özterzi* (see *Mustafa Özterzi*, § 93; and for one of the relevant judgments of the Court of Cassation, see § 65).

113. 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 had been 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 members of the judiciary detained in the aftermath of the attempted coup is ambiguous.

114. 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.

115. 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.

116. 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.

117. 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.

118. 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.

119. 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 a mere 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 aforementioned framework– should not be regarded as contradicting the place and importance of the judgments of the ECHR in the Turkish legal system.

120. In the light of the foregoing, 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 including the members of the Supreme Courts.

121. Turkish law stipulates a special procedure for investigating the members of the Constitutional Court, the Council of State and the Court of Cassation as well as the elected members of the High Council of Judges and Public Prosecutors ("the HCJP") due to both their professional offences and personal offences, and it contains particular regulations regarding the procedure whereby detention is ordered as a preventive measure. Investigation/prosecution is carried out in accordance with the general provisions only in cases of discovery *in flagrante delictio*, and no special procedure for permission is envisaged in this regard (for detailed assessments in this regard, see *Alparslan Altan*, §§ 117-118 concerning the

members of the Constitutional Court; *Salih Sönmez*, §§ 108-109 concerning the members of the Court of Cassation; and *Resul Çomoğlu*, § 56 concerning the members of the Council of State).

122. As a matter of fact, the Court has considered that membership of an armed terrorist organisation constituted a personal offence on part the supreme court members who were detained immediately after the coup attempt for membership of the FETÖ/PDY that was the structuring behind the said attempt, and that discovery *in flagrante delictio* might be deemed to have existed regarding these persons (for a judgment -issued after the judgment of the ECHR in the case of *Alparslan Altan v. Turkey*- where detailed explanations to this end were made, see *A.B.*, §§ 80-95).

123. Besides, the procedure for investigating and prosecuting the members of the judiciary other than the judges serving at the Supreme Courts as well as other than the elected members of the HCJP (referred to as the Council of Judges and Public Prosecutors (CJP) following the amendment made by Decree Law no. 703 dated 2 July 2018). Following the examination of the provisions enshrined in the relevant law, the procedures for investigating and/or prosecuting respective crimes, and whether a special procedure would be applied regarding the detention of the applicant who had been serving as a judge at the first instance court should be determined.

124. Article 1 of Law no. 2802 provides that it is among the objectives of this law that judges and prosecutors of judicial and administrative courts be subjected to investigation and prosecution for the offences committed in connection with or in the course of their official duties or for their personal offences. In this scope, first, disciplinary sanctions that shall be imposed on judges and prosecutors in case of their failure to act in conformity with their professions and posts are enumerated in Article 62 of Law no. 2802. Besides, it is stipulated in Article 77 § 1 that where it is considered that continuation of profession by a judge or prosecutor undergoing an investigation will impair the proper conduct of the investigation or harm the supremacy and dignity of the judiciary, then he may be temporarily suspended from the office by the HCJP.

125. Provisions regarding the investigation and prosecution processes to be conducted against judges and prosecutors are also set forth under the Seventh Section of the Law, titled "*Investigation and Prosecution*". The first subsection thereof, titled "*Investigation*", contains Articles 82-88; the second subsection, titled "*Prosecution*", contains Articles 89-92; the third subsection, titled "*Personal Offences*", contains Article 93; and the fourth subsection, titled "*Common Provisions*", contains Articles 94-98.

126. In Article 82 thereof, titled "Investigation", the legislator stipulates that the permission of the Ministry of Justice is required (after the adoption of Law no. 6087, permission of the HCJP has been required) for launching an inquiry or investigation against judges and prosecutors for the offences committed in connection with or in the course of their official duties, as well as for their conducts and behaviours not complying with their professions and duties. It is also set forth therein that the Minister of Justice may assign judicial inspectors or a judge or a prosecutor, having more seniority than the suspects, to conduct inquiry and investigation. However, by the adoption of Law no. 6087, inspectors at the HCJP have been granted the authorization and assigned with the duty to research and, if need be, to conduct an inquiry or investigation against judges and prosecutors so as to find out whether they have committed offences in connection with or in the course of their official duties, and whether their conducts and behaviours have complied with the requirements of their profession.

127. It is regulated in Article 83 of the Law that the inspectors are not required to take a prior permission for investigating the issues they have been aware of during inspection or investigation as well as in non-delayable cases; however, they must immediately inform the Ministry (after the adoption of Law no. 6087, the HCJP). Article 84 contains provisions regarding the defence of judges and prosecutors in the course of investigation; Article 85 sets forth the authorities to decide on the requests for detention made during the investigation; Article 86 sets forth the investigation and prosecution authorities to take an action against those who have been involved in the offences committed by judges and prosecutors; and Article 87 contains provisions related to the procedures to be followed after the conclusion of the investigation conducted against judges and prosecutors.

128. Article 88 § 1 of the Law, titled "*Procedure for apprehension and interrogation*", provides that except *in flagrante delicto* circumstances falling under the jurisdiction of assize courts, judges and prosecutors claimed to have committed an offence cannot be apprehended, interrogated or subjected to bodily search and their houses cannot be searched as well; however, the Ministry shall be informed immediately about the situation. Pursuant to Article 88 § 2 thereof, investigation and prosecution processes shall be directly conducted against the law enforcement officers and their commanders, who have acted contrary to the first paragraph, by the authorized public prosecutor's office, in accordance with the general provisions.

129. Article 89, which contains provisions regarding prosecution process, embodies the actions to be taken, if prosecution process is needed to be conducted against judges and prosecutors on account of the offences committed in connection with or in the course of their official duties; Article 90 enumerates the authorities that will conduct the prosecution (the proceedings); Article 91 stipulates the date that will be taken as a basis in determining these authorities; and Article 92 sets forth the provisions regarding appeals against the decisions finding no ground for detention, release or initiation of the final investigation.

130. Third Section of the Law is titled "*Personal Offences*". Pursuant to Article 93 § 1, titled "*Investigation and Prosecution of Personal Offences*", under the Third Section, while the jurisdiction for investigating the personal offences of judges and prosecutors shall be exercised by the public prosecutor's office at the assize court closest to the assize court located within the area of jurisdiction of the relevant judge or prosecutor, and the jurisdiction for opening the final investigation (prosecution) shall be exercised by the assize court located there, these jurisdictions have been granted, respectively, to the provincial chief public prosecutor's office located in the province where the regional court of appeal, to which the court where the relevant person takes office is affiliated, is located and to the assize court located at the same place.

131. It is set forth in Article 94, titled "*cases of discovery in flagrante delictio falling under the jurisdiction of assize court*", under the Fourth Section, titled

"*Common Provisions*", that in cases of discovery *in flargante delictio* falling within the jurisdiction of assize court, the preliminary investigation against judges and prosecutors shall be conducted in accordance with the general provisions; that the preliminary investigation shall be conducted *ex officio* by the authorised public prosecutors; and that the situation shall be notified to the Ministry of Justice without delay.

132. Considering the systematic of Law no. 2802, provisions thereof, as well as the aforementioned explanations together, it is understood that the restrictions set forth in Article 88 are applicable to the offences, committed by judges and prosecutors, in connection with or in the course of their official duties. As a matter of fact, in Articles 82-88 under the first subsection titled "*Investigation*" of the Seventh Section titled "*Investigation and Prosecution*", the legislator has determined the investigation procedure in respect of judges and prosecutors for their profession-related offences, as well as in Articles 89-92 under the Second Section titled "Prosecution", the legislator has determined the procedure to be followed in cases where it is decided that the final investigation will be opened against these persons. The Court of Cassation also has a similar approach to the case.

133. According to the relevant Law, as a rule, judges and prosecutors can be investigated for the offences committed in connection with or in the course of their official duties, 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 (decision to launch the final investigation) of the competent authority.

134. Besides, the provision embodied in Article 88 of Law no. 2802, which provides "*except in flagrante delicto circumstances falling under the jurisdiction of assize courts, judges and prosecutors claimed to have committed an offence cannot be apprehended, interrogated or subjected to bodily search and their houses cannot be searched as well*" cannot be interpreted as prohibiting the investigation or prosecution of judges and prosecutors for offences committed in connection with or in the course of their official duties. As previously indicated by the Constitutional Court, it is commonly acknowledged in contemporary legal systems that judges and prosecutors also have criminal liability if they commit offences. A judge or a prosecutor

may commit offences in connection with their duties. In such cases, judge or prosecutor cannot enjoy impunity just because he is a judge or prosecutor. For this reason, in our legal system, as regards the criminal acts of judges and prosecutors, which they may commit in connection with their duties, special investigation and prosecution procedures as well as the incumbent authorities are stipulated in the Constitution, Law no. 2802 and Law no. 6087 (see *Mustafa Başer and Metin Özçelik*, no. 2015/7908, 20 January 2016, § 159; and *Süleyman Bağrıyanık and Others*, no. 2015/9756, 16 November 2016, § 235).

135. As a matter of fact, in one of its judgments where it examined the lawfulness of detention by the first instance court of the applicants who were chief public prosecutor, acting chief public prosecutor and public prosecutor, the Constitutional Court discovered that Article 88 of Law no. 2802 did not prohibit the imposition of protection measures -including detention on remand- with regard to judges and prosecutors after the inquiry and investigation procedures as to whether or not they had committed offences committed in connection with or in the course of their official duties were concluded and a permission for investigation was granted by the legally authorised bodies. Accordingly, it is unacceptable that where there is no case of discovery *in flagrante delicto*, arrest, search and interrogation procedures as well as detention measures cannot be applied for judges and prosecutors under any circumstances. Otherwise, where there is no case of discovery *in flagrante delicto*, members of the judiciary will not be subjected to investigation for the offences allegedly committed by them and no protection measure will be applied, as well as unexplainable consequences will be borne in a society in which the rule of law has been adopted. Therefore, there is no legal obstacle to the implementation of protection measures, including detention on remand, against judges and prosecutors for the offences related to their duties, provided that the procedural provisions set forth in the relevant law are complied with and a permission for investigation has been granted by the competent authorities (see *Süleyman Bağrıyanık and Others*, §§ 240, 243).

136. On the other hand, there is no statutory provision seeking a permission or a decision given by a competent authority in order for an investigation or prosecution to be conducted against judges and prosecutors

for their personal offences. Neither Law no. 2802 nor Law no. 6087 contains a provision stipulating that permission for an investigation or prosecution shall be granted in respect of the judges and prosecutors alleged to have committed a personal offence. As regards the personal offences of judges and prosecutors, the practices of both Turkish judicial authorities and administrative bodies, especially the HCJP and the Ministry, have always been in this direction. In this context, it should not be ignored that the HCJP's decision regarding the granting of a permission for investigation referred to in the detention order issued against the applicant, does not mean allowing for a criminal investigation to be conducted on account of a personal offence, but rather an examination within the context of disciplinary law. Since the applicant was later dismissed from office pursuant to Decree-law no. 667, it is seen that the disciplinary investigation against him was not completed. In this regard, it should be borne in mind that conducting an investigation merely against members of the supreme courts (Constitutional Court, Court of Cassation, and Council of State) and elected members of the HCJP even if they are charged with a personal offence, is conditioned upon a decision/permission of certain authorities, save for the cases of discovery *in flagrante delicto.*

137. Although it is not stipulated in Article 93 of Law no. 2802 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 discovery *in flagrante delicto*– there is a separate regulation included therein as regards the investigation and prosecution authorities. Accordingly, at the time of the applicant's detention, the chief public prosecutor's office at the assize court closest to the assize court located within the jurisdiction area of the judge or prosecutor concerned was authorised to investigate the personal offences committed by judges and prosecutors; and the said assize court was authorised to conduct the final investigation. However, in accordance with Article 7 of Decree-law no. 680 issued during the state of emergency period, this authority has been granted to the provincial chief public prosecutor's office located in the province where the regional court of appeal, to which the court where the relevant person takes office is affiliated to, is located and to the assize court located at the same place.

138. 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.

139. In this case, 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 official duty has a decisive importance in terms of the lawfulness of his detention.

140. Terrorism is defined in Article 1 of Law no. 3713, which reads*" Terrorism; is any kind of act done by one or more persons belonging to an organization with the aim of changing the characteristics of the Republic as specified in the Constitution, its political, legal, social, secular and economic system, damaging the indivisible unity of the State with its territory and nation, endangering the existence of the Turkish State and Republic, weakening or destroying or seizing the authority of the State, eliminating fundamental rights and freedoms, or damaging the internal and external security of the State, public order or general health by means of using force and violence and by pressure, intimidation, oppression or threat methods".*

141. After emphasizing that the criminal organisation constituted a danger to the public order, public peace and public safety, which underlaid the offence, and that the acts of organising for committing offence were defined as independent types of crime, the Court of Cassation stated "*Those who created this dangerous situation for the first time were the founders of the organisation, those who directed this situation were the directors of the organisation, and those who contributed to the continuation of this danger and its transformation into actions by capitulating to the organisational will were the members of the organisation*".

142. Accordingly, membership of a terrorist organisation, which means to ensure the continuation of the risk posed to the existence, integrity,

order and safety of the state and to the fundamental rights and freedoms of the state and its materialisation through concrete acts by means of using force and violence and by pressure, intimidation, oppression or threat methods, cannot be considered as a duty-related offence for public officials. The Court of Cassation's established case-law also overlaps with this consideration. As a matter of fact, the Court, also referring to the relevant judgments of the Court of Cassation in its judgment *Alparslan Altan*, specified that membership of a terrorist organisation was a personal offence (see *Alparslan Altan*, § 123). In fact, nor did the applicant raise the allegation that the impugned offence was a duty-related offence.

143. In addition, before the coup attempt, criminal investigations and prosecutions had also been carried out against members of the judiciary on account of some activities related to the FETÖ/PDY, and the suspects had been detained on remand during the investigation process within the scope of protection measures. These measures, namely detention on remand, have also been challenged through individual application before the Constitutional Court. In the case of *Mustafa Başer and Metin Özçelik*, in which the lawfulness of the detention of two judges was challenged, the HCJP granted permission for an investigation and, subsequently, for prosecution. However, in the relevant case, investigation and prosecution had been carried out for the offence of professional misconduct, which is undoubtedly a duty-related offence, as well as membership of a terrorist organisation, which is a personal crime. At the outcome of the proceedings, the applicants were convicted of both offences. In addition, the applicants' imputed acts had been investigated by the HCJP under the disciplinary law (see *Mustafa Başer and Metin Özçelik*, §§ 29-48). In the case of *Süleyman Bağrıyanık and Others,* where the detention of public prosecutors was challenged through individual application, it was claimed that the applicants had unlawfully -in accordance with the aims of the terrorist organisation- exercised the authorities granted to them by virtue of their official duties, in addition, disciplinary investigation was conducted against them (see *Süleyman Bağrıyanık and Others*, §§ 51-61; 79-85). Therefore, the subject matters of the aforementioned applications were not similar to those which were subjected to the investigations conducted against the members of judiciary for the offences related to the FETÖ/PDY in the aftermath of the coup attempt.

144. As stated above, 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.

145. In this case, as regards the applicant, who held office 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 discovery *in flagrante delicto*. The existence of a case of discovery *in flagrante delicto* regarding the imputed offence may have been considered as relevant only for determining the jurisdiction *ratione loci* of the public prosecutor's office conducting the investigation and of the magistrate judge ordering the detention. In Turkish law, the jurisdiction *ratione loci* of the investigation and prosecution authorities is not acknowledged as a situation related to public order. As a matter of fact, it is regulated in Code no. 5271 that the alleged lack of jurisdiction can only be raised until a certain stage of the proceedings, and afterwards, the judicial authorities cannot issue a decision on lack of jurisdiction, that the actions taken by a judge or court lacking jurisdiction cannot be deemed null and void merely due to the lack of jurisdiction, and that in non-delayable cases, even if a judge or court has no jurisdiction, they will take necessary actions in their judicial district. That being so, the issues such as which public prosecutor's office conducted the investigation and which magistrate judge issued the detention order have no bearing on the lawfulness of the detention. In fact, there is no difference between the magistrate judges in different places, who have been vested with the authority to order detention, in terms of the tenure of judges as well as the impartiality or independence of the courts, and the said judges are exactly afforded with the same guarantees.

146. In addition, Law no. 2802 cannot be said to deprive the judges and prosecutors from procedural safeguards in case of any personal offence. Pursuant to Article 93 of Law no. 2802, certain judicial authorities shall be authorised to conduct investigation or prosecution against judges

and prosecutors for their personal offences. Accordingly, in the absence of a particular 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. In this regard, even in case of a personal crime, the apprehension, search or interrogation of judges and prosecutors by law enforcement officers in the absence of a decision rendered by judicial bodies (prosecutor's office/judge/court) is prohibited by Law no. 2802. Considering Articles 88 and 93 of Law no. 2802 together, it should be acknowledged that such a restriction, which is also applicable to the cases where a permission for investigation has been granted for duty-related offences, applies to personal offences, as well. Indeed, the fact that certain judicial bodies are authorised to deal with personal offences as per Article 93 of Law no. 2802, and the fact that investigations, despite being subject to general provisions, shall be conducted *ex officio* by the competent public prosecutors even in cases of discovery *in flagrante delictio* as per Article 94 thereof serve the purpose of preventing the application of protection measures against judges and prosecutors by the law enforcement officers.

147. 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 on remand had a legal basis.

148. Prior to a consideration as to whether the applicant's detention on remand, apparently having a legal basis, pursued a legitimate aim and whether it was proportionate, it should be examined *whether there was a strong indication of guilt*, which is a prerequisite for detention.

149. In the present case, it was specified in the detention order issued against the applicant that there had been concrete evidence in the case file demonstrating the existence of a suspicion of guilt; however, the said order contained no explanatory information apart from the coup attempt as well as the decisions of the HCJP.

150. The indictment relied on the applicant's dismissal from his profession in accordance with the decision of the HCJP for having committed the offence of membership of a terrorist organisation, namely

FETÖ/PDY, on his being a member of the Turkish Association of Judges and Prosecutors (YARSAV), on his having made phone calls with persons who were investigated for offences related to the FETÖ/PDY and who were then found to have been ByLock users, and on the witness statements taken during the investigation phase.

151. A.Ç., who was one of the witnesses whose statements had been taken at the investigation stage, indicated that the applicant had lived in the houses affiliated to the FETÖ/PDY for a while; and C.U., who was another witness, stated that the applicant whom he had met while he was a candidate judge was a member of the FETÖ/PDY. C.U. stated at the prosecution stage that the candidate judges linked to the FETÖ PDY had been divided into groups, that he had been in the same group with the applicant, that the applicant had stayed in the houses belonging to this structure during his internship period, and that then they had come together once a year within the scope of the meetings organised by the judges/prosecutors within the structure. Another witness S.K. heard during the prosecution phase stated that he was holding office in private sector as a mathematics teacher, that he was a private brother (*mahrem abi*) responsible for some members of the judiciary, including the applicant, while he was in Malatya, and that he met with these persons periodically.

152. Accordingly, consideration of the aforementioned witness statements as a strong indication of guilt on the part of the applicant was neither unfounded nor arbitrary. As a matter of fact, in the case of *Selçuk Özdemir*, the Court regarded the statements of a number of suspects charged with membership of the FETÖ/PDY, who claimed that the applicant who had been holding office as a judge had connection with the FETÖ/PDY and was a member of the said structure, as a strong indication of guilt.

153. Besides, it should be evaluated whether the applicant's detention, for which the prerequisite of existence of a strong suspicion of guilt was fulfilled, pursued a legitimate aim. In such an evaluation, the general circumstances prevailing at the time when the arrest warrant was issued should not be disregarded.

154. The Court indicated that during the investigations conducted in the aftermath of the coup attempt into the offences related to the said attempt or to the FETÖ/PDY that was the perpetrator of the coup attempt, the protective measures other than detention might have remained insufficient in order to ensure the proper collection of evidence as well as the safe conduct of the investigations. The risks of fleeing taking advantage of the turmoil during this period and tampering with evidence are much more when compared to the offences committed during an ordinary period (see *Aydın Yavuz and Others*, §§ 271, 272; and *Selçuk Özdemir*, §§ 78, 79).

155. In addition, membership of an armed terrorist organisation, underlying the applicant's detention, is among the offences for which heavy sanctions shall be imposed according to the Turkish legal system, and the gravity of the punishment prescribed in the law for the imputed offence is one of the indicators of the risk of fleeing (for considerations in the same vein, see *Hüseyin Burçak,* no. 2014/474, 3 February 2016, § 61; and *Devran Duran* [Plenary], no. 2014/10405, 25 May 2017, § 66). Besides, the imputed offence is among those enumerated in Article 100 § 3 of Code no. 5271, for which "*the ground for detention*" may be deemed as existing (see *Gülser Yıldırım (2)*, § 148).

156. In the present case, the 2nd Magistrate Judge of Van, ordering the applicant's detention, relied on the facts such as the nature of the offence allegedly committed by the applicant, existence of the risk of tampering with the evidence in view of the gravity of the sentence prescribed for the imputed offence, as well as on the fact that the evidence had not been collected yet, that the imputed offence was among the catalogue offences (enumerated in the pertinent law) for which the ground for detention might be deemed as existing, that the detention was a proportionate measure given the severity of the act and the sentence prescribed, and that the conditional bail would remain insufficient.

157. Accordingly, considering together the general circumstances prevailing at the material time, the aforementioned particular circumstances of the case, and the content of the decision issued by the 2nd Magistrate Judge of Van, the grounds for the applicant's detention, such as the risks of tampering with the evidence and fleeing, had factual basis.

158. It should be established whether the applicant's detention amounted to a proportionate measure. In determination of the proportionality of detention in terms of Articles 13 and 19 of the Constitution, all circumstances of the case should be taken into account (see *Gülser Yıldırım (2)*, § 151).

159. First of all, the investigation of terrorist offences poses serious difficulties for the public authorities. Therefore, the right to personal liberty and security should not be interpreted in a way making it extremely difficult for the judicial authorities and security forces to effectively fight against offences -notably organised ones- and guilt (for considerations in the same vein, see *Süleyman Bağrıyanık and Others*, § 214; and *Devran Duran*, § 64). 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 (i.e. confidentiality, cell-type structuring, infiltrating all institutions, attributing holiness to itself, and acting with obedience and dedication), it is obvious that such investigations are much more difficult and complex when compared to other types of criminal investigations (*Aydın Yavuz and Others*, § 350).

160. That being the case, considering the severity of the punishment imposed by the Van 2nd Magistrate Judge 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 and the conditional bail as a measure would not be sufficient, thus the conclusion of the Magistrate Judge was neither arbitrary nor ill-founded.

161. Consequently, the Court has found inadmissible, as being manifestly ill-founded, the alleged unlawfulness of the applicant's detention, since there is apparently no violation in this sense.

162. Accordingly, since the interference with the applicant's right to personal liberty and security was not in contradiction with the safeguards set out in Articles 13 and 19 of the Constitution, there is no need for a further examination as to the criteria laid down in Article 15 of the Constitution.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 4 June 2020 that

A. The alleged violation of the right to personal liberty and security due to the alleged unlawfulness of the applicant's detention on remand be DECLARED INADMISSIBLE as *being manifestly ill-founded*; and

B. The litigation costs be COVERED by the applicant.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

DECISION

M.T.

(Application no. 2018/10424)

4 June 2020

On 4 June 2020, the Plenary of the Constitutional Court found inadmissible the alleged violation of the right to personal liberty and security as being manifestly ill-founded in the individual application lodged by *M.T.* (no. 2018/10424).

THE FACTS

[6-70] 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.

V. EXAMINATION AND GROUNDS

71. The Constitutional Court ("the Court"), at its session of 4 June 2020, examined the application and decided as follows:

A. Alleged Unlawfulness of Custody

1. The Applicant's Allegations

72. The applicant maintained that his right to personal liberty and security, safeguarded by Article 19 of the Constitution, had been violated, stating that he had been taken into custody although the conditions had not been satisfied.

2. The Court's Assessment

73. Ordinary legal remedies must be exhausted in order to lodge an individual application with the Constitutional Court. Individual application to the Constitutional Court is a secondary legal remedy in cases where the alleged violations of rights have not been redressed by inferior courts (see *Ayşe Zıraman and Cennet Yeşilyurt*, no. 2012/403, 26 March 2013, §§ 16, 17).

74. The Constitutional Court –referring to the relevant case-law of the Court of Cassation– has concluded that although the original case

has not been concluded on the date of examination of the individual application concerning the allegations that the custody period prescribed by the law was exceeded, the custody period was not reasonable and the apprehension was unlawful, the action for compensation stipulated in Article 141 of Code no. 5271 was an effective legal remedy that needed to have been exhausted (see *Hikmet Kopar and Others*, §§ 64-72; *Günay Dağ and Others* [Plenary], no. 2013/1631, 17 December 2015, §§ 141-150; and *Mehmet Hasan Altan (2)*, §§ 81-91).

75. Accordingly, it has been concluded that the remedy set forth in Article 141 of Code no. 5271 was an effective legal remedy available to the applicant and that therefore, the individual application lodged without exhausting this ordinary legal remedy was incompatible with the *secondary nature* of the individual application mechanism.

76. For these reasons, this part of the application must be declared inadmissible for *non-exhaustion of legal remedies*.

B. Alleged Unlawfulness of the Applicant's Detention

1. The Applicant's Allegations

77. The applicant maintained that his right to personal liberty and security was violated as his detention was ordered in the absence of a criminal suspicion against him as well as of any concrete substantiating facts or evidence; that nor was there any risk of his tampering with evidence or absconding; and that his detention order and the subsequent decisions issued on his appeal against his detention were unreasoned for containing no examination as to his complaints.

2. The Court's Assessment

78. Article 13 of the Constitution, titled *"Restriction of Fundamental Rights and Freedoms"*, reads as follows:

> *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and*

the requirements of the democratic order of the society and the secular republic and the principle of proportionality."

79. The first paragraph, and the first sentence of the third paragraph, of Article 19 titled *"Personal liberty and security"* read as follows:

"Everyone has the right to personal liberty and security.

…

Individuals against whom there is strong evidence of having committed an offence may be arrested by decision of a judge solely for the purposes of preventing escape, or preventing the destruction or alteration of evidence, as well as in other circumstances prescribed by law and necessitating detention."

80. The applicant's allegations under this heading must be examined from the standpoint of the right to personal liberty and security in the context of Article 19 § 3 of the Constitution.

a. Applicability

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

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

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

82. In examining the individual applications against measures taken during the extraordinary administration procedures, the Constitutional Court is to take into account the protection regime set out in Article 15 of the Constitution with respect to fundamental rights and freedoms (see *Aydın Yavuz and Others*, §§ 187-191). The criminal act imputed to the applicant by the investigation authorities and underlying his detention is his alleged membership of the FETÖ/PDY, stated to be the perpetrator of the coup attempt. According to the Court, the said criminal act is related to the incidents requiring the declaration of state of emergency (see *Selçuk Özdemir*, § 57).

83. In the course of this examination, it would be primarily ascertained whether the applicant's detention was in breach of the safeguards enshrined in the Constitution, notably Articles 13 and 19 thereof. In case of any breach, it would be then assessed whether the criteria laid down in Article 15 of the Constitution justified it (see *Aydın Yavuz and Others*, §§ 193-195 and 242).

b. General Principles

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

85. It must be determined whether the detention, as an interference with the right to personal liberty and security, complies with the relevant conditions set out in Article 13 of the Constitution, i.e., being prescribed by law, relying on one or several justified reasons provided in the relevant provision of the Constitution, and not being in breach of the principle of proportionality (see *Halas Aslan*, no. 2014/4994, 16 February 2017, §§ 53-54).

86. As set forth in Article 19 § 3 of the Constitution, only those against whom *there is a strong indication of guilt* may be detained on remand. In other words, pre-condition of detention is the presence of a strong indication that the person charged with a criminal offence has committed

it. To that end, it is necessary to support an allegation with plausible evidence which can be considered as strong. The nature of the facts which can be considered as plausible evidence is, to a large extent, based on the particular circumstances of the given case (see *Mustafa Ali Balbay*, no. 2012/1272, 4 December 2013, § 72). Besides, one of the aims underlying detention is to proceed with the criminal investigation and/or prosecution by way of confirming or dispelling the suspicions regarding the suspect (see *Dursun Çiçek*, no. 2012/1108, 16 July 2014, § 87; and *Halas Aslan*, § 76). Therefore, it is not absolutely necessary that all evidence has been collected at a sufficient level at the time of arrest or detention. In this sense, the facts underlying the criminal charge and thus the detention could not be of the same level with those which would be discussed at the subsequent stages of the criminal proceedings and serve as a basis for conviction (see *Mustafa Ali Balbay*, § 73).

87. On the other hand, all concrete evidence indicating the existence of strong criminal suspicion could not be sufficiently demonstrated in the detention order issued in respect of a suspect or an accused person considered to have involved in the coup attempt or to be in relation with the structure, the perpetrator of the coup attempt, notably under the circumstances prevailing immediately after the coup attempt. In this sense, in handling the individual applications before it, the Constitutional Court may have access to the relevant investigation files or case-files via the National Judiciary Informatics System ("the UYAP"). Accordingly, in the examination of the individual applications involving detention-related complaints, the information and documents available in the files, access to which is ensured via the UYAP, -notably, the indictments where the contents of such evidence as well as the evidence-related assessments of the investigation authorities are explained thoroughly- are also taken into consideration so as to have a sound and better grasp of the contents of the evidence relied on, cited, or referred to in a detention order. In this regard, the facts which are not indicated in the detention order but included in the investigation file and relied on -in the indictment- as a ground for the charges are taken into account, to the extent available through the UYAP, by the Court in dealing with the individual applications involving the alleged unlawfulness of the detention (see *Zafer Özer*, no. 2016/65239, 9 January 2020, § 41).

88. It is evident that this assessment method is a state of necessity for the detention measures applied in the aftermath the coup attempt. Notably, it is undoubtedly difficult to demonstrate in detail all concrete evidence indicating the existence of criminal suspicion in the detention orders issued in respect of those detained immediately after the coup attempt. It should be accordingly considered reasonable that under these circumstances, the strong indications of criminal guilt, which have not been specified in the time of detention, be comprehensively explained and assessed by the investigation authorities at the subsequent stage. In this respect, in the examination of the alleged unlawfulness of the detention measure applied immediately after the coup attempt, not only the facts referred to in the detention order but also those included in the file and generally specified in the indictment as the basis of the criminal charge, access to which are ensured through the UYAP, would be taken into consideration (see *Zafer Özer*, § 42).

89. Besides, it is also provided for in Article 19 § 3 of the Constitution that an individual may be placed under pre-trail detention for the purpose of preventing the risks of *absconding* or *removing or tampering with evidence*. As also set out in Article 100 of Code no. 5271, detention may be ordered in cases where the suspect or accused person absconds or hides, or where there are concrete facts which raise the suspicion of absconding, or where the behaviours of the suspect or accused person indicate the existence of a strong suspicion of tampering with evidence or attempting to put an unlawful pressure on witnesses, victims or other individuals. In the relevant Article, the offences regarding which the ground for arrest may be deemed to exist *ipso facto* are enlisted, provided that there exists a strong suspicion of having committed those offenses (see *Halas Aslan*, §§ 58 and 59).

90. It is also set out in Article 13 of the Constitution that the restrictions as to fundamental rights and freedoms cannot be contrary to the "principle of proportionality". In this context, one of the issues to be considered is the fact that the detention must be proportionate to the significance of the imputed offence as well as to the severity of the sanction to be imposed (see *Halas Aslan*, § 72).

91. In each concrete case, it primarily falls to the judicial authorities ordering detention to assess whether there exists a strong indication

of criminal guilt, the pre-condition for detention, whether the grounds justifying detention exist, and whether the detention was proportionate. As a matter of fact, the judicial authorities which have direct access to all parties of the case and the evidence are in a better position than the Constitutional Court in this respect. However, the exercise of this discretionary power by the judicial authorities is subject to the Court's review which must be conducted especially on the basis of the detention process and the grounds of the detention order, as well as in consideration of the particular circumstances of the given case (see *Gülser Yıldırım (2)* [Plenary], no. 2016/40170, 16 November 2017, §§ 123 and 124).

c. Application of Principles to the Present Case

92. The applicant was detained on remand in the aftermath of the coup attempt, pursuant to Article 100 of Code no. 5271, for his alleged membership of a terrorist organisation, namely the FETÖ/PDY, considered to be the perpetrator of the attempt, within the scope of the investigation conducted into the BAKİAD, the association considered to have a link with this organisation. It thus appears that the applicant's detention had a legal basis.

93. It must be then assessed whether there existed *a strong indication of criminal guilt*, the pre-condition of detention, before proceeding with the examination as to the questions whether the applicant's detention, revealed to have a legal basis, pursued a legitimate aim and was proportionate.

94. During the police interrogation, the applicant denied the accusations against him related to the FETÖ/PDY and also maintained that he was not a user of the ByLock (see § 41 above). In the detention order issued in respect of the suspects including the applicant, it is stated that the concrete evidence demonstrating the existence of strong criminal suspicion of membership of the said terrorist organisation is available in the case-file, and in this sense, a general reference is made to some pieces of evidence included therein without making any distinction based on each individual. The magistrate judge ordering their detention relied on, *inter alia*, the documents on the activities and money transfers performed by the BAKİAD, the report issued by the MASAK, the communication records indicating phone conversations, the account activities before the

Bank Asya, as well as the ByLock inquiry results. The ByLock program was qualified by the magistrate judge as the communication network of the FETÖ/PDY (see § 42 above). Also in the decision on the dismissal of the challenge to the detention order, it is generally indicated with a reference to the detention order that there exists concrete evidence demonstrating the existence of the strong criminal suspicion against the suspects including the applicant (see § 43 above).

95. In the police report and indictment issued with respect to the applicant, the authorities relied as the evidence indicating that the applicant committed the imputed offence (membership of a terrorist organisation) on the applicant's use of the ByLock stated to be used for ensuring communication among the FETÖ/PDY members, his serving as an accountant in the Board of Directors of the BAKİAD -the association considered to have a link with the FETÖ/PDY- in 2009-2011 and 2015, as well as on the MASAK report concerning the money transfers between him and the other suspects of the same investigation (see §§ 44 and 46). It is stated, with respect to the ByLock program revealed to be used by the applicant, in the indictment that it is the communication network of the FETÖ/PDY and was developed by this organisation upon the instruction of its leader, Fetullah GÜLEN; and that given the features of the ByLock program, those using it are considered to be in relation with this organisation (see § 47 above).

96. Accordingly, the most significant basis of the criminal charge against the applicant and thus his detention is the determination that he was using the ByLock program. In this sense, an assessment as to the ByLock program must be primarily made during the examination as to the alleged unlawfulness of detention, with a view to ascertaining whether there was a strong indication of criminal guilt in respect of the applicant.

97. In its judgment in the case of *Aydın Yavuz and Others*, the Constitutional Court in examining the alleged unlawfulness of the applicants' detention made certain findings and assessments concerning the ByLock program, as two applicants were revealed to be its users, mainly based on the judgment rendered by the 16th Criminal Chamber of the Court of Cassation in its capacity as a first instance court (see *Aydın*

Yavuz and Others, § 106). In the light of these findings and assessments on the features of the ByLock program, the Court noted that the individuals' use, and download on their electronic/mobile devices, of this program might be considered by the investigation authorities as a strong indication of their connection with the FETÖ/PDY. In this judgment, taking into consideration the features of the ByLock program, the Court found neither unfounded nor arbitrary the acceptance -by the investigation authorities and the courts ordering detention- of the use of this program by the persons accused of being a member of the FETÖ/PDY as a *strong indication* of criminal guilt, in consideration of the particular circumstances of the given case (see *Aydın Yavuz and Others*, § 267).

98. Besides, following the judgment in the case of *Aydın Yavuz and Others*, the public authorities notably the judicial bodies continued to make determinations and assessments as to the features and the use of ByLock. In this sense, the Constitutional Court has found it necessary to re-evaluate its relevant case-law by taking into consideration such determinations and assessments.

99. In this sense, the nature of the ByLock application, as well as the way how it became known to investigation authorities must be taken into consideration. In the course of the period during which the investigation authorities and the public authorities started to perceive the FETÖ/PDY's staffing within the public institutions 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 MİT also conducted inquiries and inspections, within the boundaries of its own field of work, into the FETÖ/PDY's activities. As a matter of fact, it is laid down in Article 4 § 1 (a) of Law no. 2937 that the MİT is liable to create state-wide national security intelligence in respect of the existing and probable activities, performed at home and abroad, against the territorial integrity, existence, independence, safety, constitutional order and national power of the Republic of Turkey, as well as to report this intelligence to the relevant institutions (see § 63 above).

100. During these inspections and inquiries conducted by the MİT, 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 the ByLock application was in contact. These findings were subject to detailed technical examinations. The inquiries and inspections conducted into this application by the MİT within its own field of work are not in the form of a judicial investigation. In Article 4 § 1 (i) of Law no. 2937, it is set forth that the MİT is empowered to gather, record and analyse information, documents, news and data on counter-terrorism issues by use of any kind of procedures, means and systems of technical and human intelligence and to report the intelligence created to the relevant institutions (see § 63 above).

101. It is set forth in Article 6 of the same Law that in performing its duties, the MİT may apply clandestine working procedures, principles and methods as well as collect data on foreign intelligence, national defence, terrorism, international offences and cyber security which are conveyed through telecommunication channels (see § 64 above). It thus appears that the MİT is empowered through this Law to collect information and data on relevant persons and groups by technical means as well as to analyse these information and data, with a view to revealing the terrorist activities in advance, without being performed, for the purposes of maintaining the constitutional order and national safety of the country.

102. As a matter of fact, it is inevitable, in democratic societies for the protection of fundamental rights and freedoms, to need intelligence agencies for 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. Threats against democratic constitutional order may be identified, and precautions may be taken against these threats through information and data obtained by intelligence agencies. In this regard, the MİT is vested, by Articles 4 and 6 of Law no. 2937, with the powers to obtain and analyse information, documents and all other data concerning terrorist offences, which are transmitted through telecommunication channels, by using any kind of intelligence methods, to acquire any computer data available abroad, as well as to report them to the relevant institutions.

103. The organisation of, and activities performed by, the FETÖ/PDY have been a subject of social debate for a long time, and notably in the aftermath of 2013, the investigation authorities and the public authorities started to consider this structure as a threat to national safety (see §§ 9 and 10 above). In this regard, notably the 17-25 December investigations and the stopping of MİT trucks are, *inter alia*, the basic grounds of the conclusion reached by the investigation authorities and the judicial bodies to the effect that the activities of this structure have been intended for overthrowing the Government (see §§ 12 and 13 above). It is further indicated in several investigation/prosecution files that many cases filed/conducted by judicial members, who were considered to have a link with this structure, have been also intended for ensuring or increasing its efficiency within public institutions, notably at the TAF, as well as within different field of the civil society (see § 11 above). During such a period, the public authorities have, on one hand, issued decisions and carried out practices revealing the illegal aspect of the FETÖ/PDY and taken certain measures against the organisation on the other (see §§ 15 and 16 above). The coup attempt of 15 July demonstrated how great the threat posed by the FETÖ/PDY to national security was and how it turned into a severe risk against the existence and integrity of the nation, despite the certain measures taken prior thereto (see, for detailed explanations and assessments, *Aydın Yavuz and Others*, §§ 12-25; and 212-221).

104. It is not for the Constitutional Court to review or decide on the lawfulness or expediency of the activities performed by the MİT within its own field of work. In this sense, the subject-matter of the present application is not the performance of intelligence activities by the State's intelligence agencies considering that the threat posed by FETÖ/PDY to national security turned into an *imminent* threat.

105. The MİT delivered to judicial/investigation authorities (the Ankara Chief Public Prosecutor's Office) the information on the FETÖ/PDY terrorist organisation of which it had become aware (the ByLock program) while performing its duties under Articles 4 and 6 of Law no. 2937. This act -whereby the MİT merely informed the competent judicial authorities of the concrete information which was related to an issue falling into the scope of its own field of work (counter-terrorism) and which was found

out on a legal basis- cannot be construed to the effect that the MİT, an intelligence agency, had engaged in *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 an inquiry conducted for the purpose of collecting 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.

106. Besides, it must be borne in mind that the Ankara 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 a program which was considered to be the covered communication means used by the members and heads of the FETÖ/PDY terrorist organisation. The MİT's notification 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 -thereby revealing the material truth- does not render them unlawful merely on account of the nature of the notifying authority, namely the MİT.

107. It is undoubtedly for the judicial authorities to conduct necessary inquiries, examinations and assessments with respect to the authenticity or reliability of digital materials submitted by the MİT. As a matter of fact, the inspection and examination on the digital data concerning the ByLock program submitted to the investigation authorities by the MİT were conducted by the investigation authorities pursuant to the decisions issued by the competent/incumbent magistrate judges in accordance with Article 134 of Code no. 5271. At the end of these inspections and examinations carried out by the persons assigned by the judicial authorities notably the relevant law-enforcement units, these data were accepted as evidence during the investigation/prosecution stages.

108. It has been observed that the challenges and complaints raised by those who were under investigation and/or prosecution due to the FETÖ/PDY-related offences against their alleged use of the ByLock program were also taken into consideration by the investigation authorities and

judicial bodies; and to that end, certain technical inquiries and inspections were performed with a view to revealing whether these persons had indeed used this program. In the judgments of the Court of Cassation and the regional courts of appeal, the principles as to the way in which these inquiries and inspections would be conducted and on the basis of which findings, the relevant persons would be considered to have used the ByLock program (for a reference to some of these judgments, see *Ferhat Kara*, §§ 91-104). Therefore, it cannot be said that the facts revealed regarding the ByLock program, as in the form relied on by the investigation authorities or judicial bodies for the criminal charge in question, were merely intelligence findings which were devoid of evidential value (for comprehensive explanations on the nature, interpretation and matching of the ByLock data, see *Ferhat Kara*, §§ 58-67).

109. According to the judicial and technical reports as well as the Court of Cassation's judgments, an organisation member is to be informed, by another member of the organisation, of the existence of ByLock application, its organisational significance and confidentiality, how it is downloaded and used, and how a friend is added to get in contact. As also indicated in the inquiries conducted by the judicial units, the ByLock program does not include any sections such as user manual, frequently asked questions and feedbacks. Therefore, any person -who has no relation with the organisation but has downloaded the 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 other member of the organisation. In the judicial processes, not download of the impugned application, but signing up to it and its use for organisational purposes were relied on. As a matter of fact, according to the findings of the judicial authorities, no investigation was conducted against individuals for merely having downloaded the ByLock application on their devices. Nevertheless, in case of any allegation to the contrary, the judicial authorities conducted inquiries in this respect (see *Ferhat Kara*, § 160).

110. On the other hand, in assessing whether the use of ByLock program constitute a strong indication for the offences related to the FETÖ/PDY organisation, the nature and features of the application as well as the way in which the FETÖ/PDY has organised must be considered as a whole.

Besides, the transcriptions, by the investigation authorities or judicial bodies, of the contents of communication through this program and the facts indicated in the statements of the certain persons (suspect/accused person) revealed to use the said program must also be borne in mind. In this scope, the following conclusions may be reached:

i. It is indicated in several court decisions that the FETÖ/PDY, an organisation based on confidentiality, has developed strong cryptographic programs to use for organisational communication so as not to be disclosed; and that among these program, the ByLock is the main one used by the organisation for the prevention of the identification of its users and ensuring confidential communication.

ii. The fact that ByLock, a program designed to ensure communication via internet, is generally downloaded manually (through external hard drive, memory cards and Bluetooth) by the FETÖ/PDY members on the electronic/mobile devices of the other persons having a relation with the organisation, which is quite different from the other programs of similar nature in terms of installation process, demonstrates that the program was developed so as to prevent the transcription of the confidential communication concerning the organisational activities. This was also specified in the messages sent through the ByLock, as well as in the suspects' statements.

iii. The absence of any initiative to promote the ByLock program as well as of any effort to increase the number of its users, and the fact that the program was known by the Turkish people or the foreigners before the coup attempt of 15 July indicate that it was not designated in the pursuance of a commercial purpose. These facts are consistent with the assessments to the effect that the ByLock was developed to be used by a certain -clandestine- group of users. In this sense, it is also noted that its use has become widespread within the organisation in progress of time.

iv. The extraordinary security measures taken to ensure confidentiality of the ByLock program points to the fact that the program was not developed for the purpose of providing an ordinary communication service. In this sense, it is remarkable that the ByLock operates through a server with an IP address abroad, and the server manager also leased 8 different IP

addresses abroad in order to hamper the identification of its users; and that these IP addresses are used with the various versions of the ByLock application. The payments of these leasing processes are paid through methods based on *anonymity*, and the contact information or any reference information on the previous works of the person who has developed and put into service the application is not available, both of which may be regarded as the measures intended for hampering the identification of the server manager. Accordingly, these findings on the installation of the ByLock may be said to comply with the working procedures and methods of the FETÖ/PDY, a structure organised in several countries along with Turkey and based on confidentiality.

v. The findings on the use of ByLock also reveal that this application was developed for the use of a certain group under strict control and inspection and with a high degree of confidentiality. As a matter of fact, for the use of the ByLock application, its download on the phone or electronic/mobile devices is not sufficient. To that end, a username/code and password are created and a dedicated strong cryptographic key, which is created by random hand movements on the phone, is determined. This information is then conveyed to the application server in an encrypted manner. The requirement that the users from Turkey access to the program via VPN -in order to conceal their identities and communication-, as well as unlike global and commercial applications, seeking no information specific to the user and requiring no verification process while signing up also aim at ensuring confidentiality both for the program itself and its users. These facts are also consistent with, to a significant extent, the FETÖ/PDY's ideology based on confidentiality in its activities and making the lives of its members subject to a strict control and monitoring in all aspects.

vi. The measures taken, in the designation process of the ByLock application, to prevent, in every case, the disclosure of the communication through it also demonstrate that the application is not intended for meeting an ordinary communication need, but rather for ensuring private and confidential communication. Accordingly, even if the users do not delete or forget to delete any data, the system automatically deletes the relevant data upon a particular time without the need for any manual operation on the device. This function prevents access to communication

made through the program even if the device with ByLock application has been seized. These installation and operation features correspond to the FETÖ/PDY's objective to perform its activities with a high degree of confidentiality under all circumstances.

vii. Although it has organised and engaged in activities in many countries, the FETÖ/PDY is a Turkey-based structure. Its members are mainly the Turkish citizens or the Turks living abroad. In this sense, the ByLock is a program designed for those living in Turkey or the Turks abroad. This fact is also substantiated by the findings that the source codes of the system include Turkish expressions; that the usernames, group names and decrypted passwords within the program are mainly consisted of Turkish expressions; that the contents of transcribed messages sent/received through the ByLock are almost all in Turkish; and that almost all of the searches with respect to the application through search engines have been made from Turkey.

viii. The operation features of the ByLock are designed completely in consistency with the FETÖ/PDY's structuring model. In this sense, two ByLock users may engage in communication only when both of them add each other's username and/or user-code. The ByLock program does not allow its users to automatically get in contact through it with those in their phonebooks. Thereby, contact of the users with any other user is even under the control of the system. It therefore appears that the operation of the ByLock application is in accordance with the cell-type structure of the organisation.

ix. ByLock has been designed to ensure communication within the organisation without the need for any other means for communication. In this context, this application enables encrypted instant messaging, e-mail sending, intra-group messaging, voice calls, transmission of videos or documents. As the users involve in communication, notably of organisational nature, only through the ByLock server, the server manager is thereby enabled to check and control the groups and the contents of the communication within the program. Regard being had also to the fact that the server and communication data are stored in the database through encryption, it appears that such a practice complies with the FETÖ/PDY's method to continuously check and control its members.

x. There are also findings to the effect that the ByLock program is primarily designed by the FETÖ/PDY to ensure organisational communication of its own members. In this sense, it has been observed that the users prefer *code names* assigned to them within the organisation, instead of their real names, in the list of *friends* and contents of the messages. One of the basic characteristics of the FETÖ/PDY is the use of *code names* by its members in order to ensure confidentiality. Besides, names assigned to the groups within the application comply with the FETÖ/PDY's structuring method, activities and communication jargon.

xi. The findings as to the certain users within the ByLock database also reveal the link between the program and the FETÖ/PDY. In this scope, findings have been obtained to the effect that a significant part of the first 100 users in the database of the ByLock servers have relation with the FETÖ/PDY. It has been established that many persons considered to take part within the organisational structure in the security organisation and judiciary and/or to have involved in organisational activities are the ByLock users.

xii. A significant part of the transcribed contents of the communication ensured through the ByLock is pertaining to the organisational contacts and activities of the FETÖ/PDY members. In this sense, it has been observed that the following organisational messages were sent through the ByLock application: dissemination of instructions and thoughts of Fethullah Gülen; giving notice of the measures to be taken by the FETÖ/PDY members in case of operations to be held by the law-enforcement units against them, as well as of the steps to be subsequently taken; ensuring the release of suspects or accused persons, by certain judges and prosecutors, within the scope of the investigations and prosecutions conducted into the FETÖ/PDY; blacklisting of those who have expressed unfavourable opinions, or who have struggled, against the FETÖ/PDY in the public institutions; informing the members that if it is disclosed, the use of ByLock communication system would be discontinued, and alternative programs would be used instead; and preparation of legal texts or alternative scenarios which would be used in the defence of the organisation members.

xiii. The FETÖ/PDY is a terrorist organisation, which has organised clandestinely within the existing administrative system with a view to taking over the constitutional institutions of the State for re-shaping the State, society and citizens in accordance with its ideology and for managing the economy and social and political life through an oligarchic group. The judicial authorities considered the operations such as the *17-25 December investigations* and stopping of the MİT trucks, as well as several other cases known to the public, as the activities performed by the judicial members and law-enforcement officers having a link with the FETÖ/PDY in pursuance of the organisational purposes. As a matter of fact, 15 July, when the coup attempt was staged, is the day when this purpose sought to be achieved by the organisation was put into the action in the most brutal way and with full reality. In this sense, the expressions as to how the Government would be overthrown, how the judicial members and security units having a relation with the organisation would take role in this process, how the high-ranking public officials having no relation/connection with the FETÖ/PDY would be forced to resign, and how the media organs and civil society would be taken under control, which are used in the messages sent/received by the FETÖ/PDY members through ByLock, may be said to reveal the link between the use of this program and the FETÖ/PDY.

xiv. Many persons who were under investigation/prosecution on account of any FETÖ-PDY-related offence provided information about the ByLock program. In their statements, the suspects/accused persons have noted a) one of the measures taken by the FETÖ/PDY for confidentiality is the ByLock application; b) the use of ByLock dates back to the period following *17-25 December investigations*, and the FETÖ/PDY members were asked by the organisation heads to use the ByLock program by March 2014; c) the FETÖ/PDY heads told the organisation members that ByLock was a safe application developed by the organisation itself and used only by and among the organisation members; d) the organisation members downloaded the ByLock on the mobile phones, tablets or computers of one another via internet or Bluetooth; e) in downloading ByLock on mobile phones, other programs, such as phone reset and note taking applications, were also downloaded so as to ensure the deletion of the data available

in the ByLock database in case of a police operation, and in case of such an operation, the organisation members were informed of how these applications would be used; f) the heads of the organisation advised the ByLock users to use the program with mobile phones with no SIM card, to subscribe for Wi-Fi service in the name of any other person, and to get connect to the program from internet cafes or workplaces ensuring public wi-fi access; g) the program was primarily put at the disposal of military officers, security organisation staff, judges-prosecutors or the courthouse staff and subsequently provided for the use of civilians; h) the aim pursued in using the ByLock program was to avoid disclosure and to ensure confidentiality within the organisation, and accordingly, the organisational issues were discussed and shared through it; i) it was used for ensuring organisational communication, making citation to Fetullah Gülen's conversation notes and ensuring communication by and among the organisation members; j) at the outset, merely the messages concerning the issues said to be classified were sent/received through ByLock, but subsequently any kind of messages were sent/received through this program; k) the organisation members were instructed to delete ByLock and start to use *Eagle* application in the event that ByLock appeared in the visual media; and l) ByLock had remained in use until the end of January 2016 (for the relevant statements, see *Ferhat Kara*, §§ 41, 56).

111. On the other hand, a significant part of the persons detained on account of the FETÖ/PDY-related offences in the aftermath of the coup attempt lodged an individual application with the Constitutional Court. In examining the alleged unlawfulness of the applicants' detention in thousands of such cases, the Court has, with a reference to its judgment in the case of *Aydın Yavuz and Others*, concluded that in cases where the applicants have been proven to be a ByLock user, the investigation authorities or the courts ordering detention could consider the use of this program as *a strong indication of criminal guilt*. Within this framework, it has been observed that persons from almost all professions and all sections of the society were revealed to be a ByLock User (for some of these persons in respect of whom the Plenary or the Section rendered a judgment, see *Salih Sönmez*, no. 2016/25431, 28 November 2018, § 125 and *Ramazan Bayrak*, no. 2016/22901, 7 February 2019, § 90 as regards the applicants taking office as a member at the Court of Cassation;

see *Resul Çomoğlu*, no. 2017/8756, 26 September 2019, § 69 as regards the applicant taking office as a member at the Council of State; see *Selçuk Özdemir*, § 74, *Burhan Yaz*, no. 2016/67047, 11 September 2019, § 65, *Selim Öztürk*, no. 2017/4834, 8 May 2019, § 63, *Recayi Demir*, no. 2016/28560, 26 September 2019, § 76, *Tarık Kavak*, no. 2016/22177, 26 September 2019, § 42, *Selahattin Kayaalp*, no. 2016/77848, 26 September 2019, § 50, *Osman Berk*, no. 2017/12608, 11 December 2019, § 50, *A.E.S.*, no. 2017/13568, 12 February 2020, § 51, *Yavuz Güllü*, no. 2017/5933, 9 January 2020, § 54; *Raşit Hünal*, no. 2017/26943, 27 February 2020, § 54, *Numan Acar*, no. 2016/66486, 26 February 2020, § 43, *Şevki Metin Aydın*, no. 2017/14372, 26 February 2020, § 56, *Şenol Coşkun*, no. 2017/10093, 11 March 2020, § 66 as regards the applicants taking office as a judge at the judicial or administrative courts; see *Ufuk Yeşil*, no. 2016/21926, 17 April 2019, § 53, *Şener Gülmedi*, no. 2016/48072, 18 April 2019, § 56, *Mutlu Bulut*, no. 2017/20749, 26 September 2019, § 73 as regards the applicants taking office as a public prosecutor; see *Mustafa İnce*, no. 2016/50467, 3 April 2019, § 43, *Emrullah Tayıpoğlu*, no. 2017/21511, 4 April 2018, § 66, and *İsmail Şahan*, no. 2016/54509, 28 November 2019, §§ 62, 63 as regards the applicants taking office at the security organisation; see *Yavuz Korucu*, no. 2017/2324, 27 November 2019, § 42 as regards the applicant, a research assistant in a university; see *Atıf Duran*, no. 2016/6056, 17 April 2019, § 42, *Cengiz Türkmen*, no. 2016/43843, 3 July 2019, § 53, and *Muammer Koçan*, no. 2016/56282, 26 September 2019, § 79 as regards the applicants serving as a teacher; see *İsmail Solmaz*, no. 2017/15251, 12 February 2020, § 58 as regards the applicant taking office as a municipality officer; see *Emre Ayhan*, no. 2016/80704, 13 February 2020, § 79 as regards the applicant serving as a doctor; see *Neslihan Aksakal*, no. 2016/42456, 26 December 2017, § 57 as regards the applicant taking office as a banking expert; see *Mehmet Bilal Çolak*, no. 2017/25971, 30 October 2018,§ 62 as regards the applicant, a producer; see *Ahmet Karakaş*, no. 2017/6293, 28 November 2018, § 61 as regards the applicant, a speaker; see *Ali Ahmet Böken*, no. 2017/25973, 12 December 2018, § 51 as regards the applicant holding office as the head of news department; see *Vahit Yazgan*, no. 2016/65902, 15 November 2018, § 58, *Özcan Güney*, no. 2017/20709, 15 November 2018, § 66, *Ayşenur Parıldak*, no. 2017/15375, 28 November 2018, § 58, and *Bayram Kaya*, no. 2017/26981, 28 November 2018, § 56 as regards the applicants, a journalist).

112. In this sense, it may be said that the use of ByLock program, which was -according to the judicial bodies- designated by the FETÖ/PDY to ensure organisational communication, by persons from various professions in almost all platforms of the public and civil sectors is also consistent with the structuring way of this organisation. As a matter of fact, the FETÖ/PDY is a structure that was organised -prior to the coup attempt- in almost all public institutions notably the judicial bodies, civil administration units, security organisation and the Turkish Armed Forces. Thus, during the state of emergency declared in the aftermath of the coup attempt, tens of thousands of public officers serving at very different units/positions including the legislative organ and judicial bodies as well as thousands of judicial members were suspended or dismissed from public office for having a link with the FETÖ/PDY. Besides, it is known that this structure has organised in almost all sections of the civil society. In this sense, several institutions operating in different sectors were closed down for being in relation or in connection with this organisation (for detailed information see *Aydın Yavuz and Others*, §§ 56-66).

113. In addition, in the above-mentioned judgments of the Court, there are other facts indicating the organisational relation of a significant part of the applicants in respect of whom there was a strong indication of having committed a FETÖ/PDY-related offence for being a ByLock user, and the Court also took into consideration these facts (see *Selçuk Özdemir*, § 75; *Burhan Yaz*, § 63; *Selim Öztürk*, § 64; *Recayi Demir*, § 77; *Tarık Kavak*, § 42; *Selahattin Kayaalp*, § 51; *Osman Berk*, § 51; *Salih Sönmez*, § 126; *Ramazan Bayrak*, § 91; *Ufuk Yeşil*, § 54; *Şener Gülmedi*, § 57; *Mutlu Bulut*, § 74; *Atıf Duran*, § 42; *Cengiz Türkmen*, §§ 54, 55;*Ali Ahmet Böken*, § 52, *Ayşenur Parıldak*, § 59; *Muammer Koçan*, §§ 79, 80; *Resul Çomoğlu*, §§ 69-71; *İsmail Şahan*, §§ 62, 63; *Yavuz Güllü*, §§ 54, 55; *Raşit Hünal*, § 55; and *İsmail Solmaz*, § 59). In this regard, it must be borne in mind that there are other facts and available evidence in support of the conclusion reached by the investigation authorities and judicial bodies to the effect that the use of ByLock is an act falling under the scope of the FETÖ/PDY's organisational activities.

114. Regard being had to the above-mentioned facts and assessments as a whole, it may be said that the judicial bodies' assessments to the effect that the ByLock communication system is indeed a program -under the

guise of a global application- designated exclusively for organisational communication among the FETÖ/PDY members and that the organisational communication has been ensured with great confidentiality through this program are based on a very strong factual basis and material/technical data. Therefore, the qualification of the ByLock use as an organisational activity cannot be considered to be unfounded or arbitrary.

115. Besides, as also noted in the Court of Cassation's judgments, it is possible to ascertain with legal certainty whether the given persons used the ByLock program. In this sense, it is possible to determine the date of connection to the ByLock communication system, the IP address accessing to the system, the number of contacts between the given dates, the persons who were communicated with, as well as the content thereof (for a judgment of the Court of Cassation in this respect, see *Ferhat Kara*, § 94). It is stated in several supreme courts' judgments, which have become an established case-law in the Turkish law, that the ByLock communication system is a network designed for the members of the FETÖ/PDY and used exclusively by certain members of this terrorist organisation; and that therefore, the determination, on the basis of technical data which would lead to a definite conclusion without any suspicion, that the relevant person has become a part of this network in line with the organisational instruction and used it for ensuring confidential communication is accepted as an evidence demonstrating the person's relation with the organisation (for a citation from these judgments, see *Ferhat Kara*, §§ 92-103).

116. Consequently, the Court has found no reason to depart from the assessments and the conclusion reached in its *Aydın Yavuz and Others* judgment, in consideration of several facts such as the findings of the law-enforcement units and public authorities -which are also accepted by the judicial bodies- with respect to the designation of the ByLock application, the way and method of its use, encryption techniques employed, nature of the users and groups names within the application and the content of the communication ensured through it; the complete consistency between the information and documents reached concerning, and the features of, the ByLock and the way in which FETÖ/PDY got organised; the statements of certain ByLock users; the existence of other facts and evidence demonstrating that a significant part of the

persons revealed to have used the ByLock program has a relation with the FETÖ/PDY; as well as the fact that the judicial authorities have made examinations and inquiries so as to ascertain with legal certainty whether the given persons used the program.

117. Accordingly, the use of ByLock program or its download on electronic/mobile devices may be considered as an indication of a relation/link with the FETÖ/PDY. The degree of such indication may vary by every concrete case, depending on the factors such as whether this program has been actually used by the individual concerned, the manner and frequency of its use, the position of, and importance attached to, the contacted persons within the FETÖ/PDY, and the content of messages communicated via this program (see *Aydın Yavuz and Others*, § 267). It may be said that these considerations are important also for the determination of the degree and extent of the relation between the given person and the FETÖ/PDY. This is indeed a requisite of the case-law to the effect that *the facts which raise a suspicion need not be of the same level as those to be discussed at the subsequent stages of the criminal proceedings and necessary to justify a conviction*, which is cited in many judgments of the Court and is considered as an established examination and assessment criterion also by the ECHR (for the Court's case-law, see *Mustafa Ali Balbay*, § 73; and for the ECHR's approach, see § 69).

118. In this regard, in the present case, the investigation authorities' and the relevant courts' assessment that the use of ByLock, a communication network designed by the FETÖ/PDY for ensuring organisational communication, by the applicant charged with being a member of this organisation constitutes a *strong indication* of criminal guilt cannot be considered as unfounded or arbitrary, given the features of the said program.

119. Finally, the applicant -who was revealed, as noted in the inferior court's conviction decision, to have connected to the ByLock for 714 times in total between 1 September 2014 and 30 December 2014 via his mobile phone on the basis of the BTK's data (see § 55 above)- claimed neither before the investigation authorities or judicial bodies nor before the Court in his individual application that he had downloaded the ByLock through open sources and used it for purposes other than an organisational framework. Therefore, the Court has not found it necessary to conduct any further

examination or assessment on this matter other than the explanations given above (see § 109 above).

120. Besides, the other facts taken a basis by the investigation authorities for the criminal charge against the applicant have not been subject to any further assessment as the applicant's use of ByLock is considered as a strong indication of criminal guilt. In this respect, it should be taken into consideration that nor did the inferior court consider these facts as the sole decisive evidence for the existence of an organisational relation between the applicant and the FETÖ/PDY, but considered merely his taking office in the board of directors of the BAKİAD as a supportive fact (see §§ 56 and 57 above).

121. However, it must be assessed whether the applicant's detention had a legitimate aim. In such an assessment, the general conditions prevailing at the time of detention must be taken into account.

122. Considering the fear atmosphere created by the severe incidents that occurred during the coup attempt, the complexity of the structure of the FETÖ/PDY that is regarded as the perpetrator of the coup attempt and the danger posed by this organisation, orchestrated criminal or violent acts committed by thousands of FETÖ/PDY members in an organised manner, the necessity to immediately launch investigations against thousands of people including public officials for their alleged membership of the FETÖ/PDY although they might not be directly involved in the coup attempt, the preventive measures other than detention may not be sufficient for ensuring the gathering of evidence properly and for conducting the investigations in an effective manner (in the same vein, see *Aydın Yavuz and Others*, § 271; and *Selçuk Özdemir*, § 78).

123. The risk of absconding entailed by the persons involved in the coup attempt or having connection with the FETÖ/PDY, the perpetrator of the coup attempt, by taking advantage of the turmoil in its aftermath, and the risk of tampering with evidence are more likely than the risks with respect to the offences committed during the ordinary times. Besides, the fact that the FETÖ/PDY has organized in almost all public institutions and organisations within the country, that it has been carrying out activities in over 150 countries, and that it has many important

international alliances will greatly facilitate the opportunity to abscond and reside abroad for the persons who are subject to investigation with respect to this organization (in the same vein, see *Aydın Yavuz and Others*, § 272; and *Selçuk Özdemir*, § 79).

124. The membership of an armed terrorist organisation underlying the applicant's detention is an offence entailing severe criminal sanctions in the Turkish legal system, and the gravity of the sentence prescribed for the said offence is one of the circumstances indicating the risk of absconding (in the same vein, see *Hüseyin Burçak*, no. 2014/474, 3 February 2016, § 61; and *Devran Duran* [Plenary], no. 2014/10405, 25 May 2017, § 66). Besides, the imputed offence is among the offences regarding which the ground for detention may be deemed to exist *ipso facto* under Article 100 § 3 of Code no. 5271 (see *Gülser Yıldırım (2)*, § 148).

125. In the present case, the magistrate judge, ordering the applicant's detention, relied on the nature of his alleged membership of an armed terrorist organisation, the gravity of the sanction prescribed in the law, the qualification of the imputed act as a catalogue offence under Article 100 § 3 of Code no. 5271, the risk of absconding, as well as the fact that the evidence has not been fully gathered yet (see § 42 above).

126. Accordingly, regard being had to the general conditions prevailing at the time of detention and the above-cited particular circumstances of the present case and the detention order issued by the magistrate judge as a whole, it may be concluded that the risks of the applicant's absconding and tampering with the evidence -based on the gravity of the imputed offence- necessitating his detention had factual basis.

127. It must be also ascertained whether the applicant's detention was proportionate. In assessing the proportionality of a given detention under Articles 13 and 19 of the Constitution, all circumstances of the given case must be taken into consideration (see *Gülser Yıldırım (2)*, § 151).

128. Primarily, conducting an investigation into terrorist offences leads public authorities to confront with significant difficulties. Therefore, the right to personal liberty and security must not be constructed in a way that would seriously hamper the judicial authorities' and security

forces' effective struggle against crimes -particularly organised crimes- and criminality (see, in the same vein, *Süleyman Bağrıyanık and Others*, § 241; and *Devran Duran*, § 64). Regard being had to especially the scope and nature of the investigations conducted in relation to the coup attempt or into the FETÖ/PDY as well as to the characteristics of the FETÖ/PDY (confidentiality, cell-type structuring, infiltrating public institutions and organizations, attributing holiness to itself, and acting on the basis of obedience and devotion), it is clear that these investigations are far more difficult and complex than other criminal investigations (see *Aydın Yavuz and Others*, § 350).

129. Given the above-cited circumstances of the present case, the magistrate judge's conclusion -in consideration of the gravity of the sanction prescribed for the imputed offence, the nature and significance of the criminal act in question- that the applicant's detention was proportionate and the measures of conditional bail would remain insufficient cannot be said to be arbitrary and unfounded.

130. For these reasons, as it is clear that there is no violation as to the alleged unlawfulness of the applicant's detention, this part of the application must be declared inadmissible for *being manifestly ill-founded*, without any further examination as to the other admissibility criteria.

131. Accordingly, having concluded that the impugned interference with the applicant's right to personal liberty and security, which was in the form of detention, did not fall foul of the constitutional safeguards with respect to this right (inherent in Articles 13 and 19 of the Constitution), the Court did not find it necessary to make a further examination under the criteria laid down in Article 15 of the Constitution.

C. Alleged Unreasonable Length of the Applicant's Detention

1. The Applicant's Allegations

132. The applicant maintained that his right to personal liberty and security was violated, claiming that his detention exceeded reasonable time; that the grounds of his continued detention were not relevant and sufficient; and that his continued detention was ordered on stereotyped grounds.

133. The applicant also alleged that there was a violation of the principle of equality taken in conjunction with the right to personal liberty and security as his continued detention was ordered despite the release of certain persons who had been detained on the basis of the same evidence. The Constitutional Court is not bound by the legal qualification of the facts by the applicants and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). In this respect, as the alleged violation of the principle of equality was mainly related to the applicant's continued detention, the Court did not find it necessary to make any separate assessment in this respect.

2. The Court's Assessment

134. As required by the subsidiary nature of the individual application mechanism, for an individual application to be lodged with the Constitutional Court, the ordinary legal remedies must be primarily exhausted (see *Ayşe Zıraman and Cennet Yeşilyurt*, §§ 16 and 17).

135. With respect to the individual applications lodged on the allegation that the detention exceeded the maximum period or reasonable time, the Constitutional Court has, with a reference to the relevant case-law of the Court of Cassation, qualified the opportunity to bring a compensation action, which is provided in Article 141 of Code no. 5271, as an effective legal remedy needed to be exhausted in cases where the applicant was released as of the examination date of the individual application, even if the main case has not been adjudicated yet (see *Erkam Abdurrahman Ak,* no. 2014/8515, 28 September 2016, §§ 48-62; and *İrfan Gerçek,* no. 2014/6500, 29 September 2016, §§ 33-45).

136. In the present case, the applicant's release was ordered on 15 August 2018 after having lodged his individual application. Accordingly, the alleged unreasonable length of his detention could be handled through the action to be brought pursuant to Article 141 of Code no. 5271. If the applicant's detention is found to have exceeded the reasonable time at the end of the action to be brought under this provision, the incumbent court may award compensation to him. In this regard, the legal remedy laid down in Article 141 of Code no. 5271 is an effective remedy which is appropriate in the particular circumstances of the applicant's case and

is capable of providing redress. Therefore, the examination by the Court of individual application lodged without exhaustion of this ordinary remedy does not comply with the "subsidiary nature" of the individual application system.

137. For these reasons, this part of the application must be declared inadmissible for *non-exhaustion of legal remedies*.

JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 4 June 2020 that

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

B. 1. The alleged violation of the right to personal liberty and security due to the unlawfulness of his custody be DECLARED INADMISSIBLE for *non-exhaustion of legal remedies*;

2. The alleged violation of the right to personal liberty and security due to the unlawfulness of his detention be DECLARED INADMISSIBLE for *being manifestly ill-founded*;

3. The alleged violation of the right to personal liberty and security due to the unreasonable length of detention be DECLARED INADMISSBLE for *non-exhaustion of legal remedies*; *and*

C. The litigation costs be COVERED by the applicant.

CHAPTER TWO
JUDGMENTS

RIGHT TO LIFE (ARTICLE 17 § 1)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

ŞEHMUS ALTINDAĞ AND OTHERS

(Application no. 2014/4926)

9 January 2020

On 9 January 2020, the First Section of the Constitutional Court found a violation of the procedural aspect of the right to life safeguarded by Article 17 of the Constitution in the individual application lodged by *Şehmus Altındağ and Others* (no. 2014/4926).

THE FACTS

[8-35] 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.

V. EXAMINATION AND GROUNDS

36. The Constitutional Court ("the Court"), at its session of 9 January 2020, examined the application and decided as follows:

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

37. The applicants maintained that on 24 December 1991 the law enforcement forces serving at Kulp district of Diyarbakır province had led to the death of seven persons and the injury of two persons by using firearms without the necessary legal conditions having been satisfied; that the investigating authorities had failed to conduct an effective and prompt investigation into this incident; and that, due to their restriction of access to the investigation file, the only information which they had been able to learn was the fact that the investigation report (*fezleke*) issued by the Chief Public Prosecutor's Office ("the Prosecutor's Office") had been sent to the Diyarbakır Chief Public Prosecutor's Office. Relying on the above, they complained of alleged violations of the right to a fair trial and the right to life.

38. In its observations, the Ministry indicated the following: In 2004, i.e. nearly eleven years after the communication of the files to the relevant administration along with a decision of non-jurisdiction, the applicants submitted an application with the Prosecutor's Office, the Kulp District-Governor's Office, and the Ministry. Upon this application, it was understood from the letter dated 18 March 2015 of the Diyarbakır Provincial Administration Board that the file had been lost during correspondence

among institutions and that there was no existing postal or custodianship (*zimmet*) record that could help determine whether it had been sent to the District Administration Board. By that date when the applicants learned that there had not been any progress with regard to the substance of the investigation, they had the possibility of lodging an application with the European Court of Human Rights ("the ECHR") but they did not avail themselves of this avenue. After they had become aware of the fact that the file had been lost and that there had been no progress with regard to the substance of the investigation, they remained inactive for nearly four years until they filed a petition of complaint with the Prosecutor's Office. The applicants were under an obligation to show diligence and initiative in their allegations concerning the right to life, that is to bring their complaints before the competent judicial bodies without waiting for too long. According to the ECHR, the applicants should lodge their applications with the ECHR as soon as they realised, or must have realised, that an investigation was not going to be launched, that no progress had been made in the investigation, that an effective criminal investigation had not been conducted, or that there was not any realistic prospect at all for such an investigation to be conducted in the future. If they waited for too long as from that moment or waited without any specific reason therefor, their applications might be rejected. The determination of when that moment was reached depends, naturally, on the circumstances of each case.

39. It was further stated in the Ministry's observations that the applicants had had the opportunity to apply with the Court within thirty days from 23 September 2012, i.e. the date when the avenue of individual application before the Court had been put in place; however, they lodged their application with the Court on 8 April 2014. In individual applications concerning the alleged ineffectiveness of the investigation, which are lodged while the criminal investigation is still on-going and the statutory limitation period has not yet expired, the Court holds an assessment on the basis of the circumstances of each particular case and may find a violation on account of the lack of an effective investigation (see *Rahil Dink and Others*, no. 2012/848, 17 July 2014). Therefore, the application should be rejected due to the fact that it had not been lodged with the Court within the thirty-day time-limit running from 23 September 2012.

40. Lastly, the Ministry observed that the investigation report no. 2013/21 which was sent by the Prosecutor's Office to the Diyarbakır Chief Public Prosecutor's Office listed as complainants only some of the applicants, namely Dilek Bulut (Bingöl), Şehmus Bulut, Mukadder Okut, Salahattin Altın and Şehmus Altındağ, whereas the other applicants, namely Nuriban Öztürk, Heremsi Öztürk, Betül Öztürk, Faruk Öztürk and Sevgül Öztürk, were not listed as complainants in the investigation report. There is no information in the application form, either, to show that these persons took any step before judicial authorities, either personally or through their representatives, from 1991 when the incident took place until 2014 when they lodged their application with the Court. It is not possible for the applicants to raise their allegations for the first time before the Court via an individual application, without initially bringing them before the prosecutor's office. As a result of subsidiary nature of the individual application mechanism, any allegation which has not been raised before ordinary legal remedies and general courts cannot be raised as complaint before the Court; furthermore, new information and documents which have not been submitted with general courts cannot be used in the application lodged with the Court, either.

41. In their submissions in response to the Ministry's observations, the applicants maintained the following: In principle, the State's obligation to conduct an effective investigation into an alleged violation of the right to life or the prohibition of torture and ill-treatment does not require a complaint to be filed by victims. This obligation starts as soon as the moment of learning about the violation. The fact that the victims have not raised a complaint or taken any step with regard to the progress of the case-file neither releases the State from this obligation nor results in the emergence of any fault attributable to the victims. Arguing that an investigation should have been conducted *ex officio* into the incident, the applicants listed the negligences in the investigation giving rise to the application.

B. The Court's Assessment

42. The Court is not bound by the legal qualification of the facts by the applicants and it makes such assessment itself (see *Tahir Canan*,

no. 2012/969, 18 September 2013, § 16). As the arguments raised by the applicants concern alleged violations of substantive and procedural aspects of the right to life, it is necessary and sufficient to examine the application within the scope of the right to life.

43. In addition, since the other applicants' relatives died during the incident giving rise to the application, it is possible to examine the application within the scope of the right to life in respect of those persons. However, as applicant Şehmus Altındağ was injured during the incident and subsequently became disabled, an assessment should be made as to whether an examination under the right to life can be held in respect of this applicant.

44. One of the conditions necessary for the application of principles concerning the right to life to a case is the occurrence of an unnatural death; nevertheless, an application concerning an incident that has not resulted in death may also be examined under the right to life in consideration of circumstances of the individual case, such as the nature of the act committed against the victim and the motive of the perpetrator. In making this assessment, it is important to take account of whether the act is potentially lethal in nature and the consequences of the act on the physical integrity of the victim (see *Yasin Ağca*, no. 2014/13163, 11 May 2017, §§ 109, 110; *Mustafa Çelik and Siyahmet Şeran*, no. 2014/7227, 12 January 2017, § 69).

45. In the present case, when the lethal nature of the armed force to which applicant Şehmus Altındağ was allegedly subjected is considered together with the other factors in the application, it has been concluded that the application should be examined within the scope of the right to life in respect of Şehmus Altındağ, as well.

46. On the other hand, as it is clearly laid down in the section concerning the examination with regard to the effective investigation requirement, the documents pertaining to the impugned investigation does not shed light to the questions of how the applicants' relatives died, how applicant Şehmus Altındağ was injured, and whether the use of firearms took place as a last resort where it was *absolutely necessary* and *proportionate*. This undoubtedly stems from the deficiencies in the investigation. For this reason, as there is not sufficient information and documentation to the

extent where it would be possible to ascertain whether there has been a violation of the substantive aspect of the right to life, the examination under the right to life will be limited to the procedural aspect of the right.

1. Admissibility

a. As regards the Victim Status and, in this context, the Admissibility Criterion of Compatibility *Ratione Personae*

47. The applicant Salahattin Altın is the father of M.N.A. who died during the incident. Applicants Heremsi Öztürk, Betül Öztürk, Faruk Öztürk and Sevgül Öztürk are the children of Ö.Ö. who died during the incident, whereas Nuriban Öztürk is his wife. Applicant Şehmus Altındağ sustained an injury and became disabled as a result of the shots fired during the incident. The applicants, Şeyhmus Bulut and Dilek Bingöl, are the children of F.B. who died during the incident. Therefore, there is no incompatibility *ratione personae* in respect of these persons.

48. The applicant Mukadder Okut is indicated as the wife of F.B.; however, it has been understood that they were not officially married. Nevertheless, it has been observed that Şeyhmus Bulut and Dilek Bingöl are the children of these two persons and that Mukadder Okut was accorded the capacity of complainant during the criminal proceedings. For this reason, it has been concluded that applicant Mukadder Okut has been indirectly affected by the death of F.B.; thus, she carries the status of *indirect victim*. Therefore, there is no incompatibility *ratione personae* with regard to the victim status of applicant Mukadder Okut (for cases where applicants were recognised as indirect victims even though they were not officially married, see *Duygu Altıntaş and Others*, no. 2015/18411, 13 September 2018, § 59; *Aısha Fares*, no. 2015/18701, 31 October 2018, § 75).

b. As regards the Admissibility Criteria of Exhaustion of Remedies and Time-limit Rule

i. In respect of applicants Sevgül Öztürk, Nuriban Öztürk, Heremsi Öztürk, Betül Öztürk and Faruk Öztürk

49. As a requirement of the subsidiary nature of the remedy of individual application, firstly ordinary legal remedies must be exhausted

in order to be able to lodge an application with the Court. An applicant must duly submit his complaint primarily and in a timely manner with the competent administrative and judicial authorities, provide the authorities with the relevant information and evidence in his possession and exercise due diligence in this process to pursue the case and his application (see *İsmail Buğra İşlek*, no. 2013/1177, 26 March 2013, § 17).

50. The applicants Sevgül Öztürk, Nuriban Öztürk, Heremsi Öztürk, Betül Öztürk and Faruk Öztürk - relatives of deceased Ö.Ö. - have not raised their complaints concerning the death of their relative before investigating authorities in any way. Other applicants have not given any information to the Court to the effect that they are relatives of Ö.Ö., either. The State's obligation to conduct an effective formal investigation capable of ensuring the identification and, if necessary, the punishment of persons responsible for each case of unnatural death does not absolve the applicants from their obligation to diligently pursue the investigations into the death of their relatives. For this reason, it has been concluded that the remedies available within the legal system have not been exhausted in regard to the complaint concerning the alleged violation of Ö.Ö.'s right to life (for a finding of applicants' failure to exhaust legal remedies in a case where they were not personally participated in the criminal investigation conducted into an incident resulting in the death of their relative, did not make any request to participate in the investigative procedures, and did not challenge the decision of non-prosecution issued at the end of the investigation, see *Bedih Durmaz and Others*, no. 2014/5534, 7 March 2018, §§ 44-46).

51. For these reasons, the part of the application concerning an alleged violation of the procedural aspect of the right to life as lodged by the applicants Sevgül Öztürk, Nuriban Öztürk, Heremsi Öztürk, Betül Öztürk and Faruk Öztürk must be declared inadmissible, without any further examination as to the other admissibility criteria, for *non-exhaustion of ordinary legal remedies*.

ii. As regards the Other Applicants

52. Though it is not absolutely necessary, it would be in conformity with the subsidiary nature of the protection mechanism introduced via

the avenue of individual application to wait for the completion of the investigation by the public authorities concerned, so long as its length does not exceed a reasonable amount of time, before examining whether the investigations into complaints concerning an alleged violation of the right to life were effective (see *Rahil Dink and Others*, § 76; *Hüseyin Caruş*, no. 2013/7812, 6 October 2015, § 46).

53. On the other hand, it would not be reasonable to expect applicants to wait for the outcome of the investigation if an investigation has not been launched into the unnatural death even though they actually applied to the competent authorities, there has been no progress in the investigation, or the investigation has become ineffective. In such cases, applicants should display due diligence and be able to lodge their complaints with the Court without too much time elapsing (see *Rahil Dink and Others*, § 77). Because there is no remedy available to ensure the effectiveness of the investigation. In that case, there is no requirement to exhaust the ordinary legal remedies in respect of the said alleged violations (see *Yasin Ağca*, § 121). In such a situation, applicants must lodge an individual application within thirty days running from the moment when they realise, or must have realised, that an effective investigation is/was not being conducted. The determination of when the applicants must have realised that an effective investigation was not being conducted will naturally depend on the circumstances of each individual case (see *Adle Azizoğlu and Sadat Azizoğlu*, no. 2014/15732, 24 January 2018, § 87).

54. As long as there are promising developments and realistic assumptions to believe that some progress will be made in the investigation and measures that ensure the advancement of the investigation are being taken, applicants should not be expected to lodge an individual application without first exhausting the ordinary legal remedies. Nonetheless, even in such cases where the applicants become aware of the fact that the investigation has subsequently become ineffective, they must lodge an individual application within the time-limit running from the moment when they realise, or must have realised, this fact (see *Adle Azizoğlu and Sadat Azizoğlu*, § 88).

55. It is understood in the present case that, following the applicants' complaint in 2009, some investigative steps were taken until 2011 and

later in 2011 the Prosecutor's Office drew up an investigation report on the incident and sent the file to the Diyarbakır Chief Public Prosecutor's Office. In its observations, the Ministry opined that the application should be rejected due to the fact that it had not been lodged with the Court within the thirty-day time-limit running from 23 September 2012. However, the Court notes that, after the investigation report which had been rejected in 2011 on account of its deficiencies, a new set of investigative steps was taken with a view to remedying those deficiencies, such as taking statements from the suspects and the complainants, and a second investigation was issued on 23 December 2013 as a result. Therefore, it is not possible to conclude that the applicants realised, or must have realised, that there had been no progress in the investigation and that an effective criminal investigation was not being conducted during the period between 23 September 2012 and the date on which the second investigation report was issued. That is, the investigative steps taken after 23 September 2012 have been considered to be promising developments which led to believe that there would be some progress in the investigation. One may think in this situation that the available legal remedies have not yet been exhausted; however, the Court examines the applications which have been lodged without the available legal remedies being exhausted on the condition that those remedies become exhausted until the date of the [Court's] examination (see *Ziver Demircan*, no. 2014/235, 3 February 2016, §§ 41-48). As the investigation giving rise to the application ended before the date of the examination on the individual application, there is no failure to exhaust the ordinary legal remedies in the present application.

56. As regards the applicants, Şehmus Altındağ, Salahattin Altın, Şeyhmus Bulut, Mukadder Okut and Dilek Bingöl, the complaints concerning alleged violations of the procedural aspect of the right to life are not manifestly ill-founded and there exists no ground to declare them inadmissible; therefore, they must be declared admissible.

2. Merits

a. General Principles

57. Under the procedural aspect of the right to life with regard to the effective investigation requirement, the State is under an obligation

to conduct an effective formal investigation capable of ensuring the identification and, if necessary, the punishment of those responsible for each case of unnatural death (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, § 54).

58. To ensure the effectiveness of investigations concerning cases of deaths arising, or allegedly arising, from the use of force by public officers, the investigating authorities must be independent from those persons who might have been involved in the case. This requirement does not only define hierarchical and institutional independence but also necessitates that the investigation is actually (also in practice) carried out independently (see *Cemil Danışman*, no. 2013/6319, 16 July 2014, § 96).

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

60. On the other hand, the nature and degree of the review meeting the minimum standard of effectiveness of the investigation depend on the particular circumstances of the case. The question of effectiveness in this scope should be assessed on the basis of all relevant facts and the practical realities of the investigative work. Therefore, it is not possible to reduce the variety of situations that can occur to a simple list of investigative acts or other minimum criteria (see *Fahriye Erkek and Others*, no. 2013/4668, 16 September 2015, § 68).

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

62. To say that it is effective, a criminal investigation should also be conducted with a reasonable level of diligence and speed (see *Salih Akkuş*, no. 2012/1017, 18 September 2013, § 30). This is a necessity so as to ensure adherence to the rule of law and to prevent any appearance of collusion in or tolerance of unlawful acts.

63. Lastly, an investigation may be considered effective if the decision taken at the end of the investigation is based on a comprehensive, objective and impartial analysis of all findings and, in addition, the decision concerned includes an assessment of whether the interference with the right to life is a proportionate interference which arises from an exigent circumstance which is sought by the Constitution (see *Cemil Danışman*, § 99).

b. Application of Principles to the Present Case

64. The applicants have not raised any allegations about taking of action *ex officio* by investigating authorities upon a suspicious death, effective participation in the investigation, or independence of the investigation; in any case, no deficiency has been observed in the impugned investigation in so far as relevant to the said issues. Indeed, the public prosecutors at the Chief Public Prosecutor's Office at the State Security Court who were informed of the incident took action *ex officio*: they inspected the scene of the incident and attended the post-mortem examination and autopsy procedures which were carried out by two physicians. The applicants were able to submit their complaints with the investigating authorities, challenge the decision of non-prosecution, and participate in the investigation without any obstruction. Even though the Kulp Magistrates' Court imposed a restriction on the right to examine and obtain a copy of the investigation documents, the applicants did not complain of having been unable to access the investigation file in their objection against the decision of non-prosecution. Moreover, no public officer who might have been involved in the incident took part in the investigation conducted by public prosecutors. On the other hand, it is necessary to examine the impugned investigation within the framework of other principles of effective investigation, as well.

65. The Prosecutor's Office, which had disjoined the investigation in respect of İ.Y. from the investigation at issue and sent it to the Diyarbakır Governor's Office for further action, issued a decision of non-prosecution (no. K.1993/27, dated 6 July 1993) in respect of the remaining suspects and sent the investigation file to the District Administration Board; however, it did not inquire the outcome of either of the investigations. Indeed, the fact that the investigation files had been missing was found out upon an application submitted by some of the applicants in 2004. Despite this, the Prosecutor's Office had waited until some applicants filed a criminal complaint on 18 November 2009 to launch a new application into the matter. Further, although the Kulp District-Governor's Office had communicated that the act attributed to the suspects fell within the scope of the general (ordinary) investigation procedure, the Prosecutor's Office applied to the Regional Administrative Court in order to obtain leave for investigation, deeming it necessary. These issues alone are sufficient for the Court to reach the conclusion that the investigation was not conducted with reasonable speed and due diligence.

66. In cases where there is varying and restricted information concerning the way how an incident has taken place and the identity of its perpetrators, the material findings concerning the incident must be immediately secured and examined, and those who may have probably witnessed to, or have any knowledge about, the incident must be questioned within a short amount of time. This is of great importance for the clarification of the cause of the death or for the identification of those responsible therefor (see *Yavuz Durmuş and Others*, no. 2013/6574, 16 December 2015, § 61). It is clear that it will become more and more difficult to collect evidence and ascertain the way in which the incident took place due to reasons such as the inevitable loss of evidence, displacement of witnesses, and difficulty in remembering the events as the time passes (see *Yavuz Durmuş and Others*, § 62). Nonetheless,

i. Despite being possible immediately after the incident, no step was taken so as to identify the members of the security forces who had used firearms during the incident and, in this connection, to conduct a ballistic examination on the firearms of the security officers and the casings that might have probably been found at the scene of the incident.

ii. No effort was exerted to take the statements from the members of the security forces who had not used their weapons during the incident but had knowledge about the incident, the persons who had been injured during the incident, or the persons who had not been subjected to any action against them in connection with the incident and, thus, had the capacity of witness.

iii. No fingerprint analysis was conducted on the firearms seized at the scene of the incident with a view to identifying the persons who had fired shots on the security forces.

iv. Despite the bullet marks on them, the damaged vehicle was not examined nor were the bullets found in the vehicles at the scene collected because of the shattered glass pieces.

67. Regard being had to the fact that what is of importance in the present case is to determine under which circumstances the use of firearms took place and whether their use of armed force was part of legitimate defence, it has been observed that the failure to collect the evidence had a direct bearing on the outcome of the investigation and prevented the determination of how the incident occurred. From this standpoint, it is not possible to say that all the evidence which could be used to shed light on the death and identify those responsible were collected in the investigation in question.

68. Lastly, it should be pointed out that the investigating authority, issuing a decision of non-prosecution by concluding that the security officers had acted within legitimate defence despite the lack of any concrete evidence as to whether applicant Şehmus Altındağ and the relative of applicants Şeyhmus Bulut, Mukadder Okut and Dilek Bingöl had opened fire on the security forces or had attacked them with sticks and stones or how the incident involving deaths and injuries had taken place, failed to properly satisfy the requirement that all evidence obtained during the investigation be subject to thorough, objective and impartial analysis.

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

3. Application of Article 50 of Code no. 6216

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

> *"(1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled...*
>
> *(2) If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favour of the applicant or the remedy of filing a case before the general courts may be shown. The court, which is responsible for holding the retrial, shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."*

71. The applicants requested a finding of violation and claimed compensation.

72. In its judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court indicates the general principles as to how a violation of any fundamental right, which has been found established by the Constitutional Court, and its consequences would be redressed. In another judgment, the Court also mentions the consequences of the failure to comply with a violation judgment as well as with the principles set in the abovementioned judgment and accordingly notes that this situation would constitute a continuing violation and also lead to the violation of the respective right for the second time (see *Aligül Alkaya and Others*, no. 2016/12506, 7 November 2019).

73. Accordingly, in case of a finding of a violation of any fundamental right and freedom within the scope of an individual application, the basic rule for redressing the violation and its consequences is to ensure

restitution as much as possible, that is to say, to ensure restoration to the former state existing prior to the violation. To that end, it must be primarily required to find the source of the violation, to put an end to the continuing violation, to eliminate the decision or the act giving rise to the violation or their consequences, to compensate for the pecuniary and non-pecuniary damage resulting therefrom, as well as to take the other measures deemed necessary in this respect (see *Mehmet Doğan*, §§ 55, 57).

74. In cases where the violation originates from a court ruling, the Court decides to send a copy of the judgment to the relevant court for a retrial to be held to remove the violation and its consequences pursuant to Article 50 § 2 of Code no. 6216 and Article 79 § 1 (a) of the Internal Regulations of the Constitutional Court. The said statutory provision, unlike the similar legal practices found in the procedural law, stipulates an avenue of redress that is specific to the individual application mechanism and that results in a retrial for the purpose of eliminating the violation. For this reason, when the Court rules in favour of a retrial in connection with a judgment finding a violation, the trial court concerned does not enjoy any margin of appreciation in accepting the presence of grounds for retrial, which is different in this aspect from the practice of reopening of proceedings under the procedural law. Therefore, the trial court that has received such a judgment is under a statutory obligation to issue a decision to hold a retrial on account of the finding of a violation by the Court, without waiting for a request to that effect from the person concerned, and conduct the procedures necessary for elimination of the continuing violation (see *Mehmet Doğan*, §§ 58, 59; *Aligül Alkaya and Others*, §§ 57-59, 66, 67).

75. Having examined the application, the Court has concluded that the right to life has been violated in its procedural aspect. Thus, it has been understood that the violation stemmed from the decision of non-prosecution issued by the Diyarbakır Chief Public Prosecutor's Office.

76. In this situation, there is legal interest in conducting a new investigation in order to remove the consequences of the violation of the procedural aspect of the right to life. A re-investigation to be conducted in this scope aims to remove the violation and its consequences according to

Article 50 § 2 of Code no. 6216, which contains a provision that is specific to the individual application mechanism. In this regard, what is to be done consists of the delivery of a new decision at the end of a new investigation which is to be conducted in line with the principles set out in the judgment finding a violation and be capable of remedying the reasons that has led the Court to arrive at the violation judgment. For this reason, a copy of the judgment must be sent to the Diyarbakır Chief Public Prosecutor's Office for re-investigation.

77. On the other hand, it is clear the finding of a violation in the present case will not be able to offer adequate redress for the damages sustained by the applicants. Therefore, within the scope of the principle of *restitutio in integrum* (restitution), it must be decided that applicants Şeyhmus Bulut, Mukadder Okut and Dilek Bingöl be awarded a net amount of 40,000 Turkish liras (TRY) jointly and applicants Salahattin Altın and Şehmus Altındağ be awarded TRY 40,000 each as non-pecuniary compensation, for the non-pecuniary damages which cannot be redressed by a mere finding of violation, in order to eliminate the violation of the procedural aspect of the right to life with all of its consequences.

