THE CONSTITUTIONAL COURT OF TÜRKİYE

SELECTED JUDGMENTS

2021

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(Individual Application)

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Selected Judgments 2021

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FOREWORD

The individual application remedy has 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 this remedy has in turn increased the human rights awareness among the mass public. The individual application has 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 chronic problems such as lengthy trials.

Despite the relatively short time period, the Constitutional Court has built considerable case-law since the individual application that started to operate in 2012. This volume of the book includes selected judgments rendered by the Constitutional Court in 2021 within the scope of individual application. These judgments, many of which attracted high public attention as well, bear significance with regards to the development of case-law. Sincerely wishing that this book will contribute to upholding the rule of law and protecting rights and liberties of individuals.

Prof. Dr. Zühtü ARSLAN
President of the Constitutional Court

INTRODUCTION

This book covers selected judgments which are capable of providing an insight into the case-law established in 2021 by the Plenary and Sections of the Turkish Constitutional Court through the individual application mechanism. In the selection of the 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.

In the judgments included in the book, the Constitutional Court deals with the merits of the case following its examination on the admissibility. These 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 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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REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

T.A.

(Application no. 2017/32972)

29 September 2021

On 29 September 2021, the Plenary of the Constitutional Court found a violation of the obligation to protect life and conduct an effective investigation, safeguarded by Article 17 of the Constitution, regarding the process whereby the public officers were investigated in the individual application lodged by *T.A.* (no. 2017/32972).

THE FACTS

[9-98] The applicant's daughter S.E. divorced her husband V.A. in 2013. At the end of the divorce proceedings, the family court held that the custody of the joint child would be entrusted to the mother, and that the child would see the father weekends. However, V.A. disturbed S.E. many times through communication devices and by getting closer to her, visiting her workplace and home, and threatened to kill her as well as insulting her, during both the divorce proceedings and the process after the divorce decision was issued. After each incident, S.E. filed a criminal complaint with the police against V.A., stating that she was in fear of her life. The police took preventive and protective measures, including the one prescribing that V.A. would not get closer than 100 meters to S.E., in accordance with the Law no. 6284 on Protecting Family and Preventing Violence against Women, and submitted them to the judge for approval. Although the family court ordered injunctions in favour of S.E., whereby V.A. was also prohibited to get closer to S.E., the last injunction ordered against V.A. in the form of a restraining order was not served on him who was the only addressee of the said decision. It is also unclear whether the previous injunction had been communicated to V.A.

Subsequently, an action was brought against V.A. for insult and threat, the hearing of which was held before the magistrates' court. However, V.A. did not attend the hearing despite the proper service of summons, and therefore he was ordered to be brought before the court by force. At the hearing, S.E. also claimed that she was in fear of her life, that V.A. did not comply with the injunction and that his relationship with the joint child should be terminated. In this sense, reiterating her aforementioned requests, S.E. filed a complaint with the chief public prosecutor's office for an action to be taken. She enclosed the transcript of messages sent by V.A. to her petition.

On 15 November 2013, when the last injunction expired, S.E. was killed by her ex-husband V.A. during the delivery of the joint child to the latter. The incumbent assize court, relying on the indictment issued by the chief public prosecutor's office, sentenced V.A. to life imprisonment for intentional killing, which was subsequently reduced to 25 years' imprisonment. The court sentenced V.A. to imprisonment also for other imputed offences. The decision was upheld by the Court of Cassation. The applicant's complaint against the relevant public officers was dismissed by the incumbent public authorities and the regional administrative court.