78. The total litigation costs of TRY 3,206.10 including the court fee of TRY 206.10 and counsel fee of TRY 3,000, as established on the basis of the documents in the case file, must be reimbursed jointly to applicants Şehmus Altındağ, Salahattin Altın, Şeyhmus Bulut, Mukadder Okut and Dilek Bingöl.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 9 January 2020 that

A. 1. The part of the application concerning an alleged violation of the procedural aspect of the right to life as lodged by the applicants Sevgül Öztürk, Nuriban Öztürk, Heremsi Öztürk, Betül Öztürk and Faruk Öztürk be DECLARED INADMISSIBLE for *non-exhaustion of ordinary legal remedies*;

2. The part of the application concerning an alleged violation of the procedural aspect of the right to life as lodged by the applicants Şehmus

Altındağ, Salahattin Altın, Şeyhmus Bulut, Mukadder Okut and Dilek Bingöl be DECLARED ADMISSIBLE;

B. The procedural aspect of the right to life safeguarded by Article 17 of the Constitution was VIOLATED in respect of the applicants Şehmus Altındağ, Salahattin Altın, Şeyhmus Bulut, Mukadder Okut and Dilek Bingöl;

C. A copy of the judgment be SENT to the Diyarbakır Chief Public Prosecutor's Office for re-investigation to remove the consequences of the violation of the obligation to conduct an effective investigation as required by the right to life;

D. A net amount of TRY 40,000 be PAID jointly to the applicants Şeyhmus Bulut, Mukadder Okut and Dilek Bingöl and a net amount of TRY 40,000 be PAID each to the applicants Salahattin Altın and Şehmus Altındağ in respect of non-pecuniary damages, and other compensation claims be REJECTED;

E. The total litigation costs of TRY 3,206.10 including the court fee of TRY 206.10 and counsel fee of TRY 3,000 be jointly REIMBURSED to the applicants Şehmus Altındağ, Salahattin Altın, Şeyhmus Bulut, Mukadder Okut and Dilek Bingöl;

F. The payments be made within four months as from the date when the applicants apply to the Ministry of Treasury and Finance following the notification of the judgment. In case of any default in payment, statutory INTEREST ACCRUE for the period elapsing from the expiry of four-month time-limit to the payment date; and

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

ABDULKADİR YILMAZ AND OTHERS (2)

(Application no. 2016/13649)

29 January 2020

On 29 January 2020, the First Section of the Constitutional Court found a violation of the procedural aspect of the right to life, safeguarded by Article 17 of the Constitution, in the individual application lodged by *Abdulkadir Yılmaz and Others (2)* (no. 2016/13649).

THE FACTS

[9-64] 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.

V. EXAMINATION AND GROUNDS

65. The Constitutional Court ("the Court"), at its session of 29 January 2020, examined the application and decided as follows:

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

66. The applicant Naciye Kaya pointed to the findings concerning the fault indicated in the expert report obtained by the chief public prosecutor's office and drew attention to the fact that the First Chamber had previously revoked the decision not to grant permission for an investigation. In this connection, she alleged that her right to an effective remedy had been violated, stating that the decision of the First Chamber, dated 19 April 2016, was unlawful and unfair, and that the First Chamber had delivered its decision without making an assessment as to the statements of the witnesses and victims heard by the assize court, without taking into account any of their objections against the decision not to grant permission for an investigation and as a result of an incomplete and biased inquiry on the basis of the statements of four accused persons against whom criminal proceedings had been initiated before the assize court.

67. Other applicants referred to the principles adopted by the European Court of Human Rights ("the ECHR") and the Constitutional Court in relation to the procedural aspect of the right to life involving the obligation to conduct an effective investigation and alleged a violation of their rights to life, fair trial and effective remedy, stating that the decision of the First Chamber, dated 10 December 2015, had not been based on concrete findings, that a decision had been rendered in respect of the inspectors of the Ministry of Labour on the basis of the preliminary inquiry report issued by the inspectors of the same Ministry as well as the statements of the inspectors which had not been supported by any evidence, that criminal proceedings had been initiated before the assize court against A.Ç., E.E., İ.A. and M.A.G.Ç. who had been considered by the First Chamber to have made statements in favour of the inspectors under preliminary inquiry, that both the expert report obtained by the chief public prosecutor's office and the reports issued by certain public corporations indicated deficiencies in the inspection of the mine, and that there was no other remedy available to identify the responsibilities of the General Director of Occupational Health and Safety and twelve labour inspectors.

68. The Ministry, in its observations, noted that the complaints similar in substance to those raised by the applicants had been examined, and the

principles concerning the relevant issue had been determined by the Court in the individual applications of *Naziker Onbaşı and Others* and *Mehmet Ali Emir and Others* ([Plenary], no. 2014/16482, 17 January 2019) and that the observations concerning the substantive and procedural aspects of the right to life had been submitted to the file pertaining to the individual application (no. 2015/2068) lodged by the applicants Abdülkadir Yılmaz, Elif Yılmaz, Gülşen Ejdar, Hacer Yılmaz, Katriye Yılmaz, Nagihan Yılmaz, Onur Yılmaz, Ahmet Akdağ, Mefaret Akdağ, Nurcan Akdağ and Yiğit Ahmet Akdağ against the decision of non-prosecution issued by the chief public prosecutor's office.

69. The Ministry apparently considered within the scope of the file pertaining to the individual application no. 2015/2068 that:

i. The applicants Abdülkadir Yılmaz, Gülşen Ejdar, Hacer Yılmaz, Katriye Yılmaz, Nagihan Yılmaz, Onur Yılmaz and Nurcan Akdağ had not participated in the investigation process;

ii. The Constitutional Court was to obtain information and documents from the relevant institutions in order to establish whether any compensation had been paid on account of the impugned incident and thus whether the applicants had victim status in this context;

iii. The applicants were entitled to bring compensation proceedings before the civil or administrative courts;

iv. The investigation process had not yet been completed because the trial conducted by the assize court had not been concluded;

v. In their application form, the applicants had not provided concrete information about the identities of their deceased relatives, the degree of their relationship with them and the manner how the right to life had been violated.

B. The Court's Assessment

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

allegations concerned the ineffectiveness of the criminal investigation conducted into the incident resulting in the death of their relatives, all allegations raised in the present application were examined within the scope of the procedural aspect of the right to life involving the obligation to conduct an effective investigation guaranteed by Article 17 of the Constitution.

71. The relevant parts of Articles 17 and 5 of the Constitution to be relied on in the assessment of the allegations provide as follows:

> *"Personal inviolability, corporeal and spiritual existence of the individual"*
>
> *Article 17- Everyone has the right to life...*
>
> *…*
>
> *Fundamental aims and duties of the State*
>
> *Article 5 - The fundamental aims and duties of the State are (...) to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law; and to provide the conditions required for the development of the individual's corporeal and spiritual existence."*

1. Admissibility

72. In the present application, there is no other ground for inadmissibility. Nevertheless, in view of the fact that there is no allegation about the death of the applicants' relatives having been intentionally caused and that the applicants lodged an individual application to challenge the decision not to grant permission for an investigation, an assessment must be made as to whether the administrative and judicial remedies available in the legal system had been exhausted before the introduction of the individual application. However, such assessment is dependent on the determination of whether the positive obligation to *set up an effective judicial system* imposed on the State by Article 17 of the Constitution required a criminal investigation in the present case. This procedure requires an examination

on the merits. Accordingly, the question of whether the legal remedies had been exhausted must be examined together with the merits.

2. Merits

a. General Principles

73. Article 17 of the Constitution, which safeguards the right to life, when read in conjunction with Article 5 thereof in which one of the aims and duties of the State is set out as providing the conditions required for the development of the individual's corporeal and spiritual existence, imposes certain negative and positive obligations on the State (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, § 50).

74. In addition to its negative obligation to refrain from the intentional and unlawful taking of life of any individual within its jurisdiction, the State also has a duty, within the scope of its positive obligations, to safeguard the lives of those within its jurisdiction against risks likely to result from the acts of public authorities, other individuals or even the individual himself. In the context of this duty, the State must primarily adopt deterrent and protective legislative arrangements against the threats and risks posed to the right to life and must also take necessary administrative measures (see *Serpil Kerimoğlu and Others*, § 51; and *İpek Deniz and Others*, no. 2013/1595, 21 April 2016, § 149).

75. Moreover, the State also has a positive obligation to *set up an effective judicial system* capable of ensuring that the legislative and administrative framework set up to protect the right to life is properly implemented and that any breaches of that right are repressed and punished. This obligation applies in the context of any activity, whether public or not, in which the right to life may be at stake (see *Serpil Kerimoğlu and Others*, § 52).

76. The State's positive obligations within the scope of the right to life also have a procedural aspect. This procedural obligation requires the conduct of an independent investigation capable of establishing all aspects of any unnatural death and leading to the identification and, if necessary, punishment of those responsible for such death (see *Serpil Kerimoğlu and Others*, § 54; *Sadık Koçak and Others*, no. 2013/841, 23 January 2014, § 94).

77. The type of investigation to be conducted into an incident, as required by the procedural obligation, is to be determined on the basis of whether the obligations concerning the essence of the right to life require any criminal sanction. In the case of deaths caused intentionally or resulting from an attack or ill-treatment, the State is obliged by virtue of Article 17 of the Constitution to conduct criminal investigations capable of leading to the identification and punishment of those responsible for the attack causing death. In such cases, a mere payment of compensation as a result of administrative and judicial investigations and criminal proceedings is not sufficient to remedy the violation of the right to life and put an end to the person's victim status (see *Serpil Kerimoğlu and Others*, § 55).

78. However, Article 17 of the Constitution does not grant the applicants the right to ensure prosecution or punishment of third parties for a criminal offence or imposes on the State the duty to conclude all proceedings with a conviction (see *Serpil Kerimoğlu and Others*, § 56).

79. If the infringement of the right to life is not caused intentionally, the positive obligation to *set up an effective judicial system* does not necessarily require criminal proceedings to be brought in every case and may be satisfied if civil, administrative or even disciplinary remedies were available to the victims (see *Serpil Kerimoğlu and Others*, § 59).

80. However, where it is established that the negligence attributable to public authorities on that account goes beyond an error of judgment or carelessness, in that the authorities in question, fully realising the likely consequences and disregarding the powers vested in them, failed to take measures that were necessary and sufficient to avert the risks inherent in a dangerous activity, the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation of the right to life, irrespective of any other types of remedy which individuals may exercise on their own initiative (see *Serpil Kerimoğlu and Others*, § 60).

b. Application of Principles to the Present Case

81. In the individual application of *Naziker Onbaşı and Others* where the Court examined an alleged violation of the right to life on account

of the issuance of a decision not to grant permission for an investigation in respect of certain public officers to whom fault had been attributed in the expert reports obtained within the scope of the criminal investigation carried out into another mine accident and a decision of non-prosecution was issued against certain suspects, the Court concluded that operating a coal mine was a dangerous activity since it involved certain risks to the lives and physical integrity of individuals, notably those of the workers of the mine, and that the State was therefore liable, by virtue of its obligation to protect individuals' lives, to take necessary measures so as to protect lives and physical integrity of individuals as well as to prevent deaths and injuries during the performance of this service. In this regard, it considered that the obligation to set up an effective judicial system required the conduct of an effective criminal investigation into the relevant incident in view of the fact that many people had lost their lives due to similar incidents taking place in previous years, that the existence of the risk of inrush (instantaneous outburst of gas) at the scene of the accident had been known, and that it had been possible to take measures against such existing risk as indicated in the expert reports.

82. Similarly to the findings in the expert report obtained within the scope of the investigation in the individual application of *Naziker Onbaşı and Others,* the expert report obtained within the scope of the investigation which is the subject of the present application explained, from a technical aspect, the manner how the incident had occurred. Having regard to the fact that in its petition filed with the Turkish Coal Enterprises in relation to the transfer of contract, the company which had undertaken coal production and delivery service in 2006 had submitted its request for transfer of the service on the basis of high water yield and production failure due to the fires occurring during production activities by noting that there would be irreparable problems in the future, the report found that it had already been known by the Turkish Coal Enterprises and S... A.Ş., which had taken over coal production service, that the mine site had posed a high risk of fire. Therefore, the assessments in the Court's judgment on the said application apply as such to the present application as well, and the obligation to set up an effective judicial system requires the conduct of a criminal investigation in the present case. Thus, the compensation

proceedings brought/to be brought before the civil and/or administrative courts do not have any effect on the application, and there is no deficiency in the application as regards the exhaustion of legal remedies.

83. Following these assessments, an examination must be made as to whether the decision not to grant permission for investigation in respect of the officers serving at the Ministry of Labour was compatible with the procedural aspect of the right to life involving the obligation to conduct an effective investigation. In doing this, it must however be borne in mind that the subject of the examination would be the State's obligations concerning the right to life within the scope of Article 17 of the Constitution and that the Court does not have the authority to make an assessment as to whether the persons had individual criminal liability.

84. In a State of law, it may be deemed reasonable to require the permission of a certain authority for the conduct of a judicial investigation against public officers since they perform their duties on behalf of the State and they are under risk of frequent complaints and investigations in connection with certain issues resulting from the performance of their duties (see *Hidayet Enmek and Eyüpsabri Tinaş*, no. 2013/7907, 21 April 2016, § 106). Indeed, Article 129 § 6 of the Constitution provides that prosecution of public servants and other public officials for alleged offences shall be subject, except in cases prescribed by law, to the permission of the administrative authority designated by law (see *Hidayet Enmek and Eyüpsabri Tinaş*, § 107).

85. On the other hand, the procedure concerning permission for an investigation has been designed to prevent public officers from facing unjustifiable charges concerning the commission of an offence on account of their duties as well as to avoid any delay in the performance of their public services. The preliminary examination required to be made to this end prior to the initiation of a criminal investigation is intended for determining whether there is a ground to necessitate a criminal investigation. Therefore, the procedure concerning permission for an investigation must not be applied, beyond the said purpose, in such a manner as to cause a delay in the criminal proceedings and to prevent the conduct of the investigation in an effective manner or to create the

impression that the public officers are exempted from the criminal investigation (for the Court's assessments in the same vein, see *Naziker Onbaşı and Others*, § 70).

86. Indeed, the minimisation of the risks posed to the lives and physical integrity of the individuals within the scope of a dangerous activity, the identification of those responsible for taking necessary measures, and the judicial response to be provided by the State in respect of the responsibilities are of importance for the prevention of similar incidents as well (see *Naziker Onbaşı and Others*, § 71).

87. In the present case, the expert report obtained within the scope of the investigation carried out into the incident resulting in the death of the applicants' relatives explained, from a technical aspect, the deficiencies in the mine as regards occupational health and safety and the contribution of those deficiencies to the occurrence of the incident. It then noted that the labour inspectors from the Ministry of Labour who had inspected the mine from 2010 to the date of the incident had been also responsible for the incident due to the failure to establish those deficiencies and irregularities during the inspections. The expert report obtained by the assize court indicated that the assessments concerning fault in the expert report obtained by the chief public prosecutor's office were appropriate.

88. However, the preliminary inquiry report issued by a chief inspector, two inspectors and three deputy inspectors serving on the Inspection Board as a result of the preliminary inquiry conducted upon a request filed by the chief public prosecutor's office seeking permission for investigation in respect of the officers serving at the Ministry of Labour noted that it was impossible to ensure the conduct of a fresh expert review within the statutory time-limit prescribed for a preliminary inquiry. It nevertheless stated that the findings concerning fault in the expert report issued on 5 September 2014 at the investigation stage had been unfounded in general and legal terms. It thus concluded that it would be appropriate for a new commission of experts having capacity to make legal assessments besides technical assessments to be appointed to conduct inquiries into the mine accident. On the basis of this report, the Minister of Labour refused to grant permission for an investigation.

89. The expert report obtained by the chief public prosecutor's office had been drawn up by persons specialised in the relevant field, and the duty of the persons who had conducted the preliminary inquiry was essentially to determine whether there was a ground to necessitate a criminal investigation with a view to preventing public officers from facing unjustifiable charges and avoiding delays in public services. Therefore, it has not been possible to understand why those conducting the preliminary inquiry needed an expert review and how they concluded -despite having no capacity to make technical assessments- that the findings in the expert report dated 5 September 2014 had been unfounded in general and legal terms.

90. The objections filed by the chief public prosecutor's office and the applicants against the decision not to grant permission for an investigation were dismissed on the grounds that the mine had been inspected, that no deficiency had been found as regards occupational health and safety, that there was no direct causal link between the acts of those under preliminary inquiry and the occurrence of the mine accident. Thus, the judicial process ended as regards the public officers in respect of whom a permission for investigation had been requested. However, the expert report obtained by the chief public prosecutor's office explained the deficiencies concerning occupational health and safety in the mine as from 2010 and noted that the failure to discover the said deficiencies during the inspections had had an effect on the occurrence of the impugned incident. Moreover, although the First Chamber made an assessment concerning the causal link, it is in fact for the investigation authorities to determine whether there exists a causal link between the act and its consequence within the meaning of criminal law. For this reason, it is not compatible with the principles of effective investigation to end the judicial process without allowing the investigation authorities to make assessments as to whether the negligent acts of the public officers as established by the expert reports entailed a criminal law liability, and if so, whether there existed a causal link within the meaning of criminal law between those negligent acts and their consequences. It must again be noted that the failure to charge with a criminal offence or prosecute those responsible for endangering life may amount to a violation of the right to life.

91. This finding concerning the requirement to conduct an effective investigation in the case does not mean that the judicial process to be conducted in respect of those established to be at fault by the expert report necessarily required criminal proceedings to be brought or such proceedings to be concluded with a particular sentence, but points to the need to effectively use appropriate means capable of ensuring identification and accountability of those responsible. Moreover, the expert report obtained within the scope of the investigation which is the subject of the present application contained no assessment as regards the officers of the Ministry of Labour other than labour inspectors, and it must therefore be noted that the judgment delivered by the Constitutional Court does not have a favourable or unfavourable effect on those other than labour inspectors.

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

3. Application of Article 50 of Code no. 6216

93. Article 50 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, insofar as relevant, provides as follows:

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

(2) If the violation found arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be eliminated. In cases where there is no legal interest in holding the retrial, the applicant may be awarded compensation or be informed of the possibility to institute proceedings before the general courts. The court, which is responsible for holding the retrial, shall deliver a decision on the basis of the file, if possible, in a way that will eliminate the violation and the consequences thereof as the Constitutional Court has explained in its decision of violation."

94. The applicants requested the Court to find a violation and award compensation.

95. In its judgment on the individual application of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court set out the general principles concerning the elimination of the violation. In another judgment, the Court explained the relevant principles as well as the consequences of the failure to comply with its judgment finding a violation and pointed out that this would amount to the continuation of the violation and might also result in a violation for the second time (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

96. Where a violation of any fundamental right is found within the scope of an individual application, the basic rule for redressing the violation and the consequences thereof is to ensure restitution to the extent possible, that is to say, to ensure restoration of the original state prior to the violation. To that end, it is primarily required to identify the cause of the violation and then to end the continuing violation, to revoke the decision or act giving rise to the violation, to eliminate the consequences thereof, to compensate the pecuniary and non-pecuniary damages resulting from the violation, and to take other measures deemed appropriate in this context (see *Mehmet Doğan*, §§ 55 and 57).

97. In cases where the violation results from a court decision, the Court holds that a copy of the judgment be sent to the relevant court for a retrial with a view to redressing the violation and the consequences thereof pursuant to Article 50 § 2 of Code no. 6216 and Article 79 § 1 (a) of the Internal Regulations of the Constitutional Court. The relevant legal regulation, as different from the similar legal norms set out in the procedural law, provides for a remedy specific to the individual application and giving rise to a retrial for the elimination of the violation. Therefore, in cases where the Court orders a retrial in connection with its judgment finding a violation, the relevant inferior court does not enjoy any margin of appreciation in acknowledging the existence of a ground for a retrial, as different from the practice of reopening of the proceedings set out in the procedural law. Thus, the inferior court to which such judgment is notified is legally obliged to take the necessary steps, without awaiting a request of the person concerned, to redress the consequences of the continuing violation in line with the Court's judgment finding a violation

and ordering a retrial (see *Mehmet Doğan*, §§ 58 and 59; and *Aligül Alkaya and Others (2)*, §§ 57-59, 66 and 67).

98. In the present application, it has been concluded that the procedural aspect of the right to life was violated. Thus, it is understood that the violation resulted from the decisions of the First Chamber of the Council of State, dated 10 December 2015 (docket no. 2015/1720, decision no. 2015/1723) and 14 April 2016 (docket no. 2016/5, decision no. 2016/513).

99. In these circumstances, there is a legal interest in conducting a retrial for redressing the consequences of the violation of the procedural aspect of the right to life. Such retrial is intended for redressing the violation and the consequences thereof pursuant to Article 50 § 2 of Code no. 6216 containing a provision concerning individual applications. In this scope, the procedure required to be conducted is to deliver a new decision redressing the reasons leading the Court to find a violation and order a retrial, in line with the principles indicated in the judgment finding a violation. Therefore, it must be held that a copy of the judgment be sent to the First Chamber of the Council of State for a retrial.

100. As it has been understood that the finding of a violation constitutes sufficient just satisfaction, it has not been considered necessary to award compensation additionally.

101. The total litigation costs of TRY 3,239.50 including the court fee of TRY 239.50 and the counsel fee of TRY 3,000, as established on the basis of the documents in the case file, must be reimbursed to the applicant Naciye Kaya and jointly to the applicants Abdülkadir Yılmaz, Elif Yılmaz, Gülşen Ejdar, Hacer Yılmaz, Katriye Yılmaz, Nagihan Yılmaz, Onur Yılmaz, Ahmet Akdağ, Mefaret Akdağ, Nurcan Akdağ and Yiğit Ahmet Akdağ.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 29 January 2020 that

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

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

C. A copy of the judgment be SENT to First Chamber of the Council of State (docket no. 2015/1720, decision no. 2015/1723; docket no. 2016/5, decision no. 2016/513) for a retrial to redress the consequences of the violation of the procedural aspect of the right to life;

D. The applicants' claims for compensation be REJECTED;

E. The total litigation costs of TRY 3,239.50 including the court fee of TRY 239.50 and the counsel fee of TRY 3,000 be REIMBURSED to the applicant Naciye Kaya and jointly to the applicants Abdülkadir Yılmaz, Elif Yılmaz, Gülşen Ejdar, Hacer Yılmaz, Katriye Yılmaz, Nagihan Yılmaz, Onur Yılmaz, Ahmet Akdağ, Mefaret Akdağ, Nurcan Akdağ and Yiğit Ahmet Akdağ.

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

G. A copy of the judgment be SENT to the Ministry of Family, Labour and Social Services; and

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

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

Y.K.

(Application no. 2016/14347)

2 June 2020

On 2 June 2020, the Second Section of the Constitutional Court found violations of both substantive and procedural aspects of the prohibition of torture, safeguarded by Article 17 of the Constitution, in the individual application lodged by *Y.K.* (no. 2016/14347).

THE FACTS

[8-59] 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, claiming that he had been tortured and ill-treated 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.

V. EXAMINATION AND GROUNDS

60. The Constitutional Court ("the Court"), at its session of 2 June 2020, examined the application and decided as follows:

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

1. The Applicant's Allegations

61. The applicant alleged a violation of his right to personal liberty and security on the grounds that his freedom had been restricted during the period when he had been held in the Aşkale Foreigners' Removal Centre in the absence of any judicial or administrative decision, that he had not been informed of his rights during the relevant period and that he had not had the opportunity to claim compensation on account of the violations

suffered by him. He also complained about the absence of an effective remedy at his disposal to receive redress for such violations.

2. The Court's Assessment

62. The Court is not bound by the legal qualification of the facts by the applicant, and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). As the right to an effective remedy before a judicial authority safeguarded by Article 19 § 8 of the Constitution as regards those deprived of their liberty is a *lex specialis* in relation to Article 40 thereof, the Court has not found it necessary, in the present case, to make a separate examination under Article 40 of the Constitution (for the Court's judgment in the same vein, see *B.T.*, no. 2014/15769, 30 November 2017, § 69). The applicant's allegations will be examined as a whole within the scope of Article 19 of the Constitution.

63. The respect for fundamental rights and freedoms is a principle with which all organs of the State need to comply, and an application must primarily be made to the administrative authorities and the courts of instance against a violation which occurs in the event of non-compliance with this principle. As a requirement of the subsidiary nature of the remedy of individual application, ordinary legal remedies must firstly be exhausted in order to lodge an application with the Court. The applicant must have duly submitted his complaint in his individual application primarily to the competent administrative and judicial authorities in a timely manner, provided to the authorities the relevant information and evidence available to him, and exercised due diligence in this process to pursue his case and application. An individual application with the Court may be lodged if the alleged violations cannot be remedied through the said ordinary review mechanism (see *İsmail Buğra İşlek*, no. 2013/1177, 26 March 2013, § 17).

64. Pursuant to Article 57 § 6 of Law no. 6458, an objection may be filed with magistrate judges against administrative detention orders. Magistrate judges have the authority to review the lawfulness of a decision to place a person in administrative detention. The cases concerning the compensation of the damages sustained due to unlawful administrative detention orders shall be under the jurisdiction of the administrative courts.

The competence of administrative judicial authorities shall be limited to establishing whether any damage has been caused by an administrative detention order, and if so, the amount of the damage. These authorities do not have competence to review the lawfulness of such decision. Therefore, a full remedy action cannot be brought before an administrative court before the filing of an objection against the administrative detention order (see *B.T.*, §§ 70 and 71).

65. It must be underlined that the applicant stated that he had been placed in administrative detention on 4 November 2015 and held in the Istanbul Foreigners' Removal Centre and that he did not raise any complaint about an alleged restriction of his freedom during the period when he had been held in the relevant centre. In the event of transfer of the foreigners placed in administrative detention to another Centre due to administrative necessity, there is no legal obligation to issue a further administrative detention order and again inform the foreigner of the grounds for such order and the legal remedies available to challenge the order.

66. It must be noted that the applicant did not submit any document to the magistrate judge at any stage of the administrative detention process pursuant to Article 57 § 6 of Law no. 6458. Due to his failure to avail himself of this remedy designed to review the lawfulness of the administrative detention order, he did not have the opportunity to bring a full remedy action on account of the alleged unlawful order.

67. Consequently, it has been established that the applicant had recourse to neither the legal remedy available under Law no. 6458 providing for an effective legal review of the alleged restriction of his freedom nor the remedy of bringing a full remedy action allowing for redress for the allegedly unjustified administrative practice.

68. For these reasons, this part of the application must be declared inadmissible *for non-exhaustion of legal remedies* without being examined in terms of other admissibility criteria.

B. Alleged Violation of the Prohibition of Inhuman or Degrading Treatment

1. The Applicant's Allegations

69. The applicant alleged that he had been held in the Aşkale Foreigners' Removal Centre for ten days with his hands and feet tied up by handcuffs connected to each other through chains in a cell without heating in December, namely the coldest time of the year, that he had been prevented from having contact with the outside world during the relevant period and that the substantive aspect of the prohibition of torture safeguarded by Article 3 of the European Convention on Human Rights ("the Convention") and Article 17 of the Constitution had been thus violated on account of the treatment inflicted on him.

70. The applicant also claimed that the procedural aspect of the prohibition of torture had also been violated on account of the authorities' failure to fulfil the obligation to conduct an effective investigation into his complaints. The applicant stated that the investigation initiated following the criminal complaint filed by him with the prosecutor's office and the magistrate judge had been carried out in line with the submissions of the administrators exercising public power, that no inquiry had been conducted as to whether the CCTV camera footages sent by the Centre were relevant for the incident, that a crime scene investigation had not been conducted, that the practice of handcuffing in the Centre had had no legal basis despite the decision dated 22 June 2016 of the Erzurum 2nd Magistrate Judge noting the contrary, and that neither a disciplinary sanction nor a judicial punishment had been imposed on the officers of the penitentiary institution in connection with their acts.

71. The applicant lastly complained that the domestic remedies available to challenge the alleged torture and ill-treatment raised by the foreigners held in the Centres had remained ineffective and that his right to an effective remedy had also been violated in conjunction with the prohibition of torture and ill-treatment. In this connection, he alleged that he had filed a complaint with the prosecutor's office and the magistrate judge due to the treatment allegedly inflicted on him, but that he had not been referred to a hospital for a mental and physical examination during

the investigation, that a crime scene investigation had not been carried out, that the CCTV camera footages had not been secured and examined, and that the investigation into the incident had not been carried out fairly.

2. The Court's Assessment

72. Article 17 of the Constitution, titled *"Personal inviolability, corporeal and spiritual existence of the individual"*, provides insofar as relevant as follows:

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

73. The relevant part of Article 5 of the Constitution provides as follows:

> *"The fundamental aims and duties of the State are to safeguard … the Republic and democracy, to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence."*

74. The Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, § 16). The Court considers that the applicant's complaints raised under Article 17 of the Constitution and Article 3 of the Convention must be examined from the standpoint of the prohibition of inhuman or degrading treatment safeguarded by Article 17 § 3 of the Constitution. Moreover, the applicant's complaints about an alleged violation of his right to an

effective remedy and an alleged violation of the procedural aspect of the prohibition of inhuman or degrading treatment are based on the same facts and claims. Therefore, the Court does not find it necessary to make a separate examination within the scope of the right to an effective remedy.

a. Admissibility

75. The alleged violation of the prohibition of inhuman or degrading treatment must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

76. Article 17 § 3 of the Constitution provides that no one shall be subjected to torture or to inhuman or degrading treatment and that no one shall be subjected to punishment or treatment incompatible with human dignity. This prohibition is absolute in nature and requires that the officers exercising public power must not in any way undermine the physical and mental integrity of persons (see similarly, among many other authorities, *Cezmi Demir and Others*, no. 2013/293, 17 July 2014, § 81).

77. In the examination of the complaints concerning the prohibition of torture and ill-treatment, the substantive and procedural aspects of the said prohibition must be separately addressed. The substantive aspect of the prohibition includes two separate obligations. The first of them is the obligation not to subject individuals to torture, inhuman or degrading treatment or punishment (negative obligation). The second of them is the obligation to put in place effective preventive mechanisms to prevent individuals from being subjected to such treatment. The procedural aspect of the prohibition includes the obligation to conduct an effective criminal investigation capable of leading to the identification and punishment of those responsible for the alleged violations of the prohibition of torture and ill-treatment which are *arguable* and raise *reasonable suspicion* (see similarly, among many other authorities, *Cihan Koçak*, no. 2014/12302, 8 September 2020, §§ 45 and 46)

78. The applicant's allegations that he had been held in a cold cell in the Centre with his hands and feet tied up by handcuffs connected to each

other through chains and that he had been prevented from having contact with the outside world will be examined under the substantive aspect of the prohibition of torture. His allegation about the lack of an effective investigation into the alleged ill-treatment has been examined under the procedural aspect of the prohibition.

i. Alleged Violation of the Substantive Aspect of the Prohibition of Inhuman or Degrading Treatment

(1) General Principles

79. Article 17 of the Constitution, which provides that no one shall be subjected to torture or to inhuman or degrading treatment and that no one shall be subjected to punishment or treatment incompatible with human dignity, safeguards one of the most fundamental values of democratic societies. The prohibition of ill-treatment is absolute in nature and must not be infringed irrespective of the conduct of the victim or the motivation of the authorities. Pursuant to Article 15 § 2 of the Constitution, no derogation from this prohibition is permissible even in the event of war, mobilisation or a state of emergency (for the Court's judgments in the same vein, see *Cezmi Demir and Others*, § 104; and *Ali Rıza Özer and Others* [Plenary], no. 2013/3924, 6 January 2015, § 74).

80. A treatment must attain a minimum level of severity if it is to fall within the scope of Article 17 § 3 of the Constitution. The assessment of this minimum is relative; it depends on the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, the sex, age and state of health of the victim. Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it (see *Cezmi Demir and Others*, § 83).

81. In assessing whether there had been ill-treatment infringing Article 17 of the Constitution, the Court examines all the evidence submitted to it. This evidence may have been adduced by the applicant, submitted by the Ministry or obtained from other sources. In order to prove the truth of the alleged facts, the existence of proof beyond reasonable doubt is required. Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the parties when

evidence is being obtained has to be taken into account (see, in the same vein, *Cezmi Demir and Others*, § 95).

82. Therefore, it appears that there is a difference in terms of intensity rather than quality between the terms used in paragraph 3 of Article 17 of the Constitution. Accordingly, the form of treatment causing the greatest harm to the corporeal and spiritual existence of a person in the context of the constitutional regulation may be designated as *torture*. In addition to the severity of the treatment, Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment notes that *torture* is inflicted with the aim of obtaining information, inflicting punishment or intimidating or for any reason based on discrimination (see *Cezmi Demir and Others*, §§ 84 and 85).

83. An inhuman treatment which did not attain the level of *torture* but was premeditated, was applied for a certain period of time and caused injury or intense physical and mental suffering may be described as *inhuman or degrading treatment*. The suffering involved must not go beyond the inevitable element of suffering connected with a given form of legitimate treatment or punishment. Unlike torture, *inhuman or degrading treatment* does not require the intent to cause suffering to be based on a specific purpose (see *Cezmi Demir and Others*, § 88).

84. A treatment or punishment may be considered as *incompatible with human dignity* where it arouses in persons' feelings of fear, humiliation, anguish and inferiority capable of humiliating and debasing them or drives the victim to act against his will or conscience (see *Tahir Canan*, § 22). In this context, as different from *inhuman or degrading treatment*, the treatment inflicted on the person causes a humiliating or debasing effect rather than physical or mental pain (see *Cezmi Demir and Others*, § 89).

85. A foreign national may be arrested or detained on account of the ongoing deportation procedures. During the period when such persons have been lawfully deprived of their right to personal liberty and security, they may enjoy other rights and freedoms falling within the scope of the protection of the Constitution (see, *mutatis mutandis*, *K.A.* [Plenary], no. 2014/13044, 11 November 2015, § 93; and *Cihan Koçak*, § 57).

86. The prohibition of torture and ill-treatment under Article 17 § 3 of the Constitution is also applicable to the practices in respect of the persons under administrative detention. On many occasions, the Court examined the conditions of detention of the foreigners kept under administrative detention within the scope of the prohibition of torture and ill-treatment and pointed out the minimum standards required to be provided to those persons (see, among many other authorities, *K.A.*, §§ 87-99).

87. Article 17 of the Constitution cannot be said to prohibit the imposition of restrictive measures on the persons accommodated in the Centres or the use of force in the events of attempted escape, uprising, hostage-taking, assault, legitimate defence or necessity. However, the prohibition of torture and ill-treatment would be infringed if these restrictive measures or the use of force are resorted to beyond the extent strictly required by the exigencies of the situation or in a situation which does not inevitably require the use of force. When assessing the allegations of ill-treatment in such cases, the Court will examine the lawfulness, necessity and proportionality of the restrictive measures (see, *mutatis mutandis*, *Gülşah Öztürk* and Others, no. 2013/3936, 17 February 2016, § 52; and *Cihan Koçak*, §§ 59 and 60).

(2) Application of Principles to the Present Case

88. As a general rule, it is for the courts of instance and the judicial authorities to assess the evidence concerning the disputes brought before them, and in accordance with the subsidiary nature of the individual application, it is not the Constitutional Court's task to substitute its assessment of the facts for that of those authorities. However, in cases where inevitably required by the particular circumstances of the application, the Constitutional may make an assessment in this regard. In particular, a detailed examination must be made as to the allegations about a violation of the prohibition of torture and ill-treatment.

89. In the present case, the applicant's statement of facts concerning the allegations of torture and ill-treatment was different from the conclusions reached by the competent authorities in respect of the incidents at issue as a result of the criminal investigation. Therefore, an assessment must be made so as to determine whether there was evidence beyond reasonable

doubt as regards the applicant's allegation that he had been held in a cold cell-type room for ten days with his hands and feet handcuffed.

(a) Allegation about the applicant's having been put in handcuffs with chains

90. G.E., İ.A., R.F., R.K., K.B., A.C.Ö., O.O and Ö.K., who were serving as security officers at the Aşkale Foreigners' Removal Centre at the material time, declared that there was a practice of putting handcuffs with chains on the hands and feet of the persons placed in isolation rooms (*ilgi odası*). Ö.F.U. stated that he had seen the persons held in those rooms in handcuffs but that he had not seen chains. Se.K. and S.K. maintained that they had heard of the practice of putting handcuffs and chains, but that they had not seen any person subjected to such practice.

91. In his statement, G.E. alleged that both the hands and feet of the persons placed in isolation rooms were being put in chains and that those chains were also being connected to each other through another chain. Moreover, G.E. stated that he had drawn up a report on the verbal instruction of the director of the Centre requiring everyone placed in isolation rooms to be put in chains in order to prevent them from doing harm to themselves and that he had himself transmitted the instruction to the security director. G.E. declared that there was a total of ten chains which had been handed over during shifts through a record made on the handover book. G.E. noted that before the inspection at the Centre these chains had been handed over to the security director in accordance with the instruction of the director of the Centre and that the practice of putting chains had been terminated. R.K. stated that the practice of handcuffing had continued for some time at the Centre as regards every person placed in isolation rooms and made a description of the shape of the handcuffs and chains similarly to that of G.E. In this connection, R.F. also made a similar description as to the handcuffs and chains put on the persons held in isolation rooms.

92. İ.A. declared that the practice of putting handcuffs with chains had started on 1 October 2015 as regards the persons placed in isolation rooms, but had been terminated at the end of December 2015. He stated that after having received the order for termination of such practice, he had himself

collected the chains and handed over them to M.B., who was serving as a security director at the material time. K.B. maintained that following the investigation conducted against A.A., namely the director of the Centre, the practice of putting handcuffs with chains on persons placed in isolated rooms had ended.

93. M.B., namely the security director at the Centre at the material time, E.C., namely an assistant expert, and A.A., namely the acting director of the Centre, alleged that there had never been a practice of putting chains or handcuffs on persons placed in isolation rooms at the Aşkale Foreigners' Removal Centre. Some of the members of the staff of the Centre stated that the applicant had not been put in chains or handcuffs during the period of his detention in the isolation room while some of them declared that they did not remember whether the applicant had been put in handcuffs and chains. Moreover, some of them alleged that they had no information about the incident. After all, there was no witness statement indicating that the applicant had been subjected to the practice of putting handcuffs with chains during the period of his detention in the isolation room.

94. There was also no physical evidence to support the allegation that the hands and feet of the applicant had been put in handcuffs with chains. The investigation authorities were not provided with any footage concerning the applicant's detention in the isolation room. The medical report issued in respect of the applicant did not contain any finding indicating that his hands and feet had been put in handcuffs and chains.

95. In view of the witness statements indicating that the foreigners held in the Aşkale Foreigners' Removal Centre between October 2015 and December 2015 were being automatically subjected to the practice of putting handcuffs with chains in the event of their placement in the isolation rooms, there was a reasonable suspicion that the applicant had also been subjected to the practice in question. However, it must be underlined that the same witnesses stated that the applicant had not been subjected to the practice of putting handcuffs with chains during the period of his detention in the isolation room and that there was no physical evidence to support the applicant's allegations.

96. Consequently, the Court considers that there was no evidence beyond reasonable doubt to support the allegation that the applicant had been held in a single room with his hands and feet tied up by handcuffs connected to each other through chains.

(b) Allegation about the applicant's having being accommodated in a single room without heating for ten days

97. On 1 December 2015 at around 1 a.m. the applicant was placed in a single room described as the *isolation room* following the attempted escape of another person as understood from the statements of G.E., İ.A., S.K., R.F., R.K., M.B, and K.B., who were serving as private security officers at the institution at the material time, F.B., who was serving as a security director, and E.C., who was serving as an assistant expert.

98. The finding report issued on 14 March 2016 by the crime scene investigation officers described the physical characteristics of the *isolation rooms* in Block G at the Aşkale Foreigners' Removal Centre. According to the report, the rooms measuring approximately 8 m^2 could be entered through iron doors with iron ratchet locks on them. The inside of the rooms and the iron doors were covered with 20-cm-thick foam rubber. There was a camera system in all rooms. There was a window, a toilet and a tap inside the rooms. As a property, there was only a sponge mattress. This description was also consistent with the statements of the personnel of the Centre. The personnel of the Centre also declared that these rooms had a heating system connected to the central system at the Centre.

99. The applicant alleged that he had been held in the isolation room for a total of ten days. F.P., E.C. and İ.A. stated that they did not know for how many days the applicant had been held in the isolation room. R.K. maintained that he had seen the applicant being held in the isolation room a few days after his placement in the said room, but that he did not remember for a total of how many days he had been held there. M.B. declared that he did not remember how long the applicant had been held in the isolation room, but that this period of time might be one week. G.E. stated that the applicant had been held in the isolation room for a few days and subsequently released from the room in accordance with the instruction of A.A., who was serving as the acting director at

the relevant time. G.E. further maintained that on the same day A.A. had said that the applicant would be taken to the Prosecutor's Office to give his statement. In view of the fact that the applicant's statement had been taken on 10 December 2015 before the Aşkale Public Prosecutor's Office, it is understood that the statement of G.E. confirmed the allegations that the applicant had been held in the isolation room between 1 December 2015 and 10 December 2015.

100. All of the persons stating that the applicant had been held in the isolation room were members of the staff of the Aşkale Foreigners' Removal Centre. Some of them were the security officers who had executed the decision to place the applicant in the isolation room. Some of them were the persons having monitored the applicant through the security camera for the duration of his accommodation in the isolation room.

101. Consequently, although there was no evidence supporting the alleged coldness of the said room, it has been concluded that there was evidence beyond reasonable doubt to indicate that the applicant had been placed in the isolation room on 1 December 2015 and held there until he was taken to the Aşkale Chief Public Prosecutor's Office on 10 December 2015 for questioning. The examination of the alleged violation of the substantive aspect of the prohibition of inhuman or degrading treatment will be carried out solely on the basis of the material fact established as such.

102. It is understood that the applicant was placed in an isolation room following the attempted escape of another person on 1 December 2015, but that the application file does not contain any evidence indicating the applicant's relation with the escaping person or his link with the escape attempt. 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 reason after his placement in the isolation room. Nor was there any allegation or evidence indicating that the applicant had been taken into custody due to a criminal investigation/prosecution. Similarly, there was no evidence pointing to the possibility that the applicant might do harm to himself, other persons staying at

the Centre or the property there. On the contrary, all witness statements indicated that the applicant had been looking calm and harmonious during his stay at the Centre. Indeed, the administration of the institution did not make an explanation as to why the applicant had been placed in a room described as the *isolation room*.

103. The Foreigners' Removal Centres are institutions adopting a human-oriented approach in ensuring the accommodation and control of the foreigners in respect of whom a deportation order has been issued. These centres are required to provide services on the basis of the protection of the right to life of the individuals held there as well as the strengthening of them both socially and psychologically. Nevertheless, it is necessary to maintain safety and security within the institution for the proper conduct of the services provided by the Centres. In this context, it must be acknowledged that the public officials responsible for the administration of the institution have the power to take necessary security measures. However, such power must be exercised in good faith within the framework of respect for fundamental rights and freedoms.

104. It is understood that the applicant was held for ten days in the *isolation room* designed in the form of an *observation room* (for a judgment of the Constitutional Court concerning the *observation room*, see *Cihan Koçak*, §§ 69-71 and also see § 98), that he was unable to contact with other persons staying at the Centre or his family or legal representative, that he was not provided with any means of communication such as radio, television or telephone, that he even ate his meals in the isolation room, and that there is no evidence indicating that he was allowed to get outdoors.

105. In these circumstances, it has been concluded that the impugned interference in the form of holding the applicant for ten days in a room called as the *isolation room* without the possibility of any contact with the outside world, in the absence of any legitimate aim and in contravention with the aforementioned working principles of the Centres may be regarded as torture given its nature and duration.

106. For these reasons, the Court concludes that there has been a violation of the substantive aspect of the prohibition of inhuman or degrading treatment guaranteed by Article 17 § 3 of the Constitution.

ii. Alleged Violation of the Procedural Aspect of the Prohibition of Inhuman or Degrading Treatment

107. The State's positive obligation within the scope of the individual's right to protect and improve his corporeal and spiritual existence also has a procedural aspect. This procedural obligation requires that there should be some form of effective official investigation capable of leading to the identification and, if necessary, punishment of those responsible for any kind of physical and mental attacks. The essential purpose of such investigation is to secure the effective implementation of the law preventing those attacks and, in cases involving State agents or bodies, to ensure their accountability for the incidents occurring under their responsibility (see *Cezmi Demir and Others*, § 110).

108. Accordingly, where an individual makes a credible assertion that he has suffered an unlawful treatment infringing Article 17 of the Constitution at the hands of a State agent, this constitutional provision, read in conjunction with the State's general obligation under Article 5 of the Constitution titled "*Fundamental aims and duties of the State*", requires that there should be an effective official investigation. This investigation must be capable of leading to the identification and punishment of those responsible. Otherwise, this provision, despite its importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see *Tahir Canan*, § 25).

109. The purpose of criminal investigations is to secure the effective implementation of the legislative provisions protecting the corporeal and spiritual existence of a person and to ensure accountability of those responsible. This is not an obligation of result, but of appropriate means and cannot be interpreted as imposing the public authorities the duty to conclude all proceedings with a conviction or a particular sentence (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, § 56).

110. For criminal investigations to be effective, they must be conducted with reasonable diligence and promptness. The investigation authorities must act *ex officio* and secure all the evidence capable of leading to the clarification of the incident and identification of those responsible. This

evidence includes, depending on the nature of the incident, criminal examinations, reconstruction of the events at the incident scene as well as statements of eye-witnesses, victims and possible suspects. The persons alleging to have been subjected to ill-treatment must be medically examined without any delay and a report must be issued in relation to the existence and extent of the alleged treatment (see, *mutatis mutandis*, *Cezmi Demir and Others*, §§ 114 and 116; and *Cihan Koçak,* §§ 74 and 79).

111. It is understood that in his criminal complaint filed with the Aşkale Chief Public Prosecutor's Office through his lawyer, the applicant explained his allegations of torture and ill-treatment in a detailed manner and indicated the evidence which he requested to be collected. At the first stage of the criminal investigation promptly initiated upon the complaint in question, a crime scene investigation was not carried out, and the investigation authorities did not obtain and secure the CCTV camera footage by themselves, but rather confined themselves to the video footage submitted by the officials at the Centre against whom the applicant filed the complaint at issue. 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, against whom the applicant filed the relevant complaint, were not identified and their defence submissions were not obtained. The criminal investigation ended by a decision of non-prosecution dated 21 December 2015.

112. At the second stage which started following the decision to extend the investigation delivered on 10 February 2016 by the Erzurum 2nd Magistrate Judge, the applicant was referred to the hospital on 3 May 2016 for the first time and a medical report was obtained in respect of him due to ill-treatment allegedly inflicted on him. It was not possible to take statements of the foreigners being held in the Aşkale Foreigners' Removal Centre at the date of the incidents indicated in the applicant's complaint as they had been transferred to other Centres. Since the electronic infrastructure of the Aşkale Foreigners' Removal Centre allowed for the store of security camera records for a maximum period of three days, it was not possible to obtain the footage of the room where the applicant had allegedly been held at the material time.

113. At the second stage of the investigation, the persons working as security officers and security camera monitoring personnel were questioned, and a crime scene investigation was carried out in line with the allegations. The personnel of the Centre declared that the applicant had been held in a room described as the *isolation room*. As a result of the crime scene investigation, it was established that the isolation rooms were single rooms having an iron ratchet locking system and containing only a sponge mattress inside. Consequently, on 14 June 2016 a further decision of non-prosecution was issued. By its decision of 22 June 2016, the Erzurum 2nd Magistrate Judge dismissed the objection filed against the decision of non-prosecution on the ground that the case-file contained no evidence other than the abstract statement of the complainant concerning the alleged commission of the offence of torture.

114. The decision taken as a result of the investigation must be based on a comprehensive, objective and impartial analysis of all findings obtained during the investigation process and must also contain an assessment of whether the interference with the right to life was a proportionate one resulting from an exigent circumstance required by the Constitution (see *Cemil Danışman*, no. 2013/6319, 16 July 2014, § 99).

115. First of all, in the assessment of the complaint about an alleged violation of the substantive aspect of the prohibition of inhuman or degrading treatment, attention must be drawn to the fact that evidence beyond reasonable doubt was obtained during the criminal investigation to indicate that the applicant had been arbitrarily held for ten days in a single room described as the isolation room without the possibility of any contact with the outside world. In the light of this finding, the decisions of non-prosecution issued as a result of the investigation and the decisions dismissing the applicant's objections against them cannot be said to be based on a comprehensive, objective and impartial assessment of all findings obtained during the investigation process. In accordance with Article 17 § 3 of the Constitution, the State's positive obligations within the scope of the prohibition of ill-treatment require that criminal proceedings be initiated against the persons concerned and a judicial conclusion compatible with the material truth be reached (for the Court's similar approach, see *İbrahim Süleymanoğlu*, no. 2015/6557, 17 July /2019, §§ 83 and 84).

116. Secondly, the Court notes that certain pieces of evidence which were of critical importance for the investigation were lost due to the failure to immediately collect them. 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 the elapse of a certain period of time. Therefore, an investigation capable of leading to the clarification of *the allegations about the applicant's hands and feet having been put in chains* cannot be said to have been carried out with due diligence.

117. Consequently, the Court has found a violation of the procedural aspect of the prohibition of inhuman or degrading treatment guaranteed by Article 17 § 3 of the Constitution.

C. Application of Article 50 of Code no. 6216

118. Article 50 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, insofar as relevant, provides as follows:

> *"(1) At the end of the examination of the merits it is decided that the right of the applicant has been violated or not. In cases where a decision of violation has been made, what is required for the elimination of the violation and the consequences thereof shall be ruled...*
>
> *(2) If the violation found arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be eliminated. In cases where there is no legal interest in holding the retrial, the applicant may be awarded compensation or be informed of the possibility to institute proceedings before the general courts. The court, which is responsible for holding the retrial, shall deliver a decision on the basis of the file, if possible, in a way that will eliminate the violation and the consequences thereof as the Constitutional Court has explained in its decision of violation."*

119. The applicant requested the Court to find a violation of the prohibition of inhuman or degrading treatment safeguarded by Article 17 § 3 of the Constitution and to award him compensation in respect of non-pecuniary damage.

120. In its judgment on the individual application of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018, §§ 54-60), the Court has made detailed explanations as to what is required for redressing the violation and the consequences thereof in cases where a decision of violation has been made as a result of the examination of the impugned incident. In line with the aforementioned case-law, the basic rule for redressing the violation and the consequences thereof under Code no. 6216, namely restitution, must be applied to the present case.

121. In the present application, it has been concluded that the substantive and procedural aspects of the prohibition of inhuman or degrading treatment were violated on the ground that the applicant had been arbitrarily held for ten days in a single room at the Centre and that an effective investigation had not been carried out into his complaint about the relevant incident.

122. Since there is legal interest in conducting a fresh investigation for redressing the consequences of the violation of the prohibition of inhuman or degrading treatment, a copy of the judgment must be sent to the Aşkale Chief Public Prosecutor's Office (investigation no. 2016/294) for a fresh investigation.

123. The applicant must be paid a net amount of TRY 30,000 in respect of non-pecuniary damages which cannot be compensated merely by the finding of a violation due to the violation of the prohibition of inhuman or degrading treatment.

124. In respect of the litigation costs, the counsel fee of TRY 3,000 must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 2 June 2020 that

A. The applicant's request for confidentiality of his identity in the documents accessible to the public be GRANTED;

B. 1. The alleged violation of the right to personal liberty and security be DECLARED INADMISSIBLE for non-exhaustion of legal remedies;

2. The alleged violation of the prohibition of inhuman or degrading treatment be DECLARED ADMISSIBLE;

C. The substantive and procedural aspects of the prohibition of inhuman or degrading treatment safeguarded by Article 17 § 3 of the Constitution were VIOLATED;

D. A copy of the judgment be SENT to the Aşkale Chief Public Prosecutor's Office for the conduct of a fresh investigation so that the consequences of the violation of the prohibition of inhuman or degrading treatment be redressed;

E. A net amount of TRY 30,000 be PAID to the applicant in compensation for non-pecuniary damage and the remaining compensation claims be REJECTED;

F. The litigation costs consisting of the counsel fee of TRY 3,000 be REIMBURSED TO THE APPLICANT;

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

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

FERİDE KAYA (2)

(Application no. 2016/13985)

9 June 2020

On 9 June 2020, the First Section of the Constitutional Court found violations of both substantive and procedural aspects of the prohibition of torture, safeguarded by Article 17 of the Constitution, in the individual application lodged by *Feride Kaya (2)* (no. 2016/13985).

THE FACTS

[7-51] 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.

V. EXAMINATION AND GROUNDS

52. The Constitutional Court ("the Court"), at its session of 9 June 2020, examined the application and decided as follows:

A. The Applicant's Allegations

53. The applicant alleged that her rights to a fair trial and an effective remedy and the prohibition of torture had been violated on the grounds that she had been subjected to torture in the custody room and forced to give her statement as desired, that false reports had been issued at the hospital where she had been taken for compulsory medical examination

during and at the end of the custody period, that an effective investigation had not been carried out against those responsible although torture had been proven to have been inflicted on her in view of the state of evidence in the file, that the criminal proceedings had ultimately been discontinued unlawfully due to the expiry of the prescription period, and thus the offence had gone unpunished.

B. The Court's Assessment

54. The Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). In view of the fact that the alleged violations of the applicant's rights to a fair trial and an effective remedy fall within the scope of the State's obligation to conduct an effective investigation in respect of the prohibition of ill-treatment, a separate examination has not been made as regards those rights.

1. Admissibility

55. The impugned allegation must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

56. Article 17 of the Constitution, titled *"Personal inviolability, corporeal and spiritual existence of the individual"*, provides insofar as relevant as follows:

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

57. Article 5 of the Constitution reads as follows:

> *"The fundamental aims and duties of the State are… to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence."*

58. In the examination of the complaints concerning the prohibition of torture and ill-treatment, the substantive and procedural aspects of the prohibition must be separately addressed. In this connection, the substantive aspect of the prohibition does not only include the obligation not to subject individuals to torture, inhuman or degrading treatment or punishment (negative obligation). It also includes a positive obligation to put in place effective preventive mechanisms to prevent individuals from being subjected to such treatment.

59. The procedural aspect of the prohibition of torture and ill-treatment includes the obligation to conduct an effective investigation capable of leading to the identification and punishment of those responsible for the alleged violations of this prohibition which are arguable and raise reasonable suspicion (positive obligation).

60. The applicant primarily claimed that she had been subjected to physical attack and torture by the law enforcement officers and then maintained that the authorities had failed to conduct an effective investigation in order to ascertain the circumstances of the incident. Therefore, the applicant's complaints must be assessed separately under both substantive and procedural aspects of the prohibition of ill-treatment.

a. Alleged Violation of Article 17 of the Constitution under its Substantive Aspect

i. General Principles

61. Article 17 of the Constitution safeguards everyone's right to protect and improve their corporeal and spiritual existence. Paragraph 1 thereof

is intended for the protection of human dignity. Paragraph 3 of the same article provides that no one shall be subjected to "*torture*" or "*inhuman or degrading treatment*" and that no one shall be subjected to "*punishment or treatment incompatible with human dignity*".

62. The obligation of the State to respect for the individual's right to protect and improve his corporeal and spiritual existence requires, firstly, that public authorities must not interfere with this right, in other words, must not cause any physical and mental harm to persons in the ways set out in the third paragraph of the said article. This is a negative obligation of the State resulting from its obligation to respect for the physical and mental integrity of the individual (see *Cezmi Demir and Others*, no. 2013/293, 17 July 2014, § 81).

63. Within the scope of the right guaranteed by Article 17 of the Constitution, the State has a positive obligation to protect the individual's right to protect and improve his corporeal and spiritual existence as regards those within its jurisdiction against risks likely to result from acts of both public authorities and other individuals as well as those of the individual himself. The State is under an obligation to protect the individual's corporeal and spiritual existence against any danger, threat and violence (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, § 51).

64. This obligation of protection imposes on the State a duty to take measures to prevent those persons from being subjected to torture, inhuman or degrading treatment, or treatment or punishment incompatible with human dignity. This obligation constitutes one element of the substantive aspect of the prohibition of ill-treatment, namely the State's positive obligation to protect individuals' physical and mental integrity through administrative and legal legislation. Where the State fails to take reasonable measures to prevent a risk of ill-treatment which they knew or should have known, the responsibility of the State may be engaged within the meaning of Article 17 § 3 of the European Convention on Human Rights ("the Convention") (see *Cezmi Demir and Others*, § 82).

65. While there is no absolute necessity for all prosecutions to result in a conviction or a particular sentence, the courts must not, under any

circumstances, allow the offences threatening life and the severe attacks against physical and mental integrity to go unpunished, be pardoned or become time-barred. The judicial authorities, as guardians of the laws enacted in order to protect the physical and mental integrity of the individuals within their jurisdiction, must be decisive in imposing sanctions on those responsible and must not allow for a manifest disproportion between the gravity of the offence and the punishment imposed. Otherwise, the positive obligation of the State to protect, through administrative and legal legislation, the physical and mental integrity of persons would not be fulfilled (see *Cezmi Demir and Others*, § 77).

66. Moreover, a treatment must attain a minimum level of severity if it is to fall within the scope of Article 17 § 3 of the Constitution. The assessment of this minimum is relative; it depends on the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, the sex, age and state of health of the victim (see *Tahir Canan*, § 23). Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it. Its context, such as an atmosphere of heightened tension and emotions, is also another factor required to be taken into consideration (see *Cezmi Demir and Others*, § 83).

67. Ill-treatment is graded and described in different terms by the Constitution and the Convention depending on its effects on the person. Therefore, it appears that there is a difference in terms of intensity between the terms used in Article 17 § 3 of the Constitution. In determining whether a particular form of treatment should be classified as *torture*, consideration must be given to the distinction, embodied in the said article, between this notion and that of *inhuman or degrading treatment* and *treatment incompatible with human dignity*. It is understood that such a distinction has been made by the Constitution in order to attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering and to make a gradation, and that the terms in question have a broader and different meaning than the elements of the offences of torture, inhuman or degrading treatment and defamation regulated in the Turkish Criminal Code (Law no. 5237 of 26 September 2004) (see *Cezmi Demir and Others*, § 84).

68. Accordingly, the form of treatment causing the greatest harm to the corporeal and spiritual integrity of a person in the context of the

constitutional regulation may be designated as torture (see *Tahir Canan*, § 22). In addition to the severity of the treatment, there is an element of intent, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which in Article 1 defines torture as the intentional infliction of severe pain or suffering with the aim of obtaining information, inflicting punishment or intimidating or for any reason based on discrimination (see *Cezmi Demir and Others*, § 85).

69. An inhuman treatment which did not attain the level of torture but was premeditated, was applied for hours at a stretch and caused actual bodily injury or intense physical and mental suffering may be described as *inhuman or degrading treatment* (see *Tahir Canan*, § 22). The suffering involved must not go beyond the inevitable element of suffering connected with a given form of legitimate treatment or punishment. Unlike torture, inhuman or degrading treatment does not require the intent to cause suffering to be based on a specific purpose. Forms of treatment such as physical attack, battery, psychological interrogation techniques, keeping in bad conditions, deporting or extraditing a person to a place where he will suffer from ill-treatment, disappearance of a person under State supervision, destruction of a person's house, fear and concern caused by waiting for a long time for the execution of death penalty, and child abuse may be qualified as *inhuman or degrading treatment* within the meaning of Article 17 § 3 of the Constitution (see *Cezmi Demir and Others*, § 88).

70. More lenient degrading treatment or punishment may be considered as incompatible with human dignity where it arouses in its victims feelings of fear, humiliation, anguish and inferiority capable of humiliating and debasing them or drives the victim to act against his will or conscience (see *Tahir Canan*, § 22). In this context, as different from inhuman or degrading treatment, the treatment inflicted on the person causes a humiliating or debasing effect rather than physical or mental pain (*Cezmi Demir and Others*, § 89).

71. In order to determine within the scope of which concept a given treatment falls, each case needs to be assessed in the light of its particular circumstances (see *Cezmi Demir and Others*, § 90).

72. Moreover, as emphasised on many occasions by the European Court of Human Rights ("the ECHR") and recalled in its judgment in the case of *Yurtsever and Others v. Turkey* (no. 22965/10, 8 July 2014), attention must especially be drawn to the principle providing that the criminal liability of the perpetrator is distinct from the State's responsibility under the Convention. In its said judgment, the ECHRlaid a clear emphasis on the relevant principle and noted that it had no jurisdiction to rule on the guilt or innocence within the meaning of criminal law (see *Yurtsever and Others v. Turkey*, § 68).

ii. Application of Principles to the Present Case

73. The applicant alleged that she had been subjected to ill-treatment by the gendarmerie officers who had taken her statement while she had been held in the custody room of the Çorum Provincial Gendarmerie Command on the charge of aiding and abetting a terrorist organisation.

74. The Court requires that the alleged ill-treatment presumed to have attained the threshold of severity must be proven beyond reasonable doubt and primarily addresses this issue in the examination of the individual applications lodged with it. Persons claiming to be victims of an ill-treatment, except for the cases where the burden of proof shifts to the State, must provide indications and evidence demonstrating that they have been subjected to treatment of such severity as to fall within the scope of the prohibition of ill-treatment (see *Beyza Metin*, no. 2014/19426, 12 December 2018, § 45).

75. In the present case, as regards the physical findings concerning the alleged ill-treatment, the medical reports were of importance. Although the medical reports issued in respect of the applicant during the period of her custody indicated no sign of battery or coercion, criminal proceedings were instituted against the doctors who had issued the relevant reports due to misconduct on the ground that they had issued those reports unlawfully without making any medical examination. Moreover, these medical reports were not the sole ones relied on to elucidate the allegations and further medical reports were issued during the investigation carried out into the alleged ill-treatment and the applicant's allegations were supported by most of those reports. In these circumstances, in view of the

fact that doubt was cast on the authenticity of the initial medical reports within the scope of the criminal proceedings, it must be acknowledged that there was sufficient evidence indicating that the applicant had been subjected to physical and mental attack while in custody under the supervision and responsibility of the State. The obligation to prove otherwise has now shifted to the State.

76. It is clear that it would be difficult for the applicants to substantiate their complaints about some forms of ill-treatment allegedly inflicted on them during custody, due to the difficulty in collecting evidence, in view of the fact that they were disconnected from the outside world as they were in custody and that it was not possible to see at any time the doctors, lawyers, family relatives or friends who could support them and provide the required evidence. A conclusion may be reached in respect of the applicants' allegations in this scope only in the event of the examination of all the data in the file as a whole (see *Cezmi Demir and Others*, § 99).

77. As a result of the proceedings, the trial court acknowledged in the reasoning of its judgment dated 24 November 2012 that the applicant had been subjected to ill-treatment while in custody. In its quashing decision dated 12 December 2012, the 8th Criminal Chamber of the Court of Cassation concluded that the applicant had been subjected to torture during the period of custody and noted that there was nothing inappropriate in this finding of the trial court. Due to the existence of elements of proof of ill-treatment beyond reasonable doubt such as medical reports, witness statements supporting the allegations and the findings of judicial authorities, the public authorities were expected to make a reasonable explanation as to the cause of the applicant's health problems. As a result of the investigation carried out by the prosecutor's office, the gendarmerie officers who were being tried as accused persons denied the charges and did not make a convincing explanation as to how the injuries had occurred during the period of custody.

78. In the examination of the complaints in individual applications, the Court has a subsidiary role. It is, as a rule, for the judicial authorities to assess the evidence within the scope of an investigation and it is not the Court's task to substitute its assessment of the facts for that of those

authorities. The competence of the Court in respect of the allegations of ill-treatment is limited to those concerning the fundamental rights and freedoms guaranteed by the Constitution within the scope of the European Convention on Human Rights ("the Convention") and the protocols thereto, to which Turkey is a party. Therefore, the Court is not tasked with reaching a finding as to guilt or innocence in the context of criminal liability. Moreover, although the Court is not bound by the findings of the judicial authorities, there must be strong reasons under normal conditions for it to depart from those authorities' findings as to the facts (see *Cezmi Demir and Others*, § 96).

79. It appears that the case file contains the medical reports obtained on the initiative of the applicant himself as well as those issued upon the trial court's request. Although in its report dated 9 February 2009 the Forensic Medicine Institute concluded that a conclusive finding could not be made as to whether the limitation of movement ability on the applicant's right arm and the mental disturbance had allegedly occurred during the process of custody, it was noted that the physical and mental findings in the report issued by the Forensic Medicine Department of the Cerrahpaşa Faculty of Medicine at the Istanbul University were compatible with the history of torture within the framework of the Istanbul Protocol. It is understood that the report issued by the Faculty of Medicine in question was also supported by other reports included in the case file before the trial court.

80. The findings reached by the Forensic Medicine Institute as a result of a medical examination of the applicant in person were also supported by other reports included in the case file. In this scope, it has been found established that the applicant suffered a *rotator cuff rupture* (shoulder joint ligament tear) on the right shoulder, an *ecchymosis* on the right arm and *post-traumatic stress disorder* after her placement in custody. Although the Forensic Medicine Institute did not reach a medical finding, other medical reports included in the file (issued by the Faculty of Medicine of the Istanbul University, the Cerrahpaşa Faculty of Medicine and the Istanbul Representation Office of the Human Rights Foundation) indicated that such health problems might have been caused by beating and application of electric shock to the body. As a result of the overall assessment of the applicant's submissions at the stages, the witness statements consistent

with those submissions, the findings in various medical reports, the reasoned judgment dated 24 November 2011 of the trial court finding that the applicant had been subjected to ill-treatment and the quashing decision dated 12 December 2012 of the 8th Criminal Chamber of the Court of Cassation finding in line with the trial court's judgment, it has been concluded that the applicant had been subjected to ill-treatment causing physical and mental suffering during the period of her custody. However, in view of the fact that the investigation was concluded due to the expiry of the prescription period and that it was thus closed by a final judgment without identification of the perpetrator or perpetrators, it must be said that the public authorities acted in breach of their obligation to make explanation as to the allegations of ill-treatment. In the light of the applicant's statement before the Prosecutor's Office, the indictment and the course of the incident, it has been understood that the acts amounting to ill-treatment had been committed for the particular purpose of obtaining information from the applicant or forcing her to confess her guilt and that the public officials had acted intentionally during the said process.

81. Torture, inhuman or degrading treatment or treatment incompatible with human dignity cannot be inflicted even in the most difficult circumstances, such as where the right to life is at stake, irrespective of the importance of the motive behind the ill-treatment (see *Cezmi Demir and Others*, § 104). In the present case, it has been understood that degrading treatment incompatible with human dignity, causing physical or mental suffering and affecting the capabilities of perception or will had been inflicted on the applicant in order to obtain information from her or force her to admit the imputed offences, and that such treatment had been inflicted with a certain intention for two days in such a manner as to arouse feelings of fear, concern and inferiority capable of breaking her resistance through severe physical pain or mental suffering.

82. The treatment intentionally inflicted on the applicant may be qualified as torture in view of its purpose and duration, its physical and mental effects indicated in the medical reports and the extent of the impugned acts, as well as regard being had to the fact that such treatment had been intentionally inflicted by the agents of the State in charge in order to force the applicant to make confession or provide information about the

relevant incidents. It has been concluded that there had been a breach of the State's negative obligation under Article 17 of the Constitution.

83. Furthermore, it must be noted that the Court's judgment finding a violation does not contain an assessment as to the criminal liability of those standing trial as accused persons in the impugned proceedings and aims to indicate the State's responsibility within the scope of the constitutional provisions in the context of the present case.

b. Alleged Violation of Article 17 of the Constitution under its Procedural Aspect

i. General Principles

84. The State's positive obligation within the scope of the individual's right to protect and improve his corporeal and spiritual existence also has a procedural aspect. This procedural obligation requires that there should be some form of effective official investigation capable of leading to the identification and, if necessary, punishment of those responsible for any kind of unnatural physical and mental attacks. The essential purpose of such investigation is to secure the effective implementation of the law preventing those attacks and, in cases involving State agents or bodies, to ensure their accountability for the incidents occurring under their responsibility (see *Cezmi Demir and Others*, § 110).

85. Accordingly, where an individual makes a credible assertion that he has suffered an unlawful treatment infringing Article 17 of the Constitution at the hands of a State agent, this constitutional provision, read in conjunction with the State's general obligation under Article 5 of the Constitution titled "*Fundamental aims and duties of the State*", requires that there should be an effective official investigation. This investigation must be capable of leading to identification and punishment of those responsible. Otherwise, this provision, despite its importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see *Tahir Canan*, § 25).

86. The type of investigation to be conducted into an incident, as required by the procedural obligation, is to be determined on the basis of

whether the obligations concerning the essence of an individual's right to protect his corporeal and spiritual existence require any criminal sanction. In the case of deaths and injuries caused intentionally or resulting from an attack or ill-treatment, the State is obliged by virtue of Article 17 of the Constitution to conduct criminal investigations capable of leading to the identification and punishment of those responsible for the attack causing death or injury. In such cases, a mere payment of compensation as a result of administrative and judicial investigations and criminal proceedings is not sufficient to remedy the impugned violation and put an end to the person's victim status (see *Serpil Kerimoğlu and Others*, § 55).

87. The purpose of criminal investigations is to secure the effective implementation of the legislative provisions protecting the corporeal and spiritual existence of a person and to ensure accountability of those responsible for deaths or injuries. This is not an obligation of result, but of appropriate means (see *Serpil Kerimoğlu and Others*, § 56).

88. Criminal investigations to be conducted must be effective and adequate in the sense that they are capable of leading to the identification and punishment of those responsible. An effective and adequate investigation requires that the investigation authorities act ex officio and gather all the evidence capable of leading to the clarification of the incident and identification of those responsible. Hence, an investigation into the allegations of ill-treatment must be conducted independently, promptly and thoroughly. In other words, the authorities must make a serious attempt to find out the facts and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions; in this scope, they must take all the reasonable measures available to them to secure the evidence concerning the incident, including *inter alia* eye-witness testimony and criminal expertise (see *Cezmi Demir and Others*, § 114).

89. In an investigation into the complaints about ill-treatment, it is of importance for the officials to act promptly. It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, during investigations into alleged ill-treatment, the authorities must act with due promptness and diligence in order to secure their adherence to the rule of law, prevent any appearance

of collusion in or tolerance of unlawful acts, and maintain public confidence (see *Cezmi Demir and Others,* § 119).

90. The ECHRpoints out that where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an *effective remedy* that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible. The ECHRalso underlines the importance of the suspension from duty of the agent under investigation or on trial as well as his dismissal if he is convicted (see *Abdülsamet Yaman v. Turkey*, no. 32446/96, 2 November 2004, § 55).

ii. Application of Principles to the Present Case

91. The applicant alleged that the criminal proceedings initiated against those responsible in the absence of an effective investigation had been discontinued due to expiry of the prescription period although the provisions on prescription were not applicable to such type of offences.

92. The criminal proceedings against the doctors tried for having committed misconduct by issuing false reports were discontinued due to expiry of the prescription period and the judgment in this regard became final. The applicant lodged an individual application with the Court and submitted the relevant judgment to the latter. The Court, having concluded that the procedural aspect of the prohibition of ill-treatment had been violated, referred to the shortcomings in the proceedings before the trial court and considered that the discontinuation of the proceedings 9 years and 2 months after the date of commission of the offence, without a discussion of whether certain measures could have been taken for the conduct of the proceedings more expeditiously and whether a judgment could have been delivered in the light of the available evidence, created an appearance of collusion in or tolerance of unlawful acts, and thus amounted to a violation within the scope of the prohibition at issue.

93. The criminal proceedings which were the subject matter of the individual application no. 2013/2365 became final as regards the doctors but continued as regards the gendarmerie officers. Following the quashing decision of the Court of Cassation dated 12 December 2012, the trial court

held its first hearing on 9 April 2013 and pronounced its judgment on 18 April 2013. The applicant filed a petition of appeal against the judgment and noted that the prescription period was about to expire. However, the letter of notification was issued on 7 June 2014 by the Chief Public Prosecutor's Office at the Court of Cassation, and on 19 January 2016 the Plenary of the Court of Cassation in Criminal Matters discontinued the proceedings. Therefore, it appears that the proceedings were concluded with a final judgment 13 years 4 months and 20 days after the date of commission of the offence. 1 year of this period was spent in the investigation carried out by the prosecutor's office.

94. Although in the proceedings involving the gendarmerie officers and doctors it was lawful for the accused persons to be tried collectively in view of the entirety of the investigation, there would be difficulties or delays caused by the requirement to provide procedural safeguards. Nevertheless, the judicial authorities were expected to complete, in the most expeditious manner and by paying regard to the parties' rights the investigation into such a serious offence as torture in view of the nature of the acts and severity of the penalties prescribed for such acts.

95. It has been understood that having continued the proceedings following the quashing decision of the Court of Cassation dated 12 December 2012, the judicial authorities concluded the file approximately 3 years and 1 month later despite the applicant's warnings concerning the prescription period, and that the judgment was based on the expiry of the prescription period. In the context of this application, there is no reason requiring the Constitutional Court to depart from its conclusions and finding of a violation in the individual application file no. 2013/2365. It has been considered that within the scope of the positive obligation to ensure expeditious completion of the investigations in the context of the prohibition of ill-treatment and to prevent them from being time-barred, the judicial authorities did not act with due diligence in the impugned investigation and ultimately showed tolerance towards and remained indifferent to unlawful acts constituting the offence of torture.

96. Consequently, the Court has found a violation of the procedural aspect of the prohibition of torture guaranteed by Article 17 § 3 of the Constitution.

3. Application of Article 50 of Code no. 6216

97. Article 50 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, insofar as relevant, provides as follows:

> *"(1) At the end of the examination of the merits it is decided that the right of the applicant has been violated or not. In cases where a decision of violation has been made, what is required for the resolution of the violation and the consequences thereof shall be ruled...*
>
> *(2)If the violation found arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favour of the applicant or the remedy of filing a case before the general courts may be shown. The court which is responsible for holding the retrial shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."*

98. The applicant requested the Court to find a violation and order a retrial and also claimed TRY 100,000 in respect of compensation.

99. In its judgment on the individual application of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court set out the general principles concerning the redress of the violation. In another judgment, the Court explained the relevant principles as well as the consequences of the failure to comply with its judgment finding a violation and pointed out that this would amount to the continuation of the violation and might also result in a violation for the second time (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

100. Where a violation of any fundamental right is found within the scope of an individual application, the basic rule for redressing the violation and the consequences thereof is to ensure restitution to the extent possible, that is to say, to ensure restoration of the original state prior to the violation. To that end, it is primarily required to identify the cause of the

violation and then to end the continuing violation, to revoke the decision or act giving rise to the violation, to redress the consequences thereof, to compensate the pecuniary and non-pecuniary damages resulting from the violation, and to take other measures deemed appropriate in this context (see *Mehmet Doğan*, §§ 55 and 57).

101. In the present application, it has been concluded that the substantive and procedural aspects of the prohibition of torture were violated on the grounds that the judgment of the trial court had not provided redress for the applicant's suffering and that the investigation had not been effective in the sense that it had not been capable of leading to the identification and punishment of those responsible.

102. In the impugned incident, there is no legal interest in conducting a retrial due to the expiry of the prescription period although it has been concluded that both the substantive and procedural aspects of the prohibition of torture under Article 17 § 3 of the Constitution were violated. Accordingly, in the light of the circumstances of the present case, the applicant must be paid a net amount of TRY 90,000 -in view of the fact that she was awarded TRY 20,000 in the file no. 2013/2365- in respect of her non-pecuniary damages which cannot be compensated merely by the finding of a violation.

103. The total litigation costs of TRY 3,239.50 including the court fee of TRY 239.50 and the counsel fee of TRY 3,000, as established on the basis of the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 9 June 2020 that

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

B. The substantive and procedural aspects of the prohibition of torture safeguarded by Article 17 § 3 of the Constitution were VIOLATED;

C. A net amount of TRY 90,000 be PAID to the applicant in compensation for non-pecuniary damage;

D. The total litigation costs of TRY 3,239.50 including the court fee of TRY 239.50 and the counsel fee of TRY 3,000 be REIMBURSED to the applicant;

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

F. A copy of the judgment be SENT to the 1st Chamber of the Çorum Assize Court (E. 2013/20, 18 April 2013) for information; and

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

TAHİR BAYKUŞAK

(Application no. 2016/31718)

9 July 2020

On 9 July 2020, the Second Section of the Constitutional Court found a violation of the prohibition of ill-treatment, safeguarded by Article 17 of the Constitution, in the individual application lodged by *Tahir Baykuşak* (no. 2016/31718).

THE FACTS

[7-29] 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.

V. EXAMINATION AND GROUNDS

30. The Constitutional Court ("the Court"), at its session of 9 July 2020, examined the application and decided as follows:

A. The Applicant's Allegations

31. The applicant alleged that he had been publicly subjected to coercion and violence by the police officers in the presence of his teacher colleagues and other persons during a simple identity check process, that he had then been forced to lay on the ground and handcuffed, and that he had subsequently been taken to the police station as if he had been a guilty person. He also contended that no investigation had been carried out against the doctor who had allegedly issued a false report in respect of him. The applicant claimed that there had been a violation of the prohibition of ill-treatment as well as his rights to a fair trial and an effective remedy on the ground that the criminal investigation had not been duly carried out and that a decision of non-prosecution had been issued regarding the incident complained of by him.

B. The Court's Assessment

32. The Court is not bound by the legal qualification of the facts by the applicant, and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). It has been considered that the applicant's allegations must be examined within the scope of the prohibition of ill-treatment safeguarded by Article 17 § 3 of the Constitution and it has not been deemed necessary to make a separate examination as regards the rights to a fair trial and an effective remedy.

33. The complaints concerning the prohibition of torture and ill-treatment must be examined separately under its substantive and procedural aspects in consideration of the negative and positive obligations of the State. The State's negative obligation includes the obligation not to subject individuals to torture, inhuman or degrading treatment or punishment while the State's positive obligation includes both the obligation to protect individuals against such treatment (preventive obligation) and the obligation to ensure identification and punishment of those responsible

through an effective investigation (obligation to conduct an investigation). The substantive aspect of the prohibition of torture and ill-treatment covers the negative and preventive obligation while the obligation to conduct an investigation falling within the scope of the positive obligation constitutes the procedural aspect of the prohibition (for similar procedure of examination, see *Cezmi Demir and Others*, no. 2013/293, 17 July 2014, § 75; *Mehmet Şah Araş and Others*, no. 2014/798, 28 September 2016, § 64; and *Mustafa Rollas*, no. 2014/7703, 2 February 2017, § 49).

34. While the allegations concerning the prohibition of ill-treatment are, as a rule, examined separately under the substantive and procedural aspects, an examination in respect of the acts allegedly committed by a public official concerns both the negative and positive obligations in the context of the prohibition of ill-treatment. Therefore, the application must be examined as a whole.

1. Admissibility

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

2. Merits

a. General Principles

36. The obligation of the State to respect for the individual's right to protect and improve his corporeal and spiritual existence requires, firstly, that public authorities not interfere with this right, in other words, must not cause any physical and mental harm to persons in the ways set out in the third paragraph of the said article. This is a negative obligation of the State resulting from its obligation to respect for the physical and mental integrity of the individual (see *Cezmi Demir and Others*, § 81).

37. Within the scope of the right guaranteed under Article 17 of the Constitution, the State has a positive obligation to protect the individual's right to protect and improve his corporeal and spiritual existence as regards those within its jurisdiction against risks likely to result from the acts of both public authorities and other individuals as well as those

of the individual himself. The State is under an obligation to protect the individual's corporeal and spiritual existence against any danger, threat and violence (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, § 51).

38. This obligation of protection imposes on the State a duty to take measures to prevent those persons from being subjected to inhuman or degrading treatment, torture or treatment or punishment incompatible with human dignity. This obligation constitutes one element of the substantive aspect of the prohibition of ill-treatment, namely the State's positive obligation to protect individuals' physical and mental integrity through administrative and legal legislation. Where the State fails to take reasonable measures to prevent a risk of ill-treatment which they knew or should have known, the responsibility of the State may be engaged within the meaning of Article 17 § 3 of the Constitution (see *Cezmi Demir and Others*, § 82).

39. While there is no absolute necessity for all prosecutions to result in a conviction or a particular sentence, the courts must not, under any circumstances, allow the offences threatening life and the severe attacks against physical and mental integrity to go unpunished, be pardoned or become time-barred. The judicial authorities, as guardians of the laws enacted in order to protect the physical and mental integrity of the individuals within their jurisdiction, must be decisive in imposing sanctions on those responsible and must not allow for a manifest disproportion between the gravity of the offence and the punishment imposed. Otherwise, the positive obligation of the State to protect, through administrative and legal legislation, the physical and mental integrity of persons would not be fulfilled (see *Cezmi Demir and Others*, § 77).

40. Moreover, a treatment must attain a minimum level of severity if it is to fall within the scope of Article 17 § 3 of the Constitution. The assessment of this minimum is relative; it depends on the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, the sex, age and state of health of the victim (see *Tahir Canan*, § 23). Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it. Its context, a

circumstance such as an atmosphere of heightened tension and emotions is also another factor required to be taken into consideration (see *Cezmi Demir and others*, § 83).

41. Ill-treatment is graded and described in different terms by the Constitution and the European Convention on Human Rights ("the Convention") depending on its effects on the person. Therefore, it appears that there is a difference in terms of intensity between the terms used in 17 § 3 of the Constitution. In determining whether a particular form of treatment should be classified as *torture*, consideration must be given to the distinction, embodied in the said article, between this notion and those of *inhuman or degrading treatment* and *treatment incompatible with human dignity*. It is understood that such a distinction has been made by the Constitution in order to attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering and to make a gradation and that the terms in question have a broader and different meaning than the elements of the offences of *torture*, *inhuman or degrading treatment* and *defamation* regulated in the Turkish Criminal Code (Law no. 5237) (see *Cezmi Demir and Others*, § 84).

42. Accordingly, the form of treatment causing the greatest harm to the corporeal and spiritual integrity of a person in the context of the constitutional regulation may be designated as *torture* (see *Tahir Canan*, § 22). In addition to the severity of the treatment, there is an element of *intent*, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which in Article 1 defines *torture* as the intentional infliction of severe pain or suffering with the aim of obtaining information, inflicting punishment or intimidating or for any reason based on discrimination (see *Cezmi Demir and Others*, § 85).

43. An inhuman treatment which did not attain the level of *torture* but was premeditated, was applied for hours at a stretch and caused actual bodily injury or intense physical and mental suffering may be described as *inhuman or degrading treatment* (see *Tahir Canan*, § 22). The suffering involved must not go beyond the inevitable element of suffering connected with a given form of legitimate treatment or punishment. Unlike torture,

inhuman or degrading treatment does not require the intent to cause suffering to be based on a specific purpose. Forms of treatment such as physical attack, battery, psychological interrogation techniques, keeping in bad conditions, deporting or extraditing a person to a place where he will suffer from ill-treatment, disappearance of a person under State supervision, destruction of a person's house, fear and concern caused by waiting for a long time for the execution of death penalty, and child abuse may be qualified as *inhuman or degrading treatment* within the meaning of Article 17 § 3 of the Constitution (see *Cezmi Demir and Others*, § 88).

44. More lenient degrading treatment or punishment may be considered as *incompatible with human dignity* where it arouses in its victims' feelings of fear, humiliation, anguish and inferiority capable of humiliating and debasing them or drives the victim to act against his will or conscience (see *Tahir Canan*, § 22). In this context, as different from *inhuman or degrading treatment*, the treatment inflicted on the person causes a humiliating or debasing effect rather than physical or mental pain (see *Cezmi Demir and Others*, § 89).

45. Article 17 of the Constitution does not prohibit the use of force for effecting an arrest. Nevertheless, such force which may be described as physical violence applied in order to restrict a person's freedom of movement may be used only if it is indispensable due to the resulting threat and it must not be used to a greater extent than necessary (see *Ali Rıza Özer and Others* [Plenary], no. 2013/3924, 6 January 2015, § 81; and *Ali Ulvi Altunelli*, § 76).

46. Where it is found that individuals were subjected to ill-treatment a result of the acts of the public officials, the time when such force causing injury was used must be established. The principles concerning the allegations of ill-treatment inflicted on a person while he was under the supervision of the State may be applied in the context of the use of force after the completion of the process of taking the person under control. Where it is established that such force had been used before the person was completely taken under control, in other words, during the efforts to take the person under control, the proportionality of the force used must be assessed (see *Zeki Bingöl*, no. 2013/6576, 18 November 2015, § 88).

47. Only in certain well-defined circumstances can recourse to physical force by police officers be deemed not to amount to ill-treatment. In this context, recourse to physical force is permissible in circumstances requiring an arrest and where it has been made necessary by a person's own conduct. However, even in these circumstances, such force may be used only if unavoidable and must be proportionate (for the Court's assessments in the same vein, see *Ali Rıza Özer and Others*, § 82).

48. The State's positive obligation within the scope of the right to protect and improve one's corporeal and spiritual existence also has a procedural aspect. Article 17 of the Constitution, read in conjunction with the State's general obligation under Article 5 of the Constitution titled "*Fundamental aims and duties of the State*", requires that the State, within the framework of its procedural obligation, must ensure the conduct of an effective official investigation capable of leading to the identification and, if necessary, punishment of those responsible for any kind of physical and mental attacks (see *Cezmi Demir and Others*, § 110).

49. The purpose of criminal investigations is to secure the effective implementation of the legislative provisions protecting the corporeal and spiritual existence of a person and to ensure accountability of those responsible. This is not an obligation of result, but of appropriate means. On the other hand, these assessments do not mean that Article 17 of the Constitution grants the applicants the right to ensure prosecution and punishment of third parties for a criminal offence or imposes the public authorities the duty to conclude all proceedings with a conviction or a particular sentence (see *Cezmi Demir and Others*, § 113).

50. In the examination of the complaints in individual applications, the Court has a subsidiary role. It is, as a rule, for the judicial authorities to assess the evidence within the scope of an investigation and it is not the Court's task to substitute its assessment of the facts for that of those authorities. The competence of the Court in respect of the allegations of ill-treatment is limited to those concerning the fundamental rights and freedoms guaranteed by the Constitution within the scope of the Convention and the Protocols thereto, to which Turkey is a party. Therefore, the Court is not tasked with reaching a finding as to guilt or innocence in the context

of criminal liability. Moreover, although the Court is not bound by the findings of the judicial authorities, there must be strong reasons under normal conditions for it to depart from those authorities' findings as to the material facts (see *Cezmi Demir and Others*, § 96).

51. For the obligation to conduct an effective investigation to be considered to have been fulfilled;

- The authorities must act *ex officio* as soon as they are informed of the incident and must secure all the evidence capable of leading to the ascertainment of the incident and the identification of those responsible (see *Cezmi Demir and Others*, § 114);

- The investigation must be open to public scrutiny and must give the victims the requisite degree of effective participation in the proceedings to enable them to protect their legitimate interests (see *Cezmi Demir and Others*, § 115);

- The persons responsible for the investigation and carrying out the inquiries must be independent from those implicated in the events (see *Cezmi Demir and Others*, § 117);

- The investigation must be carried out with reasonable diligence and promptness (see *Cezmi Demir and Others*, § 114),

- The decision taken as a result of the investigation must be based on a comprehensive, objective and impartial analysis of all the findings obtained during the investigation (see *Cemil Danışman*, no. 2013/6319, 16 July 2014, § 99).

b. Application of Principles to the Present Case

52. It appears that on the same day after the incident a forensic examination report was obtained in respect of the applicant by the police officers and that a criminal investigation was launched on the following day on the basis of the police investigation report.

53. The video footages pertaining to the incident scene were obtained by the police officers without any delay. They were examined and a report was issued in this regard.

54. The applicant alleged that during a quarrel breaking out between him and the police officers after he had presented his identity card to them, one of the officers had battered him by slapping in the face. In his statement, the applicant gave the names of three persons whom he believed to have witnessed the incident. The prosecutor's office did not take statements of those witnesses. The decision of non-prosecution issued by the prosecutor's office did not include any explanation to clarify why the statements of those witnesses had not been taken. Indeed, it appears that the witnesses involved in the case in which the applicant was being tried as an accused person were heard by the court and that they confirmed the applicant's statement. In other words, the findings of injury in the forensic examination reports as indicated under the part "The Facts" and especially the statements of the witnesses heard before the court support the allegations of battery raised by the applicant who had allegedly been subjected to physical assault by the police officers.

55. In view of the particular circumstances of the case, it has been concluded that the treatment inflicted by the police officers on the applicant, who was a teacher, at the time of his departure from school in such a manner as to be witnessed by his colleagues as well attained a certain level of severity and that the minimum threshold of severity required by Article 17 of the Constitution was thus exceeded.

56. As a result of the assessment of the present incident as a whole in the light of the circumstances in which the incident took place, the witness statements and the nature of the applicant's injury, it is possible to qualify the act as treatment incompatible with human dignity.

57. According to the report drawn up by the police officers who were parties to the incident, the applicant had got angry and attacked the police officers when he had been asked to present his identity card. The report also noted that the applicant had been handcuffed by gradual use of force and that a criminal record check was carried out through the General Information Gathering (GBT) System. It cannot be understood from the report the manner how the police officers involved in the incident could obtain the identity details required for the conduct of a criminal record check in respect of the applicant. The main dispute between the applicant and the police officers who were parties to the incident was the question

of whether the applicant had presented his identity card to the police officers. It is obvious that the Prosecutor's Office should have clarified how the police officers were able to obtain the information required for the conduct of a criminal record check.

58. The applicant emphasised during the investigation stage that a medical report had been issued in respect of him without a medical examination and that he had filed a complaint against the relevant doctor. Although the first medical report issued in respect of the applicant indicated no sign of battery or coercion, the subsequent report obtained on the same day upon the applicant's request noted ecchymoses and abrasions on his body. The investigation file contains no information or document indicating that an investigation was launched against the relevant doctor in view of the applicant's clear complaint supported by conflicting medical reports and thus required to be investigated.

59. Regard being had to the fact that the Prosecutor's Office failed to take statements of the witnesses to ascertain the impugned circumstances of the incident and the material truth, that the contradictions in the police report could not be resolved, and that according to the available information no investigation was launched against the relevant doctor despite the existence of a reasonable suspicion, it has been concluded that the investigation into the incident was not conducted thoroughly and effectively.

60. Consequently, the Court has found violations of the substantive (negative obligation) and procedural aspects of the prohibition of ill-treatment safeguarded by Article 17 § 3 of the Constitution, on the ground that the applicant had been injured during his arrest by the police officers.

3. Application of Article 50 of Code no. 6216

61. Article 50 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, insofar as relevant, provides as follows:

> *"(1) At the end of the examination of the merits it is decided that the right of the applicant has been violated or not. In cases where a decision*

of violation has been made, what is required for the elimination of the violation and the consequences thereof shall be ruled ...

(2) If the violation found arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be eliminated. In cases where there is no legal interest in holding the retrial, the applicant may be awarded compensation or be informed of the possibility to institute proceedings before the general courts. The court, which is responsible for holding the retrial, shall deliver a decision on the basis of the file, if possible, in a way that will eliminate the violation and the consequences thereof as the Constitutional Court has explained in its decision of violation."

62. The applicant requested the Court to order a retrial.

63. In its judgment on the individual application of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Constitutional Court set out the general principles concerning the redress of the violation. In another judgment, the Court explained the relevant principles as well as the consequences of the failure to comply with its judgment finding a violation and pointed out that this would amount to the continuation of the violation and might also result in a violation for the second time (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

64. Where a violation of any fundamental right is found within the scope of an individual application, the basic rule for redressing the violation and the consequences thereof is to ensure restitution to the extent possible, that is to say, to ensure restoration of the original state prior to the violation. To that end, it is primarily required to identify the cause of the violation and then to end the continuing violation, to revoke the decision or act giving rise to the violation, to redress the consequences thereof, to compensate the pecuniary and non-pecuniary damages resulting from the violation, and to take other measures deemed appropriate in this context (see *Mehmet Doğan*, §§ 55 and 57).

65. In cases where the violation results from a court decision or where the court could not provide redress for the violation, the Constitutional Court holds that a copy of the judgment be sent to the relevant court for a

retrial with a view to redressing the violation and the consequences thereof pursuant to Article 50 § 2 of Code no. 6216 and Article 79 § 1 (a) of the Internal Regulations of the Constitutional Court. The relevant legal regulation, as different from the similar legal norms set out in the procedural law, provides for a remedy specific to the individual application and allowing for a retrial for redressing the violation. Therefore, in cases where the Court orders a retrial in connection with its judgment finding a violation, the relevant inferior court does not enjoy any margin of appreciation in acknowledging the existence of a ground for a retrial, as different from the practice of reopening of the proceedings set out in the procedural law. Thus, the inferior court to which such judgment is notified is legally obliged to take the necessary steps, without awaiting a request of the person concerned, to redress the consequences of the continuing violation in line with the Constitutional Court's judgment finding a violation and ordering a retrial (see *Mehmet Doğan*, §§ 58 and 59; and *Aligül Alkaya and Others (2)*, §§ 57-59, 66 and 67).

66. In the application subjected to an examination, it has been concluded that there was a violation of the prohibition of treatment incompatible with human dignity safeguarded by Article 17 of the Constitution. Accordingly, in the present case, it is understood that the violation resulted from the decision of no need for further prosecution issued by the chief public prosecutor's office without collection of the evidence required to deliver a judicial decision.

67. In these circumstances, there is a legal interest in carrying out a fresh and effective criminal investigation for redressing the consequences of the violation of the prohibition of treatment incompatible with human dignity. The fresh investigation to be conducted accordingly is intended for redressing the violation and the consequences thereof pursuant to Article 50 § 2 of Code no. 6216. In this regard, the action needed to be taken by the chief public prosecutor's office is to primarily revoke the decision of non-prosecution leading to a violation and to ultimately issue a fresh decision after the conduct of necessary examinations in line with the finding of a violation. Therefore, a copy of the judgment must be sent to the Istanbul Chief Public Prosecutor's Office (investigation file no. 2016/76662) for a fresh investigation.

68. The total litigation costs of TRY 3,239.50 including the court fee of TRY 239.50 and the counsel fee of TRY 3,000, as established on the basis of the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 9 July 2020 that

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

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

C. A copy of the judgment be SENT to the Istanbul Chief Public Prosecutor's Office for the conduct of a fresh investigation so that the consequences of the violation of the prohibition of treatment incompatible with human dignity be redressed;

D. The total litigation costs of TRY 3,239.50 including the court fee of TRY 239.50 and the counsel fee of TRY 3,000 be REIMBURSED to the applicant;

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

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

RIGHT TO PERSONAL LIBERTY AND SECURITY (ARTICLE 19)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

ESRA ÖZKAN ÖZAKÇA

(Application no. 2017/32052)

8 October 2020

On 8 October 2020, the Plenary of the Constitutional Court found a violation of the right to personal liberty and security, safeguarded by Article 19 of the Constitution, in the individual application lodged by *Esra Özkan Özakça* (no. 2017/32052).

THE FACTS

[8-52] 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 made 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.

V. EXAMINATION AND GROUNDS

53. The Constitutional Court, at its session of 8 October 2020, examined the application and decided as follows:

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

54. The applicant alleged that her right to personal liberty and security had been violated, stating that the imposition of a measure entailing the obligation not to leave residence by the decision of the Ankara 5th Magistrate Judge in view of the state of evidence despite the dismissal of the request for the imposition of such measure by the decision of the Ankara 4th Magistrate Judge in view of the same state of evidence constituted a contradiction, that the said measure which had considerably restricted her personal liberty lacked any legal basis, and that the imposition of such measure while she had been on a hunger strike was not proportionate.

55. The applicant also claimed that her right to a fair trial had been violated, maintaining that the objection filed by the public prosecutor against the decision of the Ankara 4th Magistrate Judge had been examined in the absence of a hearing, that a more severe measure had been imposed on her upon such objection, and that her objection had also been futile.

56. The Ministry, in its observations, noted that the impugned protection measure had a legal basis and that such measure had been imposed in order to ensure the applicant's presence at the hearings and the prompt conclusion of the proceedings. According to the Ministry, the applicant benefited from procedural guarantees in view of the fact that she had been heard prior to the imposition of a measure, that she had been asked whether she had anything to say in respect of the evidence, and that she had been provided with the opportunity to file an objection.

57. The Ministry also drew attention to the fact that the conditional bail measures limited the liberty of a person to a lesser extent as compared to the detention measure and that they had been introduced as a substitute for detention since they allowed for the conduct of the proceedings without placing the person concerned in detention. The Ministry indicated that the conditional bail measure as an alternative protection measure to detention contributed to the operability of the rule requiring the imposition of the detention measure only in exceptional cases and thus considered that the imposition of the conditional bail measure which was more lenient than detention given the severity of the penalty prescribed by the laws for the offence imputed to the applicant was suitable and necessary -also in

view of the wide margin of appreciation afforded to the inferior courts- to ensure her participation in the judicial process.

B. The Court's Assessment

58. Article 13 of the Constitution, titled "*Restriction of fundamental rights and freedoms*", provides as follows:

> *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality."*

59. Article 19 § 1 and the first sentence of Article 19 § 3 of the Constitution, titled "*Personal liberty and security*", of the Constitution provide as follows:

> *"Everyone has the right to personal liberty and security.*
>
> *...*
>
> *Individuals against whom there is strong evidence of having committed an offence may be arrested by decision of a judge solely for the purposes of preventing escape, or preventing the destruction or alteration of evidence, as well as in other circumstances prescribed by law and necessitating detention."*

60. Article 23 § 1 and 2 of the Constitution, titled "*Freedom of residence and movement*", provide as follows:

> *"Everyone has the freedom of residence and movement.*
>
> *Freedom of residence may be restricted by law for the purpose of preventing crimes, promoting social and economic development, achieving sound and orderly urbanization, and protecting public property.*
>
> *Freedom of movement may be restricted by law for the purpose of investigation and prosecution of an offence, and prevention of crimes."*

61. The Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969,

18 September 2013, § 16). In this regard, the applicant's allegations must be examined within the scope of the right to personal liberty and security safeguarded by Article 19 of the Constitution.

1. Applicability

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

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

63. The Court has pointed out that in the examination of individual applications concerning the measures taken during the periods when extraordinary administration procedures are applied, it will take into account the regime of safeguards concerning the fundamental rights and freedoms set out in Article 15 of the Constitution. Accordingly, in cases where there is an extraordinary situation the existence of which has been declared and where the measure constituting an interference with the fundamental rights and freedoms invoked in the individual application is connected with the extraordinary situation, the examination shall be conducted in accordance with Article 15 of the Constitution (see *Aydın Yavuz and Others*, §§ 187-191).

64. The main reason for the declaration of a state of emergency in Turkey on 21 July 2016 was the coup attempt which took place on 15 July 2016. Therefore, the Court took into consideration Article 15 of the

Constitution when examining whether the right to personal liberty and security had been violated as a result of the detention measures applied during an investigation carried out into the acts committed directly within the scope of the coup attempt in its decision on the individual application of *Aydın Yavuz and Others* and during an investigation carried out into the acts which were not directly connected with the coup attempt but related to the FETÖ/PDY which was the structure behind the coup attempt and was subsequently declared as a terrorist organisation in its decision on the individual application of *Selçuk Özdemir* ([Plenary], no. 2016/49158, 26 July 2017) (see *Aydın Yavuz and Others*, §§ 237-241; and *Selçuk Özdemir*, § 57).

65. As a result of the examination of the documents concerning the process of the state of emergency, it has been understood that the threat and danger posed to public order and national security not only by the coup attempt and the FETÖ/PDY but also by other terrorist organisations had an effect on the declaration of the state of emergency and its continuation (for details, see *Aydın Yavuz and Others*, § 227). In the present case, the charge giving rise to the imposition on the applicant a measure entailing the obligation not to leave residence during the period of state of emergency was connected with terrorism (namely, the terrorist organisation DHKP/C), which was one of the facts leading to the declaration of the state of emergency.

66. In this regard, the examination of the lawfulness of the conditional bail measure requiring the applicant not to leave her residence will be made within the scope of Article 15 of the Constitution. Indeed, the Court took into consideration Article 15 of the Constitution when examining alleged violation of the right to education submitted by an applicant being held as a convict in the penitentiary institution in connection with an offence related to the terrorist organisation Hezbollah on the ground that he had not been allowed to take distance education exams for the duration of the state of emergency (see *Mehmet Ali Eneze*, no. 2017/35352, 23 May 2018, §§ 29-31). During this examination, a review will first be made to determine whether the measure contravened the guarantees set out in the relevant articles of the Constitution, especially Articles 13 and 19 thereof, and if so, an assessment will be made as to whether the criteria set out in Article 15 of the Constitution justified such contravention (as regards the

detention measure, see *Aydın Yavuz and Others*, §§ 193-195, 242; and *Selçuk Özdemir*, § 58).

2. Admissibility

67. The alleged violation of the right to personal liberty and security must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

3. Merits

a. Existence of an Interference

i. General Principles

68. According to the Court, the deprivation of liberty within the meaning of Article 19 of the Constitution involves two elements: a person's confinement in a delimited area for a non-negligible period of time and lack of consent by the person concerned (see *Cüneyt Kartal*, no. 2013/6572, 20 March 2014, § 17).

69. The term *liberty* used in Article 19 § 1 of the Constitution, which provides "*Everyone has the right to personal liberty and security*", refers to not only liberty and independence but also freedom. In this regard, for the existence of an interference with personal liberty, the freedom of movement must have been restricted materially. For the existence of an interference with his right to personal liberty and security, the person must be physically held in a certain place for at least a disturbing length of time (see *Galip Öğüt* [Plenary], no. 2014/5863, 1 March 2017, § 34).

70. It appears that Article 19 §§ 2 and 3 of the Constitution, when the text of the article is taken as a whole, is related to physical freedom of persons and that the guarantees set out in the subsequent paragraphs are applicable to the persons deprived of their liberty physically. Thus, the right to personal liberty and security safeguards only the physical liberty of individuals (see *Galip Öğüt*, § 35).

71. The difference between the restrictions on the right to personal liberty and security safeguarded by Article 19 of the Constitution and those on the freedom of travel under Article 23 thereof is not one of *nature*

or *substance* but one of *degree* or *intensity*. The restriction on the freedom of movement in the context of the right to personal liberty and security must be much more severe in terms of degree and intensity than an interference with the freedom of travel. In the assessment of the degree or intensity of the restriction, account must be taken of various factors such as the type, duration, effects and manner of implementation of the measure in question as well as the extent to which the daily life of the individual is kept under control by the State (for similar assessments, see *Sebahat Tuncel*, no. 2012/1051, 20 February 2014, § 44).

72. On the other hand, the conditional bail measure imposes certain obligations on a suspect or an accused person in the event of the existence of the reasons for detention and places him under the supervision and control of judicial authorities (see *Hülya Kar* [Plenary], no. 2015/20360, 7 February 2019, §18).

ii. Application of Principles to the Present Case

73. Article 109 of Law no. 5271, titled "*Conditional bail*", contains provisions concerning the protection measure of conditional bail. Paragraph 1 thereof provides that in an investigation conducted into an offence, in the existence of the grounds for detention, a conditional bail may be ordered instead of the suspect's placement in detention. In paragraph 3 thereof, the legislator has specified the obligations (measures) which may be imposed within the scope of a conditional bail and made it possible for the suspect or the accused person to be subjected to one or more of them instead of detention.

74. At this point, it can be said that all conditional bail measures as an alternative to detention constitute a less severe interference with the fundamental rights and freedoms as compared to detention. Indeed, Article 101 § 1 of Law no. 5271 stipulates that in their request for detention the public prosecutors must indicate the legal and factual reasons indicating that the conditional bail measure would be insufficient and Article 109 § 2 thereof provides that the provisions of conditional bail may also be applicable to the cases in which a prohibition of detention is prescribed. Moreover, Article 112 of the same Law provides that the competent judicial authority may immediately issue a detention order against a suspect or an

accused person who does not voluntarily comply with the conditional bail provisions, regardless of the term of the prison sentence to be imposed.

75. The measure entailing the obligation not to leave residence is one of the conditional bail measures set out in Article 109 of Law no. 5271. The description of such measure is made in Article 56 of the Regulation in which the conditional bail measure entailing the obligation not to leave residence is defined as requiring that the suspect or the accused person must not leave his residence determined by the court without an excuse or a permission. Accordingly, where the suspects or the accused persons are subjected to such conditional bail measure, it is not possible for them to leave their residences except for the cases where they have an excuse or have received permission beforehand. In such case, these persons have to maintain their lives in their residences continuously until the end of the measure imposed on them. As set out in Article 57 of the relevant Regulation, the execution of the measure in question is monitored by use of an electronic bracelet. In this manner, the persons concerned will have violated their obligations entailed by the conditional bail measure once they have left the dwellings where they reside.

76. As mentioned above, the important factor in the assessment of whether a measure restricting the freedom of physical movement of persons amounts to an interference with their right to personal liberty and security guaranteed by Article 19 of the Constitution or with their right to freedom of travel safeguarded by Article 23 thereof is not the *nature* or *substance* of the restriction. In the ascertainment of which of those rights are interfered with as a result of such measure, the *degree* and *intensity* of the restriction must be taken into account. The factors which are of importance in such assessment include the type, duration, effects and manner of implementation of the measure in question as well as the extent to which the daily life of the individual is kept under control. In this context, the measure entailing the obligation not to leave residence is a conditional bail measure which confines an individual's physical freedom area only to the inside of the dwelling where he resides, which may be executed by use of an electronic bracelet, and which is applied uninterruptedly throughout the day -until lifted- and which may give rise to the imposition of the detention measure on the suspect or the accused

person in the event of non-compliance. In view of this nature of the measure, the manner of its implementation and its characteristics, it must be concluded that such measure amounts to an interference with the right to personal liberty and security since its restrictive effect on the freedom of movement is much more severe in terms of degree and intensity than the freedom of travel.

77. Indeed, the European Court of Human Rights ("the ECHR") adopted rulings to the effect that the measure entailing the obligation not to leave a delimited area or residence constituted an interference, in view of its degree and intensity, not with the freedom of travel but with the right to liberty and security safeguarded by Article 5 of the European Convention on Human Rights ("the Convention").

b. Whether the Interference Constituted a Violation

i. General Principles

78. In the assessment of the lawfulness of a measure entailing the obligation not to leave residence and constituting an interference with the right to personal liberty and security, an examination must be made to determine whether such measure complies with the requirements of being prescribed by law, being based on one or more justifiable reasons set out in the relevant articles of the Constitution and not being contrary to the principle of proportionality, just as is the case with detention orders, since the measure entailing the obligation not to leave residence is considered as a protection (conditional bail) measure as an alternative to detention (see, *mutatis mutandis*, *Halas Aslan*, no. 2014/4994, 16 February 2017, §§ 53, 54).

79. According to Article 19 § 3 of the Constitution, the detention measure may be imposed only on *individuals against whom there is a strong indication of guilt*. Since the obligation not to leave residence is prescribed as a conditional bail measure which is applied as an alternative to detention and constitutes an interference with the right to personal liberty and security, the precondition for the application of such measure is the existence of strong indication of the individual's guilt just as is the case with detention. Therefore, the accusation must be supported by convincing evidence

which may be considered strong (as regards detention, see *Mustafa Ali Balbay*, no. 2012/1272, 4 December 2013, § 72).

80. On the other hand, Article 19 § 3 of the Constitution points out that detention order may be imposed for the purposes of *preventing escape, or preventing the destruction or alteration of evidence*. Due to its nature as an alternative to detention, the conditional bail measure entailing the obligation not to leave residence may be ordered solely for the purposes set out in the Constitution. In view of its nature and characteristics, the said measure may be considered as a judicial measure especially intended for preventing the suspects or the accused persons from absconding.

81. Furthermore, Article 13 of the Constitution states that the restrictions on fundamental rights and freedoms shall not be contrary to the principle of *proportionality*. One of the factors to be taken into consideration in this context is the question of whether the conditional bail measure entailing the obligation not to leave residence is proportionate to the aim pursued.

82. The principle of proportionality consists of three sub-principles: suitability, necessity and proportionality in the narrow sense. The suitability test requires that the interference must be suitable to achieve the aim pursued; the necessity test requires that the interference must be necessary in order to achieve the aim pursued, in other words that it must not be possible to achieve the same aim through a less severe interference; and the test of proportionality in the narrow sense 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 (see the Court's decision no. E.2016/13, K.2016/127, 22 June 2016, § 18; and *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 38).

83. In order for the conditional bail measure entailing the obligation not to leave residence to be proportionate, other conditional bail measures serving as an alternative to detention and constituting a less severe interference with fundamental rights and freedoms must be insufficient. In this regard, the measure entailing the obligation not to leave residence must not be imposed in cases where other conditional bail measures which have a less severe effect on fundamental rights and freedoms are sufficient for the achievement of the legitimate aim pursued.

84. It is primarily for the judicial authorities which have imposed the conditional bail measure entailing the obligation not to leave residence to make an assessment concerning the existence of a strong indication of the commission of the offence, the existence of the reasons for restriction set out in the Constitution and the proportionality of such measure, which constitute the preconditions for its application. Indeed, the judicial authorities, which are in direct contact with the parties and the pieces of evidence, are in a better position than the Court. However, it is for the Court to review whether the judicial authorities have exceeded the margin of appreciation afforded to them. The Court's review in this scope must be based on the process concerning the application of the measure and the reasons provided by the judicial authority for the imposition of such measure in view of the circumstances of the case (for similar assessments as regards detention, see *Gülser Yıldırım (2)* [Plenary], no. 2016/40170, 16 November 2017, §§ 123 and 124).

ii. Application of Principles to the Present Case

85. Within the scope of an investigation carried out into the offences of membership of a terrorist organisation and disseminating propaganda in favour of the terrorist organisation, the magistrate judge imposed on the applicant a measure entailing the obligation not to leave residence pursuant to Article 109 of Law no. 5271. Therefore, the measure at issue which had been imposed on the applicant as an obligation entailed by the conditional bail measure had a legal basis.

86. Before the examination of whether the conditional bail measure, which has been understood to have a legal basis, pursued a legitimate aim and was proportionate, an assessment must be made as to whether there was *a strong indication of the commission of the offence* which constituted the pre-condition for its application.

87. The examination of the investigation documents concerning the applicant reveals that the charges relied on for the imposition of the impugned measure were based on the sit-in protest held on the Yüksel Street by the applicant and her husband and the hunger strike protest held by them following the dismissal from public service of first the applicant's husband and subsequently the applicant herself by a Decree

Law -within the scope of the measures taken during the period of the state of emergency- on account of their membership, affiliation or relation with the structures, entities or groups declared by the decision of the National Security Council to be acting against the national security of the State. The investigating authorities alleged that these protests which had been held by certain persons including the applicant had in fact been intended for serving the aim of the terrorist organisation DHKP/C in line with its orders and instructions and disseminating propaganda in favour of it and put questions to the applicant in this context when taking her statements.

88. In this regard, it appears that in relation to the charges, the investigating authorities referred to the activities of the structures considered to have connection with the DHKP/C and noted that the sit-in and hunger strike protests staged by the applicant's husband S.Ö. and N.G. -following their dismissal from public service- had ceased to be a means for claiming rights and turned into an activity serving the aims of the terrorist organisation, that these protests in which the applicant had subsequently been involved had been embraced by the media outlets of the terrorist organisation DHKP/C, that statements had been made and messages had been posted in this context on a magazine, on social media accounts and on a TV channel broadcasting over the Internet, and that banners had been carried during certain demonstrations. They also drew attention to the fact that some expressions used by the applicant during her placement in custody had been published on a social media account considered to have connection with the said terrorist organisation.

89. It is clear that a sit-in or a hunger strike protest which may be regarded as one of the aspects of the freedom of expression under certain conditions must not be in itself considered to amount to an offence. However, where there are facts indicating that the conduct of such protests constitutes a terrorism-related activity or where the persons involved in them act in such a manner as to praise, legitimise or encourage the terrorist organisation's methods involving coercion, violence and threat, such activities may be considered as an offence.

90. In this context, when considering that the sit-in and hunger strike protests constituting the subject of the charges against the applicant and

forming the basis for the conditional bail measure requiring her not to leave her residence had been held in line with the instructions and aims of the terrorist organisation DHKP/C, the investigating authorities relied on the fact that those protests had been defended and supported in certain platforms considered to have connection with the said organisation. However, the investigation documents did not include any concrete fact or finding indicating that the applicant had carried out those protests within the scope of an organisational relationship or as part of an organisational attitude. Moreover, they did not explain what kind of a role the applicant had had in the making of the statements and the publication of the expressions taken as basis for the charges against her.

91. The applicant stated that her participation in the sit-in protest held on the Yüksel Street was as a result of her and her husband's dismissal from public service, that she had in fact taken part in such protest in order to provide support for her husband, that she had chosen it as a means for claiming her rights, and that she had embarked on a hunger strike upon detention of her husband. During the assessment of the applicant's acts in the light of the circumstances of the present case, the course of the incidents must not be ignored. In this regard, according to the findings made by the investigating authorities, N.B., who was among those dismissed from public service, staged a sit-in protest in the relevant area on 9 November 2016, and the applicant's husband S.Ö. participated in the said protest as of 23 November 2016. There is no finding or allegation indicating that the applicant, who was also dismissed from public service, participated in the protest at issue during the relevant process. When the persons in question staged a hunger strike on 11 March 2017, the applicant participated in the sit-in protest which was being held by her husband S.Ö. The applicant embarked on a hunger strike when her husband was placed in detention on 23 May 2017.

92. Besides, the expressions "*I was taken into custody for being on a hunger strike; I was taken into custody when I was walking on the street. I will not give in to these pressures. I will continue to resist* (*Açlık grevinde olduğum için gözaltına alındım, yolda yürürken gözaltına alındım. Bunlara boyun eğmeyeceğim, direnişe devam edeceğim*)" reportedly used by the applicant during her placement in custody cannot be said, by their very nature, to have legitimised or

praised violence, terrorism or insurrection. The investigation documents did not make any explanation as to what kind of an effect the applicant had had on the publication of those expressions on a social media account declared to have relation with the DHKP/C.

93. In this regard, in the light of the existing material, it has been concluded that the investigating authorities was not able to sufficiently reveal the existence of a strong indication of the applicant's having committed an offence.

94. In view of this conclusion, the Court does not deem it necessary to examine whether the measure entailing the obligation not to leave residence pursued a legitimate aim or was proportionate. Moreover, regard being had to the finding of a violation of the essence of a right due to the impugned measure, it has been considered that it is not necessary to separately examine the complaints concerning the lack of a hearing during the imposition of the said measure and the lack of examination of the objections against such measure.

95. For these reasons, it has been concluded that the imposition on the applicant a measure entailing the obligation not to leave residence without demonstration of the existence of a strong indication of her having committed an offence was contrary to the safeguards set out in Article 19 § 8 of the Constitution in respect of the right to personal liberty and security.

96. Nevertheless, an examination must be made as to whether the impugned measure was legitimate within the scope of Article 15 of the Constitution, which governs the suspension and restriction of fundamental rights and freedoms in extraordinary times.

4. Article 15 of the Constitution

97. Pursuant to Article 15 of the Constitution, the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures which derogate the guarantees embodied in other articles of the Constitution may be taken in times of war, mobilization, martial law, or state of emergency. However, Article 15 of the Constitution does not grant unlimited power to public authorities. The measures contrary to the

safeguards set out in other articles of the Constitution must not interfere with rights and freedoms set out in Article 15 § 2 of the Constitution, must not be contrary to the obligations arising from the international law and must be to the extent required by the exigencies of the situation. The examination to the conducted by the Court under Article 15 of the Constitution must be limited to these criteria. The Court has set out the procedures and principles of such examination (see *Aydın Yavuz and Others*, §§ 192-211 and 344).

98. The right to personal liberty and security is not one of the core rights which are set out in Article 15 § 2 of the Constitution and which are non-derogable even during the periods of war, mobilization and state of emergency when extraordinary administration procedures are in force. It is therefore possible in times of emergency to take measures as regards this right although they contravene the safeguards enshrined in the Constitution (see *Aydın Yavuz and Others*, §§ 196 and 345).

99. Moreover, this right is not among the non-derogable core rights set out in the international conventions to which Turkey is a party, notably Article 4 § 2 of the International Covenant on Civil and Political Rights ("the ICCPR") and Article 15 § 2 of the European Convention on Human Rights ("the Convention") as well as the additional protocols thereto. Furthermore, it has not been established that the impugned interference with the applicant's right to personal liberty and security was in breach of any other obligation (any safeguard continuing to be under protection in times of emergency) stemming from the international law (see *Aydın Yavuz and Others*, §§ 199, 200 and 346; and *Turhan Günay* [Plenary], no. 2016/50972, 11 January 2018, § 86).

100. However, the right to personal liberty and security is a fundamental right which precludes the State from interfering with the individuals' freedom in an arbitrary fashion (see *Erdem Gül and Can Dündar* [Plenary], no. 2015/18567, 25 February 2016, § 62). Not depriving individuals of their liberty in an arbitrary fashion is among the most significant safeguards at the core of all political systems based on the principle of rule of law. The requirement for an interference with individuals' freedom not to be arbitrary is a fundamental guarantee which must be applicable also during

the periods when emergency administration procedures are in force (see *Aydın Yavuz and Others*, § 347).

101. The essential safeguard preventing any arbitrary interference with the individuals' right to personal liberty and security by means of the application of the conditional bail measure entailing the obligation not to leave residence as an alternative to detention is the requirement of revealing the indication of the commission of an offence. Since the existence of an indication of the commission of an offence -just as is the case with detention- is a precondition for the application of the said measure, acknowledging otherwise would render all safeguards concerning the right to personal liberty and security meaningless. Therefore, the imposition on a person of a conditional bail measure entailing the obligation not to leave residence without an indication of his having committed an offence cannot be considered as a measure taken *to the extent required by the exigencies of the situation* even when extraordinary administration procedures are in force, regardless of the reason for the adoption of these procedures (for similar assessments as regards the detention measure, see *Turhan Günay*, § 88).

102. In the present case, the Court has concluded that the investigating authorities imposed the impugned measure on the applicant without revealing the indications of her having committed an offence by providing concrete facts. In this regard, it has been considered that Article 15 of the Constitution which allows for the suspension and restriction of the exercise of fundamental rights and freedoms in times of emergency did not justify the impugned interference with the applicant's right to personal liberty and security in contravention of the safeguards set out in Article 19 of the Constitution.

103. For these reasons, it must be held that there has been a violation of the applicant's right to personal liberty and security under Article 19 § 3 of the Constitution in conjunction with Article 15 thereof.

Mr. Muammer TOPAL, Mr. Rıdvan GÜLEÇ and Mr. Basri BAĞCI agreed with this conclusion by expressing a concurring opinion.

Mr. Kadir ÖZKAYA, Mr. Serdar ÖZGÜLDÜR, Mr. Recai AKYEL, Mr. Yıldız SEFERİNOĞLU and Mr. Selahaddin MENTEŞ disagreed with this view.

5. Application of Article 50 of Code no. 6216

104. Article 50 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court dated 30 March 2011, insofar as relevant, provides as follows:

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

(2) If the violation found arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be eliminated. In cases where there is no legal interest in holding the retrial, the applicant may be awarded compensation or be informed of the possibility to institute proceedings before the general courts. The court, which is responsible for holding the retrial, shall deliver a decision on the basis of the file, if possible, in a way that will eliminate the violation and the consequences thereof as the Constitutional Court has explained in its decision of violation."

105. The applicant requested the Court to award her a sufficient amount of compensation.

106. In the application, it has been held that Article 19 § 3 of the Constitution was violated due to the unlawfulness of the conditional bail measure entailing the obligation not to leave residence. In the criminal proceedings against the applicant, the measure entailing the obligation not to leave residence ended on 19 October 2017. Therefore, it has been understood that there is nothing to do other than awarding compensation for redressing the consequences of the violation.

107. The applicant must be paid a net amount of TRY 20,000 in respect of non-pecuniary damages which cannot be compensated merely by the finding of a violation due to the interference with the right to personal liberty and security.

108. The total litigation costs of TRY 3,239.50 including the court fee of TRY 239.50 and the counsel fee of TRY 3,000, as established on the basis of the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 8 October 2020:

A. UNANIMOUSLY that the alleged violation of the right to personal liberty and security due to the unlawfulness of the conditional bail measure entailing the obligation not to leave residence be DECLARED ADMISSIBLE;

B. BY MAJORITY and the dissenting opinions of Mr. Kadir ÖZKAYA, Mr. Serdar ÖZGÜLDÜR, Mr. Recai AKYEL, Mr. Yıldız SEFERİNOĞLU and Mr. Selahaddin MENTEŞ, that the right to personal liberty and security safeguarded by Article 19 § 3 of the Constitution was VIOLATED due to the unlawfulness of the conditional bail measure entailing the obligation not to leave residence;

C. That a net amount of TRY 20,000 be PAID to the applicant in compensation for non-pecuniary damage and that the remaining compensation claims be REJECTED;

D. That the total litigation costs of TRY 3,257.50 including the court fee of TRY 257.50 and the counsel fee of TRY 3,000 be REIMBURSED to the applicant;

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

F. That a copy of the judgment be SENT to the 25th Chamber of the Ankara Assize Court (E. 2017/48) for information; and

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

DISSENTING OPINION OF JUSTICES KADİR ÖZKAYA, RECAİ AKYEL, YILDIZ SEFERİNOĞLU AND SELAHADDİN MENTEŞ

The application concerned the alleged violation of the right to personal liberty and security due to the unlawfulness of the conditional bail measure entailing the obligation not to leave residence.

The majority of the Court held that there had been a violation of the applicant's right to personal liberty and security within the scope of Article 19 § 3 of the Constitution due to the absence of a strong indication of her having committed an offence in the context of the lawfulness of the conditional bail measure requiring her not to leave her residence.

We agree with the majority in finding that in view of its nature, the manner of its implementation and its characteristics, the measure entailing the obligation not to leave residence amounts to an interference with the right to personal liberty and security since its restrictive effect on the freedom of movement is much more severe in terms of degree and intensity than the freedom of travel and that in the examination of the lawfulness of such measure, an assessment must be made as to whether it complies with the requirements of being prescribed by law, the existence of the reasons for restriction set out in the Constitution and compliance with the principle of proportionality, just as is the case with the detention measure.

The measure entailing the obligation not to leave residence is provided for as a conditional bail measure as an alternative to detention in Article 109 of Law no. 5271. Accordingly, there is no doubt that the impugned measure had a legal basis.

However, in our view, the majority's opinion that there was no strong indication of the applicant's having committed an offence is not compatible with the scope of the file.

Indeed, in many of its decisions concerning the detention measure which constitutes a more severe interference with the right to personal liberty and security as compared to the measure entailing the obligation not to leave residence, the Court has emphasised that one of the purpose of detention based on a criminal charge is to further the criminal investigation and/or prosecution by way of confirming or dispelling the

suspicions against the person concerned (see *Dursun Çiçek*, no. 2012/1108, 16 July 2014, § 87; and *Halas Aslan*, no. 2014/4994, 16 February 2017, § 76).

Therefore, during the imposition of the protection measures such as arrest, detention or the one entailing the obligation not to leave residence, it is not absolutely necessary for all evidence to have been collected adequately. In this respect, the facts grounding suspicions which will constitute the basis for the detention based on a criminal charge must not be equated with those which will be discussed at the subsequent stages of the criminal proceedings and will constitute grounds for the conviction (see *Mustafa Ali Balbay*, no. 2012/1272, 4 December 2013, § 73).

It appears that the conditional bail measure requiring the applicant not to leave her residence was imposed within the scope of an investigation carried out by the Ankara Chief Public Prosecutor's Office into certain activities connected with the terrorist organisation and that in this context, the public authorities found that the sit-in and hunger strike protests held on the Yüksel Street in the Ankara province by certain persons including the applicant had become an activity organised by the terrorist organisation across the country and turned into a campaign of the organisation.

In view of the overall assessment of the information and documents concerning the application, the general circumstances at the moment of the imposition of the measure and the particular circumstances of the present case, it has been concluded that the public authorities' assessments concerning the existence of a strong indication of the applicant's having committed an offence cannot be said to be unfounded and arbitrary and that the measure entailing the obligation not to leave residence had factual grounds.

Moreover, it must be borne in mind that the protection measures other than the detention measure and the measure entailing the obligation not to leave residence would be insufficient in the secure conduct of the investigations and prosecutions into terrorism-related offences and especially in the prevention of persons from absconding. In addition, it must be noted that the persons under investigation in connection with terrorist offences can more easily abscond and accommodate abroad as compared to other persons thanks to the structure and connections of the

relevant organisations (for assessments in the same vein, see *Yıldırım Ataş*, no. 2014/4459, 26 October 2016, § 60; *Aydın Yavuz and Others*, §§ 271 and 272; and *Selçuk Özdemir* [Plenary], no. 2016/49158, 26 July 2017, §§ 78 and 79).

Moreover, the investigation/prosecution of terrorist offences confronts public authorities with serious difficulties. For this reason, the right to personal liberty and security must not be interpreted in such manner which would cause excessive difficulties for the judicial authorities and security forces in effectively combating crime and criminals, in particular organised crimes (for assessments in the same vein, see *Süleyman Bağrıyanık and Others*, no. 2015/9756, 16 November 2016, § 214).

In the present case, the conditional bail measure entailing the obligation not to leave residence within the scope of an investigation carried out into a terrorism-related offence had a functional nature as regards its legitimate aim of preventing the applicant from absconding. Moreover, the said measure has a less severe effect on the right to personal liberty and security as compared to detention. Indeed, persons subjected to a detention measure are deprived of their liberty by placement in penitentiary institutions or detention centres while those subjected to a measure entailing the obligation not to leave residence are deprived of their liberty by confinement in their own dwellings. Although the suspects or the accused persons are obliged to stay in their dwellings continuously as a result of such measure, there is no restriction on their communication with other persons living in those dwellings or visiting them in the said dwellings or on their use of interpersonal or mass communication channels. In these circumstances, the impugned measure has not been considered to be disproportionate. Indeed, the conditional bail measure requiring the applicant not to leave residence was not applied by the judicial authorities for a long period of time. This measure was put into effect on 10 July 2017 and lifted by the trial court on 19 October 2017 (i.e. approximately 100 days later).

For these reasons, we do not agree with the judgment adopted by a majority vote and we consider that the conditional bail measure entailing the obligation not to leave residence did not amount to a violation of the applicant's right to personal liberty and security under Article 19 § 3 of the Constitution.

DISSENTING OPINION OF JUSTICE SERDAR ÖZGÜLDÜR

Chapter Four of the Code of Criminal Procedure ("the CCP") concerns the "protection measures" and sets out the procedures of "arrest and placement in custody", "detention", "conditional bail", "search and seizure", "interception of communications made via telecommunications", and "confidential investigator and surveillance via technical equipment". The "detention" measure laid down in Articles 100 to 108 of the CCP is the most severe one among the protection measures as regards the right to personal liberty and security while the "conditional bail" measure set out in Articles 109 to 115 of the same Law is a protection measure having less severe consequences than the detention measure as regards the said right. The conditional bail measure which required the applicant "not to leave residence" (Article 109 § 3-j of the CCP) between 10 July 2017 and 19 October 2017 and "to report to the police station located in the nearest proximity to her place of residence for signature every Saturday" (Article 109 § 3-b of the CCP) between 10 July 2017 and 15 March 2018 undoubtedly constitutes a protection measure as an alternative to detention. In an individual application concerning an alleged violation of the right safeguarded by Article 19 § 3 of the Constitution, it is necessary to take into account, during the Court's judicial review, the fact that the application was lodged to challenge the detention or conditional bail measure, and the compliance with the criterion of "strong indication of the commission of an offence" must be examined in view of the effect of these two types of protection measures on the right to liberty and security and the particular circumstances of the application.

In the present application, having regard to the fact that the public prosecutor's office did not request the applicant's placement in detention at the investigation stage; that a conditional bail measure first requiring the applicant "not to leave her residence" and then requiring her "to report to the police station for signature once a week", which was more lenient than detention, was imposed on the applicant to ensure her participation in the judicial process, in view of the exceptional nature of detention as a measure of last resort, despite the severity of the penalty prescribed for the offence imputed to the applicant; and that this measure which had been imposed by the inferior courts was suitable and necessary in view of the information

and findings in the file, I consider that the right to personal liberty and security safeguarded by Article 19 § 3 of the Constitution was not violated and thus I cannot agree with the majority's opinion to the contrary.

CONCURRING OPINION OF JUSTICES MUAMMER TOPAL, RIDVAN GÜLEÇ AND BASRİ BAĞCI

Detention and protection measures are, by their nature, susceptible to subjective assessments, and they are therefore among the most controversial issues of the criminal procedure law. While agreeing with the judgment adopted by the majority of the Court, we are of a different opinion methodologically as to the grounds relied on for the finding of a violation and as to the examination of the detention measures within the scope of the right to personal liberty and security.

Indeed;

The Court must adopt an approach as a supreme court conducting a judicial review in respect of the complaints concerning an alleged violation of the right to personal liberty and security and must not address the issue by substituting itself for a magistrate judge which would deliver a decision on the relevant incident. Acting otherwise would not be compatible with the spirit of the application.

It must be acknowledged that the detention measure, as a subject of the criminal procedure law, requires expert knowledge to a certain extent. In this regard, the magistrate judges are placed in a more advantaged position vis à vis the Court in obtaining evidence at first hand. While this view has been expressed in the judgment adopted by the majority, it has been ignored within the scope of the reasons relied on for the finding of a violation.

As is seen in the present case, the facts relied on by the majority for finding a violation are based on a result-oriented approach without regard to the atmosphere prevailing at the beginning of the investigation. Paragraph 90 of the draft judgment notes that there was no concrete data indicating that the protest attended by the applicant had been held in

line with the instruction of the organisation. A request for the imposition of a measure is in fact submitted to allow for an inquiry of such data. The existence of such data constitutes a ground not for a measure but for a conviction. The situation prevailing at the relevant moment was the finding that the terrorist organisation attached particular importance to the relevant incidents. The act of revealing the organic relationship constitutes the essential subject matter of the investigation. The main purpose of detention or conditional bail is to ensure the conduct of such investigation.

We are also of the view that the manner of assessment adopted by the majority is not compatible with the subsidiary function of the Court. The Court's role is not to make its own assessment as to the issue on the basis of the evidence in the file and then to decide on detention, but rather to review whether the actors (public prosecutor or magistrate judge) involved in the process carried out their functions in compliance with the constitutional safeguards.

One of the most considerable disadvantages of the present approach is possibly the risk of its rendering the ongoing proceedings meaningless. The assessments to be made by the Court as to the protection measures solely on the basis of the file without enjoying the possibility of a face to face procedure and many possibilities affecting the formation of an opinion leading to a conclusion may potentially affect the ongoing trial process negatively in such a manner as to go beyond the intended purpose.

In our opinion, the issue on which the Court must primarily and essentially focus during such review must be the legal performance of the public prosecutor and the judge.

In this connection, an examination must be made as to whether the public prosecutor sufficiently explained the necessity of the detention or other measures for the investigation when submitting a request in this regard. Then, an inquiry must be conducted as to whether the judge had a grasp of the evidence in the file and as to how this was reflected on the decision. At this stage, a thorough examination must be made as to whether any reasonable explanation provided by the suspect was taken into consideration in the delivery of the decision.

In addition, as prescribed by the procedural law (Article 101 § 2 of the CCP), an assessment must be made as to whether the reasons based on concrete facts were properly provided in respect of the evidence. An examination must be made as to for which reasons the detention and conditional bail measures were considered suitable, necessary and proportionate for the achievement of the aim pursued by them and whether the assessment was relevant for the situation.

Any interference with the margin of appreciation afforded to the magistrate judge must be avoided in cases other than those where there is no evidence, where the prohibitions concerning investigation, criminal proceedings or detention are in force, and where the act does not constitute an offence or has become time-barred.

As a result of the examination of the present case within the framework of the aforementioned manner of approach;

We agree with the majority in finding that the practice of house arrest constitutes a substantial interference with the right to personal liberty and security in the light of the particular circumstances of the relevant case. However, a reference abstractly made to the suspect's risk of absconding in the letter of request issued by the public prosecutor is not compatible with the content of the file. There is theoretically a risk of absconding as regards every suspect. Attempting to draw an inference from such fact would lead us to conclude that every suspect must be detained on remand or subjected to a measure, and such conclusion is unacceptable. At this point, the law requires the existence of more concrete grounds. Thus, the legislator seeks the existence of concrete facts within the scope of the risk of absconding (Article 100 § 2-a of the CCP).

The purpose of the protection measures is primarily to ensure collection of the evidence without being lost or tampered with and subsequently to allow for the execution of a possible penalty. In view of the fact that the evidence was still being collected within the scope of the relevant file, the protection measures were expected to provide the benefit of serving the collection of the evidence. No mention was made about the existence of a situation such as the suspect's absconding or hiding herself or about any concrete evidence pointing to a possibility of absconding. In this

respect, the request of the public prosecutor was not compatible with the exigencies of the situation.

In the impugned incident, it appears that sufficient reasons were not provided for the subsequent imposition of a measure requiring the applicant "not to leave her residence" while she was initially subjected to a measure requiring her to report to the police station on certain days and that an explanation was not made as to how the subsequent measure having a more restrictive effect on the right to personal liberty as compared to the initial measure would contribute to the collection of the evidence and the prevention of the evidence from being lost. Consequently, in line with the aforementioned explanations, we agree with the majority in finding a violation but we rely on a separate ground for such finding.

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

AYLA DEMİR İŞAT

(Application no. 2018/24245)

8 October 2020

On 8 October 2020, the Plenary of the Constitutional Court found a violation of the right to respect for private life safeguarded by Article 20 of the Constitution in the individual application lodged by *Ayla Demir İşat* (no. 2018/24245).

THE FACTS

[9-84] 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 of the said Union following the coup attempt of 15 July, due to her alleged connection or relation with the Fetullahist Terrorist Organisation/Parallel State Structure ("FETÖ/PDY"), by virtue of the Decree-law no. 667. The applicant brought an action for her reinstatement to 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. The applicant then appealed against the decision; however, it was ultimately upheld by the Court of Cassation.

On 2 August 2018, she lodged an individual application.

V. EXAMINATION AND GROUNDS

85. The Constitutional Court ("the Court"), at its session of 8 October 2020, examined the application and decided as follows:

A. Request for Legal Aid

86. The applicant claimed that she could not afford to pay the litigation costs and accordingly requested to be granted legal aid.

87. In accordance with the principles set out by the Court in the case of *Mehmet Şerif Ay* (no. 2012/1181, 17 September 2013), the Court has accepted the request for legal aid by the applicant, who has been found to be unable to afford the litigation costs without suffering a significant financial burden, for not being manifestly ill-founded.

B. Examination Procedure

88. In certain international instruments regarding the human rights, States are allowed to depart from legal regime of the ordinary period and to resort to measures contrary to the international obligations of the ordinary period in the event of a war or emergency cases threatening the existence or life of the nation. Within this framework, it is set out respectively in Articles 4 and 15 of the International Covenant on Civil and Political Rights ("the ICCPR") and the European Convention on Human Rights ("Convention") that measures contrary to the obligations set forth in these instruments may be taken under certain circumstances during such periods (see *Aydın Yavuz and Others*, §§ 169, 170). It should be noted that in periods when emergency administration procedures are in force, the Court has the authority to examine the applications involving alleged violation, by public force, of any of the fundamental rights and freedoms safeguarded in the Constitution which also fall into the scope of the Convention or its additional protocols to which Turkey is a party (see *Aydın Yavuz and Others*, § 181).

89. The criteria as to the restriction of fundamental rights and freedoms in ordinary times are laid down in Article 13 of the Constitution, whereas those regarding the restriction or suspension of the exercise of the rights and freedoms in times of *war*, *mobilization*, and *a state of emergency* are set out in Article 15 of the Constitution. In this sense, the principles set forth in the judgment of *Aydın Yavuz and Others* should be recalled.

90. The criteria to be taken into consideration in imposing a restriction on fundamental rights and freedoms during an ordinary period are set out in Article 13 of the Constitution (see *Aydın Yavuz and Others*, § 184). According to Article 15 of the Constitution where criteria concerning the restriction and even suspension of fundamental rights and freedoms in a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended or measures which are contrary to the guarantees embodied in the Constitution may be taken in times of war, mobilization, martial law or a state of emergency. However, Article 15 of the Constitution does not entrust the public authorities with an unlimited power in this respect. The measures which are contrary to the guarantees

embodied in other provisions of the Constitution must not infringe upon the rights and freedoms set forth in Article 15 § 2 of the Constitution, must be in keeping with the obligations stemming from international law and within the extent required by the exigencies of the situation (see *Aydın Yavuz and Others*, § 186).

91. Accordingly, the present case involving a measure taken during a period when emergency administration procedures were in force will be primarily examined from the standpoint of Article 13 of the Constitution. If it is found to run contrary to the safeguards set forth therein, the regime set out in Article 15 of the Constitution with respect to fundamental rights and freedoms will also be taken into consideration (see, in the same vein, *Aydın Yavuz and Others*, §§ 343-359).

C. Alleged Violation of the Right to Respect for Private Life

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

92. The applicant maintained:

i. She had opened a bank account at Bank Asya, which was the ground underlying the termination of her employment contract, for saving money in 2009. There was merely an increase of 5,215.34 Turkish liras ("TRY") in the said account between 2013 and 2014. Such an amount was not capable of making financial contribution to a bank. She had not made money transfers to any person or institution, other than those to her husband and brother. Her account activities consisted of routine transactions.

ii. She had not had any link with the Fetullahist Terrorist Organisation/Parallel State Structure ("the FETÖ/PDY"). She had not been subjected to any judicial process within the scope of the investigations conducted into the FETÖ/PDY. In a state governed by rule of law, it was not accurate to take a judicial action merely on the basis of suspicion, and besides, such suspicion could not be proven to even exist. The termination of her employment contract on the basis of the lists issued and submitted by the Security General Directorate and the National Intelligence Organisation, without making an assessment, would not constitute an acceptable or justified reason.

iii. The action brought by her for reinstatement to her job had been dismissed unlawfully, and the inferior courts adjudicated her case in breach of the lustration principles. An individual in a democratic society might be lustrated only under inevitable and necessary conditions and in a limited manner. In the process of lustration, the principle that the fault on the part of the relevant person be certainly considered and the termination of employment contract be applied as a last resort must be observed. However, in her case, this principle had been ignored.

iv. An action had been taken against her on the basis of ambiguous concepts such as connection and link, which was in breach of the lawfulness principle. The termination of her employment contract merely due to her deposit of money at a legally-operating bank on a regular basis run contrary to the principle of legal security.

v. She had the right to earn a living by performing a job she had freely occupied. She had planned her economic and social life on the basis of the job from which she had been dismissed. The termination of her contract constituted an interference with her nearly six-year carrier as a lawyer. She had been stigmatised due to this termination, and she could not find a new job on account thereof. She would be accordingly deprived of economic and social rights during her lifetime and therewith the civil rights.

vi. For these reasons, there had been violations of the right to protect and improve her corporeal and spiritual existence, the right to respect for private life, the right to property, the right to a fair trial, the right to hold a public office, the presumption of innocence, as well as of the principle of equality.

93. In its observations, the Ministry defined the termination on ground of suspicion and stated that this kind of termination was acknowledged as a good cause for termination. The Ministry recalled that in the present case, according to the first instance court, the parties had lost confidence in one another, which had been necessary for the maintenance of professional relationship among them; that as the employment contract had been terminated with good reason, the action brought by the applicant had been

dismissed; and that the dismissal decision had become final following the appellate process. The Ministry referred to the Court's judgments which indicated that it was the inferior courts that were competent to interpret statutory provisions; and that any alleged violation would be in the nature of an appellate complaint in the absence of any situation giving rise to no manifest error of judgment or arbitrariness. It further noted that in the aftermath of the coup attempt of 15 July, a state of emergency had been declared throughout the country, and thereafter, a derogation declaration had been submitted to the Secretariat General of the Council of Europe on 21 July 2016 regarding the obligations as to the protection of fundamental rights and freedoms inherent in the Convention. Pursuant to Article 15 of the Convention and Article 4 of the ICCPR, States were entitled, in extraordinary times, to go beyond the legal regime applied in the ordinary period and might impose restrictions on fundamental rights and freedoms to a greater extent than that of the ordinary period. The Ministry further indicated that Article 15 of the Constitution embodied arrangements as to the steps to be taken in such cases and that this provision should be taken into consideration in the examination of individual applications regarding the measures taken during the state of emergency.

94. In the letter submitted by the applicant in reply to the Ministry's observations, it was asserted that during the prosecutions conducted within the scope of the FETÖ/PDY, the criteria of being relation and connection with the FETÖ/PDY had changed; and that therefore, these criteria should have undergone changes also in terms of labour law. It was further claimed that the 16th Criminal Chamber of the Court of Cassation had held that the mere holdership of an account at Bank Asya and performing routine transactions would not constitute an evidence for membership of an organisation; and that the applicant's transactions should have been considered in this scope. The allegations already specified in the application form were also reiterated.

2. The Court's Assessment

95. Article 20 § 1 of the Constitution, titled *"Privacy of private life"*, provides, in so far as relevant, as follows:

"Everyone has the right to demand respect for his/her private (…) life. Privacy (…) of private life shall not be violated."

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

97. The applicant's allegations concern the imposition of a measure on her professional life, the termination of her employment contract in that vein and the dismissal of the action brought by her for reinstatement as a whole. It is indisputable that professional life of individuals is closely interrelated with their private life, and thus, in proceedings involving any measure regarding, or any interference with, professional life, the right to respect for private life may come into play. In this sense, there must necessarily exist criteria so as to determine under which circumstances, such measures or interference with respect to professional life could be considered to fall into scope of *private life* or which disputes brought before the Court could be considered relevant in this context, and the assessments must be made in consideration of such criteria (see *C.A. (3)*, no. 2018/10286, 2 July 2020, § 88).

98. In this sense, the Court has considered that the present application must be assessed from this standpoint; and that if, at the end of such assessments, the right to respect for private life is found to be applicable to the applicant's case, all allegations raised by her must be examined under this right.

a. Applicability

i. General Principles

99. In its several previous judgments, the Court has frequently stressed that the right to respect for private life also embodies the right to be in contact with those in the relevant person's circle and assures the right to maintain a private social life; and that individuals' professional life is closely interrelated with their private life. It has, however, noted that the right to respect for private life comes into play especially in cases where issues regarding private life are relied on in any act or action with respect to the given person's profession (see *K.Ş.*, no. 2013/1614, 3 April 2014, § 36;

Serap Tortuk, no. 2013/9660, 21 January 2015, § 37; *Bülent Polat* [Plenary], no. 2013/7666, 10 December 2015, § 62; *Ata Türkeri*, no. 2013/6057, 16 December 2015, § 31; *Ö.Ç.*, no. 2014/8203, 21 September 2016, § 50; *Haluk Öktem* [Plenary], no. 2014/13433, 13 October 2016, § 27; *E.G.* [Plenary], no. 2014/12428, 13 October 2016, § 34; and *C.A. (3)*, § 90).

(1) Reason-Based Applicability

100. The approach adopted by the Court to the effect that *the right to respect for private life* will be applicable in cases when issues falling under private life are taken as a basis in the acts and actions to be performed regarding the given person's profession indicates that *private life*, the value protected under this right, comes into play for the reasons related to this notion. As a matter of fact, in case of any interference with professional life having an important function in maintaining contact with the outside world due to any grounds related to private life or in case of taking of any restrictive measures on the basis of any issues related to private life, such kinds of disputes may be addressed within the scope of *private life*. That is because an interference with an individual's professional life or any act or administrative or judicial action with respect to him for any reasons pertaining to his private life would evidently have a bearing on his private life (see *C.A. (3)*, § 91).

101. Besides, any interferences with or measures regarding the individuals' professional life forming a significant part of their social life for any reasons related to their private life are, a fortiori, suitable for being assessed within the scope of the notion of *private life*. Appointment to an office or dismissal from office on the basis of the individual's conducts falling within the scope of his private life, which he does not display at the outside world, may be an example thereof. In this framework, it is undisputed that the interferences exercised or measures taken based on an element inherent in private life, that is to say, based on a ground are applicable under *the right to respect for private life* (see *C.A. (3)*, § 92).

(2) Consequence-Based Applicability

102. However, every case involving an interference or measure with respect to professional life of individuals, which is not based on any ground regarding private life, cannot be assessed directly under the right to

respect for private life. The processes involving such kind of interferences are to be convenient for an examination from the standpoint of the right to respect for private life and triggering the application of the safeguards inherent therein. Although it is foreseeable that interferences with or measures taken with respect to professional life would have a bearing, even indirect, on individuals' social lives and their communication with those within their circle, thus on their private life, it must be demonstrated that such bearing that has occurred or is likely to occur must be of a severe nature and attain a minimum level of severity to the extent that would necessitate an examination under the right to respect for private life. The level of severity may be determined in consideration of the particular circumstances of every concrete case and by assessing the arguable claims and evidence submitted by the applicants (see *C.A. (3)*, § 93).

103. In this sense, in order for interferences or measures directed towards professional life, in the absence of any reasons regarding private life, to be assessed under the right to respect for private life, it must have a severe bearing on private life of those concerned or such a bearing of this level may probably arise. The following issues should be taken into consideration in the assessment as to whether such a matter has attained a minimum level of severity that necessitates an examination under the right to respect for private life (see *C.A. (3)*, § 94):

i. Degree of impact on the inner circle of the given person;

ii. Degree of impact on his social circle and reputation;

iii. Degree of impact or damage to be caused by the impugned interference or measure on his profession –in consideration of the objective qualifications of the profession–;

iv. To which extent the impact or damage sustained is demonstrated and proven with plausible explanations;

v. Grounds underlying the interferences or measures directed towards professional life.

104. In determining such level of severity, as the concrete effects and repercussions of feelings such as sorrow, anxiety, concern for the future or

fear sustained or likely to be sustained on their private lives will be taken into consideration, it must be once again emphasised that sufficient and plausible explanations regarding these issues should be provided and the allegations should be assessed (see *C. A. (3)*, § 95).

105. Besides, it should be recalled that in terms of these two applicability criteria, such allegations –for an assessment as to their applicability– should first have been raised during the administrative or judicial processes that are to be exhausted before lodging an individual application (see *C. A. (3)*, § 96).

ii. Application of Principles to the Present Case

106. In the present case, the applicant's employment contract was terminated unilaterally by the employer on the ground that the trust required for the maintenance of professional relationship had been impaired. Given the decisions issued during the process, it has been observed that the ground underlying the termination of the employment contract was the applicant's having performed transactions at Bank Asya, which was found established by judicial decisions to be the financial centre of the FETÖ/PDY, thus the suspicion of her being in connection and relation with structures, formations or groups conducting activities against national security of the State.

107. It is therefore evident that the impugned measure regarding the applicant's professional life was not based on any reason pertaining to private life. In that case, it must be ascertained, in line with the abovementioned criteria, whether the dispute arising from the termination of the applicant's employment contract attained the minimum level of severity required for an examination under the right to respect for private life.

108. The applicant did not provide any information concerning her professional life before 2010 the year when she started to work with the employer. The applicant starting to be employed at the employer cooperative as a cooperative officer in the status of a worker when she was at the age of 29, had worked there until 2016 when her contract was terminated.

109. The applicant maintained that she had been stigmatised due to both the ground of the termination of her employment contract and the termination itself; that she could not therefore find a new job; and that

she would be deprived of economic and social rights for lifetime by the consequences thereof. In this sense, it should be taken into consideration that there is no factor which would hinder the acceptance of the allegations raised by the applicant that the suspicion giving rise to the termination of the applicant's employment contract was her connection or relation with the said terrorist organisation; that no judicial action had been taken against her; that she had been dismissed from office without any compensation and she had no longer received any payment; that she was at the beginning of her professional life given her age; and that the effect of the grief and anxiety suffered by her due to the impugned process on her inner and outer world had reached to a significant extent. In this framework, it has been considered that the impugned interference with the applicant's professional life would undermine, to a great extent, her ability to build up and maintain relationship with others and also have severe consequences with respect to her social and professional reputation; and that hence, it may probably have repercussions on, and bear consequences as to, her private life to a significant degree of severity.

110. As emphasised, the interference in the form of the termination of the applicant's employment contract does not led to an automatic application of the right to respect for private life. However, it has been considered that for the reasons explained, the interference with the professional life in the present application had significantly affected the applicant's *private life* and this effect reached a certain level of severity. Accordingly, it has been concluded that the circumstances of the present case were appropriate for an examination under the *right to respect for private life*.

b. Admissibility

111. For these reasons, the alleged violation of the right to respect for private life must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

c. Merits

112. It is not in every case possible to make an exact definition of, and a distinction between, negative and positive obligations inherent in the right to respect for private life. Negative obligations incumbent on

the State require to refrain from any arbitrary interference with right to respect for private life. Positive obligations on the other hand necessitate the protection of this right and taking of specific measures so as to afford the safeguards inherent in the respect for private life even in the sphere of relations among individuals (see, in the same vein, *Adnan Oktar (3)*, no. 2013/1123, 2 October 2013, § 32; *Ömür Kara and Onursal Özbek*, no. 2013/4825, 24 March 2016, § 46; and *C.A. (3)*, § 103).

113. In the present case, the impugned interference with the applicant's professional life was based on the resolution of the employer, the Board of Directors of the Central Union of the Turkish Agricultural Credit Cooperatives, dated 11 August 2016. Given the facts that the Central Union of the Turkish Agricultural Credit Cooperatives established in accordance with Law no. 1581 may be authorised by the Government for the certain field of activities; that its auditors may be removed from office by the relevant ministry; that the resolutions issued by its general assembly shall become final upon the approval of the relevant Ministry; and that it has certain powers and exemptions pursuant to statutory provisions, it appears that the Central Union of the Turkish Agricultural Credit Cooperatives is furnished with the privileges inherent in public power, which was also acknowledged by the inferior courts. In this sense, it has been considered that the impugned measure imposed by the Central Union of the Turkish Agricultural Credit Cooperatives must be considered to amount to an exercise of public power. Therefore, the present application would be assessed from the standpoint of the State's negative obligations.

i. Existence of an Interference

114. The applicant's employment contract was terminated on 11 August 2016, by the employer furnished with certain privileges of public power, due to her relation, connection and link with the FETÖ/PDY. Therefore, it is evident that the resolution ordering the termination of the employment contract constituted an interference with the applicant's right to respect for private life.

ii. Whether the Interference Constituted a Violation

115. The abovementioned interference would constitute an interference of Article 20 of the Constitution unless it complies with the conditions

set forth in Article 13 of the Constitution. Article 13 of the Constitution, titled *"Restriction of fundamental rights and freedoms"*, provides, in so far as relevant, as follows:

> *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution (…). These restrictions shall not be contrary to (…) the requirements of the democratic order of the society and (…) and the principle of proportionality."*

116. Therefore, it must be determined whether the impugned restriction complied with the requirements set out in Article 13 of the Constitution and applicable to the present case, namely being prescribed by law, relying on one or several justified reasons specified in the relevant provision of the Constitution and not being contrary to the requirements of a democratic society, as well as the proportionality principle.

(1) Lawfulness

117. The impugned interference was performed within the framework of Law no. 4857 on the basis of Article 4 § 1 of Decree-law no. 667. Therefore, the interference had a legal basis.

(2) Legitimate Aim

118. Article 13 of the Constitution makes the restriction of fundamental rights and freedoms conditional upon the existence of special grounds for restriction set forth in the constitutional provision concerning the relevant right and freedom. However, no special ground for restriction is prescribed with respect to Article 20 § 1 of the Constitution. Although in the second paragraph thereof, certain grounds for restriction are laid down, these grounds are related merely to the search and seizure procedures. Accordingly, these grounds cannot be relied on in respect of all aspects of the right to respect for private life (see the Court's judgment no. E.2012/100, K.2013/84, 4 July 2013; and *Ahmet Çilgin*, no. 2014/18849, 11 January 2017, § 40; and *C.A. (3)*, § 109).

119. Although Article 20 of the Constitution prescribes no ground for the restriction of the right to respect for private life, it cannot be said to be

an absolute right which could not be restricted under any circumstances. As laid down in Article 12 of the Constitution, the fundamental rights and freedoms also compromise the duties and responsibilities of the individual towards the society, his/her family and other individuals. In this context, it may be concluded that even the rights for which no special ground for restriction is prescribed have certain boundaries deriving from the very nature of the given right itself. Besides, these rights may be restricted also on the basis of the rules laid down in other provisions of the Constitution. Accordingly, it is acknowledged that the rights and freedoms enshrined in the other provisions of the Constitution as well as the duties incumbent on the State may set boundaries with respect to the rights and freedoms for which no special ground for restriction is indicated (see the Court's judgments no. E.2014/87, K.2015/112, 8 December 2015; E.2016/37, K.2016/135, 14 July 2016, § 9; E.2013/130, K.2014/18, 29 January 2014; and *Ahmet Çilgin*, § 39). In other words, the scope and field of application, in the objective sense, of the fundamental rights and freedoms must be determined not independently in terms of every norm but according to the meaning within the Constitution as a whole (see the Court's judgment no. E.2017/130, K.2017/165, 29 November 2017, § 12; and *C.A. (3)*, § 110).

120. In Article 5 of the Constitution, it is set forth *"The fundamental aims and duties of the State are to safeguard the independence and integrity of the Turkish Nation, the indivisibility of the country, the Republic and democracy, to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence."* Accordingly, it is among the State's fundamental aims and duties to ensure welfare, tranquillity and happiness of individuals and the society (see *Ö.N.M.*, no. 2014/14751, 15 February 2017, § 71). The prerequisite for ensuring welfare, tranquillity and happiness of individuals and the society is to secure national safety and public order. In an environment where national safety and public order are not ensured, it is not possible to duly exercise the rights and freedoms and to respect the individuals' private lives. In this sense, the State is liable not only to

protect rights and freedoms but also to ensure national security and public order (see *Ö.N.M.*, § 72; and *C.A. (3)*, § 111).

121. In so far as an individual's profession is qualified as a part of his private life, the interferences with profession, thus the right to respect for private life, must pursue a legitimate aim. However, it should be borne in mind that professional relationship places mutual duties and obligations on both the employer and the employee. In professional life, in cases where the parties act in the way they wish or one of the parties acts in disregard of the other party's objective and reasonable expectations for the maintenance of professional relationship, the professional relationship between them may naturally come to an end. Otherwise, professional relationship turns into a compulsory relation which cannot be terminated in any way. In that case, the aim to establish such professional relationship becomes meaningless. The cases where the trust necessary for the maintenance of professional relationship has disappeared or where it is obvious that the expected interest pursued through such professional relationship would not be achieved may serve as an example thereof (see *C.A. (3)*, § 112).

122. In the present case, the employer furnished with the privileges inherent in public power terminated the applicant's employment contract on the ground that she had a member, or was in relation or connection, with any structures, formations or groups revealed to perform acts and actions against national security, which undermined the trust relationship between the employer and the employee. It may be said that the discretionary power granted to the institutions wielding public power is broader notably in cases where they aim at maintaining national security and public order and ensuring sustainability of public service. Therefore, it is considered that as regards the measures taken with respect to a profession, which constitutes an interference with the right to respect for private life, the preservation of national security and public order as well as the ensuring of sustainability of public service may be regarded as a ground for restriction deriving from the very nature of the right. In this context, in the particular circumstances of the present case, the Court has concluded that the impugned interference with the applicant's right to respect for private life was based on the said grounds for restriction and thus pursued a legitimate aim.

(3) Compliance with the Requirements of a Democratic Society and Proportionality

(a) General Principles

123. As stated in the Court's judgments, the notion, requirements of a democratic society, requires any restriction imposed on a given right to be a measure of compulsory or exceptional nature and applied as a measure of last resort that should only be applied when all other options are deemed insufficient. Being one of the requirements of a democratic society means that a given restriction serves the purpose of meeting a pressing social need in a democratic society (see the Court's judgment no. E.2016/179, K.2017/176, 28 December 2017; *Haluk Öktem*, § 49; *Erhun Öksüz* [Plenary], no. 2014/12777, 13 October 2016 § 53; *G.G.*, § 56; *Ata Türkeri*, § 44; *Salim Onur Şakar*, no. 2015/2711, 21 September 2017, § 35; and *C.A. (3)*, § 114).

124. The tests of *requirements of a democratic society* and *proportionality* are laid down as two separate criteria in Article 13 of the Constitution. However, these two criteria are inextricably linked with one another. The aim of the proportionality principle is to prevent an unduly restriction of fundamental rights and freedoms. Pursuant to the Court's judgments, the proportionality principle consists of three sub-elements, namely *suitability* that entails that the interference envisaged be suitable for achieving the aim pursued, *necessity* that entails that the impugned interference be necessary for achieving the aim pursued, and *commensurateness* that entails that a reasonable balance be struck between the means and the aim pursued and the impugned restriction would not place a disproportionate burden (see *Ferhat Üstündağ*, no. 2014/15428, 17 July 2018, §§ 45, 48; *Bülent Polat*, § 106; *Tevfik Türkmen* [Plenary], no. 2013/9704, 3 March 2016, § 70; *Bülent Kaya* [Plenary], no. 2013/2941, 11 May 2016, § 82; and *C.A. (3)*, § 115).

125. The Turkish Republic faced a coup attempt that jeopardised its national security and targeted at democratic state of law enshrined in Article 2 of the Constitution. In this sense, the taking of certain additional and extraordinary measures by the State with respect to employees/public officers considered to have connection with the terrorist organisations that were the perpetrator of the coup attempt and to pose a threat to

national security, to enable the private-law legal entities furnished with the privileges of public power to take the necessary actions so as to discontinue employing such individuals; to engage in reform activities for the continued performance of public service and materialisation of certain arrangements to that end, in brief to conduct lustration process, may be qualified as acts and actions based on justified grounds (see, in the same vein, the Court's judgment no. E.2016/6 (miscellaneous), K.2016/12, 4/8/2016, §§ 77-81; and *C.A. (3)*, § 116).

126. The significant issues to be taken into consideration in ascertaining whether the constitutional safeguards have been fulfilled in conducting the lustration process are as follows (see *C.A. (3)*, § 117):

i. As the strict standard of proof –sought in the criminal proceedings– may not be applied within the scope of the measures of lustration from public, the discretionary power exercised by authorities wielding public power is broadened. Therefore, the exigency criterion must be applied more strictly and the discretionary power must not be exceeded.

ii. In the decisions within the process, it must be demonstrated that the measure applied has been individualised.

iii. The measure must be of the last resort likely to be applied, meet a pressing social need and be proportionate. Although it is necessary to demonstrate more strong grounds to show the necessity of lustration for a title or position that is less critical, the less significant nature of the title or position does not mean that the individuals holding such titles and positions cannot be lustrated by public authorities. It should be acknowledged that the public authorities have discretionary power in conducting lustration process also with respect to the officers taking office/holding relatively less critical titles or positions on condition of relying on plausible grounds. In assessments to be made on this matter, it should be ascertained whether a fair balance was struck between the interest of the public and that of the individual as the subject of the interference (see, in the same vein, *K.Ş.*, § 49; and *Bülent Polat*, § 107).

iv. Besides, the grounds relied on by judicial authorities to demonstrate that an interference with the right to respect for private life was in keeping with the principles of *being necessary in a democratic society* and *proportionality* must be plausible, relevant and sufficient (see, in the same vein, *Ata Türkeri*, §§ 45, 47; and *Murat Deniz*, no. 2014/5318, 21/9/2016, § 66).

v. Moreover, it is important that the judicial review as to such measures be conducted effectively and within a reasonable period by observing the procedural requirements.

127. It should be also borne in mind that in assessments to be made in this respect, the particular circumstances of every concrete case will be taken into consideration and that therefore, the conclusions to be reached may vary by cases (see *C.A. (3)*, § 118).

(b) Application of Principles to the Present Case

128. The applicant claimed that the account she opened at Bank Asya in 2009 was relied on as a ground for the termination of her employment contract; that her account activities had indeed consisted of routine transactions; and that she had not transferred money to any person or institution other than her husband and brother. Asserting that the increase amounting to 5,215.34 Turkish liras ("TRY") in her account in 2013-2014 had been found by the Security General Directorate, the applicant maintained that her dismissal from office for lifetime, without her fault being assessed, the existence of criminal suspicion with respect to her being demonstrated and in disregard of the principle of necessity as well as the principle that termination must be applied as a last resort, constituted an interference with her right to respect for private life. Moreover, she stated that the action brought for reinstatement to her job had been dismissed unlawfully and that the inferior courts had issued decisions in breach of the principles as to lustration from public offices.

129. In the resolutions taken by the employer, it was stated that it had been found prejudicial to allow employees -identified to be a member or sympathiser of the FETÖ/PDY that had attempted to overthrow the Grand National Assembly of Turkey and the Government of the

Turkish Republic on 15 July- to continue holding office, in line with the objectives determined by the State and for the purposes of maintaining public order and ensuring effective performance of the services. The applicant considered to fall into this scope was firstly suspended from office. Subsequently, the employment contracts of 38 employees including the applicant were terminated without notice and compensation. The reasoning of the resolution was the connection or relation of the relevant persons whose employment contracts had been terminated with any structures, formations or groups conducting activities against national security.

130. In the action brought by the applicant for her reinstatement, the incumbent court conducted inquiries to ascertain whether the applicant had any relation or connection with the FETÖ/PDY. In this scope, it sent warrants to the Security General Directorate, Directorate General of Bank Asya and Bank Asya Kızılay Branch Office. As a result, the inferior courts dismissed the applicant's case, stating that it was ordinary for the institutions and organisations rendering public service, like the employer in the present case, to conduct investigations and inquiries with respect to persons having a link with illegal organisations and that the employer was entitled to prefer not to continue employing persons in whom the former had no longer any trust.

131. It is not possible to qualify the continued performance of the assigned services by the employees as an absolute right pursuant to the employment contracts to which they are subjected. It should be noted that the employers' expectation that their workers should perform services effectively and display loyalty to predetermined, objective rules is based on a justified requirement. That is because the cases where the decreased efficiency in performance of the relevant work or impairment of trust relationship with the employer is caused for any reasons related to the employee would evidently have a bearing on the employer's interest. Therefore, the impairment and termination of professional relationship that maintains within the scope of statutory arrangements and the rules determined by the employer are an ordinary process in the presence of legitimate grounds (see *C.A. (3)*, § 123).

132. As regards the termination of employment contract, one of the measures likely to be applied in such cases, the right to respect for private life safeguarded by Article 20 of the Constitution does not prohibit the termination of professional relationship through a unilateral declaration of intention. However, the measure in the form of termination of professional relationship, which is applied by the employer, may be qualified as a necessary measure of last resort only when it is demonstrated that the given employee has acted against the employer's interest and expectations. In other words, the grounds which are not to the detriment of the employer's interest cannot be regarded as compulsory measures of last resort. For instance, the employee's having a certain world view or sympathy for certain groups cannot be qualified *per se* as a condition having a bearing on the employer's interest (see *C.A. (3)*, § 124).

133. Besides, the notion of the employer's interest may be interpreted broadly when the employer is a public institution or organisation or any private-law legal entity furnished with certain privileges of public power. In other words, as the discretionary power must be interpreted in a narrower manner in so far as it relates to those employed by a private-law legal entity, it is possible to make different assessments. In this sense, it may be said that the finding by the employer of any disloyalty to the State on the part of an employee is a compulsory case enabling employers to terminate the employment contract. That is because it should be accepted that an employer exercising public power has no liability to tolerate working with a person having no loyalty or weak loyalty to the State and is entitled to unilaterally terminate professional relationship with those considered to be disloyal to the State. However, it is obvious that for measures to be taken on the basis of the breach of liability to display loyalty by the employee, thus the impairment of trust relationship between the employee and the employer, merely existence of simple suspicion would not be sufficient; and there must be concrete facts in support thereof. The grounds relied on by both the employer and the judicial bodies must be capable of demonstrating and persuading that the trust relationship between the employee and the employer has been impaired (see *C.A. (3)*, § 125).

134. In the present case, the ground for the termination of the employment contract is the suspicion that the applicant had a connection or relation with the FETÖ/PDY found established to conduct activities against national security and the impairment of the trust relationship due to this suspicion. In its previous judgments, the Court has acknowledged that as the FETÖ/PDY got organised in almost all public institutions and the said coup attempt was staged by this structure, the potential threat has turned into a current danger; and that extraordinary measures must be taken so as to maintain the democratic constitutional order (see the Court's judgment no. E. 2016/6 (miscellaneous) K. 2016/12, 4 August 2016, § 80; and *Aydın Yavuz and Others*, § 26).

135. It appears that the suspicion that the applicant had connection and relation with the FETÖ/PDY, found established to perform activities against national security, is mainly based on the bank account opened by her at Bank Asya in 2009. The letter of 28 February 2017, which was communicated by the Security General Directorate, provided information regarding the applicant's account at Bank Asya.

136. In the letter forming a basis for the decision, it was stated that Fetullah Gülen, leader of the FETÖ/PDY, instructed the members of the said organisation on 25 December 2013 to deposit money at Bank Asya; and that there was an increase amounting to TRY 5,215.34 at the applicant's Bank Asya account between 31 December 2013 and 31 December 2014. It was further noted therein that the applicant had not been subjected to any investigation conducted into the FETÖ/PDY; that nor was she subjected to any judicial process following the coup attempt of 15 July; that she had no enrolment in the associations or unions related to the FETÖ/PDY; that she was not a partner or manager of any such company; and that there was no finding that she was a user of ByLock application. During the proceedings conducted against her, the applicant maintained that she had been using her account at Bank Asya since 2009; that her account activities consisted of routine transactions; that she had not made money transfer to any person or institution other than her husband and brother; and that she had not received any instruction from any person.

137. It was found established by the judicial decisions that Bank Asya had obtained income through the amounts deposited by the organisation members upon the call by the leader and heads of the FETÖ/PDY, that it thereby provided financial resource to the organisational activities and was the financial centre of the organisation (see *Aydın Yavuz and Others*, § 35; *Metin Evecen*, no. 2017/744, 4 April 2018, § 59; and the judgment of the 16th Criminal Chamber of the Court of Cassation, no. E. 2017/1862 K. 2017/5796 and dated 20 December 2017). On the other hand, the Court of Cassation acknowledged that the ordinary account activities could not be considered as an organisational activity or as an act of aiding the said organisation (see the judgment of the 16th Criminal Chamber of the Court of Cassation, no. E. 2020/1974 K. 2020/3079 and dated 25 June 2020). In any case, it is obvious that the abovementioned principles be observed in order to terminate a contract on the ground of having a connection or relation with the FETÖ/PDY for having deposited money at Bank Asya and thus the impairment of the trust relationship between the employer and employee.

138. In consideration of the documents available in the case file and showing the transactions performed by the applicant via her Bank Asya account since 2010, it has been considered that the grounds underlying the suspicion that the applicant had connection or relation with the FETÖ/PDY were far from proving that the trust relationship between the employer and the employee had been impaired. That is because it has been revealed that the impugned bank account was opened before 2013 and the last account activity was dated 11 August 2015; and that the transactions performed by the applicant via her Bank Asya account prior to the instruction of FETÖ/PDY leader Fetullah Gülen as to the deposit of money to Bank Asya were similar to those performed after this instruction.

139. Besides, given that the transactions performed upon the said instruction were not in the form of a continuous increase in the amount at her account and there were several transactions reducing the balance and that the parties of the transactions and the applicant herself were a regular income earner, it must be demonstrated that on which grounds the total increase of merely TRY 5,215.34 had not been qualified as a routine account activity. It appears that in the impugned process, no examination

was conducted in this respect; that both the resolution issued by the employer terminating the applicant's contract and the decisions issued by the first instance courts failed to satisfy the requirements to demonstrate the grounds justifying the discretionary power exercised and to provide strong and plausible grounds. Therefore, in the light of the information and documents submitted during the proceedings, it has been considered that the impugned interference exceeded the discretionary power.

140. Besides, it has been observed that the inferior courts failed to make an assessment as to the applicant's challenge to the effect that *the impugned increase in her balance amounted to routine banking activities*. Accordingly, it was not clarified whether the account had been opened not for performing routine banking transactions but upon the instruction of the said terrorist organisation; whether there was a significant increase in the balance, which was not an ordinary account activity or whether any transaction had been performed within the scope of another organisation activities; and whether there had been any other ground justifying the impugned termination. These issues should have been elucidated through an adversarial trial by inferior courts. Therefore, the relevant decisions lacked any relevant and sufficient grounds to demonstrate that the trust relationship between the applicant and her employer had been impaired as she had a connection, relation or link with the said armed terrorist organisation.

141. In this sense, it has been concluded that the administrative and judicial decisions according to which the applicant had a connection or relation with the FETÖ –which undermined her loyalty to the State– and the trust relationship between the employer and the employee had been impaired due to reasons stemming from the applicant contained no plausible, relevant and sufficient grounds to demonstrate that the impugned interference met a pressing social need. As a result, the impugned interference failed to fulfil the condition of being compatible with the requirements of a democratic society.

142. For these reasons, it has been concluded that there was a violation of the right to respect for private life safeguarded by Article 20 of the Constitution.

143. As it has been found established that the measure imposed with respect to the applicant's professional life and the dismissal of the action, subject-matter of which was the impugned measure, were contrary to the safeguards inherent in Article 20 of the Constitution in ordinary time, it must be ascertained whether they were justified within the scope of Article 15 of the Constitution whereby the exercise of fundamental rights and freedoms may be suspended and restricted in extraordinary times.

d. Article 15 of the Constitution

144. The conditions as to the applicability of Article 15 of the Constitution and the explanations as to the scope of the examination to be conducted are set forth in the Court's judgment in the case of *Aydın Yavuz and Others*. Article 15 may come into play only when there is an extraordinary situation which has been declared and the measure taken is related to this extraordinary situation (see *Aydın Yavuz and Others*, §§ 188-230).

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

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

146. The examination to be made under Article 15 of the Constitution will be confined to the ascertainment whether the given interference

was related to the core rights enshrined in the Constitution; whether it infringed upon the right and freedoms laid down in paragraph 2 of the same provision; whether it was contrary to the obligations stemming from international law and whether it was to the extent required by the exigency of the situation.

147. The right to respect for private life is not among the core rights enshrined in Article 15 § 2 of the Constitution as inviolable even in times when extraordinary administration procedures such as war, mobilisation or a state of emergency are in force. Therefore, it is possible to take measures, with respect to this right, in breach of the constitutional safeguards in times of a state of emergency.

148. Nor is this right among the non-derogable core rights laid down in the international conventions to which Turkey is a party in the field of human rights as an obligation stemming from international law, notably Article 4 § 2 of the ICCPR and Article 15 § 2 of the ECHR, as well as the additional protocols thereto. Furthermore, it has not been found established that the impugned measure taken with respect to the applicant's private life was in breach of any obligation (any safeguard continued to be under protection in times of emergency) stemming from the international law.

149. Besides, the right to respect for private life prohibits any arbitrary interference with the safeguards inherent therein even by any third party. To abstain from arbitrarily interfering with the individuals' professional life and thus their private life is among the most significant safeguards, also given the possible effects and consequences to occur in any case to the contrary. In this sense, negative obligations, which are a part and parcel of this safeguard and incumbent on the State, should also be considered in this scope.

150. It is among the basic guarantees, applicable also in times when extraordinary administration procedures are in force, to fulfil the prescribed obligations, to ensure that the measures taken with respect to professional life having a bearing on the future of the individuals themselves and their families as well as on their reputation not to be arbitrary, and to resolve any related conflicts within the scope of the requirements of the right to respect for private life.

151. The last stage in ascertaining whether an impugned measure constituting an inference with fundamental rights and freedoms in times when extraordinary administration procedures are applied under Article 15 of the Constitution was legitimate is the examination as to whether it is *to the extent required by the exigency of the situation*.

152. In order to conclude that the measure resulting in the termination of the applicant's employment contract and therefore, the conflict resolved by the inferior courts are *to the extent required by the exigencies of the situation* under Article 15 of the Constitution, they must not be arbitrary at the outset. On the other hand, in assessing whether the impugned measure was proportionate, the characteristics of the case leading to the declaration of the state of emergency in our country and the circumstances emerging upon the declaration of the state of emergency must also be taken into consideration (see *Aydın Yavuz and Others*, § 349).

153. The principle of proportionality is set forth in Article 13 of the Constitution where the criteria set for the restriction of fundamental rights and freedoms in ordinary times are laid down. However, the proportionality pointed out in Article 15 of the Constitution refers to the proportionality in a situation leading to the implementation of emergency administration procedures. In this respect, the proportionality set forth in Article 15 of the Constitution allows for much more interference with fundamental rights and freedoms in comparison to the proportionality criteria laid down in Article 13 thereof. This point is also supported by the very fact that the criterion set forth in Article 15 of the Constitution can only be applied in cases where a measure derogating from the safeguards regarding fundamental rights and freedoms set forth in the Constitution –including Article 13– for ordinary times is taken (see *Aydın Yavuz and Others*, § 203).

154. The principle of proportionality set out in Article 15 of the Constitution requires that the means used for restricting or suspending the exercise of fundamental rights and freedoms be appropriate and necessary for achieving the aim pursued and that the means and the aim be proportionate to one another (see the Court's judgment no. E.1990/25, K.1991/1, 10 January 1991). Accordingly, the measure must be appropriate for achieving the aim of eliminating the threat or danger underlying the

emergency case and must be necessary for achieving this aim; furthermore, there must be no disproportionality between the public interest sought to be achieved and the unfavourable effect of the measure restricting fundamental rights and freedoms on the individual (see *Aydın Yavuz and Others*, § 204; and among many other judgments, the Court's judgment no. E.2013/57, K.2013/162, 26 December 2013).

155. In the determination of the elements of the proportionality, all conditions of the emergency period in which the measure is taken must be assessed together. The nature of the interfered right or freedom is also important in this sense. The period of the time when the measure is taken must also be taken into account in determination of the proportionality. In this respect, measures taken during a time when the events constituting the emergency case have occurred and when the concrete danger is obvious and measures taken during a period when the danger or the threat has considerably been eliminated must be assessed in different ways (see *Aydın Yavuz and Others*, §§ 205-207).

156. On the other hand, the duration, scope and gravity of the measure which interferes with fundamental rights and freedoms should be taken into consideration in determining the proportionality. As a matter of fact, the longer the duration of the interference is, the more the burden on individual is. However, a short-term measure may also affect fundamental rights and freedoms to a severe extent due to its scope or gravity. Thus, the gravity of the measure may cause individual to bear an excessive burden regardless of its duration (see *Aydın Yavuz and Others*, § 208).

157. On the other hand, it is necessary to provide individuals with procedural safeguards to challenge disproportionate or arbitrary interferences with fundamental rights and freedoms. Accordingly, depriving individuals of these safeguards will be incompatible, to a considerable extent, with the principle of proportionality. Besides, a wide discretionary power is granted to the public authorities, who face with such a threat or danger and are primarily responsible for combating it, in the issues as to whether a measure is appropriate to eliminate the threat or danger that constitutes the emergency case and is proportionate to the aim to be achieved. However, it is the Constitutional Court that has the

power to examine whether the measure, subject-matter of an individual application, goes beyond this discretionary power (see *Aydın Yavuz and Others*, §§ 209, 210).

158. During the state of emergency declared in the aftermath of the coup attempt of 15 July, norms of general and abstract nature, which were pertaining to the suspension from office, were put into force. In this scope, many persons including the workers were subjected to actions bearing a direct effect (see *Aydın Yavuz and Others*, §§ 56-61). In this sense, Article 4 of Decree Law no. 667 also sets forth that all public officers, save for judicial members (including workers), who are considered to be a member, be in relation or in connection with terrorist organizations or structures, formations and groups that have been determined, by the National Security Council, to perform activities against the national security of the State shall be dismissed from profession or public office; and that those who have been dismissed shall not be employed or assigned a duty, directly or indirectly, again in the public sector.

159. In consideration of the coup attempt and characteristics of the FETÖ/PDY, it is evident that to introduce statutory arrangements and to perform actions for the suspension from office of those who are found to be inconvenient so as to protect the security of the State, safety of the individuals as well as maintain public order are stemming from a real need. However, it is necessary that such measures be applied only in respect of those who are considered to be inconvenient and to the extent required by the exigencies of the situation.

160. Besides, as is explained above, the duration, scope and gravity of a measure constituting an interference with fundamental rights and freedoms must be taken into consideration in the determination of proportionality, and individuals must be afforded procedural safeguards whereby they could challenge the disproportionate or arbitrary interferences.

161. As for the present case, it must be proven that the impugned measure, as a result of which the applicant was subjected to lustration procedure while working at a place furnished with privileges of public power, was to the extent required by the exigencies of the situation. Also given the effect on the applicant of the said measure applied on the basis

of the Decree Law no. 667, it is considered that the obligations expected from the State notably during the trial process must be fulfilled also under the state of emergency. In this sense, the exercise of discretionary power within the prescribed limits and demonstration of the grounds in a plausible manner are among the obligations that must be fulfilled also under the state of emergency. Accordingly, it has been considered that the measure applied with respect to the applicant on the suspicion of her having connection or relation with the FETÖ/PDY, in the absence of any plausible grounds to demonstrate that the underlying suspicion was serious, strong and objective, failed to fulfil the said obligations.

162. In this sense, the impugned measure in breach of the prescribed safeguards was not to the extent required by the exigencies of the situation.

163. For these reasons, it has been concluded that the impugned measure applied with respect to the applicant and infringing the right to respect for private life enshrined in Article 20 of the Constitution was not compatible with the criteria laid down in Article 15 of the Constitution allowing for the suspension and restriction of fundamental rights and freedoms under state of emergency.

D. Application of Article 50 of Code no. 6216

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

> *"1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled…*
>
> *2) If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favour of the applicant or the remedy of filing a case before the general courts may be shown. The court which is responsible for holding the retrial shall deliver a decision over the file, if possible, in a*

way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."

165. The applicant requested the Court to find a violation, order a retrial and award him compensation.

166. In its judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court indicates the general principles as to how a violation of any fundamental right, which has been found established by the Constitutional Court, and its consequences would be redressed. In another judgment, the Court also mentions the consequences of the failure to comply with a violation judgment as well as with the principles set in the abovementioned judgment and accordingly notes that this situation would constitute a continuing violation and also lead to the violation of the respective right for the second time (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

167. Accordingly, in case of a finding of a violation of any fundamental right and freedom within the scope of an individual application, the basic rule for redressing the violation and its consequences is to ensure restitution as much as possible, that is to say, to ensure restoration to the former state existing prior to the violation. To that end, it must be primarily required to find the source of the violation, to put an end to the continuing violation, to eliminate the decision or the act giving rise to the violation or their consequences, to compensate for the pecuniary and non-pecuniary damages resulting therefrom, as well as to take the other measures deemed necessary in this respect (see *Mehmet Doğan*, §§ 55, 57).

168. In cases where the violation resulted from a court decision or the court failed to redress the violation, the Court orders the communication of a copy of its judgment to the relevant court to conduct a retrial for the redress of the violation and its consequences pursuant to Article 50 § 2 of Code no. 6216 and Article 79 § 1 (a) of the Internal Regulations of the Court. This statutory provision prescribes a compensatory remedy, which is specific to the individual application mechanism and requires a retrial for the redress of the violation, as distinct from the similar legal institutions available in the procedural law. Therefore, in cases where the Court orders a retrial in conjunction with its judgment finding a violation,

the relevant court has no discretion to discuss the existence of the ground necessitating a retrial, which is different from the venue of re-opening of the proceedings available in the procedural law. Accordingly, the court receiving such a judgment is legally obliged to conduct a retrial by virtue of the violation judgment rendered by the Court, without awaiting for any such request by the person concerned, and to take the necessary actions to redress the consequences of the continuing violation (see *Mehmet Doğan*, §§ 58, 59; and *Aligül Alkaya and Others (2)*, §§ 57-59, 66-67).

169. In the present case, it has been concluded that the right to respect for private life was violated. The said violation apparently resulted from the court decisions.

170. In that case, there is a legal interest in conducting a re-trial so as to redress the consequences of the violation of the right to respect for private life. The re-trial to be conducted is intended for eliminating the violation and its consequences pursuant to Article 50 § 2 of Code no. 6216, which embodies an arrangement as to individual application mechanism. In this scope, the step required to be taken is to conduct a retrial and to issue, in line with the principles in the violation judgment, a fresh decision that eliminates the reasons giving rise to the violation. The inferior court must clarify, through adversarial proceedings, whether the applicant's account had been opened not for performing routine banking transactions but rather upon the instruction of the said terrorist organisation; whether any extraordinary transaction such as a significant increase in deposit money had been performed or whether any transaction had been performed within the scope of organisational activity; or whether there was any other reason justifying the termination of the applicant's employment contract. Accordingly, a copy of the judgment must be sent to the 40th Chamber of the Ankara Labour Court to conduct a retrial.

171. Since a retrial offers sufficient redress for the violation and its consequences, the applicant's claims for compensation must be rejected.

172. The counsel fee of TRY 3,000 as established on the basis of the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 8 October 2020 that

A. The request for legal aid be ACCEPTED;

B. The alleged violation of the right to respect for private life be DECLARED ADMISSIBLE;

C. The right to respect for private life safeguarded by Article 20 of the Constitution WAS VIOLATED;

D. A copy of the judgment be SENT to the 40th Chamber of the Ankara Labour Court for retrial in order to eliminate the consequences of the violation of the right to respect for private life (E. 2016/1885, K.2017/232);

E. The applicant's claims for compensation be REJECTED;

F. The total litigation costs of TRY 3,000 be REIMBURSED to the applicant;

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

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

RIGHT TO THE PROTECTION OF PERSONAL DATA (ARTICLE 20)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

ARİF ALİ CANGI

(Application no. 2016/4060)

17 September 2020

On 17 September 2020, the Plenary of the Constitutional Court 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 in the individual application lodged by *Arif Ali Cangı* (no. 2016/4060).

THE FACTS

[8-50] 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 submission 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").

V. EXAMINATION AND GROUNDS

51. The Constitutional Court ("the Court"), at its session of 17 September 2020, examined the application and decided as follows:

A. Alleged Violation of the Right to a Trial within a Reasonable Time

1. The Applicant's Allegations

52. The applicant maintained that at the end of the case brought by him on 11 December 2007, a decision dismissing the request for rectification of the decision was issued on 22 December 2015; and that the proceedings lasting over 8 years could not be considered reasonable. He accordingly alleged that his right to a trial within a reasonable time had been violated.

2. The Court's Assessment

53. By Article 20 of Law no. 7145 dated 25 July 2018, promulgated in the Official Gazette no. 30495 and dated 31 July 2018, a provisional article was added to Law no. 6384 on the Settlement of Certain Applications Lodged with the European Court of Human Rights through Payment of Compensation, which is dated 9 January 2013.

54. In Provisional Article added to Law no. 6384, it is set forth that individual applications lodged with the Court due to excessive length of the proceedings, delayed or incomplete execution or non-execution of judicial decisions and pending before the Court by the date of entry into force of this article shall be examined by the Human Rights Compensation Commission of the Ministry of Justice ("the Compensation Commission"), upon an application to be filed within three months as from the notification of the inadmissibility decision issued for non-exhaustion of the available remedies.

55. In the judgment *Ferat Yüksel* (no. 2014/13828, 12 September 2018), the Court examined whether the remedy of filing an application with the Compensation Commission in relation to individual applications lodged before 31 July 2018 with the alleged failure of the relevant authorities to conclude the proceedings in a reasonable period of time or to timely and fully execute court decisions was accessible and capable of offering

reasonable prospects of success as well as providing adequate redress, thereby discussed its effectiveness (see *Ferat Yüksel*, § 26).

56. In brief, the Court has held in the *Ferat Yüksel* judgment that the aforementioned remedy is accessible as it does not put individuals under financial burden and facilitates the application process; that it is capable of providing a reasonable prospect of success for alleged violations given the way it is arranged; that it has potential to provide adequate redress as it offers the possibility to award compensation and/or, where this is not possible, any other means for redress (see *Ferat Yüksel*, §§ 27-34). In accordance with these explanations, the Court has concluded that the examination of the present application lodged without the exhaustion of the remedy before the Compensation Commission, which is accessible at first sight and is considered to have the capacity to offer a prospect of success and to provide adequate redress, was incompatible with the *subsidiary nature* of the individual application mechanism. The Court has accordingly declared this part of the application inadmissible for non-exhaustion of the available remedies (see *Ferat Yüksel*, §§ 35, 36).

57. In the present case, there is no circumstance which requires the Court to depart from the conclusions in its *Ferat Yüksel* judgment in so far as it relates to this part of the application. Consequently, the application must be declared inadmissible for *non-exhaustion of legal remedies* without any further examination as to the other admissibility criteria.

B. Alleged Violation of the Right to the Protection of Personal Data under the Right to Respect for Private Life

1. The Applicant's Allegations

58. The applicant maintained that he had become aware of the letter issued by the Ministry of Interior when it had been submitted to the file of the criminal investigation conducted against the columnist against whom he had filed a criminal complaint; that the letter had been submitted by the columnist after being notarised; and that the content of this letter had been cited also in the letter of reply, which was submitted during the proceedings with respect to the action for non-pecuniary damage brought by him against the columnist. He also asserted that the information

regarding him, which might be demanded only by judicial authorities, had been delivered by the administration to the company's representative without the conditions prescribed in the legislation being taken into consideration; and that it was uncertain by whom and in which way the impugned letter would be used. He further asserted that a reference was made to the impugned letter in the news titled *"Environmentalist Lawyers were Blacklisted"* in another newspaper; that thereafter, the *Bugün* daily also published news on the same matter; that although it was found established that his personal rights had been infringed due to the letter of the Ministry of Interior, the incumbent court dismissed his case; and that the decisions issued by the Council of State lacked any grounds. Besides, he claimed that in the impugned letter, the tone used in mentioning the names of the relevant persons created the impression that they had conducted an activity on behalf of a criminal syndicate; that personal data might be processed only in cases prescribed by law and with the relevant person's consent; that he had been reflected as an agent of foreign country; and that he had been declared guilty despite the lack of any investigation against him. He accordingly maintained that there had been violations of the presumption of innocence, the right to respect for private life and the right to a fair trial.

2. The Court's Assessment

59. Article 20 of the Constitution, titled *"Privacy of private life"*, provides, in so far as relevant, as follows:

> *"Everyone has the right to demand respect for his/her private and family life. Privacy of private or family life shall not be violated.*
>
> *…*
>
> *Everyone has the right to request the protection of his/her personal data. This right includes being informed of, having access to and requesting the correction and deletion of his/her personal data, and to be informed whether these are used in consistency with envisaged objectives. Personal data can be processed only in cases envisaged by law or by the person's explicit consent. The principles and procedures regarding the protection of personal data shall be laid down in law."*

60. The Constitutional Court is not bound by the legal qualification of the facts by the applicants and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The very essence of the applicant's complaints concerns the alleged transfer of certain personal data to third parties by the administration. Therefore, the Court has concluded that the application must be examined from the standpoint of the right to the protection of personal data under the right to respect for private life, which is enshrined in Article 20 § 3 of the Constitution, in consideration of the principles cited below.

a. Applicability

61. The right to respect for private life is enshrined in Article 20 of the Constitution. The State is liable to refrain from any arbitrary interference with private and family lives of individuals and prevent the unjust attacks of third parties. One of the legal interests safeguarded within the scope of the right to respect for private life is the right of privacy, which covers not only the right to be left alone, but also the individual's legal interest of controlling the information about him. An individual has an interest in securing that any information concerning himself is not disclosed or disseminated without his consent, that such information is not accessible by others and is not used without his consent, in other words, that such information remains confidential. This points out the individual's right to determine the future of the information about him (see *Serap Tortuk*, no. 2013/9660, 21 January 2015, §§ 31, 32). The right to the protection of individuals' personal data falling under the right to respect for private life is explicitly laid down in Article 20 of the Constitution (see *Nurcan Belin*, no. 2014/14187, 10 January 2018, § 38).

62. In Article 20 § 3 of the Constitution, it is set forth that everyone has the right to request the protection of his personal data which embodies the rights to be informed of, have access to, and request the correction and deletion of, such personal data, as well as to pursue whether they are used in line with the envisaged objectives. It is further set out that personal data may be processed only in cases envisaged by law or with the relevant person's explicit consent; and that the principles and procedures regarding the protection of personal data shall be regulated by law. The right to protection of personal data aims at protecting the individuals'

rights and freedoms in the processing of their personal data, as a special form of the right to the protection of human dignity and develop one's personality freely (see the Court's judgment no. E.2014/122 K.2015/123, 30 December 2015, §§ 19, 20; and *Nurcan Belin*, § 45).