V. EXAMINATION AND GROUNDS

99. The Constitutional Court ("the Court"), at its session of 29 September 2021, examined the application and decided as follows:

A. The Applicant's Allegations

100. In three separate application forms, the applicant explained in a detail the facts concerning the process resulting in the death of her daughter and stated in brief that the public authorities had failed to protect her daughter. In this scope, she alleged that her daughter had been killed, as a result of negligence on the part of the public officials, by her former husband who had repeatedly threatened her. She complained that the relevant public officials had failed to fulfil their duties of observation, supervision, coordination and notification to protect her daughter against violence. She also contended that the execution of the interim measures had not been followed up and that the interim measures had not even been notified to the perpetrator. Moreover, she stated that her daughter had been isolated due to the indifference and negligence on the part of the public officials, that the negligent acts of the public officials in this regard had been disregarded, that criminal proceedings had not been carried out against the public officials, that the existence of premeditation had not been taken into consideration during the criminal proceedings against the perpetrator although her daughter had been killed with premeditation, that the sentence imposed had been disproportionate, and that the reductions in sentence had been unjustified. In this connection, she alleged a violation of the right to a fair trial, the right to an effective remedy and the right to life.

B. The Court's Assessment

101. 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..."

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

> *"The fundamental aims and duties of the State are … to 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. Legal Qualification of the Allegations and the Scope of Examination

103. 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 her submissions covering the process prior to and after the killing of her daughter, the applicant alleged in brief that the public officials' failure to take necessary measures in an effective manner had resulted in her daughter's death, that permission for an investigation against the relevant public officials had nevertheless not been granted, and that the former husband of her daughter, namely the perpetrator, had not been subjected to an appropriate sentence. Therefore, the death in the present case will be examined as a whole within the scope of the right to life.

104. In the applications concerning the right to life, the Court makes a separate examination of the substantive and procedural aspects of the right in view of the State's negative and positive obligations. The State's negative obligation requires that the officers using force by exercising a public power must refrain from the intentional and unlawful taking of life of any individual (obligation to refrain from killing) while the State's positive obligation requires both the protection of the individuals' right

to life against any danger (obligation to protect life) and the conduct of an 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 (obligation to conduct an effective investigation). The substantive aspect of the right to life entails a negative obligation and an obligation to protect life while the procedural aspect only covers the right to conduct an effective investigation, namely another element of the positive obligation (see *Aziz Biter and Others,* no. 2015/4603, 19 February 2020, § 58).

105. The applicant lodged an individual application in respect of more than one process. Since the Court previously delivered its decision on the applicant's individual application concerning her complaints about the judges and prosecutors, a further assessment will not be made on this issue in this scope.

106. Two of the processes complained of by the applicant in her individual application concern her complaints filed with the relevant authorities against the police officers and the officials from the Izmir Provincial Directorate of the Ministry of Family, Labour and Social Services on the ground that they had allegedly not fulfilled their duties despite the opportunities at their disposal. As regards these processes, the applicant alleged that the public officials had not taken effective measures to protect her daughter despite the existence of a clear danger and that the public officials had thus committed an offence, but that permission for an investigation against them had not been granted. On the basis of this essence, this part of the application will be examined in the context of the *obligations to protect and conduct an effective investigation within the scope of the right to life*.

107. The other process which is the subject of the present application concerns the criminal proceedings against the perpetrator V.A. As regards the process at issue, the applicant maintained that the perpetrator had been subjected to a disproportionate sentence favourable to him as a result of the conclusion concerning the absence of the element of premeditation in the killing and the application of the provisions concerning discretionary mitigation. This part of the application concerning the criminal proceedings

against the perpetrator will be examined in the context of the *obligation to conduct an effective investigation*. Although the applicant also submitted allegations concerning the proceedings into other offences (theft, threat and defamation) imputed to the perpetrator during the relevant criminal investigation process, an assessment will not be made as to those issues in the present application which essentially concerns the right to life.

2. Admissibility

a. As regards the Criminal Investigation against the Perpetrator V.A.

108. The procedural aspect of the State's positive obligations within the scope of the right to life 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 death (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, § 54). The purpose of the obligation concerning the procedural aspect of the relevant right is to protect life through effective and deterrent sanctions and to secure the effective implementation of the law safeguarding the right to life (see *Aziz Biter and Others*, § 58).

109. The type of investigation to be conducted into an incident, as required by the obligation to conduct an effective investigation, 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 (see *Serpil Kerimoğlu and Others*, § 55).