63. As set out in the Court's judgments, personal data covers all information concerning a person, provided that he is an identified and identifiable person. It is noted that not only the personal identifying information such as name, surname, date and place of birth, but also any information such as phone number, motor vehicle plate number, social security number, passport number, cv, photo, footage, voice records, fingerprints, statements of health, genetic information, IP address, e-mail address, shopping habits, hobbies, preferences, persons interacted with, group memberships and family information, which lead to direct or indirect identification of the person, are regarded as personal data (see the Court's judgments nos. E.2014/74, K.2014/201, 25 December 2014; E.2014/180, K.2015/30, 19 March 2015; and E. 2017/180, K. 2018/109, 6 December 2018, § 54).

64. In order for an examination from the standpoint of the right to the protection of personal data safeguarded by Article 20 § 3 of the Constitution, it should be primarily ascertained whether there are any personal data required to be afforded protection under the said right. Given the wording of the relevant constitutional provision, the relevant international documents and comparative law, any form of information concerning an identified or identifiable natural person or legal entity is regarded as personal data. However, in every case or application, the question whether there are personal data under Article 20 § 3 of the Constitution is addressed autonomously in the particular circumstances of the given case or application. In cases where any personal data are at stake, any forms of restriction on, and interference with, such data triggers the safeguards inherent in the said constitutional provision.

65. In the present case, in the letter of reply submitted by the Ministry of Interior to the company's lawyer, there is information about the hotel where the applicant stayed, names of the persons with whom he was in contact and the aim underlying the social relationship between him and these persons. It is further stated therein with respect to the persons

whose names are cited in conjunction with the applicant that a judicial process had been conducted by citing *"certain persons have been involved in various offences, which are brought before judicial authorities"*. In consideration of the letter as a whole and given that the information about the hotel where the applicant stayed, the persons with whom he was in contact, his social relations and a judicial process is in the form of *data belonging to an identified natural person*, it must be qualified as *personal data*. In that case, in the present case where the information classified as personal data was delivered to the company's lawyer, who was a third party, the Court has concluded that Article 20 § 3 of the Constitution on the right to the protection of personal data is applicable.

b. Admissibility

66. The alleged violation of the right to the protection of personal data under the right to respect for private life must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

c. Merits

i. Existence of an Interference

67. In the present case, the administration delivered the information regarding the hotel where the applicant stayed and his social relations including the persons with whom he was in contact to a third party by a letter. It is beyond dispute that such information concerning the applicant may be qualified as *personal data* for being *belonging to an identifiable natural person*. It has been accordingly concluded that the disclosure of personal data to a third person constituted an interference with the applicant's right to the protection of personal data falling into the scope of the right to respect for private life safeguarded by Article 20 § 3 of the Constitution.

ii. Whether the Interference Constituted a Violation

68. Article 13 of the Constitution reads as follows:

> *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions*

shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality."

69. The impugned interference would be in breach of Article 17 of the Constitution if it does not satisfy the conditions set out in Article 13 thereof. It must be therefore determined whether the impugned restriction complies with the conditions set out in Article 13 of the Constitution and applicable to the present case, i.e., being prescribed by law, relying on one or more of the justified reasons, and not being in breach of the requirements of a democratic society and the principle of proportionality (see *R.G.* [Plenary], no. 2017/31619, 23 July 2020, § 82; *Halil Berk*, no. 2017/8758, 21 March 2018, § 49; *Süveyda Yarkın*, no. 2017/39967, 11 December 2019, § 32; and *Şennur Acar*, no. 2017/9370, 27 February 2020, § 34). In this context, it must be primarily examined whether the interference had a legal basis.

(1) Lawfulness

70. As set forth in the Constitution, the restriction of fundamental rights and freedoms must be primarily prescribed by law. The requirement of being "prescribed by law" or the lawfulness principle is enshrined in Article 8 of the European Convention on Human Rights ("the Convention") as a criterion of restriction and protection. However, the notion of *being prescribed by law* laid down in the Convention is not exactly the same with the *lawfulness principle* enshrined in the Constitution (see *Bülent Polat* [Plenary], no. 2013/7666, 10 December 2015, § 73).

71. The European Court of Human Rights ("the ECHR") interprets the requirements prescribed in law, in other words, the lawfulness in a broad manner and accordingly acknowledges that the principles set through the established case-law in judicial decisions may also meet the lawfulness requirement (see *Malone v. the United Kingdom*, no. 8691/79, 2 August 1984, §§ 66-68; and *Sunday Times v. the United Kingdom (no. 1)*, no. 6538/74, 26 April 1979, § 47), whereas the Constitution envisages that any form of restrictions may be imposed absolutely *by law*, thereby affording protection wider than that afforded by the Convention (see *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 31; and *Bülent Polat*, § 75). Article 13 of the Constitution, which sets forth that fundamental

rights and freedoms may be restricted only by law, does not allow the executive and the administration to impose a restriction on any right or freedom through a first-hand regulatory act in the absence of any statutory provision (see *Tuğba Arslan* [Plenary], no. 2014/256, 25 June 2014, § 87).

72. Article 13 of the Constitution, where the criteria for restricting fundamental rights and freedoms are set forth, provides that fundamental rights and freedoms may be restricted *only by law*. Besides, the third sentence of Article 20 § 3 of the Constitution sets out that personal data may be processed *"only in cases prescribed by law or upon explicit consent of the relevant person"*, and the fourth sentence sets forth that the principles and procedures as to the protection of personal data shall be determined *"by law"*. Accordingly, the primary criterion to be taken into consideration in case of any interference with the right to the protection of personal data is whether the given interference has a legal basis.

73. For an interference to be considered to have a legal basis, primarily the formal existence of a law is necessary. A justified interference with the right to the protection of personal data is conditional upon the existence of a provision in regulatory acts performed by the legislature under the name of law, which allows for an interference.

74. Besides, as a requisite of the principle of a state governed by rule of law, enshrined in Article 2 of the Constitution, quality of the given law is also of importance in estbalishing whether the lawfulness requirement has been fulfilled. That is because the principles of legal security and certainty are prerequisites for a state governed by rule of law. Aimed at ensuring the legal safety of persons, the principle of legal security requires that legal norms are foreseeable, that individuals can trust the state in performing all of their acts and actions, and that the state avoids using any methods which would undermine this trust in making statutory arrangements (see the judgments nos. E.2013/39, K.2013/65, 22 May 2013; and E.2014/183, K.2015/122, 30 December 2015, § 5). The certainty principle means that legislative acts must be sufficiently clear, non-ambiguous, understandable and applicable so as not to allow any hesitation or doubt on the part of both the administration and individuals and they must include safeguards against arbitrary practices of public authorities (see the Court's judgments

nos. E.2010/80, K.2011/178, 29 December 2011; and E.2013/39, K.2013/65, 22 May 2013).

75. Accordingly, in a state governed by rule of law, any interference with the fundamental rights and freedoms may be said to have a legal basis not only when a law exists in form, but also when the wording of the given law is clear and precise to the extent that would enable individuals to foresee the consequences of their conducts. In other words, the law forming a basis for the impugned interference must be sufficiently precise and foreseeable (see, in the same vein, *Halime Sare Aysal* [Plenary], no. 2013/1789, 11 November 2015, § 62). It should be also noted that interferences with the right to the protection of personal data by way of *processing* them are considered to fulfil the lawfulness requirement if such interferences are performed in cases prescribed by law or upon the explicit consent of the relevant person.

76. In the present case, the applicant's personal data were disclosed to a third party without his explicit consent. It therefore appears that the requirement of *"explicit consent"* laid down in the third sentence of Article 20 § 3 of the Constitution was not fulfilled. Therefore, it must be discussed whether any of *the cases prescribed* in Law no. 4982 and Law no. 1136 was at stake in the present case.

77. In this context, as set forth in Article 21 of Law no. 4982, titled *"Intimacy of private life"*, any information or documents which fall within the scope of the intimacy of a person' private life and disclosure of which would constitute an unjust interference with information on his health, his private and family life, his honour and dignity and his professional and economic values do not fall into the scope of the right to information. The only exception to this statutory arrangement is the written consent of the relevant person who is in advance informed of the disclosure of such information and of the existence of any case of public interest.

78. In the present case, it is obvious that the information regarding the hotel where the applicant stayed, his social circle and the trial process, which was in the nature of personal data, falls within the scope of the intimacy of private life and, if being disclosed, might constitute an unjust interference with honour and dignity as well as professional values of the

applicant serving as a lawyer. In that case, in consideration of Law no. 4982, it has been observed that the applicant's personal data disclosed by the administration in the present case did not fall into the scope of the right to information. Besides, given that the administration and the judicial authorities failed to demonstrate any public interest to justify the disclosure of such information and that nor did the applicant give explicit consent to the disclosure of his personal data, it may be concluded that the provisions of Law no. 4982 did not form a legal basis for the disclosure of the applicant's personal data to a third person.

79. As indicated in the Court's case-law, in the legislative intent of Law no. 1136, the qualifications and significance of the profession of lawyer as a public service are noted. It is further stated therein that lawyers are entrusted with the duty of revealing the truth to secure justice and thus act in pursuance of public interest. Articles 1 and 2 of this Law set forth that lawyers perform a profession involving an overriding public interest. The position within the legal order of lawyers -who are bound to provide assistance, along with the judicial organs, to competent boards and institutions in the full implementation of legal rules for ensuring just and fair resolutions by primarily making use of their knowledge and experience- is important in a state of law. *Independent judiciary*, an element *sine qua non* for state of law, makes sense along with *defence*, which is an element *sine qua non* for judiciary. Defence is the indispensable element of the judiciary made up of the triangle of *argument-defence-judgment*. An equitable justice may be secured only with the effective participation of the lawyers (see the Court's judgment no. E.2007/16, K.2009/147, 15 October 2009).

80. In this sense, it may be said that Article 2 § 3 of Law no. 1136, titled *"Aim of profession of lawyers"*, which sets forth *"These institutions shall be liable to submit the information and documents deemed necessary by the lawyer for examination, save for the special provisions in the relevant laws"* and which relied on as a ground for the impugned interference, aims at ensuring the public authorities to assist the lawyers for ensuring their effective participation in proceedings, in pursuance of an equitable trial. However, this statutory provision cannot be interpreted broadly in a way that leads to the disclosure of any kind of information and documents demanded

by lawyers without the discussion by the administration whether such demands of lawyers are of relevance to a given case.

81. In the present case, the main case for which the applicant's personal information was disclosed to a third party is an annulment action with respect to a zoning plan. However, the incumbent courts failed to demonstrate during the proceedings that the information asked by the lawyer such as the one concerning the institutions known as *German Foundations*, whether certain persons conducted any activity against Bergama Ovacık Altın Madeni, as well as the other persons with whom the applicant was in contact and the hotel where he stayed, which were noted in the letter of reply issued by the security directorate, had been relevant to the merits of the action brought for the annulment of the zoning plan. What is more, no explanation was provided as to the reason why the applicant's personal information –the hotel where he stayed and the persons with whom he was in contact– had been obtained, and the legal basis for obtaining such information was not demonstrated. Besides, also given the lack of any information to the effect that the applicant was under a criminal investigation, it has been ascertained that the impugned administrative act whereby such information, which may be considered to have been collected only for intelligence purposes, was disclosed to third parties in the absence of the applicant's explicit consent was not one of the cases laid down in Law no. 4982 and Law no. 1136; and that the impugned interference due to the disclosure of the applicant's personal data to a third party lacked a legal basis.

82. Besides, as the present case is also concerning the provision of information, which was composed of personal data but may be classified as intelligence information collected by the State for its own security- to the third persons, a comprehensive examination as to its compatibility with the requirements of a democratic society must be conducted, in consideration of the gravity and significance of the present case.

(2) Legitimate Aim

83. Article 13 of the Constitution provides that fundamental rights and freedoms may be restricted only on grounds specified in the relevant provisions of the Constitution. On the other hand, Article 20 §

3 of the Constitution provides no specific ground for restriction as to the limitations and interferences with the right to the protection of personal data. However, as set forth in the established case-law of the Court, the rights and freedoms for which no specific ground for restriction is prescribed are also subject to certain limitations resulting from the very nature of these rights and freedoms. Besides, the rights and freedoms enshrined in the other provisions of the Constitution as well as the duties incumbent on the State may set boundaries to the rights and freedoms in terms of which no specific ground for restriction is pescribed (see, among many other judgments, the Court's judgment no. E.2014/177, K.2015/49, 14 May 2015).

84. It is accordingly evident that the right to the protection of personal data, one of the arrangements laid down in Article 20 § 3 of the Constitution, may be subject to restrictions. However, the grounds justifying restriction or the legitimate aims are not specified in the said paragraph. In that case, such grounds or legitimate aims may vary by the field in which the right to the protection of personal data is restricted or interfered with. Accordingly, the ground for restriction must be primarily ascertained in the particular circumstances of every file or application, given that the right to the protection of personal data has certain boundaries resulting from the very nature of this right. It must be then assessed whether this ground may be considered as a legitimate aim. It must be nevertheless acknowledged that the rights and freedoms enshrined in the other provisions of the Constitution as well as the duties incumbent on the State may set boundaries to this right.

85. In the light of these explanations, it may be said that the disclosure of the applicant's personal data in the present case merely serves the special interest of a third party, which is one of the parties in a dispute under private law. In that case, it is obvious that the disclosure of the applicant's personal data falling under the scope of the intimacy of private life, which could not be proven to be of relevance to the merits of the relevant proceedings, to a third party –thus amounting to an interference with the applicant's right to the protection of personal data– pursued no legitimate aim.

(3) Compliance with the Requirements of a Democratic Society

(a) General Principles

86. Any interference with fundamental rights and freedoms may be considered to be *compatible* with the requirements of a democratic society only when it meets a pressing social need and is proportionate. It is evident that the assessment under this heading cannot be made independently of the principle of proportionality, which is based on the relation between the aim underlying the impugned restriction and the means employed to attain that aim. That is because Article 13 of the Constitution lays down two separate criteria, namely not *being compatible with the requirements of a democratic society* and *not being contrary to the principle of proportionality*, which are the parts of a whole having a close interplay with one another (see *Ferhat Üstündağ*, no. 2014/15428, 17 July 2018, § 45).

87. In order to acknowledge that the measure constituting an interference met a pressing social need, it must be capable of achieving the relevant aim, be the last resort and the most lenient measure available. An interference which does not help to achieve the aim or is obviously heavier *vis-à-vis* the aim pursued cannot be said to meet a pressing social need (see *Ferhat Üstündağ*, § 46).

88. Proportionality refers to the absence of an excessive imbalance between the aim pursued by the restriction and the restrictive measure employed. In other words, proportionality refers to establishing a fair balance between the rights of an individual and interests of the public, or the rights and interests of other individuals if the purpose of the interference is to protect the rights of others. A problem in terms of the principle of proportionality may be at stake in the event that a clearly disproportionate burden is imposed on the holder of the right, which was interfered with, when compared to the relevant public interest or the interests of others (see *Ferhat Üstündağ*, § 46).

89. The State is liable, under the right to the protection of intimacy of private life, to prevent the obtaining or use of personal data by unauthorised persons, as well as to preclude the disclosure of such data.

90. As laid down in Article 12 of the Constitution, everyone inherently has fundamental rights and freedoms of indispensable and inalienable nature. This constitutional provision of general nature is intended for excluding the unfavourable conducts and behaviours directed towards, and impairing, individuals' personal values. Besides, in Article 5 of the Constitution, the protection of individuals' fundamental rights and freedoms and securing of the conditions required for the development of their material and spiritual existence are laid down as one of the fundamental aims and duties of the State. In the light of these constitutional provisions, it is obvious that the State is liable not only to refrain from any arbitrary interference with individuals' right to the protection of personal data, but also to preclude the encroachment by the third parties (see *Erol Kumcu*, no. 2015/18988, 9 May 2019, § 32).

(b) Application of Principles to the Present Case

91. In the present case, the applicant's personal data were disclosed upon the demand of the legal representative of the company, a party to the case seeking the annulment of a zoning plan, for being used during the proceedings. In this context, given that the letter submitted by the administration to the company's representative contained information regarding the hotel where the applicant stayed, the persons with whom he was in contact and his social circle, it cannot be said that such information was not of the nature which could have a bearing on the merits of the proceedings where the alleged unlawfulness of a zoning plan was discussed. Besides, in the full-remedy action brought by the applicant, it was not assessed whether the disclosed personal data were relevant to the case whereby the annulment of the zoning plan was sought and whether the disclosure of such data was necessary within the context of the proceedings.

92. Besides, as set forth in the Court's case-law, public institutions and organisations, such as the police department and national intelligence organisation -which are empowered in the relevant organisational laws, namely Law no. 2559 on Police Duties and Powers, dated 4 July 1934, and State Intelligence Services and the National Intelligence Act no. 2937 and dated 1 November 1983- are entrusted with duties and powers so as

to maintain national security, public safety, public order and economic security. In these laws, the duties and powers of such public institutions and organisations are exhaustively laid down. It is accordingly indicated therein that these duties are, *inter alia*, to form national security intelligence concerning the existing and possible activities directed, both at home and abroad, towards the integrity of the Republic Turkey with its country and nation, its existence, independence, security, constitutional order as well as towards all elements forming its national power. Thereby, the preventive, protective and intelligence activities to be conducted by these public institutions and organisations are set forth. The duties and responsibilities of such institutions and organisations, as well as the criminal sanctions to be imposed in case of infringement of these duties and responsibilities, are laid down in detail in these organisational laws. Besides, Article 136 of the Turkish Criminal Code no. 5237 criminalises the act of unlawfully disclosing, disseminating or obtaining any personal data. It is therefore apparent that there are legal safeguards which would prevent the misuse of information to be obtained and preclude the disclosure of information regarding the individuals' private life and of any personal data (see the Court's judgment, no. E.2016/125, K.2017/143, 28 September 2017, §§ 159, 160).

93. However, given the information provided by the administration that no inquiry was being conducted against the applicant by the Ministry of Interior, it has been observed that the administration failed to demonstrate on which grounds the applicant's personal data had been collected in the present case. Besides, nor did the inferior courts during the full-remedy action provide relevant and sufficient grounds to show the pressing social need justifying the impugned collection and disclosure of the applicant's personal data. Regard being had also to the fact that such personal data was of no relevance to the merits of the proceedings for which it was indeed demanded, it has been concluded that the collection of such data belonging to the applicant and its disclosure to a third party in the absence of his explicit consent did not correspond to a pressing social need and were not compatible with the requirements of a democratic society.

94. Consequently, the Court has found a violation of the applicant's right to the protection of his personal data under the right to respect for private life safeguarded by Article 20 of the Constitution.

C. Application of Article 50 of Code no. 6216

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

> *"1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled…*
>
> *2) If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favour of the applicant or the remedy of filing a case before the general courts may be shown. The court which is responsible for holding the retrial shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."*

96. The applicant requested the Court to find a violation and award him 10,000 Turkish liras ("TRY") and TRY 25,000 in compensation for his pecuniary and non-pecuniary damage, respectively.

97. In its judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court indicates the general principles as to how a violation of any fundamental right, which has been found established by the Constitutional Court, and its consequences would be redressed. In another judgment, the Court also mentions the consequences of the failure to comply with a violation judgment as well as with the principles set in the abovementioned judgment and accordingly notes that this situation would constitute a continuing violation and also lead to the violation of the respective right for the second time (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

98. Accordingly, in case of a finding of a violation of any fundamental right and freedom within the scope of an individual application, the

basic rule for redressing the violation and its consequences is to ensure restitution as much as possible, that is to say, to ensure restoration to the former state existing prior to the violation. To that end, it must be primarily required to find the source of the violation, to put an end to the continuing violation, to eliminate the decision or the act giving rise to the violation or their consequences, to compensate for the pecuniary and non-pecuniary damage resulting therefrom, as well as to take the other measures deemed necessary in this respect (see *Mehmet Doğan*, §§ 55, 57).

99. In cases where the violation resulted from a court decision or the court failed to redress the violation, the Court orders the communication of a copy of its judgment to the relevant court to conduct a retrial for the redress of the violation and its consequences, pursuant to Article 50 § 2 of Code no. 6216 and Article 79 § 1 (a) of the Internal Regulations of the Court. This statutory provision prescribes a compensatory remedy, which is specific to the individual application mechanism and requires a retrial for the redress of the violation, as distinct from the similar legal institutions available in the procedural law. Therefore, in cases where the Court orders a retrial in conjunction with its judgment finding a violation, the relevant court has no discretion to discuss the existence of the ground necessitating a retrial, which is different from the venue of re-opening of the proceedings available in the procedural law. Accordingly, the court receiving such a judgment is legally obliged to conduct a retrial by virtue of the violation judgment rendered by the Court, without awaiting for any such request by the person concerned, and to take the necessary actions to redress the consequences of the continuing violation (see *Mehmet Doğan*, §§ 58, 59; and *Aligül Alkaya and Others (2)*, §§ 57-59, 66, 67).

100. In the present case, it has been concluded that there was a violation of the right to the protection of personal data under the right to respect for private life due to the disclosure of personal data by the administration to a third party. It has been therefore observed that the violation resulted from the relevant administration's act. Nor could the incumbent court redress the violation.

101. In that case, there is a legal interest in conducting a retrial in order to redress the consequences of the violation of the right to the protection of personal data. The retrial to be conducted is for the elimination and

redressing of the violation and its consequences pursuant to Article 50 § 2 of Code no. 6216 embodying a provision specific to individual application. In this sense, the step required to be taken is to conduct a retrial and to issue a new decision which eliminates the reasons leading the Court to find a violation and which is in pursuance of the principles set by the Court in its violation judgment. Accordingly, a copy of the judgment must be sent to the 7th Chamber of the Ankara Administrative Court to conduct a retrial.

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

103. The total litigation costs of TRY 3,239.50 including the court fee of TRY 239.50 and counsel fee of TRY 3,000, as established on the basis of the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 17 September 2020 that

A. 1. The alleged violation of the right to a trial within a reasonable time be declared INADMISSIBLE for *non-exhaustion of legal remedies*;

2. The alleged violation of the right to the protection of personal data under the right to respect for private life be declared ADMISSIBLE;

B. The right to the protection of personal data under the right to respect for private life safeguarded by Article 20 of the Constitution was VIOLATED;

C. A copy of the judgment be SENT to the 7th Chamber of the Ankara Administrative Court (E.2007/1516, K.2008/2337) to conduct a retrial for the redress of the violation of the right to the protection of personal data;

D. The applicant's claims for compensation be REJECTED;

E. The total litigation costs of TRY 3.239.50 including the court fee of TRY 239.50 and the counsel fee of TRY 3,000 be REIMBURSED to the applicant;

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

G. A copy of the judgment be SENT to the 10th Chamber of the Council of State (E.2014/2080) and to the Ministry of Justice for information.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

E.Ü.

(Application no. 2016/13010)

17 September 2020

On 17 September 2020, the Plenary of the Constitutional Court found violations of the right to the protection of personal data and the freedom of communication safeguarded respectively by Articles 20 and 22 of the Constitution in the individual application lodged by *E.Ü.* (no. 2016/13010).

THE FACTS

[7-51] The applicant started to take office as a lawyer at an attorney partnership. Like all other lawyers at the workplace, he was assigned an institutional e-mail account, flow and contents of which were stored on the employer's server.

The applicant was in charge in a team consisting of five lawyers and led by the lawyer, A.A.Y.. Upon a quarrel taking place at the workplace, three lawyers in the team submitted complaint petitions to the company management. In their petitions, they maintained that the team leader A.A.Y. had been no longer objective in his relationship with the applicant and supported the latter in every case against the other teammates. The applicant then submitted his replies to the allegations, and an interview was held between the management and him at the workplace.

The employer then decided to examine the applicant's correspondence via the institutional e-mail account. At the end of this examination, his employment contract had been terminated.

The applicant then brought an action, seeking reinstatement to his post. However, the incumbent labour court dismissed the action. On appeal, the first instance decision was upheld by the Court of Cassation.

On 15 July 2016, the applicant lodged an individual application.

V. EXAMINATION AND GROUNDS

52. The Constitutional Court ("the Court"), at its session of 19 September 2020, examined the application and decided as follows:

A. The Applicant's Allegations

53. The applicant maintained that his personal correspondence he had exchanged via his corporate e-mail accounts had been monitored by his employer despite the lack of any written or oral rule at his workplace which allowed for the examination and monitoring of the employees' e-mails; and that the employer had conducted such an examination so as to find a justification for the termination of his employment contract. He asserted that the corporate e-mail account of the team leader, A.A.Y. had been also monitored by the employer; that among these messages, those which were in the form of personal correspondence and unknown to the employer had been relied on as a ground for the termination of his employment contract; and that in the declaratory action seeking his reinstatement to his post, the impugned correspondence was also accepted as evidence. He further maintained that the termination had not a justified or valid ground; that his employment contract had not been terminated within six workdays following the notification of the reason of termination; and that the inferior court failed to provide justification which would refute his challenges and evidence. The applicant accordingly claimed that there had been violations of the right to a fair trial, the freedom of communication and the right to respect for private life. He requested the Court to conceal his identity in the documents accessible to the public due to the nature of his profession.

B. The Court's Assessment

54. Article 20 of the Constitution, titled *"Privacy of private life"*, provides, in so far as relevant, as follows:

> *"Everyone has the right to demand respect for his/her private and family life. Privacy of private or family life shall not be violated.*
>
> *…*
>
> *Everyone has the right to request the protection of his/her personal data. This right includes being informed of, having access to and requesting the correction and deletion of his/her personal data, and to be informed whether these are used in consistency with envisaged objectives.*

Personal data can be processed only in cases envisaged by law or by the person's explicit consent. The principles and procedures regarding the protection of personal data shall be laid down in law."

55. Article 22 of the Constitution, titled *"Freedom of communication"*, reads as follows:

"Everyone has the freedom of communication. Privacy of communication is fundamental.

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

Public institutions and agencies where exceptions may be applied are prescribed in law."

56. The right to respect for private life is enshrined in Article 20 of the Constitution. The State is liable to refrain from any arbitrary interference with private and family lives of individuals and prevent the unjust attacks of third parties.

57. It is enshrined in Article 20 § 3 of the Constitution that everyone has the right to request the protection of his/her personal data. It is the constitutional arrangement that corresponds to the right to respect for private life safeguarded by Article 8 of the European Convention on Human Rights ("the Convention"). The right to the protection of personal data aims at protecting the individuals' rights and freedoms while being processed, as a special form of the right to the protection of human dignity and develop one's personality freely (see the Court's judgment no. E.2014/122 K.2015/123, 30 December 2015, §§ 19, 20).

58. As set out in the Court's judgments, personal data covers all information concerning a person, provided that he is an identified and identifiable person. It is noted that not only the personal identifying information such as name, surname, date and place of birth, but also any information such as phone number, motor vehicle plate number, social security number, passport number, cv, photo, footage, voice records, fingerprints, statements of health, genetic information, IP address, e-mail address, shopping habits, hobbies, preferences, persons interacted with, group memberships and family information, which lead to direct or indirect identification of the person, are regarded as personal data (see the Court's judgments nos. E.2014/74, K.2014/201, 25 December 2014; and E.2014/180, K.2015/30, 19 March 2015).

59. In order for an examination from the standpoint of the right to the protection of personal data safeguarded by Article 20 § 3 of the Constitution, it should be primarily ascertained whether there are any personal data required to be protected under the said right. Given the wording of the relevant constitutional provision, the relevant international documents and comparative law, any form of information concerning an identified or identifiable natural person or legal entity is regarded as personal data. However, in every case or application, the question whether there are personal data under Article 20 § 3 of the Constitution is ascertained autonomously in the particular circumstances of the given case or application. In cases where any personal data are at stake, any form of restriction on, and interference with, such data triggers the safeguards inherent in the said constitutional provision.

60. Besides, freedom of communication safeguarded under Article 22 of the Constitution afford protection for both the communication, as well as for the confidentiality of the communication regardless of its content and form. Expressions used in the oral, written and visual communications, either mutual or collective, of individuals must be kept confidential and protected against unjust interferences (see *Yasemin Çongar and Others*, no. 2013/7054, 6 January 2015, § 49).

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

the employer terminated the applicant's employment contract on the basis of the information the former had obtained by means of monitoring the applicant's messages through his corporate e-mail account and retroactively examining their contents. Regard being had to the facts that the information concerning e-mail accounts was recorded on internet, the available data were accessed and the contents thereof were examined and used, it may be said that there was also an act of data processing in the present case. In this sense, given that the applicant's e-mail information and correspondence were *in the form of information regarding an identified natural person*, the Court has held that the access to such information, its use and processing be examined form the standpoint of the right to the protection of personal data under the right to respect for private life, as well as of the freedom of communication.

1. Admissibility

62. The alleged violations of the right to the protection of personal data and the freedom of communication must be declared admissible for not being manifestly ill-founded and there being no other grounds for their inadmissibility.

2. Merits

a. General Principles

63. In the first sentence of Article 20 § 3 of the Constitution, it is set forth generally that everyone is entitled to request the protection of his own personal data. In the second sentence, certain safeguards in the context of personal data are provided, whereas in the third sentence, it is set forth that personal data may be processed only in cases prescribed by law or with the explicit consent of the person concerned. The fourth sentence thereof lays down that the principles and procedures as to the protection of personal data shall be regulated by law. Accordingly, in consideration of the wording of this provision, it is clear that Article 20 § 3 of the Constitution affords protection, within the framework of the right to the protection of personal data, not only against the restrictions or interferences merely in the form of processing, but also against any kind of interferences and restrictions with respect to personal data.

64. On the other hand, the fundamental rights falling within the joint protection realm of the Constitution and the Convention may be infringed not only through the direct exercise of public power but also sometimes due to interferences by third parties which are subject-matter of disputes between persons under private law. In the first situation, there is no hesitation as to the direct fulfilment by the public authorities of the negative and positive obligations incumbent on them for ensuring the relevant safeguards, whereas the second situation requires an assessment, in the particular circumstances of each case, as to what kind of protection the State is expected to afford the individuals against the interference by third parties and what the scope of its obligations is (see *Ömür Kara and Onursal Özbek*, no. 2013/4825, 24 March 2016, § 45).

65. As set forth in Article 12 of the Constitution, everyone has inherent fundamental rights and freedoms, which are inviolable and inalienable. This constitutional arrangement of general nature excludes any unfavourable conducts and behaviours directed against the personal values of individuals. Moreover, in Article 5 of the Constitution, the provision of the conditions required for the protection of fundamental rights and freedoms as well as for the improvement of their material and spiritual existence is enumerated as one of the fundamental aims and duties of the State. In the light of these arrangements, it may be said that the State is liable not only to refrain from any arbitrary interference with the fundamental rights and freedoms of individuals, but also to prevent any attacks of third parties; and that the State also has positive obligations in this respect. Also in cases where disputes arise between persons under private law, in the examination of whether the guarantees inherent in the fundamental rights and freedoms have been fulfilled, such applications -regard being had to their particular circumstances- may be handled within the scope of the State's positive obligations, as the persons under private law cannot be held responsible for the obligations imposed on the public authorities by the Constitution. Accordingly, as a positive obligation incumbent on it under the right to the protection of personal data, which falls within the scope of the right to respect for private life, and the freedom of expression, the State is liable to protect all individuals under its jurisdiction against risks which may arise out of the actions of

public authorities, of other individuals or of the individual himself (see *Ömür Kara and Onursal Özbek*, § 46; *Ali Çığır*, no. 2015/19298, 8 May 2019, §§ 32, 33; *Erol Kumcu*, no. 2015/18988, 9 May 2019, §§ 32, 33; and *Ulvi Bacıoğlu*, no. 2015/3175, 10 October 2019, §§ 33, 34).

66. These positive obligations require the establishment of a legal infrastructure for the resolution of disputes between persons under private law, the examination of such disputes through fair proceedings including procedural safeguards, and the examination of whether the constitutional safeguards inherent in fundamental rights have been observed during these proceedings. In this sense, the inferior courts must not disregard these safeguards. A fair balance must be struck between the competing interests of the employer and of the employees. It must be assessed whether the interference with the applicants' fundamental rights and freedoms had a legitimate purpose and was proportionate. The decision to be issued at the end of such assessments must be based on relevant and sufficient grounds (see *Ömür Kara and Onursal Özbek*, §§ 47-50).

67. The Court has already determined the general issues required to be taken into consideration by the inferior courts, with respect to disputes regarding the monitoring of communication means by an employer, in balancing the interests of parties within the scope of the State's positive obligations and in examining the proportionality of the alleged interference. It has accordingly indicated that in resolution of the dispute, the courts must consider how the restrictive and obligatory rules in the employment contracts have been determined in the particular circumstances of a given case; whether the parties concerned have been informed of such regulations; whether the legitimate aim underlying the interference with the fundamental rights of employees is proportionate to the impugned interference; and whether the termination of the employment contract is reasonable and proportionate given the action or inaction on the part of employees (see *Ömür Kara and Onursal Özbek*, § 50).

68. Given the above-mentioned considerations, the Court has concluded that the question whether the employer had the authority to monitor the employee's correspondence must be addressed within the scope of the positive obligations of the State under the right to the protection of personal data and freedom of communication. Primarily, as in the present

case, in case of any dispute arising from the provision of communication means such as computer, internet and e-mail for the employees' use by the employers wishing to avail of the technological developments, a balance must be struck between the employer's interests and the employee's fundamental rights and freedoms. In this regard, it should be kept in mind that the relation between employer and employee is determined and shaped through an employment contract that prescribes certain rights and obligations for both parties and is essentially based on mutual trust. It should be also considered that labour law to which the dispute in question is related is of a dynamic nature; and that professional relations are subject to certain specific legal rules which are different from general rules.

69. In this sense, it may be said that the employer may in principle monitor the communication means made available for the employees and impose restrictions on their use, within the scope of his managerial authority, for reasons which may be deemed justified and legitimate such as the effective performance of the works, control of the information flow, protecting himself against criminal and legal liabilities likely to result from the employees' acts and actions, assessing efficiency of employees or security concerns. It should be, however, recalled that the employer's managerial authority is confined to the conduct of works and ensuring order and safety at the workplace. Accordingly, it should be stressed that the employer's authorities and rights are unlimited; that the fundamental rights and freedoms of the employee –namely, the freedom of communication and the right to the protection of personal data in the present case– are also protected also at the workplace; and that the restrictive and mandatory rules at the workplace must not infringe upon the very essence of the employees' fundamental rights. In this framework, to accept that the employer has an unlimited and absolute power to monitor and control the communication means available at the workplace merely because they are provided by the employer will run counter to the employee's legitimate expectation that his fundamental rights and freedoms be respected also at the workplace in a democratic society.

70. Within the framework of all these explanations, the Court will ascertain whether the inferior courts duly examined whether the third person interfering with the relevant right in the present case provided

the following safeguards under the positive obligations of the State as applicable in the particular circumstances of the present case:

i. It must be examined whether the employer had justified grounds to monitor the communication tools made available for the employee at the workplace and the contents of communication. In that case, it must be ascertained whether the employer's grounds were legitimate also in consideration of the qualifications of the work performed and the workplace. In such ascertainment, there must be a distinction between the examination of flow of communication and that of communication contents, and thereby, more serious grounds must be sought to justify the examination of contents of the communication.

ii. In a democratic society, the monitoring of communication and procession of personal data must be performed in a transparent manner, and as a requisite thereof, the employees must be notified in advance of such process. According to the international law and comparative law, such notification –as appropriate in the particular circumstances of a given case– must include, at least, the legal basis and purposes of the monitoring of communication and processing of personal data, scope of the monitoring and processing, the period for storage of the data, rights of the data subject, outcomes of the monitoring and processing, as well as the probable beneficiary of the obtained data. Besides, the notification must also indicate the restrictions prescribed by the employer with respect to the use of communication tools. There is no particular, predetermined way of such notification. Any method capable of making individuals notified of the process whereby personal data is processed and communication is monitored within the scope mentioned above, thus ensuring transparency may be preferred.

iii. The interference by the employer with the employee's right to the protection of personal data and freedom of communication must be relevant to the aim sought to be pursued and sufficient for attaining it. Besides, the data obtained through the monitoring of communication is to be used in line with the pursued aim.

iv. The interference by the employer with the employee's right to the protection of personal data and freedom of communication may be deemed necessary only when the same aim cannot be attained through a more lenient means of interference, and the interference is necessary for the aim sought to be pursued. It must be ascertained whether it is possible to apply any other methods and measures which entail less interference with the employee's personal data, instead of monitoring of and having access to his communication. In this sense, it must be determined, in the particular circumstances of every concrete case, whether the aim sought to be pursued by the employer could be attained without the employee's communication being monitored.

v. The interference by the employer with the employee's right to the protection of personal data and freedom of communication may be deemed proportionate only when the communication is monitored, and data is processed or somehow made use of to the extent limited to the aim sought to be pursued. Any restriction or interference that would go beyond this aim must not be permitted.

vi. It must be assessed whether the conflicting interests and rights of the parties were fairly balanced, given the effect of the monitoring of communication on the relevant employee and the consequences thereof. In cases where it is found established that an excessive burden is imposed on one of the parties, it may be concluded that the State has failed to fulfil its positive obligations.

b. Application of Principles to the Present Case

71. The applicant maintained that although the monitoring and examination of his e-mail correspondences had constituted an unjust interference with his private life and freedom of communication, the incumbent court did not reach such a conclusion at the end of the case he brought for reinstatement to his post; that his correspondence had been made public by the employer; and that the impugned interferences were rendered legitimate through the decisions issued by the inferior courts. These allegations must be examined within the context of the State's positive obligations in consideration of the above-mentioned principles.

72. It has been primarily observed that Law no. 4857 contains no special arrangement as to the monitoring of communication tools made available by the employer for employees and the processing of the employees' personal data. However, given that there is no obstacle to the implementation, in labour law disputes, of the safeguards inherent in the right to the protection of personal data under the right to respect for private life and the freedom of communication, which are respectively enshrined in Articles 20 and 22 of the Constitution, as well as of the general arrangements prescribed in Law no. 6698 and in the Turkish legal system, it may be said that positive obligations in terms of a legal basis have been fulfilled.

73. In the present case, the applicant held office as a lawyer in a law office with several other employees. The applicant maintained that the employer had monitored the institutional e-mail accounts, which were designed to facilitate the conduct of works and made available for the employees, with a view to obtaining concrete evidence within the scope of the disciplinary investigation conducted into the problems at the workplace. It appears that it is undisputed between the applicant and the employer that the applicant had an institutional e-mail account designated to him and that the e-mail account made available to him was examined by the employer. It has been revealed that the employer having several employees and institutionally engaging in legal profession intended to ensure the effective performance of works by processing his employees' personal data and monitoring flow of communication via the institutional e-mail accounts assigned to them. Accordingly, it may be said that in the present case, the assignment of institutional e-mail accounts in a way that would enable the access to flow and content of communication constituted a legitimate interest for the administration of the workplace and was also an appropriate means to attain the aim pursued.

74. In the present case, the employer stated during the proceedings that it was revealed during the disciplinary investigation that the applicant had deleted the messages in his e-mail account; and that the messages on the basis of which his employment contract was terminated had been obtained through the monitoring and examination of the e-mail account of the team leader, A.A.Y.. The applicant maintained that the messages

relied on by the employer were his personal correspondence that had been selected among thousands of e-mails and formulated with the expectation that they would not be read by the employer. It appears that the e-mail messages submitted to the court by the employer were those which had been exchanged by and between the applicant and the team leader, generally related to their thoughts about each other and the workplace and sometimes consisted of dialogues in the form of dispute.

75. It should be primarily emphasised that in cases where no full and explicit notification is provided in advance as to any probable monitoring of communication via institutional e-mail account and the terms of use of the communication tools, the employer may also foresee that an employee may probably use his institutional e-mail account for personal correspondence with a legitimate expectation that the fundamental rights and freedoms will be protected also at the workplace. In this sense, it should be accepted that the employees will have a reasonable expectation that their fundamental rights and freedoms would be respected in the absence of such explicit notification; and that they must be provided with the necessary safeguards inherent in these fundamental rights and freedoms.

76. In the present case, regard being had to the facts that the applicant served at the law office within the scope of an unwritten employment contract; and the employer did not submit, during the proceedings, any information or document demonstrating that he had sent a notification -whereby his authority to monitor and examine the institutional e-mails and the scope thereof were indicated- to the applicant, it has been concluded that the employer failed to provide an explicit notification that the correspondence via institutional e-mail account might be subject to monitoring and examination. However, the applicant's employment contract was terminated on the basis of the e-mails. During the proceedings, the defendant employer failed to demonstrate that he had made a notification demonstrating *the legal basis and purposes of the processing of personal data, scope of the processing, the period for storage of the data, rights of the data subject, outcomes of the processing, as well as the probable beneficiary of the obtained data*. In this context, it has been observed that during the proceedings, the inferior courts failed to discuss whether

such a notification had been made with respect to the communication via e-mail accounts, which was the main reason for the termination of the applicant's employment, as well as to address the applicant's well-founded allegations that the employer had access to his e-mails without his consent and a prior notification although he had not himself made them public.

77. Besides, given the issues raised by the other members of the applicant's team in their complaint petition forming a basis for the disciplinary investigation, it appears that the employer did not provide an explanation as to the existence of a situation which necessitated the impugned access to the applicant's e-mail correspondence; and that in the notice of termination, it was merely indicated *"for the purposes of conducting an inquiry into the allegations and gaining an insight into the relations among team members"*. However, although it was indeed possible to attain the same aim by other means such as examination of the parties' complaints and defence submissions, hearing of the witnesses and examination of the workplace records as well as of process and outcomes of the projects being conducted, the employer failed to clearly demonstrate that why the monitoring and examination of the contents of the e-mail correspondence were necessary. Nor did the inferior courts make an assessment in this regard.

78. Besides, the extent of the impugned interference by the employer must be discussed. In this sense, taking account of the applicant's messages submitted by the employer within the scope of the proceedings and the proceedings itself as a whole, the Court has observed that the employer had access to the correspondence against A.A.Y's and the applicant's consent; that not only the messages between A.A.Y. and the applicant but also those with third parties were examined; that the scope of monitoring and examination of the correspondence was not limited to the claims raised by the employer, but other contents not certainly known to be of relevance to the matter were also accessed; and that these contents were also relied on in termination of the applicant's employment contract. It has been accordingly concluded that the employer had access to, and relied on, not only the communication flow with respect to the applicant's e-mails, but also their contents to an indefinite extent.

79. For these reasons, as the inferior courts adjudicating the impugned dispute resulting from a professional relationship under private law failed to conduct a rigorous trial during which the above-mentioned constitutional safeguards were observed and thereby to fulfil the positive obligations, the Court has found violations of the right to the protection of personal data and the freedom of communication safeguarded respectively under Articles 20 and 22 of the Constitution.

3. Application of Article 50 of Code no. 6216

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

> *"1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled…*
>
> *2) If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favour of the applicant or the remedy of filing a case before the general courts may be shown. The court which is responsible for holding the retrial shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."*

81. The applicant requested the Court to find a violation, award 10,000 Turkish Liras ("TRY") in compensation of his non-pecuniary damage, and to order redress for the losses sustained.

82. In its judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court indicates the general principles as to how a violation of any fundamental right, which has been found established by the Constitutional Court, and its consequences would be redressed. In another judgment, the Court also mentions the consequences of the failure

to comply with a violation judgment as well as with the principles set in the abovementioned judgment and accordingly notes that this situation would constitute a continuing violation and also lead to the violation of the respective right for the second time (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

83. Accordingly, in case of a finding of a violation of any fundamental right and freedom within the scope of an individual application, the basic rule for redressing the violation and its consequences is to ensure restitution as much as possible, that is to say, to ensure restoration to the former state existing prior to the violation. To that end, it must be primarily required to find the source of the violation, to put an end to the continuing violation, to eliminate the decision or the act giving rise to the violation or their consequences, to compensate for the pecuniary and non-pecuniary damages resulting therefrom, as well as to take the other measures deemed necessary in this respect (see *Mehmet Doğan*, §§ 55, 57).

84. In cases where the violation resulted from a court decision or the court failed to redress the violation, the Court orders the communication of a copy of its judgment to the relevant court to conduct a retrial for the redress of the violation and its consequences, pursuant to Article 50 § 2 of Code no. 6216 and Article 79 § 1 (a) of the Internal Regulations of the Court. This statutory provision prescribes a compensatory remedy, which is specific to the individual application mechanism and requires a retrial for the redress of the violation, as distinct from the similar legal institutions available in the procedural law. Therefore, in cases where the Court orders a retrial in conjunction with its judgment finding a violation, the relevant court has no discretion to discuss the existence of the ground necessitating a retrial, which is different from the venue of re-opening of the proceedings available in the procedural law. Accordingly, the court receiving such a judgment is legally obliged to conduct a retrial by virtue of the violation judgment rendered by the Court, without awaiting for any such request by the person concerned, and to take the necessary actions to redress the consequences of the continuing violation (see *Mehmet Doğan*, §§ 58, 59; and *Aligül Alkaya and Others (2)*, §§ 57-59, 66, 67).

85. In the present case, it has been held that there had been violations of the right to the protection of personal data and freedom of communication

due to the failure to conduct proceedings in pursuance of the constitutional safeguards inherent therein. It accordingly appears that the violations resulted from a court decision.

86. In that case, there is a legal interest in conducting a retrial in order to redress the consequences of the violations of the right to the protection of personal data and freedom of communication. The retrial to be conducted is for the elimination and redressing of the violation and its consequences pursuant to Article 50 § 2 of Code no. 6216 embodying a provision specific to individual application. In this sense, the step required to be taken is to conduct a retrial and to issue a new decision which eliminates the reasons leading the Court to find a violation and which is in pursuance of the principles set by the Court in its violation judgment. Accordingly, a copy of the judgment must be sent to the relevant to conduct a retrial.

87. Besides, in the present case, it is obvious that merely the finding of a violation would not be sufficient for the redress of the damages sustained by the applicant. Hence, in order to eliminate the violation and its consequences within the framework of the *restitution* rule, the applicant must be paid a net amount of TRY 8,000 in compensation of the non-pecuniary damage that he sustained due to the violations of the right to the protection of personal data and freedom of communication, which cannot be redressed by merely the finding of a violation, and his other claims for compensation must be rejected.

88. The total litigation costs of TRY 3,239.50 including the court fee of TRY 239.50 and counsel fee of TRY 3,000, as established on the basis of the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 17 September 2020 that

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

B. The alleged violations of the right to the protection of personal data and freedom of communication be declared ADMISSIBLE;

C. The right to the protection of personal data and freedom of communication safeguarded respectively by Articles 20 and 22 of the Constitution were VIOLATED;

D. A copy of the judgment be SENT to the 8th Chamber of the İstanbul Labour Court (E.2015/105, K.2015/566) to conduct a retrial for the redress of the violations of the right to the protection of personal data and freedom of communication;

E. A net amount of TRY 8,000 be PAID to the applicant in compensation for non-pecuniary damage, and the other claims for compensation be REJECTED;

F. The total litigation costs of TRY 3.239.50 including the court fee of TRY 239.50 and the counsel fee of TRY 3,000 be REIMBURSED to the applicant;

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

H. A copy of the judgment be SENT to the 9th Civil Chamber of the Court of Cassation for information; and

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

FREEDOM OF COMMUNICATION (ARTICLE 22)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

BESTAMİ EROĞLU

(Application no. 2018/23077)

17 September 2020

On 17 September 2020, the Plenary of the Constitutional Court found no violation of the right to the protection of personal data and freedom of communication, safeguarded respectively by Articles 20 and 22 of the Constitution, in the individual application lodged by *Bestami Eroğlu* (no. 2018/23077).

THE FACTS

[9-83] The applicant was holding office as a teacher at the material time. An investigation was initiated against him following the coup attempt of 15 July for his alleged membership of the Fetullahist Terrorist Organisation/ Parallel State Structure ("FETÖ/PDY"). The incumbent chief public prosecutor's office indicted him before the assize 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 applicant was 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.

V. EXAMINATION AND GROUNDS

84. The Constitutional Court ("the Court"), at its session of 17 September 2020, examined the application and decided as follows:

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

1. The Applicant's Allegations

85. The applicant maintained that his right to personal liberty and security had been violated as his detention on account of his use of the ByLock application was in breach of Articles 15 and 19 of the Constitution.

2. The Court's Assessment

86. Individual applications must be lodged with the Constitutional Court within 30 days upon the exhaustion of the available legal remedies

or, in cases where no available legal remedy exists, by the date when the violation is become known, pursuant to Article 47 § 5 of the Code on the Establishment and Rules of Procedures of the Constitutional Court no. 6216 and dated 30 March 2011, as well as Article 64 § 1 of the Internal Regulations of the Court.

87. In the event that an individual application involving the complaints concerning detention on a criminal charge is lodged upon a decision ordering continued detention, the time-limit of 30 days shall start to run by the date when the decision is known to the relevant party if no challenge is raised to the continued detention, but if there has been a challenge, by the date when the decision issued by the tribunal adjudicating the challenge is known (see *Fırat İşgören*, no. 2014/6425, 17 November 2016, § 34).

88. In the present case, there is no information and/or document demonstrating that the applicant challenged his continued detention ordered by the first instance court in conjunction with a conviction decision of 14 March 2017. Therefore, the application should have been lodged with the Court within 30 days following 14 March 2017 when the final decision issued by the first instance court was pronounced to the applicant. Accordingly, it has been observed that the individual application lodged on 26 July 2018 was out of time.

89. For these reasons, this part of the application must be declared inadmissible as being *out of time*.

B. Alleged Violations of the Right to the Protection of Personal Data under the Right to Respect for Private Life and the Freedom of Communication

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

90. The applicant maintained that the communication means and content must be confidential; that his communication via ByLock application had been obtained in breach of Articles 134 and 135 of the Code of Criminal Procedure no. 5271 ("Code no. 5271"); and that his right to the protection of personal data and privacy of communication had been breached due to the unlawfulness of the acquisition of ByLock application and disclosure of his personal data. Therefore, he claimed that there had

been violations of his rights to respect for private life, to the protection of personal data as well as of the freedom of communication.

91. In its observations, the Ministry referred to the assessments and findings as to ByLock communication system in the judgments of the 16th Criminal Chamber of the Court of Cassation (no. E.2015/3, K.2017/3; and E.2017/1443, K.2017/4758) and of the General Assembly of Criminal Chambers of the Court of Cassation (no. E.2017/16.MD-956, K.2017/370), as well as in the Court's judgment in the case of *Aydın Yavuz and Others*. Making a reference to these judgments, the Ministry stated that the acquisition of the data created through the use of the ByLock communication system did not fell into the scope of Article 135 § 1 of Code no. 5271 or Article 6 § 2 of Law no. 2937, but Article 134 § 1 of Code no. 5271, titled *"Search back-up and provisional seizure of computers, computer programs and transcripts"*. The Ministry noted that the acquisition of communication contents in the computer and computer programs -which was conducted pursuant to the *"examination, back-up and transcription"* order given, by the Ankara 4th Magistrate Judge by virtue of Article 134 of Code no. 5271 upon the request of the Ankara Chief Public Prosecutor's Office, with respect to the digital data obtained from ByLock by the National Intelligence Organisation ("MİT") in accordance with Articles 4 § 1 (I) and 6 § 1 (d) and (g) of Law no. 2937- had not been unlawful. The Ministry also indicated that the user ID information was obtained through the analysis of ByLock data that had been acquired lawfully; that the inquiry had been targeted at a particular person, in other words, at the outset, no inquiry had been conducted with respect to personal data of any person.

2. The Court's Assessment

a. Applicability

92. Article 20 of the Constitution, titled *"Privacy and protection of private life"*, read in so far as relevant, as follows:

> *"Everyone has the right to demand respect for his/her private and family life. Privacy of private or family life shall not be violated.*
>
> *(…)*

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

93. The legislative intent of the amendment made in Article 20 of the Constitution by Law no. 5982 and dated 7 May 2010 is as follows:

"There are indirect provisions for the protection of personal data in the Constitution; however, they are not sufficient. Both in the comparative law and the international documents to which Turkey is a party, a special emphasis is placed on the protection of personal data. Through this provision, the right to the protection of personal data, which is bestowed to everyone, is safeguarded as a constitutional right. In this context, the provision lays down the rights and powers granted to individuals with respect to their own personal data, as well as the circumstances under which personal data may be processed. It is also set forth therein that the principles and procedures regarding the protection of personal data shall be regulated by law."

94. Article 22 of the Constitution, titled *"Freedom of communication"*, provides as follows:

"Everyone has the freedom of communication. Privacy of communication is fundamental.

Unless there exists a decision duly given by a judge on one or several of the grounds of national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms of others, or unless there exists a written order of an agency authorized by law in cases where delay is prejudicial, again on the abovementioned grounds, communication shall not be impeded nor its privacy be violated. The decision of the competent authority shall be submitted for the approval of the judge having jurisdiction within twenty-

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

Public institutions and agencies where exceptions may be applied are prescribed in law."

95. Article 22 of the Constitution sets forth that everyone has the freedom of communication and that privacy of communication is essential. In Article 8 of the European Convention on Human Rights ("the Convention"), it is enshrined that everyone has the right to respect for his correspondence (see *Yasemin Çongar and Others*, no. 2013/7054, 6 January 2015, § 48).

96. The joint protection realm of the Constitution and the Convention affords safeguards not only for the freedom of communication but also for its privacy, regardless of its content and form. Communications via post, e-mail, telephone, fax and internet must be considered to fall under the scope of the freedom of communication as well as confidentiality of communication. In this context, expressions used in the oral, written and visual communications, either mutual or collective, of individuals must be kept confidential (see *Yasemin Çongar and Others*, §§ 49, 50).

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

98. The applicant maintained that there had been violations of privacy of his communication, freedom of communication, as well as of the right to the protection of personal data due to the unlawful acquisition of his user ID information concerning ByLock application. For an examination as to this allegation, it must be firstly elucidated whether ByLock program is a means for communication and thus whether the communication over this program fell into the scope of the freedom of communication.

99. In the judgments of the Court and the Court of Cassation, it has been found established that Bylock program enables instant messaging, sending and receiving e-mails, creating contact list, group messaging, voice call and sending images or documents. It is indicated therein that ByLock, by its structure and software, is a means ensuring instant

communication among persons and transmission of certain data. For access to ByLock application, online connection is needed as it does not support offline use. In other words, its users may send messages, e-mails and data through internet connection (see the judgment of the General Assembly of the Criminal Chambers of the Court of Cassation no. E.2017/16.MD-956, K.2017/370 and dated 26 September 2017; and *Ferhat Kara*, §§ 42-54). Given all these features, it is undoubted that ByLock program is an online communication means. Regard being had to the fact that freedom of communication covers any communication via mail, e-mail, telephone, facsimile and internet, it has been concluded that the communication held via ByLock communication program must be also considered to fall into the scope of the freedom of communication.

100. It is prescribed in Article 20 § 3 of the Constitution that everyone has the right to request the protection of his/her personal data and that this right includes being informed of, having access to, and requesting the correction and deletion of, his/her personal data, and to be informed whether these data are used in line with the envisaged objectives. The relevant article also provides that personal data can be processed only in cases envisaged by law or with the person's explicit consent and that the principles and procedures regarding the protection of personal data shall be regulated by law. Thereby, the constitutional boundaries have been set. It is especially emphasised therein that everyone has the right to be informed whether their personal data have been used in line with the envisaged objectives.

101. In the first sentence of Article 20 § 3 of the Constitution, it is set forth generally that everyone has the right to request the protection of his/her personal data. In the second sentence, certain special guarantees in the context of personal data are envisaged, whereas in the third sentence, it is set forth that personal data may be processed only in cases prescribed by law and with the explicit consent of the relevant person. In the fourth sentence, it is noted that the principles and procedures as to the protection of personal data shall be regulated by law. In consideration of its wording, it has been observed that Article 20 § 3 of the Constitution affords protection, within the scope of the right to the protection of personal data, against restrictions or interferences not merely in the form

of processing, but against any form of interferences or restrictions with respect to personal data.

102. For an examination under the right to the protection of personal data safeguarded by Article 20 § 3 of the Constitution, it must be primarily ascertained whether there is any personal data required to be protected under the said right. Given the wording of the relevant constitutional provision, the international documents and comparative law on the issue, the Court has acknowledged that the notion of personal data amounts to all information regarding an identified or identifiable natural or legal person (see the Court's judgments no. E.2014/74, K.2014/201, 25 December 2014; E.2013/122, K.2014/74, 9 April 2014; E.2014/149, K.2014/151, 2 October 2014; E.2013/84, K.2014/183, 4 December 2014; E.2014/180, K.2015/30, 19 March 2015; *Bülent Kaya* [Plenary], no. 2013/2941, 11 May 2016, § 49; and *Fatih Saraman*, [Plenary], no. 2014/7256, 27 February 2019, § 57).

103. In this sense, it is autonomously determined, in the particular circumstances of every case and application, whether the data in a given application may be classified as personal data under Article 20 § 3 of the Constitution. If such data is found to be of a personal nature, any form of restriction or interference with respect thereto triggers the safeguards inherent in the relevant provision of the Constitution.

104. As stated in the Court's judgment *Ferhat Kara*, ByLock data, except for digital data like setup file of the ByLock application which was found in the devices of the accused persons seized during the judicial investigations and prosecutions conducted against them, are essentially based on two sources. The primary source is the data obtained from ByLock server, which were delivered by the MİT to judicial authorities and analysed by the latter in line with court decisions. The second source is the CGNAT data pertaining to the IPs accessing from Turkey to ByLock IPs, which were acquired from the Information and Communication Technologies Authority ("BTK") in line with court decisions (see *Ferhat Kara*, § 58). The BTK determined the *identifying information* of the subscribers of the numbers having access to ByLock IP upon the requests of the chief public prosecutor's offices and courts and reported such information to these authorities (see *Ferhat Kara*, §§ 32-38). In the Court's judgments, it is indicated that IP address, starting and ending time of the service rendered,

type of the service utilised, volume of data transmitted and identifying information of subscribers, which fall within the scope of communication traffic information, constitute *personal data* (see the Court's judgment no. E.2014/149, K.2014/151, 2 October 2014).

105. It has been accordingly concluded that the collection of information concerning the use of phone and internet by the relevant person, IP addresses he connected, e-mails and messages he sent and calls he made and received, thus the data on the use of his ByLock communication program fell within the scope of both the right to protection of personal data under the right to respect for private life and the freedom of communication. Therefore, it has been considered that the applicant's allegation as to the unlawful acquisition of the documents proving his use of ByLock application must be examined from the standpoint of the right to the protection of personal data and the freedom of communication also in consideration of the close link of this allegation with both personal data and communication.

b. Admissibility

106. In the present case, it must be primarily examined whether the application was lodged within the prescribed time.

107. Pursuant to Article 47 § 5 of the Code on Establishment and Rules of Procedures of the Constitutional Court no. 6216, dated 30 March 2011, and Article 64 § 1 of the Internal Regulations of the Court, an individual application should be made within thirty days starting from the exhaustion of legal remedies or from the date when the violation is become known, if no remedies are envisaged (see *Bilent Aktaş and Others*, no. 2014/19389, 7 December 2016, § 11). Accordingly, the prescribed time of 30 days for lodging an individual application due to an act, action or omission alleged to give rise to a violation of any fundamental rights and freedoms that are under the joint protection of the Constitution and the Convention shall start to run by the date when a final decision issued upon the exhaustion of a legal remedy prescribed with respect to the impugned act or action –if available– is become known or, in case of the existence of no legal remedy with respect to the impugned act or action, by the date when it was performed.

108. The remedy required to be exhausted must be capable of providing redress in respect of the consequences of the alleged violation, be effective and accessible, as well as offer reasonable prospects of success. It must be available not only in theory but also in practice. It is not necessary to exhaust the remedies which are not capable of redressing the consequences of the violation or which are far from being actually accessible and available (see *Fatma Yıldırım*, no. 2014/6577, 16 February 2017, § 39). However, any doubt to the effect that any remedy which is capable of offering a reasonable prospect of success in theory would not accomplish in practice does not justify the failure to exhaust that remedy (see *Sait Orçan*, no. 2016/29085, 19 July 2017, § 36).

109. The question as to whether the applicant can be considered to have done everything which could be reasonably expected of him must be examined in the light of the particular circumstances of each case (see *S.S.A.*, no. 2013/2355, 7 November 2013, §§ 27 and 28). However, in cases where it appears that exhaustion of available remedies would not serve the purpose or is not effective, an application lodged without these remedies being exhausted may be examined (see *Şehap Korkmaz*, no. 2013/8975, 23 July 2014, § 33). Besides, the exhaustion of legal remedies is not a rule of absolute nature that must be applied so strictly. In the event that exhaustion of a legal remedy available in theory places an extraordinary burden on the applicant in the particular circumstances of a given case, it may be decided that the exhaustion of such remedy is not necessary (see *Rasul Kocatürk*, no. 2016/8080, 26 December 2019, § 38).

110. In the present case, the allegation that the unlawful acquisition of the data regarding the applicant's use of ByLock communication program had been in breach of his right to the protection of personal data and freedom of communication was raised in the criminal proceedings which were conducted against the applicant and where the data obtained via ByLock program were relied on as evidence. It was then brought before the Court through individual application on 26 July 2018 following the conclusion of the criminal proceedings. The criminal court conducting the criminal proceedings against the applicant would not make an examination as to whether the acquisition of ByLock-related information and the use of data obtained from ByLock application had violated the

freedom of communication and the right to the protection of personal data. Nor is it authorised to afford an appropriate redress in case of finding of a violation. Therefore, it is not possible to consider the criminal proceedings against the applicant as an effective remedy with respect to the alleged violations of his right to the protection of personal data and freedom of communication due to the acquisition and use of information regarding ByLock communication program.

111. On the other hand, the ineffectiveness of the criminal proceedings in terms of the said complaint is not decisive *per se* to qualify the individual application lodged following the conclusion of the criminal proceedings as being out of time. In making an assessment as to the prescribed time for lodging an individual application, all circumstances of a given case should be taken into consideration, and due regard should be paid to the necessity that no excessive burden be imposed on the applicant. In this sense, in cases where it is disputed that a remedy prescribed in the law is capable of finding a violation and affording appropriate redress and where there are justified reasons for the applicant to have an expectation that he may obtain a result through this legal remedy, the individual applications lodged upon the exhaustion of this remedy may be regarded to be submitted within due time. In cases where there is no mechanism other than a remedy, efficiency of which in terms of the constitutional complaint, is in dispute and the given applicant lodges an individual application upon exhausting this disputed remedy, there are strong reasons justifying the flexible approach adopted with respect to the prescribed time for lodging an application. That is because what is essential is the establishment and redress of a violation through ordinary legal remedies before filing an application with the Constitutional Court. Besides, it is incumbent on the State, pursuant to Article 40 of the Constitution, to set up legal mechanisms to find establish and redress violations of the fundamental rights and freedoms safeguarded by Article 40 of the Constitution. It is therefore reasonable for the person concerned to raise the alleged violation through, and to give the opportunity for the establishment and redress of the violation to, primarily ordinary legal remedies before lodging an application with the Court, which is of a subsidiary nature.

112. In the Turkish law, there is no legal mechanism whereby, before an individual application is being lodged, the alleged violations of freedom of communication due to interferences –in the form of monitoring of communication and subsequently the interception of communication in the event that a criminal case is brought– will be dealt with; a violation, if any, will be found established; and if necessary, appropriate redress will be provided. On the other hand, although in the criminal proceedings conducted against the applicant, the trial court was not authorised to ascertain whether there had been a violation of the freedom of communication due to the acquisition and use of information from ByLock program, it had the power to examine whether ByLock data had been obtained lawfully. As a matter of fact, in the present case, the inferior courts provided their assessments in this respect in their decisions. The conclusion reached by the court that ByLock data had been obtained lawfully is not in the form of a separate examination from the standpoint of freedom of communication. It will, however, be substantial in terms of the lawfulness of the impugned interference with the freedom of communication. Also given the existence of no other remedy with respect to the alleged violation of freedom of communication, it must be acknowledged that the individual application lodged by the applicant after exhaustion of the criminal-trial remedy capable of addressing, even indirectly, the lawfulness of the interference with the freedom of communication and within 30 days after becoming aware of the final decision was made in due time.

113. For these reasons, the alleged violations of the right to the protection of personal data under the right to respect for private life and the freedom of communication must be declared admissible for not being manifestly ill-founded and there being no other grounds for their inadmissibility.

c. Merits

i. Existence of an Interference

114. In the present case, although the applicant denied being a user of the ByLock application during all proceedings and thereby committing the offence imputed to him, it was this allegation that was one of the main grounds of the investigation conducted against him. In the criminal charge against the applicant, the data obtained from ByLock communication

program were also relied on. Upon the request of the chief public prosecutor's office, the communication data showing the applicant's use of ByLock communication program were obtained on the basis of the decision of the incumbent magistrate judge. It has been observed that the applicant's ByLock user information, messages and log records were accessed; and that such information was analysed and secured by the investigation and prosecution authorities. This electronic information found established, by the inferior courts, to belong to the applicant, as an identified natural person, must be regarded as personal data. In the present case, the *collection* of personal data in the form of interception of these electronic data by the public authorities, their *transmission* for being submitted to the judicial authorities and their *use* for being subject to analysis and being relied on in the conviction constituted an interference with the *right to the protection of personal data*. Besides, as these data fall into the scope of *communication*, their access, transmission and use constitute an interference also with the *privacy of communication*. Accordingly, the impugned measures applied with respect to the applicant constituted an interference with the right to the protection of personal data under the right to respect for private life as well as of the freedom of communication.

ii. Whether the Interference Constituted a Violation

115. Article 13 of the Constitution, titled *"Restriction of fundamental rights and freedoms"*, reads as follows:

> *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality."*

116. The abovementioned interference shall constitute violations of Articles 20 and 22 of the Constitution unless it satisfies the requirements laid down in Article 13 of the Constitution. Therefore, it must be determined whether the impugned restriction complied with the requirements set out in Article 13 of the Constitution and applicable to the present case, namely being prescribed by law, pursuing a legitimate aim, and not being

contrary to the requirements of a democratic society, as well as to the proportionality principle (see *Halil Berk*, no. 2017/8758, 21 March 2018, § 49; *Süveyda Yarkın,* no. 2017/39967, 11 December 2019, § 32; and *Şennur Acar*, no. 2017/9370, 27 February 2020, § 34).

117. The essence of the applicant's complaint is related to the question whether the interference with the right to the protection of personal data and the freedom of communication had a legal basis. Therefore, an examination as to the legal basis of the impugned interference must be conducted.

(1) Lawfulness

(a) General Principles

118. Article 13 of the Constitution regulating the regime whereby the fundamental rights and freedoms may be restricted sets forth, as a basic principle, that these rights and freedoms may be restricted *"only by law"*. Besides, it is set forth in the third sentence of Article 20 § 3 of the Constitution that personal data can be processed *"only in cases envisaged by law or by the person's explicit consent"* and in the fourth sentence thereof that the principles and procedures regarding the protection of personal data shall be regulated *"by law"*. In the same vein, Article 22 § 2 of the Constitution provides that communication shall not be impeded nor its privacy be violated *"unless there exists a written order of an agency authorized by law"*. Accordingly, the primary criterion to be taken into consideration in case of interferences with the right to the protection of personal data and freedom of communication is that the interference must be based on law.

119. The lawfulness requirement primarily necessitates the formal existence of a law. An interference with the right to the protection of personal data and the freedom of communication is conditional upon the existence of a provision included in regulatory acts performed by the legislature -called as law- and allowing for an interference. Besides, it should be noted in this sense that the interferences with the right to the protection of personal data due to their processing may be deemed to fulfil the lawfulness requirement if inflicted in cases prescribed by law or with the explicit consent of the relevant person.

120. Besides, quality of the given law is of importance in the determination as to whether the lawfulness requirement has been fulfilled, as a requisite of the principle of state governed by rule of law that is enshrined in Article 2 of the Constitution. That is because the principles of legal security and certainty are prerequisites for a state governed by rule of law. Aimed at ensuring the legal safety of persons, the principle of legal security requires that legal norms are foreseeable, that individuals can trust the state in all of their acts and actions, and that the State avoids using any methods which would undermine this trust in their legislative acts (see the Court's judgments nos. E.2013/39, K.2013/65, 22 May 2013; and E.2014/183, K.2015/122, 30 December 2015, § 5). The certainty principle means that legislative acts must be sufficiently clear, non-ambiguous, understandable and applicable not to allow any hesitation or doubt on the part of both the administration and individuals and they must provide safeguards against arbitrary practices of public authorities (see the Court's judgments nos. E.2013/39, K.2013/65, 22 May 2013; and E.2010/80, K.2011/178, 29 December 2011). Accordingly, in order for an interference with fundamental rights and freedoms in a state of law to be based on law, a law must exist in form and its wording must be certain and precise to the extent that would enable individuals to foresee the consequences of their acts. In other words, the law allowing for an interference should be sufficiently precise and foreseeable (see, in the same vein, *Halime Sare Aysal* [Plenary], no. 2013/1789, 11 November 2015, § 62).

121. However, according to the Court, as regards the issues envisaged to be regulated exclusively by law, such as the restriction of fundamental rights and freedoms, it is required that the basic principles, procedures and framework thereof be determined by law. However, leaving by the legislature, of the issues requiring expertise and related to administration, to the executive after determining the basic rules cannot be interpreted as a transfer of legislative power (see the Court's judgment no. E.2014/133, K.2014/165, 30 October 2014). In this sense, it is acknowledged that if the basic principles, procedures and framework regarding the restriction of fundamental rights and freedoms are indicated by the law-maker in statutory arrangements, the details thereof may be determined through regulatory acts (see *Mehmet Koray Eryaşa*, no. 2013/6693, 16 April 2015, § 63).

(b) Application of Principles to the Present Case

122. As noted in the Court's judgment *Ferhat Kara*, ByLock data, except for digital data like setup file of the ByLock application which was found in the devices of the accused persons seized during the judicial investigations and prosecutions conducted against them, are essentially based on two sources. The primary source is the data obtained from ByLock service, which were submitted by the MİT to the judicial authorities and subject to an examination by the judicial authorities by virtue of court decisions. The second source is the CGNAT records showing the IP addresses from Turkey that accessed to ByLock IPs, which were obtained from the BTK on the basis of a court decision (information showing the number of access to IP addresses of ByLock server on a given date) (see *Ferhat Kara*, § 58). Having determined the *identifying information of* the subscribers connecting to ByLock IPs, the BTK reported them to the chief public prosecutor's office and the courts (see *Ferhat Kara*, §§ 32-58). Therefore, in the present case, the Court examined whether the impugned interference had a legal basis under two headings, namely in terms of the data obtained from ByLock server and the process following the submission of these data to the judicial authorities.

(i) As regards the Data Obtained from ByLock Server

123. It is inevitable, in democratic societies for the protection of fundamental rights and freedoms, to need intelligence agencies and the methods employed by such agencies for effectively fighting against very complex structures, such as terrorist organisations, and tracking them through covered methods. Therefore, to collect and analyse information about terrorist organisations, with an aim of collapsing them through covered intelligence methods, amount to a significant need in democratic societies. Threats against democratic constitutional order may be identified and precautions may be taken against these threats through the information and data obtained by intelligence agencies (see *Ferhat Kara*, § 130).

124. The organisation of, and activities performed by, the FETÖ/PDY have been a subject of a social debate for a long time, and notably in the aftermath of 2013, the investigation authorities and the State's security

agencies started to consider this structure as a threat to national safety. In this regard, notably the investigations of 17-25 December and the stopping of MİT trucks are, *inter alia*, the basic grounds of the conclusion reached by the investigation authorities and the judicial bodies to the effect that the activities of this structure have been intended for overthrowing the Government. It is further indicated in several investigation/prosecution files that many cases filed/conducted by judicial members, who are considered to have a link with this structure, have also aimed at ensuring or increasing the organisational efficiency within public institutions notably at the Turkish Armed Forces, as well as within different field of the civil society. During such a period, the public authorities have, on one hand, issued decisions and carried out practices revealing the illegal aspect of the FETÖ/PDY and, on the other, taken certain measures against the organisation (see *Ferhat Kara*, § 131).

125. It is not for the Constitutional Court to decide on the lawfulness or expediency of the performance of intelligence activities by the State's intelligence agencies considering that the threat posed by FETÖ/PDY to national security turned into an *imminent* threat. Nor is it the subject-matter of the examination in the present case. The relevant authorities cannot be expected to wait, so as to take the necessary preventive measures, until the realisation of any terrorist threat. It has been comprehended that the complex structure and international nature of the FETÖ/PDY necessitated the performance of certain intelligence activities concerning this organisation before the coup attempt. In this sense, the coup-attempt of 15 July demonstrated how great the threat posed by the FETÖ/PDY to national security was and how it turned into a severe risk against the existence and integrity of the nation despite the certain measures taken prior thereto (see, for detailed explanations and assessments, *Aydın Yavuz and Others*, §§ 12-25; and *Ferhat Kara*, § 132).

126. In the course of the period during which the investigation authorities and the State's security agencies started to perceive the FETÖ/PDY's getting organised within the public institutions 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 MİT also conducted inquiries and inspections, within the boundaries

of its own field of work, into the FETÖ/PDY's activities. As a matter of fact, it is laid down in Article 4 § 1 (a) of Law no. 2937 that the MİT is liable to create state-wide national security intelligence in respect of the existing and probable activities, performed at home and abroad, against the territorial integrity, existence, independence, safety, constitutional order and national power of the Republic of Turkey, as well as to report this intelligence to the relevant institutions.

127. During these inspections and inquiries conducted by the MİT, a foreign-based mobile application, namely ByLock, which was apparently designed to ensure organisational communication among the FETÖ/PDY members was discovered, and it was also found out that there were servers with which the ByLock application was in contact. These findings were subject to detailed technical examinations. The inquiries and inspections conducted into ByLock by the MİT within its own field of work are not in the form of a judicial investigation. In Article 4 § 1 (i) of Law no. 2937, it is set forth that the MİT is empowered to gather, record and analyse information, documents, news and data on counter-terrorism issues by use of any kind of procedures, means and systems of technical and human intelligence and to report the created intelligence to the relevant institutions (see *Ferhat Kara,* § 128).

128. In Article 6 of the same Law, it is set forth that in performing its duties, the MİT may apply clandestine working procedures, principles and methods as well as collect data on foreign intelligence, national defence, terrorism, international offences and cyber security which are conveyed through telecommunication channels (see § 84 above). It thus appears that the MİT is empowered through this Law to gather information and data on relevant persons and groups by technical means, as well as to analyse these information and data, with a view to revealing the terrorist activities in advance without being performed for the purposes of maintaining the constitutional order and national safety of the country.

129. 129. In Article 4 § 1 (a) of Law no. 2937, it is set forth that the MİT is liable to create state-wide national security intelligence in respect of the existing and probable activities, performed at home and abroad, against the territorial integrity, existence, independence, safety, constitutional order and national power of the Republic of Turkey, as well as to report

this intelligence to the relevant institutions. In subparagraph (i) of the same provision, it is laid down that the MİT is empowered to gather, record and analyse information, documents, news and data on counter-terrorism issues by use of any kind of procedures, means and systems of technical intelligence and to report the intelligence created to the relevant institutions. Article 6 of the same Law also indicates that in performing its duties, the MİT may apply clandestine working procedures, principles and methods as well as collect data on foreign intelligence, national defence, terrorism, international offences and cyber security which are conveyed through telecommunication channels. It thus appears that the MİT is empowered through this Law to collect information and data on relevant persons and groups by technical means as well as to analyse these information and data, with a view to revealing the terrorist activities in advance without being performed for the purposes of maintaining the constitutional order and national safety of the country. In this regard, the MİT is vested, by Articles 4 and 6 of Law no. 2937, with the powers to obtain and analyse information, documents and all other data concerning terrorist offences, which are transmitted through telecommunication channels, by using any kind of intelligence methods, to purchase any computer data available abroad, as well as to report them to the relevant institutions. It has been accordingly concluded that the relevant statutory arrangements are sufficiently clear, comprehensible and foreseeable and thus satisfy the *lawfulness* requirement.

(ii) As Regards the Process Following the Submission of ByLock Data to Judicial Authorities

130. Upon the submission by the MİT of the digital materials obtained from the ByLock server and the technical report issued with respect to these materials to the Ankara Chief Public Prosecutor's Office, the investigation process was thereafter conducted in accordance with Law no. 5271. Thereafter, the Ankara Chief Public Prosecutor's Office requested the Ankara 4th Magistrate Judge to conduct an inquiry into, make a back-up and transcribe the digital materials in question pursuant to Article 134 of Code no. 5271. Upon the said the request, the magistrate judge issued an order for *"conducting an inquiry, making a back-up and conducting an expert examination as to the digital materials"* (see *Ferhat Kara*, § 28).

131. Subsequently, the Ankara Chief Public Prosecutor's Office requested from the BTK the reports pertaining to how many times the subscribers included in the *"ByLock subscribers list"* connected to the ByLock IP addresses (CGNAT data) (see *Ferhat Kara*, § 32). The subscription information related to the connecting GSM numbers and ADSL numbers were also submitted by the BTK to the Ankara Chief Public Prosecutor's Office. Subsequently, the General Directorate of Security, Department of Anti-Smuggling and Organised Crime ("the EGM-KOM"), using the subscription information received from the Ankara Chief Public Prosecutor's Office, created a new table of *"user ID_list"* (user list) (see *Ferhat Kara*, § 35).

132. Also in the judgment of the General Assembly of the Criminal Chambers of the Court of Cassation, no. E.2017/16.MD-956, K.2017/370 and dated 26 September 2017, it is underlined that the data obtained through the ByLock communication system fall under the scope of Article 134 of Code no. 5271. According to this judgment, as the records concerning communication through internet are saved in the computer file, these communication records may be subject to the search, back-up and seizure processes, pursuant to Article 134 § 1 of Code no. 5271. As noted by the Court of Cassation, the notion of *"computer files"* stated in Article 134 of Code no. 5271 does in technical sense include not only the records recorded in desktops and laptops but also all digital files that may be available in CDs, DVDs, flash disks, floppy disks, as well as in any data processing or data collection means or tools including all removable storages, digital-based mobile devices such as mobile phones and etc..

133. In the present case, the Kayseri 3rd Magistrate Judge ordered, pursuant to Articles 116, 127 and 134 of Code no. 5271, a search at the applicant's home on 6 September 2016; the seizure of any kind of digital materials capable of keeping records such as mobile phones, computes, hard disks, flash disks, sim card and etc.; and taking of a back-up copy of all records obtained, as well as their analysis and transcription. By virtue of the decision of the Kayseri 1st Magistrate Judge, dated 2 November 2016, the establishment of the communication records as to the applicant's phone number between the dates 1 October 2013 and 1 October 2016 and of the relevant base stations was ordered. Besides, the EGM-KOM of the

Kayseri province issued and submitted a New ByLock Inquiry Result Report on 6 February 2017 where it was noted that as revealed on the basis of the phone number and IMEI number of the applicant's mobile phone, he had downloaded and used ByLock communication program and his *ID user number was (4397)*. In the same vein, the ByLock Identification and Assessment Report ("the ByLock Report"), which demonstrated the use of ByLock program by the applicant on the basis of the information obtained from the investigation file of the Ankara Chief Public Prosecutor's Office no. 2016/180056, was issued. Besides, pursuant to the decision of the regional court of appeal, the HTS records of GSM numbers used by the applicant and of the IMEI numbers belonging to these numbers as well as the HTS records as to the information on the dates, hours and base stations when and through which a connection was made to the identified ByLock IP numbers, were obtained from the BTK.

134. Accordingly, it has been observed that the impugned interference in the form of acquisition of the applicant's communication information showing that he was using ByLock communication program was performed in accordance with a judge's decision primarily under Article 134 of Code no. 5271 concerning the seizure of the digital materials, taking a back-up copy thereof and transcription of the obtained records, as well as subsequently under Article 135 of the same Code concerning the acquisition of the communication records of the applicant's phone number and the related base stations. In this sense, there are clear and comprehensive rules as to the search and seizure of digital data, and the establishment of communication records, which are the measures prescribed in Articles 134 and 135 of Code no. 5271. The scope and limits of discretionary power of assessment exercised by public authorities are demonstrated in a precise manner. In the same vein, the offences for which these measures may be applied, the duration of these measures and the conditions as to the storage and destruction of the obtained records are set forth. Besides, it is envisaged that the application of these measures be conditional upon a judge's approval even in urgent cases so as to provide a sufficient protection against arbitrariness. Accordingly, the statutory provisions forming a basis for the impugned interference are precise, accessible and foreseeable to the extent that sufficiently indicates the admissible limits of interferences with the given rights and freedoms.

Consequently, it has been concluded that the relevant provisions of Code no. 5271 were in keeping with the *lawfulness* requirement (see, in the same vein, *Mehmet Seyfi Oktay* [Plenary], no. 2013/6367, 10 December 2015, § 53; *Rıdvan Bayram*, no. 2013/1171, 9 September 2015, § 43; *C.E.*, no. 2016/436, 12 September 2019, § 49; *Günay Dağ and Others*, no. 2013/1631, 17 December 2015, § 136).

(2) Legitimate Aim

135. Article 13 of the Constitution makes the restriction of fundamental rights and freedoms conditional upon the existence of special grounds for restriction set forth in the constitutional provision concerning the relevant right and freedom. However, no special ground for restrictions on, and interferences with, the right to the protection of personal data is prescribed in Article 20 § 3 of the Constitution. However, as set forth in the established case-law of the Court, even the rights for which no special ground for restriction is prescribed have certain boundaries deriving from the very nature of the given right itself. Besides, the rights and freedoms enshrined in the other provisions of the Constitution as well as the duties incumbent on the State may establish boundaries with respect to the rights and freedoms for which no special ground for restriction is indicated (see, among many other judgments, the Court's judgment no. E.2014/177, K.2015/49, 14 May 2015).

136. As indicated by Article 20 § 3 of the Constitution, the right to the protection of personal data may be restricted. However, the grounds or the legitimate aims justifying restrictions are not enumerated exhaustively in the paragraph. As the areas of use of the notion personal data, which amount to all information regarding an identified or identifiable natural person, are so broad, it is inevitable that there are different grounds or legitimate aims justifying restrictions for each area of use. In that case, the ground or legitimate aim justifying a given restriction or interference may vary by the area in which the right to the protection of personal data has been restricted or inferred with. During the examination to be made accordingly, the ground for restriction, which has emanated from the very nature of the given case or application, must be determined by considering that the right to the protection of personal data is subject to certain restrictions stemming from the very nature of this right. It must be then

assessed whether this specific ground for restriction may be considered to constitute a legitimate aim. It must be also acknowledged that the rights and freedoms enshrined in other provisions of the Constitution as well as the duties incumbent on the State may constitute a limitation with respect to this right.

137. It is among the State's basic duties to reveal and prevent terrorist activities directed towards the Republic of Turkey. In this sense, it has been concluded that the limitation of the right to the protection of personal data for the purposes of revealing terrorist organisations and their activities and thus preventing the commission of offences pursued a legitimate aim.

138. On the other hand, as set forth in Article 22 of the Constitution, freedom of communication may be restricted on one or several of the grounds of national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms of others. In the present case, the applicant's communication records regarding the ByLock communication program were obtained, pursuant to Articles 134 and 135 of Code no. 5271 and in line with judge's decisions, for the purposes of fighting against the said terrorist organisation, preventing the commission of offence and securing the available evidence. It has been accordingly concluded that the impugned interference pursued a legitimate aim of maintaining public order and safety within the context of fighting against offences and offenders, which is laid down in Article 22 of the Constitution.

(3) Compliance with Requirements of a Democratic Society and Proportionality

(a) General Principles

139. Any interference with the fundamental rights and freedoms may be considered to be compatible with the requirements of a democratic society only when it meets a pressing social need and is proportionate. It is evident that an assessment under this heading cannot be made independently of the proportionality principle founded on the relation between the aim of the restriction and the means applied to attain this aim. That is because two separate criteria, namely *not being incompatible with*

the requirements of a democratic society and *not being contrary to the principle of proportionality*, are set forth in Article 13 of the Constitution. These two criteria are parts of a whole and closely linked to each other (see *Ferhat Üstündağ*, no. 2014/15428, 17 July 2018, § 45).

140. Any measure constituting an interference may be considered to meet a pressing social need provided that it is suitable for achieving the pursued aim and appears to be the last resort likely to be used as well as to be a less severe measure likely to be applied. Any interference which fails to attain the pursued aim or which is manifestly more severe than what is necessary for achieving the pertinent aim cannot be said to meet a pressing social need (see *Ferhat Üstündağ*, § 46).

141. Proportionality points to the balance required to exist between the aim sought to be achieved and the measure applied for restriction. In other words, proportionality means that a fair balance be struck between the rights and interests of the given person and the public interests or, if the interference is intended for protecting the others' rights, the rights and interests of the others. If it is revealed that a manifestly disproportionate burden is placed on the holder of the right interfered with when compared to the public interest or the interest of the other individuals on the other scale, a problem from the standpoint of the proportionality principle may be at stake (see *Ferhat Üstündağ*, § 46).

142. However, fulfilling the requirement of meeting a pressing social need is not sufficient for any restriction on, or interference with, the right to the protection of personal data to be compatible with the requirements of a democratic society. That is because in the second sentence of Article 20 § 3 of the Constitution, which provides *"This right includes being informed of, having access to and requesting the correction and deletion of his/her personal data, and to be informed whether these are used in consistency with envisaged objectives."*, certain special safeguards are also afforded against the restrictions on, or interferences with, the right to the protection of personal right. These safeguards are specifically designated by the constitution-maker for ensuring the restrictions on or interferences with right to the protection of personal data to be compatible with the requirements of a democratic society.

143. Moreover, in the first sentence of Article 20 § 3 of the Constitution, it is laid down *"Everyone has the right to request the protection of his/her personal data"*. In the second sentence, it is also indicated that this right involves certain special safeguards that are cited above. In consideration of the notion *"…also includes…"* in the second sentence in conjunction with the first sentence thereof, it has been observed that the constitution-maker does not intend to confine the safeguards required to be afforded within the scope of the right to the protection of personal data in a democratic society to those listed in the second sentence. As a matter of fact, given the international documents and comparative law texts, it appears that individuals are provided with the safeguards laid down in the Constitution; that in some cases, these safeguards are envisaged to be a part of certain principles with a broader extent; in some cases, special safeguards laid down in the Constitution are detailed; and that in some cases, certain additional safeguards are prescribed. Regard being had to the legislative intent of the constitutional amendment making a reference to the international documents and comparative law instruments, to the general provision as to the right to the protection of personal data in the first sentence of Article 20 § 3 of the Constitution, and to the fact that the safeguards laid down in the second sentence are not exhaustive, it has been concluded that in making an assessment under the test of being compatible with the requirements of a democratic society, one of the criteria for restricting fundamental rights and freedoms that are laid down in Article 13 of the Constitution, the principles set forth in the international documents and comparative law instruments may be taken into consideration in so far as relevant to the particular circumstances of every concrete case.

144. In this sense, the following additional safeguards must be afforded, in part or in whole, based on the nature of the personal data that were subject to a public interference:

i. The processing of personal data should be conducted in a transparent way, and as a requisite thereof, data owners should be notified of the process beforehand. Such a notification should, as applicable to the particular circumstances of every concrete case, demonstrate the legal ground and aims of the processing personal data, the scope

of data to be processed, the duration for which the data would be stored, the rights of the data owner, consequences of the processing, and probable beneficiaries of the data. There is no certain means of such notification. Any appropriate method enabling those concerned to be aware of the procedure whereby their personal data will be processed to the extent mentioned above may be applied for ensuring transparency.

ii. Processing of personal data should be conducted in a transparent manner. As a requisite thereof, data owners should be provided with the opportunity to access their personal data, and necessary measures should be taken to ensure the use of this opportunity easily.

iii. Personal data should be kept in an accurate and updated way. Necessary measures should be taken so as to ensure the immediate correction or deletion of personal data that are not updated or stored lawfully. In this sense, those concerned should be provided with the opportunity to make a request to that end.

iv. Appropriate technical and structural measures should be prescribed so as to ensure the confidentiality of personal data and prevent unauthorised or unlawful processing, loss, destruction of, or damage to, such data, and these measures should be applied effectively.

v. For qualifying a restriction on, or interference with, the right to the protection of personal data proportionate, the obtained personal data should not be stored for a period longer than that which is sufficient for the pursued aim of restriction or interference.

vi. For qualifying a restriction on, or interference with, the right to the protection of personal data proportionate, the method whereby automatic consequences would be reached regarding the data owner on the basis of such personal data, which is a method impairing the interests of the data owner, should not be, in principle, applied. In cases where it is inevitable to apply this method by the nature of the given work, the data owner should be provided with procedural safeguards, such as the right to request the issuance of a decision

that is not based on this method, so as to alleviate the disadvantages on the part of the data owner.

vii. For qualifying a restriction on, or interference with, the right to the protection of personal data proportionate, the data to be processed or utilised in any way should be limited to the aim sought to be achieved, and any restriction or interference that would go beyond the pursued aim should not be allowed. Besides, those concerned should have the opportunity to apply to court in case of a breach of the safeguards inherent in the given right, and procedural safeguards should be provided so as to ensure a fair trial.

viii. In cases where personal data of critical nature, such as information on religion or philosophical belief, race or ethnic origin, sexual orientation, membership of certain organisations, health, genetic and biometric information, and information on conviction are at stake, the right to the protection of personal data should not be in principle restricted or interfered with. In certain exceptional circumstances where restriction or interference is necessary, the safeguards for the protection of personal data should be applied more strictly, given the severity of the consequences such restriction or interference would cause on those concerned and the risk of giving rise to discriminatory practices with respect to them.

145. As regards the restrictions and interferences inflicted for the purposes of national security, public order, State's financial interests, prevention of offences, protection of rights and freedoms of the relevant persons or other persons or for statistical or scientific researches, if necessitated by the nature of the work, exceptions may be introduced with respect to the special safeguards afforded against the restrictions on, and interferences with, the right to the protection of personal data. However, even in this case, the minimum standards of the requirements, laid down in Article 13 of the Constitution, for the restriction of all fundamental rights and freedoms must be complied with. In other words, even in exceptional cases, the impugned restriction and interference must have a legal basis, rely on the reasons justifying restriction or pursue a legitimate aim, meet a pressing social need as a requisite of the democratic society

and be proportionate. In that case, these requirements are interpreted regardless of the special safeguards. However, existence of an exceptional circumstance does not automatically set aside all of the special safeguards. In any case of an exceptional nature, it should be assessed whether the exception applied is necessary in terms of each special safeguard, in consideration of the nature of the process.

(b) Application of Principles to the Present Case

146. The aim of the interference with the applicant's right to the protection of his personal data and freedom of communication was to reveal the FETÖ/PDY and its activities and thereby to prevent the commission of offence. It is obvious that the acquisition, analysis, and delivery to the investigation authorities, of the data obtained through ByLock communication program, as well as the establishment of communication records and the base stations in question for ascertaining whether the applicant had used this program were an appropriate means for attaining the said aim.

147. Secondly, it must be examined whether the impugned interference corresponded to a pressing social need and, in this sense, whether the acquisition of the applicant's ByLock data and establishment of the communication records and base station mobility were a means of last resort.

148. Today, terrorism is one of the most severe leading threats, all over the world, against the democratic society and individuals' right to maintain a life free of violence. Terrorist organisations do not generally perform their acts and actions limited to the geographical boundaries of a country and emerge as a global security problem of an international nature. Thanks to its specific structure and confidentiality-based functioning method and its ability to use civil organisations to attain its organisational aims, the FETÖ/PDY, which has been able to gain a place in several countries and has expanded its acts and activities across the world, is among the most organised and dangerous terrorist organisations. Therefore, it is evident that merely the powers granted to investigation authorities within the scope of a criminal investigation would not be sufficient for eliminating the threat and danger posed by this organisation to national security. It

has therefore become inevitable to resort to covert intelligence techniques for the disclosure of the activities performed by the organisation and identification of its members. Besides, Articles 20 and 22 of the Constitution do not preclude an interference with the freedom of communication and the right to the protection of personal data through the use of intelligence methods. No democratic state remains inactive in case of threats against its own existence. It is an undisputed fact that the State has the power and duty to fight against persons and structures aiming at overthrowing the democratic social order of the State, its constitutional order and legitimate government. In this sense, having access to ByLock data through using covert intelligence techniques cannot be said to be incompatible with the requirements of a democratic society.

149. As a matter of fact, the data obtained through ByLock server had a significant role in the disclosure of the organisational activities and identification of the members. Several high level heads of the organisation could be identified through the analysis of the ByLock data. It is also obvious that it could not be possible to reach the same conclusion through the use of a less severe means, given the specific structure of the FETÖ/PDY. It has been accordingly concluded that the acquisition of data on the ByLock server through the use of intelligence methods and their submission to the judicial authorities fulfilled the criterion of being compatible with the requirements of a democratic society.

150. Thirdly, it must be examined whether the special safeguards deriving from the nature of the right to the protection of personal data were afforded in the present case. However, it must be discussed whether there was any circumstance necessitating an exception to the special safeguards prescribed with respect to the restrictions on, and interferences with, the right to the protection of personal data.

151. Pursuant to Article 13 of the Constitution and Article 14 § 1 thereof, 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."*, exemption may be introduced with respect to special safeguards

inherent in the right to the protection of personal data for the purposes of maintaining the democratic order and national security as well as fighting against terrorism. In this sense, it is set forth in the international law instruments that special safeguards inherent in the right to the protection of personal data may be set aside for the protection and maintenance of national security and fighting against terrorism. In Article 28 of Law no. 6698, titled *"exemptions"*, the processing of personal data, within the scope of preventive, protective and intelligence activities, with a view to fighting against offence and maintaining national security is among the exemptions listed therein.

152. In the present case, it is evident that the aim underlying the impugned interference with the applicant's right to the protection of personal data and freedom of communication was closely related to the aims of maintaining national security and preventing the commission of offences. The public authorities reached the conclusion that merely conducting a judicial investigation would be insufficient to disclose the organisational activities, identify the members of the organisation and to prevent the risks posed by the organisation to public order and national security. Therefore, certain covert intelligence techniques, which were not prescribed within the scope of criminal investigation, were applied. It is undisputed that the severity of the threat, posed by the said organisation to the sovereignty of the Republic of Turkey and put into practice through the coup attempt of 15 July 2016, played an effective role in resorting to such covert techniques. Therefore, it is evident that the interference in the present case necessitated an exception to the special safeguards inherent in the right to the protection of personal data.

153. However, the existence of an exceptional case does not require the setting aside of all special safeguards automatically. Given the particular circumstances of the present case, it has been concluded that the safeguards (1) being limited in nature, (2) not stored for a long period, (3) not bearing an automatic outcome with respect to the data owner and (4) ensuring effective judicial review must be afforded. In that case, it must be assessed whether the applicant was provided with these safeguards in the present case.

154. There is no information demonstrating that the impugned interference with the right to the protection of personal data and freedom of communication due to the acquisition of ByLock data by the use of intelligence techniques went beyond the aims of revealing the organisational activities and members and ensuring the collapse of the organisation. Nor did the applicant raise a complaint that these data had been used not limited to the aim pursued. The data obtained through the ByLock communication program were used merely within the scope of the criminal proceedings conducted against the applicant for his alleged membership of the said organisation. It has been therefore concluded that the applicant's personal data were used in accordance with the envisaged aim.

155. The data showing that the applicant was the user of ByLock communication program, as well as the information on his use of telephone and internet, IP addresses, e-mails, messages he sent and calls he made, which were submitted by the BTK, have been envisaged to be saved for the duration of the proceedings. It is obvious that the storage, until the end of the proceedings, of the personal data used as evidence in the proceedings is necessary for the right to a fair trial. Nor did the applicant complain that the period for storage of his relevant data was exceeded. Therefore, it has been considered that in the present case, the storage period was longer than the prescribed duration.

156. The data obtained from the ByLock server did not yield any automatic outcome with respect to the applicant. They were assessed and analysed primarily by the law enforcement officers and subsequently by the judicial authorities. They were then used during the investigation against the applicant. Finally, the applicant had the opportunity to raise his objections against these data during the proceedings before the inferior courts which comprehensively examined and addressed the applicant's objections. Accordingly, the applicant did not raise any complaint as to the special safeguards inherent in the right to the protection of personal data, which are cited above under the heading of *"General Principles"*. Nor was any deficiency determined with respect to these safeguards. It has been thus considered that the applicant could avail himself of the legal safeguards.

157. For these reasons, the Court has concluded that there were no violations of the right to protection of personal data under the right to respect for private life as well as of the freedom of communication respectively safeguarded by Articles 20 and 22 of the Constitution.

C. Other Alleged Violations

158. The applicant maintained that his use of ByLock program did not constitute an offence by the date he had used it; and that the subsequent criminalisation of its use amounted to conviction on the basis of an act which did not form an offence by the date it had been performed, which was in breach of the principle of *nullum crimen nulla poena sine lege*.

159. It is incumbent on the applicant to substantiate their allegations as to the impugned incidents by submitting the evidence and to raise his legal claims by providing explanations as to the alleged violation of the constitutional provision invoked. The applicant is to indicate, in the petition submitted to the Court, the right or freedom allegedly violated due to an act, action or omission of a public authority, the constitutional provisions invoked, the reasons of the alleged violation, the evidence relied on, as well as the act, action or omission allegedly giving rise to a violation. In the petition, the incidents related to the act, action or omission whereby the public authority allegedly gave rise to a violation should be summarized chronologically, and the rights and freedoms allegedly violated, which may be subject to an examination through individual application mechanism, and the reasons and evidence thereof should be explained (see *Veli Özdemir*, no. 2013/276, 9 January 2014, §§ 19, 20; and *Ünal Yiğit*, no. 2013/1075, 30 June 2014, §§ 18, 19).

160. It should be emphasised that the applicant was convicted on account of not his use of ByLock application but his membership of the organisation in question. In this sense, the inferior court did not qualify the use of Bylock as an offence in the present case. It accepted the applicant's use of ByLock as evidence of his membership of the said organisation. Therefore, his allegation that there was a violation of the principle of *nullum crimen nulla poena sine lege* lacked an arguable ground. The applicant did not raise any other allegation as to the principle of *nullum crimen nulla poena sine lege* in so far as it fell under the scope of

the constitutional protection. In this sense, it has been considered that the alleged violation of the principle in question could not be substantiated.

161. For these reasons, this part of the application must be declared inadmissible for *being manifestly ill-founded*.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 17 September 2020 that

A. 1. The alleged violation of the right to personal liberty and security be DECLARED INADMISSIBLE as being *out of time*;

2. The alleged violations of the right to the protection of personal data under the right to respect for private life as well as of the freedom of communication be DECLARED ADMISSIBLE;

3. The other alleged violations be DECLARED INADMISSIBLE for *being manifestly ill-founded*;

B. The right to the protection of personal data and the freedom of communication safeguarded respectively by Articles 20 and 22 of the Constitution were NOT VIOLATED;

C. The litigation costs be COVERED by the applicant; and

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

FREEDOMS OF EXPRESSION AND THE PRESS (ARTICLES 26 AND 28)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

DENİZ KARADENİZ AND OTHERS

(Application no. 2014/18001)

6 February 2020

On 6 February 2020, the Plenary of the Constitutional Court found violations of the prohibition of treatment incompatible with human dignity and the freedom of expression, respectively safeguarded by Articles 17 and 26 of the Constitution, in the individual application lodged by *Deniz Karadeniz and Others* (no. 2014/18001).

THE FACTS

[9-51] A banner reading "Murderer and Thief AKP (*Katil, Hırsız AKP*)" had been hung on the premises of the Freedom and Solidarity Party ("Özgürlük ve Dayanışma Partisi/ÖDP") before an 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 police officers concerned. The applicants' subsequent appeal was dismissed by the magistrate judge.

The applicants lodged an individual application on 10 November 2014.

V. EXAMINATION AND GROUNDS

52. The Constitutional Court ("the Court"), at its session of 6 February 2020, examined the application and decided as follows:

A. Alleged Violation of the Prohibition of Treatment Incompatible with Human Dignity

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

53. The applicants maintained that they had been subjected to battery and insult by the security officers. The applicant, Yonca Koyun, also alleged that she had been sexually assaulted. All applicants, save for

Doğuş Yavuz, asserted that excessive amount of tear gas had been used in an indoor venue; that the security officers fired tear gas directly towards their faces; that for being exposed to tear gas, they had suffered from several complaints such as the failure to breath properly for a long time and irritation on the face and other parts of the body; and that the applicant Nurhan Barış Polat had jumped out of the building and his heels had been therefore broken. They further maintained that their complaints and symptoms had not been completely indicated in the medical examination form and they could not receive the adequate treatment at the hospital where they had been taken.

54. The applicants claimed that despite the insult and battery by the security officers, Yonca Koyun's being subjected to sexual assault and the unnecessary and disproportionate nature of the impugned intervention with tear gas, the incumbent chief public prosecutor's office had not conducted an inquiry into the circumstances of the impugned incident but reached a conclusion on the basis of the report issued by the police officers involved in the incident, which was a clear indication that the investigation conducted into the impugned incident was insufficient and also lacked impartiality and independence. They further claimed that the magistrate judge dealing with their challenge against the decision issued by the chief public prosecutor's office had adjudicated their challenge on the basis of the same report without any inquiry; and that the search and seizure warrants issued with respect to them had been unlawful. They accordingly maintained that there had been violations of the prohibition of ill-treatment and the right to a fair trial safeguarded respectively by Articles 17 § 3 and 36 of the Constitution.

55. In its observations, the Ministry noted that the complaints raised by the applicants were to be examined under Article 17 of the Constitution; and that the applicants' complaints that might be addressed from the standpoint of Article 17 were related to their injuries that had been sustained during their arrest and that could be treated with simple medical intervention. The Ministry accordingly concluded that these injuries, which were considered as a natural consequence of the security officers' intervention proportionate to the incident, would not constitute a breach of the said constitutional provision.

56. The applicants did not submit any submissions in reply to the Ministry's observations.

2. The Court's Assessment

57. Article 17 § 1 and 3 of the Constitution, titled *"Personal inviolability, corporeal and spiritual existence of the individual"*, in so far as relevant, reads as follows:

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

58. Article 5 of the Constitution, titled *"Fundamental aims and duties of the State"*, in so far as possible, provides as follows:

> *" The fundamental aims and duties of the State are to safeguard (…) the Republic and democracy, to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence."*

a. Classification of the Complaints and the Scope of the Examination

59. In the examination of the complaints concerning the prohibition of ill-treatment, the substantive and procedural aspects of the prohibition must be separately addressed, also given the negative and positive obligations incumbent on the State. In this connection, the negative obligation includes the liability not to subject individuals to torture, inhuman or degrading treatment or punishment, whereas the positive obligation includes the liability to prevent individuals from being subjected to such treatment by means of setting up the necessary legal and administrative

framework (preventive obligation) as well as the liability to identify and punish those who are responsible by conducting an effective investigation into the incident (investigatory obligation). The substantive aspect of the prohibition of ill-treatment, which concerns the period prior to and in the course of the incident, involves the liability to take preventive measures and negative obligation. The obligation to conduct an effective investigation, one of the two aspects inherent in the positive obligation and concerns the aftermath of the incident, constitutes the procedural aspect of the prohibition of ill-treatment. In the present case, the applicants complained of the violations of the substantive aspect of the prohibition of ill-treatment in so far as it related to negative obligation, as well as of the procedural aspect of the obligation to conduct an effective criminal investigation. In addressing the applicants' complaints, the Court will primarily make an examination under the admissibility criteria. The allegations raised by the applicant Doğuş Yavuz will be examined separately from those of the other applicants, in consideration of the application form and information and documents attached thereto.

60. Besides, as the applicants' allegations that their right to a fair trial had been violated were considered to fall within the scope of the prohibition of ill-treatment, the Court has not found it necessary to make a separate examination as to these allegations.

b. Admissibility

i. As regards the Applicant Doğuş Yavuz

61. In the individual application form prepared by the attorney representing and acting on behalf of all the applicants, the applicant, Doğuz Yavuz, maintained that he had been subjected to battery and insult by the police officers, which amounted to a violation of the prohibition of ill-treatment; and that however, no effective investigation had been conducted against these officers. The application form as well as the information and documents attached thereto demonstrate that the applicant was not present at the premises of the political party, of which the applicant was a member, at the time when the police officers entered inside. Although it was indicated in the application form that the other applicants –noted as thirteen applicants– had been intensively exposed to

tear gas both inside and outside the building and the effects thereof were mentioned, no complaint on the same matter was raised with respect to this applicant. It appears from the application form that the applicant's complaint of being subjected to battery and insult was formulated in conjunction with the complaints of the other applicants. However, there was no explanation, including time and place, as to the alleged battery and insult sustained by the applicant.

62. The applicant's explanations just after the incident also demonstrate that he was not at the party premises at the initial stage of the impugned incident. He mentioned certain events alleged to have taken place between him and the police officers outside the building when he arrived therein, upon seeing the crowd, following the initial stage of the incident. He explicitly stated that he had not been subjected to any battery, insult or to any physical coercion through a truncheon or any other similar material during the impugned incidents. He merely claimed that he had been influenced by the tear gas used towards the applicant Deniz Karadeniz. The forensic report issued as regards the applicant also indicates that there was no sign of battery and physical coercion on his body.

63. The applicant's explanations as to the incident and other available information and documents clearly show that he was not subjected to any physical force. Nor did he substantiate his claim that he had been influenced by the tear gas sprayed towards the other applicants.

64. On the other hand, the police report drawn up following the incident shows that the applicant tried to preclude his friends' custody outside the building and resisted the police officers during his arrest; and that he had been therefore gradually subjected to physical force. There is, however, no explanation as to the nature of the force inflicted by the police officers.

65. It should be primarily noted that allegations of ill-treatment must be substantiated with appropriate evidence. The veracity of the impugned incidents must be established by the evidence beyond any reasonable doubt. Such evidence may consist of either sufficiently severe, clear and consistent signs or certain unrebuttable presumptions (see *Ali Rıza Özer and Others* [Plenary], no. 2013/3924, 6 January 2015, § 83). In this sense, each and every allegation of ill-treatment cannot be expected to be covered

by the protection provided by Article 17 § 3 of the Constitution and the positive obligations incumbent on the State. Therefore, in the assessment of the available evidence, the conducts of those concerned must also be taken into consideration (see *Cezmi Demir and Others*, no. 2013/293, 17 July 2014, § 95).

66. At this point, it must be stated that the allegations of battery and insult stated in the application form could not be considered to be an arguable claim and be substantiated by appropriate evidence. Besides, the chief public prosecutor's office also concluded that the applicant had been subjected to physical force but it did not attain the minimum level of severity. The Court, considering that the use of force was accepted also in the incident report, confined its examination concerning whether the impugned acts of the police officers fell within the scope of the prohibition of ill-treatment to the applicant's arrest during which he was considered to have been subjected to physical force, as the allegations of battery and insult were not considered as an arguable claim for not being supported by appropriate evidence.

67. A treatment must attain a minimum level of severity in order for it to fall within the scope of Article 17 § 3 of the Constitution. The minimum level in question is relative and must be assessed under the concrete circumstances of each incident. In this context, factors such as the duration of the treatment, its physical and mental effects, and the victim's gender, age and health status are of importance (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 23). In addition, the motive and purpose of the treatment may be also taken into account. It must also be considered whether the ill-treatment occurred at a time of excitement and emotional intensity (see *Cezmi Demir and Others*, § 83).

68. According to the forensic medical report issued as regards the applicant, the physical force applied to the applicant did not cause any effect on his physical integrity. Nor did he mention any mental effect thereof. The application did not contain any factor which required it to be considered from the standpoint of the prohibition of ill-treatment, such as the duration of the alleged treatment as well as the gender, age and health status of the applicant, other than the physical and mental effects of the alleged treatment. Therefore, the physical force applied by the police

officers did not attain the minimum level of severity required to fall within the scope of the prohibition of ill-treatment. However, this prohibition may come into play only when the impugned acts attain a minimum level of severity to be determined in consideration of various factors. In this sense, it is obvious that the applicant's allegations are unfounded.

69. For these reasons, the Court has declared inadmissible the alleged violation of the prohibition of ill-treatment for *being manifestly ill-founded*.

ii. As regards the Other Applicants

70. The alleged violation of the prohibition of ill-treatment, in so far as it concerned the other applicants, must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

c. Merits

i. Alleged Violation of the Substantive Aspect of the Prohibition of Treatment Incompatible with Human Dignity

(1) General Principles

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

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

73. Given its effects on individuals, ill-treatment is graded and defined with different terms in the Constitution. Therefore, it appears that the

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

74. Accordingly, pursuant to the given constitutional provision, treatment causing damage, to the highest extent, to an individual's corporeal and spiritual existence may be qualified as *torture* (see *Tahir Canan*, § 22). In addition to the severity of the treatment, there is a *purposive* element to torture, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which defines, in Article 1, defines *torture* in terms of the intentional infliction of severe pain or suffering with the aim, inter alia, of obtaining information, inflicting punishment or intimidating (see *Cezmi Demir and Others*, § 85).

75. Inhuman treatments which do not attain the level of *torture* but which have been premeditated, inflicted for hours during a long period and have caused physical injury or intense moral or physical suffering may be defined as *inhuman or degrading treatment* (see *Tahir Canan*, § 22). The suffering caused in such cases must go beyond the suffering inevitably inherent in a legitimate treatment or punishment. Unlike torture, *inhuman or degrading treatment* does not involve the condition of causing a suffering with a certain motivation. Treatment such as physical assaults, battery, psychological methods of interrogation, placement in poor conditions, expulsion or extradition of a person to any place where he would face the risk of being ill-treated, disappearance of a person under the State's supervision, destruction of a person's home, feelings of fear or anguish resulting from the prolonged delay in the execution of a death penalty and child abuse may be classified as *inhuman or degrading treatment* within the

meaning of Article 17 § 3 of the Constitution (see *Cezmi Demir and Others*, § 89).

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

77. In order to determine under the scope of which notion an ill-treatment falls, each concrete case must be assessed under its own particular circumstances. If a treatment is inflicted publicly or the public is informed of such treatment, it would play an important role in qualifying a treatment as degrading and incompatible with human dignity. However, it is also defined as ill-treatment if it makes the person himself feel inferior. Besides, it is also taken into consideration whether the treatment is applied with the intent of humiliation or degradation. However, the failure to establish such intent would not mean that the treatment does not amount to ill-treatment. A treatment may be in the form of both inhuman or degrading treatment and treatment incompatible with human dignity. Any given form of torture may constitute inhuman or degrading treatment; however, every treatment incompatible with human dignity may not amount to an inhuman or degrading treatment. Detention conditions, treatments towards those who are placed in detention, discriminatory behaviours, defamatory expressions used by state agents, certain unfavourable situations experienced by the disabled, or degrading treatments such as forcing a person to eat or drink something unusual may constitute treatment incompatible with human dignity (see *Cezmi Demir and Others*, § 90).

78. It must be noted that Article 17 § 3 of the Constitution does not provide a ground for restriction and that the prohibition of torture, inhuman or degrading treatment, and treatment or punishment incompatible with human dignity are of an absolute nature. The absolute nature of the

prohibition of ill-treatment is applicable even in times of a war or in case of any other type of general threat to the nation, which are specified in Article 15 of the Constitution (see *Ali Rıza Özer and Others*, § 74).

79. It should be, however, stated that Article 17 of the Constitution does not prohibit the use of force for effecting an arrest within the scope of a certain legal procedure. When faced with a resistance while performing their duties, the police officers are empowered to apply force with a view to, and to the extent that is necessary for, breaking the resistance (see *Cezmi Demir and Others*, § 92). However, recourse to physical force by security officers only in certain circumstances with definite boundaries may be considered not to form ill-treatment. In this sense, it is possible to apply physical force in cases necessitating arrest and due to the relevant person's own conducts (see *Ali Rıza Özer and Others*, § 82).

80. However, such acts would in principle breach the prohibition of ill-treatment unless the use of force due to a person's own conduct or behaviour is certainly inevitable as there is no other available means. Besides, the use of force is allowable only if it is not excessive. In this sense, it should be noted that the difficulties inevitably associated with the fight against crime could not justify any restriction to be imposed on the protection afforded to secure the bodily integrity of individuals (see *Ali Rıza Özer and Others*, § 92). Accordingly, in the assessment of allegations of ill-treatment during an arrest, it must be taken into consideration whether there is a situation that necessarily requires the use of force and whether the applied force is proportionate (see *Gülşah Öztürk and Others*, no. 2013/3936, 17 February 2016, § 52; and *Arif Haldun Soygür*, no. 2013/2659, 15 October 2015, § 51).

81. An attack against a police officer or prevention of the officer from performing his duties by applying force to him is active resistance during arrest, whereas the failure to comply with the police officer's instruction such as refusing to show the required documents, refusing to get on or get off a police vehicle constitutes passive resistance. The force to be applied by a police officer may vary by the type of resistance, and it may be considered to have a legitimate basis only when the resistance is still continuing (see *Arif Haldun Soygür*, § 52). On the other hand, the

police officer's power to apply force should never be used as a means of punishment or vengeance. Otherwise, it would lead to the violation of the prohibition of ill-treatment (see *Arif Haldun Soygür*, § 54).

82. It should be taken into consideration that the use of tear gas by police officers as a means for intervening with social events is not prohibited in national or international legislation. However, it should be assessed, from the standpoint of Article 17 of the Constitution, whether the criteria laid down with respect to the use of such gases have been satisfied (see *Ali Rıza Özer and Others*; *Özlem Kır*, no. 2014/5097, 28 September 2016; *Turan Uytun and Kevser Uytun*, no. 2013/9461, 15 December 2015).

2. Application of Principles to the Present Case

83. The information and documents in the case file are not sufficient to establish *beyond reasonable doubt* that the applicants were insulted. This was the case also for the allegation of sexual assault raised by the applicant Yonca Koyun.

84. However, it is also undisputed that the security officers applied physical force, including the use of tear gas, to the applicants. It is also evident from the forensic medicine reports issued with respect to the applicants following the incident. The use of physical force was acknowledged also through the statements of the police officers, the report drawn up by these officers, as well as the relevant decision issued by the chief public prosecutor's office. The matter which is disputed between the parties is the necessity of applying such force and the proportionality of the force used.

85. In the present case, the police officers tried to enter inside the building with a view to fulfilling the public prosecutor's instruction that the banner unfurled at the party premises be removed and seized and that the applicants be arrested. However, the applicants inside the building refused to open the door. There are significant discrepancies between the statements of the police officers and those of the applicants with respect to the subsequent stages of the incident.

86. It should be underlined that the police officers intended to enter inside the building in order to fulfil the instruction given by the public

prosecutor. It is obvious that to enforce the public prosecutor's instruction is a requisite of the police officers' duties. It should be also noted that the applicants were liable to open the door for the police officers who were fulfilling the public prosecutor's instruction. The consideration that the relevant instruction was unlawful could not be regarded as a ground justifying the applicants' refusal to open the door. Therefore, it may be concluded that the police officers' endeavour to enter inside the building by using force with a view to fulfilling the instruction given by the public prosecutor as the applicants refused to open the door had a legitimate basis.

87. However, in the present case, the parties' statements as to the entrance of the police officers inside the building were controversial. According to the report issued by the police officers, the officers had to enter inside the building by using force as they could not persuade the applicants to open the door. On the other hand, the applicants maintained that they did not open the door as they considered that the persons in civilian clothes, who had arrived in front of the building before the riot police and kicked the door, were members of the ruling party; and that the riot police subsequently arriving in the incident scene had broken the door and entered inside the building without any warning. The information and documents available in the case file were not sufficient to prove whose statements were accurate. Therefore, the Court has found it appropriate not to make an assessment as to the necessity of the impugned use of physical force in the present case.

88. Although it is acknowledged that the use of force by police officers was strictly necessary, it must be also assessed whether the used force was proportionate. The information and documents in the case file were sufficient for the Court to make a proportionality assessment.

89. Physical force applied to a person showing resistance to police officers who try to arrest him should be limited to the extent that is sufficient for breaking the resistance. The increase in the force applied by police officers should be deemed reasonable in parallel with the intensity of the resistance shown by the person concerned. It should be acknowledged that police officers have a certain degree of discretionary power in determining

the severity of the force applied. However, the degree of such force must in no way go beyond the aim of *breaking the resistance* and cause anguish to the person resisting. In this sense, in cases where the physical force used to break the resistance exceeds the necessary threshold, it may be concluded that it deviates from the intended purpose and is indeed intended to cause merely physical pain. The use of force in such circumstances cannot be said to fall within the permissible limits under Article 17 § 3 of the Constitution. Besides, in the assessment as to whether the force applied is proportionate, the nature of the aim sought to be attained by the arrest warrant as well as that of the means preferred to break the resistance are also taken into consideration.

90. In the present case, the police officers' aim was to remove the banner unfurled at a Party's premises and constituting an offence according to the public prosecutor, as well as to arrest persons unfurling this banner and also uttering insulting expressions towards the prime minister. It has been understood that about 10 police officers in civilian clothes, who arrived in the incident scene to that end, asked the riot police being present in front of the building for an intervention to enter inside the building. It appears from the documents in the file that the riot police entering inside the party premises upon breaking the door sprayed tear gas directly towards the applicants, who were at a room inside the building.

91. In its previous judgments, the Court has addressed the procedures of the use of pepper gas/tear gas, which is considered as a means used by police officers in intervening with social events and the use of which is not prohibited in national and international legislation, in assessing the proportionality of the use of physical force under the right to life and the prohibition of ill-treatment. In doing so, the Court has considered the *information note on the chemical weapons used in social events* issued by the Turkish Medical Association, where it is stated that the gas used in Turkey may lead to reactions such as shortness of breath, nausea, vomiting and irritation and may even cause death in children, the elders, pregnant women and those with chronic illnesses (see *Ali Rıza Özer and Others*, § 91).

92. Given the possible effects mentioned above, the use of such types of gases may be deemed lawful only when other available means suitable

for breaking the resistance have been already resorted but have yielded no result or it is clearly obvious under the particular circumstances of a given case that no result could be obtained. Besides, it should be also borne in mind that the use of such gases at indoor places may intensify their unfavourable effects. In the present case, the tear gas was sprayed towards the applicants at an indoor space without any chance of avoiding the possible effects. The police officers failed to consider whether there was any other alternative means of applying force that was capable of achieving the same aim. It has been further observed that the necessary measures were taken to prevent the risk of the applicants' fleeing; that to that end, sufficient number of police officers were made ready outside the building; and that the police officers outside the building were provided with the equipment suitable for eliminating the risk of fleeing and showing resistance.

93. The riot police is a special intervention team that has received necessary trainings with respect to such interventions and consists of officers having sufficient experience in intervening with such kinds of events. The use, by the police officers in this team, of tear gas at an indoor space cannot be considered proportionate given the above-explained circumstances of the present case.

94. Although it is specified in the report issued by the police officers that at the time when they sprayed tear gas, the windows at the room were open, it has been observed that no investigation was conducted after the incident so as to clearly establish whether the windows at the room had been open. Moreover, given the possible effects of the use of such gases in indoor spaces, the openness of the windows could not be considered as an element that would render proportionate the use of physical force in the form of spraying tear gas in an indoor space.

95. It should be further emphasised that in assessments as to whether the use of gas in an indoor space is proportionate, one of the factors to be taken into consideration is whether those exposed to gas have any means of escape to avoid the effects thereof. In this sense, it must be noted that in the present case, the applicants, who were in a crowd in a confined space, were not notified that tear gas would be used and they should therefore

leave the room and go outside to sustain no harm. Nor were they provided with the opportunity to go outside within the shortest time possible when they were exposed to gas. As a matter of fact, it is stated in the application form that the applicant Nurhan Barış Polat jumped out of the building not to run away from the police officers as the latter claimed, but to avoid the effects of the gas. The incumbent criminal court also reached the same conclusion.

96. In the forensic medical report issued with respect to the applicants, it is noted that some of the applicants had *redness on all their faces*, which clearly demonstrates the physical effects on the applicants of the use of gas in an indoor space. The applicants also complained of shortness of breath. The applicant Nurhan Barış Polat stated that she had not indeed run away from the riot police but had to jump out of the building as she could no longer endure the effects of the gas. These conditions were sufficient for the Court to conclude that the physical effects of the gas on the applicants were not lenient. The Court has not therefore found it necessary to make a further assessment as to the amount of the tear gas sprayed.

97. Besides, as will be explained below in the part where procedural obligation is discussed, it has been observed that although it was maintained in the present case, rifles with tear gas canisters had been *inter alia* used, the competent authorities made no effort to obtain certain information as to the amount of the gas used by the police officers (see § 112 below). Those in charge at the building stated that although they had been outside the room where the applicants had been, they left the building as soon as the riot police entered inside the building, in order not to be affected by the tear gas. These statements also indicate that in the present case, any alternative means were not considered in the use of physical force; and that the riot police entered inside the building in line with a decision to directly use tear gas, without considering any other alternatives.

98. In addition, even if such kinds of gases are used inevitably for the lack of any other available means, those who are exposed to them must be immediately taken to a health care facility where they are to be provided with relieving treatments regarding their complaints. The effects of the

sprayed gas must be taken into consideration, and necessary medical care must be provided by the expert medical professionals in the shortest time possible for the elimination of such complaints. Besides, it is necessary to make the necessary equipment -such as ambulance, health care professionals or oxygen masks- ready so as to provide medical care for those likely to be affected by the gas before its use. In the present case, there is no explanation, information or document indicating that such a preparation was made before the impugned use of tear gas.

99. For these reasons, the Court has found the use of physical force, which is in the form of spraying tear gas in an indoor space, disproportionate under the particular circumstances of the present case.

100. As the force applied in the present case was found disproportionate, the Court has not found it necessary to make a separate examination of the applicants' allegations that they had been exposed to tear gas by being targeted directly on their faces before and after their arrest. In addition, their allegations that they had been subjected to disproportionate force with truncheon or other means were not examined on the same ground.

101. Consequently, given the particular circumstances of the present case, the Court has held that the disproportionate acts performed by the security officers reached a certain level of severity and constituted a breach of the prohibition of ill-treatment safeguarded by Article 17 § 3 of the Constitution. It has been concluded that the force applied to the applicants constituted *treatment incompatible with human dignity* arousing a feeling of distress and inferiority to the extent that would disregard human values and dignity.

102. Consequently, the Court has found a violation of the substantive aspect of the prohibition of treatment incompatible with human dignity.

ii. Alleged Violation of the Procedural Aspect of the Prohibition of Treatment Incompatible with Human Dignity

(1) General Principles

103. The positive obligation incumbent on the State under the right to protect one's corporeal and spiritual existence also has a procedural aspect.

Accordingly, in the event that an individual has an *arguable* allegation that he has been subjected to unlawful treatment by a state agent and in violation of Article 17 of the Constitution, Article 17 of the Constitution -taken together with Article 5 titled *"Fundamental aims and duties of the State"*- requires the conduct of an effective official investigation (see *Tahir Canan*, § 25). Within the framework of this procedural obligation, the State must carry out an effective official investigation capable of identifying and punishing those responsible for any form of physical and psychological attacks. The main purpose of such an investigation is to ensure the effective implementation of the law preventing such attacks and to hold the perpetrators including public officers accountable (see *Cezmi Demir and Others*, § 110).

104. Otherwise, despite the importance attached to it, Article 17 of the Constitution, which imposes an absolute prohibition on the prohibition of ill-treatment, would become ineffective in practice, and in some cases, it would ensure those responsible to be not accountable for the impugned incident by taking advantage of *de facto* immunity, thereby leading to infringements of the individuals' rights in similar way (see *Tahir Canan*, § 25). The mere award of compensation at the end of administrative or judicial investigations and proceedings conducted into such incidents does not provide effective deterrence for the prevention of similar incidents. Nor is it sufficient for the elimination of the aggrievement of the persons.

105. In order for a criminal investigation to be effective and sufficient, it is required that the investigative authorities must act *ex officio* and gather all the evidence capable of clarifying the incident and identifying those responsible without waiting for a criminal complaint by the victim. Therefore, investigations must be conducted with due diligence and promptness, as well as must be in-depth, as required by the severity of the alleged violation of the prohibition of ill-treatment. In other words, the investigation authorities must immediately take an *ex officio* step so as to have a good understanding of the incidents and refrain from relying on swift and unfounded conclusions, with a view to concluding the investigation and justifying their decisions (see *Cezmi Demir and Others*, §§ 114).

2. Application of Principles to the Present Case

106. In the present case, it appears that the report issued by the police officers did not provide any explanation as to the tear gas guns and ammunitions, as well as the amount of tear gas used during the police intervention. Nor does the investigation file contain any information and document to the effect that an inquiry was conducted into these matters. It also appears that no incident scene investigation was conducted so as to inquire and obtain material evidence; and that the subsequent situation at the incident scene was not investigated.

107. It has been observed that the applicants' complaints with respect to the police officers were not investigated separately and were adjudicated by a decision issued in relation to the investigation conducted against the applicants; and that this decision was also based on the impugned report drawn up by the police officers concerned. The public prosecutor's office reached a conclusion without conducting an inspection into the incident scene, discussing the necessity of the use of gas in an indoor space and taking the statements of the police officers having involved in the incident so as to question the grounds relied on by these officers in using force. It is not possible to say that such an investigation was conducted in due diligence and seriousness as required by Article 17 § 3 of the Constitution.

108. On the other hand, it appears that in the written instructions given to the police officers by the authorities on the basis of the circular of the relevant Ministry, it is ordered that video footage be taken during the use of tear gas so as to prevent the submission of unreal or unsubstantiated allegations of disproportionate use of force. It should be noted that such video footages have an important function not only for elucidating the conditions under which the impugned incident took place, but also for precluding the police officers from applying unnecessary and disproportionate force. It also appears from the statement given by the police officer Ş.T. in his capacity as a complainant that a video footage was taken when the banner was unfurled; but he provided no other information as to the subsequent stage of the impugned incident. In this sense, the applicants alleged that such a video had been recorded during the incident; but it had been discontinued when the police officers had started to apply force. The investigation authorities failed to inquire

whether these allegations raised by the applicants had been accurate, in other words, whether there was a video footage of the incident.

109. These deficiencies in the collection of evidence in the investigation had deep effects on the sufficiency of the investigation. However, the obligation to conduct an investigation as required by the prohibition of ill-treatment necessitates the elucidation of the particular circumstances of the incident. This obligation requires not to address all investigation-related quests raised by the victims, but rather to research the allegations which may affect the course of the investigation and would contribute to the establishment of the material truth. Along with these deficiencies, the conclusion of the investigation process based on the report issued by the police officers intervening in the impugned incident demonstrates that the investigation was not conducted with due diligence and the investigation authorities did not make a serious effort to reveal the material truth.

110. In view of all these considerations, it has been concluded that no effective criminal investigation, as required by the prohibition of treatment incompatible with human dignity under Article 17 of the Constitution, was conducted in the present case.

111. Consequently, the Court has found a violation of the procedural aspect of the prohibition of treatment incompatible with human dignity.

B. Alleged Violation of the Freedom of Expression

1. As regards the Applicant Doğuş Yavuz

112. The applicant maintained that initiation of criminal proceedings against him for having unfurled a banner, content of which did not indeed constitute an offence, had been in breach of the freedom of expression safeguarded by Article 26 of the Constitution.

113. The applicant, arriving in front of the Party premises following the impugned incidents, was arrested while trying to prevent his friends' being taken into police custody by being subjected to gradual force which was not considered to fall under the prohibition of ill-treatment. Although a criminal case was launched against all applicants including Doğuş Yavuz for allegedly having committed a criminal act by unfurling a banner on

the Party premises and chanting slogans, all of them were acquitted of the imputed offences on general grounds. However, the incumbent first instance court failed to make an assessment in the specific context of the applicant.

114. Article 48 § 2 of Code no. 6216 on the Establishment and Rules of Procedure of the Constitutional Court, dated 30 March 2011, explicitly sets forth that the Constitutional Court shall declare inadmissible the manifestly ill-founded applications. In this sense, individual applications involving no interference with any fundamental rights and freedoms may be deemed to be manifestly ill-founded (see *Hikmet Balabanoğlu*, no. 2012/1334, 17 September 2013, § 24).

115. In the present case, it has been observed that the criminal case was filed against the applicant not on account of expression of any thought, but erroneously. Therefore, it has been concluded that as he was ultimately acquitted of the imputed offence and was not ill-treated due to his thoughts, there was no breach of his freedom of expression.

116. Consequently, the Court has declared this part of the application inadmissible for *being manifestly ill-founded* without a further examination as to the other admissibility criteria.

2. As regards the Other Applicants

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

117. The applicants maintained that the issuance of a search and seizure warrant by the chief public prosecutor's office with respect to a banner which indeed fell within the boundaries of criticism and did not therefore constitute an offence, the removal of the impugned banner through the use of force to the extent that would constitute an ill-treatment, as well as their being taken into police custody and the initiation of criminal proceedings against them for expression of their thoughts, which did not constitute an offence, had been in breach of the freedom of expression safeguarded by Article 26 of the Constitution.

118. The Ministry stated, in its observations, that the freedom of expression safeguarded by Article 26 of the Constitution and Article 10 of

the European Convention on Human Rights ("the Convention") was not an unlimited right and that it might be subject to certain limitations on the basis of legitimate aims set forth in the Constitution and the Convention. It accordingly noted that the impugned interference with the applicants' freedom of expression was intended for maintaining public order and must be therefore considered legitimate within the meaning of Article 26 § 2 of the Constitution.

b. The Court's Assessment

119. Article 26 of the Constitution, titled *"Freedom of expression and dissemination of thought"*, in so far as relevant, reads as follows:

> *"Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities…*
>
> *The exercise of these freedoms may be restricted for the purposes of … public order, …, protecting the reputation or rights … of others ….*
>
> *The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law."*

i. Admissibility

120. The alleged violation of the freedom of expression must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

ii. Merits

(1) Existence of an Interference

121. Under the particular circumstances of the present case, the removal of the banner unfurled by the applicants at the premises of a political party -of which they were a member- by use of force undoubtedly constitutes an inference with the freedom of expression.

(2) Whether the Interference Constituted a Violation

122. According to the documents submitted to the Court, the applicants were intervened with by the police officers for unfurling a banner including the statements *"Murderer, Thief AKP (Justice and Development Party)"* on the window of the provincial premises of the Freedom and Solidarity Party and chanting slogans making insulting remarks towards the ruling party and the Prime Minister. The chief public prosecutor's office considered that the applicants impaired the peace and tranquillity of the meeting held by the ruling party at the same hours by unfurling the impugned banner and slogans, as well as insulted the Prime Minister.

123. Article 30 of Law no. 2911, which prescribes punishment for the impairment of peace and tranquillity of a meeting or march, and Article 125 of Law no. 5237, which prescribes punishment for the insults against public officers, are the legal basis of the impugned interference in the present case. Besides, the interference pursued two legitimate aims, namely the maintenance of public order and protection of the rights of others. What should be ascertained at this stage is whether it was an interference compatible with the requirements of a democratic society.

124. Freedom of expression enshrined in Article 26 of the Constitution constitutes one of the main pillars of a democratic society and among the conditions *sine qua non* for the progress of the society and the improvement of individuals (see *Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, § 69; and *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, §§ 34-36).

125. Freedoms of expression is applicable to everyone and of vital importance for the proper functioning of democracy (see *Bekir Coşkun*, §§ 34-36). Therefore, any interference with the freedom of expression may be considered to be *compatible* with the requirements of a democratic society only when it meets a pressing social need and is proportionate (see *Bekir Çoşkun* [Plenary], §§ 53-55; *Mehmet Ali Aydın*, §§ 70-72; and the Court's judgment no. E.2007/4 K.2007/81, 18 October 2007). Any measure constituting an interference may be considered to meet a pressing social need provided that it is suitable for achieving the pursued aim and appears to be the last resort likely to be used as well as to be the most lenient measure likely to be applied (see, *mutatis mutandis*, *Bekir Coşkun*, § 51;

Mehmet Ali Aydın, § 68; and *Tansel Çölaşan*, no. 2014/6128, 7 July 2015, § 51). Proportionality means that a fair balance be struck between the rights and interests of the given person and the public interests or, if the interference is intended for protecting the others' rights, the rights and freedoms of other individuals (see, *mutatis mutandis*, *Bekir Coşkun*, § 57; *Tansel Çölaşan*, § 46, 49 and 50; and *Hakan Yiğit*, no. 2015/3378, 5 July 2017, §§ 59 and 68).

126. It has been stated several times that any interference with the freedom of expression without a good cause or with any justification failing to fulfil the criteria set by the Court would be in breach of Article 26 of the Constitution. For an interference with the freedom of expression to be compatible with the requirements of a democratic society, the grounds relied on by public authorities must be relevant and sufficient (see, among any other judgments, *Kemal Kılıçdaroğlu*, § 58; *Bekir Coşkun*, § 56; *Tansel Çölaşan*, § 56). In other words, in the present case, the grounds relied on in interfering with the freedom of expression of the persons having a link with a political party are to be plausible and shown to be based on compelling reasons.

127. In the present case, it does not seem easy to ascertain due to which expressions uttered by them, the applicants were intervened with. In the report issued by the police officers on 19 March 2014, it was maintained that certain insulting expressions had been uttered towards the ruling party and the then Prime Minister. However, the first instance court did not reach such a conclusion. Besides, although it was stated that there had been a video footage taken during the impugned incidents and substantiating the police report, it was not submitted to the judicial authorities. In that case, the information and documents included in the file and the acknowledgement of the first instance court reveal that the main reason for the issuance of an arrest warrant and arrival of the police officers in the provincial premises of ÖDP is the banner unfurled by the applicants. In this sense, it was noted that a fire truck was called so as to remove the impugned banner; however, it could not be removed for being taken inside the building. Accordingly, the matter which must be assessed is the impugned act of unfurling a banner on the party premises.

128. The first instance court did not find the expressions *"Murdered, Thief AKP"* on the banner, which were directed at the AKP, provocative.

According to the first instance court, the impugned banner did not impair the peace and tranquillity of the AKP's meeting.

129. It appears that the banner, the main reason giving rise to the impugned incidents, contained two harsh statements, which were in the form of a value judgment, directed at the ruling party, AKP. One of the said statements was "thief" which implied that the ruling party was involved in corruption. In democratic regimes, the question whether the total welfare in the country is distributed fairly among all the society is the leading matter of public interest. Individuals and groups may voice their complaints such as the poor functioning of the economy-regulatory mechanisms, seeking rent and corruption as well as ask the government to account and the administration to be transparent as far as possible only in democratic regimes where thoughts can be expressed without any restraint.

130. The second statement directed at the AKP, which was in the form of a value judgment, was *"murdered"*. One of the most significant issues on the agenda is to put an end to the violent and terrorist acts performed by the PKK and taking place in Turkey for a long time. PKK was at the relevant time, and currently is, the primary threat to the national security. On the other hand, certain sections of the society criticise the security-oriented counter-terrorism policy adopted by the government, notably question the recourse to harsh security measures. Those who support the adoption of counter-terrorism methods, which are not security-oriented, assert that the State and naturally the ruling party exercising the state power are responsible for the deaths taking place during the counter-terrorism activities. In this sense, describing the ruling party as *"murderer"* should be considered as the harshest form of expressing the dissatisfaction with the current security policies.

131. However, the fine line between the criticism of the counter-terrorism policies of the State and the support and legitimization of the acts and activities of a terrorist organisation must be always considered. Given the particular circumstances of the present case, it has been observed that there is no finding to the effect that the impugned statement was expressed so as to justify the violent acts of the PKK terrorist organisation.

132. In the present case, on the day when the impugned incidents took place, tens of thousands of AKP supporters arrived in Edirne to attend the AKP meeting and thereby created a huge crowd at the meeting place. The statements on the impugned banner may be considered to offend the supporters of the AKP. However, it must be recalled that freedom of expression applies not only to information and ideas that are accepted or considered harmless or irrelevant by the society, but also to those that offend, shock or disturb (see *Emin Aydın (2)*, no. 2013/3178, 25 June 2015, § 35). In its several judgments, the Court has noted that freedom of expression should be interpreted broadly to allow for exaggeration and even provocation to a certain extent (see *Ali Suat Ertosun*, no. 2013/1047, 15 April 2015, § 66; *Zübeyde Füsun Üstel and Others* [Plenary], no. 2018/17635, 26 July 2019, § 102).

133. It has been concluded that these notions are a part of the style used by those who unfurled the banner, which was intended for causing polemics and triggering severe reactions (in the same vein, see *Zübeyde Füsun Üstel and Others*, § 103). It has been previously stated in many occasions that the use of harsh statements by the politicians towards the social and political actors, notably towards their opponents, may be deemed as a part of their purpose to consolidate their supporters (see *Kemal Kılıçdaroğlu*, § 65).

134. The critical thoughts, which include the impugned statements of *"thief"* and *"murderer"*, were expressed mainly in a furious tone. It may be considered that the applicants' aim was to shock not only the authorities but also the society so as to voice their wish for the discontinuation of the violent acts taking place for a long time and express their dissatisfaction due to financial developments (see, for a judgment whereby the harsh statements against the counter-terrorism policies are assessed, *Zübeyde Füsun Üstel and Others*, § 103).

135. The impugned banner was unfurled on the provincial premises of a political party during the election process. Article 68 § 2 of the Constitution sets forth that political parties are indispensable elements of a democratic political life. They are not only the means enabling the public to participate in politics but also a fundamental element and assurance of pluralist politics. Political parties, which have an unalienable role and

gravity in the guidance of decision-making processes and in the use of political power, and democracy are interrelated and complementary institutions. As a result, in today's contemporary democracies, the State's policies are designated through obvious struggle among the political parties.

136. As a requsite of their indispensible singificance for democracy, political parties are laid down, in a comprehensive manner, in the Constitutions and the laws. One of these statutory arrengements is the provision which allows for hanging a notice on the premises of political parties, which is closely relevant to the settlement of the dispute in the present case. In Article 60 –titled *"Venues for Announcements and Advertisements"*- of Law no. 298 on the Basic Provisions on Elections and Voter Registers, dated 26 April 1961, certain in-depth arrangements are laid down. In paragraph 1 thereof, it is set forth that party flags, banners, posters, placards and similar materials may be unfurled or posted up outside the premises of political parties and at the offices of the candidates from the start date of election to the date when the electioneering process ends. The same paragraph also allows the political parties to unfurl and post up party flags, banners, posters, placards and similar materials at their headquarters, as well as at their provincial, district and county premises.

137. In the present case, it should be taken into consideration that the impugned banner was hanged outside the Edirne provincial premises of ÖDP prior to the forthcoming local elections. It is explicit that in the light of the consideration that Law no. 298 regards the outer side of political party premises as a venue for continuous propaganda, the authorities should make more rigorous assessments while intervening with such a banner.

138. According to the police reports, indictment and other documents included in the file, it has been considered that the impugned police intervention was intended essentially to prevent the disturbance of the peace and tranquillity of those gathering to attend the meeting held by the AKP. However, as a requisite of their unalienable importance for the contemporary democracies, the acts of expressing and disseminating any statements which do not pose a threat to public order and incite to violence must be tolerated. Competent authorities may take measures to eliminate

the threats against the public order only if they are real (see *Eğitim ve Bilim Emekçileri Sendikası and Others* [Plenary], no. 2014/920, 25 May 2017, § 81).

139. In the present case, neither the public prosecutor nor the first instance court issuing the seizure warrant could demonstrate that the impugned banner had provoked or had the potential to provoke the people gathering on that day and that the banner was, in its content, instigating, or might lead to the escalation of conflicts and disturb public order. Besides, the incumbent criminal court dealing with the applicants' case concluded that the impugned banner was not of a nature that would disturb the peace and tranquillity of a meeting, pointing out that the AKP meeting venue was about 2 km away from the ÖDP's premises.

140. For an interference with the expression of a thought, which has not yet turned into a provocation or could not be proven so, it must be demonstrated that such expression has posed a threat, to a certain extent, under the particular circumstances of a given case. Expression of thoughts which are conducive to raising awareness of, or encouraging, those who are ready to commit acts considered to constitute an offence in the legal system by their very nature or content so as to damage the State, intimidate the society or agitate the ongoing social conflicts or which increase the risk of committing an offence may be considered jeopardous to the extent that would incite aggression.

141. In the light of all available information and documents, it has been concluded that in the present case, due to the impugned interference with the applicants' expression of thought by unfurling a banner, those concerned faced an arbitrary interference by public authorities based on certain assumptions in exercising their freedom of expression safeguarded by the Constitution. To regard any expression of thought as an explicit and ongoing threat, based on certain abstract considerations in the absence of any concrete data, would amount to an excessive interpretation. Otherwise, it would potentially impose a constraint on several constitutional rights and freedoms, notably the freedom of expression, on the basis of assumptions. This would render impossible the public debates and expression of thoughts.

142. In the present case, the Court has found no element which demonstrated that the banner unfurled by the applicants had posed a threat against public order or had an offensive content. In that case, what remains to be discussed is the criticism directed towards a political party by statements that may be regarded as *shocking* and *disturbing* for certain sections of the general public.

143. Certain principles have been set and adopted regarding the criticisms directed towards public authorities or public policies (see *Zübeyde Füsun Üstel and Others*, §§ 104-109). Political parties are not organs that wield public power. However, it is obvious that notably a political party being in power is, for significantly determining the public policies, under a broader obligation to tolerate the criticisms against its policies as well as the expression of thoughts not in support of these policies, regardless of whether such criticisms and thoughts are acceptable or not (see, in the context of the public authorities' obligation to tolerate criticisms, *Mehmet Ali Aydın*, § 69; and *Ayşe Çelik*, § 53).

144. In this sense, individuals should not be imposed any sanction due to their opinions and thoughts criticising the anti-terror policies adopted by a ruling political party, regardless of how severe they are (see, *mutatis mutandis*, *Zübeyde Füsun Üstel and Others*, § 105). Besides, the acceptable level of criticism against political parties –notably those in power as they determine and steer public policies– is much wider than that of an individual. In a democratic system, it should be always taken into consideration that the thoughts and policies of political parties are also subject to strict scrutiny of the public (see, for the assessments that public authorities are also subject to strict scrutiny of the public, *Ayşe Çelik*, § 54; *Zübeyde Füsun Üstel and Others*, § 106; *Bekir Coşkun*, § 66; and *Ergün Poyraz (2)* [Plenary], no. 2013/8503, 27 October 2015, § 69).

145. Political parties and especially those using the facilities of being a ruling party always have the opportunity to reply and react the attacks and criticisms directed towards them. However, the bodies wielding public power should abstain from initiating a criminal investigation and prosecution due to such unjust verbal attacks towards political parties, unless they incite violence (in the same vein, see *Zübeyde Füsun Üstel and Others*, § 107).

146. Lastly, it appears that despite the highly harsh nature of the statements in the impugned banner, they are a matter of public debate on an issue of public concern.

147. It is clear that the applicants, as a member of a political party, have the freedom to get and share information with respect to matters concerning corruption and counter-terrorism policies, on condition of being subjected to certain limitations and restrictions necessary in a democratic society. They preferred to exercise this right by writing a sentence which has currently become a stereotyped slogan on a banner.

148. Having made a comprehensive examination, the Court has considered that the impugned interference with the applicants' freedom of expression, by resorting to force, for merely preventive purposes and in a manner that would amount to ill-treatment was not in the form of the most lenient measure of last resort. It has concluded that the impugned interference did not meet a pressing social need and was not proportionate, thus being *incompatible with the requirements of a democratic society*.

149. Consequently, the Court has found a violation of the freedom of expression safeguarded by Article 26 of the Constitution.

Mr. Serdar ÖZGÜLDÜR, Mr. Burhan ÜSTÜN, Mr. Muammer TOPAL, Mr. Rıdvan GÜLEÇ, Mr. Recai AKYEL and Mr. Selahaddin MENTEŞ did not agree with this conclusion.

C. Application of Article 50 of Code no. 6216

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

> *"1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled…*
>
> *2) If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the*

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

151. The applicants requested the Court to find a violation, order a retrial and award 15,000 Turkish Liras ("TRY") to each of them as compensation.

152. In its judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court indicates the general principles as to how a violation of any fundamental right, which has been found established by the Constitutional Court, and its consequences would be redressed. In another judgment, the Court also mentions the consequences of the failure to comply with a violation judgment as well as with the principles set in the abovementioned judgment and accordingly notes that this situation would constitute a continuing violation and also lead to the violation of the respective right for the second time (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

153. Accordingly, in case of a finding of a violation of any fundamental right and freedom within the scope of an individual application, the basic rule for redressing the violation and its consequences is to ensure restitution as much as possible, that is to say, to ensure restoration to the former state existing prior to the violation. To that end, it must be primarily required to find the source of the violation, to put an end to the continuing violation, to eliminate the decision or the act giving rise to the violation or their consequences, to compensate for the pecuniary and non-pecuniary damages resulting therefrom, as well as to take the other measures deemed necessary in this respect (see *Mehmet Doğan*, §§ 55, 57).

154. Therefore, in cases where the Court orders a retrial in conjunction with its judgment finding a violation, the relevant court has no discretion to discuss the existence of the ground necessitating a retrial, which is different from the venue of re-opening of the proceedings set forth in the procedural laws. As a matter of fact, in cases where a violation is found, it

is not the inferior courts but rather the Court that has found the violation to enjoy the discretion regarding the necessity of a retrial. The inferior court is obliged to take the necessary actions to eliminate the consequences of the violation in accordance with the judgment finding a violation, which was issued by the Court (see *Mehmet Doğan*, § 59).

155. In the present case, it has been held that there were violations of the substantive and procedural aspects of Article 17 § 3 of the Constitution, as well as of Article 26 thereof, due to the use of disproportionate force by police officers and the lack of an effective investigation. It has been revealed that the violation of the substantive aspect of the prohibition of treatment incompatible with human dignity resulted from the acts performed by the police officers; the violation of the freedom of expression resulted from the decisions issued by the chief public prosecutor's office within the scope of the investigation and the acts of the police officers; whereas the violation of the procedural aspect of the prohibition of treatment incompatible with human dignity resulted from the investigation conducted by the chief public prosecutor's office and the decision issued in this regard.

156. In this sense, there is a legal interest in conducting a reinvestigation and initiating a criminal case against the police officer(s) responsible for the impugned incident, with a view to redressing the consequences of the violation of the prohibition of treatment incompatible with human dignity. The reinvestigation to be conducted to that end is aimed at redressing the violation and its consequences pursuant to Article 50 § 2 of the Code no. 6216. In this regard, the step required to be taken by the chief public prosecutor's office is to revoke its decision of non-prosecution, which gave rise to the violation in the present case, and to bring a criminal case against the police officer(s) responsible after obtaining certain incomplete evidence so as to comply with the judgment finding a violation. It has been therefore held that a copy of the violation judgment be sent to the Edirne Chief Public Prosecutor's Office (investigation file no. 2014/3145) for a reinvestigation.

157. The applicants, except for the applicant Doğuş Yavuz, must be severally awarded a net of amount of TRY 15,000 in compensation for the non-pecuniary damage which was sustained by them on account of the violations of the substantive and procedural aspects of the prohibition of

treatment incompatible with human dignity, as well as of the freedom of expression and which could not be redressed by merely conducting a reinvestigation.

158. The total litigation costs of TRY 3,206.10 including the court fee of TRY 206.10 and counsel fee of TRY 3,000, as established on the basis of the documents in the case file, must be reimbursed to the applicants, other than Doğuş Yavuz.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 6 February 2020:

A. 1. UNANIMOUSLY that the alleged violations of the prohibition of ill-treatment and freedom of expression, in so far as relevant to the applicant Doğuş Yavuz, be DECLARED INADMISSIBLE for *being manifestly ill-founded*;

2. UNANIMOUSLY that the alleged violations of the prohibition of ill-treatment and freedom of expression, in so far as relevant to the other applicants, be DECLARED ADMISSIBLE;

B. 1. UNANIMOUSLY that as regards the other applicants, the substantive aspect of the prohibition of treatment incompatible with human dignity safeguarded by Article 17 § 3 of the Constitution was VIOLATED;

2. UNANIMOUSLY that as regards the other applicants, the procedural aspect of the prohibition of treatment incompatible with human dignity safeguarded by Article 17 § 3 of the Constitution was VIOLATED;

3. By MAJORITY and dissenting opinions of Mr. Serdar ÖZGÜLDÜR, Mr. Burhan ÜSTÜN, Mr. Muammer TOPAL, Mr. Rıdvan GÜLEÇ, Mr. Recai AKYEL and Mr. Selahaddin MENTEŞ, that as regards the other applicants, the freedom of expression safeguarded by Articles 26 of the Constitution was VIOLATED;

C. That a copy of the judgment be SENT to the Edirne Chief Public Prosecutor's Office for a reinvestigation so as to redress the consequences of the violation of the prohibition of treatment incompatible with human

dignity;

D. That a net amount of TRY 15,000 be PAID severally to the applicants, save for the applicant Doğuş Yavuz, in compensation of non-pecuniary damage; and other compensation claims be DISMISSED;

E. 1. That the total litigation costs of TRY 3,206.10, including the court fee of TRY 206.10 and the counsel fee of TRY 3,000, be REIMBURSED JOINTLY to the applicants, save for the applicant Doğuş Yavuz;

2. That the court expense incurred by the applicant Doğuş Yavuz be COVERED by the applicant;

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

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

DISSENTING OPINION OF JUSTICES SERDAR ÖZGÜLDÜR, BURHAN ÜSTÜN, MUAMMER TOPAL AND RIDVAN GÜLEÇ

In the present case, the applicants gathered at a provincial premises of a political party on the date when another political party held an open-air meeting in the same province for the forthcoming local elections. They unfurled a banner directed towards a political party through the window of that premises. The incumbent public prosecutor issued a warrant for a search at the party premises and seizure of the said banner for the purpose of preventing probable social disturbances at the meeting venue where several people came from the other provinces. According to the report drawn up by the police officers conducting the public prosecutor's instruction, those who were at the party premises also chanted slogans against the political party to hold a meeting at the same province, as well as against its chairman. Given the highly probable risk of disturbing public order, the police officers' acts of removing the impugned banner and

prevention the chanting of the impugned slogans had a legitimate basis. It could not be therefore said that the applicants' freedom of expression had been violated. Although at the end of the proceedings against the applicants for insulting the Prime Minister by way of unfurling a banner and chanting slogans, the inferior court acquitted the applicants, it appears that the inferior court failed to make an assessment as to the impugned act of insulting, which was found established through the content of the report drawn up by the police officers and the statements of the witnesses heard by the public prosecutor's office. The inferior court should have issued a favourable or unfavourable decision with respect to the acts established in the indictment. However, it failed to do so. Therefore, given the explicit deficiency of judgment on the part of the first instance court, the ground relied on in that decision could not be taken as a basis for the assessment with respect to the freedom of expression. That is because in its decision, the inferior court stated that the applicants' unfurling a banner had not been a means and act, which could disturb a peace and tranquillity of an open-air meeting to be held by a political party, and was not of a nature which would humiliate or degrade any person or party. However, we do not find the inferior courts' assessments accurate. We consider that the statements and slogans "murderer" and "thief" were not of an "abstract" value judgment but of explicitly insulting and invective nature for being targeted at a political actor and party. Although the politicians and political legal entities are reasonably expected to tolerate criticism, to a certain extent, in consideration of the status they hold and political duties they perform, it is undoubted that the remarks and expressions going beyond criticism and explicitly constituting a defamation would be prejudicial to their honour and dignity. In other words, the honour and dignity of politicians and political parties should be also protected. In striking a fair balance within the meaning of the freedom of expression, such moral values should be afforded much protection against the expressions and conducts that would eliminate or render meaningless these values. The humiliating and insulting expressions or acts are not under the protection of the freedom of expression. We cannot accept the consideration to the effect that the impugned expressions "thief" and "murderer" are in the form of a severe political criticism that must be tolerated. As the interference with the applicants' freedom of expression was based on

the aim of maintaining public order, it pursued a legitimate aim within the meaning of Article 26 § 2 of the Constitution where the freedom of expression is enshrined. For these reasons, we reach the conclusion that there was no violation of the applicants' freedom of expression. Therefore, we disagree with the majority that found a violation of the said freedom.

DISSENTING OPINION OF JUSTICES RECAİ AKYEL AND SELAHADDİN MENTEŞ

We disagree with the majority finding a violation of the freedom of expression and dissemination of thought due to the removal by the police officers, of a banner unfurled at the provincial premises of a political party, within the scope of the measures taken prior to the open-air meeting to be held before local elections with the attendance of the Prime Minister.

The freedom of expression and dissemination of thought is not among the core rights very essence of which cannot be infringed. Accordingly, it may be subject to certain limitations for the purpose of maintaining public order. We consider that the removal of a banner unfurled at the provincial premises of a political party by the police officers within the scope of the measure taken to preserve public order prior to an open-air meeting where the Prime Minister would attend should have been regarded to fall into scope of the acts performed by the public authorities to maintain public order and thus considered reasonable.

Several people from the surrounding provinces attended an open-air meeting, which was held on the occasion of an election and where the Prime Minister was also present, and thus arrived in the meeting venue from various directions. Those, who were the supporters of that party, may reasonably be disturbed when they would become aware of a banner insulting them, which was unfurled at the premises of another political party. It is psychological fact that the group of individuals gathering on the date when the meeting would be held for a certain purpose may be excited and emotional. It is also another well-known fact that the crowds are driven by mass psychology and open to inducements and provocations.

To ensure elections, long-term electoral activities and open-air meetings to be held in peace and tranquillity and to secure the maintenance of the welfare throughout the province after the elections, the public authorities in the relevant province must act in a responsive and diligent manner. There are steps required to be taken prior to, in the course of and subsequent to a meeting with a view to ensuring the political party meetings to be held in peace. Even the slightest negligence and vulnerability on the part of the public authorities in maintaining public safety and peace may lead to severe security problems.

Therefore, the removal, of a banner unfurled at a provincial premises of a political party, by police officers within the scope of the security measures taken to maintain public order before an open-air meeting held on the occasion of local elections and with the participation of the Prime Minister should have been considered as a security measure taken to maintain public order and safety during the meeting day. Therefore, it should have been considered not to constitute a violation of the freedom of expression and dissemination of thought.

In consideration of the predominant purpose of maintaining public order and safety, we disagree with the majority finding a violation of the freedom of expression and dissemination of thought.

RIGHT TO PROPERTY
(ARTICLE 35)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

FARMASOL TIBBİ ÜRÜNLER SAN. VE TİC. A.Ş. (2)

(Application no. 2017/37300)

15 January 2020

On 15 January 2020, the First Section of the Constitutional Court found a violation of the right to property safeguarded by Article 35 of the Constitution in the individual application lodged by *Farmasol Tıbbi Ürünler San. ve Tic. A.Ş. (2)* (no. 2017/37300).

THE FACTS

[8-20] The applicant company engaged in the trade of medicinal products 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 an objection by paying the objection fee of 6,831 Turkish liras. The Public Procurement 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 Public Procurement Authority. Thereupon, the applicant brought an action against it 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 company lodged an individual application on 15 November 2017.

V. EXAMINATION AND GROUNDS

21. The Constitutional Court ("the Court"), at its session of 15 January 2020, examined the application and decided as follows:

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

22. The applicant company submitted the following: the matter of debate in the case giving rise to the judgment dated 16 June 2011 of the Court was whether the charging of a fee for objection (*itirazen şikâyet bedeli*,

hereinafter "the objection fee") was unlawful. In the case giving rise to the present application, a dispute emerged due to the refusal to return the objection fee which it had paid despite the fact that the applicant company was found to be in the right in its complaint. In a ruling dated 30 June 2017 concerning a similar dispute, the Chamber of the Regional Administrative Court held that the objection fee could be recovered from the tendering authority. The applicant company argued that the refusal to return the objection fee - despite the fact that its objection before the Public Procurement Authority had been accepted to be in accordance with the law - was disproportionate and, thus, complained of an alleged violation of the right to property.

23. The applicant company further submitted that the objection application (*itirazen şikâyet başvurusu*) was an avenue it had to exhaust prior to filing an action. If it had directly filed an action, it would have paid 250 Turkish liras (TRY) in litigation costs. On the other hand, the objection fee was TRY 6,381; therefore, it was able to have the unlawfulness established by incurring a cost that is 25 times more. Claiming that the refusal to return the fee that it had paid - despite having been found in the right in the dispute - amounted to a disproportionate interference, the applicant company alleged that a decision was rendered in contravention of the case-law and its right to a fair trial was violated. Relying on similar grounds, the applicant also complained of an alleged breach of the principle of equality.

24. In its observations, the Ministry indicated the following: the legal basis for the charging of the objection fee, which the applicant Company paid when submitting its objection application with the Public Procurement Authority, was the provision under Article 53 § (j) (2) of the Law no. 4734. In the case that was filed for annulment of the said provision, the Court had not found it to be in breach of the Constitution (see the Court's constitutionality review decision no. E.2009/9 K.2011/103, 16 June 2011). The Ministry added that, in rendering that judgment, the Court had taken note of the purpose of the legislative provision in question and concluded that this rule had not been put in place in a disproportionate manner. After stressing that fact, the Ministry opined that these points should be taken into consideration in the assessment of the applicant's complaints.

25. In their petition of reply, the applicant's representative indicated that the Ministry's observations did not correspond to the allegations they raised in the application form and that the said decision of the Court did not constitute a precedent in respect of the present application. In their counter statements, they also drew attention to the Ministry's avoidance from submitting observations with regard to the issue of application of the Code of Administrative Procedure (Law no. 2577, dated 6 January 1982).

B. The Court's Assessment

26. Article 35, entitled "Right to property", of the Constitution reads as follows:

> *"Everyone has the right to own and inherit property.*
>
> *These rights may be limited by law only in view of public interest.*
>
> *The exercise of the right to property shall not contravene public interest."*

27. The Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The applicant company, in addition to an alleged violation of the right to property, also complained, on the basis of the same grounds, of alleged violations of the right of access to a court and the principle of equality. Having understood that the essence of the applicant's complaint concerns the refusal to return the objection fee despite the fact that its objection before the Public Procurement Authority had been accepted to be in accordance with the law, the Court has concluded that the allegations of violation should be examined within the scope of the right to property.

1. Admissibility

28. The complaint concerning an alleged violation of the right to property is not manifestly ill-founded and there exists no ground to declare it inadmissible, therefore it must be declared admissible.

2. Merits

a. Existence of Property

29. Considering that the impugned objection fee was collected out of the applicant company's assets, there is no doubt about the existence of property within the meaning of Article 35 of the Constitution in the present case.

b. Existence of an Interference and its Type

30. The right to property safeguarded as a fundamental right under Article 35 of the Constitution is such a right that enables an individual to use the thing he owns, benefit from its fruits, and dispose of that thing provided that he does not prejudice the rights of others and respects the restrictions imposed by law (see *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 32). Therefore, restricting any of the owner's powers to use his property, benefit from its fruits, and dispose of the property constitutes an interference with the right to property (see *Recep Tarhan and Afife Tarhan*, no. 2014/1546, 2 February 2017, § 53).

31. In view of Article 35 of the Constitution read together with other articles that touch upon the right to property, the Constitution lays down three rules in regard to interference with the right to property. In this respect, the first paragraph of Article 35 of the Constitution provides that everyone has the right to property, setting out *the right to peaceful enjoyment of possessions*, and the second paragraph sets the framework of interference with the right to peaceful enjoyment of possessions. Article 35 § 2 of the Constitution lays down the circumstances under which the right to property may be restricted in general and also draws out the general framework of conditions of *deprivation of property*. The last paragraph of Article 35 of the Constitution forbids any exercise of the right to property in contravention to the interest of the public; thus, it enables the State to control and regulate the enjoyment of property. Certain other articles of the Constitution also contain special provisions that enable the State to have control over property. It should further be pointed out that deprivation of property and regulation/control of property are specific forms of interference with the right to property (see *Recep Tarhan and Afife Tarhan*, §§ 55-58).

32. The collection of objection fee from the applicant company constitutes an interference with the right to property and this interference should be examined within the framework of the third rule concerning the control or regulation of the enjoyment of the property in the interest of the public.

c. Whether the Interference Constituted a Violation

33. Article 13 of the Constitution provides as follows:

> *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality."*

34. Article 35 of the Constitution does not envisage the right to property as an unlimited right; accordingly, this right may be limited by law and in the interest of the public. In interfering with the right to property, Article 13 of the Constitution must also be taken into consideration as it governs the general principles concerning the restriction of fundamental rights and freedoms. In order for the interference with the right to property to be in compliance with the Constitution, the interference must have a legal basis, pursue the aim of public interest, and be carried out in accordance with the principle of proportionality (see *Recep Tarhan and Afife Tarhan*, § 62).

i. Whether the Interference was Prescribed by Law

35. The first criterion required to be examined in case of an interference with the right to property is whether the interference had a legal basis in law. Where it is established that this criterion was not met, the Court will arrive at the conclusion that there has been a breach of the right to property, without holding any examination under the remaining criteria. For an interference to be prescribed by law, there must be sufficiently accessible, certain and foreseeable rules regarding the interference (see *Türkiye İş Bankası A.Ş.* [Plenary], no. 2014/6192, 12 November 2014, § 44;

Ford Motor Company, no. 2014/13518, 26 October2017, § 49; and *Necmiye Çiftçi and Others*, no. 2013/1301, 30 December 2014, § 55).

36. In the present case, the administration and inferior courts cited Article 53 § (j) (2) of the Law no. 4734 as the legal basis for the objection fee that gives rise to the present case. Indeed, this provision of law names the impugned objection fee as an item of revenue for the Public Procurement Authority. Seeing that the said provision of law is clearly accessible, foreseeable and certain, the Court has concluded that the interference based thereon satisfies the requirement of being prescribed by law. On the other hand, Law no. 4734 does not contain any stipulation as to whether the application fee shall be returned if the objection is found to be justified. This matter should be discussed in the context of the proportionality of the interference. Seeing that the said provision of law is clearly accessible, foreseeable and certain, the Court has concluded that the interference based thereon satisfies the requirement of being prescribed by law.

ii. Whether the Interference Pursued a Legitimate Aim

37. According to Articles 13 and 35 of the Constitution, the right to property may only be restricted in the interest of the public. In addition to providing the possibility of restricting the right to property as deemed necessary by the public interest and being a reason for the restriction, the notion of public interest envisages that the right to property cannot be restricted except for the interest of public and effectively protects the right to property by determining limits of the restriction in this respect. The concept of public interest is one that brings with it the margin of appreciation of the State bodies and it should be evaluated separately on the basis of each particular case as it does not fit a singular objective definition (see *Nusrat Külah*, no. 2013/6151, 21 April 2016, §§ 53, 56; and *Yunis Ağlar*, no. 2013/1239, 20 March 2014, §§ 28, 29).

38. Considering that, in the present case, the purpose of the collection of an objection fee by the Public Procurement Authority is to prevent superfluous applications and to ensure the effective functioning of the administrative process, there is no doubt that the fee requirement pursues a public interest aim (see, for similar considerations, the judgment no. E.2009/9 - K.2011/103, 16 June 2011).

iii. Whether the Principle of Proportionality was Observed

(1) General Principles

39. Lastly, the Court should examine whether there was a reasonable balance of proportionality between the objective sought by the interference with the applicant's right to property and the means used for achieving this objective.

40. The principle of proportionality (*ölçülülük*) comprises of three subprinciples, which are "*suitability*" (*elverişlilik*), "*necessity*" (*gereklilik*) and "*commensurateness*" (*orantılılık*). "Suitability" means that the prescribed interference is suitable for achieving the objective aspired for; "necessity" shall mean that the interference is absolutely necessary for that objective, that is when achieving such objective with a lighter intervention is not possible; and "commensurateness" shall refer to the need for striking a reasonable balance between the interference with the individual's right and the objective sought (see the judgments no. E.2011/111, K.2012/56, 11 April 2012; no. E.2014/176, K.2015/53, 27 May 2015; no. E.2016/13, K.2016/127, 22 June 2016, § 18; and *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 38).

41. Pursuant to the principle of proportionality, a fair balance must be struck between the public interest sought in restricting the right to property and the individual's rights. This fair balance will have been upset where it is found out that the applicant has personally borne an excessive burden. In the assessment of proportionality of the interference, the Court will take account of the burden imposed on the applicant from two perspectives: on the one hand, it will examine the importance of the legitimate aim sought to be achieved; and, on the other, it will have regard to the nature of the interference along with the behaviour of the applicant and the public authorities (see *Arif Güven*, no. 2014/13966, 15 February 2017, §§ 58, 60; and *Osman Ukav*, no. 2014/12501, 6 July 2017, § 71).

42. Placing the burden of covering the expenses incurred in administrative or judicial avenues of application on the person who caused them, i.e. the party who is found to be unjustified, may be considered as a proportionate interference. However, subjecting individuals to bear the burden of the expenses made due such administrative application or

proceedings despite the fact that they are found to be justified at the end of the process in question might render the interference with the right to property disproportionate. Lastly, the placement on persons of the burden of such administrative or judicial expenses must not, in any case, cause an excessive personal burden on the part of individuals when it is balanced against the public interest.

(2) Application of Principles to the Present Case

43. In the present case, it is clear that the collection of a fee from those who will apply for an objection, within the framework of the aim to prevent superfluous applications and to ensure the effective functioning of the administrative process, was *suitable* for achieving the aim of the interference. Considering the fact that the act carried out by the public authorities comprised merely of collection of the fee and the margin of appreciation afforded to the public authorities with regard to the determination of the most appropriate means to be used in the interference, it can be said that the interference was also *necessary*. For this reason, a deliberation should be held as to whether the interference was *commensurate*.

44. The applicant company complains not of paying an objection fee during its application but of the refusal to return this objection fee although it was found to be justified in its application.

45. In the case giving rise to the present application, upon the objection lodged therewith, the Public Procurement Authority decided in favour of the applicant company and decided to indicate a remedial action. The reason why the Public Procurement Authority decided to indicate a remedial action is the unlawful act performed by the administration that had held the tender. By virtue of the Law no. 4734, the bidders cannot bring an action without raising a complaint and subsequently filing an objection. The applicant had to pay an objection fee of TRY 6,381 to file an objection in order to ensure the establishment of the unlawfulness of the act performed by the administration. However, although the objection process resulted in a decision in favour of the applicant company and the impugned act of the tendering administration was found unlawful, the relevant fee was not returned to the applicant.

46. As indicated above, the purpose of the collection of an objection fee for the remedy of objection under the relevant law is to prevent superfluous applications and to ensure the effective functioning of the administrative process. Although the collection of a fee from the applicant company for an objection pursued the aim of protecting the above-mentioned public interest, the interference with the applicant's right to property - in the form of the failure to return the relevant fee in spite of the decision in its favour - must not place an excessive burden on the applicant.

47. The applicant could not bring an action [before a court] without primarily exhausting the administrative remedies prescribed in the legislation. If the applicant Company had been able to 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 litigation costs 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 litigation costs to be incurred in bringing an action before an administrative court. If the bidders are aware that the objection fee would not be returned to them even if their claim is found justified, they may refrain from having recourse to this remedy.

48. The applicant company, which had been forced to pursue administrative remedies due to the unlawful act conducted by the tendering administration, was not reimbursed the application fee it had paid despite being found justified in its complaint. As a result, the applicant company's assets suffered a loss equal to the amount of the fee in question. In the present case, the impugned interference with the right to property due to non-reimbursement of the objection fee to the applicant company despite the decision in its favour was disproportionate as the applicant company's interests were disregarded.

49. 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 Public Procurement Authority to which the fee had been paid, an excessive burden was placed on the applicant. Indeed, the impugned fee could easily be claimed from the relevant administration within the administrative process. It was incompatible with the procedural

safeguards inherent in the right to property to have the applicant assume this burden.

50. 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 - K.2011/103 of 16 June 2011, the said decision of the Court is not related to the reimbursement of the objection fee. In its decision, the Court has in fact discussed whether the collection of the objection fee was lawful.

51. In conclusion, the non-reimbursement of the fee that had been collected during the application for objection despite the eventual decision in favour of the applicant company placed an excessive personal burden on it. In the light of the above, the Court concludes that the fair balance which needed to be struck between public interest and the applicant's right to property was upset to the detriment of the applicant and that the interference was not proportionate.

52. For these reasons, the Court has found a violation of the right to property protected under Article 35 of the Constitution.

3. Application of Article 50 of Code no. 6216

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

> *"(1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled...*
>
> *(2) If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favour of the applicant or the remedy of filing a case before the general courts may be shown. The court, which is responsible for*

holding the retrial, shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."

54. The applicant requested a finding of violation and claimed compensation.

55. In its judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court indicates the general principles as to how a violation of any fundamental right, which has been found established by the Constitutional Court, and its consequences would be redressed. In another judgment, the Court also mentions the consequences of the failure to comply with a violation judgment as well as with the principles set in the abovementioned judgment and accordingly notes that this situation would constitute a continuing violation and also lead to the violation of the respective right for the second time (see *Aligül Alkaya and Others* (2), no. 2016/12506, 7 November 2019).

56. Accordingly, in case of a finding of a violation of any fundamental right and freedom within the scope of an individual application, the basic rule for redressing the violation and its consequences is to ensure restitution as much as possible, that is to say, to ensure restoration to the former state existing prior to the violation. To that end, it must be primarily required to find the source of the violation, to put an end to the continuing violation, to eliminate the decision or the act giving rise to the violation or their consequences, to compensate for the pecuniary and non-pecuniary damage resulting therefrom, as well as to take the other measures deemed necessary in this respect (see *Mehmet Doğan*, §§ 55, 57).

57. In cases where the violation resulted from a court decision or the court failed to redress the violation, the Court orders the communication of a copy of its judgment to the relevant court to conduct a retrial for the redress of the violation and its consequences, pursuant to Article 50 § 2 of Code no. 6216 and Article 79 § 1 (a) of the Internal Regulations of the Court. This statutory provision prescribes a compensatory remedy, which is specific to the individual application mechanism and requires a retrial for the redress of the violation, as distinct from the similar legal institutions available in the procedural law. Therefore, in cases where the

Court orders a retrial in conjunction with its judgment finding a violation, the relevant court has no discretion to discuss the existence of the ground necessitating a retrial, which is different from the venue of re-opening of the proceedings available in the procedural law. Accordingly, the court receiving such a judgment is legally obliged to conduct a retrial by virtue of the violation judgment rendered by the Court, without awaiting for any such request by the person concerned, and to take the necessary actions to redress the consequences of the continuing violation (see *Mehmet Doğan*, §§ 58, -59; *Aligül Alkaya and Others* (2), §§ 57-59, 66, 67).

58. Having examined the application, the Court has concluded that the right to property was violated. Thus, it has been understood that the violation stemmed from the act of the administration. Furthermore, the inferior courts were not able to remedy the violation, either. From this standpoint, it can be said that the violation also stemmed from a court decision.

59. In such cases, there is legal interest in holding a retrial in order to remove the consequences of the violation of the right to property. A retrial to be conducted in this scope aims to remove the violation and its consequences according to Article 50 § 2 of Code no. 6216, which contains a provision that is specific to the individual application mechanism. In this regard, what is to be done consists of deciding to hold a retrial and the delivery of a new decision at the end of a new trial to be conducted in line with the principles set out in the judgment finding a violation and be capable of remedying the reasons that has led the Court to arrive at the violation judgment. For this reason, a copy of the judgment must be sent to the Ankara 11th Administrative Court (no. E.2016/1996) for retrial.

60. As the finding of a violation and the ruling in favour of a retrial is considered to be capable of offering adequate redress, there is no need for awarding compensation.

61. The total litigation costs of TRY 3,257.50 including the court fee of TRY 257.50 and counsel fee of TRY 3,000, as established on the basis of the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 15 January 2020 that

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

B. The right to property safeguarded by Article 35 of the Constitution was VIOLATED;

C. A copy of the judgment be SENT to the Ankara 11th Administrative Court (no. E.2016/1996) for a retrial to remove the consequences of the violation of the right to property;

D. The applicant's claims for compensation be REJECTED;

E. The total litigation costs of TRY 3,257.50 including the court fee of TRY 257.50 and counsel fee of TRY 3,000 be REIMBURSED to the applicant;

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

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

BEDRETTİN MORİNA

(Application no. 2017/40089)

5 March 2020

On 5 March 2020, the Plenary of the Constitutional Court found a violation of the prohibition of discrimination, taken in conjunction with the right to property, in the individual application lodged by *Bedrettin Morina* (no. 2017/40089).

THE FACTS

[8-29] 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.

V. EXAMINATION AND GROUNDS

30. The Constitutional Court ("the Court"), at its session of 5 March 2020, examined the application and decided as follows:

A. The Applicant's Allegations

31. The applicant submitted that, although he had become entitled to receive old age pension by having paid his contributions pertaining to the period he had spent abroad in accordance with the legislative provisions applicable at the date of his request for crediting, this right of his was revoked nearly 6 years later on the ground that a portion of the period for which he had been credited pertained to the time prior to he acquired Turkish citizenship. According to the applicant, this practice was contravention of law as it deprived a Turkish citizen of the right to social security and created an unacceptable inequality between persons who acquired citizenship by birth and those who acquired it by a decision of the administration. The applicant complained that this practice, which was not only unjust but also in contravention of the prohibition of discrimination, deprived him of his right to social security, thereby violating the principle of equality, the right to property, and the right to a fair trial enshrined in the Constitution.

B. The Court's Assessment

32. Article 35 of the Constitution, titled "Right to property", reads as follows:

> *"Everyone has the right to own and inherit property.*
>
> *These rights may be limited by law only in view of public interest.*
>
> *The exercise of the right to property shall not contravene public interest."*

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

> *"Everyone is equal before the law without any discrimination based on language, race, colour, sex, political view, philosophical belief, religion, sect or similar other reasons.*
>
> *...*
>
> *State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings."*

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

35. Even if Article 10 of the Constitution is formulated as the "prohibition of discrimination", it is necessary to put the prohibition of discrimination into practice in an effective manner as the principle of equality has a normative value to be relied on in every case in the constitutional context. In other words, the principle of equality also contains the prohibition of discrimination as a substantial standard norm (see *Tuğba Arslan* [Plenary], no. 2014/256, 25 June 2014, § 108). It is not possible to examine the applicant's complaints concerning an alleged violation of the prohibition of discrimination in an abstract manner and it is necessary to address them in conjunction with other fundamental rights and freedoms enshrined in the Constitution and the Convention (see *Onurhan Solmaz*, no. 2012/1049, 26 March 2013, § 33). Thus, the complaint concerning an alleged violation of this right must also specify in respect of which right or freedom under the Constitution or Convention there was an alleged discrimination. However, there is no requirement to allege or prove that another right within the shared protective sphere of the Constitution and the Convention; it is sufficient and necessary if the subject matter of the dispute giving rise to the application falls within the ambit of other rights in this protective sphere.

36. The applicant lodged an individual application by complaining of alleged violations of the principle of equality, the right to property, and the right to a fair trial. Considering the application form and its annexes as a whole, the Court has understood that the applicant complained mainly that the fact that a different method was adopted - depending on the way of acquisition of citizenship - in crediting individuals for the period they spent working abroad led to an unjust and discriminatory treatment in entitlement to and payments of the [old age pension] pay. Therefore, the Court has found it appropriate to hold an assessment on the applicant's complaint in this regard from the standpoint of the prohibition of discrimination in the context of the right to property to which it relates.

Justices Mr. Serdar ÖZGÜLDÜR and Mr. Kadir ÖZKAYA expressed a dissenting opinion in this respect.

1. Admissibility

37. The alleged violation of the right to property must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

Justices Mr. Serdar ÖZGÜLDÜR and Mr. Kadir ÖZKAYA expressed a dissenting opinion in this respect.

2. Merits

38. Article 60 of the Constitution provides that "*Everyone has the right to social security. The State shall take the necessary measures and establish the organisation for the provision of social security*"; and Article 62 stipulates that "*The State shall take the necessary measures to ensure family unity, the education of the children, the cultural needs, and the social security of Turkish citizens working abroad, and to safeguard their ties with the motherland, and to help them on their return home*".

39. Article 62 of the Constitution points at the existence of the State's positive obligation in ensuring the social security of Turkish citizens who work in foreign countries. Indeed, by adopting Law no. 3201 in this connection, the legislature envisaged that certain persons working in foreign countries may receive old age pension on some conditions.

40. Law no. 3201 aims to enable the Turkish citizens who work abroad to have their documented work period outside the country be taken into account in terms of their social security. The Law rendered it possible for citizens who work abroad or who returned home to be taken under the social security umbrella within the scope of Article 62 of the Constitution. According to Article 6 of this Law, a monthly pay will be granted on the conditions that the individual has returned home indefinitely (i.e. is a returnee), that the credited premium debt has been paid in full, and that a request has been submitted in writing following the payment of the debt in full.

41. In the present case, it must be recognised that the old age pension claimed by the applicant constitutes "property" within the meaning of Article 35 of the Constitution.

42. The Court has already laid down the principles related to the prohibition of discrimination in the context of the right to property in the case of *Reis Otomotiv Ticaret ve Sanayi A.Ş.* ([Plenary], no. 2015/6728, 1 February 2018). Accordingly, in the examination of an alleged discrimination in the context of the right to property, the Court shall first determine under Article 10 of the Constitution whether there has been a similar reason and a different treatment and, in this connection, whether there has been a difference in treatment towards persons in the same or a similar situation in terms of interference with the right to property. This shall be followed by scrutinising whether the different treatment has been based on objective and reasonable grounds and whether the interference has been proportionate before reaching a conclusion (see *Reis Otomotiv Ticaret ve Sanayi A.Ş.*, § 77).

a. Determination of Similar Reason and Different Treatment

43. The wording of Article 10 of the Constitution acknowledges that the reasons for discrimination are not limited to reasons which may be categorised as personal reasons that individuals bear since birth or acquire later, such as sex, race or religion as listed in the Article. Therefore, the concept of "similar [other] reasons" indicated in the Article covers a wide scope in terms of its meaning. It should be borne in mind that the approach that is embraced via the terms "everyone" and "similar reasons" used in the wording of the Article is not a limited one in terms of the person who is protected against discrimination and the bases for discrimination (see *Reis Otomotiv Ticaret ve Sanayi A.Ş.*, § 83). In the case giving rise to the application, since the complaint concerns a treatment that allegedly discriminated between those who were born Turkish citizens and those who acquired Turkish citizenship later with respect to the counting of their periods of service abroad, the reason for discrimination should be discussed on the basis of "acquisition of citizenship".

44. As indicated above, Article 1 of Law no. 3201 limits the possibility of those who worked in foreign countries to receive old age pension, *ratione personae*, to Turkish citizens and persons who had been Turkish citizens by birth but subsequently lost their Turkish citizenship by way of obtaining permission for alienage. It stipulates that only the insured periods that such persons "spent abroad as Turkish citizens" after turning

18, which they can document, shall be taken into account. The applicant, on the other hand, acquired Turkish citizenship later via naturalisation. It has been understood from the applicant's civil registry record that he was admitted into Turkish citizenship by a decision of the Council of Ministers pursuant to Article 6 of the now-repealed Law on Settlement (Law no. 2510 of 14 June 1934).

45. The applicant acquired Turkish citizenship as a result of an act carried out by the administration while he was a citizen of a different country (i.e. via naturalisation) and the period for which he wished to be credited pertained to the labour he had performed abroad. In this respect, the working conditions of natural-born citizens and naturalised citizens, as well as the place of their labours within the social insurance system, bear similar characteristics. In this sense, natural-born Turkish citizens and naturalised Turkish citizens each make up comparable categories in terms of entitlement to old age pension by filling the pension contribution gaps they incurred (i.e. were "credited") for the periods of service abroad. In other words, as regards the possibility to be credited the pension contributions for the period during which they performed their service/labour abroad, it is clear that those who are citizens by birth and those who acquired citizenship subsequently via an administrative act are in a "similar situation" that allows for a comparison to be made between them.

46. In the present case, after he had been in Germany from 2 February 1973 until 21 January 2003, the applicant acquired Turkish citizenship via a decision dated 6 September 1996 of the Council of Ministers and submitted an application with the Social Security Institution ("the SSI") on 3 March 2006, requesting to be credited by virtue of Law no. 3201. The SSI granted the applicant's request for entitlement to old age pension, thereby allocating him a monthly pay as from 1 July 2009. Nevertheless, the old age pension which the applicant had received for a while was later stopped on the ground that it was impossible for the applicant to be entitled to old age pension by means of filling the pension contribution gaps pertaining to his period of labour abroad prior to his naturalisation and that, accordingly, the remainder of his period of labour was not sufficient for entitlement to old age pension.

47. Article 1 of Law no. 3201 provides that those who may benefit from these rights are either the persons who were Turkish citizens at the time of the labour in question or the persons who had left citizenship via a permission of alienage despite having been born as Turkish citizens. According to these provisions, natural-born Turkish citizens are accorded the chance to be credited for the entirety of their period of labour which they spent performing their services abroad under certain conditions, whereas those who acquired citizenship afterwards via naturalisation are not allowed to be credited for their period of labour which they spent performing their services abroad before becoming a citizen. This, in turn, constitutes a "difference in treatment" towards comparable groups on the basis of acquisition of citizenship.

b. Existence of Objective and Reasonable Grounds

48. It must be acknowledged that the State enjoys a certain margin of appreciation in granting Turkish citizens an entitlement to old age pension by way of filling pension contribution gaps incurred for the period of services rendered abroad. Moreover, it is clear that the public authorities also have a certain margin of appreciation in the evaluation of whether, or to what extent, a different treatment is necessary in similar situations. However, there is no doubt that this margin of appreciation is not without limits with respect to the prohibition of discrimination in conjunction with the right to property (see, in the same vein, *Reis Otomotiv Ticaret ve Sanayi A.Ş.*, § 94; and *Tevfik İlker Akçam*, no. 2018/9074, 3 July 2019, § 50).

49. When interfering with the right to property, the public authorities who cause different treatments towards persons in the same position must be able to provide reasonable and objective grounds which are capable of justifying this difference. In this scope, while the determination of the conditions for crediting for the period of labour performed abroad fall, as a rule, within the margin of appreciation afforded to public authorities, they are also under an obligation not to interfere in a discriminatory manner without relying on reasonable and objective grounds (see, in the same vein, *Reis Otomotiv Ticaret ve Sanayi A.Ş.*, § 95; and *Tevfik İlker Akçam*, § 51).

50. As mentioned above, Law no. 3201 aims, in general, to ensure that persons who lived abroad and worked in the countries where they lived

can, after returning to Turkey, enjoy the social security rights that are accorded to the citizens residing in Turkey on certain conditions. This aim pursued by Law no. 3201 is also compatible with the measures which the State guarantees to take under Article 62 of the Constitution in regard to the Turkish citizens working in foreign countries.

51. It has been noted that, in the implementation of provisions of Law no. 3201, natural-born citizens are allowed to fill pension contribution gaps via crediting while no such opportunity is granted for those who subsequently acquired citizenship for the periods of labour abroad prior to their acquisition of this citizenship. The applicant, who subsequently acquired Turkish citizenship via naturalisation, requested to be credited the pension contribution gaps for the entirety of his period of services rendered in foreign countries, which is possible for natural-born Turkish citizens. In both situations, the practice is similarly to credit and enable persons to fill the pension contribution gaps pertaining to the periods they spent working in foreign countries. In addition to this, considering that the applicant could have been entitled to old age pension if he had been credited his contribution gaps and paid the same premium as natural-born Turkish citizens, it cannot be said that an additional financial burden would have been placed on the social security system from the standpoint of either the amount of premium or the amount of monthly pension. There is no reason with regard to the other conditions mentioned in this Law, either, for differentiating the approach to be taken towards subsequently-naturalised Turkish citizens in crediting them for the contribution gaps pertaining to their service period. Accordingly, a person who is a Turkish citizen by birth may receive old age pension by filling the gaps in their premium payments pertaining to the whole period of time they spent working abroad; however, being a subsequently-naturalised Turkish citizen, the applicant was deprived of the opportunity of being credited for and filling those gaps pertaining to the period of labour he performed abroad prior to acquiring his citizenship, which, by extension, resulted in his deprivation of the old age pension. Nonetheless, there was no objective or reasonable ground to administer such a different treatment on the basis of the moment of acquisition of citizenship.

52. On the one hand, the public authorities enjoy a wide margin of appreciation in granting an entitlement to old age pension by way of filling pension contribution gaps credited for the period of service abroad. In the circumstances of the present case, on the other hand, the applicant's deprivation of the possibility of having his period of service abroad prior to acquisition of citizenship counted towards his entitlement to pension without any justified and objective reason constituted a discriminatory treatment within the context of the right to property. As a result of this discriminatory interference with the right to property without any objective and reasonable grounds, the applicant, who was no longer in working age, had to bear an excessive burden for being left outside the social security coverage. Therefore, it has been concluded that the prohibition of discrimination in the context of the right to property was violated in the case giving rise to the application.

53. In the light of this conclusion, there is no need to hold a separate examination on the complaint concerning a violation of the right to property.

54. For these reasons, it must be held that there has been a violation of the prohibition of discrimination under Article 10 of the Constitution taken in conjunction with the right to property under Article 35.

Justices Mr. Serdar ÖZGÜLDÜR, Mr. M. Emin KUZ, Mr. Kadir ÖZKAYA, Mr. Recai AKYEL, Mr. Yıldız SEFERİNOĞLU and Mr. Selahaddin MENTEŞ expressed dissenting opinions in this respect.

3. Application of Article 50 of Code no. 6216

55. Article 50 of the Code no 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, in so far as relevant, provides as follows:

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

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

56. The applicant requested a finding of violation and claimed compensation.

57. The general principles on how to redress the violation when a violation is found have been laid down by the Court in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018). In addition to these principles, the Court has also touched upon in another case the consequences of the non-enforcement of a judgment finding a violation and this would not only mean that the violation is continuing but also result in the violation of the right at issue for a second time (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

58. If the Court finds a violation of a fundamental right within the scope of an individual application, the main requirement which needs to be satisfied to be able to consider that the violation and its consequences have been removed is to ensure restitution to the extent possible, that is to restore the situation to the state it was in prior to the violation. For this to happen, the continuing violation needs to be ceased by determining the source of the violation, the decision or act giving rise to the violation as well as the consequences thereof need to be removed, where applicable the pecuniary and non-pecuniary damages caused by the violation need to be indemnified, and any other measures deemed appropriate in that scope need to be taken (see *Mehmet Doğan*, §§ 55, 57).

59. Before ruling on what needs to be done to redress the violation and its consequences, the source of the violation must first be ascertained. In this respect, a violation may stem from administrative acts and actions,

judicial acts, or legislative acts. Determining the source of the violation plays a significant role in the determination of the appropriate way of redress (*Mehmet Doğan*, § 57).

60. If a violation has emerged as a result of the application by the administrative authorities or the inferior courts of a provision of law with such a clarity that does not enable them interpret it in accordance with the Constitution or as a result of uncertainties in the law, then the violation stems not from the application of the law but directly from the law itself. In this case, to be able to say that the violation has been removed with all of its consequences, the provision of law giving rise to the violation must either be repealed completely or amended in a way that will not lead to further violations or the uncertainty must be eliminated to prevent it from causing any further violations (see *Süleyman Başmeydan*, no. 2015/6164, 20 June 2019, § 70).

61. In the present case, the Court has concluded that there has been a violation of the prohibition of discrimination under Article 10 of the Constitution taken in conjunction with the right to property under Article 35 of the Constitution and that the violation stemmed directly from Article 1 of Law no. 3201.

62. Seeing that the relevant provision of the Law is still in force, it will not be possible to redress the violation via a retrial. The discretion lies with the legislative branch with respect to reviewing the provision of Law giving rise to the violation so that the violation can be redressed and similar violations can be prevented from arising in the future. It is important for redressing this violation to adopt a legislative amendment that would enable naturalised citizens to be covered under the social security umbrella by way of allowing them to be credited for and to fill the contribution gaps pertaining to their service periods abroad, contingent upon certain conditions. Since such a legislative action would be compatible with the purpose and function of the individual application mechanism by preventing similar violations in the future, a copy of the judgment must be communicated to the legislative branch for their information and appreciation.

Justice Mr. Serdar ÖZGÜLDÜR expressed a dissenting opinion in this respect.