110. For a criminal investigation to be effective, the investigating authorities must act ex officio and establish all the evidence capable of leading to the clarification of the incident and identification of those responsible. Any deficiency in the investigation which undermines its ability to establish the cause of death or the identity of the persons responsible will risk falling foul of the obligation to carry out an effective investigation (see *Serpil Kerimoğlu and Others* § 57). In order to ensure actual accountability for the criminal investigation, it is necessary that the

investigation should be open to public scrutiny and give the relatives of the deceased person the requisite degree of participation in the proceedings to enable them to protect their legitimate interests in each case (see *Serpil Kerimoğlu and Others*, § 58). The criminal investigation must be carried out with reasonable diligence and promptness in order to secure adherence to the rule of law, prevent any appearance of collusion in or tolerance of unlawful acts (see *Salih Akkuş*, no. 2012/1017, 18 September 2013, § 30).

111. If this procedural obligation is not duly fulfilled, it will not be possible to exactly establish whether the State has actually complied with its negative and positive obligations. Therefore, the obligation of investigation constitutes a guarantee of the State's negative and positive obligations under this article (see *Salih Akkuş*, § 29).

112. Where the stage of investigation has led to the institution of criminal proceedings to establish criminal responsibility for any unnatural death as in the present case, the proceedings as a whole, including the trial stage before the first-instance court, must satisfy the requirements of Article 17 of the Constitution. Accordingly, the inferior courts may guarantee that the interferences with the right to life of the victims and the attacks on their material and spiritual existence will not be allowed to go unpunished under any circumstances (see *Sadık Koçak and Others*, no. 2013/841, 23 January 2014, § 77).

113. Article 17 of the Constitution neither grants the applicants the right to ensure prosecution or punishment of third parties for a criminal offence nor imposes on the State the duty to conclude all proceedings with a conviction. This is not an obligation of result, but of appropriate means (see *Serpil Kerimoğlu and Others*, § 56). The fact that the obligation of investigation is not an obligation of result but an obligation to use the appropriate means does not mean that every investigation should necessarily come to a conclusion which coincides with the victim's account of events; however, it should in principle be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible (see *Doğan Demirhan*, no. 2013/3908, 6 January 2016, § 66). Although this is the fundamental view, the inferior courts, by making a separate assessment in

the particular circumstances of each case, should not allow the acts against the right to life to go unpunished (see *Filiz Aka,* no. 2013/8365, 10 June 2015, § 32).

114. In this context, another important point needed to be addressed by the Court is to review whether and to what extent the inferior courts, in reaching their conclusions in the proceedings carried out into such incidents, may be deemed to have examined the case thoroughly and diligently as required by Article 17 of the Constitution. Indeed, the sensitivity to be shown by the inferior courts in this regard will ensure that the significant role of the judicial system in place in preventing similar violations of the right to life is not undermined (see *Filiz Aka*, § 32). This is essential for ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts (see *Fahriye Erkek and Others,* no. 2013/4668, 16 September 2015, § 91).

115. On the other hand, it is under the duty of the administrative and judicial authorities to assess the evidence concerning the occurrence of incidents (see *Rıfat Bakır and Others,* no. 2013/2782, 11 March 2015, § 68). It must be noted that the Court cannot directly substitute itself for the relevant investigating and trial authorities in assessing the evidence and determining the necessary investigation proceedings. In other words, it is not the Court's task to substitute its own assessment of the facts for that of the authorities in question (see *Hıdır Öztürk and Dilif Öztürk*, no. 2013/7832, 21 April 2016, § 185). The Court's duty and competence in this regard are limited to reviewing whether the issues sought in the guarantees of the right to life under Article 17 of the Constitution were satisfied in the relevant judicial process.

116. In cases where following a death a criminal investigation was launched ex officio on the day of the death, where there was no doubt on the willingness of the investigating and first-instance trial authorities to ascertain the circumstances of the incident in the light of the evidence obtained as a result of rigorous and prompt steps, and where the investigation was capable of leading to the establishment of the exact cause of death and the punishment of the perpetrator, the Court, as a rule, acknowledges that one cannot reproach the investigations carried out and

the decisions issued for having been insufficient or contradictory unless there was no deficiency likely to have had an impact on the seriousness and thoroughness of the investigation and trial processes (see *Sadık Koçak and Others*, § 95).