63. On the other hand, sending a copy of the judgment to the legislative branch falls short of fully redressing the applicant's victimisation due to the violation in the present case. Therefore, within the scope of the principle of *restitutio in integrum* (restitution) as regards the consequences of the violation, any pecuniary and non-pecuniary damages that might be incurred by the applicant should be redressed. In the present case, the collection of the amount of 61,513.62 Turkish liras (TRY), which was claimed from the applicant via a notification dated 12 March 2015, must be waived or the amount that has already been collected, if any, must be returned to the applicant. As the ruling in favour of a refund of the payments made is capable of offering adequate redress, there is no need for a separate award of non-pecuniary compensation. The Grand National Assembly of Turkey must be informed of the situation on the subject of granting pension to persons in such a position as the applicant.

64. The total litigation costs of TRY 3,257.50 including the court fee of TRY 257.50 and counsel fee of TRY 3,000, as established on the basis of the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 5 March 2020:

A. BY MAJORITY and by dissenting opinions of Mr. Serdar ÖZGÜLDÜR and Mr. Kadir ÖZKAYA, that the applicant's allegations be EXAMINED within the scope of the prohibition of discrimination in conjunction with the right to property;

B. BY MAJORITY and by dissenting opinions of Mr. Serdar ÖZGÜLDÜR and Mr. Kadir ÖZKAYA, that the alleged violation of the prohibition of discrimination in conjunction with the right to property be DECLARED ADMISSIBLE;

C. BY MAJORITY and by dissenting opinions of Mr. Serdar ÖZGÜLDÜR, Mr. M. Emin KUZ, Mr. Kadir ÖZKAYA, Mr. Recai AKYEL, Mr. Yıldız SEFERİNOĞLU and Mr. Selahaddin MENTEŞ, that the

prohibition of discrimination under Article 10 of the Constitution taken in conjunction with the right to property under Article 35 of the Constitution was VIOLATED;

D. BY MAJORITY and by dissenting opinion of Mr. Serdar ÖZGÜLDÜR, that the situation concerning elimination of the structural problem be COMMUNICATED to the Grand National Assembly of Turkey;

E. That a copy of the judgment be SENT to the Social Security Institution for necessary steps to be taken with regard to waiver of the amount claimed or refund of the amount collected in order to redress the consequences of the violation of the prohibition of discrimination in conjunction with the right to property;

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

G. That the total litigation costs of TRY 3,257.50 including the court fee of TRY 257.50 and counsel fee of TRY 3,000 be REIMBURSED to the applicant;

H. That the payment be made within four months as from the date when the applicant applies to the Ministry of Treasury and Finance following the notification of the judgment; in case of any default in payment, statutory INTEREST ACCRUE for the period elapsing from the expiry of four-month time-limit to the payment date;

I. That a copy of the judgment be SENT to the 6th Chamber of the Bursa Labour Court (E.2016/649, K.2017/152) and to the 21st Civil Chamber of the Court of Cassation (E.2016/2445, K.2016/13288) for information; and

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

DISSENTING AND CONCURRING OPINIONS OF JUSTICE SERDAR ÖZGÜLDÜR

1. I have not been able to agree with the declaration of admissibility on the basis of the reason in question as I believe that the subject matter of the individual application should be examined within the framework of the right to a fair trial under Article 36 of the Constitution instead of the prohibition of discrimination under Article 10 of the Constitution in conjunction with Article 35 of the Constitution.

2. In the present case, it has been observed that the dispute arising between the applicant and the Social Security Institution ("the SSI") resulted to the detriment of the applicant on the basis of the provisions of the "Law on the Evaluation of Periods Spent by Turkish Citizens Abroad in terms of their Social Security" (Law no. 3201 of 8 May 1985). However, it is understood from the case-file that the applicant requested the application of Article 29 § 4 of the Agreement on Social Security, which was signed between the governments of the Republic of Turkey and the Federal Republic of Germany on 30 April 1964 and was promulgated in the Official Gazette no. 12121 of 8 October 1965 (amended on 28 May 1969, 25 October 1974 and 2 November 1984), which provides that "If a person entered one of the German pension insurance schemes before joining the Turkish insurance, their entry into this German pension insurance scheme is considered to be the entry into the Turkish insurance"; thus, he claimed that the labour he had performed in Germany between 1973 and 2003 should be recognised as if it had been done in Turkey. Also, Article 1 of this Agreement, for the purposes of the implementation of the agreement, defines the term "national" or "citizen" in relation to Turkey as a person who has Turkish citizenship. However, although the applicant was already a Turkish citizen at the time of his claim for old age pension and the said agreement does not stipulate any restriction with respect to naturalised Turkish citizens, the applicant's claim was disregarded and the restrictive provisions of Law no. 3201 were applied to his dispute.

3. The last paragraph of Article 90 of the Constitution states that "International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a

conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail." The Turkish-German Agreement on Social Security of 30 April 1964 is still in force and it is not actually possible to change the provisions of an international agreement with a provision of [domestic] law. Article 1 of Law no. 3201 and Articles 1 and 29 of the said Agreement - in so far as relevant to those who work in Germany - contain provisions that contradict with each other. In view of the explicit and mandatory provision in the above-mentioned last paragraph of Article 90 of the Constitution, there is no doubt that Articles 1 and 29 § 4 of the said Agreement should have been applied to the dispute giving rise to the application rather than Article 1 of Law no. 3201. In this case, even though the inferior courts should have addressed this serious claim and provided a positive or negative response, it seems that, with disregard for this necessity, they assessed the matter merely within the framework of Law no. 3201. This had led [me] to the conclusion that the applicant's right to a fair trial under Article 36 of the Constitution was violated in the context of "the right to a reasoned decision".

4. In the face of this reason, since Law no. 3201 is not actually applicable to the dispute giving rise to the application, there is no need for applying (calling on to) the Grand National Assembly of Turkey in regard to this rule on the ground that it caused the violation

5. For these reasons, considering that

a. The complaint concerning alleged violation of the prohibition of discrimination is not admissible;

b. The applicant's right to a fair trial under Article 36 of the Constitution was violated in the context of "the right to a reasoned decision" and that the finding of a violation should be based on this reason; and

c. There is no need for making a communication (call) to the Grand National Assembly of Turkey for an amendment to Article 1 of Law no. 3201 on the ground that it caused a violation,

I do not agree with the majority's assessments to the contrary.

DISSENTING OPINION OF JUSTICE M. EMİN KUZ

It has been found that the prohibition of discrimination was violated because, for naturalised citizens, the possibility of being credited for their periods of labour spent abroad was granted to them only in respect of such periods they spent after the date of their acquisition of citizenship.

The reasoning of the judgment indicated: the State enjoys a margin of appreciation in granting citizens the opportunity of being credited and filling the contribution gaps pertaining to their periods of labour abroad; however, there is a limit to the proportions of any different treatment in this regard in the context of the prohibition of discrimination; in the determination of the conditions for crediting for periods of labour abroad, there may be no different treatment towards persons in the same position without reasonable and objective grounds; the provision of law that constituted the legal basis for the impugned treatment, namely Article 1 of Law no. 3201, regulating the procedures and principles surrounding the enjoyment by the citizens who worked abroad and returned home of the social security rights that are accorded to other workers in the country, introduced such stipulations that differentiated between natural-born Turkish citizens and naturalised citizens; nevertheless, no objective and reasonable grounds were provided for that difference in treatment. In conclusion, a violation of the prohibition of discrimination was found in conjunction with the right to property [by the majority].

As mentioned in the judgment, Law no. 3201 was put into force pursuant to Article 62 of the Constitution, which points out the State's positive obligation in ensuring the social security of the Turkish citizens working abroad. Article 1 of the said Law stipulates that the documented insured periods spent abroad by Turkish citizens (and persons who had been Turkish citizens by birth but subsequently lost their Turkish citizenship by way of obtaining permission for alienage) working abroad after turning 18 "as Turkish citizens" shall be taken into account by virtue of the provisions of this Law.

The majority's reasoning indicates that natural-born citizens and naturalised citizens are in a similar situation as regards the possibility to be credited the pension contributions for the period during which they

performed their labour abroad; that natural-born Turkish citizens are accorded the chance to be credited for the entirety of their period of labour which they spent performing their services abroad whereas naturalised citizens are not allowed to be credited for their period of labour which they spent performing their services abroad before becoming a citizen; and that this constitutes a difference in treatment on the basis of acquisition of citizenship. Nonetheless, it is not possible for me to agree with that finding.

The two judgments of the European Court of Human Rights ("the ECHR") that are cited in the judgment concern finding of a violation of the prohibition of discrimination due to (i) termination of social security payments on the ground that the applicant, who had retired after forty years of work in his country, was permanently resident abroad (see *Pichkur v. Ukraine*, no. 10441/06, 7 November 2013, §§ 45-54) and (ii) different treatment based on citizenship towards the applicant, a former Soviet Union national who had lived and worked in Latvia since she was twelve years old, via refusal to take her thirty-one years of employment in this country into account when calculating her entitlement to a retirement pension (see *Andrejeva v. Latvia* [GC], no. 55707/00, 18 February 2009).

To put differently, the ECHR judgments that are cited as references concern the refusal to take into account the periods of labour rendered in the country concerned, not abroad, for purposes of social insurance (due to residence in a foreign country in the first case; and in the second, because of working in the status of a permanently resident non-citizen of Latvia despite having previously been a national of the former USSR). In the present case, on the other hand, the Law that was relied on for the impugned act regulates the conditions sought for evaluation of the periods of labour that were spent entirely abroad by Turkish citizens so that they may benefit from the social security rights enjoyed by those who work domestically. There is no doubt that, as it is the case with the applications giving rise to the ECHR judgments cited above, when there is a difference in treatment, it is necessary to establish whether or not the different treatment had any justified and objective grounds within the context of the prohibition of discrimination.

Nonetheless, the term "Turkish citizens" in the wording of Article 1 of Law no. 3201, which was the legal basis for the impugned act, has such an inclusive scope that covers all citizens, regardless of whether they acquired citizenship by birth or via naturalisation. Since the article in question also governs the possibility of persons who had been Turkish citizens by birth but subsequently lost their Turkish citizenship by way of obtaining permission for alienage to be credited for their periods of labour abroad, it allows for the evaluation under this Law "the documented insured periods spent abroad … as Turkish citizens" after turning 18 by both the natural-born and the naturalised citizens. In other words, even those who left citizenship by way of obtaining permission for alienage despite having been born as Turkish citizens may only have their insured periods of labour abroad which they spent "as Turkish citizens" taken into consideration in this context. Thus, because the law provides for being credited for the periods of labour "spent abroad as a Turkish citizen" without making a distinction between natural-born and naturalised citizens, there is no question of difference in treatment on the basis of acquisition of citizenship.

On the other hand, even assuming that the said provision of law envisaged a different treatment between natural-born and naturalised citizens, considering that the periods of labour spend abroad only "as Turkish citizens" by those who left citizenship despite having been born as Turkish citizens are taken into account for the crediting practice, the practice in question cannot be said to be lacking objective and reasonable grounds so that these persons would not be negatively affected, as well.

There is no debate, either, about the fact that under this legislative arrangement, which was put in place within the scope of the State's positive obligations in an aim to enable the Turkish citizens who work abroad to have their documented work period outside the country be taken into account in terms of their social security, the State has quite a wide margin of appreciation and that it should be respected as long as it is not manifestly in contravention of public interest. The fact that only the periods spent abroad as a Turkish citizen are considered as creditable is not different from, for example, the requirement of returning to Turkey indefinitely to be able to become entitled to pension. Also, having regard

to the sustainability of the social security system, the legislative provision in question cannot be said to be in contravention of public interest.

Finally, in the judgment, the majority concluded that the applicant, who was no longer in working age, had to bear an excessive burden for being left outside the social security coverage as a result of this impugned interference. Nonetheless, the inferior courts dismissed the applicant's case because, although the applicant had become entitled to old age pension for having completed 3,600 days of labour abroad as from 6 September 1996, he raised no claim on this basis. Therefore, it is not possible for me to join the majority in concluding that an excessive burden was placed on the applicant.

For these reasons, I do not agree with the majority's finding of a violation of the prohibition of discrimination in conjunction with the right to property.

DISSENTING OPINION OF JUSTICE KADİR ÖZKAYA

1. The applicant, who was born on 31 May 1951 as a citizen of the Republic of Yugoslavia and worked in Germany, acquired Turkish citizenship by a decision dated 6 September 1996 of the Council of Ministers. Afterwards, on 3 March 2006 he submitted an application with the Social Security Institution ("the SSI") to request to be credited for (so that he could pay for the gaps in his premiums related to) 10,945 days of his labour which he had performed in Germany between 2 February 1973 and 21 January 2003 pursuant to the Law on the Evaluation of Periods Spent by Turkish Citizens Abroad in terms of their Social Security (Law no. 3201).

2. With a letter dated 6 September 2006 the SSI informed the applicant that he might be credited for his periods of service abroad rendered between 2 February 1973 and 21 January 2003. Having received this information, on 9 July 2008 the applicant paid to the SSI the sum of TRY 23,010.75, which was the amount of premiums credited corresponding to his 5,400 days of labour between 21 January 1988 and 21 January 2003. Following this payment of the amount credited, the applicant began receiving old age pension as from 1 July 2009.

3. On 22 January 2015, i.e. nearly 6 years and 7 months later, the SSI cut the applicant's old age pension. This act was based on Article 1 of Law no. 3201. The SSI reasoned this act by noting 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 on 6 September 1996 and that, accordingly, the remaining period of his service did not meet the minimum period required for his entitlement to old age pension. Having revoked the old age pension, the SSI also notified the applicant to pay back within a month's time the sums which were deemed to have been unduly paid to him from 23 September 2009 until 22 January 2015, which amounted to TRY 61,513.62 in total.

4. The applicant filed an action against this decision in which he argued, by citing the case-law of the Court of Cassation and regulations of the International Labour Organization, that making a distinction between natural-born and naturalised Turkish citizens constituted a breach of the principle of equality. He continued that the act taken in his respect deprived him of his acquired rights nearly 6 years after his retirement (i.e. entitlement to pension) and that it victimised him in an irreparable way as he was 64 years old and planned his life accordingly. Consequently, his action was dismissed by the relevant courts.

5. The court decisions, in sum, relied on the following reasoning: the dispute mainly focused on whether the credited premium payments related to periods of service abroad, which had initially been credited and collected by the SSI erroneously and later annulled, would give the applicant an anticipatory status of voluntarily-insured as from the date of payment; in the case at issue, first and foremost, it was not possible for him to be credited for his periods of labour abroad pertaining to the time before he acquired Turkish citizenship; in order to be entitled to the status of voluntarily-insured by virtue of Article 85 of the Law no. 506, he should have informed the SSI of such a wish either in writing or by means of making regular premium payments; however, in the present case, the applicant had neither submitted a written application with the SSI to be re-enter the voluntary insurance scheme under Article 85 of the Law no. 506 nor made premium payments in a fashion capable of demonstrating his wish to be voluntarily-insured.

6. On 19 December 2017 an individual application was lodged with the Court.

7. The majority of our Court found it appropriate to examine the application within the scope of the prohibition of discrimination taken in conjunction with the right to property. Having declared the application admissible, the majority concluded that the prohibition of discrimination under Article 10 of the Constitution taken in conjunction with the right to property under Article 35 of the Constitution was violated in the applicant's case.

8. For the reasons explained below, I do not agree with the ruing.

9. As indicated above, the SSI informed the applicant with a letter dated 6 September 2006 that he might be credited for his periods of service abroad rendered between 2 February 1973 and 21 January 2003; upon which the calculated amount of credited premium gaps were paid to the SSI; the applicant began receiving the old age pension as from 1 July 2009; and, having eventually realised its error, on 22 January 2015 the SSI annulled the act and demanded the erroneously-made payments be returned.

10. It should be considered normal that public authorities might perform erroneous acts from time to time. In this scope, it should be acknowledged that, as part of their duties, they can rectify their errors and perform the correct acts. Nevertheless, in the rectification of the erroneous act, attention must be paid to avoid placing an excessive burden on the person concerned (see *Kırca Mühendislik İnş. Turz. Tic. ve San. A.Ş.*, no. 2014/6241, 29 September 2016, § 75).

11. In the present case, the impugned act was performed on 22 January 2015; that is, nearly 5 years and 7 months after the applicant had begun receiving old age pension and when he was 64 years old. In addition to alleging a breach of the principle of equality, the applicant maintained that the act taken in his respect deprived him of his acquired rights nearly 6 years after his retirement (i.e. entitlement to pension) and that it victimised him in an irreparable way as he was 64 years old and planned his life accordingly.

12. On the other hand, the provisions of the Law no. 3201 were taken as the legal basis for the act of revocation in respect of the applicant. Over the course of the court proceedings, the 21st Civil Chamber of the Court of Cassation and the 6th Chamber of the Bursa Labour Court delivered their rulings by interpreting Law no. 3201 and Law no. 506.

13. Law no. 3201 was put into force pursuant to Article 62 of the Constitution, which points out the State's positive obligation in ensuring the social security of the Turkish citizens working abroad.

14. Note should primarily be taken of the fact that the States enjoy quite a wide margin of appreciation in the creation and implementation of social security systems. Because this subject is closely relevant to states' social security policies and budgetary policies. Therefore, there is no debate about the fact that under this legislative arrangement, which was put in place within the scope of the State's positive obligations in an aim to enable the Turkish citizens who work abroad to have their documented work period outside the country be taken into account in terms of their social security, the State has quite a wide margin of appreciation and that it should be respected as long as it is not manifestly in contravention of public interest.

15. Turning to Law no. 3201 in this context, it is observed that the Law regulates the conditions for the Turkish citizens who worked abroad to be able to benefit from the social security rights that are enjoyed by those who work in the country and, in this connection, the conditions surrounding the evaluation of their periods of service spent abroad by the persons concerned.

16. Article 1 of the said Law stipulates that the documented insured periods spent abroad by Turkish citizens (and persons who had been Turkish citizens by birth but subsequently lost their Turkish citizenship by way of obtaining permission for alienage) working abroad after turning 18 "as Turkish citizens" shall be taken into account by virtue of the provisions of this Law. According to the article in question, the opportunity of being credited for periods spent abroad is a right that is accorded to citizens only. However, there is no distinction as to whether the citizenship was acquired by birth or via naturalisation.

17. As underlined by Justice Emin KUZ in his dissenting opinion, the term "Turkish citizens" in the wording of the article has such an inclusive scope that covers all citizens, regardless of whether they acquired citizenship by birth or via naturalisation. Since the article in question also governs the possibility of persons who had been Turkish citizens by birth but subsequently lost their Turkish citizenship by way of obtaining permission for alienage to be credited for their periods of labour abroad, it allows for the evaluation under this Law "the documented insured periods spent abroad … as Turkish citizens" after turning 18 by both the natural-born and the naturalised citizens. In other words, even those who left citizenship by way of obtaining permission for alienage despite having been born as Turkish citizens may only have their insured periods of labour abroad which they spent "as Turkish citizens" taken into consideration in this context. Thus, because the law provides for being credited for the periods of labour "spent abroad as a Turkish citizen" without making a distinction between natural-born and naturalised citizens, there is no question of difference in treatment on the basis of acquisition of citizenship.

18. In other words, it has been observed that the provision of Law in question does not deliver a result based on being a natural-born Turkish citizen or not in the calculation of periods of service abroad; thus, it does not create any inequality. In this scope, the legislature aimed not to create inequality but, on the contrary, to set out that the periods of service spent abroad may be acceptable on certain conditions.

19. In the light of the foregoing, I am of the opinion that the present application should have been examined not within the scope of the prohibition of discrimination in conjunction with the right to property but, instead, only under the right to property and with regard to the question whether the interference with the applicant right to property stemming from the administration's erroneous act was proportionate. I believe that the examination should have focused on issues such as the administration's part in the erroneous act, the administration's attitude in the face of the erroneous act, the time elapsed until the realisation of the error, the method employed in the rectification of the erroneous act, and the efforts to divide the responsibility for the error and to avoid placing an excessive burden on the person concerned (see *Kırca Mühendislik İnş. Turz.*

Tic. ve San. A.Ş., no. 2014/6241, 29 September 2016, § 75). With this opinion, I do not agree with the majority's decisions to examine the application within the scope of the prohibition of discrimination in conjunction with the right to property, to declare the application admissible from that standpoint, and to find a violation of the prohibition of discrimination under Article 10 of the Constitution in conjunction with the right to property under Article 35 of the Constitution.

DISSENTING OPINION OF JUSTICES RECAİ AKYEL, YILDIZ SEFERİNOĞLU AND SELAHADDİN MENTEŞ

1. The applicant submitted that, although he had become entitled to receive old age pension by having paid his contributions pertaining to the period he had spent abroad in accordance with the legislative provisions applicable at the date of his request for crediting, this right of his was revoked nearly 6 years later on the ground that a portion of the period for which he had been credited pertained to the time prior to he acquired Turkish citizenship. According to the applicant, this practice is contravention of law as it deprives a Turkish citizen of the right to social security and creates an unacceptable inequality between persons who acquire citizenship by birth and those who acquire it by a decision of the administration. The applicant complained that this practice, which is not only unjust but also in contravention of the prohibition of discrimination, deprived him of his right to social security, thereby violating the principle of equality, the right to property, and the right to a fair trial enshrined in the Constitution.

2. It should be borne in mind that States have quite a wide margin of appreciation in the creation and implementation of a social security system. Because this area is closely relevant to states' social security policies and budgetary policies. Unless there is a manifest interference with the fundamental rights and freedoms, judicial organs are expected to refrain from intervening in this area.

3. Article 1 of Law no. 3201 provides as follows:

"The documented insured periods spent abroad by Turkish citizens and such periods spent abroad as Turkish citizens after turning 18 by persons who had been Turkish citizens by birth but subsequently lost their Turkish citizenship by way of obtaining permission for alienage and the periods of unemployment up to 1 year at each time in between or at the end of those periods or the periods spent abroad as a housewife shall be taken into account in terms of their social security in accordance with this Law upon their request if premiums were not paid to the social security establishments named in this Law."

4. In the present case, having been born as a national of the Republic of Yugoslavia, the applicant acquired citizenship of the Republic of Turkey by a decision dated 6 September 1996 of the Council of Ministers upon his request. Article 1 of Law no. 3201, which was applied to the applicant's case, was in force when he acquired citizenship. Thus, there was legal certainty and foreseeability.

5. When the said provision of law is analysed, it is understood that the legislature stipulates certain conditions for the evaluation of periods of service rendered abroad. To elaborate,

- As regards persons who, despite having been Turkish citizens by birth, had left Turkish citizenship and subsequently re-acquired citizenship, their periods of service spent abroad while not being a Turkish citizen are *not* taken into consideration but their periods of service in Turkey are counted.

- As regards persons who acquired Turkish citizenship via naturalisation, their periods of service in Turkey prior to naturalisation are counted whereas only their periods of service abroad spent without being a citizen are *not* taken into account.

- As regards all Turkish citizens, be they natural-born or naturalised, both their periods of service in Turkey and their periods of service abroad spent as Turkish citizens are taken into consideration.

6. The above-mentioned legislative provision does not create any consequence, with regard to the calculation of periods of service,

depending on whether or not Turkish citizenship was acquired by birth. The calculation is made on the basis of the natural-born and naturalised citizens' periods of service in Turkey and in foreign countries. Furthermore, according to the provision at issue, the evaluation is made by taking account of the periods of service rendered after the person turned 18 years old.

7. The assessment made in the judgment, namely that the provisions of Law no. 3201 allow natural-born citizens to fill pension contribution gaps via crediting while it grants no such opportunity for those who subsequently acquired citizenship for the periods of labour abroad prior to their acquisition of this citizenship, cannot be considered as an interpretation that is compatible with the letter and spirit of the law.

8. Benefiting from the opportunity of crediting for periods of labour rendered abroad is contingent upon certain conditions. First of all, the person must be a Turkish citizen. The opportunity of being credited for periods spent abroad is a right that is accorded to citizens only. However, there is no distinction as to whether this citizenship was acquired by birth or via naturalisation. Moreover, only the periods that the citizen spent after turning 18 years of age shall be taken into consideration.

9. However, in some cases, there may be a bilateral agreement signed between the country concerned and Turkey. The date of starting working in a country which is party to a bilateral agreement is considered as if it was done in Turkey and that date is taken as basis in the calculation of the insurance period. These countries are: Germany, Albania, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, the Czech Republic, France, Georgia, Croatia, the Netherlands, Switzerland, Canada, Quebec, the Turkish Republic of Northern Cyprus, Luxembourg, Macedonia, and Slovakia. As regards persons who are credited for their insured periods spent in these countries, the day on which they first started working in these countries shall be acknowledged as if it was their initial day of entry into labour in Turkey if they have never worked in Turkey or if that date precedes their entry into the insurance system in Turkey.

10. An advantage of being a resident in a country which is a party to such an agreement is that individuals may combine the periods of labour

spent in the countries concerned with their period of labour spent in Turkey.

11. In the light of all the foregoing points, it has been observed that the relevant statutory provision does not deliver a result based on being a natural-born Turkish citizen in the calculation of periods of service abroad; thus, it does not create any inequality. In this scope, the legislature aimed not to create inequality but, on the contrary, to set out that the periods of service spent abroad may be acceptable under certain conditions. It has further been noted that it is possible to execute bilateral agreements on the subject of counting the entirety of the periods of service spent abroad. Indeed, such agreements have been made with 18 countries. The principle of reciprocity between states seems to be put into practice in this manner.

12. Considering that the Court's finding that Article 1 of Law no. 3201 has violated the principle of equality will not only affect the social security system but also result in the conclusion to the effect that the State will no longer need to enter into bilateral agreements, we have reached the opinion that there has not been a violation of the prohibition of discrimination under Article 10 of the Constitution in conjunction with the right to property under Article 35 of the Constitution; therefore, we do not agree with the majority's conclusion to the contrary.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

DOĞAN DEPİŞGEN

(Application no. 2016/12233)

11 March 2020

On 11 March 2020, the Second Section of the Constitutional Court found a violation of the right to property, safeguarded by Article 35 of the Constitution, in the individual application lodged by *Doğan Depişgen* (no. 2016/12233).

THE FACTS

[7-34] 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.

V. EXAMINATION AND GROUNDS

35. The Constitutional Court ("the Court"), at its session of 11 March 2020, examined the application and decided as follows:

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

36. The applicant complained that his salary as a neighbourhood headman (*muhtar*) was not paid for the period when he was held in pre-

trial detention, despite the fact that he had been unjustly detained. He maintained that he had a legitimate expectation to receive this salary and that, if he had not been unjustly detained, the said salary would have been paid to him. On that account, the applicant alleged that his right to a fair trial and right to property were violated.

B. The Court's Assessment

37. Article 35, titled "Right to property", of the Constitution reads as follows:

> *"Everyone has the right to own and inherit property.*
>
> *These rights may be limited by law only in view of public interest.*
>
> *The exercise of the right to property shall not contravene public interest."*

38. The Court is not bound by the legal qualification of the facts by the applicants and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). As the essence of the applicant's complaint, given its subject matter, concerns the right to property, the Court has found it appropriate to examine the application within the scope of the right to property.

1. Admissibility

39. The alleged violation of the right to property must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

a. Existence of Property

i. General Principles

40. A person complaining that his/her right to property was violated must prove in the first place that such a right existed in the first place (see *Mustafa Ateşoğlu and Others*, no. 2013/1178, 5 November 2015, § 54). For this reason, it is primarily necessary to evaluate the legal status of the

applicant on the point of whether or not he has an interest in relation to property which requires protection under Article 35 of the Constitution (see *Cemile Ünlü*, no. 2013/382, 16 April 2013, § 26; and *İhsan Vurucuoğlu*, no. 2013/539, 16 May 2013, § 31).

41. The right to property safeguarded by Article 35 of the Constitution encompasses the rights over any kind of assets which represents an economic value and is assessable with money (see the Court's decision no. E.2015/39, K.2015/62, 1 July 2015, § 20). In this framework, along with movable and immovable properties, which undoubtedly have to be considered as property, the limited real rights and non-material rights established over those properties as well as any enforceable claims fall within the scope of the right to property (see *Mahmut Duran and Others*, no. 2014/11441, 1 February 2017, § 60).

42. The right to property has a different meaning and scope than the property rights notions adopted in the private law or the administrative law and the right to property that is acknowledged within these branches should be addressed by adopting an autonomous interpretation independently from the legal regulations and case-law (see *Hüseyin Remzi Polge*, no. 2013/2166, 25 June 2015, § 31; and *Mustafa Ateşoğlu and Others*, § 51).

43. The right to property enshrined in Article 35 of the Constitution is a safeguard that protects existing possessions, properties and assets. A person's expectation to obtain a property which is not already owned by that person does not fall within the notion of the property protected by the Constitution, no matter how strong his or her interest is in this matter. It should be noted in this context that Article 35 of the Constitution safeguards the right to property but not acquiring or accessing the property on an abstract basis. As an exception to this, an "economic value" or a "legitimate expectation" to obtain an enforceable "claim" may benefit from the guarantee of the right to property which is protected under certain circumstances (see *Kemal Yeler and Ali Arslan Çelebi*, no. 2012/636, 15 April 2014, §§ 36, 37; *Mehmet Şentürk* [Plenary], no. 2014/13478, 25 July 2017, §§ 41, 53; and *Mustafa Ateşoğlu and Others*, §§ 52-54).

44. A legitimate expectation is not an expectation away from an objective basis: it is a sufficiently concrete expectation based on a legal provision, or an established piece of judicial case-law or a legal procedure related to an interest in kind which demonstrates that there is a high prospect of success (see *Selçuk Emiroğlu*, no. 2013/5660, 20 March 2014, § 28; *Mehmet Şentürk*, § 42). Therefore, the determination as to the existence of the right to property based on a legitimate expectation, which falls into the scope of the joint protective realm of the Constitution and the European Convention on Human Rights ("the Convention"), is contingent upon the recognition of the ownership claim raised in the applicable legal system, and such recognition is ensured by virtue of provisions of law and judicial decisions (see *Üçgen Nakliyat Ticaret Ltd. Şti.*, no. 2013/845, 20 November 2014, § 37). The existence of an unsubstantiated expectation to acquire a right or a claim which may only be raised within the scope of the right to property is not enough to acknowledge a legitimate expectation (see *Kemal Yeler and Ali Arslan Çelebi*, § 37).

ii. Application of Principles to the Present Case

45. First of all, there is no doubt that the headman's salary, which represents an economic value, can be a subject of the right to property. What is disputed in the present case is whether or not the applicant was able to prove the existence of this salary. As this salary was not paid to the applicant, there is no question of an existing property. However, it should also be determined whether the applicant had a legitimate expectation on a concrete basis that he would obtain this receivable.

46. As indicated above, for the establishment of a legitimate expectation, the Court expects the applicant's claim to be based on a provision of law or an established piece of judicial case-law. In other words, only in the presence of such a concrete basis can one speak of the existence of a legitimate expectation (see, for a case where legitimate expectation was established on the basis of a judicial decision, *Osman Ukav*, no. 2014/12501, 6 July 2017, §§ 55-59; see *a contrario*, for a case where legitimate expectation was found to be non-existent due to the absence of such a concrete basis, *Mehmet Şentürk*, §§ 40-54).

47. In the present case, however, it is clear that the applicant had been elected as a neighbourhood headman and was entitled to receive the headman's salary in accordance with Article 1 of 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 according to Article 141 *et seq*. of Law no. 5271. Accordingly, it must be accepted that the applicant had a legitimate expectation on a concrete basis, within the meaning of Article 35 of the Constitution, that the said damages would be redressed and, in this scope, he would be able to receive his unpaid headman's salary.

b. Existence of an Interference and its Type

48. The right to property safeguarded as a fundamental right under Article 35 of the Constitution is such a right that enables an individual to use the thing he/she owns, benefit from its fruits, and dispose of that thing provided that he/she does not prejudice the rights of others and respects the restrictions imposed by law (see *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 32). Therefore, restricting any of the owner's powers to use his/her property, benefit from its fruits, and dispose of the property constitutes an interference with the right to property (see *Recep Tarhan and Afife Tarhan*, no. 2014/1546, 2 February 2017, § 53).

49. In view of Article 35 of the Constitution, read together with other articles that touch upon the right to property, the Constitution lays down three rules in regard to interference with the right to property. In this respect, the first paragraph of Article 35 of the Constitution provides that everyone has the right to property, setting out *the right to peaceful enjoyment of possessions*, and the second paragraph draws the framework of interference with the right to peaceful enjoyment of possessions. Article 35 § 2 of the Constitution lays down the circumstances under which the right to property may be restricted in general and also draws out the general framework of conditions of *deprivation of property*. The last paragraph of Article 35 of the Constitution forbids any exercise of the right to property in contravention to the interest of the public; thus, it enables the State to control and regulate the enjoyment of property. Certain other articles of the Constitution also contain special provisions that enable the

State to have control over property. It should further be pointed out that deprivation of property and regulation/control of property are specific forms of interference with the right to property (see *Recep Tarhan and Afife Tarhan*, §§ 55-58).

50. In the case giving rise to the present application, the applicant was not paid his headman's salary for the time he spent in detention. Given the applicant's legitimate expectation to receive this salary within the meaning of Article 35 of the Constitution, there is no doubt that the non-payment of this salary constituted an interference with the applicant's right to property. As the interference at issue did not pursue the aim of *deprivation of property* or *regulation/control of property in the interest of the public*, the Court has found it appropriate to examine the interference within the framework of the general rule concerning *the right to peaceful enjoyment of possessions*.

c. Whether the Interference Amounted to a Violation

51. Article 13 of the Constitution provides as follows:

> *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality."*

52. Article 35 of the Constitution does not envisage the right to property as an unlimited right; accordingly, this right may be limited by law and in the interest of the public. In interfering with the right to property, Article 13 of the Constitution must also be taken into consideration as it governs the general principles concerning the restriction of fundamental rights and freedoms. In order for the interference with the right to property to be in compliance with the Constitution, the interference must have a legal basis, pursue the aim of public interest, and be carried out in accordance with the principle of proportionality (see *Recep Tarhan and Afife Tarhan*, § 62).

i. Whether the Interference was Prescribed by Law

53. The first criterion required to be examined in case of an interference with the right to property is whether the interference had a basis in law. Where it is established that this criterion was not met, the Court will arrive at the conclusion that there has been a breach of the right to property, without holding any examination under the remaining criteria. For an interference to be prescribed by law, there must be sufficiently accessible, certain and foreseeable rules regarding the interference (see *Türkiye İş Bankası A.Ş.* [Plenary], no. 2014/6192, 12 November 2014, § 44; *Ford Motor Company*, no. 2014/13518, 26 October 2017, § 49; and *Necmiye Çiftçi and Others*, no. 2013/1301, 30 December 2014, § 55).

54. In the present case, the first-instance court ruled, with reference to the provision in Article 7 of the Regulation, that the applicant could not receive headman's salary for his detention period during which he had not been present at his post. This ruling was upheld by the Regional Administrative Court and, with the dismissal of the request for rectification, it became final. Article 1 of Law no. 2108 provides that a specified amount of monthly allowance shall be paid to headmen of villages and city/town neighbourhoods (i.e. headman's salary) and the procedures and principles regarding the payment of this allowance shall be governed by a regulation. Article 7 of the relevant Regulation stipulates that village and neighbourhood headmen shall receive this allowance as long as they are performing that duty and that, in case of illness, leave of absence or resignation from office, this allowance shall be paid to the deputies acting on their behalf.

55. The Court has explicitly indicated in its several judgments within the scope of the individual application mechanism that any interference with the right to property must be based on a formal law only in an absolute sense (see *Torsan Orman San. ve Tic. Ltd. Şti.*, no. 2014/13677, 20 September 2017, § 74; and *Üçaş Gıda Pazarlama ve Tekstil San. ve Tic. Ltd. Şti.*, no. 2014/16633, 6 December 2017, § 57). In this context, the Court observes that a restriction that is not prescribed by the law was imposed via a regulatory act. The fact that the provision in question was interpreted as being applicable to the period which the applicant had spent in detention,

which can be said to be falling outside the scope of reasons originating from the applicant such as illness, leave of absence or resignation from office, may also seem problematic in terms of the requirement of being prescribed by law. However, in determining whether the interference was justified, a conclusion will be reached after addressing the requirements of legitimate aim and proportionality.

ii. Whether the Interference Pursued a Legitimate Aim

56. According to Articles 13 and 35 of the Constitution, the right to property may only be restricted in the interest of the public. In addition to providing the possibility of restricting the right to property as deemed necessary by the public interest and being a reason for the restriction, the notion of public interest effectively protects the right to property by envisaging that the right to property cannot be restricted except for in the interest of public and determining limits of the restriction in this respect. The concept of public interest is one that brings with it the margin of appreciation of the State bodies and it should be evaluated separately on the basis of each particular case as it does not fit a singular objective definition (see *Nusrat Külah*, no. 2013/6151, 21 April 2016, §§ 53, 56; and *Yunis Ağlar*, no. 2013/1239, 20 March 2014, §§ 28, 29).

57. The public authorities are afforded a wide margin of appreciation in determining the benefits and the procedures and principles of the allowances to be offered to village or neighbourhood headmen. In this framework, it is clear that there is a legitimate aim based on public interest with respect to determining at what periods the allowances/salaries be paid to the headmen.

iii. Whether the Principle of Proportionality was Observed

(1) General Principles

58. Finally, it should be examined whether the interference with the applicant's right to property was in compliance with the principle of proportionality.

59. The principle of proportionality (*ölçülülük*) comprises of three subprinciples, which are "capability" (*elverişlilik*), "exigence" (*gereklilik*)

and "proportionality" (*orantılılık*). "Capability" means that the prescribed interference is capable of achieving the objective aspired for; "exigence" shall mean that the interference is absolutely necessary for that objective, that is when achieving such objective with a lighter intervention is not possible; and "proportionality" shall refer to the need for striking a reasonable balance between the interference with the individual's right and the objective sought (see the Court^'s decisions no. E.2011/111, K.2012/56, 11 April 2012; no. E.2014/176, K.2015/53, 27 May 2015; and no. E.2016/13, K.2016/127, 22 June 2016, § 18; and *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 38).

60. Pursuant to the principle of proportionality, a fair balance must be struck between the public interest sought in restricting the right to property and the individual's rights. This fair balance will have been upset where it is found out that the applicant has personally borne an excessive burden. In the assessment of proportionality of the interference, the Court will take account of the burden imposed on the applicant from two perspectives: on the one hand, it will examine the importance of the legitimate aim sought to be achieved; and, on the other, it will have regard to the nature of the interference along with the behaviour of the applicant and the public authorities (see *Arif Güven*, no. 2014/13966, 15 February 2017, §§ 58, 60; and *Osman Ukav*, § 71).

61. In the context of the principle of proportionality, the administration is under an obligation to act in compliance with the principle of "good governance". The principle of "good governance" requires public authorities to act in a timely manner, with an appropriate method and, first and foremost, consistently when it comes to a subject that falls within the scope of public interest (see *Kenan Yıldırım and Turan Yıldırım*, no. 2013/711, 3 April 2014, § 68). In this connection, the administrations must remedy the consequences of their own mistakes and not place that burden on individuals (see *Reis Otomotiv Ticaret ve Sanayi A.Ş.* [Plenary], no. 2015/6728, 1 February 2018, § 100).

(2) Application of Principles to the Present Case

62. In the present case, there is no reason to call into question, per its nature, the "capability" or "exigence" of the interference with the

applicant's right to property. Therefore, it must be ascertained whether the interference was "proportionate".

63. In the case at hand, the applicant was prosecuted for the charges on which he had been placed in detention and, at the end of the trial held before an assize court, the applicant was acquitted of each of those charges. Following the finalisation of this acquittal, the applicant brought an action under Law no. 5271 to claim compensation for his pecuniary and non-pecuniary damages. As the assize court accepted that the applicant had been detained unjustly, it awarded the applicant TRY 7,057.59 in terms of pecuniary and TRY 10,750 in terms of non-pecuniary compensation. That decision became final once it was upheld by the Court of Cassation. In the context of the present case, there is no reason to depart from these findings of the criminal courts.

64. It is clear that the applicant should be paid a monthly salary for having been elected as headman pursuant to Article 1 of Law no. 2108. However, the said salary was not paid to the applicant for the period between 6 May 2007 and 26 August 2008, when he was in detention. In the action filed by the applicant, the administrative tribunals dismissed the applicant's claim as they, interpreting the relevant Regulation but in the absence of such a provision in the Law, concluded that those salaries could not be paid to the applicant. However, it is obvious that the applicant had not left the office of his own accord for such reasons stated in the relevant Regulation as illness or leave of absence. Indeed, the administrative tribunals also acknowledged that, since the applicant was acquitted, the losses he had sustained due to his detention had to be compensated according to Article 141 *et seq*. of Law no. 5271.

65. Nevertheless, when interpreting provisions of the relevant Law and of the Regulation, the inferior courts failed to consider the reason why the applicant had had to leave the office. Seeing that it was obligatory by Law to pay the applicant's salary and there was no restriction provided by law to the contrary and that, even if the relevant provision of the Regulation was taken as basis, the applicant had been forced to leave his office against his will, the Court cannot accept the argument to the effect that the salary could not be paid because the applicant had not performed his duty

during the specified period of time. In this framework, although it may seem reasonable that following the applicant's detention the salaries in question were not paid to him temporarily over the course of that period, the administrative and judicial authorities were not able to prove whether the non-payment of the salaries for which he had a legitimate expectation was justified despite the fact that he was awarded compensation for the damages he incurred due to the detention.

66. It should further be noted in this connection that, if the applicant had not been placed in detention in the present case, he would have been able to perform his duty as a headman and to receive the salaries he claimed. Accordingly, even though the other pecuniary and non-pecuniary damages which the applicant had incurred due to his detention in the present case were compensated, it cannot be said that all of his losses have been redressed as the salaries which should have been paid to him as required by law on account of his headmanship were not paid.

67. In sum, the applicant, who was found by public authorities to be entitled to receive an award of compensation due to his detention, did not receive the salary payments that he was due on account of his election as a headman for the period of time when he stayed in detention. The applicant's request to secure the payment of those salaries was also rejected by the inferior courts in spite of the fact that he had a legitimate expectation based on law to obtain the salaries in question. 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 provide justifiable grounds for denial of the payment of the said salaries to the applicant. Therefore, the non-payment of the headman's salaries to the applicant due to the strict interpretation of the relevant provisions of law and regulations by the inferior courts placed an excessive burden on the applicant. The fair balance to be struck between the protection of the applicant's right to property and the public interest pursued by the interference was upset to the detriment of the applicant. Hence, the impugned interference with the applicant's right to property was disproportionate.

68. For these reasons, it must be held that there has been a violation of the right to property protected under Article 35 of the Constitution.

3. Application of Article 50 of Code no. 6216

69. Article 50 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, insofar as relevant, provides as follows:

> *"(1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled...*
>
> *(2) If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favour of the applicant or the remedy of filing a case before the general courts may be shown. The court which is responsible for holding the retrial shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."*

70. The applicant requested a finding of violation and claimed non-pecuniary compensation.

71. The general principles on how to redress the violation when a violation is found have been laid down by the Court in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018). In addition to these principles, the Court has also touched upon in another case the consequences of the non-enforcement of a judgment finding a violation and this would not only mean that the violation is continuing but also result in the violation of the right at issue for a second time (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

72. If the Court finds a violation of a fundamental right within the scope of an individual application, the main requirement which needs to be satisfied to be able to consider that the violation and its consequences have been removed is to ensure restitution to the extent possible, that is to restore the situation to the state it was in prior to the violation. For this to

happen, the continuing violation needs to be ceased by determining the source of the violation, the decision or act giving rise to the violation as well as the consequences thereof need to be removed, where applicable the pecuniary and non-pecuniary damages caused by the violation need to be indemnified, and any other measures deemed appropriate in that scope need to be taken (see *Mehmet Doğan*, §§ 55, 57).

73. In cases where the violation originates from an administrative act or action, the Court rules, by virtue of Article 50 § 1 of Code no. 6216 and in consideration of the circumstances of each individual case, on what steps must be taken henceforth. In cases where there were legal remedies available to challenge an administrative act or action and the Court finds a violation as a result of an examination on the individual application that was lodged after the exhaustion of those remedies, and if it is possible for the court concerned to redress that violation along with its consequences through a retrial, the Court may rule to send a copy of the judgment to the court concerned for the latter to hold a retrial in order to remedy the violation and its consequences (see *Ali Kayan*, no. 2015/9814, 20 March 2019, § 86).

74. The statutory provision envisaging to send a copy of the judgment to the relevant court for a retrial to be held to redress the violation and its consequences pursuant to Article 50 § 2 of the Code no. 6216 and Article 79 § 1 (a) of the Internal Regulations, unlike the similar legal practices found in the procedural law, stipulates an avenue of redress that is specific to the individual application mechanism and that results in a retrial for the purpose of redressing the violation. For this reason, when the Court rules in favour of a retrial in connection with a judgment finding a violation, the trial court concerned does not enjoy any margin of appreciation in accepting the presence of grounds for retrial, which is different in this aspect from the practice of reopening of proceedings under the procedural law. Therefore, the trial court that has received such a judgment is under a statutory obligation to issue a decision to hold a retrial on account of the finding of a violation by the Court, without waiting for a request to that effect from the person concerned, and conduct the procedures necessary for redressing the continuing violation (see *Mehmet Doğan*, §§ 58-59; and *Aligül Alkaya and Others (2)*, §§ 57-59, 66-67).

75. The Court has concluded that the applicant's right to property was violated due to the non-payment of his headman's salary by the administrative authorities for the period he had stayed in detention. Thus, it has been understood that the violation originated from an administrative act in the present case.

76. It has also been noted that the applicant was able to file an action against this administrative act and, after his action was dismissed, he lodged an individual application with the Court. In such cases, there is a legal interest in holding a retrial in order to redress the consequences of the violation of the right to property. A retrial to be conducted in this scope, unlike the similar practices found in the procedural law, aims to redress the violation and its consequences according to Article 50 § 2 of Code no. 6216, which contains a provision that is specific to the individual application mechanism. In this regard, what is to be done consists primarily of setting aside the court decision that gave rise to the violation of the right and delivering a new decision at the end of a new trial to be conducted in line with the principles set out in the judgment finding a violation and be capable of remedying the reasons that has led the Court to arrive at the violation judgment. For this reason, a copy of the judgment must be remitted to the Kastamonu Administrative Court for retrial.

77. The applicant's claim for compensation, on the other hand, must be rejected as the Court considers that ruling in favour of a retrial offers the applicant sufficient redress for the consequences of the violation of the right to property.

78. The total litigation costs of TRY 3,239.50 including the court fee of TRY 239.50 and the counsel fee of TRY 3,000, as established on the basis of the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 11 March 2020 that

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

B. The right to property safeguarded by Article 35 of the Constitution was VIOLATED;

C. A copy of the judgment be REMITTED to the Kastamonu Administrative Court (no. E.2014/1448, K.2015/1012) for a retrial to redress the consequences of the violation of the right to property;

D. The applicant's claims for compensation be REJECTED;

E. The total litigation costs of TRY 3,239.50 including the court fee of TRY 239.50 and the counsel fee of TRY 3,000 be REIMBURSED to the applicant;

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

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

RIGHT TO FAIR TRIAL (ARTICLE 36)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

ŞEHRİVAN ÇOBAN

(Application no. 2017/22672)

6 February 2020

On 6 February 2020, the Plenary of the Constitutional Court found 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, in the individual application lodged by *Şehrivan Çoban* (no. 2017/22672).

THE FACTS

[9-60] The applicant, 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 audio-visual information system ("the SEGBİS"). The applicant submitted a petition to the court whereby she expressed that she did not want to attend the hearing through the SEGBİS 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.

V. EXAMINATION AND GROUNDS

61. The Constitutional Court ("the Court"), at its session of 6 February 2020, examined the application and decided as follows:

A. As regards the Request for Legal Aid

62. The applicant requested legal aid by declaring that she could not afford to pay the fee for an individual application and the related costs.

63. In accordance with the principles set out in the judgment of the Court on the individual application of *Mehmet Şerif Ay* (no. 2012/1181, 17 September 2013), the request for legal aid made by the applicant, who

could not apparently pay the litigation costs without suffering considerable financial difficulties, should be granted for not being manifestly ill-founded.

B. Alleged Violation of the Right to be Present at the Hearing

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

64. The applicant alleged a violation of her right to a fair trial, maintaining that she had refused to attend the hearing through the SEGBİS which would allegedly put her in a difficult situation in making her defence, and that a hearing had been conducted in her absence although the public prosecutor's opinion on the merits should have been read out in her presence in accordance with the relevant legislative provisions and the well-established case law.

65. In its observations, the Ministry made explanations as to the legislation concerning the SEGBİS and noted that the relevant legislation clearly set out the circumstances in which the SEGBİS might be used, the authority having the power to decide on the use of such method, and the conditions concerning the technical infrastructure required for an audio-visual connection. The letter of opinion noted that those whose statements were taken through the SEGBİS had the possibility to see the persons present and hear the submissions made in the hearing room and that the trial authority and other persons present at the hearing also had the opportunity to mutually conduct the judicial acts such as taking statements, making submissions and addressing questions, in other words that these possibilities offered by the SEGBİS ensured compliance with the principle of face to face trial (*yüz yüzelik ilkesi*) as one of the elements of the trial. The letter drew attention to the fact that in the present case there was no statement or defence submission obtained via the SEGBİS and noted that the applicant had presented her defence submissions during the first hearing before the trial court in the presence of her lawyer and with the assistance of an interpreter.

66. In its observations, the Ministry further indicated that the applicant, who had been transferred to a penitentiary institution located in another province while the criminal proceedings had still been ongoing, had been

ordered to attend the hearings through the SEGBİS because of concerns related to possible security problems during her transfer, that due to the applicant's refusal to attend the hearings through the SEGBİS, the criminal proceedings had continued in her absence but in the presence of her lawyer, and that the conduct of the proceedings in such manner was not contrary to the principles of equality of arms and adversarial proceedings included among the aspects of the right to a fair trial.

2. The Court's Assessment

67. Article 36 § 1 on the Constitution, titled *"Freedom to claim rights"*, reads as follows:

> *"Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures."*

68. The Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). In this sense, the applicant's allegations were examined from the standpoint of the right to be present at the hearing, which falls within the scope of the right to a fair trial.

69. On a previous occasion, the Court examined the use of the SEGBİS from the standpoint of *the right to personal liberty and security* in its judgment on the individual application of *Erdal Korkmaz and Others* (no. 2013/2653, 18 November 2015, §§ 98-105). In the individual application in question, the applicants, who had been placed in detention within the scope of an investigation initiated into the offence of membership of an armed terrorist organisation, alleged a violation of their constitutional rights, stating that they had not been brought before the judge who had conducted the review of their detention and that the review had been carried out through the SEGBİS (see *Erdal Korkmaz and Others*, § 98). In the said judgment, the Court emphasised that the SEGBİS allowed for the possibility of seeing the persons present and hearing the submissions made in the hearing room and provided the parties to the proceedings with the opportunity of mutually conducting the judicial acts. Thereafter, the Court stated that the proceedings conducted through the SEGBİS were

compatible with the principle of face to face trial (see *Erdal Korkmaz and Others*, § 103).

70. The Court has not previously examined in a detailed manner the possibility of ensuring the applicants' appearance at the hearing by means of audio and visual connection from the standpoint of *the right to be present at the hearing* within the scope of *the right to a fair trial*. Accordingly, as regards *the disputes over a criminal charge*, a substantial assessment concerning the interferences with t*he right to be present at the hearing* within the scope of the right to a fair trial will be made for the first time in this judgment.

a. Admissibility

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

b. Merits

i. Scope of the Right and Existence of an Interference

72. As enshrined in Article 36 of the Constitution, everyone has the rights to assert a claim, to defence and to a fair trial. The relevant article of the Constitution provides for the rights to assert a claim and to defence separately from the right to a fair trial and this implies that the parties must be provided with the opportunity of bringing their claims and defence submissions before the court (see *Mehmet Fidan*, no. 2014/14673, 20 September 2017, § 37).

73. In the reasoning for addition of the notion of "*… and the right to a fair trial"* to Article 36 of the Constitution, it is emphasised that the right to a fair trial, which is safeguarded also by the international conventions to which Turkey is a party, has been incorporated into the text of the article. The European Court of Human Rights ("the ECHR") has established the requirements of the right to a fair trial on the basis of the concept of fair trial under Article 6 § 1 of the European Convention on Human Rights ("the Convention"). On many occasions the ECHR has emphasised that one of the requirements of the right to a fair trial under Article 6 § 1 of the

Convention is the right to be present at the hearing. Therefore, it must be acknowledged that the right to a fair trial safeguarded by Article 36 of the Constitution covers the right to be present at the hearing.

74. The accused's presence 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 operative. For the fair administration of criminal justice, it is of great importance to bring the accused before the court. The adoption of a trial system based on the principles of equality of arms and adversarial proceedings requires the accused's presence at the hearing. The relevant right involves not only being present at the hearing but also pursuing the trial process, hearing allegations and witness statements and raising arguments to support claims/defence submissions. Thus, the right to be present at the hearing is directly related to the right of the accused to participate in the proceedings. By being present at the hearing, a person subject to a criminal charge participates in the proceedings effectively, is involved in the process of the delivery of the judgment in respect of him, and gets the opportunity to steer the trial. In this manner, the judges have the opportunity of observing the attitude and conduct as well as the physical characteristics of the accused person.

75. The right to be present at the hearing is also closely linked to the right to defence which is a specific aspect of the right to a fair trial. For the assurance of the right to *defence in person*, which is the most important element of a fair trial in the criminal proceedings, the accused person must be afforded the opportunity of being present at the hearing. The accused person's presence at the hearing is of high importance especially *at critical stages* where assessments capable of having an effect on the judgment to be delivered by the court are made or where other acts concerning the substance of the case are conducted. The right to be present at the hearing refers to a person's attendance at the hearing of his case in person or together with his lawyer. In this way, the accused person, who is best placed to know the incident, ensures the discussion of the evidence and has the opportunity of refuting the evidence against him and influencing the decision to be delivered by the court and thus proving the accuracy of his defence submissions.

76. The right to be present at the hearing is also closely linked to the right to examine or have examined witnesses and to benefit from the assistance of an interpreter. It would be difficult for an accused person to effectively enjoy these rights in the event of his non-appearance at the hearing. In cases requiring the exercise of the relevant rights, the right to be present at the hearing provides the accused person with the possibility of presenting his defence submissions before the court in the most appropriate and effective manner, revealing the weak/unreliable aspects of the statements of witnesses by putting questions to them, and thus influencing the outcome of the proceedings. Accordingly, even if instruments providing high quality voice and image are used, the interest served by the remote transmission of the accused person's voice and image to the hearing room is not the same as the one served by his presence in the hearing room in person. Therefore, the said right may be limited only in exceptional circumstances.

77. The right to be present at the hearing is also regulated in the relevant procedural laws. Article 193 § 1 of the Code of Criminal Procedure ("the CCP" or Law no. 5271") provides that no hearing shall be held in the absence of the accused person. Pursuant to the relevant provision, save for the exceptions provided for by the law, no hearing shall be held in respect of an accused person who fails to appear. One of those exceptions is set out in paragraph 2 of the same article, which provides that if a decision other than conviction is required to be delivered in respect of the accused on the basis of the evidence collected, the case may be concluded in his absence even if he has not been questioned. Other exceptions are set out in Articles 194, 195, 196, 200 and 204 of the same Law. However, the norm to be taken as basis in the examination of individual applications is the Constitution, and a review of lawfulness is not conducted. Therefore, the interference must be compatible with constitutional requirements.

78. In the present case, there was apparently an interference with the applicant's right to be present at the hearing due to the trial court's dismissal of her request to be present in the hearing room and the attempts to ensure her attendance through the SEGBİS.

ii. Whether the Interference Constituted a Violation

79. The right to be present at the hearing safeguarded by Article 26 of the Constitution is not absolute and may exceptionally be subject to restrictions. However, such interference amounts to a violation of Article 36 of the Constitution, unless it is compatible with the conditions set out in Article 13 thereof.

80. Article 13 of the Constitution, insofar as relevant, provides as follows:

> *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to ... the principle of proportionality."*

81. Therefore, an examination must be made to determine whether the impugned interference complied with the requirements of being prescribed by law, being based on a justifiable reason and not being contrary to the principle of proportionality as laid down in Article 13 of the Constitution.

(1) Lawfulness

82. The trial court's dismissal of the request for personal presence at the hearing submitted by the applicant held as a convict in the penitentiary institution was based on Article 196 § 4 of the Law no. 5271. Therefore, the impugned interference complied with the criterion of *lawfulness*.

(2) Legitimate Aim

83. Article 13 of the Constitution provides that the fundamental rights and freedoms may only be restricted for the special reasons indicated in the constitutional article concerning the relevant right and freedom.

84. Nevertheless, according to the rulings of the Court, even the rights in respect of which no special reason for restriction has been indicated are, by their nature, subject to certain limitations. Moreover, these rights may be restricted on the basis of the rules set out in other provisions of the Constitution. Accordingly, the duties imposed on the State by the

rights and freedoms set out in other provisions of the Constitution may constitute a limitation for the rights and freedoms in respect of which no special reason for restriction has been indicated (see the Court's decisions no. E.2014/87, K. 2015/112, 8 December 2015; E.2016/37, K. 2016/135, 14 July 2016, § 9; E.2013/130, K.2014/18, 29 January 2014; and *Sevim Akat Eşki*, no. 2013/2187, 19 December 2013, § 33).

85. Article 36 of the Constitution does not prescribe a special reason for restriction. In such case, an examination must be made as to whether the duties imposed on the State by the rights and freedoms set out in other provisions of the Constitution may be acknowledged as a reason for restriction in the present case.

86. Article 17 § 1 of the Constitution provides that everyone has the right to life and the right to protect and improve their corporeal and spiritual existence. The duty imposed on the State by this provision to protect the right to life must be taken into consideration in the restriction of the right to be present at the hearing, which is an element of the right to a fair trial of the persons facing a criminal charge under Article 36 of the Constitution.

87. In the present case, the applicant's request for attendance at the hearing in person was dismissed in view of the risk to be caused by her transfer to her life and to the life of public officers. Accordingly, it has been concluded that the impugned interference pursued the aims of maintaining public order and security as well as protecting the life and physical integrity of both the imprisoned person and the security officers who would accompany her, which are among the legitimate aims within the meaning of Article 17 of the Constitution.

88. Moreover, Article 141 of the Constitution has also imposed on the judicial authorities the duty of concluding the proceedings as expeditiously as possible and at minimum cost. Where the fulfilment of such duty under the burden of heavy workload becomes difficult, the introduction of alternative methods for the settlement of disputes may be deemed necessary for the purpose of securing the effectiveness of the constitutional rules (see the Court's decision no. E.2013/85, 2013/95, 22 September 2010). In the present case, the applicant's request for

attendance at the hearing in person was dismissed on the ground that she had previously presented her defence submissions before the court. Accordingly, it has been concluded that the interference with the right to be present at the hearing for the purpose of reducing delays caused by the transfer of prisoners from the penitentiary institution to the hearing room and expediting the proceedings pursued a legitimate aim to achieve procedural economy.

(3) Proportionality

(a) General Principles

89. The principle of proportionality consists of three sub-principles: *suitability*, *necessity* and *proportionality in the narrow sense*. The *suitability* test requires that the interference must be suitable to achieve the aim pursued; the *necessity* test requires that the interference must be necessary in order to achieve the aim pursued, in other words that it must not be possible to achieve the same aim through a less severe interference; and the test of *proportionality in the narrow sense* 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 (see the Court's decisions no. E.2011/111, K.2012/56, 11 April 2012; E.2016/16, K.2016/37, 5 May 2016; and *Mehmet Akdoğan and Others,* no. 2013/817, 19 December 2013, § 38).

90. Accordingly, for an interference with the right to be present at the hearing to be compatible with the Constitution, it must not only be *suitable* to achieve the aim pursued but must also be *necessary*. As explained above, the *necessity* test requires that the least restrictive one must be preferred among the means constituting an interference with the right. Among the measures restricting a right or a freedom, the one with a less interfering effect on the norm area of the right must be preferred. Nevertheless, it must be acknowledged that the public authorities are afforded a certain margin of appreciation in choosing the means to constitute an interference with the right. Indeed, the competent public authorities are better placed to render a right decision on which means will produce effective and efficient results for the achievement of the aim pursued. Especially in cases where there is no alternative means or the available alternative means are

not effective or less effective for the achievement of the legitimate aim pursued, there must be very strong reasons to say that the margin of appreciation afforded to the public authorities in choosing the relevant means does not comply with the *necessity* criterion.

91. The right to be present at the hearing must be applied, by its nature, more strictly on the issues forming the core of the criminal law. Especially in the criminal proceedings concerning the offences punishable by a deprivation of liberty, an important factor is the extent of the interest to be served by the accused person's presence at the hearing at *critical stages* where assessments capable of having an effect on the judgment to be delivered by the court are made or where other acts concerning the substance of the case are conducted. In the criminal proceedings concerning a criminal charge, it is essential that the accused person should be present at the hearing at a stage where acts concerning the substance of the case are conducted. In exceptional circumstances, the trial may be conducted in absentia. Therefore, as regards the principle of *necessity*, the right to be present at the hearing may be restricted only if it has been *made necessary* by the circumstances of the case. In this respect, any measure restricting the right to be present at the hearing must primarily be proven to be *necessary*. In this context, the existence of a fact requiring the accused person's non-appearance at the hearing must be revealed by the inferior courts on the basis of a concrete and relevant ground.

92. As is known, the SEGBİS is described as an audio-visual information system in which sound and image are simultaneously transmitted, recorded and stored in the electronic medium in the National Judiciary Informatics System (UYAP) (see *Erdal Korkmaz and Others,* § 99). In fact, the use of the SEGBİS in the disputes related to criminal charges as well as civil rights and obligations -and the execution of penalties in this context- is not categorically contrary to the Constitution. On the contrary, the possibility provided to persons to attend the hearings via an audio-visual information system or to express themselves verbally before the judicial authorities has a function considerably facilitating those persons' participation in judicial processes. In this regard, the advantages provided in the context of the right to a fair trial by the UYAP, which has been introduced recently and is

one of the most important projects in the practice of law in Turkey, and by the SEGBIS, a part of the former, as well as the importance of using these systems that are continuously improved are undeniable.

93. However, it must not be ignored that the attendance at the hearing through the SEGBİS provides a more limited advantage to individuals as compared to presence at the hearing in person in terms of the possibility of expressing themselves verbally before the judicial authorities and effectively participating in the proceedings. In such case, the inferior courts must provide the reason why it is necessary to have the individual attend the hearing through the SEGBİS, which is a practice restricting to a certain extent the right to be present at the hearing in person. In the context of the demonstration of such necessity, the inferior courts must indicate the reason why the persons' attendance at the hearing through the SEGBİS has been deemed sufficient despite their request for personal presence at the hearing as well as the circumstances which have made it impossible or considerably difficult for them to be present at the hearing in person. In this connection, it is important to bear in mind the applicability of alternative measures affording the persons the possibility of being present at the hearing in person if they so request. Referring to the importance of being present at the hearing in person, the legislator stipulates that in cases where Law no. 5271 is applicable, a person's attendance at the hearing by means of the audio-visual communication technique may be ordered only if deemed *strictly necessary* by the judge or the court.

94. In cases where the *necessity* of the interference has been demonstrated, the question of whether the accused person's non-appearance at the hearing undermined the overall fairness of the proceedings must be addressed from the standpoint of the principle of *proportionality in the narrow sense*, namely another element of the principle of proportionality. In this scope, a detailed examination must be made as to whether the person who was not present at the hearing had any knowledge about the observations and evidence provided by the other party or could make any comment on them, and whether the person concerned was afforded a reasonable opportunity to participate in the proceedings without being placed in a disadvantaged position. In the assessment as regards the *proportionality*, an examination must be made as to whether the act conducted in the

absence of the accused person was an act (concerning the substance of the case) requiring his personal appearance at the hearing.

95. On the other hand, it is possible to waive, either expressly or tacitly, the right to be present at the hearing. In any event, such a waiver must be established in an unequivocal manner and must not run counter to any public interest. A waiver of the right to be present at the hearing may not be compatible with public interest unless minimum safeguards are provided to the defending party in proportion to such waiver. Moreover, in order for a tacit waiver to be valid, it must be revealed that the accused person could have reasonably foreseen the consequences of his acts at issue. Accordingly, the competent judicial authorities must not make an assessment based on a presumption in this regard.

(b) Application of Principles to the Present Case

96. The trial started while the applicant was being held in detention in the Van M Type Closed Penitentiary Institution. The applicant attended the hearing dated 15 March 2016 together with her lawyer and presented her defence submissions with the assistance of an interpreter who had been appointed *ex officio*. In the meantime, she was transferred to the Sincan Closed Penitentiary Institution for Women and an interlocutory decision was issued to the effect that she should be brought to the SEGBİS room to attend the next hearing through video conference. At the subsequent hearing (dated 14 April 2016), the administration of the penitentiary institution notified that the applicant had refused to attend the hearing through the SEGBİS. During the same hearing, the public prosecutor submitted his opinion on the merits. When the lawyer of the accused person requested time to provide defence submissions on the merits, the trial court adjourned the delivery of a judgment until the next hearing.

97. At the last hearing dated 12 May 2016, the applicant's lawyer was present, and the administration of the penitentiary institution notified that the applicant had refused to attend the hearing through the SEGBİS. Thereupon, the trial court continued the proceedings, stating that the applicant had presented the essential part of her defence submissions before the court, that the lives of the applicant and the public officers might be put in danger during the applicant's transfer from the Ankara province

to the hearing room due to the terrorist incidents which took place in the centre of and around the Van province, and that the attendance at the hearing through the SEGBİS was lawful. During the same hearing, the public prosecutor reiterated his opinion on the merits. After the applicant's lawyer provided defence submissions on the merits, the proceedings were concluded and the judgment was pronounced.

98. In her petitions filed at the stages, the applicant maintained that the method of video conference was subject to consent and insistently noted that she wanted to attend the hearings in person.

99. As regards the principle of proportionality, an examination must be made firstly as to the *suitability* of the interference. In the present case, the purpose of the decision requiring the applicant's attendance at the hearing through the SEGBİS was to ensure that there be no difficulty in protecting the security of the applicant and the officers during the applicant's transfer to the hearing room due to the terrorist incidents which took place 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, it is understandable that the right to be present at the hearing was restricted by the need to attach weight to legitimate aims such as preventing the prolongation of the proceedings and to concerns about a security problem which might be caused by the applicant's transfer. The impugned interference with the applicant's right to be present at the hearing can be said to be *suitable* for the protection of the right to life of the applicant and the public officers as well as for the achievement of the aim of ensuring the conduct of proceedings within a reasonable time.

100. Secondly, the *necessity* of the interference must be examined. The *necessity* test in the examination of proportionality requires that the least interfering means must be chosen. The applicant, who was on trial for a major crime, namely membership of a terrorist organisation, was transferred to a penitentiary institution located outside the jurisdiction of the trial court in the course of the proceedings for other reasons such as the population of the penitentiary institution exceeding the capacity as well as the security concerns. However, these reasons were not indicated in the relevant decision. Moreover, there is no information indicating that the

judicial organs and the administration of the penitentiary institution made arrangements in accordance with the requirements of the applicant's right to be present at the hearing (whether the date of hearing of the ongoing proceedings in respect of the applicant was taken into consideration prior to the decision on her transfer and whether a reasonable effort was made to take necessary security measures for the applicant's transfer to the courtroom on the planned date of hearing). In the present case, the first-instance court dismissed the applicant's request for personal presence at the hearing by pointing to a security problem in general terms and did not make an effort to ensure her attendance at the hearing in person.

101. The public prosecutor submitted his opinion on the merits and the trial court pronounced its judgment in the absence of the applicant, who was present during the first hearing, but whose attendance at the subsequent hearings through an audio-visual communication technique was attempted to be ensured, and who insistently submitted her request for attending the hearings in person by means of petitions she had filed on different dates. In other words, the trial court dismissed the applicant's request for personal presence at the hearings during which the public prosecutor's opinion on the merits were read out and a judgment in respect of the applicant was delivered, namely at a stage where acts concerning the substance of the case were conducted. Although the security concerns put forth by the first-instance court may be considered reasonable, the trial court failed to inquire into, for example, whether the hearing could be held on a more suitable day. The particular circumstances hindering the applicant's presence 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 is observed that the trial court dismissed the applicant's request without trying an alternative method to ensure her presence at the hearing and without demonstrating why it had been impossible to ensure her presence at the hearing and why the use of the SEGBİS method had been compulsory.

102. In this context, the inferior courts' direct dismissal of the applicant's request for personal presence at the hearing without considering other alternatives and providing concrete and relevant grounds leads to the

conclusion that the interference was not necessary due to the failure to choose the most appropriate means. Hence, it has been concluded that the impugned interference was not *necessary* since the inferior courts failed to demonstrate in concrete terms the *necessity* of the dismissal of the applicant's request for personal presence at the hearing, where acts concerning the merits of the case had been conducted.

103. Since it has been concluded that the interference was not necessary, no separate examination has been conducted as to the *proportionality in the narrow sense*.

104. For these reasons, it must be held that there has been 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.

Mr. Selahaddin MENTEŞ agreed with this conclusion by expressing a concurring opinion.

Mr. Hicabi DURSUN, Mr. Kadir ÖZKAYA, Mr. Rıdvan GÜLEÇ, Mr. Recai AKYEL and Mr. Yıldız SEFERİNOĞLU disagreed with this view.

C. Alleged Violation of the Right to a Trial before an Independent and Impartial Court

1. The Applicant's Allegations

105. The applicant alleged that the public prosecutor who had taken part in the proceedings had been dismissed from profession and placed in detention on the charge of membership of the Fetullahist Terrorist Organisation/Parallel State Structure (FETÖ/PDY) and that this issue undermined the independence and impartiality of the judiciary.

2. The Court's Assessment

106. Pursuant to Articles 47 § 3 and 48 §§ 1 and 2 of the Code on Establishment and Rules of Procedures of the Constitutional Court (Code no. 6216), an individual application form must summarise in a chronological order the incidents giving rise to the violation allegedly caused by the public power, must explain how the rights within the scope of the individual application have been violated, and must also indicate

the relevant reasons and evidence (see *Veli Özdemir*, no. 2013/276, 9 January 2014, §§ 19 and 20).

107. In the present case, the applicant did not make any concrete or legally acceptable explanation as to the issues allegedly infringing the independence and impartiality of the court carrying out the impugned proceedings and as to how they affected the acts imputed to her and found established by the inferior court and the authenticity of the procedures conducted on the basis of those acts. In this regard, the applicant did not fulfil her obligation to present evidence concerning the alleged violation and make explanations as to the alleged violation of her fundamental right and freedom. Accordingly, it has been concluded that the applicant failed to substantiate her allegations.

108. For these reasons, this part of the application must be declared inadmissible for being *manifestly ill-founded.*

D. Application of Article 50 of Code no. 6216

109. Article 50 of the Code no. 6216, in so far as relevant, provides as follows:

> *"(1) At the end of the examination of the merits it is decided that the right of the applicant has been violated or not. In cases where a decision of violation has been made, what is required for the elimination of the violation and the consequences thereof shall be ruled...*
>
> *(2)If the violation found arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be eliminated. In cases where there is no legal interest in holding the retrial, the applicant may be awarded compensation or be informed of the possibility to institute proceedings before the general courts. The court, which is responsible for holding the retrial, shall deliver a decision on the basis of the file, if possible, in a way that will eliminate the violation and the consequences thereof as the Constitutional Court has explained in its decision of violation."*

110. The applicant requested the Court to find a violation.

111. In its judgment on the individual application of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court set out the general principles concerning the redress of the violation. In another judgment, the Court explained the relevant principles as well as the consequences of the failure to comply with its judgment finding a violation and pointed out that this would amount to the continuation of the violation and might also result in a violation for the second time (see *Aligül Alkaya and Others* (2), no. 2016/12506, 7 November 2019).

112. Where a violation of any fundamental right is found within the scope of an individual application, the basic rule for redressing the violation and the consequences thereof is to ensure restitution to the extent possible, that is to say, to ensure restoration of the original state prior to the violation. To that end, it is primarily required to identify the cause of the violation and then to end the continuing violation, to revoke the decision or act giving rise to the violation, to redress the consequences thereof, to compensate the pecuniary and non-pecuniary damages resulting from the violation, and to take other measures deemed appropriate in this context (see *Mehmet Doğan*, §§ 55 and 57).

113. In cases where the violation results from a court decision, the Court holds that a copy of the judgment be sent to the relevant court for a retrial with a view to redressing the violation and the consequences thereof pursuant to Article 50 § 2 of Code no. 6216 and Article 79 § 1 (a) of the Internal Regulations of the Constitutional Court. The relevant legal regulation, as different from the similar legal norms set out in the procedural law, provides for a remedy specific to the individual application and giving rise to a retrial for redressing the violation. Therefore, in cases where the Court orders a retrial in connection with its judgment finding a violation, the relevant inferior court does not enjoy any margin of appreciation in acknowledging the existence of a ground for a retrial, as different from the practice of reopening of the proceedings set out in the procedural law. Thus, the inferior court to which such judgment is notified is legally obliged to take the necessary steps, without awaiting a request of the person concerned, to redress the consequences of the continuing violation in line with the Court's judgment finding a violation and ordering a retrial (see *Mehmet Doğan*, §§ 58 and 59; *Aligül Alkaya and Others* (2), §§ 57-59, 66 and 67).

114. In the present application, it has been concluded that the right to be present at the hearing was violated. Thus, it has been understood that the violation resulted from a court decision.

115. In these circumstances, there is legal interest in conducting a retrial for redressing the consequences of the violation of the right to be present at the hearing. Such retrial is intended for redressing the violation and the consequences thereof pursuant to Article 50 § 2 of Code no. 6216 containing a provision concerning individual applications. In this scope, the procedure required to be conducted is to deliver a new decision redressing the reasons leading the Court to find a violation and order a retrial, in line with the principles indicated in the judgment finding a violation. Therefore, it must be held that a copy of the judgment be sent to the 2nd Chamber of the Van Assize Court for a retrial.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 6 February 2020:

A. That the applicant's request for legal aid be GRANTED;

B. 1. UNANIMOUSLY that the alleged violation of the right to a trial before an independent and impartial court be DECLARED INADMISSIBLE *for being manifestly ill-founded*;

2. UNANIMOUSLY that the alleged violation of the right to be present at the hearing within the scope of the right to a fair trial be DECLARED ADMISSIBLE;

C. BY MAJORITY and by dissenting opinions of Mr. Hicabi DURSUN, Mr. Kadir ÖZKAYA, Mr. Rıdvan GÜLEÇ, Mr. Recai AKYEL and Mr. Yıldız SEFERİNOĞLU, that 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 was VIOLATED;

D. That a copy of the judgment be SENT to the 2nd Chamber of the Van Assize Court (E.2016/41, K.2016/328) for a retrial for redressing the consequences of the violation of the right to be present at the hearing; and

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

DISSENTING OPINION OF JUSTICE HİCABİ DURSUN

The applicant, against whom criminal proceedings had been initiated on the charge of membership of an armed terrorist organisation, alleged that she had been deprived of her right to present her defence submissions in the courtroom due to the attempts to ensure her attendance through the Audio-Visual Information System ("the SEGBİS") despite all her objections filed during the trial process, that she had thus not been able to present her objections against the public prosecutor's opinion on the merits, and that her right to a fair trial had therefore been violated.

The applicant was brought from the Van M Type Closed Penitentiary Institution to the first hearing held on 15 March 2016 before the Van Assize Court and presented her defence submissions before the trial court with the assistance of an interpreter after the indictment had been read out in the presence of her lawyer. Upon receipt of intelligence information indicating that the prisoners on trial for terrorist offences would carry out actions which would have repercussions such as escape, uprising or hostage-taking in the penitentiary institutions as of March 2016, the administrations to which the penitentiary institutions were affiliated was informed by the Ministry about the requirement to take measures against the possible incidents. In this scope, in view of the fact that the Van M Type Closed Penitentiary Institution where the applicant was being held as a detainee was located close to the neighbourhoods in the city centre where terrorist incidents frequently took place, that there was thus a high risk that a collective action which might take place in the penitentiary institution might be supported by the residents of the neighbourhoods and other prisoners in the penitentiary institution, and that there was an increase in the incidents undermining order due to the overcrowding in the wards, it was requested that certain detainees including the applicant who were on trial for terrorist offences should be transferred to other penitentiary institutions. Thereupon, on 28 March 2016 the applicant was transferred to the Ankara Sincan Penitentiary Institution, and the trial court sent to the penitentiary institution a letter requesting it to ensure the applicant's attendance at the hearing through the SEGBİS.

The SEGBİS is an information system in which sound and image are simultaneously transmitted and recorded in the electronic medium. The

legislation sets out the relevant provisions concerning the said system and clarifies in a detailed manner how the system functions. The SEGBİS provides the opportunity of hearing via video conference the defence submissions and statements of persons who are outside the jurisdiction of the public prosecutor's officers and courts or who do not appear before the court.

The accused's presence 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 operative. The relevant right involves not only being present at the hearing but also pursuing the trial process, hearing the submissions made during that process and raising allegations and defence arguments. Those whose statements are taken through the SEGBİS have the possibility to see the persons present and hear the submissions made in the hearing room and that the trial authority and other persons present at the hearing also have the opportunity to mutually conduct the judicial acts such as taking statements, making submissions and addressing questions. In other words, these possibilities offered by the SEGBİS ensure compliance with the principle of face to face trial as one of the elements of trial.

Article 141 has imposed on the judicial authorities the duty of concluding the proceedings as expeditiously as possible and at minimum cost. The SEGBİS provides the persons accommodated in a penitentiary institution outside the jurisdiction of the trial authority with the opportunity of being promptly brought before a judge and obtaining a decision within a reasonable time. Moreover, thanks to the SEGBİS, it is no longer necessary to transfer by a vehicle a person held in the penitentiary institution to the trial court and thus the risks which may occur during transfers such as accidents or terrorist attacks are averted and the possible damages are avoided.

In the assessment of whether Article 36 of the Constitution was violated, the particular circumstances of the present case in the light of the entirety of the proceedings must be taken into consideration. Turning to the circumstances of the present case, the applicant was present as a detainee during the hearing dated 15 March 2016, provided her defence submissions in the hearing room with the assistance of an interpreter

appointed by the trial court and denied all the charges against her. All information and documents included in the file were read out to the applicant, who was asked whether she had any comment to make in response to them. Subsequently, the applicant was transferred to the Ankara Closed Penitentiary Institution for Women for security reasons and the trial court made attempts to ensure her attendance at the hearings through the SEGBİS. Having examined the applicant's request for personal presence at the hearing following her refusal to be present in the SEGBİS room as she would allegedly not defend herself effectively by such means, the trial court dismissed the request on the ground that the applicant had presented her defence submissions in person before the court during the first hearing, that the lives of the applicant and the public officers might be put in danger during the applicant's transfer due to the terrorist incidents which took place in the centre of and around the Van province, and that there might arise security problems during the applicant's transfer to the Van province. Article 196 § 5 of Law no. 5271 provides that "*In respect of an accused person who, due to certain grounds of necessity, such as illness or disciplinary measure or other grounds, was transferred to a hospital or a prison located outside the jurisdiction of the trial court, the court may order that he be not transferred to the courtroom to attend the hearings during which his presence is not considered necessary provided that he was previously questioned before the court*." As is seen, the trial court revealed the existence of the grounds of necessity set out in Article 196 of Law no. 5271. Moreover, during the second and third hearings where the applicant was not present, the trial court only read out the victim's statements which had been taken by means of a rogatory letter and which was in favour of the applicant as different from the statements given by the said victim at the investigation stage and the expert reports concerning the translation of the letter found on the applicant; the applicant's lawyer who was present at those hearings was asked whether she had any comment to make on those documents; and the public prosecutor submitted his opinion on the merits. The public prosecutor's opinion on the merits was consistent with the indictment since it did not contain any fact different from those indicated in the indictment. Indeed, the victim presented her defence submissions in response to the indictment in the hearing room during the first hearing, and the accused's

lawyer also provided detailed defence arguments in response to the public prosecutor's opinion on the merits.

Consequently, in view of the particular circumstances of the present case in the light of the entirety of the proceedings and having regard to the fact that the applicant personally attended the first hearing where she presented detailed defence submissions concerning the charges against her; that the trial court made attempts to ensure her presence at the hearings through the SEGBİS upon her transfer to another prison for security reasons; that the applicant's statements were ordered to be taken via the SEGBİS serving for the principle requiring the conclusion of the proceedings as expeditiously as possible and at minimum cost pursuant to Article 141 of the Constitution; that the applicant was thus afforded the opportunity of defending herself without being placed in a disadvantaged position, taking part in the trial process effectively, clearly seeing the persons present and hearing the submissions made in the hearing room, providing her defence arguments without any restriction, putting questions to the other party, and benefiting from the assistance of her lawyer, if any; that during the hearings where the applicant was not present in person, the trial court did not hear any complainant, witness or victim and an act concerning the substance of the case was not carried out; that the public prosecutor's opinion on the merits did not contain any fact different from those indicated in the indictment; that during the first hearing the accused person presented her detailed defence submissions before the court in response to the indictment; and that the trial court revealed the grounds of necessity set out in Article 196 of the Code of Criminal Procedure (Law no. 5271), I disagree with the majority and consider that 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 was not violated.

DISSENTING OPINION OF JUSTICES KADİR ÖZKAYA, RIDVAN GÜLEÇ, RECAİ AKYEL AND YILDIZ SEFERİNOĞLU

1. The majority of the Court found that the applicant's right to be present at the hearing within the scope of the right to a fair trial safeguarded by Article 36 of the Constitution had been violated in the course of the conduct (conclusion with a judgment) of the criminal proceedings initiated for the applicant's punishment for membership of an armed terrorist organisation since some of her acts had demonstrated her role in the process of recruitment of members for the armed terrorist organisation.

2. The judgment concluded that there had been a violation of the applicant's right to be present at the hearing within the scope of the right to a fair trial safeguarded by Article 36 of the Constitution, holding that there had been an interference with the applicant's right to be present at the hearing due to the trial court's dismissal of her request to be present in the hearing room and the attempts to ensure her attendance through the SEGBİS; that the trial court had considered that the use of the SEGBİS to interfere with the applicant's right to be present at the hearing in person had constituted an appropriate means for the protection of the lives of the applicant and the public officers and for the conduct of the trial within a reasonable time in view of the fact that the problems concerning the security of the applicant and the public officers might arise during the applicant's transfer due to the terrorist incidents which had taken place in the centre of and around the Van province although in her petitions filed at various stages of the trial the applicant had maintained that the method of video conference was subject to consent as set out in the decisions of the Court of Cassation and insistently noted that she wanted to attend the hearings in person; that even though the applicant, who had been on trial for a major crime, namely membership of a terrorist organisation, had been transferred to a penitentiary institution located outside the jurisdiction of the trial court in the course of the proceedings for other reasons such as the population of the penitentiary institution exceeding the capacity as well as the security concerns, these reasons had not been indicated in the judgment of the trial court; that there was no information as to whether the judicial organs and the administration

of the penitentiary institution had taken into consideration the date of hearing of the ongoing proceedings in respect of the applicant prior to the decision on her transfer and whether they had made reasonable effort to take necessary security measures for the applicant's transfer to the courtroom on the planned date of hearing; that the first-instance court had dismissed the applicant's request for personal presence at the hearing by pointing to a security problem in general terms without demonstrating the existence of particular circumstances making it impossible for her attendance at the hearing in person; that the trial court had not made any effort to ensure the applicant's personal attendance, such as inquiring into whether the hearing could be held on a more suitable day; that the trial court had dismissed the applicant's request without trying an alternative method and demonstrating that the use of the SEGBİS method had been compulsory; and accordingly that the interference with the applicant's right to be present at the hearing where acts concerning the substance of the case had been conducted had not been necessary.

3. We disagree with the majority opinion for the following reasons:

4. On 30 July 2015 a person, whose clear identity has not been disclosed, reported to the Van Provincial Security Directorate that "a person named Şehrivan [the applicant] travelling from the Mersin province to the Van province by bus would hand over the person beside her to the organisation" in order to recruit members for the organisation PKK/KCK (At the date when such report was made, the applicant was residing in the Mersin province).

5. Within the scope of the investigation launched upon such report, the security officers engaged in a pursuit of a passenger bus belonging to a private firm which was transporting passengers from the Mersin province to the Van province and which was considered to have been carrying the applicant and the person beside her.

6. After the bus had arrived at the Van Bus Terminal and dropped off its passengers, two women checked around and asked the departure point of the vehicles heading to the Yüksekova district. Thereupon, the relevant security officers considered that these women might be the persons reported and thus they conducted an identity check.

7. According to the incident report dated 30 July 2015, the identity check revealed that one of the women was the applicant and the other one was a woman having being sought as a missing person as from 28 July 2015 and carrying an identity card issued in the name of S.D. although her real name was R.T.

8. On 31 July 2015 R.T., who gave her statement as a victim in the presence of her lawyer, declared that she was residing with her family in the Mersin province; that some of her relatives had joined the terrorist organisation PKK; that she also had decided to join the organisation; that she had thus gone to the building of the Mersin provincial branch of a political party and requested her name to be included in the list of persons willing to join the organisation; that she had subsequently been called on phone, been invited to the party building and been handed over to a person whom she knew as Şehrivan (i.e. the applicant) in order for her to join the organisation; that Şehrivan had firstly changed her t-shirt and then told that they would first go to the Van province and subsequently to the Hakkari province where she (i.e. R.T.) would be handed over to a male friend of her (i.e. Şehrivan, namely the applicant) and that she (i.e. Şehrivan) would then return back; that after they had met in the party building, she had stayed in the Mersin province together with Şehrivan for one day and then arrived at the Van province by the same bus; and that before getting on the bus, Şehrivan had given her the identity card of S.D. who was a friend of Şehrivan in her workplace.

9. On the same date (i.e. on 31 July 2015) the applicant was questioned by the public prosecutor. During her questioning, the applicant denied the charges against her and alleged that she was originally from the Bitlis province, but that she was residing in the Mersin province together with her family, that she was unemployed, that she had come to the Van province to visit her relatives, that she had met R.T., whom she had not previously known, during an event held by the Association for Solidarity and Support for Relatives of Disappeared Persons (*Yakınlarını Kaybeden Ailelerle Yardımlaşma ve Dayanışma Derneği*, YAKAY-DER) and that they had travelled together, that she did not admit the statements of R.T., that she had welcomed R.T. into her house since she had compassion for her, that she had not taken R.T. anywhere to join the PKK, ... that there

was a camera in front of the building of the provincial branch, that the examination of the video footage of the camera would reveal that she had not met R.T. there, that she reiterated her previous statements concerning the phone numbers found on her, that the letter found on her might have been sent by her brother, that she had not taken anyone to anywhere to join the PKK, and that she denied the charge against her.

10. On 30 July 2015 the applicant was taken into custody within the scope of the investigation and on 31 July 2015 she was placed in detention. On the basis of the indictment dated 18 January 2016, criminal proceedings were initiated against her for membership of an armed terrorist organisation. The indictment noted that the applicant had acted within the framework of the order and command chain of the armed terrorist organisation and brought along the victim R.T. from the Mersin province to the Van province in order to recruit her for the rural wing of the organisation and that such act constituted an organisational activity in accordance with the distribution of duties within the framework of the organisational activities.

11. On 2 March 2016 the trial court heard R.T. by means of a rogatory letter. In her statement, R.T. made submissions different from those she had made at the investigation stage and maintained that she was residing in the Mersin province, that she was engaged in gardening, that she had a maternal aunt residing in the Van province, that she had gone to the Van province by bus in order to visit her aunt for the first time, that she had previously known the accused Şehrivan Çoban (i.e. the applicant) neither in the Mersin province nor in the Van province, that the person in question had also travelled on the same bus as her, that they had been taken into custody when the bus had arrived at the terminal, and that she had neither made any attempt to join the organisation nor received help from anyone in this regard.

12. When the victim R.T. was asked whether she had any comment to make on the statement she had given before the public prosecutor in the presence of her lawyer after the reading out of such statement, she denied the statement at issue and alleged that she had given such statement since she had been very tired and frightened, that her current (new) statement was true, that she had no complaint about the accused person whom she

did not know and that she did not have any request for participation in the proceedings as a civil party.

13. During the hearing held on 15 March 2016 in the proceedings before the 2nd Chamber of the Van Assize Court ("the trial court"), the statement of the victim R.T. taken by means of a rogatory letter was read out to the applicant, who provided her defence submissions in the presence of her lawyer. The applicant reiterated the defence submissions she had presented during the investigation stage and maintained in brief that she had not previously known R.T., that she had planned to go to the Van province in order to visit her relatives there, that she had travelled together with R.T. since R.T. had expressed her desire to visit her relatives in the Yüksekova district, and that she had not given R.T. an identity card belonging to another person. During the same hearing, the applicant's lawyer stated that there was no evidence against the applicant other than the concrete statement given by the victim at the investigation stage and that the victim's statement in question contained contradictions. In this context, the lawyer requested the extension of the inquiry for the clarification of the circumstances of the incident.

14. In the meantime, upon receipt of intelligence information indicating that the prisoners on trial for terrorist offences would carry out actions and protests which would have repercussions such as escape, uprising or hostage-taking in the penitentiary institutions as of March 2016, the administrations to which the penitentiary institutions were affiliated was informed by the Ministry about the requirement to take measures against the possible incidents. In this scope, in view of the fact that the Van M Type Closed Penitentiary Institution where the applicant was being held as a detainee was located close to the neighbourhoods in the city centre where terrorist incidents were frequently taking place, that there was thus a high risk that a collective protest which might take place in the penitentiary institution might be supported by the terrorist elements in the neighbourhoods and other prisoners in the penitentiary institution, and that there was an increase in the incidents undermining order due to the overcrowding in the wards, it was requested that certain detainees who were on trial for the offence of membership of a terrorist organisation should be transferred to other penitentiary institutions.

15. Upon approval of the transfer request by the General Directorate of Prisons and Detention Houses ("the General Directorate"), the applicant was transferred to the Ankara Sincan Closed Penitentiary Institution for Women ("the Penitentiary Institution") on 28 March 2016. The letter of approval noted that if letters requesting the transferred prisoners' attendance at the hearings were sent from the courts before which those prisoners were on trial, such hearings should be held by means of the Audio-Visual Information System ("the SEGBİS"), and that if this was not possible, the relevant prisoners should be taken to the hearings after the relevant public prosecutor's offices had taken necessary security measures.

16. The trial court sent a letter to the Penitentiary Institution requesting it to ensure the applicant's attendance at the hearing scheduled for 14 April 2016 through the SEGBİS.

17. By referring to the said letter, the applicant stated that she did not want to attend the hearing through the SEGBİS but that she wanted to be present at the hearing in person and to provide her defence submissions as such.

18. During the hearing dated 14 April 2016 where the applicant's lawyer was present, the applicant's petition indicating her refusal to attend the hearing through the SEGBİS was read out. Due to the applicant's refusal to be present in the SEGBİS room, the hearing continued in the applicant's absence without establishing a connection through the SEGBİS. At the hearing, the trial court read out to the applicant's lawyer the statement of the victim R.T., which had been taken by means of a rogatory letter, and the expert report concerning the translation of a letter found on the applicant during her body search. The lawyer was then asked whether she had any comment to make on them.

19. The applicant's lawyer requested the applicant's release, stating that the victim R.T. had retracted her submissions against the applicant and that there was no other evidence against the applicant.

20. During the same hearing, the public prosecutor submitted his opinion on the merits. The opinion did not include any fact different from those indicated in the indictment. When the applicant's lawyer requested time to provide defence submissions in response to the public prosecutor's

opinion, the trial court granted the request and the hearing was adjourned until 12 May 2016.

21. The trial court sent a letter to the Penitentiary Institution requesting it to ensure the applicant's presence in the SEGBİS room at the hearing date. Thus, the Penitentiary Institution informed the applicant that she was requested to be present in the SEGBİS room to attend the hearing through the SEGBİS.

22. In her petition filed with the trial court on 26 April 2016, the applicant referred to various decisions of the Court of Cassation and declared that she would not be present in the SEGBİS room and that she wished to attend the hearing in person, noting that her presence at the hearing in person was necessary in order for her right to defence not to be restricted and that it was not possible for her to defend herself effectively by means of the video conference method.

23. During the last hearing of the trial dated 12 May 2016, the trial court assessed the applicant's request for personal presence at the hearing and stated that the applicant's questioning which formed the essential part of her defence had been conducted before the court during the first hearing, that there might arise security problems during the applicant's transfer to the Van province where the trial was being conducted from the penitentiary institution located in the Ankara province where she was being held as a detainee, and that the lives of the applicant and the public officers might thus be put in danger due to the terrorist incidents which took place in the centre of and around the Van province, and that the procedure of hearing defence submissions through the SEGBİS was compatible with the relevant legislation. For these reasons, the applicant's request was dismissed by an interlocutory decision and the hearing continued in the applicant's absence.

24. During the hearing, the applicant's lawyer provided defence submissions in response to the public prosecutor's opinion on the merits and maintained in brief that they did not agree with the public prosecutor's opinion, that there was no concrete evidence of the commission of the offence of membership of an organisation, and that the initial submissions of R.T. against the applicant were contradictory.

25. On 12 May 2016 the trial court convicted the applicant of "membership of an armed terrorist organisation" and sentenced her to 8 years and 9 months' imprisonment.

26. The judgment noted:

- that it could not be acceptable that the victim R.T. had declared at the trial stage that she did not know Şehrivan Çoban while she had stated at the investigation stage that she had been brought by Şehrivan Çoban to the Van province from the Mersin province to join the rural wing of the terrorist organisation; that even the accused Şehrivan Çoban had stated in her confessing submissions that she had met R.T. in the Mersin province, that she had welcomed R.T. into her house, that she had travelled together with R.T., that she had purchased the bus ticket, and that she had given her t-shirt to R.T. on the way; that according to the incident report dated 30 July 2015 the victim and the accused person had gone to the toilet together and then got on the shuttle vehicle together;

- that according to the incident report dated 30 July 2015, the criminal record check carried out following the identification process revealed that R.T. was being sought as a missing person as from 28 July 2015; that the family of a person would not have submitted a missing person complaint if such person had planned to visit a relative;

- that For these reasons, it was concluded that the act of the victim who had made detailed submissions at the investigation stage but then retracted those statements at the trial stage was intended for relieving the accused person from the charge and the punishment; that in these circumstances the victim's statements which were consistent with the scope of the file had been outweighed by her statements made at the trial stage; and that for the same reasons, the accused person's defence submissions based on denial could not be relied on.

27. The applicant filed an appeal against the judgment, stating that contradictory witness statements had been taken as basis for the judgment

and that a hearing had been unduly held in her absence despite her refusal to attend the hearing through the SEGBİS and her request for personal presence at the hearing.

28. On 1 February 2017 the 16th Criminal Chamber of the Court of Cassation upheld the judgment. According to the decision of the Court of Cassation, the applicant's acts of giving clothes to the victim in order to conceal the identity of the victim who was under age, obtaining the identity card belonging to another person and purchasing a fake bus ticket demonstrated her role in the recruitment of members for the armed terrorist organisation and the trial court's finding that the applicant was a member of an armed terrorist organisation was considered justified.

29. On 2 May 2017 the applicant lodged an individual application.

30. The applicant alleged a violation of her right to a fair trial, maintaining that she had refused to attend the hearing through the SEGBİS, which would allegedly put her in a difficult situation in making her defence, and that a hearing had been conducted in her absence although the public prosecutor's opinion on the merits should have been read out in her presence in accordance with the relevant legislative provisions and the well-established case law.

31. As indicated in many rulings of the Constitutional Court and the ECHR, for the criminal proceedings to be fair and equitable, it is of capital importance that an accused person should be brought before a court, both because of his right to a hearing and because of the need to ensure review of the accuracy of the allegations against him and compare his statements with those of other persons (such as victims and witnesses) involved in the incident in any manner. Indeed, if the accused person does not appear at the hearing, it becomes difficult for him to exercise his rights to "defend in person" and to "examine or have examined witnesses". In these circumstances, the accused's right to be present at the hearing must be guaranteed. In this regard, it is not possible to disagree with the explanations as to the principles concerning the accused's right to be present at the hearing in the judgment adopted by a majority vote.

32. Moreover, as indicated in the judgment, 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 is not absolute and may be subject to restrictions where required by the situation and in the presence of the relevant conditions.

33. In this context, a discussion must be held as to whether the requirement to ensure an accused person's attendance at the hearings of the trial against him through the SEGBİS instead of his presence in the hearing room amounts to a restriction on the "right to be present at the hearing" and, if so, whether such restriction is compatible with the Constitution on a case basis.

34. In the judgment based on a majority opinion, such requirement was qualified as a restriction. We also consider it as a restriction. Indeed, for the reasons agreed by us in relation to the meaning and scope of the right to be present at the hearing and the possibilities afforded by such right to the persons as provided in the judgment based on a majority opinion, the requirement (basic rule) of the right to be present at the hearing is to ensure the personal attendance of the person on trial for a criminal charge at the hearings of the trial against him by securing his presence in the hearing room in person. Nevertheless, the use of the SEGBİS and similar methods must not be construed as amounting to a violation of "the right to be present at the hearing" in every case. In other words, a categorical approach on the issue must not be adopted and an assessment must be made on a case basis and in the light of the particular circumstances of each case.

35. The ECHR notes that while the participation of the accused in the proceedings via video conference is not, in itself, contrary to the Convention, the application of such method in each individual case must pursue a legitimate aim and the procedures concerning its application must be compatible with the requirements of respect for the right to defence (as prescribed by Article 6 of the Convention) (see *Asciutto v. Italy*, no. 35795/02, 27 November 2007).

36. In the present case, the applicant personally attended the hearing held on 15 March 2016 in the criminal proceedings against her before the 2nd Chamber of the Van Assize Court by appearing in the hearing room in the presence of her lawyer. She filed petitions of request for personal

attendance at the subsequent hearings as well, but attempts were made for her attendance through the SEGBİS at the hearing dated 14 April 2016 and the last hearing dated 12 May 2016. Thus, those hearings were held through the SEGBİS (in the presence of the applicant's lawyer) in the absence of the applicant.

37. The relevant legislation clearly sets out the description of the SEGBİS method, the manner how its infrastructure has been formed, the conditions in which it can be used, and the authority which will decide on the use of such method. According to the relevant legislative provisions, the SEGBİS is described as an information system in which sound and image are simultaneously transmitted, recorded and stored in the electronic medium in the National Judiciary Informatics System (UYAP). Those whose statements are taken through the SEGBİS have the possibility to see the persons present and hear the submissions made in the hearing room and that the trial authority and other persons present at the hearing also have the opportunity to mutually conduct the judicial acts such as taking statements, making submissions and addressing questions.

38. The SEGBİS provides the persons accommodated in a penitentiary institution outside the jurisdiction of the trial authority with the opportunity of being promptly brought before a judge and obtaining a decision within a reasonable time. Moreover, thanks to the SEGBİS, it is no longer necessary to transfer by a vehicle a person held in the penitentiary institution to the trial court and thus the risks which may occur during transfers such as accidents or terrorist attacks are averted and the possible damages are avoided.

39. Furthermore, pursuant to the Code of Criminal Procedure (Law no. 5271), the judge or the court has the authority to question the accused person in the country by using a simultaneous audio-visual communication technique or to order his attendance at the hearings by means of such technique, where deemed necessary.

40. In the present case, during the hearing dated 15 March 2016 where the applicant was present in the hearing room as a detainee, all information and documents included in the file were read out to the applicant, who was then asked whether she had any comment to make in response to

them, who provided her defence submissions with the assistance of an interpreter appointed by the trial court and who denied all the charges against her.

41. In the meantime, on the basis of an information received from the Ministry of Justice, it was requested that certain detainees including the applicant who were on trial for the offence of membership of a terrorist organisation should be transferred to other penitentiary institutions. In this scope, the applicant was transferred to the Ankara Sincan Penitentiary Institution for Women. In other words, the applicant was transferred to the Ankara Sincan Penitentiary Institution for Women for a concrete security reason.

42. During the process of the relevant criminal proceedings subsequent to the applicant's transfer, the trial court ordered that the applicant's attendance at the hearings through the SEGBİS be ensured due to the security problems relied on for her transfer (the security problems which might be faced during the applicant's transfer to the courtroom from the penitentiary institution located in the Ankara province where she was being held as a detainee, and the possibility that the lives of the applicant and the public officers might be put in danger due to the terrorist incidents which took place in the centre of and around the Van province) and in view of the fact that the applicant had personally provided her defence submissions in the hearing room, that the file did not contain any issue other than the one in response to which she had provided defence submissions, and that the procedure of ensuring the accused persons' attendance at the hearings through the SEGBİS and hearing their defence submissions by the use of such method was compatible with the relevant legislation. For the same reasons, the trial court dismissed the applicant's request for attendance at the hearings by being present in the hearing room in person and thus the hearings continued in the absence of the applicant.

43. On the other hand, during the second and third hearings where the applicant was not present in person, a complainant or a witness was not heard, any information or document which might constitute an evidence against the applicant or which might be assessed against her and in respect of which she had not provided her defence submissions was not included in the case file, the statement of the victim which had been

taken by means of a rogatory letter and which was completely in favour of the accused person (the applicant) as different from the statements given by the said victim at the investigation stage and the expert reports concerning the translation of the letter found on the applicant by the security forces were read out, the applicant's lawyer who was present in the hearing room was asked whether she had any comment to make on those documents, and the public prosecutor submitted his opinion on the merits. It is understood that the public prosecutor's opinion on the merits did not contain any fact different from those indicated in the indictment in response to which the applicant provided her defence submissions in person. Moreover, the public prosecutor's opinion was consistent with the indictment. As mentioned above, the applicant personally provided her defence submissions in response to the indictment in the hearing room during the first hearing, and her lawyer provided detailed defence submissions in the hearing room in response to the public prosecutor's opinion on the merits.

44. Article 196 § 5 of Law no. 5271 provides that "*In respect of an accused person who, due to certain grounds of necessity, such as illness or disciplinary measure or other grounds, was transferred to a hospital or a prison located outside the jurisdiction of the trial court, the court may order that he be not transferred to the courtroom to attend the hearings during which his presence is not considered necessary provided that he was previously questioned before the court*."

45. As a result of the overall assessment of the criminal proceedings against the applicant in the light of its particular circumstances as explained in detail above, it is understood that the trial court provided sufficient reasons to reveal the existence of "grounds of necessity" for the use of the SEGBİS in the present case as set out in the relevant legislative provision; that the applicant was thus afforded the opportunity of defending herself without being placed in a disadvantaged position, taking part in the trial process effectively, clearly seeing the persons present and hearing the submissions made in the hearing room, providing her defence arguments without any restriction, putting questions to the other party, and benefiting from the assistance of her lawyer, if any; and that the applicant did not avail herself of these opportunities as from a certain stage of the proceedings.

46. In these circumstances, it has been concluded that there was not 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.

47. For these reasons, we disagree with the majority opinion and consider that there was not 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.

CONCURRING OPINION OF JUSTICE SELAHADDİN MENTEŞ

1. The majority of the Court held that there had been a violation of the applicant's right to be present at the hearing within the scope of the right to a fair trial. I agree with the majority in finding that there was a violation of the applicant's right to a fair trial, but I rely on a separate ground for such finding and consider that there was a violation not as regards the guarantee to be present at the hearing but as regards the guarantee to be provided with adequate time and facilities to present defence submissions on account of the delivery of a judgment in respect of the applicant on the basis of her statements made during her questioning without communicating the public prosecutor's opinion on the merits and reminding the rights concerning defence on the merits.

2. The facts have been summarised in detail in the reasoned judgment of the Court. In this context, it is understood that after having provided her initial defence submissions before the trial court in the presence of her lawyer in the criminal proceedings against her, the applicant was transferred from the penitentiary institution in the Van province to the Ankara Sincan Closed Penitentiary Institution for Women due to the increase in the terrorist incidents in the centre of the Van province and in the neighbouring provinces and on the basis of the intelligence information concerning the possible actions and protests, which would have repercussions as of March, such as escape, uprising or hostage-taking.

3. Thereupon, the trial court ordered that the applicant's attendance at the hearing through the SEGBİS be ensured, but the applicant filed a

petition in which she refused to attend the hearing through the SEGBİS and requested personal presence at the hearing.

4. The trial court held the second hearing on 14 April 2016 in the absence of the applicant but in the presence of her lawyer without resorting to a method of ensuring her presence in the SEGBİS room in the penitentiary institution where she was being held as a detainee. During the second hearing where the applicant was not present, the public prosecutor submitted his opinion on the merits. When the applicant's lawyer requested time to provide defence submissions in response to the public prosecutor's opinion on the merits, the trial court adjourned the hearing until 12 May 2016.

5. Despite the trial court's order requiring the authorities to ensure the applicant's presence in the SEGBİS room, the applicant noted in her petition filed on 26 April 2016 with the trial court that she would not be present in the SEGBİS room and that she wished to attend the hearing in person.

6. During the last hearing dated 12 May 2016 in the criminal proceedings against the applicant, the trial court dismissed the applicant's request for personal presence at the hearing. In dismissing the applicant's request, the trial court relied on the fact that the applicant's questioning which formed the essential part of her defence had been conducted before the court during the first hearing and that her transfer to the courtroom might lead to security problems.

7. At the hearing, the trial court convicted the applicant after having heard her lawyer's defence submissions on the merits. Thus, during the final hearing held in her absence, the applicant was convicted without her defence submissions on the merits having been heard.

8. The UYAP is an information system which ensures internal automation, in terms of hardware or software, of the central and provincial organisations of the Ministry of Justice, the affiliated and related institutions, as well as all units of the ordinary and administrative judiciary or all judicial support units and also ensures external integration with the public institutions and organisations which have installed similar information automation systems. This system has integrated a

central information system in compliance with the electronic signature infrastructure and thus a functional full integration has been achieved between the judicial units and judicial support units. The judges, prosecutors, lawyers, clerks and citizens having electronic signature roles in the system upload any kind of information and documents to the system and the active and secure functioning of the system is ensured. The information and documents which previously required correspondences and interlocutory decisions can be directly and securely obtained through the e-government system.

9. The legal infrastructure of the UYAP has been formed by introduction of provisions especially into the Code of Criminal Procedure ("the CCP" or "Law no. 5271") and the Code of Civil Procedure as well as all the relevant laws and regulations. In this context, Article 38 (A) of the CCP, titled "*Electronic processes*", includes the following paragraphs (containing detailed provisions) concerning the UYAP.

> *"(1) The National Judiciary Informatics System (UYAP) shall be used in any kind of criminal procedure. Any data, information, document or decision shall be processed, recorded and stored through the UYAP.*
>
> *(2) Subject to the exceptions provided for by the laws, the documents may be examined through the UYAP by the use of electronic signature and any kind of criminal procedure may be conducted in this manner.*
>
> *(3) Any kind of document and decision required to be issued physically within the scope of this Law may be edited, processed, stored and signed by an electronic signature.*
>
> *(4) The documents and decisions signed by a secure electronic signature shall be electronically sent to other persons or institutions. The documents or decisions sent after being signed by a secure electronic signature shall not be additionally issued in physical form and sent as such to the relevant institutions and persons unless necessary.*
>
> *(5) Where the document signed electronically is inconsistent with the one signed by hand, the document signed by a secure electronic signature and recorded in the UYAP shall be considered valid.*

(6) The documents and decisions signed by a secure electronic signature shall not be subjected to a sealing process and the provisions of the laws prescribing the issuance of more than one copy shall not be applicable to them.

(7) The documents or decisions issued physically due to compelling reasons shall be scanned and uploaded to the UYAP by authorised persons, and they shall be electronically sent to the relevant units where necessary.

(8) Where it is necessary to obtain a physical copy of a report or a document recorded in the electronic medium, the relevant copy shall be certified as the true copy of the original and then signed and sealed by the judge, public prosecutor or the authorised person.

(9) The time-limits shall expire at the end of the day in the processes conducted in the electronic medium.

(10) The information, documents and records obtained via the UYAP from the external information systems such as those concerning civil registration, land registry and criminal records shall not be additionally requested physically. The information and documents sent through the UYAP to external information systems shall not be additionally sent physically unless necessary.

(11) The procedures and principles concerning the use of UYAP for criminal procedures shall be governed by a regulation to be issued by the Ministry of Justice."

10. Article 147 § 1 (h) of the CCP provides that technical means shall be used during the recording of statement-taking and questioning processes. Article 196 of the same Law, titled "*The accused's exemption from the hearing*", provides that the accused person may be questioned and his defence submissions may be heard by the use of a simultaneous audio-visual communication technique.

11. The SEGBİS is an information system in which sound and image are simultaneously transmitted and recorded in the electronic medium in the UYAP. Thanks to its technical characteristics and hardware, the SEGBİS

functions as a part of the hearing room if a video recording is made in the UYAP. Persons with whom a connection is established through the SEGBİS during the statement-taking process are able to see the persons present in the hearing room, follow the processes conducted during the hearing, and hear the submissions made.

12. Article 9 of the Regulation on the Use of an Audio-Visual Information System in the Criminal Procedure, which was issued to govern the principles and procedures concerning the SEGBİS and which entered into force after being published in the Official Gazette no. 28060 of 29 September 2011, provides that any kind of processes conducted at the investigation or trial stage shall be recorded through the SEGBİS within the framework of the principles and procedures set out in the laws in the event of the existence of the possibility of using an audio and visual communication technique. The same Regulation provides, in the part titled "those held in the penitentiary institutions", that the persons held in the penitentiary institutions may be heard through the SEGBİS and may attend the hearing through this system.

13. Moreover, Article 141 of the Constitution provides that "*it is the duty of the judiciary to conclude trials as quickly as possible and at minimum cost*". As a reflection of the said provision, the basic approach adopted by the CCP is the unity of the hearing (completion in one session). In view of the technical infrastructure of and the possibilities provided by the UYAP and SEGBİS as well as the accessibility to information and documents, it can be said that the SEGBİS has been designed to ensure compliance with such principle. Accordingly, the SEGBİS functions in accordance with the aforementioned rule set out in the Constitution in order to achieve the legitimate aim prescribed by the rule.

14. As a result of the assessment of the present case in the light of these explanations, it is understood that the requirement to ensure the applicant's attendance at the hearing through the SEGBİS was not in itself contrary to the right to a fair trial.

15. However, in the criminal proceedings conducted against the applicant, the trial court heard the public prosecutor's opinion on the merits during the hearing where the applicant was not present in

person or did not attend through the SEGBİS. The said opinion was not communicated to the applicant, either. Neither during the hearing where the public prosecutor's opinion on the merits was submitted nor during the hearing where the judgment was pronounced did the trial court ensure the applicant's presence in the SEGBİS room in the relevant penitentiary institution. Thus, the defence submissions provided by the applicant's lawyer in the applicant's absence and the initial defence submissions presented by the applicant were taken as basis for the delivery of the judgment.

16. One of the most fundamental guarantees of the right to a fair trial is to provide individuals with the necessary time and facilities to present their defence submissions before the court. In this context, Article 147 of the CCP sets out in detail the procedures concerning the statement-taking and questioning processes and also contains provisions concerning the right to remain silent. Article 216 of the same Law provides that during the discussion of the evidence the accused person shall be allowed to provide his defence submissions in response to the public prosecutor's opinion on the merits.

17. In the present case, it is understood that the applicant did not comply with the trial court's decision requiring her attendance at the hearing through the SEGBİS and refused to be present in the SEGBİS room and that the trial court delivered a judgment without communicating to the applicant the public prosecutor's opinion on the merits, by considering it sufficient for the applicant to have presented her initial defence submissions before the court, and by confining itself to hearing the defence submissions of only the applicant's lawyer. In this regard, the trial court's delivery of a judgment without considering the use of certain alternative methods such as communicating the public prosecutor's opinion to the applicant, informing the applicant of her rights under Articles 147 et seq. of the CCP, granting time for her to prepare defence submissions, reminding her of her right to remain silent, and informing her that she would be deemed to have exercised her right to remain silent in the event of her failure to provide defence submissions amounted to an important restriction in the context of the right to defence.

18. In this context, it must not be ignored that the power to exercise the rights set out in Articles 147 and 216 of the CCP is vested in the person on trial (the accused person) in the criminal proceedings. In the present case, although one of the methods to be applied by the trial court was to ensure the applicant's presence in the SEGBİS room after the dismissal of her request for personal presence at the hearing or at least to inform the applicant about this situation or about the fact that the proceedings would be concluded, no such attempt was made. Setting aside such a method resulted in the conclusion of the proceedings without the applicant being informed of the dismissal of her request for personal presence at the hearing and being provided with the opportunity to present her defence submissions on the merits albeit through the SEGBİS.

19. For these reasons, I am of the view that the applicant's right to a fair trial was violated in the circumstances of the present case on the ground that she had not been provided with adequate time and facilities to present her defence submissions on the merits. Accordingly, I do not agree with the majority opinion that the applicant's right to a fair trial was violated in the context of the guarantee to be present at the hearing due to the attempts to ensure the applicant's attendance at the hearing through the SEGBİS.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

KEMAL ÇAKIR AND OTHERS

(Application no. 2016/13846)

5 March 2020

On 5 March 2020, the Plenary of the Constitutional Court 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 in the individual application lodged by *Kemal Çakır and Others* (no. 2016/13846).

THE FACTS

[8-27] 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.

They lodged an individual application on 28 July 2016.

V. EXAMINATION AND GROUNDS

28. The Constitutional Court ("the Court"), at its session of 5 March 2020, examined the application and decided as follows:

A. Alleged Violation of the Right of Access to a Court

1. The Applicants' Allegations

29. The applicants, stating that they were engaged in farming on the land in question and had no other means of livelihood, noted that subjective capacity must be construed very widely in cases regarding environment. They complained that although the projects applied on the land were indeed a single integrated project, they were considered as three separate projects in breach of the Regulation and accordingly maintained that their immovable had been subject to an urgent expropriation within the scope of an integrated project and that their interests had been directly infringed.

Reminding that the urgent expropriation process had been set aside as it had not involved any matter of urgency, the applicants argued that the project field was completely a privately owned land consisting of cotton fields and olive groves and that the natural environment/habitat would be thus damaged on account of the disputed project. They lastly contended that the project field was located maximum 3 km away from the Savuca village, one of the outstanding regions contributing to cotton production, and therefore, the project would cause significant damage to the cotton production. They accordingly claimed that their right to a fair trial had been violated due to the dismissal of their case for lack of capacity.

2. The Court's Assessment

30. Article 36 § 1 of the Constitution, titled *"Right to legal remedies"*, provides as follows:

> *"Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through lawful means and procedures."*

a. Applicability

31. Pursuant to Article 148 § 3 of the Constitution and Article 45 § 1 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, in order for an examination of an individual application on the merits, the right allegedly violated by a public authority must be safeguarded not only by the Constitution but also under the scope of the Convention and its additional protocols to which Turkey is a party. In other words, an individual application involving any alleged violation of the rights falling outside the joint protection realm of the Constitution and the Convention must be declared inadmissible (see *Onurhan Solmaz*, no. 2012/1049, 26 March 2013, § 18).

32. Article 36 § 1 of the Constitution sets forth that everyone has the right of litigation either as plaintiff or defendant before the courts, which thus safeguards the rights to claim and defence, as well as the right to a fair trial. In the legislative intent of Article 14 of Law no. 4709 and dated 3 October 2001, whereby the notion of *fair trial* was added to Article 36 § 1 of the Constitution, it is indicated that "*the right to a fair trial, which*

is also safeguarded by the international conventions to which the Republic of Turkey is a party, has been incorporated into the provision". It is thereby understood that the purpose of adding this notion to Article 36 of the Constitution is to safeguard the right to a fair trial which is enshrined in the European Convention on Human Rights ("the Convention") (see *Yaşar Çoban* [Plenary], no. 2014/6673, 25 July 2017, § 54). In this regard, in determining the scope and context of the right to a fair trial safeguarded by the Constitution, Article 6 of the Convention titled "Right to a fair trial" and the relevant case-law of the European Court of Human Rights ("the ECHR") must be taken into consideration (see *Onurhan Solmaz*, § 22).

33. The Convention does not safeguard the right to a fair trial with respect to all rights and obligations that a person may claim to have. In Article 6 of the Convention, it is set forth that the rights and principles concerning the right to a fair trial shall apply to the determination of *the disputes as to civil rights and obligations* or of any *criminal charge*. Thereby, the scope of this right is limited to these issues. Accordingly, an applicant is entitled to lodge an individual application concerning alleged violation of the right to legal remedies as long as he is a party to any dispute as to his civil rights and obligations or the subject of a decision on the merits of a criminal charge against him. Therefore, the applications involving alleged violation of the right to a fair trial, except for the above-mentioned issues, cannot be examined through individual application mechanism for falling outside the joint protection realm of the Constitution and the Convention (see *Onurhan Solmaz*, § 23).

34. The right to a fair trial enshrined in Article 36 of the Constitution shall apply not only to the trials concerning a criminal charge but also to those regarding the determination of *civil rights and obligations*. For the application of Article 36 § 1 of the Constitution to *civil* matters, there must exist a right afforded to the person by the legal order or at least having an arguable basis. Such a right is not necessarily related to a right which is directly or indirectly specified and safeguarded in the Constitution. In this sense, the claims and privileges afforded to individuals through law are also under the scope of a right within the meaning of Article 36 of the Constitution provided that they can be raised before the courts. Secondly, there must be a dispute with respect to this right, which has a bearing on

the relevant person's interest. Such a dispute must be also decisive for the determination and enjoyment of the right in question (see *Mehmet Güçlü and Ramazan Erdem*, no. 2015/7942, 28 May 2019, § 28).

35. In this sense, certain rights and interests that are of an insignificant nature to such an extent that they cannot be subject matter of a case can in no circumstances be qualified as a right under Article 36 of the Constitution (see *Mehmet Güçlü and Ramazan Erdem*, § 30).

36. The subject matter of the present case is the EIA (environmental impact assessment) is not Required Decision dated 21 March 2008. As stated in Article 2 § 1 of Law no. 2872, EIA refers to acts and actions related to measures which would be taken for the clarification of favourable and unfavourable possible impacts of any projects intended to be implemented and for the prevention of any unfavourable impacts, if any, or minimising them to the possible extent that would give no harm to the environment. By the Regulation issued on the basis of this Law, the Ministry of Environment and Urbanisation is allowed to issue an *EIA is not Required Decision* in respect of certain projects. Accordingly, if the probable unfavourable impacts of the project on the environment are found, thanks to the measures to be taken, to be of an acceptable level given the relevant legislation and scientific principles, the Ministry of Environment and Urbanisation may issue an *EIA is not Required Decision,* which indicates that the implementation of the relevant project is not found to cause prejudice to the environment. For the projects with *EIA is not Required Decision,* an EIA report -which requires a more detailed examination of environmental impacts- is no longer necessary.

37. In filing this application, the applicants intended to have an EIA performed with a view to ensuring the disclosure of the impacts of the relevant project on their immovable. In case of the determination of any impact caused by the project on the applicants' immovable, it may be said that certain civil rights of the applicants, notably the right to property, have been effected. As for the arguable nature of this claim under the particular circumstances of the present case, the Court has concluded that the applicants cannot be reasonably expected to substantiate the alleged impacts of the project on their immovable in support of their arguments.

They indeed filed the present case so as to ensure the determination of such impacts. Therefore, the Court has not found it necessary to make a further examination as to whether the applicants, the owners of the immovable located close to the project field, had any interests falling under the scope of a civil right in bringing an action against the *EIA is not Required Decision* issued with respect to the contested project, and as to the applicability of Article 6 of the Constitution.

B. Admissibility

38. Accordingly, the Court has declared the alleged violation of the right of access to a court admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

C. Merits

İ. Existence of an Interference and Scope of the Right

39. It is set out in Article 36 § 1 of the Constitution that everyone has the right of litigation either as plaintiff or defendant as well as the right to defence before the courts. Accordingly, the right of access to a court is an element inherent in the right to legal remedies safeguarded under Article 36 of the Constitution. In the legislative intent of adding the notion of fair trial to Article 36 of the Constitution, it is underlined that the right to a fair trial, which is also enshrined in the international conventions to which Turkey is a party, has been incorporated into the said provision. The European Court of Human Rights, interpreting the Convention, notes that Article 6 § 1 of the Convention embodies the right of access to a court (see *Özbakım Özel Sağlık Hiz. İnş. Tur. San. ve Tic. Ltd. Şti.*, no. 2014/13156, 20 April 2017, § 34*)*.

40. The right of access to a court refers to the ability to bring a dispute and any related claim before a court and to seek the conclusion of such dispute and claim in an effective manner (see the Court's judgment, no. E. 2013/40, K.2013/139, 28 November 2013).

41. A person's deprivation of the opportunity to have a dispute -related to an administrative act that has been performed by public authorities and has, by its consequences, a bearing on his legal status and thus any of his

interests- examined before a court may constitute an interference with the right of access to a court (see *Levent Tütüncü*, no. 2015/3690, 18 July 2018, § 40).

42. In the present case, there is an administrative action brought on account of the *EIA is not Required* decision issued with respect to a wind power plant (RES) production facility planned to be founded very closely to the region where the applicants' immovable was located. In the administrative action brought for the annulment of the impugned administrative act, the incumbent court dismissed it without an examination on the merits on the grounds that the applicants' immovable was not located in the region where the RES project was planned to be implemented, that in their capacity as a citizen or individual, they lacked a capacity to sue, and that there was no infringement of any interest due to the impugned act. It has been accordingly observed that there was an interference with the applicants' right of access to a court.

ii. Whether the Interference Constituted a Violation

43. Article 13 of the Constitution, titled "Restriction of fundamental rights and freedoms", in so far as relevant provides as follows:

> *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution ... These restrictions shall not be contrary to… the principle of proportionality."*

44. The impugned interference will be in breach of Article 36 of the Constitution, unless it complies with the conditions set out in Article 13 of the Constitution. In this regard, it must be assessed whether the impugned restriction complied with the requirements set out in Article 13 of the Constitution and applicable to the present case, namely being prescribed by law, being justified by one or more of the legitimate grounds, as well as not being contrary to the principle of proportionality.

(1) Lawfulness

45. In the present case, the incumbent court's decision not to examine the merits of the applicants' case is based on the ground that the applicants

had lacked any *interest*, existence of which is a condition sought for bringing an action for annulment of administrative acts. It appears that the said condition is one of the elements of the *capacity to sue* within the scope of the rules of procedural law regarding administrative jurisdiction; and that the arrangements concerning this institution are laid down in Articles 14 and 15 of Law no. 2577. It has been therefore observed that the interference with the applicant's right of access to a court had a legal basis.

(2) Legitimate Aim

46. It is a procedural rule inherent in the administrative jurisdiction that the disputes arising out of any acts with respect to which the plaintiff has no interest shall not be examined on the merits so as to preclude both the judiciary and the administration from dealing with disputes -which stem from the actions performed by administrative authorities but having any bearing on the interests of a given person, in other words, bearing no legal consequence with respect to that person- in a continuous and unnecessary manner, thereby being rendered dysfunctional and thus to ensure the prompt, regular and effective performance of public services that are the main task of both the judiciary and the administration (see *Levent Tütüncü*, § 47).

47. The observance of procedural economy in the regulation of trial procedures and thus the securing of good administration of justice and achieving of public interest are one of the requisites of the principle of a state governed by rule of law enshrined in Article 2 of the Constitution. Accordingly, it is possible to set certain conditions for bringing an action against administrative acts, in consideration of the procedural economy and the principle of good administration of justice (see *Levent Tütüncü*, § 48).

48. In the present case, it has been concluded that the non-examination on the merits, by the inferior court interpreting the procedural laws, of the action for annulment of the impugned administrative act as the applicants had no interest in seeking the annulment thereof pursued a legitimate aim for achieving the abovementioned public interest.

(3) Proportionality

(a) General Principles

49. In its assessments within the scope of individual application, the Court has noted that any restrictions which preclude a person from applying to the court or render a court decision meaningless, in other words, which render the court decision ineffective to a significant extent may give rise to a violation of the right of access to a court (see *Özkan Şen*, no. 2012/791, 7 November 2013, § 52).

50. The principle of proportionality consists of three sub-principles, which are *"suitability"*, *"necessity"* and *"commensurateness"*. *Suitability* requires that a given interference is suitable for achieving the aim pursued; *necessity* requires that the impugned interference is necessary for achieving the aim pursued, in other words, it is not possible to achieve the pursued aim with a less severe interference; and *commensurateness* 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 (see the Court's judgments no. E.2011/111, K.2012/56, 11 April 2012; no. E.2016/16, K.2016/37, 5 May 2016; and *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 38).

51. The notion of capacity covers the capacity to be a party to the proceedings and the capacity to sue. As is accepted both in theory and in practice, the capacity to sue means the materialisation and putting into action of the ability of natural persons and legal entities to exercise their civil rights. The capacity to be a party to the proceedings amounts to the ability to become a party in a case and is the realisation of the ability to utilise civil rights in procedural law (see the Court's judgment no. E. 1987/30, K. 1988/5, 15 March 1988).

52. It is essentially incumbent on the inferior courts to ascertain whether an impugned administrative act has infringed the interests of a given person and to interpret the legislation in this aspect. In consideration of the nature of the dispute before them and the provisions of the relevant legislation, the inferior courts assess whether an impugned act has infringed the plaintiff's interests also given the possible effects and

consequences thereof on his legal status. As required by the subsidiary nature of individual application mechanism, the Court has no duty to ascertain whether the impugned act has infringed any of the applicant's interests. The role to be undertaken by the Court in this sense is to examine, in light of the particular circumstances of the present case, the effect of the relevant inferior courts' interpretation to the effect that the impugned administrative act did not affect the person's interest on the right of access to a court (see *Levent Tütüncü*, § 53).

53. The commensurateness, the third sub-principle of proportionality, requires a fair balance to be struck between the public interest to be achieved and the given person's rights and freedoms. In cases where the imposed measure places an extraordinary and excessive burden on the person, the interference cannot be said to be commensurate and thus proportionate. In this sense, the imposed measure should not place an excessive and disproportionate burden on the applicants (see *Levent Tütüncü*, § 52).

54. In discussing whether the impugned act has infringed the relevant person's interests and in applying the procedural rules in this regard, the inferior courts should strike a fair balance between the public interest sought to be achieved through the impugned act and the person's interests. In this sense, in the assessment as to whether a dispute may be examined on the merits on the basis of the condition that there must be an infringement of interest, the issues such as the nature of the impugned act, its effects on the legal status of the applicant and his future life and whether such effects that cannot be eliminated as the review of lawfulness of the impugned act was not performed have placed a burden on the applicant may be taken into consideration in striking a balance between public interest and the applicant's interests (see *Levent Tütüncü*, § 54).

55. In this scope, depriving a person of the opportunity to bring an administrative act, which has obviously given rise to certain effects and consequences on his legal status and has thus affected his rights and interests, before judicial authorities may undermine the principle of proportionality as it might preclude his access to a court (see *Levent Tütüncü*, § 55).

(b) Application of Principles to the Present Case

56. In the present case, it appears that several Wind Power Plant ("RES") projects have been conducted on and surroundings the immovable properties owned by the applicants.

57. The act underlying the dispute in the present case is the *EIA is not required* decision, dated 21 March 2008, issued with respect to Söke-Çatalbük RES Production Facility to be established at the Yenidoğan and Akçakonak neighbourhoods, which are close to the applicants' immovable properties with parcel no. 793, 893 and 1762 located at the Savuca neighbourhood, the Söke district of the Aydın province. The incumbent court did not examine the dispute on the merits, stating that the applicants did not own an immovable in the area covered by project-1; and that merely their capacity as a citizen or individual would not make them entitled to capacity to sue and there was no infringement of interest due to the administrative act in question. The Chamber conducting the appellate review of the first instance decision upheld it in so far as it concerned the dismissal of the action for lack of capacity to sue.

58. Any interference with an applicant's right of access to a court due to the non-adjudication of the merits of the dispute having no impact on his interest cannot be considered as unsuitable and unnecessary for achieving the aim of public interest by ensuring the procedural economy and the principle of good administration of justice. The criteria that is essentially important for the assessment of the proportionality of the impugned interference in the present case is commensurateness. In this sense, it must be ascertained whether the impugned measure placed an excessive and disproportionate burden on the applicants.

59. The above-explained decisions issued by the inferior courts involved a categorical approach to the effect that those having no immovable at the project site -even owning immovable properties at an area close to the project site- could in no way bring an action against the project, regardless of the subjective conditions of the applicants such as the close proximity between their immovable and the project site or the intended use. However, this categorical approach containing no assessment as to the applicants' particular circumstances rendered the interference with their

right of access to a court disproportionate as it precluded those potentially under the risk of being affected by the project, despite not falling into the scope of the project, like the applicants, from bringing an action.

60. Accordingly, it has been considered that the inferior court's interpretation as to whether the applicants had any interests in case of the annulment of the impugned act and as to the application of the relevant procedural rules was a strict interpretation regarding their right of access to a court and almost hindered the exercise of this right. Therefore, it has been concluded that the interference with the applicants' right of access to a court due to the dismissal of their action for lack of capacity to sue was disproportionate.

61. For these reasons, the Court has found a violation of the applicants' right of access to a court under the right to a fair trial safeguarded by Article 36 of the Constitution.

Mr. Serdar ÖZGÜLDÜR and Mr. Rıdvan GÜLEÇ expressed a dissenting opinion in this respect.

B. Other Alleged Violations

62. The applicants also maintained that their right to the protection of corporeal and spiritual existence, right to live in a healthy and balance environment, right to privacy, as well as freedoms of expression and communication had been violated, stating that a sperate EIA process should have been conducted for each project; that the coordinates indicated in the EIA decision were erroneous; that the expropriated immovables including those in dispute were mainly consisting of agricultural lands and the farmers had no other means of livelihood; that the report had not been announced in their village and they had not been informed of the project; and that they had been excluded from the decision-making process.

63. As the impugned court decision was found to be in breach of the right of access to a court under Article 36 of the Constitution, the Court has not considered it necessary to make a separate examination as to these allegations.

C. Application of Article 50 of Code no. 6216

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

> *"1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled…*
>
> *2) If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favour of the applicant or the remedy of filing a case before the general courts may be shown. The court which is responsible for holding the retrial shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."*

65. The applicants requested the Court to redress the alleged violation by ordering a retrial as well as to award compensation for the damage they sustained.

66. In its judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court indicates the general principles as to how a violation of any fundamental right, which has been found established by the Constitutional Court, and its consequences would be redressed. In another judgment, the Court also mentions the consequences of the failure to comply with a violation judgment as well as with the principles set in the abovementioned judgment and accordingly notes that this situation would constitute a continuing violation and also lead to the violation of the respective right for the second time (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

67. Accordingly, in case of a finding of a violation of any fundamental right and freedom within the scope of an individual application, the

basic rule for redressing the violation and its consequences is to ensure restitution as much as possible, that is to say, to ensure restoration to the former state existing prior to the violation. To that end, it must be primarily required to find the source of the violation, to put an end to the continuing violation, to eliminate the decision or the act giving rise to the violation or their consequences, to compensate for the pecuniary and non-pecuniary damages resulting therefrom, as well as to take the other measures deemed necessary in this respect (see *Mehmet Doğan*, §§ 55, 57).

68. In cases where the violation resulted from a court decision or the court failed to redress the violation, the Court orders the communication of a copy of its judgment to the relevant court to conduct a retrial for the redress of the violation and its consequences, pursuant to Article 50 § 2 of Code no. 6216 and Article 79 § 1 (a) of the Internal Regulations of the Court. This statutory provision prescribes a compensatory remedy, which is specific to the individual application mechanism and requires a retrial for the redress of the violation, as distinct from the similar legal institutions available in the procedural law. Therefore, in cases where the Court orders a retrial in conjunction with its judgment finding a violation, the relevant court has no discretion to discuss the existence of the ground necessitating a retrial, which is different from the venue of re-opening of the proceedings available in the procedural law. Accordingly, the court receiving such a judgment is legally obliged to conduct a retrial by virtue of the violation judgment rendered by the Court, without awaiting for any such request by the person concerned, and to take the necessary actions to redress the consequences of the continuing violation (see *Mehmet Doğan*, §§ 58, 59; and *Aligül Alkaya and Others (2)*, §§ 57-59, 66-67).

69. In the present case, it has been concluded that the right of access to a court under the right to a fair trial safeguarded by Article 36 of the Constitution was violated due to the lack of an examination on the merits of the applicants' action as they did not have any interests with respect thereto. The said violation apparently resulted from a court decision.

70. The Court's above-cited assessment and conclusion are related merely to the violation of the right of access to a court and do not involve any determination as to the merits of the action brought by the applicants.

71. In that case, there is a legal interest in conducting a re-trial so as to redress the consequences of the violation of the right of access to a court. The re-trial to be conducted is intended for eliminating the violation and its consequences pursuant to Article 50 § 2 of Code no. 6216, which embodies an arrangement as to individual application mechanism. In this scope, the step required to be taken is to conduct a retrial and to issue, in line with the principles in the violation judgment, a fresh decision that eliminates the reasons giving rise to the violation. Accordingly, a copy of the judgment must be sent to the 2nd Chamber of the Aydın Administrative Court to conduct a retrial.

72. Since the finding of a violation and the conduct of a retrial offer sufficient redress for the violation and its consequences, the applicants' claims for compensation must be rejected.

73. The total litigation costs of TRY 3,239.50 including the court fee of TRY 239.50 and the counsel fee of TRY 3,000, as established on the basis of the documents in the case file, must be reimbursed jointly to the applicants.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 5 March 2020:

A. That the alleged violation of the right of access to a court under the right to a fair trial be DECLARED ADMISSIBLE;

B. By MAJORITY and by dissenting opinion of Mr. Serdar ÖZGÜLDÜR and Mr. Rıdvan GÜLEÇ, that the right of access to a court under the right to a fair trial safeguarded by Article 36 of the Constitution was VIOLATED;

C. That a copy of the judgment be SENT to the 2nd Chamber of the Aydın Administrative Court for retrial in order to eliminate the consequences of the violation of the right of access to a court under the right to a fair trial (E.2015/523, K.2015/501);

D. That the applicants' claims for compensation be REJECTED;

E. The total litigation costs of TRY 3,239.50 including the court fee of TRY 239.50 and the counsel fee of TRY 3,000 be REIMBURSED JOINTLY to the applicants;

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

G. That a copy of the judgment be SENT to the 14th Chamber of the Council of State for information; and

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

DISSENTING OPINION OF JUSTICES SERDAR ÖZGÜLDÜR AND RIDVAN GÜLEÇ

In the present case, the action, brought by the applicants whose immovable (cotton fields and olive groves) was located not at the project site but in a close proximity thereto (as indicated in the file, in proximity of 8-9 km.), for the annulment of the Report-1 (subject-matter of the *Environmental Impact Assessment is not required* decision with respect to the Söke-Çatalbük Wind Energy Plant (RES) (Project-1)) on the abstract grounds that there were several RES Projects being conducted at the region, which was over the potential capacity of the Aegean Region and that the project would cause damage to natural/ecological environment in the surrounding field was dismissed by the administrative court for lack of the applicants' capacity to sue for the administrative act in dispute which did not have any bearing on their any personal, current and legitimate interest as the mere capacity of being a citizen or individual would not *per se* amount to being entitled to the capacity to sue for administrative acts in the absence of any infringement of a personal, current and legitimate interest. The first instance decision was upheld by the Council of State. We disagree with the Court's majority as we consider that the inferior courts' decisions dismissing the action, which was in the form of an *"action popularis"* complaint as defined by the European Court of Human Rights, provided relevant and sufficient grounds; that bringing of an action by those -who reside outside the region where the investments allegedly causing damage to the environment are being implemented- against such investments on abstract grounds such as merely being a resident of that region or an environment-friendly citizen would fall outside the scope of Article 2 § 1 (a) of Law no. 2577; that despite Article 56 of the Constitution, which sets forth that "it is the duty of the State and citizens to improve the natural environment, to protect the environmental health and to prevent environmental pollution", the right to live in a healthy and balanced environment should be interpreted properly; and that the conclusion reached by the relevant courts with respect to the applicants having no immovable at the Project-1 site was not in breach of the right of access to a court under the right to a fair trial.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

MUHSİN HÜKÜMDAR (2)

(Application no. 2016/69274)

5 March 2020

On 5 March 2020, the Plenary of the Constitutional Court found a violation of the right to a fair hearing under the right to a fair trial safeguarded by Article 36 of the Constitution in the individual application lodged by *Muhsin Hükümdar (2)* (no. 2016/69274).

THE FACTS

[8-29] 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 objections to the effect that the collection of evidence through the method of undercover investigator had been unlawful were dismissed by the incumbent magistrate judge.

He then lodged an individual application on 6 December 2016.

V. EXAMINATION AND GROUNDS

30. The Constitutional Court ("the Court"), at its session of 5 March 2020, examined the application and decided as follows:

A. Alleged Violation of the Right to a Fair Hearing

1. The Applicant's Allegations

31. The applicant maintained that the report issued as a result of the instigation by the police officers to a misdemeanour could not serve as evidence; and that the use of such evidence could not be justified even by any public interest. Complaining that the police officers acted as an undercover investigator in his case despite not being prescribed in the relevant law, the applicant alleged that his objection to the penalty imposed on him had been unlawfully dismissed, regardless of these considerations, which was in breach of the right to a fair trial.

2. The Court's Assessment

32. Article 36 § 1 of the Constitution, entitled "*Right to legal remedies*", provides as follows:

"Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through lawful means and procedures."

a. Applicability

33. It should be primarily ascertained whether the right to a fair trial enshrined in Article 36 of the Constitution is applicable to the present case in so far as it relates to a criminal charge.

34. In its previous judgments, the Court has explicitly pointed to the circumstances under which a sanction or a legal act/action may be considered to constitute a *criminal charge* and thus fall under the scope of the safeguards with respect to *offences* and *penalties (see D.M.Ç*, no. 2014/16941, 24 January 2018; *B.Y.Ç.*, no. 2013/4554, 15 December 2015; and *Selçuk Özbölük*, no. 2015/7206, 14 November 2018). In the present case, the selling of alcoholic beverages during night-time was considered to amount to a *misdemeanour*, and the applicant was thus imposed an administrative fine of 30,454 Turkish liras ("TRY"). In the context of the principles laid down in the judgments cited above, it is undoubted that the impugned criminal process had a general impact binding for everyone and was conducted by a public authority wielding public power; that this process pursued a punitive and deterrent purpose; and that given the severity of the imposed penalty, the impugned sanction was to be considered as a *criminal charge* within the meaning of the right to a fair trial. The Court has accordingly decided that the right to a fair trial, which is under the joint protection realm of the Convention and the Constitution, is applicable to the present case in so far as it relates to a *criminal charge*.

b. Admissibility

35. The alleged violation of the right to a fair hearing must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

c. Merits

i. General Principles

36. In the legislative intent behind adding the notion of *"fair trial"* to Article 36 of the Constitution, it is emphasised that the right to a fair trial, which is also guaranteed by the international treaties to which Turkey is a party, is incorporated into the text of the provision. As a matter of fact, the right to a fair hearing is enshrined under Article 6 § 1 of the European Convention on Human Rights ("Convention"). In its several judgments involving an examination under Article 36 of the Constitution, the Court also examined the alleged use of evidence obtained unlawfully or without a legal basis in trials from the standpoint of the right to a fair hearing, one of the safeguards inherent in the right to a fair trial (see *Orhan Kılıç* [Plenary], no. 2014/4704, 1 February 2018, § 43).

37. First of all, as also mentioned above, according to the Court's well-established case-law, the notions of *criminal charge* and *punishment* should be construed in a manner that would cover also the misdemeanours (see § 34 above). Accordingly, the principles inherent in the right to a fair trial, which come into play in case of a *criminal charge*, are applicable also in terms of misdemeanours. Besides, the right to a fair hearing within the context of the right to a fair trial must be interpreted in the light of the principle of rule of law set forth in Article 2 of the Constitution.

38. The rule of law, laid down in Article 2 of the Constitution, refers to a state which respects human rights, protects and promotes these rights and freedoms, performs lawful acts and actions, establishes and maintains a fair legal order in every field, abstains from any unconstitutional behaviours and conducts, makes all state organs subject to the law, as well as which considers itself to be bound by the Constitution and laws and is open to judicial scrutiny (see the Court's judgment no. E.2017/103, K.2017/108, 31 May 2017, § 9).

39.The principles of legal security and certainty are prerequisites of rule of law. Aimed at ensuring the legal safety of persons, the principle of legal security requires that legal norms are foreseeable, that individuals can trust the state in all of their acts and actions, and that the state avoids

using any methods which would undermine this trust in the legislative acts (see the Court's judgment no. E.2018/1, K.2018/83, 11 July 2018, § 13).

40. In a state governed by rule of law, for the purpose of protecting the right to a fair trial, a person may be charged with a criminal offence and thereby be subject to administrative and judicial investigations and prosecutions only when there exists a suspicion of his having committed an *alleged* offence.

41. 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. In such a case, the punishment of persons at the end of an investigation conducted in breach of the principle of rule of law falls foul of the right to a fair hearing under the right to a fair trial. On the other hand, even in cases where there exists a suspicion as to the alleged offence, the 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.

42. Besides, the power to examine the impugned acts performed by the law-enforcement officers, which is vested in the judicial authorities, is also of great importance. In this sense, it is for the judicial authorities to diligently examine the impugned incidents and evidence as well as to take all necessary steps so as to reveal the truth. In cases where the judicial authorities find established any situation explained above, they are to act and decide in line with the safeguards laid down in the Constitution.

ii. Application of Principles to the Present Case

43. The applicant, running a store where alcoholic beverages were sold, was imposed a fine by the public authorities for having committed a misdemeanour, which was in the form of selling alcoholic beverages during night-time. As set forth in the third sentence of Article 6 § 5 of Law no. 4250, which is the legal basis of the impugned administrative fine, the retail sale of alcoholic beverages between 10.00 p.m. and 06.00

a.m. is prohibited. In the present case, the relevant public authorities accordingly stated that the sanction corresponding to this misdemeanour was administrative penalty as prescribed in Article 7 § 1 (e) of the same Law and Article 8 § 5 (k) of Law no. 4733 referenced therein.

44. In the present case, as stated in the report issued by the police officers, a police officer visiting the applicant's store as a customer on 18 November 2017 at around 02.00 a.m. asked for an alcoholic beverage and handed over marked money to the applicant, who delivered the drink to the officer while trying to give the relevant amount back in change. The police officer then showed his identity card and issued a report with respect to the prohibited act. On the basis of this report, Tobacco and Alcohol Market Regulatory Authority imposed an administrative fine on the applicant.

45. It has been accordingly observed that the police officer did not confine himself to merely investigating 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 prohibited hours. Therefore, it has been concluded that the applicant was instigated by the public officer to commit a misdemeanour, albeit the absence of any suspicion that the said misdemeanour had been previously committed.

46. Despite the applicant's explicit arguments to this end in his letters of objections, the decisions rendered by the inferior courts did not involve any assessment in this regard. On the applicant's objection, the magistrate judge solely stated that the applicant could not raise any evidence capable of refuting the official report and relied on it without discussing whether the impugned interference had been compatible with the relevant constitutional safeguards. It has been further observed that there was no other evidence, save for this report, demonstrating that the imputed misdemeanour was committed.

47. Besides, Law no. 5326 does not allow for the application of the investigation method in question, namely undercover investigator, in

cases related to misdemeanours. Nor is there any reference therein which allows for the application of Code of Criminal Procedure no. 5271 ("Code no. 5271).

48. In that case, despite acknowledging the significance and difficulties of the duty to investigate criminal acts and reveal misdemeanours in terms of public interest, the Court has concluded that in the particular circumstances of the present case, the applicant was deprived of a fair hearing as required by Article 36 of the Constitution, taken together with the principle of rule of law.

49. For these reasons, the Court has held that the applicant's right to a fair hearing under the right to a fair trial was violated.

However, Mr. M. Emin Kuz, Mr. Yıldız SEFERİNOĞLU and Mr. Selahaddin MENTEŞ disagreed with this conclusion, whereas Mr. Kadir ÖZKAYA and Mr. Recai AKYEL agreed on a different ground.

B. Other Alleged Violations

50. The applicant maintained that the other safeguards inherent in the right to a fair trial and the principle of equality had been violated, stating that his witnesses had not been heard during the examination of his objection to the administrative fine; and that the imposed penalty was disproportionate and applicable merely to alcoholic beverages.

51. Finding a violation of the applicant's right to a fair hearing falling under the right to a fair trial, the Court has not found it necessary to make a separate examination as to the other alleged violations.

C. Application of Article 50 of Code no. 6216

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

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

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

53. The applicant sought the revocation of the impugned administrative fine.

54. In its judgment in the case of *Mehmet Doğan*, the Court sets forth the general principles as to the redress of the violation of any fundamental right, which has been found established by the Constitutional Court, and its consequences (see *Mehmet Doğan* [Plenary], no. 2014/8875, 7 June 2018, §§ 57-60). In another judgment, the Court also mentions these general principles and consequences of the failure to comply with a violation judgment. It accordingly notes that this situation would constitute a continuing violation and also lead to the violation of the respective right for the second time (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

55. Accordingly, in case of a finding of a violation of any fundamental right and freedom within the scope of an individual application, the basic rule for redressing the violation and its consequences is to ensure restitution as much as possible, that is to say, to ensure restoration to the former state existing prior to the violation. To that end, it must be primarily necessary to put an end to the continuing violation by finding the underlying causes thereof, to eliminate the decision or the act giving rise to the violation or their consequences, to compensate for the pecuniary and non-pecuniary damages resulting therefrom, as well as to take any other measures deemed necessary in this respect (see *Mehmet Doğan*, §§ 55, 57).

56. In cases where the violation stems from a court decision, the Court orders the communication of a copy of its judgment to the relevant

court to conduct a retrial, with a view to redressing the violation and its consequences, pursuant to Article 50 § 2 of Code no. 6216 and Article 79 § 1 (a) of the Internal Regulations of the Court. This statutory provision prescribes a compensatory remedy, which is specific to the individual application mechanism and requires a retrial for the redress of the violation, as distinct from the similar legal institutions available in the procedural law. Therefore, in cases where the Court orders a retrial through its judgment finding a violation, the relevant court has no discretion to discuss the existence of the ground necessitating a retrial, which is different from the venue of re-opening of the proceedings available in the procedural law. Accordingly, the court receiving such a judgment is legally obliged to conduct a retrial by virtue of this judgment rendered by the Court, without awaiting for any such request by the person concerned, and to take the necessary actions to redress the consequences of the continuing violation (see *Mehmet Doğan*, §§ 58, 59; and *Aligül Alkaya and Others (2)*, §§ 57-59, 66, 67).

57. It has been concluded that the applicant's right to a fair hearing had been violated due to the active role played by the police officers, who instigated the applicant to sell alcoholic beverage as well as due to the use of such evidence. It accordingly appears that the violation in the present case resulted from the impugned administrative act and the court decision where the impugned administrative act was reviewed.

58. Accordingly, there is a legal interest in conducting a retrial in order to redress the consequences of the violation of the right to a fair hearing. The retrial to be conducted is for the elimination and redressing of the violation and its consequences pursuant to Article 50 § 2 of Code no. 6216. In this sense, the step required to be taken is to conduct a retrial and to issue a new decision which eliminates the reasons leading the Court to find a violation and which is in pursuance of the principles set by the Court in its violation judgment. Accordingly, a copy of the judgment must be sent to the Küçükçekmece 1st Magistrate Judge, the appeal authority, to conduct a retrial.

59. The total litigation costs of 3,239.50 Turkish liras ("TRY") including the court fee of TRY 239.50 and counsel fee of TRY 3,000, as established

on the basis of the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 5 March 2020:

A. UNANIMOUSLY that the alleged violation of the right to a fair hearing be DECLARED ADMISSIBLE;

B. By MAJORITY and by dissenting opinions of Mr. M. Emin KUZ, Mr. Yıldız SEFERİNOĞLU and Mr. Selahaddin MENTEŞ, that the right to a fair hearing under the right to a fair trial safeguarded by Article 36 of the Constitution was VIOLATED;

C. UNANIMOUSLY that there is NO NEED TO MAKE A SEPARATE EXAMINATION as to the other alleged violations;

D. That a copy of the judgment be SENT to the Küçükçekmece 1st Magistrate Judge (miscellaneous no. 2016/6077) to conduct a retrial for the redress of the violation of the right to a fair hearing;

E. That the total litigation costs of TRY 3,239.50 including the court fee of TRY 239.50 and the counsel fee of TRY 3,000 be REIMBURSED to the applicant;

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

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

DISSENTING OPINION OF JUSTICE M. EMİN KUZ

In the present case involving an alleged violation of the right to a fair trial due to the dismissal of the objection raised by the applicant, having committed a misdemeanour by selling alcohol beverages during night-time as a result of the police instigation, to the administrative fine imposed on him, the majority has found a violation of the right to a fair hearing under the right to a fair trial.

In the reasoning of the judgment finding a violation of the right to a fair hearing, it is noted that a police officer in civilian clothes, who visited the applicant's grocery store as a customer at night, bought an alcoholic beverage and then draw up a report upon showing his identity card, which demonstrated that he had played an active role in the commission of the said misdemeanour; that despite the existence of no suspicion as to the commission of the same misdemeanour previously by the applicant, the officer instigated the former to commit it; that although the applicant expressly raised this issue in his letter whereby he objected to the administrative fine imposed on account thereof, the magistrate judge failed to address it in its decision; and that the Misdemeanours Act no. 5326 does not embody any provision allowing for the application of such a procedure -undercover investigator- in case of a misdemeanour, and nor is there any reference therein, which would enable the application of the related provisions laid down in Code no. 5271.

Undoubtedly, employment of any procedure, which falls foul of straightforwardness, in criminal investigations or giving such an impression overshadows dignity of the authorities conducting these investigations (see Gottfried Plagemann, the Use of Undercover Investigators and His Powers in German Law, https://cdn.istanbul.edu.tr). It is also indubitable that law enforcement officers are entrusted not with the facilitation, but with the prevention, of commission of offences and cannot employ any immoral means, which indicates that the fight against crime cannot be achieved by instigating individuals to commit crimes (see Faruk Erem, *Ceza Usulü Hukuku* (Criminal Procedure Law), Issue 8, Ankara, 1978, pp. 251, 255, 257 ....). Also in its judgments, the European Court of Human Rights ("the ECHR") notes that the use of any evidence obtained by public

officials' entrapment cannot be justified even on public-interest grounds. It however states that evidence may be collected through the method of undercover investigation on condition of being within precise limits and the provision of necessary safeguards.

Nevertheless, the principles outlined in doctrine with respect to the agent provocateur or undercover investigator, as well as those as to the collection of evidence through undercover investigator, which are laid down in the judgments of the ECHR and the Court of Cassation (also referred to herein), are related to criminal offences.

Although the conclusion that the right to a fair trial was applicable to the impugned sanction in the present case is expedient, as I have previously stated in my dissenting opinions submitted in relation to the judgments where the Court has interpreted Article 38 of the Constitution in a manner which would cover, without any exception, also the administrative penalties, it must be acknowledged that when administrative penalties and notably misdemeanours are at stake, the safeguards inherent in the right to a fair trial are not of the same extent as those which are applicable in case of any criminal charge in criminal law.

In this sense, it is undoubted that in cases where public officials or any other persons interfering with the incident on the formers' request incite individuals to the extent which would instigate the commission of an act or ensure it through interferences which would vitiate the individuals' will, the same principles should be applicable also to administrative offences. It cannot be, however, said that the extent, and the conditions for application, of these principles in so far as they relate to misdemeanours are the same as those for the criminal offences.

It should be primarily noted that the misdemeanours, which were, along with the other criminal acts, laid down in the former Turkish Criminal Code no. 765 as an offence, are not embodied in the Turkish Criminal Code no. 5237 adopted in 2005 but instead laid down as an administrative offence in the Misdemeanours Act no. 5326 where specific principles, procedures and remedies are introduced with respect thereto. The imposition of a sanction due to a misdemeanour and a legality review to be carried out should not be considered as a trial conducted pursuant

to the Turkish Criminal Code and the Code of Criminal Procedure (Ersan Şen, *Kabahatler Kanunu'nun Ceza Muhakemesi Kanunu Hükümleri ile İlişkisi* (Interplay between the Misdemeanours Act and the Provisions of the Code of Criminal Procedure), https://jurix.com.tr/article/2945, p. 2).

The foremost of the core criminal-law safeguards to be employed in terms of administrative penalties is in principle the conduct of an investigation and taking of defence submissions. However, in case of misdemeanours, as it is necessary to impose an administrative penalty, without any delay, so as to maintain social order and immediately secure the order that has been already disturbed, there is no need to conduct an investigation and take defence submissions (Ali D. Ulusoy, *İdari Yaptırımlar* (Administrative Sanctions), İstanbul 2013, pp. 48, 50 and 53). The establishment of an unlawful act by drawing up of a report by public officers at the incident scene immediately after it is committed does not amount to an investigation (Ulusoy, *ibid*, p. 50), this process cannot be regarded as an investigation; nor can the public officer conducting the process be regarded as an investigator (or undercover investigator).

Therefore, I disagree with the majority in so far as it relates to the conclusion reached to the effect that the public officer in the present case was an undercover investigator, which lacked a legal basis (§ 47).

Besides, one of the basic reasons that necessitate the affording of safeguards with respect to agent provocateur or undercover investigator in criminal offences is the influence over the will of the perpetrator who has committed the offence through the provocation of these persons, that is to say, it concerns the moral element of the offence. However, as the provisions of criminal law with respect to wrongful intention or negligence are not applicable to administrative penalties including misdemeanours (Ulusoy, *ibidem*, p. 49), the question whether the violation of any norm, which amounts to a misdemeanour, involves any wrongful intention or negligence is of no importance for the occurrence of such a misdemeanour (Ulusoy, *ibidem*, p. 99).

In this framework, on condition that the acts amounting to misdemeanour and the corresponding penalties are already known beforehand through publication, it is acknowledged that these acts are

committed at least by negligence. Except for the cases where the will has been affected by reasons such as error, entrapment, pressure, if an unlawful act is committed, the moral element is considered to have existed. Therefore, a penalty may be imposed even in case of any act involving simple negligence (Ulusoy, *ibidem*, pp. 99-100).

As required by this principle, although it is the administration that is liable to put forth the material element of an offence, the liability to prove the absence of moral element, that is to say to prove that the impugned act has been committed for reasons such as error, entrapment, violence or threat, belongs to the accused (Ulusoy, *ibidem*, p. 100).

Although it is stated in the conclusion reached by the majority that the police officer did not confine himself to merely conducting a passive inspection at the applicant's store where products other than alcoholic beverages were also sold and instigated the latter to commit the impugned misdemeanour despite the absence of any suspicion that such an act had been previously committed, the applicant failed to prove, or even raise an allegation, that he had committed the misdemeanour against his will but by error or as a result of the officer's entrapment or pressure, as explained above.

In other words, in the present case, the applicant did not argue that he had been subjected to any violence or threat by the police officer or that he had sold the beverages by error without noticing the exact hour. Besides, in support of his allegation that his will had been vitiated as a result of the police entrapment, he merely stated that he had committed the impugned act as the officer had asked for three cans of beer and handed over TRY 20.

Despite the applicant's claim that he had never sold alcoholic beverages at that time of the day (00.20 a.m.), how the officer's act -which was merely asking for an alcoholic beverage and handing over money- vitiated the former's will not to commit an offence, although it was sufficient for him to just say it was forbidden to do so during the night time. Nor did he even raise an abstract allegation in this respect.

It appears that also in his objection before the magistrate judge, the applicant did not raise a concrete allegation that the impugned act did not

have any moral element and that he had committed it erroneously or due to the entrapment or oppression by the police officer. Therefore, in the present case, the public officer's asking for an alcoholic beverage during night time at the applicant's store by handing over money cannot be said to preclude the applicant from deciding and acting freely. Besides, the magistrate judge cannot be expected to make a comprehensive assessment in its decision with respect to this allegation of an abstract nature.

In the judgment finding a violation, the majority also pointed to the failure to demonstrate, in a concrete manner, the existence of a suspicion that the applicant was selling alcoholic beverages at his grocery store also during the prohibited hours. However, although it was not noted in the report that the continued activity of the applicant's store -where alcoholic beverages were apparently sold- at 00.20 a.m. constituted sufficient suspicion for the misdemeanour in question and that a denunciation had been received to that end, it appears that these factors led the public officer to ask for an alcoholic beverage. The majority's conclusion as to the existence of suspicion renders almost impossible the establishment of the commission of this misdemeanour at night time during which the sale of such drinks is forbidden. In one of its judgments, the ECHR also held that the police officers' calling a data-communications service as a customer so as to establish an offence had not been intended for instigating the applicant company (entrapment); and that the officers had already been in possession of such information (see *Eurofinacom v. France* (dec.), no. 58753/00, 7 September 2004). Similarly, in the present case, the information possessed by the police officer, who asked for an alcoholic beverage at the applicant's store, should have been found sufficient for the former to be suspicious of any wrongdoing, also given the nature of the said misdemeanour, profile of the store and the hour in question.

For these reasons, I disagree with the majority as I consider that there was no violation of the right to a fair hearing in the applicant's case.

CONCURRING OPINION OF JUSTICES KADİR ÖZKAYA AND RECAİ AKYEL

In the present case where the applicant's objection to the administrative fine imposed due to his selling alcoholic beverages during night time had been dismissed, the Court found a violation of the right to a fair hearing under the right to a fair trial as the public officers had instigated the applicant to commit the misdemeanour and this factor had not been taken into consideration in the dismissal of the objection to the impugned administrative fine. We agree with the majority for the following reasons.

In the present case, on 18 November 2014 at 00.20 a.m., a police officer in civilian clothes -acting as a customer- visited the applicant's grocery store, which was located at Mustafa Kemal Paşa Mahallesi, İstiklal Caddesi, Avcılar/İstanbul and selling also alcoholic beverages, and asked for 3 cans of beer from the seller (it was controversial whether the seller was the applicant) by handing over TRY 20, which had been previously marked. While the seller was trying to return the relevant amount in change, the police officer presented his identity card and drew up a report, taking back the marked money.

Following the submission of the report to the Tobacco and Alcohol Market Regulatory Authority ("the Authority"), the applicant was imposed an administrative fine of TRY 30,454 for having sold alcohol beverages at night time.

In the decision issued by the Authority, it is indicated that the report issued by the police officers was relied on in the establishment of the impugned misdemeanour.

The applicant objected to this decision before the Küçükçekmece 2nd Magistrate Judge ("the Judge"). In his petition, the applicant maintained that he had not sold alcoholic beverages at prohibited hours, and albeit the absence of a denunciation in this respect, he had been put in a position as if he had been selling alcoholic beverages at such hours due to the entrapment by the police who had been acted unjustly and unlawfully; and that the collection of evidence through an undercover investigator was unlawful.

The judge dismissed the applicant's objection. In the decision of 27 October 2016 whereby the applicant's objection was dismissed, it is stated that the applicant failed to raise a justified reason for his objection and there was no evidence rebutting the official report.

The applicant appealed the dismissal decision as the collection of evidence through undercover investigator had been unlawful, the tax records had not been examined and the report could not be accepted as evidence for not including the registration number of the relevant police officers. However, his appeal was also dismissed on 21 November 2016 by the Küçükçekmece 1st Magistrate Judge which noted that the contested decision was not contrary to the procedure and law.

The applicant lodged an individual application on 6 December 2016.

He maintained that his right to a fair trial had been violated on the grounds that the report issued by the police officers with respect to the incident where he had committed a misdemeanour as a result of their instigation could not be accepted as evidence, that the reliance on such evidence could not be justified even on public-interest grounds, that the police officers had acted as an undercover investigator albeit not being prescribed in the relevant law, and that his objection to the imposed fine had been unlawfully dismissed regardless of these considerations.

The Court considered the sanction in the present case to constitute a *criminal charge* within the meaning of the right to a fair trial and accordingly held that this right was applicable to the present case. We also agree with this conclusion.

However, as stated by Mr. Emin Kuz in his dissenting opinion, we also consider that given the legal characteristics of criminal offences and the acts subject to an administrative sanction under the law governing misdemeanours, as well as the reasons why such acts are subject to administrative sanctions, the safeguards of the right to a fair trial in so far as applicable to administrative sanctions and notably to misdemeanours should not be considered to be of the same degree and extent as those applicable to a criminal charge under criminal law.

Therefore, notably in case of misdemeanours, the extent, and the conditions for the application, of methods -such as agent provocateur or undercover investigator or any similar procedure- whereby law enforcement officers or any other persons acting upon their request instigate third persons to commit an act or intervene with the incident in a way that would vitiate the latter's will, must not be the same with those which come into play in respect of criminal offences.

Given the present case in this perspective, we consider that the issuance of a report by the public officers at the incident scene cannot be qualified as an investigation and thus the police officers performing this act as an investigator (or undercover investigator).

However, despite the allegations insistently raised by the applicant through his objections before the magistrate judges that he had not sold alcoholic beverages at prohibited hours and the police officers had entrapped him, in an unjust and unlawfully manner in the absence of any denunciation in this respect, thereby creating an impression that he had been selling alcoholic beverages at prohibited hours; and that they had obtained evidence through the undercover investigator, which was unlawful, the magistrate judges failed to discuss -in their decisions- the effect of the instigation by public officers, which could lead persons *considered to potentially engage in criminal acts* to commit an offence, within the meaning of the rule of law principle, the right to a fair trial and the misdemeanours law; how the role undertaken by the public officers should be considered in qualification of the act performed under the influence of such role as a misdemeanour (in terms of material and moral elements of offence); as well as whether the report taken as a basis for the impugned administrative fine had a legal basis and could be considered as a lawfully-obtained evidence. In their decisions, the magistrate judges merely indicated that the applicant failed to submit any evidence capable of refuting the official report and relied on this report. They failed to examine whether the impugned interference was compatible with the constitutional safeguards. Besides, in the present case, there was no evidence, other than the disputed report, to demonstrate that the misdemeanour imputed to the applicant had been committed.

Moreover, according to the documents submitted by the applicant's lawyer, as a result of the objection raised by the same lawyer in another case, the imposed sanction was revoked by the Küçükçekmece 2nd Magistrate Judge on 4 March 2016 through the decision miscellaneous no. 2016/1986 (about 8 months before the decision of 27 October 2016 issued in the applicant's case) where it is stated *"... The State's duty is not to incite persons to commit an offence or misdemeanour, but rather to ensure the prevention of offences and misdemeanours. In the present case, the police officers in civilian clothes, acting as a customer, bought alcoholic beverages at the claimant's store at a prohibited hour and subsequently drew up a report. They acted as an undercover investigator, a method which is laid down in Article 139 of the Code of Criminal Procedure ("CCP") and application of which is conditional upon severe criteria. In consideration of Article 22 § 4 and 28 § 5 of the Misdemeanours Act, the CCP may be applied to cases which are not explicitly stipulated in the Misdemeanours Act. In this regard, as no administrative sanction could be imposed on the basis of an evidence considered as prohibited by the court, the objection was accepted."* The appeal against this decision was also dismissed by the decision miscellaneous no. 2016/2833, dated 1 April 2016, which was issued by the Küçükçekmece 1st Magistrate Judge (about 8 months before the decision of 21 November 2016 issued in the applicant's case). However, in the present case, the magistrate judges failed to provide an explanation as to why they had departed from the conclusions in the above-mentioned decisions (dated 4 March 2016 and 1 April 2016).

Under these circumstances, despite the difficulty of revealing misdemeanours and the significance of such reveal for public interest, the Court found a violation of the applicant's right to a fair hearing in the present case.

We agree that there was a violation of the applicant's right to a fair hearing falling under the right to a fair trial but for the above-mentioned reasons.

DISSENTING OPINION OF JUSTICES YILDIZ SEFERİNOĞLU AND SELAHADDİN MENTEŞ

1. The Court's majority declared admissible the alleged violation of the applicant's right to a fair hearing under the right to a fair trial and ultimately found a violation thereof. We disagree with the majority for the following reasons.

2. The facts and circumstances of the present case are summarised in the judgment.

3. The undercover investigation is a method set out in Article 139 of the Code of Criminal Procedure, which is employed in case of certain offences specified therein so as to obtain evidence in compliance with the prescribed principles and procedures.

4. In the judgment of the 8th Criminal Chamber of the Court of Cassation (no. E. 2013/5397 K.2013/15729, 21 May 2013), which is referred to in this judgment, it is briefly stated that the officers may conduct operations so as to reveal an offence in a pending investigation; and that however, the state organs cannot instigate individuals to commit an offence and thereby obtain evidence by ensuring them, who have indeed no intention to commit an offence but do so with manipulation, to be caught red handed. In another judgment (no. E. 2016/17207 K..2019/1034, 10 January 2019), the 18th Criminal Chamber of the Court of Cassation points out that the law enforcement officer conducting an undercover investigation must never act as an agent provocateur and incite the offender, who does not already have any criminal intent, to commit an offence.

5. In the particular circumstances of the present case, a police officer visited the applicant's store, which was open at 00.20 a.m. on 18 November 2014, and bought alcoholic beverages by handing over the marked money. He then issued a report on the basis of which an administrative penalty was imposed on the applicant.

6. In the present case, there was no undercover investigator appointed in accordance with the legal procedure. Besides, nor can it be said that the public officer finding established the impugned act pursued such a

purpose. As a matter of fact, there was no offence requiring the collection of evidence by the method of undercover investigation, given the nature of the impugned act. Therefore, it cannot be concluded that the available evidence in the present case was obtained by an undercover investigator.

7. The police officer found established, by drawing up a report, the sale of alcoholic beverage at a grocery store -which was already open and providing service to its customers- at a forbidden hour. He did not make the grocery store open while being closed. He did not act in a way, which would constitute an entrapment or instigation, so as to influence the offender's will. He merely found established an act, which had been already performed. The use of marked money by the police officer did not *per se* instigate the applicant to commit the said act or influence his will. The marked money was not the basic element proving the impugned misdemeanour. The report drawn up by the police officer to the effect that the applicant's store, which was open at the relevant time, made sales at forbidden hours is sufficient for the establishment of the impugned act.

8. Besides, the provisions related to criminal intent and negligence that are the moral elements of offence are not applicable to the acts which constitute a misdemeanour. The question whether the misdemeanour was committed by criminal intent or negligence is not of importance.

9. It is obvious that the impugned incident did not involve any instigation by the police officer; and that the officer merely found established the sale of alcoholic beverages at a forbidden hour and thus imposed an administrative fine. Therefore, we do not agree with the majority in so far as they refer to the judgments, where the Court of Cassation acknowledged that such acts could have a bearing on the offender's will, and conclude that the incumbent magistrate judge failed to make an assessment in this respect. In the same vein, the related judgments rendered by the European Court of Human Rights are not applicable to the present case given the particular circumstances of the present case and the reasons we mention.

10. For these reasons, we disagree with the majority as the present case should have been declared inadmissible for the non-exhaustion of available legal remedies.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

HASAN BALLI

(Application no. 2017/21825)

2 June 2020

On 2 June 2020, the Second Section of the Constitutional Court found a violation of the right to examine a witness under the scope of the right to a fair trial, safeguarded by Article 36 of the Constitution, in the individual application lodged by *Hasan Ballı* (no. 2017/21825).

THE FACTS

[7-32] 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 had not been provided with 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.

On 3 May 2017, he lodged an individual application.

V. EXAMINATION AND GROUNDS

33. The Constitutional Court ("the Court"), at its session of 2 June 2020, examined the application and decided as follows:

A. The Applicant's Allegations

34. The applicant maintained that his right to a fair trial had been violated on the grounds that the statements of the accused S.K., which were relied on as the basis for the applicant's conviction, had been taken, in his absence, through the audio-visual information system (SEGBIS); that the other witnesses N.Ö. and Ç.D. had been heard not at the prosecution stage but only at the investigation phase; that the witnesses could not be questioned during the hearing, and no confrontation and identification process had been conducted; that the material truth had not been revealed without leaving any room for doubt; and that his conviction had been ordered on the basis of an incomplete examination.

B. The Court's Assessment

35. The Constitutional Court is not bound by the legal qualification of the facts by the applicant, and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). It has been considered that the applicant's allegations must be examined from the standpoint of the right to examine a witness under the right to a fair trial.

36. Article 36 § 1 of the Constitution provides as follows:

> *"Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through lawful means and procedures."*

1. Admissibility

37. The present application must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

a. General Principles

38. Article 36 § 1 of the Constitution sets forth that everyone has the right of litigation either as plaintiff or defendant before the courts, which thus safeguards the rights to claim and defence, as well as the right to a fair trial. In the legislative intention of adding the notion *a fair trial* to Article 36 of the Constitution, it is underlined that the right to a fair trial, which is also enshrined in the international conventions to which Turkey is a party, has been incorporated into the said Article. In this sense, it is set forth in Article 6 § 3 (d) of the European Convention on Human Rights ("the Convention") that everyone charged with a criminal offence is entitled to examine or have examined witnesses against him. It should be accordingly acknowledged that the right to a fair trial enshrined in Article 36 of the Constitution covers also the *right to examine a witness* (see *Serdar Batur*, no. 2014/15652, 24 May 2018, § 41).

39. In its several judgments involving similar allegations, the Court has set the principles with respect to the right to examine a witness. Accordingly,

an accused has the right to examine or have examined witnesses against him in criminal proceedings. In order for a fair trial, the accused must have the opportunity to question the witnesses, to confront them, as well as to test the veracity of their statements during the criminal proceedings against him. Besides, if a conviction is based, solely or to a certain extent, on the statements of a person whom the accused person could not examine or have examined during the investigation or proceedings, the accused person's rights have been restricted in a way that falls foul with the safeguards enshrined in Article 36 of the Constitution (see *Atila Oğuz Boyalı*, no. 2013/99, 20 March 2014, §§ 34-56; *Az. M.*, no. 2013/560, 16 April 2015, §§ 46-67; *Levent Yanlık*, no. 2013/1189, 18 November 2015, §§ 67-77; and *İsmet Özkorul*, no. 2013/7582, 11 December 2014, §§ 44-45).

40. A two-stage test should be applied to assess whether the admission of witness statements, obtained prior to or outside a given trial, as evidence has prejudiced the fairness of the proceedings. As to the first test, it must be demonstrated that the failure to secure the appearance of the witness in court had a justified ground. In the assessment of the second test, if the witness statement merely read out during the hearing is the sole or decisive evidence on which the decision is grounded, it must be examined whether the defence rights have been limited to the extent that would be incompatible with the requirements of a fair trial (see *Abdurrahim Balur*, no. 2013/5467, 7 January 2016, § 80).

41. As a matter of fact, these constitutional requirements are set forth also in the relevant procedural laws. As also indicated in Article 210 § 1 of the Code of Criminal Procedure no. 5271 ("Code no. 5271"), if evidence concerning an incident consists of merely witness statements, this witness shall certainly be heard at the court hearing, and reading out of a record of a previous statement or of a written statement cannot substitute for the hearing of the witness. the statutory provision -envisaging that in cases where there is no evidence other than statements of a witness concerning the impugned incident, this person shall be certainly heard at the hearing- places an explicit emphasis on the principle of directness. Accordingly, if the sole evidence of the impugned incident is the witness statements, it would not be sufficient to read out the previous statements of the witness

without hearing him in court, pursuant to Article 211 § 1 of Code no. 5271 (see *Az. M.*, § 58).

b. Application of Principles to the Present Case

42. In the present case, the applicant and his co-accused S.K. were arrested in Adıyaman by virtue of the arrest warrant issued by the incumbent court. S.K., brought before the Adıyaman Chief Public Prosecutor's Office by the law enforcement officers, was heard at the court through SEGBIS.

43. The co-accused S.K. gave statements against the applicant, in respect of the offences committed against the complainant, during her defence submissions before the court. In this sense, it is obvious that in respect of S.K.'s statements, the applicant must be afforded the safeguards inherent in the right to examine a witness.

44. It is undoubted that the applicant did not have the opportunity to examine the witness S.K., who had given testimony against the former. In that case, it must be examined whether to hear S.K. through SEGBIS at the hearing where the applicant himself had not been present had a justified reason. The court ordered the arrest of the accused person S.K. but failed to indicate whether there was a valid reason to justify the inability to examine S.K. at the hearing. Therefore, in the present case, the public authorities failed to fulfil the *obligation to justify* the failure to provide the applicant with the opportunity to examine the witness.

45. It must be assessed whether the absence of a valid reason justifying the failure to secure the presence of the witness S.K. before the court undermined the overall fairness of the proceedings. In this sense, it must be primarily considered whether S.K.'s statements were in the nature of sole or decisive evidence.

46. In consideration of the application form and annexes thereto as well as the information and documents obtained through National Judiciary Informatics System (UYAP), it appears that the witness Ç.D., who was heard at the investigation stage, did not give any statement concerning the applicant. The other witness N.Ö. stated that the applicant was

a relative of H.Ş., one of the accused persons, and had stayed with the accused persons H.Ş. and S.K. for a while. N.Ö. also gave the applicant's phone number. In the decision convicting the applicant, it is stated that according to the replies given to the letters that had been sent to the GSM companies with respect to the suspects' phone numbers stated by the complainant in his bill of complaint, the phone number 0537…, declared by the complainant, was registered in the applicant's name; and that the phone conversations with the complainant were made through the phone number registered in the applicant's name. Moreover, it appears that the applicant was convicted based on the witness statements showing that the applicant had stayed together with the accused persons at the address depicted as incident scene, the applicant's acknowledgement that he had stayed with the accused persons at the same home, as well as on S.K.'s statements against the applicant, which had been taken through SEGBIS. The incumbent court did not make any assessment as to the significance of S.K.'s statements; however, the other elements relied on by the court made sense in conjunction with S.K.'s statements. Therefore, given the reasoning of the conviction decision as a whole, it has been considered that S.K.'s statements were of a decisive nature for the applicant's conviction.

47. In the last place, it must be assessed whether the applicant was provided with any counter-balancing opportunities capable of affording redress for the restriction imposed on his right to a fair trial due to his inability to examine S.K. at the hearing. The statements of S.K., who had given testimony against the applicant, were read out at the court. The applicant was able to present his oral and written challenges and defence submissions against S.K.'s arguments. Besides, he also had the opportunity to explain the impugned incident in his own manner. All these elements may be regarded as remedial opportunities. However, the complainant H.B. stated in his statement of 22 December 2014 at the court that the applicant had not been at the incident scene and therefore among those committing the imputed offences. In consideration of the complainant's statements, the Court has considered that these above-mentioned elements were not capable of affording redress for the restriction on the applicant's right to defence. It has been accordingly concluded that in the present case, the applicant's conviction, based on the absent-witness' statements, undermined the overall fairness of the proceedings.

48. Consequently, as the applicant was not provided with the opportunity to examine the witness whose statements were relied on, to a significant extent, in his conviction, the Court has found a violation of the applicant's right to examine a witness.

3. Application of Article 50 of Code no. 6216

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

> *"(1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a judgment finding a violation has been rendered, what is required for the resolution of the violation and the consequences thereof shall be ruled on…*
>
> *(2) If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favour of the applicant or the remedy of filing a case before the general courts may be shown. The court, which is responsible for holding the retrial, shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."*

50. The applicant requested the Court to find a violation and afford redress for the consequences thereof.

51. In its judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court sets forth the general principles as to how a violation of any fundamental right, which has been found established by the Court, and its consequences would be redressed. In another judgment, the Court also mentions the consequences of the failure to comply with a violation judgment as well as with the principles set in the abovementioned judgment and accordingly notes that this situation would constitute a continuing violation and also lead to the violation of the respective right for the second time (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

52. Accordingly, in case of a finding of a violation of any fundamental right and freedom within the scope of an individual application, the basic rule for redressing the violation and its consequences is to ensure restitution as much as possible, that is to say, to ensure restoration to the former state existing prior to the violation. To that end, it must be primarily required to find the source of the violation, to put an end to the continuing violation, to eliminate the decision or the act giving rise to the violation or their consequences, to compensate for the pecuniary and non-pecuniary damages resulting from the violation, as well as to take the other measures deemed necessary in this respect (see *Mehmet Doğan*, §§ 55, 57).

53. In cases where the violation resulted from a court decision or the court failed to redress the violation, the Court orders the communication of a copy of its judgment to the relevant court to conduct a retrial for the redress of the violation and its consequences, pursuant to Article 50 § 2 of Code no. 6216 and Article 79 § 1 (a) of the Internal Regulations of the Court. This statutory provision prescribes a compensatory remedy, which is specific to the individual application mechanism and requires a retrial for the redress of the violation, as distinct from the similar legal institutions available in the procedural law. Therefore, in cases where the Court orders a retrial in conjunction with its judgment finding a violation, the relevant court has no discretion to discuss the existence of the ground necessitating a retrial, which is different from the venue of re-opening of the proceedings available in the procedural law. Accordingly, the court receiving such a judgment is legally obliged to conduct a retrial by virtue of the violation judgment rendered by the Court, without awaiting for any such request by the person concerned, and to take the necessary actions to redress the consequences of the continuing violation (see *Mehmet Doğan [Plenary]*, §§ 58, 59; and *Aligül Alkaya and Others (2)*, §§ 57-59, 66, 67).

54. In the present case, the Court has found a violation of the right to examine a witness due to the applicant's inability to examine the witness S.K. at the hearing. It has been therefore observed that the violation resulted from a court decision.

55. In that case, there is a legal interest in conducting a retrial in order to redress the consequences of the violation of the right to examine a witness. The retrial to be conducted is for the elimination and redressing

of the violation and its consequences pursuant to Article 50 § 2 of Code no. 6216. In this sense, the step required to be taken is to conduct a retrial and to issue a new decision which eliminates the reasons leading the Court to find a violation and which is in pursuance of the principles set by the Court in its violation judgment. Accordingly, a copy of the judgment must be sent to the 2nd Chamber of the Manavgat Assize Court (E.2014/141, K.2016/152) to conduct a retrial.

56. The total litigation costs of 3,257.50 Turkish liras ("TRY") including the court fee of TRY 257.50 and counsel fee of TRY 3,000, as established on the basis of the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 2 June 2020 that

A. The alleged violation of the right to examine a witness be declared ADMISSIBLE;

B. The right to examine a witness falling under the scope of the right to a fair trial safeguarded by Article 36 of the Constitution was VIOLATED;

C. A copy of the judgment be SENT to the 2nd Chamber of the Manavgat Assize Court (E.2014/141, K.2016/152) to conduct a retrial for the redress of the violation of the right to examine a witness and its consequences;

D. The total litigation costs of TRY 3,257.50 including the court fee of TRY 257.50 and the counsel fee of TRY 3,000 be REIMBURSED to the applicant;

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

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

FERHAT KARA

(Application no. 2018/15231)

4 June 2020

On 4 June 2020, the Plenary of the Constitutional Court found no violation of the right to a fair hearing within the scope of the right to a fair trial safeguarded by Article 36 of the Constitution in the individual application lodged by *Ferhat Kara* (no. 2018/15231).

THE FACTS

[9-110] 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.

V. EXAMINATION AND GROUNDS

111. The Constitutional Court ("the Court"), at its session of 4 June 2020, examined the application and decided as follows:

A. Alleged Violation of the Right to a Fair Hearing

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

112. The applicant maintained that his right to a fair trial had been violated, stating that the data from ByLock had been obtained unlawfully and was relied on as a substantive basis for his conviction.

113. In its observations, the Ministry of Justice ("the Ministry) made a reference to the examinations and findings as to the ByLock communication system, which are specified in the judgments of the 16th Criminal Chamber of the Court of Cassation (no. E.2015/3, K.2017/3; 27/1443, K.2017/4758), the General Assembly of the Criminal Chambers of the Court of Cassation (no. E.2017/16.MD-956, K.2017/370) as well as the Court's judgment in the case of *Aydın Yavuz and Others*. The Ministry further indicated that as a result of the investigation conducted against the applicant for his alleged membership of the FETÖ/PDY, it was found established that ByLock application had been downloaded on, and used through, the mobile phones operated through the GSM subscription that the applicant admitted to being in his use; and that the applicant, represented by a lawyer during the proceedings, had been provided with the opportunity of challenging the authenticity of the evidence against him and opposing its use. The Ministry emphasised that the applicant had been convicted based on his use of ByLock through the GSM subscription and mobile phones that were used by him, which involved no manifest arbitrariness to the extent that would ignore justice and common sense.

114. In his counter-statements against the Ministry's observations, the applicant asserted that the ByLock data, the underlying ground of his conviction, had been obtained unlawfully; that there were doubts as to the authenticity and reliability of these data, and they could not be therefore used as evidence during the proceedings; and that there were discrepancies between the data included in the ByLock Report and those included in the CGNAT records. He further maintained that the information on the online dates indicating his initial and last connections to ByLock system, which is indicated in these documents, is contradictory; that the date/time information as to e-mails, incoming/outgoing calls of the relevant User-ID number, which is indicated in the ByLock Report, was not consistent

with the CGNAT records; and that there were findings as to the records of incoming/outgoing calls with User-ID numbers which are not included in the list. He finally alleged that one of the IP addresses, which he had allegedly connected to, was not indeed assigned to the ByLock server at the relevant time; that according to NAT technology, it was not possible to permanently use the same dynamic IP address; however, according to the findings, he had ensured connection for a long time through the same IP; and that therefore, the findings that he had been using ByLock did not reflect the truth.

2. The Court's Assessment

115. Article 36 § 1 of the Constitution, titled *"Right to legal remedies"*, reads as follows:

> *"Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures. No court shall refuse to hear a case within its jurisdiction."*

116. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). In this sense, the applicant's allegations were examined from the standpoint of the right to a fair hearing falling under the scope of the right to a fair trial.

a. Admissibility

117. The alleged violation of the right to a fair hearing must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

i. General Principles

118. The aim of criminal trial is to establish the material truth. However, the inquiries conducted to achieve this aim is not unlimited. Establishment of the material truth lawfully is necessary to ensure criminal justice in an equitable manner. In this sense, obtaining evidence through lawful means is considered as one of the basic principles of the state of law. In

this regard, it is explicitly enshrined in Article 38 § 6 of the Constitution that the findings obtained unlawfully cannot be admitted as evidence (see *Orhan Kılıç* [Plenary], no. 2014/4704, 1 February 2018, § 42).

119. As regards the legislative intention for addition of the notion of "*… and the right to a fair trial"* to Article 36 of the Constitution, it is emphasized that the right to a fair trial, which is safeguarded also by the international conventions to which Turkey is a party, has been incorporated into the provision. As a matter of fact, the right to a fair hearing is set forth in Article 6 § 1 of the Convention. Likewise, the Constitutional Court has examined, in its several judgments involving assessments under Article 36 of the Constitution, the allegations raised on account of the use of evidence obtained without any legal basis or unlawfully during the proceedings under the right to a fair hearing, one of the safeguards inherent in the right to a fair trial. In these assessments made under Article 36, Article 38 § 6 of the Constitution is also taken into consideration (see *Orhan Kılıç*, § 43).

120. However, the question of fairness, under the substantive limb, of the establishment of the imputed acts, the interpretation and implementation of legal provisions, the admissibility and assessment of evidence, and the resolution offered for the dispute, by the Court of Cassation and inferior courts in a given case cannot be subject to an examination through individual application. Therefore, in the present case, it is not for the Court to review the lawfulness of the assessment made, and the conclusions reached, by the Court of Cassation and the inferior courts. It primarily falls within the inferior courts' jurisdiction to consider the available evidence in a particular case and to decide whether the relevant evidence is related to the case (see *Orhan Kılıç*, § 44).

121. On the other hand, it should be taken into consideration that the use of evidence, which could be *prima facie* revealed to be obtained without any legal basis or to be unlawfully obtained or which were considered unlawful by the inferior courts, as the sole or decisive evidence during the proceedings may constitute a problem with regard to the right to a fair hearing. In the criminal trial, the way in which the relevant evidence has been obtained and the extent to which it has been relied on in conviction may render unfair the proceedings as a whole (see *Orhan Kılıç*, § 45).

122. In this sense, the Court's task is not to ascertain whether certain evidential elements were obtained lawfully, but rather to examine whether the evidence which is *prima facie* unlawful or which has been found unlawful by the inferior courts has been relied on as the sole or decisive evidence during the proceedings, as well as whether such *unlawfulness* has had any bearings on the fairness of the proceedings as a whole (see, in the same vein, *Yaşar Yılmaz*, no. 2013/6183, 19 November 2014, § 46).

123. In making an assessment in this respect, it must be also considered whether the conditions under which the evidence was obtained has casted doubt on its authenticity and reliability (see *Güllüzar Erman*, no. 2012/542, 4 November 2014, § 61). A fair hearing entails the elimination of doubts as to the authenticity and reliability of the evidence, as well as the grant of an opportunity to effectively challenge to its reliability and authenticity. In this regard, the Court also examines, with regard to the alleged unlawfulness of the evidence, whether the applicants were granted the opportunity of challenging the authenticity of the evidence and opposing its use; whether the principles of equality of arms and the adversarial proceedings were observed; and whether the defence was afforded sufficient safeguards for the protection of their interest (see *Orhan Kılıç*, §§ 47, 48).

124. The above-cited constitutional requirements are also set forth in the relevant procedural laws. As a matter of fact, Article 217 § 2 of Code no. 5271 provides for *"The imputed offence may be proven by using all kinds of legally obtained evidence"*. In Article 206 § 2 of the same Code, it is set forth that in cases where the evidence is unlawfully obtained, it shall be denied, and Article 230 § 1 sets out that the evidence which has been relied on as a basis for the conviction and has been denied shall be indicated, and thereby, the evidence which has been included in the file and obtained unlawfully shall be separately and clearly demonstrated (see *Orhan Kılıç*, § 50).

125. In the examinations of individual applications, the binding norm is the Constitution, and no review as to the lawfulness is not conducted. In assessments as to whether the admission of the evidence obtained without any legal basis or unlawfully has impaired the fairness of the proceedings from the standpoint of the safeguards afforded under Articles 36 and 38 of

the Constitution, the particular circumstances of each case must be taken into consideration (see *Orhan Kılıç*, § 51).

ii. Application of Principles to the Present Case

(1) As regards the data obtained from ByLock server

126. The applicant maintained that the ByLock data were obtained through intelligence methods and unlawfully; and that therefore they could not be relied on as evidence in conviction. Accordingly, the nature of the ByLock application as well as the way how it became known to investigation authorities must be primarily ascertained.

127. 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 institutions 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 MİT also conducted inquiries and inspections, within the boundaries of its own field of work, into the FETÖ/PDY's activities. As a matter of fact, it is laid down in Article 4 § 1 (a) of Law no. 2937 that the MİT is liable to create state-wide national security intelligence in respect of the existing and probable activities, performed at home and abroad, against the territorial integrity, existence, independence, safety, constitutional order and national power of the Republic of Turkey, as well as to report this intelligence to the relevant institutions (see § 83 above).

128. During these inspections and inquiries conducted by the MİT, 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 the ByLock application was in contact. These findings were subject to detailed technical examinations. The inquiries and inspections conducted into this application by the MİT within its own field of work are not in the form of a judicial investigation. In Article 4 § 1 (i) of Law no. 2937, it is set forth that the MİT is empowered to gather, record and analyse information, documents, news and data on counter-terrorism issues by use of any kind of procedures, means and systems of

technical and human intelligence and to report the intelligence created to the relevant institutions (see § 83 above).

129. In Article 6 of the same Law, it is set forth that in performing its duties, the MİT may apply clandestine working procedures, principles and methods as well as collect data on foreign intelligence, national defence, terrorism, international offences and cyber security which are conveyed through telecommunication channels (see § 84 above). It thus appears that the MİT is empowered through this Law to collect information and data on relevant persons and groups by technical means as well as to analyse these information and data, with a view to revealing the terrorist activities in advance without being performed for the purposes of maintaining the constitutional order and national safety of the country.