117. In the present case, it has been understood that following the killing of the applicant's daughter by her former husband V.A., the police officers got to the crime scene on the same day upon a denunciation made by V.A.'s sister in this regard, that a crime scene investigation was conducted by specialised teams, that incident reports and physical examination reports were drawn up, that post-mortem examination and autopsy procedures were conducted, that the statements of the witnesses were taken, and that a criminal examination of the material evidence recovered from the crime scene was carried out.

118. Regard being had to the fact that V.A. had confessed his guilt through a message sent to his sister, that his sister had made a denunciation to the police, and that V.A. had thus surrendered himself to the police, and in view of the circumstances of the incident, the attitude of the perpetrator and the police officers' fulfilment of the requirements of the investigation without any delay, there was not any deficiency which would affect the course of the investigation or any uncertainty in terms of the identification/arrest of the perpetrator, the establishment of the exact cause of death, in other words, the ascertainment of the circumstances surrounding the death. The process during which the perpetrator had been tried not only for the offence of intentional killing but also for the offences of threat, defamation and theft was concluded with a conviction within a period of less than two years after the death. The proceedings including the process before the Court of Cassation were concluded in a total of five years, and in view of the fact that the conviction judgment was delivered within a period of less than two years and that the trial process involved more than one offence, it cannot be said that the proceedings were not concluded within a reasonable time.

119. In respect of the trial process in which the applicant as well as the Ministry of Family, Labour and Social Services participated, the applicant did not submit any allegation concerning participation in the proceedings

and accessibility to the public, and in this respect, there was no indication of the existence of any fact which would have a negative impact on the obligation to conduct an effective investigation.

120. The issue of whether deterrence was provided in the present case to prevent similar violations of the right to life is another important point needed to be addressed as regards the effectiveness of the investigation whose essential purpose is to secure the effective implementation of the legal rules safeguarding the right to life and to ensure accountability of the perpetrator for the incident. The applicant's allegations essentially concern this issue.

121. It must be essentially and particularly underlined at this stage that the State's procedural obligation in this regard is in general not an obligation of result, but of means. It must also be borne in mind that the imposition of an appropriate and/or sufficient sentence for the act of the accused person in the criminal proceedings into a severe interference with the right to life is essential for maintaining public safety and ensuring adherence to the rule of law and for preventing any appearance of tolerance of unlawful acts within the scope of the State's obligation to conduct an effective investigation to provide deterrence.

122. In the process at issue, the Assize Court sentenced the former husband V.A., who had killed the applicant's daughter, to 25 years' imprisonment. In reaching this conclusion, the Assize Court stated that the act had not been committed with premeditation but had taken place under the effect of the discussion/quarrel which had broken out during the handing over of the common child to V.A. Moreover, the Assize Court applied the provisions concerning discretionary mitigation under Article 62 of the Law no. 5237 and commuted the life imprisonment to 25 years' imprisonment in view of the social relations of V.A., his conduct subsequent to the act and during the criminal proceedings, and the possible effects of the sentence on his future.

123. The inferior courts enjoy a margin of appreciation in assessing and interpreting the manner of commission of the murder/the circumstances of the incident and determining whether there are grounds for mitigation prescribed by the legislation. The Court cannot substitute its own

assessment for that of the inferior courts as to the material facts and the relevant legislation, and the scope of its examination in this regard is limited to reviewing whether the guarantees of the right to life were respected. At this point, in the context of the guarantees of the right to life, an assessment may be made as to whether the judgment of the Assize Court created an impression of impunity or an appearance of tolerance of or collusion in such acts.

124. From this perspective, the prison sentence of 25 years listed at the top of the range of sentences prescribed for a single act in the criminal legislation cannot be said to have created such impression. Although a discretionary mitigation of the sentence imposed on the former husband V.A., who was also sentenced for the offence of threat against S.E., may appear to be a problem, the judgment convicting the perpetrator did not involve a sentence which would result in his impunity or lead to his release in a short time in a manner clearly disproportionate to his act. Thus, this judgment of the Assize Court cannot be said to have created the impression that it had mitigated or eliminated the consequences of the act constituting a severe offence.