130. As a matter of fact, it is inevitable, in democratic societies for the protection of fundamental rights and freedoms, to need intelligence agencies and the methods employed by such agencies for 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. Threats against democratic constitutional order may be identified and precautions may be taken against these threats through the information and data obtained by intelligence agencies. In this regard, the MİT is vested, by Articles 4 and 6 of Law no. 2937, with the powers to obtain and analyse information, documents and all other data concerning terrorist offences, which are transmitted through telecommunication channels, by using any kind of intelligence methods, to purchase any computer data available abroad, as well as to report them to the relevant institutions.

131. The organisation of, and activities performed by, the FETÖ/PDY have been a subject of social debate for a long time, and notably in the aftermath of 2013, the investigation authorities and the State's security agencies started to consider this structure as a threat to national safety (see, §§ 12 and 13 above). In this regard, notably the investigations of 17-25 December and the stopping of MİT trucks are, *inter alia*, the basic grounds of the conclusion reached by the investigation authorities and the judicial

bodies to the effect that the activities of this structure have been intended for overthrowing the Government (see §§ 15 and 16 above). It is further indicated in several investigation/prosecution files that many cases filed/conducted by judicial members, who were considered to have a link with this structure, have been also intended for ensuring or increasing its efficiency within public institutions notably at the TAF as well as within different field of the civil society (see § 14 above). During such a period, the public authorities have, on one hand, issued decisions and carried out practices revealing the illegal aspect of the FETÖ/PDY and taken certain measures against the organisation on the other (see §§ 18 and 19 above).

132. It is not for the Constitutional Court to decide on the lawfulness or expediency of the performance of intelligence activities by the State's intelligence agencies by considering that the threat posed by FETÖ/PDY to national security turned into an *imminent* threat. Nor is it the subject-matter of the examination in the present case. The relevant authorities cannot be asked to wait, so as to take the necessary preventive measures, until the realisation of any terrorist threat. It has been comprehended that the complex structure and international nature of the FETÖ/PDY necessitated the performance of certain intelligence activities concerning this organisation before the coup attempt. In this sense, the coup attempt of 15 July demonstrated how great the threat posed by the FETÖ/PDY to national security was and how it turned into a severe risk against the existence and integrity of the nation despite the certain measures taken prior thereto (see, for detailed explanations and assessments, *Aydın Yavuz and Others*, §§ 12-25; and 212-221).

133. The MİT delivered to judicial/investigation authorities (the Ankara Chief Public Prosecutor's Office) the FETÖ/PDY-related information of which it had become aware while performing its duties under Articles 4 and 6 of 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 (counter-terrorism) and which was found out on a legal basis- cannot be construed to the effect that the MİT, an intelligence agency, had engaged in *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 an inquiry conducted for

the purpose of collecting 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.

134. Besides, it must be borne in mind that the Ankara 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 a program which was considered to be the covered communication means used by the FETÖ/PDY's members and heads. The MİT's notification 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 -thereby revealing the material truth- does not render them unlawful merely on account of the nature of the notifying authority, namely the MİT.

135. The judicial authorities are always entitled to test the data delivered to them and to conduct necessary inquiries, examinations and assessments with respect to the authenticity or reliability of digital materials. In the present case, the incumbent judicial authorities, having received the impugned data, conducted the investigation process by making inspections and inquiries, through the competent law-enforcement units, within the framework of the provisions on search and examination of digital data, which are set out in the relevant procedural law, and in line with the decisions taken by the incumbent judges concerning the necessary preventive measure. Within this process, the necessary information, documents and evidence were obtained from the other relevant institutions and organisations. Besides, the defence has been always provided with the opportunity of challenging the authenticity or reliability of these digital materials and opposing their use, as required by the principles of equality of arms and adversarial proceedings inherent in the right to a fair trial.

136. Consequently, the delivery of the data concerning the ByLock application, which were found out during the intelligence inquiries conducted into a terrorist organisation aiming at overthrowing the constitutional order, to the Ankara 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 *prima facie* unlawfulness. Nor did the Court of Cassation or the inferior courts make any determination to the effect that this process involved any. On the contrary, the General Assembly of the Criminal Chambers of the Court of Cassation concluded in its several judgments that the way in which the ByLock data were obtained -as evidence- was lawful (see the judgment of the General Assembly of the Criminal Chambers of the Court of Cassation, no. E.2018/16-419, K.2018/661 and dated 20 December 2018). Therefore, the submission, to the Ankara 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 as practice involving a manifest error of judgment or manifest arbitrariness.

(2) As regards the process following the submission of the ByLock data to the judicial authorities

137. A criminal case was filed against the applicant for his alleged membership of the FETÖ/PDY. In the report of 30 June 2017 titled *"Result of New ByLock Inquiry"*, which was submitted to the relevant court by the EGM-KOM, it is indicated that the applicant used ByLock application several times through the GSM subscription registered in his name and with 4 different mobile phones IMEI numbers of which were determined; and that the first time he signed up for this application is 13 August 2014. The applicant was convicted for being a member of the said terrorist organisation by the court decision of 8 November 2017. In its conviction decision, the court relied on the consistency between the ByLock Report issued in respect of the applicant by the EGM-KOM and the CGNAT data on the GSM number used by him as well as on the applicant's use of ByLock communication program, designed for the use of the FETÖ/PDY's members, with his username *"serhat1299"*. In this decision, it is further indicated that the ByLock program, which was used by the applicant, is the communication network of the FETÖ/PDY and has been developed and used by this organisation; and that in consideration of the features of the program, those using this application have been considered to have connection with the organisation.

138. Accordingly, the decisive evidence underlying the applicant's conviction is the finding that he was a user of the ByLock. The applicant asserted that the ByLock data were unlawful and therefore could not be a ground for his conviction. Therefore, an assessment must also be conducted as to the period following the submission of the relevant data on ByLock program to the judicial authorities.

139. Upon the submission of the digital materials obtained from the ByLock server and the technical report issued with respect to these materials to the Ankara Chief Public Prosecutor's Office, the investigation process was thereafter conducted in accordance with Law no. 5271. In this sense, the Ankara Chief Public Prosecutor's Office requested the Ankara 4th Magistrate Judge to conduct inquiry into, make a back-up and transcribe the digital materials in question pursuant to Article 134 of Code no. 5271. Upon the said the request, the magistrate judge issued an order for *"conducting an inquiry, making a back-up and conducting an expert examination as to the digital materials"*.

140. Also in the judgment of the General Assembly of the Criminal Chambers of the Court of Cassation, which is no. E.2017/16.MD-956, K.2017/370 and dated 26 September 2017, it is underlined that the data obtained through the ByLock communication system fall under the scope of Article 134 of Code no. 5271. According to this judgment, as the records concerning communication through internet are saved in the computer file, these communication records may be subject to the search, back-up and seizure processes, which are set out as a measure in Article 134 § 1 of Code no. 5271. As noted by the Court of Cassation, the notion of *"computer files"* stated in Article 134 of Code no. 5271 does in technical sense include not only the records recorded in desktops and laptops but also all digital files that may be available in CDs, DVDs, flash disks, floppy disks as well as in any data processing or data collection means or tools including all removable storages, digital-based mobile devices such as mobile phones and etc.. It has been observed that the determinations and assessments which were made by the Court of Cassation and the inferior courts with respect to the preventive measures applied did not involve any manifest error of judgment and arbitrariness.

141. The judicial authorities conducted the necessary inquiries, examinations and assessments as to the authenticity or reliability of the digital materials submitted, which were also examined and interpreted by the relevant technical units. The defence was also granted the opportunity of challenging the authenticity of the evidence demonstrating that the applicant used ByLock application and opposing its use in accordance with the principles of the equality of arms and adversarial proceedings.

142. Consequently, in the present case, there has been no violation with respect to the allegations that the ByLock data were obtained without any legal basis or unlawfully.

143. For these reasons, the Court has found no violation of the right to a fair hearing under the scope of the right to a fair trial safeguarded by Article 36 of the Constitution.

B. Allegation that the Bylock cannot be relied on as the sole or decisive evidence for conviction

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

144. The applicant maintained that his conviction was based on ByLock data as single or decisive evidence, which was unlawful; that the documents issued with respect to ByLock were contradictory, inconsistent and ambiguous; and that these data were nevertheless relied on by the relevant courts as evidence against him. He accordingly alleged that his right to a fair trial had been violated.

145. In its observations, the Ministry pointed to the information and documents indicated by the incumbent court as evidence in the reasoned decision and noted that the applicant and his lawyer had the opportunity of raising their claims and challenges against the impugned data. The Ministry also indicated that it was within the inferior courts' jurisdiction to assess the evidence.

146. In his counter-statements against the Ministry's observations, the applicant reiterated the issues noted in the application form and annexes thereto.

2. The Court's Assessment

147. In Article 148 § 4 of the Constitution, it is set out that the complaints concerning *the issues to be examined in appellate review* cannot be subject to an examination through individual application. Accordingly, in principle, any question with respect to the establishment of impugned facts, the assessment of the evidence, the interpretation and implementation of provisions of law as well as the fairness of the conclusion reached with respect to the dispute cannot be subject-matter of an individual application. However, the findings and conclusions constituting an interference with the rights and freedoms falling under the scope of individual application and involving a manifest error of judgment or manifest arbitrariness are excluded from this rule (see, among many other authorities, *Ahmet Sağlam*, no. 2013/3351, 18 September 2013).

148. However, in cases where there is an interference with the fundamental rights and freedoms, it is the Constitutional Court that will assess the effect of the inferior courts' decisions and assessments on the safeguards provided for in the Constitution. In this respect, any examination to be made, by taking into account the safeguards provided for in the Constitution, as to whether the fundamental rights and freedoms falling into the scope of individual application have been violated cannot be regarded as "*an assessment of an issue to be considered in appellate review*" (see, *Şahin Alpay (2)* [Plenary], no. 2018/3007, 15 March 2018, § 53).

149. Besides, the Constitutional Court is entitled, in very exceptional cases, to examine a complaint with respect to the issues to be considered in appellate review, which is not directly related to the fundamental rights and freedoms, without being subject to the above-cited restriction. In very exceptional cases where the fairness of the proceedings has been undermined to a great extent and the procedural safeguards inherent in the right to a fair trial have thereby become dysfunctional, this situation -which is indeed related to the outcome of the proceedings- has by itself turned into a procedural safeguard. Therefore, the Constitutional Court's examination as to whether the inferior court's assessments rendered the procedural safeguards dysfunctional and whether the fairness of the proceedings was impaired to a great extent due to manifest arbitrariness does not mean that the Court has dealt with the outcome of the proceedings.

As a result, the Constitutional Court may interfere with the inferior courts' assessments concerning evidence only in case of a practice which is manifestly arbitrary and has rendered dysfunctional the procedural safeguards inherent in the right to a fair trial.

150. In the present case, although the applicant maintained that his right to a fair trial had been breached due to the use of ByLock data as decisive evidence for his conviction, he did not clearly indicate which of the procedural safeguards inherent in the right to a fair trial had been violated. It does not also seem possible to examine the allegation raised by the applicant under any aspect of the procedural safeguards inherent in the right to a fair trial. In this sense, what remains to be determined is whether the inferior court's reliance on the ByLock data as sole or decisive evidence for the applicant's conviction is a practice which has completely rendered dysfunctional the procedural safeguards inherent in the right to a fair trial or has been manifestly arbitrary. To that end, the process whereby the ByLock data were relied on as evidence as well as the inferior court's assessment with respect thereto must be taken into consideration.

151. The investigation units issued technical and chronological reports including comprehensive information on technical features of the ByLock program ensuring its confidentiality, its use, its encryption method, the way how it is downloaded, the fields it is used and its intended purpose and submitted them to the relevant judicial authorities. In these reports, the differences between ByLock program and the common commercial messaging programs as well as the organisational features of the former one are indicated. In this sense, it is indicated therein that the common commercial messaging programs enable for easy download, synchronisation of the persons in the phonebook with the program, identification through phone number and e-mail address and encryption, whereas ByLock program, to the contrary, makes it difficult to download, to be included in the system and to get in contact with persons, and it does not demand, during the signing up process, any personal information which would lead to the identification of the user partially or wholly.

152. Certain abbreviations and organisational literature, which were also mentioned by the organisation members in their statements, were used in the messages and e-mails sent/received through the Bylock

program. Seeking mutual consent of two users to enable them to get in contact -adding as a friend- was considered as an indication of the fact that the program was designed in accordance with the cell-type structure of the organisation. It was also admitted in the statements included in the files of investigation and/or prosecution conducted in the aftermath of the coup attempt, as well as in the messages and e-mails sent by the organisation members, that ByLock was a program designed to ensure organisational communication and was used to that end.

153. In the judgment rendered by the General Assembly of the Criminal Chambers of the Court of Cassation, no. E.2017/16.MD-956, K.2017/370 and dated 26 September 2017, it was concluded -in consideration of the technical data and information revealed by the investigation authorities and structuring and characteristics of the FETÖ/PDY- that ByLock was, by its functioning systematics and structure, a program designated and offered for the exclusive use of the FETÖ/PDY members. In the Court of Cassation's jurisprudence, ByLock communication system is regarded as a network created for the use of the FETÖ/PDY members. Therefore, the finding -through technical data which are beyond any doubt and capable of forming an exact conclusion that the relevant persons have involved in this network upon organisational instruction and it has been used for confidential communication- is admitted as evidence demonstrating the relevant person's relation with the said organisation (see §§ 94, 97 and 104 above).

154. As inferred from the Court of Cassation's judgments, the ByLock data are mainly based on two sources. The first one is the data which were obtained from the ByLock server and were then subject to examination by technical units, pursuant to a magistrate judge's/court's decision, upon being submitted by the MİT to the judicial authorities. The second one is the CGNAT records demonstrating the IP addresses in Turkey which connected to IP addresses of the Bylock server. In this sense, the judicial bodies relied on the data obtained from the ByLock server, which play a significant role for the identification of the ByLock users and determination of their hierarchical positions within the organisation. It is thereby possible to ascertain the User-ID numbers, usernames and passwords of the users signed up for the ByLock server, the dates of access, IP addresses

connected to the server, the number of connections between particular dates and with whom the relevant persons communicated.

155. In these judgments, it is further indicated that CGNAT (HIS) records saved by the operators are a kind of metadata which are used for the exact identification of the ByLock users; that as these records are in the form of summary data, they are considered as a *sign* and *indication* and would not *per se* prove that a given person is a real user of the ByLock application. It is also noted therein that the probability that the relevant persons may have been routed to the ByLock servers against their own will must also be taken into consideration. It is further emphasised that in cases where a given person has been revealed to connect to ByLock server through CGNAT records but has not been matched with a *ByLock User-ID number* yet, it must be borne in mind that he may either be a real ByLock user or have been routed to the ByLock servers through trap methods (*Morbeyin and etc.*). The Court of Cassation notes that in such cases, no conviction decision may be issued due to inadequate inquiry (see, §§ 97, 104/c above).

156. 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. At the sign-up stage, the user is required to create a username and password. For sending/receiving messages and ensuring communication, the *username/ user-code*, which has been created by the users in the course of sign-up stage 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 its judgments, the Court of Cassation points to the significant role of the ByLock Report in determination of the legal status of the relevant person. This report is a document which indicates User-ID number, username, password of the user of the ByLock server, log records available in the server and transcription of messages/e-mails if any, as well as the relation between the user and the other users in the groups created or joined by the user. In these judgments, it is accordingly noted that the ByLock report and the documents including CGNAT records are important in proving that the relevant person has signed in and used the ByLock system with

a view to ensuring organisational confidentiality and communication (see §§ 97, 104/d-i above).

157. In the judgment of the General Assembly of the Criminal Chambers of the Court of Cassation, no. E.2018/16-418, K.2019/513 and dated 27 June 2019, it is also indicated that despite the finding whereby *the User-ID has been matched with the relevant person*, there may be doubts as to the fact that the User-ID number indeed belongs to another person in consideration of the other evidence available in the file. Accordingly, in the face of defence submissions that the GSM or ADSL subscription registered in the accused person's name or the device connecting to internet through these subscriptions has been indeed used by another person or that information -such as password- required for accessing to internet connection through these subscriptions has been shared by the accused person with others or obtained unlawfully by others, necessary inquiries and examinations must be conducted in this respect. The reports including the User-ID information, which were issued by the EGM-KOM, must be assessed in conjunction with the data to be obtained as a result of the inquiries with respect to the person allegedly using the accused person's subscription or device. If considered necessary for revealing the material truth, the report on the up-to-date report on ByLock inquiry results as well as, if available, the CGNAT and HTS records must be also obtained and examined.

158. According to the judicial and technical reports as well as the Court of Cassation's judgments, an organisation member is to be informed, by another member of the organisation, of the existence of ByLock application, its organisational significance and confidentiality, how it is downloaded and used, and how a friend is added to get in contact. As also indicated in the inquiries conducted by the judicial units, the ByLock program does not include any sections such as user manual, frequently asked questions and feedbacks. Therefore, any person -who has no relation with the organisation but has downloaded the 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 other member of the organisation. In the judicial processes, not download of the impugned application, but signing up to it and its use for organisational

purposes were relied on. As a matter of fact, according to the findings of the judicial authorities, no investigation was conducted against individuals only for having downloaded the ByLock application to their device. However, in case of any allegation to the contrary, the judicial authorities conducted inquiries in this respect (see § 98 above).

159. In the light of the above-mentioned explanations, 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 this sense, the inferior courts adopt the evidence-based method (identifying the accused person on the basis of the available evidence) in making assessments as to the ByLock application and matching the data on this application with the accused persons. Moreover, these assessments are based not on a single set of data but on the comparison and ultimately confirmation of several information, documents, records and data obtained from different sources. Those accused have the opportunity, at any time during the investigation and prosecution stages, to challenge the authenticity and soundness of the evidence demonstrating that they are a ByLock user, as well as to raise any kind of claims and requests with respect thereto. Besides, the appellate authorities may also decide to quash any conviction in cases where such allegations have not been sufficiently dealt with (see §§ 97-104 above). Accordingly, it has been concluded that neither the Court of Cassation nor the inferior courts have adopted a categorical approach with respect to the Bylock.

160. In principle, it is for the trial courts to assess the available evidence in a given case and to decide whether the evidence adduced relates to the case. It is not the Constitutional Court's task to make an assessment in this respect. Therefore, it falls within the inferior courts' jurisdiction to assess whether a single piece of evidence *per se* suffices to find established the offence of membership of a criminal organisation. As the inferior courts are in direct relation with the accused person and have the opportunity of a first-hand examination of the evidence, they are in a better position in that regard than the Constitutional Court.

161. In the present case, the inferior 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 ByLock 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 the 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 practice which has completely rendered dysfunctional the procedural safeguards inherent in the right to a fair trial. It has been accordingly concluded that the allegations that ByLock data were relied on as sole or decisive evidence in the conviction were in the form of a complaint that should have been examined at the appellate stage.

162. Finally, the applicant maintained that there were discrepancies in certain ByLock data. In the assessment of the said allegation, it must be taken into consideration -independently of the present application- that the data available on the ByLock server and the CGNAT records could not be fully obtained. Therefore, there may be insubstantial differences among the data concerning the persons, depending on the ability of recovering and transcribing the data obtained from the ByLock database.

163. In the present case, as a result of the technical inquiries, the User-ID number 114205 was matched with the IP numbers used while the accused person connected to ByLock server, and all other data with respect to this User-ID number -which could be recovered- were also included in the ByLock Report. It has been revealed that the devices, which were found -through the report on ByLock inquiry result and CGNAT records- to be used with this GSM subscription, were the mobile phones that the applicant admitted, at the hearing, to having used. According to the inferior court's finding, the data such as the GSM number and log records indicated in the ByLock Report are so consistent with the CGNAT records that would not cast any doubt on the applicant's use of ByLock. Therefore, the existence of insubstantial differences between the log records pertaining to the User-ID matched with the applicant and the CGNAT records as well as among

certain data included in the different sub-charts related to this User-ID, due to the inability to completely recover the relevant data, does not lead the Court to reach any conclusion to the contrary.

164. For these reasons, this part of the application must be declared inadmissible for being *manifestly ill-founded.*

C. Alleged failure to bring the digital data before the incumbent court

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

165. The applicant maintained that his right to a fair trial had been violated, stating that the relevant digital data had not been brought before the incumbent court.

166. In its observations, the Ministry did not provide any explanation with respect to this allegation.

2. The Court's Assessment

167. As enshrined in Article 36 of the Constitution, everyone has the rights to self-defence and to a fair trial. The safeguards afforded in pursuance of the right to self-defence are in essence inherent in the right to a fair trial. As regards the legislative intention for addition of the notion of "*… and the right to a fair trial"* to Article 36 of the Constitution, it is emphasized that the right to a fair trial, which is safeguarded also by the international conventions to which Turkey is a party, is incorporated into the provision. Article 6 § 3 (b) of the Convention sets forth that everyone charged with a criminal offence has the right to have adequate time and facilities for the preparation of his defence (see *Ufuk Rifat Çobanoğlu*, §§ 35 and 37). Therefore, the right to have adequate time and facilities for the preparation of his defence undoubtedly falls within the scope of the right to a fair trial safeguarded by Article 36 of the Constitution.

168. The notion of *necessary facilities* for the defence means the requisite facilities which would or may assist the suspect/accused person in his self-defence. The facilities to be afforded to the person charged with a criminal offence are the ones that are *requisite* for the defence. One of these facilities is to enable the relevant person to access the information and evidence so as to prepare his defence submissions and thereby defend

himself before the court in the most appropriate and effective manner as well as to thus influence the outcome of the proceedings. Granting access to the information and evidence likely to lead to the accused person's acquittal or any reduce in his penalty is among the facilities to be afforded (see, *mutatis mutandis*, *Ufuk Rifat Çobanoğlu*, § 45).

169. The right to have necessary time and facilities, which is to be afforded to the defence, is directly related to the principles of equality of arms and adversarial proceedings. The principle of adversarial proceedings entails that the parties be granted the opportunity to have knowledge of, and comment on, the case file. Therefore, in criminal trials, the accused person must be given the opportunity to have knowledge, and to thereby effectively challenge, the observations filed and evidence adduced by the other party, with a view to influencing the court's decision (see *Tahir Gökatalay*, no. 2013/1780, 20 March 2014, § 25; and *Cezair Akgül*, no. 2014/10634, 26 October 2016, §§ 27-31). The principle of equality of arms means that parties of a case shall be subject to the same conditions in terms of procedural rights and that both parties shall be afforded equal opportunities to submit their allegations and arguments before the courts, without placing any party in a disadvantageous position (see *Yaşasın Aslan*, no. 2013/1134, 16 May 2013, § 32). This principle also entails that the material information -which is submitted and obtained by the prosecution- would be explained; and that in criminal trials, the accused person would not be subject to a legal condition to his detriment (see *Yankı Bağcıoğlu and Others*, §§ 63 and 64).

170. However, the burden of proof rests on the applicant by substantiating his allegations with respect to the impugned facts by means of adducing the relevant evidence before the Constitutional Court and providing explanations as to the allegedly violated constitutional provisions invoked by him. The applicant is required to indicate, in his application form, the rights or freedoms allegedly breached due to any act, action or negligence of a public authority, the constitutional provisions invoked, the grounds of the alleged violation, the evidence relied on, as well as the practices or decisions allegedly giving rise to violation. The facts as to the violation allegedly caused by a public authority must be

summarized chronologically, and the way how the rights safeguarded by the individual application mechanism have been violated, as well as the reasons and evidence with respect thereto, must be explained in the individual application form (see *Veli Özdemir*, no. 2013/276, 9 January 2014, §§ 19 and 20; and *Ünal Yiğit*, no. 2013/1075, 30 June 2014, §§ 18 and 19).

171. However, the applicant failed to provide sufficient explanation in his application form as to the said allegation, as well as to substantiate it. In his counter-statements against the Ministry's observations, he made a reference to certain petitions he had submitted to the inferior courts and requested the Court to take them into consideration. Although he provided explanations, in one of these petitions, as to the failure to bring the digital evidence before the incumbent court, these explanations were made not within the scope of the concrete problems he had encountered during his trial within the context of ByLock data but rather, in general terms, within the scope of his allegation that the relevant ByLock data had been obtained unlawfully. In other words, there is no information and document to the effect that the applicant raised before the inferior courts the concrete problems resulting from the use of ByLock data during his trial and requested the courts to conduct necessary inquiries and examinations; but the inferior courts failed to take any action.

172. For these reasons, as the applicant's allegation that the relevant digital data had not been brought before the inferior courts was not substantiated, this part of the application must be declared inadmissible for *being manifestly ill-founded*.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 4 June 2020 that

A. 1. The alleged violation of the right to a fair hearing be DECLARED ADMISSIBLE;

2. The allegation that the ByLock data could not be relied on as sole or decisive evidence for conviction be DECLARED INADMISSIBLE for *being manifestly ill-founded*;

3. The alleged failure to bring the relevant digital materials before the inferior courts be DECLARED INADMISSIBLE for *being manifestly ill-founded*;

B. There was NO VIOLATION of the right to a fair hearing inherent in the right to a fair trial safeguarded by Article 36 of the Constitution;

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

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

EMİN ARDA BÜYÜK

(Application no. 2017/28079)

2 July 2020

On 2 July 2020, the Plenary of the Constitutional Court found a violation of the right to a court within the scope of the right to a fair trial safeguarded by Article 36 of the Constitution in the individual application lodged by *Emin Arda Büyük* (no. 2017/28079).

THE FACTS

[8-40] The applicant was working as a subcontracted medical secretary at a university. His employment contract was terminated by the subcontractor, upon the request of the rectorate of the relevant university, for his alleged relation or connection with the Fetullahist Terrorist Organisation/Parallel State Structure ("FETÖ/PDY") within the scope of the Decree Law no. 667 issued after the coup attempt of 15 July 2016. The applicant then brought an action before the labour court for his reinstatement as his employment contract had been terminated without a good cause. His action was, however, dismissed by the incumbent labour court. The applicant's subsequent appellate requests before the regional court of appeal and the Court of Cassation were also rejected.

The applicant lodged an individual application on 14 June 2017.

V. EXAMINATION AND GROUNDS

41. The Constitutional Court ("the Court"), at its session of 2 July 2020, examined the application and decided as follows:

A. The Applicant's Allegations

42. The applicant stated that the incumbent court had dismissed his case on the basis of Article 4 of the Decree-Law no. 667; however, his employment contract had not been terminated in accordance with the procedure set forth therein because he had been employed by a subcontractor. He complained that the court had adjudicated his case without providing him with the right to defence; and that the action brought by him had been dismissed for his relation and connection with the FETÖ/PDY in the absence of any investigation launched against him with respect to this organisation. The applicant, asserting that the case file included no evidence showing his relation or connection with the said

terrorist organisation, stated that another action brought by his workmate in a similar situation with him had been accepted; and that therefore, the dismissal of his action had breached his presumption of innocence. He therefore maintained that his rights safeguarded by Articles 10, 36, 38 and 49 of the Constitution had been violated.

B. The Court's Assessment

43. Article 36 § 1 of the Constitution, titled *"Right to legal remedies"*, provides as follows:

> *""Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through lawful means and procedures."*

44. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). Although the applicant asserted that his right to defence had been violated due to the failure to collect evidence, the Court has considered that his application be examined under the scope of the right to a court as the essence of his allegations was related to the dismissal of the action without an examination and assessment as to the merits of the dispute.

1. Applicability

45. The right to a fair trial safeguarded by Article 36 of the Constitution shall apply not only to the proceedings concerning a criminal charge but also to the proceedings whereby *civil rights and obligations* of an individual are adjudicated. Article 36 § 1 of the Constitution may apply to the *civil* matters only when there is a *right* that is afforded to the individual by the legal order or that at least has an arguable basis. Besides, there must be a dispute having a bearing on the interest of the relevant person with respect to this right. In addition, the dispute must be of a decisive nature for the determination and exercise of the given right (see *Mehmet Güçlü and Ramazan Erdem*, no. 2015/7942, 28 May 2019, § 28).

46. The individuals' *right to work based on an employment contract* and the nullity of the termination if the employment contract has been terminated

without a good reason, as well as the right to claim compensation from courts on account thereof are enshrined in Law no. 4857. In the present case, upon the termination of his employment contract, the applicant brought an action for the establishment of the nullity of the impugned termination and for reinstatement to his post. The essence of the dispute in the present case was the questions whether the termination of the applicant's employment contract had a good reason and whether the conditions for reinstatement were satisfied. In this aspect, the action brought by the applicant was capable of ensuring his reinstatement and awarding him compensation. It has been accordingly concluded that the impugned action was of a decisive nature for the applicant's civil rights and obligations and that all safeguards inherent in the right to a fair trial must apply in this case.

2. Admissibility

47. For these reasons, the alleged violation of the right to a court must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

3. Merits

a. General Principles

48. In Article 36 § 2 of the Constitution, it is set forth that any court shall not refrain from hearing a case which is within its jurisdiction. In this context, the right to a fair trial enshrined in Article 36 of the Constitution also affords individuals the guarantee to request the court to issue a decision on a given dispute. In addition, the European Court of Human Rights ("ECHR"), interpreting the European Convention on Human Rights ("Convention"), acknowledges that Article 6 § 1 of the Convention embodies a general right in the form of right to a court and states that this right also covers the right to a decision (see *İbrahim Demiroğlu* [Plenary], no. 2017/15698, 26 July 2019 § 54).

49. Right to a court as one of the safeguards inherent in the right to a fair trial, which is an indispensable right in a democratic society, requires the bringing of a dispute before a court, the examination, assessment and adjudication of substantial claims and defence submissions with respect

to the given dispute by judicial authorities, as well as the execution of the decision issued by the court. Accordingly, the right to a court involves the right to access to a court, the right to a decision and the right to execution of a decision. In general, the right to a decision amounts to the right to request the adjudication of a dispute brought before a court. That is because the main purpose of the individual exercising his right of litigation is to obtain a decision on the merits of the impugned dispute at the end of the proceedings. In other words, if the relevant party cannot obtain a decision at the end of a case, it would become useless to file a case. On the other hand, the right to a decision guarantees not only the individuals' ability to obtain a decision merely in form at the end of the proceedings. It also requires the conclusion of the substantive requests related to the impugned dispute by the judicial authority (see, *mutatis mutandis*, *İbrahim Demiroğlu*, § 55).

50. The right of court is closely related to the right to an effective remedy that is safeguarded by Article 40 of the Constitution. As is known, Article 40 of the Constitution enshrines the right, for those whose fundamental rights and freedoms safeguarded in the Constitution have been violated, to be provided with the opportunity to apply to a competent authority without delay (right to an effective remedy) (see *Yusuf Ahmed Abdelazim Elsayad*, no. 2016/5604, 24 May 2018, § 59). The right to an effective remedy ensures that everyone who claims to have suffered a violation of one of his constitutional rights be provided with the opportunity to resort to administrative and judicial remedies that are reasonable, accessible, and capable of preventing the violation from taking place or putting an end to any continuing violation or eliminating its consequences (i.e. offering adequate redress), whereby the person concerned can have his allegations examined in a manner compatible with the nature of the right at stake. However, the mere existence in legislation of a remedy through which alleged violations of fundamental rights and freedoms may be raised is not in itself sufficient. The remedy in question must be effective also in practice (see *Yusuf Ahmed Abdelazim Elsayad*, §§ 60, 61).

51. In the event that the court, in adjudicating a dispute, concludes the proceedings in consideration of the claims and defence submissions of one party but without discussing the substantive objections, it cannot be

said that a genuine trial was conducted despite the formal existence of a decision. In that case, the availability of a judicial remedy with respect to a dispute in theory would not make a sense in practice, which would render the right to a court and thus the right to a fair trial merely an illusion.

52. The failure on the part of the incumbent court to examine the merits of the impugned dispute not only undermines the right to a fair trial, but also may lead to a violation of the right to an effective remedy with respect to other (substantial) rights and freedoms in conjunction with the civil right that is the subject-matter of the case. Judicial remedies are established mainly for the resolution of disputes related to a right or freedom. By filing a case, those concerned seek from the courts a judicial protection with respect to the given right or freedom. It is a constitutional obligation incumbent on judicial authorities to address the individuals' requests for judicial protection and accordingly to adjudicate the case by dealing with the merits of the dispute and assessing the claims and defence submissions.

53. It should be, however, noted that this obligation is not absolute. In this sense, it should be indicated that the right to a court does not preclude the adjudication of a case without an examination as to the merits pursuant to the trial procedure rules (striking out of case, deemed not to have been filed, no ground for a decision and being out of time). The dismissal of a case on certain justified grounds of a procedural nature does not pose a problem with respect to the right to a court. That is because what matters in terms of the protection afforded by the right in question is the potential of the case, at the initial period when it is filed, to resolve the merits of the impugned dispute, *save for the procedural problems* (see, *mutatis mutandis*, *İbrahim Demiroğlu*, § 56).

54. On the other hand, in its judgment *İbrahim Demiroğlu*, the Court has stated that the State has discretionary power to make arrangements for setting aside the cases with respect to certain disputes, for the purposes of ensuring good administration of justice by means of immediately resolving the disputes and reducing the number of cases by preventing the occurrence of new disputes, as well as ultimately achieving public interest by means of contributing to the establishment and maintenance of social

peace. According to the assessment in this judgment, such arrangements which preclude the examination of a given dispute on the merits by the judicial authority and therefore eliminate the individual's opportunity to obtain a decision on the dispute do not infringe the right to a decision. However, the arrangements precluding the opportunity to obtain a decision must not place an excessive and disproportionate burden on the individual. In this sense, in cases where the individual has been provided with certain opportunities in order to protect and redress, even partially, the interests related to the substantive dispute, which have been sought to be obtained by filing the case set aside, it cannot be concluded that setting aside of the case has not placed an excessive and unbearable burden on him (see, *mutatis mutandis*, *İbrahim Demiroğlu*, § 57).

55. Besides, the right to a fair trial does not afford an assurance with respect to the outcome of the case. This right provides certain procedural safeguards which would secure the fair conduct of the proceedings. Therefore, in the examinations through individual application, it is not possible to draw an inference as to the outcome of the case in making an assessment under the right to a fair trial. However, the Court is responsible for reviewing whether the inferior courts have examined, to the extent required by the very nature of the situation, the claims raised by the parties and having a bearing on the merits of the case, as a requirement of the right to a court.

b. Application of Principles to the Present Case

56. In the present case, the employment contract of the applicant, serving as a medical secretary at a university through a labour contract signed with a sub-employer, was terminated for his relation with the FETÖ/PDY. He then brought an action, pursuant to Article 20 of Law no. 4857, for reinstatement to his job against the university and the sub-employer, on the ground that his employment contract had been terminated without a valid reason.

57. The applicant complained of the court's failure to examine the merits of the case in consideration of his allegations and defence submissions. It must be first examined whether the inferior courts had dealt with and adjudicated the merits of the impugned dispute in the

action for reinstatement brought by the applicant. In the present case, it was noted in the reasoned decision of the court that the case was dismissed on the merits. However, the dismissal of the case on the merits did not point to a genuine resolution of the dispute. The dispute may be said to have been adjudicated on the merits only when the inferior courts had discussed whether the impugned termination had a valid reason under the provisions of labour law.

58. In dismissing the applicant's case, the incumbent court stated that as the applicant's employment contract had been terminated on the basis of the Decree-Law no. 667, the judicial authority could in no way review the expediency of the assessment and conclusion of the relevant public institution. In the same vein, the regional court of appeal dismissed the appellate request, stating that the applicant had been dismissed by the competent authority for his relation with the FETÖ/PDY and that there was a legal obligation necessitating the termination of the employment contract.

59. Given that the court dismissed the applicant's case as it was impossible for the judicial authority to deal with the expediency of the public institution's assessment and conclusion, it is obvious that it did not adjudicate the dispute on the merits. It also appears that although the regional court of appeal dismissed the appellate request through an additional ground, it did not indeed make an assessment as to the merits of the dispute. The regional court of appeal stated that the termination of the applicant's employment contract was a legal necessity, but it did not discuss whether the necessary conditions for the application of the relevant law had been satisfied. Nor did it make an assessment as to whether the termination had been valid within the framework of Law no. 4857. It is accordingly obvious that the assessment of the regional court of appeal was not related to the merits of the case.

60. Therefore, it should be acknowledged that there was an interference with the applicant's right to a decision due to the adjudication of his dispute without an examination on the merits. It should be therefore examined whether there is a statutory arrangement precluding the adjudication of the impugned dispute on the merits, and if any, whether it placed an excessive burden on the applicant.

61. The first instance court stated that the judicial authority could not examine the expediency of the assessment made and conclusion reached by the public authority. It emphasised that Article 4 of Decree Law no. 667 was applicable also to the workers. In concluding that the termination of the applicant's employment contract was necessary, the regional court of appeal relied on Article 4 of the Decree Law no. 667. It is set forth in this provision relied on by the inferior courts that all officers including workers, who are considered to be a member, be in relation or in connection with terrorist organizations or structures, formations and groups that have been determined, by the National Security Council, to perform activities against the national security of the State shall be dismissed from public office.

62. It is undoubted that the dismissal procedure laid down in the said provision covers all public officers, public institutions and organisations, as well as all personnel employed in any kind of cadre, position and status (including workers). However, it is not obvious whether the provision in question covers the workers employed by the sub-employers of the public institutions and organisations. Although the court stressed that Decree Law no. 667 was applicable also to the workers, it was not explained whether the notion *including workers* in the said provision indeed covered the workers employed by the sub-employer.

63. However, given the essence of the dispute in the present case, it has been concluded that an exact assessment as to whether Article 4 of Decree Law no. 667 was applicable also the workers employed by the sub-employers is not necessary in the present case. That is because the basis of the action for the reinstatement is Article 20 of Law no. 4857. Therefore, it does not matter whether Article 4 of Decree Law no. 667 was applicable to the sub-employers. Pursuant to Article 20 of Law no. 4857, the essence of the dispute in the present case was whether the termination of the applicant's employment contract had a valid reason. In consideration of the abovementioned Court of Cassation's judgments, it has been observed that Article 4 of Decree Law no. 667 does not have a bearing on the nature of the applicant's case but merely envisages *"being a member, being in relation or in connection with terrorist organizations or structures, formations and groups that have been determined, by the National Security Council, to perform activities against the national security of the State"* as a valid reason for termination. In

other words, it appears that the law-maker considers the membership of or affiliation to, or having a relation or connection with, the organisations, structures, formations or groups specified in the provision as a reason impairing the trust relationship between the employer and the employee. Therefore, it is obvious that the examination to be conducted in the action brought by the applicant against the termination of his employment contract by the sub-employer on the basis of Article 4 of Decree Law no. 667 would be intended to ascertain whether the impugned termination had a valid reason.

64. The said provision allows for the termination of the employment contracts of the workers being a member, being in relation or in connection with terrorist organizations or structures, formations and groups that have been determined, by the National Security Council, to perform activities against the national security of the State. It does not, however, contain any arrangement restricting the judicial authorities' power of review. In this sense, there is no statutory arrangement which precludes the examination of the merits of the cases filed by the workers -whose employment contracts have been terminated on the basis of Article 4 of Decree Law no. 667- for their reinstatement. Therefore, there is no ground which would entail a conclusion that the inferior courts had no obligation to examine whether the termination of the applicant's employment contract had a valid reason.

65. In brief, membership of or affiliation to or having a connection or relation with any organisations, structures, formations or groups specified in Article 4 of Decree Law no. 667 is envisaged to be a good reason justifying termination. However, this provision does not set aside the obligation incumbent on the inferior courts to inquire and demonstrate, in an action brought by a worker -who has been dismissed from his office for having a link with the formations in questions- for his reinstatement, the valid reason relied on in the termination, in other words, whether the worker had a connection with such formations, also in consideration of the rules of labour law. In the present case, the inferior courts failed to discuss and decide on whether the applicant had a link with the FETÖ/PDY and thus whether the conditions for a justified termination had been satisfied. In other words, the inferior courts did not address and adjudicate

the substantive and legal matters of the impugned dispute. Nor did they perform a genuine judicial activity. It has been therefore concluded that the applicant's right to a court was violated.

66. As there is no statutory provision which precludes the examination of the applicant's action for his reinstatement on the merits, there is no need for an examination as to whether the impugned interference with his right to a court placed an excessive burden on him.

67. For these reasons, the Court has found a violation of the right to a court safeguarded by Article 36 of the Constitution.

4. Application of Article 50 of Code no. 6216

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

> *"1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled…*
>
> *2) If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favour of the applicant or the remedy of filing a case before the general courts may be shown. The court which is responsible for holding the retrial shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."*

69. The applicant requested the Court to find a violation and award him compensation.

70. In its judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court indicates the general principles as to how a violation of any fundamental right, which has been found established by the Constitutional Court, and its consequences would be redressed. In

another judgment, the Court also mentions the consequences of the failure to comply with a violation judgment as well as with the principles set in the abovementioned judgment and accordingly notes that this situation would constitute a continuing violation and also lead to the violation of the respective right for the second time (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

71. Accordingly, in case of a finding of a violation of any fundamental right and freedom within the scope of an individual application, the basic rule for redressing the violation and its consequences is to ensure restitution as much as possible, that is to say, to ensure restoration to the former state existing prior to the violation. To that end, it must be primarily required to find the source of the violation, to put an end to the continuing violation, to eliminate the decision or the act giving rise to the violation or their consequences, to compensate for the pecuniary and non-pecuniary damages resulting therefrom, as well as to take the other measures deemed necessary in this respect (see *Mehmet Doğan*, §§ 55, 57).

72. In cases where the violation resulted from a court decision or the court failed to redress the violation, the Court orders the communication of a copy of its judgment to the relevant court to conduct a retrial for the redress of the violation and its consequences, pursuant to Article 50 § 2 of Code no. 6216 and Article 79 § 1 (a) of the Internal Regulations of the Court. This statutory provision prescribes a compensatory remedy, which is specific to the individual application mechanism and requires a retrial for the redress of the violation, as distinct from the similar legal institutions available in the procedural law. Therefore, in cases where the Court orders a retrial in conjunction with its judgment finding a violation, the relevant court has no discretion to discuss the existence of the ground necessitating a retrial, which is different from the venue of re-opening of the proceedings available in the procedural law. Accordingly, the court receiving such a judgment is legally obliged to conduct a retrial by virtue of the violation judgment rendered by the Court, without awaiting for any such request by the person concerned, and to take the necessary actions to redress the consequences of the continuing violation (see *Mehmet Doğan*, §§ 58, 59; and *Aligül Alkaya and Others (2)*, §§ 57-59, 66-67).

73. In the present case, it has been concluded that the right to a court under the right to a fair trial was violated due to the inferior courts' failure to examine the merits of the impugned dispute. The said violation apparently resulted from a court decision.

74. In that case, there is a legal interest in conducting a re-trial so as to redress the consequences of the violation of the right to a court. The re-trial to be conducted is intended for eliminating the violation and its consequences pursuant to Article 50 § 2 of Code no. 6216, which embodies an arrangement as to individual application mechanism. In this scope, the step required to be taken is to conduct a retrial and to issue, in line with the principles in the violation judgment, a fresh decision that eliminates the reasons giving rise to the violation. Accordingly, a copy of the judgment must be sent to the 1st Chamber of the Aydın Labour Court to conduct a retrial.

75. Since the finding of a violation and the conduct of a retrial offer sufficient redress in order to redress the violation and its consequences, the applicant's claims for compensation must be rejected.

76. The total litigation costs of TRY 3,257.50 including the court fee of TRY 257.50 and the counsel fee of TRY 3,000, as established on the basis of the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 2 July 2020 that

A. The alleged violation of the right to a court under the right to a fair trial be DECLARED ADMISSIBLE;

B. The right to a court under the right to a fair trial safeguarded by Article 36 of the Constitution WAS VIOLATED;

C. A copy of the judgment be SENT to the 1st Chamber of the Aydın Labour Court for a retrial in order to eliminate the consequences of the violation of the right to a court under the right to a fair trial safeguarded by Article 36 of the Constitution (E. 2016/318);

D. The applicant's claims for compensation be REJECTED;

E. The total litigation costs of TRY 3,257.50 including the court fee of TRY 257.50 and the counsel fee of TRY 3,000 be REIMBURSED to the applicant;

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

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

RIGHT TO ELECT, STAND FOR ELECTIONS AND ENGAGE IN POLITICAL ACTIVITIES (ARTICLE 67)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

KADRİ ENİS BERBEROĞLU (2)

(Application no. 2018/30030)

17 September 2020

On 17 September 2020, the Plenary of the Constitutional Court found violations of the right to stand for elections and engage in political activities, as well as the right to personal liberty and security, respectively safeguarded by Articles 67 and 19 of the Constitution, in the individual application lodged by *Kadri Enis Berberoğlu (2)* (no. 2018/30030).

THE FACTS

[10-47] 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" or "Assembly") 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.

V. EXAMINATION AND GROUNDS

48. The Constitutional Court ("the Court"), at its session of 17 September 2020, examined the application and decided as follows:

A. Alleged Violation of the Right to Stand for Elections and Engage in Political Activities

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

49. The applicant maintained under this heading:

i. The applicant, who was deprived of his parliamentary immunity pursuant to Provisional Article 20 of the Constitution, re-acquired parliamentary immunity by virtue of Article 83 § 4 of the Constitution after being re-elected as a member of parliament ("MP") during the election of 24 June 2018. Paragraph 2 of Provisional Article 20 was a provision introducing an exception to Article 83 § 2 and did not set forth that the other paragraphs of Article 83 shall not apply. Accordingly, the other paragraphs of Article 83 would remain in full force as substantial and permanent provisions. The will of the constitution-maker was so clear that it did not require any interpretation.

ii. Provisional Article 20 of the Constitution set forth that as regards the motions for the withdrawal of parliamentary immunity, which had been submitted to the relevant authorities by the date of entry into force of provisional article, the parliamentary immunities of the persons concerned shall be lifted collectively instead of the procedure whereby the Grand National Assembly of Turkey allowed for the withdrawal of immunities on an individual basis. Therefore, it was a provision which merely covered the parliamentary immunities acquired in the course of 26th legislative session and which was no longer applicable. It did not accordingly introduce a permanent exception to a concrete legal assurance, namely parliamentary immunity.

iii. Despite being re-elected as an MP in the election of 24 June and thus acquiring parliamentary immunity, he had been deprived of this immunity, and the proceedings against him had been continued pending his detention on remand. Therefore, his right to stand for elections and engage in political activities as an MP, which was safeguarded by Article 67 of the Constitution, had been violated.

50. In its observations, the Ministry stated:

i. The right to elect and stand for elections was not an absolute right. States were entitled to set certain conditions for the exercise of the right to elect and stand for elections. The broad discretionary power granted to States in the determination of the criteria as to eligibility to stand for election to parliament varied by the historical background and political state of play of each State.

ii. Provisional Article 20 of the Constitution was a constitutional provision applicable for an indefinite period of time, which was intended not to lift parliamentary immunity but to preclude the exercise of this immunity. Accordingly, Article 83 § 4 of the Constitution -prescribing that an MP whose parliamentary immunity was lifted by the GNAT's resolution, which was in the form of a legislative act, shall acquire anew immunity after being re-elected- could not apply with respect to the MPs whose parliamentary immunities had been withdrawn by virtue of Provisional Article 20 of the Constitution.

51. In his counter-statements, the applicant asserted:

i. Even if being provisional in nature, a constitutional provision did not include any effective date or indication. That is because indication of the issues, such as the date until which a provision added to the Constitution would remain in force, in the wording thereof run contrary to the general logic of the constitutional arrangement and the Constitution itself. The term during which the provisional articles of the Constitution would remain in force was comprehended in consideration of the nature of the given norm. In this sense, the constitution-maker stated that the functional purpose of the norm was to lift the parliamentary immunity, for the relevant period, of the members of parliament *"in respect of whom motions for the withdrawal of their parliamentary immunity have been submitted"* to the relevant authorities of the State.

ii. The Ministry's interpretation to the effect that *"as a constitutional provision setting a new and special scope of parliamentary immunity was*

introduced, the parliamentary immunity of the relevant MPs would be deemed to be lifted until the conclusion of the relevant motions. In case of being re-elected, these MPs would not be entitled to parliamentary immunity in regard to these motions" was erroneous. That is because any section of Provisional Article 20 of the Constitution did not contain a statement that *"MPs shall not re-acquire parliamentary immunity unless the motions concerning them are concluded."* or *"MPs shall not be considered to be entitled to parliamentary immunity in any legislative session"*.

2. The Court's Assessment

52. Article 67 §§ 1 and 4 of the Constitution, titled *"Right to vote, to be elected and to engage in political activity"*, reads in so far as relevant as follows:

> *"In conformity with the conditions set forth in the law, citizens have the right to …, to be elected, to engage in political activities ….*
>
> *The exercise of these rights shall be regulated by law."*

53. Article 83 of the Constitution, titled *"Parliamentary Immunity"* reads as follows:

> *"Members of the Grand National Assembly of Turkey shall not be liable for their votes and statements during parliamentary proceedings, for the views they express before the Assembly, or, unless the Assembly decides otherwise, on the proposal of the Bureau for that sitting, for repeating or revealing these outside the Assembly.*
>
> *A deputy who is alleged to have committed an offence before or after election shall not be detained, interrogated, arrested or tried unless the Assembly decides otherwise. This provision shall not apply in cases where a member is caught in flagrante delicto requiring heavy penalty and in cases subject to Article 14 of the Constitution as long as an investigation has been initiated before the election. However, in such situations the competent authority has to notify the Grand National Assembly of Turkey of the case immediately and directly.*

The execution of a criminal sentence imposed on a member of the Grand National Assembly of Turkey either before or after his election shall be suspended until he ceases to be a member; the statute of limitations does not apply during the term of membership.

Investigation and prosecution of a re-elected deputy shall be subject to the Assembly's lifting the immunity anew.

Political party groups in the Grand National Assembly of Turkey shall not hold debates or take decisions regarding parliamentary immunity."

54. Provisional Article 20 added to the Constitution by Article 1 of Law no. 6718 provides as follows:

"The deputies about whom a file concerning the lifting of parliamentary immunity has been submitted, by the date of adoption of this article in the Grand National Assembly of Turkey, to the Ministry of Justice, the Prime Ministry, the Office of the Speaker of the Grand National Assembly of Turkey or to the Office of the Joint Committee composed of the members of the Committee on the Constitution and the Committee on Justice by the authorities competent to investigate or permit investigations or prosecutions and the offices of public prosecutors and the courts, shall be exempt, with respect to such file, from the first sentence of the second paragraph of the Article 83 of the Constitution.

Within fifteen days of the effective date of this article, the files concerning the lifting of parliamentary immunity at the Ministry of Justice, the Prime Ministry, the Office of the Speaker of the Grand National Assembly of Turkey, the Office of the Joint Committee composed of the members of the Committee on the Constitution and the Committee on Justice shall be returned to the competent authority for the execution of the necessary procedure."

a. Admissibility

55. The alleged violation of the right to stand for elections and to engage in political activities must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

i. General Principles

56. The right to elect, to stand for elections and to engage in political activities independently or in a political party is safeguarded under Article 67 of the Constitution. Political parties regarded as an indispensable elements of pluralist democratic regimes are institutions that play a decisive role for the formation of national will, proper functioning of constitutional regime and existence of political order. In parliamentary democracy, members of parliament elected as the representative of the people through the elections held in line with democratic principles and procedures ensure and maintain the relation between the people and the administration and ensure the political legitimacy of the parliament (see *Mustafa Ali Balbay*, no. 2012/1272, 4 December 2013, § 127; and *Sebahat Tuncel (2)*, no. 2014/1440, 26 February 2015, § 39). Therefore, elections and political rights are the indispensable elements of a democratic state enshrined in Article 2 of the Constitution (see the Court's judgment no. E.2002/38, K.2002/89, 8 October 2002; and *Sebahat Tuncel*, no. 2012/1051, 20 February 2014, § 65).

57. The political rights encompass the right to engage in political activities along with the rights to vote in elections, to stand as an electoral candidate and to stand for elections. The rights enshrined in Article 67 §§ 1 and 2 of the Constitution are directly related to the aim of realisation of democracy (see *Mustafa Ali Balbay*, § 110; *Mustafa Hamarat* [Plenary], no. 2015/19496, 17 January 2019, § 45; and *Ömer Faruk Eminağaoğlu*, no. 2015/7352, 26 September 2019, § 52).

58. The parliament, holder of the legislative authority, and deputies, as its members, are the representatives of different political views prevailing within the society within the constitutional boundaries. The main duties of the MPs who are empowered, through free elections, to take decisions on behalf of the people are parliamentary activities, and the fulfilment of such duties by MPs are in pursuance of an overriding public interest and of crucial importance (see *Mustafa Ali Balbay*, § 128; and *Sebahat Tuncel (2)*, § 41).

59. The right to stand for elections covers not only the right to stand as a parliamentary candidate in elections but also the ability of the elected person to use the representative authority in his capacity as a member of parliament following the election. In this context, the interference with the participation of an elected MP in legislative activities may constitute an interference not only with MP's right to stand for election, but also with the voters' right to express their free will and the right to engage in political activities (see *Sebahat Tuncel*, § 67).

60. Public authorities may impose certain restrictions on political activities based on law and for certain constitutionally legitimate purposes. However, the political activities of the members of parliament are afforded special protection under the Constitution. The constitution-maker has thereby intended to prevent the hindrance of the people's political will and the infringement of the very essence of the right (see *Mustafa Ali Balbay*, § 129; and *Sebahat Tuncel (2)*, § 42).

ii. Existence of an Interference

61. In the present case, the applicant detained on remand by virtue of the conviction decision of the incumbent first instance court, dated 14 June 2017, was re-elected as an MP at the elections of 24 June 2018 pending the appellate review of his case. On 29 June 2018, the applicant requested the 16th Criminal Chamber of the Court of Cassation dealing with his appellate review to order his release. His request was, however, dismissed on the ground that it would be assessed in conjunction with the merits of the judgment. By its judgment of 20 September 2018, the 16th Criminal Chamber of the Court of Cassation upheld the applicant's conviction ordered by the regional court of appeal but at the same time ordered his release. The applicant was deprived of his liberty for about 3 months as a prisoner on remand after he had officially become an MP.

62. The conduct of an investigation and prosecution against the applicant was indeed conditional upon the lifting of his parliamentary immunity anew by the GNAT, for his being re-elected, as an MP pursuant to Article 83 § 4 of the Constitution. Therefore, it was observed that his continued trial in breach of Article 83 § 2 of the Constitution, his placement as a prisoner on remand and the finalisation of his conviction decision

upon being upheld constituted an interference with his right to engage in political activities.

iii. Whether the Interference Constituted a Violation

63. The above-mentioned interference shall constitute a violation of Article 67 of the Constitution unless it satisfies the requirements laid down in Article 13 of the Constitution. Article 13 of the Constitution provides as follows:

> *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality."*

64. In the present case, the 16th Criminal Chamber of the Court of Cassation considered that Provisional Article 20 of the Constitution concerning the parliamentary immunity was a special provision in comparison to Article 83 § 4 thereof, which sets forth *"Investigation and prosecution of a re-elected deputy shall be subject to the Assembly's lifting the immunity anew"* and is in the form of a permanent exception to the paragraph 2 thereof, which set out *"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"*. According to the 16th Criminal Chamber of the Court of Cassation, the provisional nature of a provision does not change its nature as a constitutional provision and would not remove the necessity that it must apply with greater priority than a general provision as it is of a special nature.

65. In the present case, the 16th Criminal Chamber of the Court of Cassation made the following assessments as to the interplay between Article 83 of the Constitution regarding parliamentary immunity and Provisional Article 20 of the Constitution: Provisional Article 20 is a special provision in reference to fourth paragraph of Article 83, which provides *"Investigation and prosecution of a re-elected deputy shall be subject to the Assembly's lifting the immunity anew"* and a permanent exception to the

second paragraph thereof, 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"*. The provisional nature of a provision does not change its nature as a constitutional provision and would not remove the necessity that it must apply with greater priority than a general provision as it is of a special nature.

66. By its decision, the Court of Cassation acknowledged that Provisional Article 20 added a third exception to two exceptions already laid down in Article 83 § 2 of the Constitution. In cases where two exceptions set forth in Article 83 § 2 of the Constitution take place, the parliamentary immunity shall be deemed to have never been acquired, without the need for a resolution by the GNAT. Besides, such a resolution is not necessary for proceeding with the investigations or prosecutions conducted against MPs whose parliamentary immunity has been lifted pursuant to Provisional Article 20. Consequently, the 16th Criminal Chamber of the Court of Cassation considered that the applicant's parliamentary immunity had been lifted not through an individual parliamentary resolution, but by virtue of Provisional Article 20 which -according to the 16th Criminal Chamber- added a new exception to the exceptional cases specified in Article 83 § 2 of the Constitution. It accordingly held that the applicant's re-election as an MP did not enable him to reacquire parliamentary immunity and dismissed his request for discontinuation of the proceedings and his detention on remand.

67. On the other hand, the applicant maintained that the interpretation by the 16th Criminal Chamber of the Court of Cassation manifestly run contrary to the legislative intent of Provisional Article 20, which was not indeed of an abstract nature and adopted for being applied merely to a concrete incident or series of incident, as well as to the will of the constitution-maker.

(1) Test of Compliance with the Wording of the Constitution

68. It is set forth in Article 13 of the Constitution that the restrictions on fundamental rights and freedoms shall not run contrary to the wording of the Constitution. Accordingly, one of the criteria with respect to the restriction of fundamental rights and freedoms, which are laid down

in Article 13 of the Constitution, is *the compliance with the wording of the Constitution*. The Constitutional Court also examines, if necessary, whether the interferences by authorities wielding public power with fundamental rights and freedoms are in accordance with the wording of the Constitution. Such an examination is the requisite of the imperative provision laid down in Article 13 of the Constitution.

69. The notion, *letter of the Constitution*, specified in Article 13 of the Constitution amounts to the text of the Constitution, that is to say, its wording. The requirement that any interference with fundamental rights and freedoms must comply with the letter of the Constitution is of importance notably when the *additional safeguards* introduced by virtue of various provisions of the Constitution are at stake. In most cases, the Constitution not only bestows a right or freedom but also protects it by putting particular emphasis on, or attaching particular importance to, certain aspects of this right or freedom so as to guarantee the exercise thereof. Besides acknowledging a right, the constitution-maker may also separately and specifically state an aspect of that right falling under its normative scope as well as introduce an additional safeguard with respect thereto.

70. As a matter of fact, Article 83 § 2 of the Constitution regarding the parliamentary immunity assures that members of parliament cannot be arrested, interrogated, detained on remand or tried in the absence of a Parliamentary resolution. The paragraph four of the same provision makes the conduct of investigation and prosecution against a re-elected MP conditional upon the lifting of the parliamentary immunity anew by the GNAT. This condition as to the parliamentary immunity is an additional safeguard emanating from the wording of Article 83 § 4 of the Constitution.

71. The matter to be resolved in the present case is whether the interpretation of the 16th Criminal Chamber of the Court of Cassation, as to Article 83 and Provisional Article 20 of the Constitution, during an appellate review pending before it was compatible with the wording of the Constitution. As in the case of constitutionality review, it is the Constitutional Court that is the final authority to interpret the constitutional provisions in the examination of individual applications.

72. Therefore, in the present case, in case of finding of an incompatibility with the wording of the Constitution and a breach of Article 83 of the Constitution whereby the parliamentary immunity is enshrined due to the impugned interpretation constituting an interference with a fundamental right, it may be concluded that the applicant's right to engage in political activities safeguarded by Article 67 of the Constitution was violated.

(2) Parliamentary Immunity in General

73. Legislative exemptions that are particularly important safeguards for the materialisation of democratic representation values are the constitutional acquirements that have been achieved through constitutional struggles lasting for centuries (see the Court's judgment no. E.2017/124, K. 2018/9, 14 February 2018). Out of these safeguards, parliamentary immunity is granted to members of parliament alleged to have committed an offence, which precludes the implementation of procedures of criminal proceedings including severe interventions such as custody and detention in the absence of the consent of the GNAT. The parliamentary immunity institution, which was introduced for the first time in the Turkish law by Article 79 of the Ottoman Basic Law of 1876 ("*Kanun-u Esasi"*), was always enshrined in the following constitutions, except for the 1921 Constitution, albeit certain changes this institution has undergone.

74. The parliamentary immunity laid down in Article 83 of the Constitution is acknowledged as a temporary assurance which aims at precluding the possibility of preventing members of parliament from legislative acts due to untimely criminal prosecutions and which automatically ends by the expiry of his term of office as an MP. The existence of rules with respect to parliamentary immunity is primarily based on the need to protect the principle of representative democracy. Such kind of immunity enables notably the members of parliament in the minority in the parliament and those opponent to actually perform their democratic functions as the elected representative of the people, without concern for any unnecessary interference.

75. Besides, in its several decisions, the Court has underlined that the main objective of the immunity institution is to protect not the Member of Parliament himself but the legislative function in his name,

thereby maintaining public interest. The aim of this institution is not to grant a privilege to members of parliament but to protect them against prosecutions to be initiated for various reasons (see, in the same vein, the Court's judgment no. E.2017/124, K. 2018/9, 14 February 2018). The aim pursued by this protection is to ensure the continued participation of MPs in the parliamentary acts and actions. Parliamentary immunity is not an absolute safeguard but affords a temporary protection to MPs against the sanctions under criminal law which would preclude their physical presence at the parliament. According to Article 83 of the Constitution, by the date when the term of office of an MP expires or a parliamentary resolution for the withdrawal of parliamentary immunity is issued, he may also be subjected to trial like an ordinary person.

(3) Meaning and Scope of Provisional Article 20

76. According to Provisional Article 20 added to the Constitution by the law adopted by the General Assembly of the GNAT on 20 May 2016, the MPs in respect of whom files for the withdrawal of their parliamentary immunity have been submitted, by 20 May 2016, to the Ministry of Justice, Prime Ministry, Office of the Speaker of the GNAT or to the Office of the Joint Committee composed of the members of the Committee on the Constitution and the Committee on Justice by the authorities competent to investigate or permit investigations or prosecutions and the offices of public prosecutors and the courts, shall be deemed to have no parliamentary immunity with respect to the acts specified in these files, without the need for any other action, voting or decision.

77. In the legislative intention of this arrangement, it is stated that the lifting of parliamentary immunity exercised by MPs is a social demand and requirement and that all files for parliamentary immunity have been included in the scope so as to avoid a political exploitation. It is thereby aimed at lifting of legislative immunities, which are considered to take a time lasting for months if examined on an individual basis and cause a substantial workload for the GNAT, through an arrangement which is objective in form and intended not to address a particular person.

78. The 16th Criminal Chamber of the Court of Cassation noted that Provisional Article 20 of the Constitution was *"a special constitutional*

provision" in comparison to Article 83 § 2 thereof, the general provision with respect to the parliamentary immunity. It should be primarily indicated that the acknowledgment that Provisional Article 20 of the Constitution is a special provision would not completely resolve the matter. That is because Provisional Article 20 does not contain provisions with respect to all cases laid down in Article 83, which is a general norm. The indisputable relation between these two provisions is that the rule laid down in 83 § 2 of the Constitution, *"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"* shall not apply merely to the files falling into the scope of Provisional Article 20 of the Constitution.

79. In the present case, there is no dispute that these two norms are not of the same nature as to the applicability *ratione temporis*; and that Article 83 § 2 is permanent, as also accepted by the Court of Cassation, the Ministry and the applicant, whereas Provisional Article 20 is a temporary provision introduced as an exception to the general provision. For these reasons, in resolving the matter in question, it must be discussed whether Provisional Article 20 has completed its function by the time it took effect for being a provision of *temporary* nature, and the consequences deriving from its being an exceptional provision must be taken into consideration.

80. It must be primarily ascertained what the notion *"with respect to such files"* specified in the first sentence of Provisional Article 20 means. As a matter of fact, the 16th Criminal Chamber of the Court of Cassation put a particular emphasis on the notion *"with respect to such files"* in its decision of 19 July 2018.

81. In this sense, the procedure as to the lifting of parliamentary immunity, which is applied in Turkey, should be examined in detail so as to elucidate the matter. The procedure whereby the parliamentary immunity is lifted is set forth in the Standing Orders of the GNAT. Accordingly, in the event that a person suspected of an offence is revealed to be an MP or a person being subjected to a criminal investigation or prosecution is elected as an MP, the authority conducting the investigation or prosecution –according to the phase of the proceedings– shall suspend the proceedings and submit a motion for the lifting of the parliamentary

immunity of the given MP to the relevant Ministry, pursuant to Article 223 § 8 of Code no. 5271 with reference to 83 § 2 of the Constitution. The motions issued following a technical inquiry by the Ministry and called as *"immunity files"* in Article 131 and *et. seq.* of the Standing Orders of the GNAT shall be communicated to the Office of the Speaker of the GNAT.

82. In that case, the notion *"such files"* –which is included in Provisional Article 20, reading as follows *"The deputies about whom a file concerning the lifting of parliamentary immunity has been submitted, by the date of adoption of this article in the Grand National Assembly of Turkey, to the Ministry of Justice, the Prime Ministry, the Office of the Speaker of the Grand National Assembly of Turkey or to the Office of the Joint Committee composed of the members of the Committee on the Constitution and the Committee on Justice …, shall be …, with respect to such files …"* and which is exempted from the first sentence of Article 83 § 2 of the Constitution– refers to the files concerning *"the motions for the lifting of parliamentary immunity"* that have been issued by the competent authorities for the lifting of the parliamentary immunity and received by the Ministry, the Prime Ministry or the GNAT. Therefore, it is obvious that the exemption introduced by Provisional Article 20 is not applicable to every criminal-trial file but confined to the *"file for lifting of parliamentary immunity"* called as motions regarding the withdrawal of the parliamentary immunity enjoyed at the time when the constitutional amendment was adopted.

83. In such case, as a person re-elected as an MP re-acquires parliamentary immunity pursuant to Article 83 § 4 of the Constitution and the *exception* in Provisional Article 20 is applicable merely to the *files for the lifting of parliamentary immunity submitted* to the authorities specified in the provision by 20 May 2016, the applicant re-elected as an MP will be subjected to the general legal regime to which other MPs elected in the same election with the applicant are subjected. Any consideration to the contrary leads to the application of Provisional Article 20 to a case which is not indeed in its normative scope and thus in breach of the wording of the Constitution.

84. On the other hand, the preparatory process may provide guidance on the elimination of alleged discrepancies as to the interpretation and

application of this rule. The explanations provided by the Chairman of the Committee on Constitution as to the practice in the course of the parliamentary negotiations of Provisional Article 20 and prior to the voting of the provision are included in the Draft Bill on the Amendments to the Constitution of the Republic of Turkey (2/1028) as well as in the Report of the Committee on Constitution. As included in the Report, these explanations also confirm the clarity in the wording of the said provision:

> *"Mr. Mustafa Şentop, the Chairman of the Committee and the Member of Parliament for İstanbul, provided a brief explanation concerning the practice so as to guide the practitioners and eliminate the hesitations likely to occur in the interpretation of the provision. Accordingly,*
>
> *- The draft constitutional amendment hinders the application of the first sentence of Article 83 § 2 of the Constitution, whereas Article 83 § 4 of the Constitution remains in full force. The conduct of an investigation or prosecution against a re-elected MP is conditional upon the withdrawal of the parliamentary immunity by the Parliament. As no arrangement is introduced as to paragraph 4, it is still in force and applicable. Therefore, those to be elected in a new election will obviously re-acquire parliamentary immunity in terms of the files for which they have been already deprived of their parliamentary immunity…"*

85. In interpreting Provisional Article 20 of the Constitution in the present case, the Court has taken into consideration also the assessments made during the preparatory process of the constitutional amendment.

(4) Conclusion

86. In the present case, it is undoubted that 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 provision of general nature, whereas Provisional Article 20, which reads "*… shall be exempt, with respect to such files, from the first sentence of the second paragraph of the Article 83 of the Constitution"*, is a provision introducing an exception to the general provision.

87. In this scope, there is no exception to paragraph 4, which provides *"Investigation and prosecution of a re-elected deputy shall be subject to the Assembly's lifting the immunity anew"*, of Article 83 according to which parliamentary immunity shall be acquired for a legislative session and cease to be held when the session expires. In other words, the rule that a re-elected MP shall re-acquire parliamentary immunity pursuant to Article 83 § 4 of the Constitution is principal and still in force.

88. As Provisional Article 20 explicitly prescribes an exception to Article 83 § 2, there is no provision of exception which hinders a re-elected MP's ability to acquire parliamentary immunity pursuant to Article 83 § 4 of the Constitution. As such an exception has not been introduced by the constitution-maker in a separate and explicit manner, the Members of Parliament who are re-elected shall be fully entitled to parliamentary immunity provided by Article 83 of the Constitution. Unless their immunity is lifted anew by the GNAT, they shall not be subjected to an investigation or prosecution.

89. The constitution-maker does not grant an explicit authority to the judiciary in the introduction of a new exception in Provisional Article 20 or expansion of the scope of the exception by way of interpretation. Moreover, as the judiciary is not a rule maker, it cannot introduce an exception through interpretation. As to introduce an exception amounts to changing of the rule, the judiciary does not have such an authority. Therefore, if there is an exception with respect to an issue, the judiciary is to apply the general rule. In the present case, Provisional Article 20 does not embody any separate and clear provision hindering a re-elected MP's entitlement to parliamentary immunity. In that case, the step that is to be taken is not to expand the scope of the exemption or to introduce a new exception through interpretation, but to apply general rule.

90. In the present case, Article 83 of the Constitution, which is the general rule, was interpreted narrowly while Provisional Article 20, which is an exception, was interpreted broadly. Any exception cannot be interpreted broadly and its scope cannot be expanded. If, as a natural consequence of this principle, there has been a hesitation as to whether the applicant's status fell into the scope of the exemption laid down in Provisional Article

20 after his being re-elected as an MP, it should be regarded that his status was not under the scope of that exemption, thereby being subject to the general rule.

91. Parliamentary immunity, which is a constitutional institution, is a protection mechanism intended for enabling MPs to freely participate in legislative activities without facing any obstacle. Therefore, parliamentary immunity has a significant function for the proper operation of representative democracy. The rights-oriented approach dominating constitutional jurisdiction should be also pursued in the interpretation of constitutional rules regarding parliamentary immunity. In this sense, the Court has stated in its previous judgments that as a consequence of this approach, the exceptions to Article 83 of the Constitution must be interpreted *"narrowly and in pursuance of freedoms"* also regard being had to the right to elect, stand for elections and engage in political activities safeguarded by Article 67 of the Constitution (see *Mustafa Ali Balbay*, § 114; and *Mehmet Haberal*, no. 2012/849, 4 December 2013, § 99).

92. However, in the present case, the provision of exception introduced by Provisional Article 20 of the Constitution was interpreted *broadly* in breach of its wording and purpose and *to the detriment* of the applicant's right to stand for elections and engage in political activities safeguarded by Article 67 of the Constitution, which gave rise to the discontinuation of the proceedings conducted against him and the failure to order his release despite his being elected as an MP, as well as the upholding of the conviction decision by the regional court of appeal.

93. Consequently, the exception laid down in Provisional Article 20 of the Constitution was not applicable to the applicant who was re-elected as an MP. The refusal to acknowledge that the applicant, who had been re-elected as an MP, re-acquired parliamentary immunity pursuant to the imperative provision set forth in Article 83 § 4 of the Constitution, which is a general provision, for being considered to fall under the scope of Provisional Article 20 of the Constitution amounted to an interpretation which run contrary to the wording of the given provision and against the will of the constitution-maker.

94. For these reasons, it has been concluded that the continuation of the proceedings conducted against the applicant and proceeding with the execution phase despite his being re-elected as an MP were contrary to Article 83 of the Constitution enshrining the parliamentary immunity, which was in breach of the right to stand for elections and engage in political activities safeguarded by Article 67 of the Constitution.

B. Alleged Violation of Right to Personal Liberty and Security

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

95. In his application of 26 November 2018, the applicant maintained:

i. Although he had re-acquired parliamentary immunity pursuant to Article 83 § 2 of the Constitution for being re-elected as an MP and a new issue affecting the lawfulness of a detention arose, the Court of Cassation did not order his release but his continued detention, which was arbitrary.

ii. He was still an MP although his parliamentary immunity had been lifted; and his detention pending trial for 16 months and the refusal of his release until the upholding of his conviction decision were contrary to the aims pursued by the constitutional norms concerning parliamentary immunity.

iii. The Court of Cassation, which ordered his release by suspending the execution of the criminal sentence until the expiry of his office as an MP pursuant to Article 83 § 3 of the Constitution after the judgment issued with respect to him had been upheld and finalised, had conducted the appellate review of his case pending his trial albeit the existence of no finalised judgment yet, which was an inconsistent approach. Therefore, his right to personal liberty and security had been violated.

96. In its observations, the Ministry did not provide any other assessment as to the alleged violation of the applicant's right to personal liberty and security, other than those made with respect to the right to stand for elections and engage in political activities.

2. The Court's Assessment

97. Article 19 §§ 1, 2 and 8 of the Constitution, titled *"Right to personal liberty and security"*, reads as follows:

> *"Everyone has the right to personal liberty and security.*
>
> *No one shall be deprived of his/her liberty except in the following cases where procedure and conditions are prescribed by law:*
>
> *Execution of sentences restricting liberty and the implementation of security measures decided by courts (…)*
>
> *Persons whose liberties are restricted for any reason are entitled to apply to the competent judicial authority for speedy conclusion of proceedings regarding their situation and for their immediate release if the restriction imposed upon them is not lawful."*

98. The applicant's complaints under this heading are in essence related to his continued detention ordered by the 16th Criminal Chamber of the Court of Cassation although he had been re-elected as an MP following the detention order after conviction and he had been accordingly entitled to parliamentary immunity. Therefore, the allegations under this heading must be examined from the standpoint of the right to personal liberty and security under Article 19 § 2 of the Constitution also in consideration of the guarantee laid down in paragraph 8 thereof.

a. Admissibility

99. In order for an individual application to be lodged with the Court, ordinary legal remedies must primarily be exhausted. The individual application to the Constitutional Court is a remedy of subsidiary nature which may be resorted in case of the inferior court's failure to redress the alleged violations (see *Ayşe Zıraman* and *Cennet Yeşilyurt*, no. 2012/403, 26 March 2013, §§ 16 and 17).

100. In dealing with the applicant's individual application involving the alleged unlawfulness of the detention order issued, in conjunction with conviction decision, with respect to him by the first instance court, the Court pointed out that the question whether his being re-elected as

an MP during the general election of 24 June 2018 constituted an obstacle to his continued detention ordered in conjunction with his conviction decision should have been discussed primarily by the inferior courts through ordinary legal remedies (see *Kadri Enis Berberoğlu*, § 60).

101. Asserting that he was entitled to parliamentary immunity for being re-elected as an MP in the general election of 24 June 2018, the applicant filed an application with the 16th Criminal Chamber of the Court of Cassation on 29 June 2018, seeking his release and also the discontinuation of the proceedings against him. On 19 July 2018, the Criminal Chamber dismissed his request for release and also held that the applicant's continued detention be assessed together with the merits of the case. The applicant challenged this decision; however, the 16th Criminal Chamber of the Court of Cassation stated that the decision whereby the request for discontinuation of the proceedings could not be subject to a challenge on 2 August 2018. As regards the applicant's detention on remand, it also decided that *"there was no ground for a rectification in the judgment"* and referred the case file to the 17th Criminal Chamber of the Court of Cassation as the appellate authority. On 6 September 2018, the 17th Criminal Chamber held that the decision that *"the applicant's detention be assessed together with the merits of the case"* did not contain any order as to the continuation of his detention or dismissal of his request for release, this decision could not be subject to challenge. It accordingly found no ground to issue a decision regarding this matter.

102. The applicant's request for release was dealt with by the 16th Criminal Chamber of the Court of Cassation in conjunction with the upholding decision issued on 20 September 2018 at the end of the appellate review of the merits of the judgment. The Criminal Chamber concluded that the parliamentary immunity did not pose a constitutional obstacle to the applicant's trial and thereby to his continued detention ordered in conjunction with conviction decision. It however held that the execution of the conviction decision issued with respect to him be suspended until the expiry of his term of office as an MP pursuant to Article 83 § 3 of the Constitution; and that the applicant be released. In this sense, it is obvious that the applicant exhausted the ordinary legal remedies with respect to the discontinuation of his detention on remand.

103. Besides, in Article 141 § 1 (a) of Code of Criminal Procedure no. 5271, it is laid down that *"those who have been … placed in detention … in circumstances not complying with the laws …"* may claim compensation from the State for their any kind of pecuniary and non-pecuniary damages. However, 16th Criminal Chamber of the Court of Cassation considered that the applicant's re-election as an MP did not lead him to be entitled to parliamentary immunity and ordered his continued detention. In consideration of this assessment by the Court of Cassation, it does not seem possible for the inferior courts to find the applicant's continued detention, despite being his being re-elected as an MP, unlawful in an action to be brought under Article 141 of the Code no. 5271. In this sense, this remedy could not be considered as an effective legal remedy capable of yielding results in the particular circumstances of the present case.

104. On the other hand, individual applications must be lodged within 30 days upon the exhaustion of the available legal remedies or, in cases where no available legal remedy exists, by the date when the violation is become known. To timely lodge an individual application is a procedural requirement needed to be taken into consideration at every stage (See *Yasin Yaman*, no. 2012/1075, 12 February 2013, §§ 18, 19).

105. The request for release submitted by the applicant as he should have been granted parliamentary immunity safeguarded by Article 83 § 2 of the Constitution for being re-elected as an MP was dealt with, for the first time, by the 16th Criminal Chamber of the Court of Cassation in its decision of 20 September 2018. The previously-issued decisions are concerning the assessment of his request for release together with the merits of the case. In this context, by its decision of 20 September 2018, the 16th Criminal Chamber of the Court of Cassation did not accept the applicant's request for release pursuant to Article 83 § 2 of the Constitution but ordered his release as the his conviction decision could be executed upon the expiry of his term of office as an MP pursuant to Article 83 § 3 thereof. The applicant raised an alleged violation of his right to personal liberty and security due to his continued detention in his individual application of 20 November 2018, which was lodged within the prescribed period of 30 days following 30 October 2018, the date when he became aware of the Court of Cassation's decision.

106. Consequently, it has been considered that as regards the alleged violation of the right to personal liberty and security, the applicant lodged his application within due time after exhausting the ordinary legal remedies.

107. The alleged violation of the right to personal liberty and security must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

i. General Principles

108. In Article 19 § 1 of the Constitution, it is set out in principle that everyone has the right to personal liberty and security. Certain circumstances under which individuals may be deprived of their freedoms, provided that the procedure and conditions of detention are prescribed by law, are listed non-exhaustively in Article 19 §§ 2 and 3 thereof. Therefore, the right to personal liberty and security may be restricted only in cases where one of the circumstances specified in this article exists (see *Murat Narman*, no. 2012/1137, 2 July 2013, § 42).

109. One of the cases whereby Article 19 of the Constitution safeguarding the individuals' physical liberty allows for the restriction of personal liberty is the *"execution of sentences restricting liberty and implementation of security measures ordered by courts"* as set forth in paragraph 2 thereof. Therefore, the execution of imprisonment sentences or security measures under the conviction decisions to be issued by judicial authorities does not infringe the right to personal liberty and security (see *Tahir Canan (2)*, no. 2013/839, 5 November 2014, § 33).

110. In case of an alleged violation raised in conjunction with *"execution of sentences restricting liberty and the implementation of security measures ordered by courts"* enshrined in Article 19 § 2 of the Constitution, the duty incumbent on the Court is confined to the ascertainment whether the deprivation of liberty has been effected partially or wholly under these circumstances. If it is revealed that the detention has not been effected partially or wholly under these circumstances, it cannot be said to pursue a legitimate aim or to be proportionate. It constitutes a direct violation of the right to personal

liberty and security (see *Ercan Bucak (2)*, no. 2014/11651, 16 February 2017, § 39; and *Şaban Dal*, no. 2014/2891, 16 February 2017, § 31).

111. A person may be said to be deprived of his liberty for the purpose of *"execution of sentences restricting liberty and the implementation of security measures ordered by courts"* when, first of all, the sentence restricting liberty or the security measure has been imposed by a court. Secondly, the decision to be executed must be related to this sentence or security measure. A person cannot be deprived of his liberty on the basis of a decision which does not entail a criminal sanction or security measure. Lastly, the deprivation of liberty must not go beyond the extent of the sentence restricting liberty or the security measure (see *Ercan Bucak (2)*, § 40; and *Şaban Dal*, § 32).

112. Besides, it is set forth in Article 19 § 8 of the Constitution that persons whose liberties are restricted are entitled to apply to the competent judicial authority for speedy conclusion of proceedings regarding their situation and, if the restriction imposed upon them is not lawful, for their immediate release. As there is no distinction as to the ground of restriction, such entitlement also covers the deprivation of liberty due to detention upon a conviction decision (see *Mehmet İlker Başbuğ*, no. 2014/912, 6 March 2014, § 80). However, the right to apply to the competent judicial authority -for the alleged unlawfulness of detention-, which is enshrined in Article 19 § 8 of the Constitution, covers the individual applications involving detentions in keeping with the conditions set forth in Article 19 § 8 of the Constitution (see *Ç.Ö.* [Plenary], no. 2014/5927, 19 July 2018, § 47).

113. In case of detention upon conviction, the given person is deprived of liberty for the execution of a liberty restricting sentence ordered by a court or on the basis of a conviction decision. Therefore, in the event that the person detained upon conviction applies to the competent judicial authority with the allegations as to this nature of his detention –for the purpose of being released–, the safeguards inherent in Article 19 § 8 of the Constitution –those applicable according to the nature of detention– may come into play (see *Ç.Ö.*, § 49).

114. Besides, also in the event that those detained upon conviction apply to the competent judicial authority, seeking their release as a new

issue regarding their convictions forming a basis for their detention, which would render their continued detentions unlawful, has arisen (such as decriminalisation of the act giving rise to conviction, in case of a situation of impunity, a statutory amendment rendering the conviction decision null and void), the safeguards under Article 19 § 8 of the Constitution may also be applied (see *Ç.Ö.*, § 50).

ii. Application of Principles to the Present Case

115. The applicant was detained upon the conviction decision issued by the first instance court. He then lodged an individual application with the Court with the alleged unlawfulness of his detention. The Court assessed the alleged unlawfulness of the detention order issued in conjunction with the conviction decision from the standpoint of *"detention upon conviction"*, that is to say *"the execution of sentences restricting liberty and the implementation of security measures ordered by courts"*, under Article 19 § 2 of the Constitution (see *Kadri Enis Berberoğlu*, § 54).

116. At the end of such examination, it has been concluded that the decision underlying the applicant's deprivation of liberty is a conviction decision, which was therefore in the form of restricting liberty; that the authority issuing the detention ordered in conjunction with conviction was a court; and that the deprival of liberty did not exceed the scope of the liberty restricting sentence or measure ordered by the court. Accordingly, the Court found the allegation that the applicant's deprivation of liberty based on a conviction decision manifestly ill-founded, thus declaring inadmissible the alleged violation of the right to personal liberty and security (see *Kadri Enis Berberoğlu*, §§ 55-61).

117. However, during the period when the applicant was still detained upon conviction and pending the appellate review of his conviction decision before the 16th Criminal Chamber of the Court of Cassation, he was re-elected as an MP at the end of the general elections. The question whether the applicant would be entitled to parliamentary immunity safeguarded by Article 83 of the Constitution for being re-elected as an MP is an issue directly affecting the lawfulness of the detention upon conviction. In such a case, even if being detained upon conviction decision, the persons are provided, under Article 19 § 8 of the Constitution, with the

opportunity to apply to the competent judicial authority so as to raise the alleged unlawfulness of detention and ensure their release (see *Mehmet İlker Başbuğ*, §§ 78-86; and *Kadri Enis Berberoğlu*, §§ 55, 60).

118. In it several judgment where the Court dealt with the lawfulness of detention measures applied with respect to MPs, on the basis of a criminal charge, it examined the parliamentary immunity within the framework of *lawfulness* (see, among many other judgments, *Gülser Yıldırm (2)* [Plenary], no. 2016/40170, 16 November 2017, §§ 126-132; and *Ayhan Bilgen* [Plenary], no. 2017/5974, 21 December 2017, §§ 110-116).

119. However, in the assessment as to the alleged violation of the right to stand for elections and engage in political activities, the continuation of the proceedings conducted against the applicant pending his detention despite his being re-elected as an MP following the entry into force of Provisional Article 20 of the Constitution that has introduced an exception to parliamentary immunity –without his parliamentary immunity being lifted pursuant to Article 83 § 4 of the Constitution– and the upholding of the conviction decision were examined from the standpoint of the test of compatibility with the wording of the Constitution.

120. In the first sentence of Article 83 § 2 of the Constitution, it is set forth that 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. The parliamentary immunity laid down in the said provision is a direct obstacle deriving from the Constitution which prevents MPs from being deprived of their liberties either based on a criminal charge or by virtue of a conviction decision, unless the conditions constituting an exception to the parliamentary immunity arise. Detention of an MP based on a criminal charge or by virtue of a conviction decision due to a criminal act falling into the scope of parliamentary immunity *per se* renders such detention unconstitutional. As such detention is in breach of the wording of the Constitution, it cannot be asserted that there is any other ground rendering detention lawful.

121. In that case, in the present case, it must be examined whether the applicant was entitled to parliamentary immunity anew for being re-elected as an MP at the election of 24 June 2018 pending detention based

on conviction and thereby whether his continued detention effected in conjunction with a conviction decision was in breach of Article 83 of the Constitution.

122. In its examination as to the alleged violation of the applicant's right to stand for elections and engage in political activities, the Court has concluded, also in the case regarding his detention ordered together with a decision, that the applicant should have been entitled to parliamentary immunity anew for being re-elected as an MP pursuant to the provision *"Investigation and prosecution of a re-elected deputy shall be subject to the Assembly's lifting the immunity anew"* laid down in Article 83 § 4 of the Constitution; and that any assessment to the contrary was incompatible with the wording of the Constitution. In this sense, it is obvious that the same findings and assessments are applicable also to the right to personal liberty and security.

123. Accordingly, it must be acknowledged that as the applicant was re-elected as an MP at the general election of 24 June 2018, he was entitled to parliamentary immunity anew by the date of his re-election; and that therefore, his continued detention after that date was not compatible with Article 83 of the Constitution.

124. Shortly afterwards the applicant's being re-elected as an MP, on 29 June 2018 the applicant applied to the 16th Criminal Chamber of the Court of Cassation conducting the appellate review of his conviction decision that formed a basis for his detention, seeking his release for being entitled to parliamentary immunity. On 19 July 2018, the Criminal Chamber dismissed the request for discontinuation of the proceedings raised by the applicant on the same ground, stating that the request for release would be assessed together with the merits of the case without providing any ground. The applicant's challenge to this decision also remained inconclusive. The applicant's request for release was assessed as to its merits by the decision of 20 September 2018. It was accordingly concluded that his re-election as an MP did not pose an obstacle to the continuation of the proceedings (and thus his detention ordered with conviction decision). The Criminal Chamber accordingly upheld the conviction decision but ordered that the execution of the finalised sentence be suspended, until the expiry of his term of office as an MP. It accordingly ordered his release.

125. Consequently, it has been observed that the applicant's request for release was not examined as to its merits until 29 June 2018 to 20 September 2018 although there was an obstacle deriving from the Constitution before the continuation of his detention ordered in conjunction with conviction decision as he had re-acquired parliamentary immunity for being re-elected as an MP at the general election of 24 June 2018; and that his detention on remand in conjunction with his conviction was continued. The applicant's being deprived of liberty during the above-mentioned dates was not compatible with Article 83 of the Constitution where the safeguards as to the parliamentary immunity are enshrined.

126. For these reasons, the Court has found a violation of the applicant's right to personal liberty and security enshrined in Article 19 of the Constitution.

C. Other Alleged Violations

127. The applicant also maintained that his right to a fair trial had been violated, stating that a decision should not have been issued without hearing the witness C.D., the basis of his conviction decision, at the court and that according to the Court of Cassation's jurisprudence, the HTS records relied on in his conviction decision could not be used as evidence of a physical gathering. He also claimed that his punishment for his alleged disclosure of the information at his hand constituted a breach of his freedom of expression.

128. As there was a violation of the right to stand for elections and engage in political activities safeguarded by Article 67 of the Constitution, a re-trial must be conducted. The Court has not found it necessary to make a further examination as to the applicant's above-mentioned complaints falling into the scope of the right to a fair trial and freedom of expression as they would be dealt with by the inferior courts and the Court of Cassation during the re-trial to be conducted.

D. Application of Article 50 of Code no. 6216

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

> *"1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled…*
>
> *2) If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favour of the applicant or the remedy of filing a case before the general courts may be shown. The court which is responsible for holding the retrial shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."*

130. The applicant requested the Court to find a violation and order a re-trial. He did not claim any compensation.

131. In its judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court indicates the general principles as to how a violation of any fundamental right, which has been found established by the Constitutional Court, and its consequences would be redressed. In another judgment, the Court also mentions the consequences of the failure to comply with a violation judgment as well as with the principles set in the abovementioned judgment and accordingly notes that this situation would constitute a continuing violation and also lead to the violation of the respective right for the second time (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

132. Accordingly, in case of a finding of a violation of any fundamental right and freedom within the scope of an individual application, the basic rule for redressing the violation and its consequences is to ensure restitution as much as possible, that is to say, to ensure restoration to the former state existing prior to the violation. To that end, it must be primarily required to find the source of the violation, to put an end to the continuing violation, to eliminate the decision or the act giving rise to the violation or their consequences, to compensate for the pecuniary and

non-pecuniary damages resulting therefrom, as well as to take the other measures deemed necessary in this respect (see *Mehmet Doğan*, §§ 55, 57).

133. In cases where the violation resulted from a court decision or the court failed to redress the violation, the Court orders the communication of a copy of its judgment to the relevant court to conduct a retrial for the redress of the violation and its consequences, pursuant to Article 50 § 2 of Code no. 6216 and Article 79 § 1 (a) of the Internal Regulations of the Court. This statutory provision prescribes a compensatory remedy, which is specific to the individual application mechanism and requires a retrial for the redress of the violation, as distinct from the similar legal institutions available in the procedural law. Therefore, in cases where the Court orders a retrial in conjunction with its judgment finding a violation, the relevant court has no discretion to discuss the existence of the ground necessitating a retrial, which is different from the venue of re-opening of the proceedings available in the procedural law. Accordingly, the court receiving such a judgment is legally obliged to conduct a retrial by virtue of the violation judgment rendered by the Court, without awaiting for any such request by the person concerned, and to take the necessary actions to redress the consequences of the continuing violation (see *Mehmet Doğan*, §§ 58, 59; and *Aligül Alkaya and Others (2)*, § 57).

134. Besides, in cases where the Court orders a re-trial, in order for a re-trial to be conducted by the inferior courts, there is no need for a request by the party in favour of whom the violation judgment is rendered or by any other person or persons concerned. Unlike the process of re-opening of the proceedings available in the relevant procedural laws, the inferior court is liable to conduct a retrial as soon as it receives the Court's judgment, without awaiting for an application by the relevant parties. Therefore, in cases requiring a retrial by virtue of the Court's judgment finding a violation, there is no stage as to the admissibility of the retrial as distinct from the process of re-opening of the proceedings prescribed in the procedural law (see *Aligül Alkaya and Others (2)*, § 58).

135. In this sense, the first step required to be taken by the inferior court is to decide to initiate a retrial as required by the Court's judgment finding a violation. As a matter of fact, by the time when the inferior court

decides to conduct a re-trial, its previous decision which was found by the Court to constitute a violation of a given fundamental right or freedom will automatically become null and void. The inferior court is then obliged to take the necessary steps so as to eliminate the consequences of the violation found by the Court (see *Aligül Alkaya and Others (2)*, § 59).

136. In the present case, it has been concluded that there were violations of the applicant's right to personal liberty and security due to the continued detention ordered in conjunction with the conviction decision despite his being entitled to parliamentary immunity and of the right to stand for elections and engage in political activities due to the continuation of detention, the continuation of proceedings and the upholding of the conviction decision. It has been therefore observed that the violations in the present case resulted from the court decisions.

137. However, the applicant's release was ordered on 20 September 2018, and thereby his detention was discontinued.

138. In the present case, it is obvious that merely the finding of a violation of the right to personal liberty and security would be insufficient to redress the damages sustained by the applicant. However, as the applicant did not claim any compensation, the Court has not found it necessary to award a further redress in regard to the applicant's detention.

139. On the other hand, there is a legal interest in conducting a re-trial so as to redress the consequences of the violation of the right to stand for elections and engage in political activities. The re-trial to be conducted is intended for eliminating the violation and its consequences pursuant to Article 50 § 2 of Code no. 6216, which embodies an arrangement as to individual application mechanism.

140. In this sense, a copy of the judgment must be sent to the 14th Chamber of the İstanbul Assize Court for a re-trial. *The first step required to be taken by the first instance court* is to decide to conduct a re-trial with a view to revoking the consequences in conjunction with the upholding decision of the Court of Cassation and to order the discontinuation of the proceedings against the applicant.

141. The total litigation costs of TRY 3,589.40 including the court fee of TRY 589.40 and counsel fee of TRY 3,000, as established on the basis of the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 17 September 2020 that

A. 1. The alleged violation of the right to stand for elections and engage in political activities be declared ADMISSIBLE;

2. The alleged violation of the right to personal liberty and security be declared ADMISSIBLE;

B. 1. The right to stand for elections and engage in political activities safeguarded by Article 67 of the Constitution was VIOLATED;

2. The right to personal liberty and security safeguarded by Article 19 of the Constitution was VIOLATED;

C. There is NO NEED TO EXAMINE the other alleged violations;

D. A copy of the judgment be SENT to the 14th Chamber of the İstanbul Assize Court (E.2016/205, K.2017/97) to conduct a retrial for the redress of the violations;

E. The total litigation costs of TRY 3,589.40 including the court fee of TRY 589.40 and the counsel fee of TRY 3,000 be REIMBURSED to the applicant;

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

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