125. In the light of all these findings, it has been considered that the process at issue disclosed nothing which would clearly be incompatible with the State's obligation to conduct a criminal investigation capable of leading to the punishment of the perpetrator with an appropriate and sufficient sentence within the framework of the guarantees of the right to life and that the judicial response cannot be said to be insufficient.

126. Consequently, it has been concluded that there was clearly not a violation of the procedural aspect of the right to life in the context of the criminal investigation carried out against the perpetrator V.A.

127. For these reasons, this part of the application must be declared inadmissible for *being manifestly ill-founded.*

b. As regards the Alleged Negligence on the part of the Public Officials

128. Owing to the natural character of the right to life, an application under such right may only be lodged by a deceased person's relatives

alleging to be a victim due to the death of such person (see *Serpil Kerimoğlu and Others,* § 41). The applicant is the mother of S.E., who lost her life during the impugned process. Therefore, there is no deficiency as regards the locus standi of the applicant to lodge the present application.

129. If the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation (the obligations to protect and conduct an effective investigation) does not necessarily require criminal proceedings to be brought in every case against the public officials who acted negligently and may be satisfied if civil, administrative or even disciplinary remedies were available to the victims (see *Serpil Kerimoğlu and Others*, § 59). However, where it is established that the negligence attributable to public authorities goes beyond an error of judgment or carelessness in a death resulting from unintentional acts, in that the authorities in question, fully realising the likely consequences, failed to take measures that were necessary and sufficient to avert the risks inherent in a dangerous activity within the powers vested in them, a criminal investigation must be carried out against those responsible for endangering life (see *Serpil Kerimoğlu and Others,* § 60).

130. From this perspective, it is necessary to establish which judicial remedy is to be exhausted to raise an allegation about a violation of the positive obligation within the scope of the right to life. In the light of the aforementioned explanations, an assessment must be made to determine whether the public authorities which had shown negligence going beyond an error of judgment or carelessness had, fully realising the likely consequences, taken necessary and sufficient measures within the powers vested in them to avert the risks. This may only be done by an examination of the application on the merits. In other words, in view of the fact that whether the effective judicial remedies in the context of the positive obligations under the right to life were exhausted will be established as a result of an assessment on the merits of the alleged violation, it has been concluded that whether the requirement of exhaustion of legal remedies was satisfied must be determined within the scope of an examination on the merits of the application.

131. Therefore, as regards the complaint about an alleged negligence on the part of the public officials in the context of the positive obligations under the right to life, the application must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

3. Merits

a. General Principles

132. Article 17 of the Constitution, which safeguards the right to life, when read in conjunction with Article 5 thereof, imposes certain negative and positive obligations on the State (see *Serpil Kerimoğlu and Others*, § 50).

133. These positive obligations necessarily require the adoption of measures designed to secure respect for the specified rights even in the sphere of the relations of individuals between themselves (see *Marcus Frank Cerny* [Plenary], no. 2013/5126, 2 July 2015, §§ 36 and 40). What kind of measures are required to be adopted must be assessed in the light of the particular circumstances of each case.

134. The State is under an obligation to protect the individual's corporeal and spiritual existence against any danger, threat or violence (see *Serpil Kerimoğlu and Others*, § 51; the judgment of the Court, docket no. 2005/151, decision no. 2008/37, 3 January 2008; the judgment of the Court, docket no. 2010/58, decision no. 2011/8, 6 January 2011). Where lives have been lost in circumstances potentially engaging the responsibility of the State, Article 17 of the Constitution entails a duty for the State to take, by all means at its disposal, effective and judicial measures so that the legislative and administrative framework set up to protect the right to life is properly implemented and 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).

135. The State must primarily make deterrent and protective legislative arrangements against the threats and risks posed to the right to life and must also take necessary administrative measures. This duty also entails an obligation to protect the individual's life against any danger, threat

or violence (see *Serpil Kerimoğlu and Others*, § 51). The State's obligation to protect within the scope of the positive obligations requires both legal and practical measures. The required measures should provide effective protection of vulnerable persons and should include reasonable steps to prevent acts of which the authorities had or ought to have had knowledge (see *R.K.*, no. 2013/6950, 20 April 2016, § 75).

136. Where the public authorities knew or should have known the existence of a real and imminent risk to the life of a person, they must take reasonable measures to avoid that risk. However, bearing in mind the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities (see *Serpil Kerimoğlu and Others*, § 53).

137. It is for the administrative and judicial authorities to determine the measures to be taken within the scope of the fulfilment of the positive obligations under the right to life. A number of methods may be adopted in order to safeguard the rights and freedoms. Even in case of a failure to implement any one of the measures prescribed by the legislation, the positive obligations may be fulfilled by applying another measure (see *Bilal Turan and Others*, no. 2013/2075, 4 December 2013, § 59).

138. The procedural aspect of the State's positive obligations within the scope of the right to life 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 death. The essential purpose of such investigation is to secure the effective implementation of the law safeguarding the right to life and to ensure accountability of the relevant persons for the deaths occurring as a result of the intervention by or under the responsibility of public officials or taking place as a result of the acts of other persons (see *Serpil Kerimoğlu and Others*, § 54).

139. While the purpose of a criminal investigation is to secure the effective implementation of the law safeguarding the right to life and to ensure accountability of those responsible, this is not an obligation to

obtain a conclusive result but an obligation to use appropriate means. Article 17 of the Constitution neither grants the applicants the right to ensure prosecution or punishment of third persons for a criminal offence nor imposes on the State the duty to conclude all proceedings with a conviction (see *Serpil Kerimoğlu and Others*, § 56).

140. 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 officials since they perform their duties on behalf of the State and 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).

141. 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).

142. Within the framework of the principle of integrity of the Constitution, the rules set out in the Constitution are necessarily required to be applied collectively in the light of the general principles of law. In this connection, the body of rules imposing an obligation to conduct an effective investigation and a requirement of permission for investigations against public officials must be interpreted in harmony with each other (see *Hidayet Enmek and Eyüpsabri Tinaş*, § 108).

b. Application of Principles to the Present Case

143. It is clearly understood from the reports referred to in the part of "*Relevant Law*", the relevant legislative provisions and the legal/administrative infrastructure that the phenomenon of violence against women is considered as a violation of a right and as a social and multidimensional issue in our country. It appears that attempts have been made to take necessary steps (legislation, infrastructure, personnel, training, etc.) within the framework of national plans in order to combat violence against women that has been addressed as a problem over

which policies were developed by the public authorities including the high-level ones such as the ministries. The fact that the issue of violence against women has been addressed by high-level public authorities and considered as a multidimensional issue and that large-scale policies were developed over this issue through broad participation also points to the severity and seriousness of this phenomenon of violence.

144. As regards the complaints concerning violence against women in a large number of previous applications, the Court examined the adequacy of the legislative infrastructure for the protection of those subjected to violence or facing such risk. As indicated in the judgments on those applications, with a view to following an effective and swift procedure for the protection of family and prevention of violence against women as well as taking persons subjected to violence or facing such risk under protection without any delay, the Law no. 6284 and the Regulation issued pursuant to this Law were put into effect in accordance with the standards established in the international conventions to which Türkiye is a party. It appears that the Law no. 6284 sets out in detail the procedures and principles concerning the measures to be taken for the protection of women, children and family members subjected to violence or facing such risk and for the prevention of violence against these persons and that certain administrative units such as the Centres for Prevention and Monitoring of Violence (ŞÖNİM) were set up to prevent violence against women as prescribed by the Law no. 6284. Accordingly, it is understood that necessary legal infrastructure has been set up within the framework of the State's obligation to protect and that the legal system put in place for the protection of those subjected to violence or facing such risk is not inadequate (see *Semra Özel Üner,* no. 2014/12009, 26 October 2016, § 39; *A.Z.Ö.,* no. 2014/546, 19 December 2017, § 76; and *Ö.T.,* no. 2015/16029, 19 February 2019, § 32). Moreover, as regards her complaints concerning violence against women, the applicant did not submit an allegation to the effect that *the legal infrastructure for the protection of those subjected to violence or facing such risk* was inadequate.

145. In view of the fact that the legal infrastructure set up and the system put in place within the framework of the State's obligation to protect has been considered adequate, the issue needed to be examined in the context

of the present case is to establish whether the competent public authorities knew or ought to have known the risk of S.E. being killed by her former husband V.A. (foreseeability), and if so, to ascertain whether the public officials took effective and practical measures which could reasonably be expected from them within the powers vested in them. In this regard, an assessment must first be made as to whether it can be said that the public authorities knew or ought to have known the existence of a real and imminent risk to the life of S.E. in the series of incidents giving rise to her being killed, in other words, whether such risk was foreseeable in the present case.

146. As a result of the assessment of the relevant process on the basis of the application form and the documents attached thereto as well as the data obtained through UYAP system, it appears that V.A. continuously harassed, insulted and threatened S.E. both through communication channels (voice calls, short messages, etc.) and physically, that multiple incidents took place between the parties in a short period of time (approximately 6 months), and that complaints were lodged with the police officers on multiple occasions in this scope.

147. Despite the absence of any data -apart from the statement of S.E.- indicating that the conduct/acts complained of in those incidents reached the level of physical violence, it has been understood that V.A. threatened S.E. with death and that the threat at issue was of continuous nature in view of the short messages in respect of which a report was drawn up by the police officers and the criminal proceedings initiated against V.A. under the file no. 2013/809 before the 4th Chamber of the Izmir Magistrate Court on the charges of successive defamation and threat. Indeed, at the end of that process, V.A. was sentenced to imprisonment not only for the offence of intentional killing but also for the offence of threat and defamation. In other words, the existence of a *threat* against S.E. was documented by the decision of the Magistrate Court.

148. S.E. lodged a complaint against V.A. with the police officers on almost every occasion whenever an incident took place during the process following the initiation of divorce proceedings, and in her statements, she contended that she feared for her life and that her husband had threatened

to kill her, her child and her family. Moreover, lastly on 29 November 2013, namely 16 days prior to her being killed/when the protection order was still in force, S.E. lodged a complaint against V.A. before the Izmir Chief Public Prosecutor's Office by enclosing the transcripts of short messages sent by V.A. and stating that she feared for her life. In her complaint, she alleged that V.A. had committed the offences of violation of the protection order, defamation, threat, and blackmailing. Even during the hearing held on 29 November 2013 in the criminal proceedings against V.A. on the charges of defamation and threat, she submitted her complaints before the magistrate judge, too, and declared that "*she feared for her life, that V.A. had violated the protection orders, and that V.A.'s relationship with their common child should be terminated*".

149. During the period starting from S.E.'s divorce and ending with her being killed, more than one interim measure, the last one entailing a *prohibition on approaching*, was ordered in favour of S.E. The operative provisions of the relevant decisions ordering an interim measure reveal that the said decisions were notified to ŞÖNİM. Moreover, the preliminary inquiry report issued in respect of the Izmir provincial director of family and social policies noted that ŞÖNİM had been informed of the interim measures ordered in favour of S.E. It must also be underlined that during the relevant process S.E. did not withdraw her complaints against V.A. and that there was thus no ground for the public authorities to pay less attention to the incident.

150. Accordingly, regard being had to the fact that serious grievances had been continuously raised before the law enforcement authorities and the judicial authorities during the process involving frequent incidents and complaints and that the interim measures had been notified, on every occasion, to ŞÖNİM, which was tasked with following up the process, it is obvious beyond any doubt that the public authorities tasked/authorised to prevent violence against women and also obliged to act in a cooperated/coordinated manner were aware of the existence of a real and imminent risk to the life of S.E. and were in a position to foresee an attack which would give rise to serious adverse consequences for life.

151. Moreover, in convicting V.A., the Assize Court found that the murder had not been committed with premeditation but as a result of an incident which had occurred suddenly and that there had been no problem as regards the obligation to conduct an effective investigation as mentioned above. It has been considered that this finding of the Assize Court did not have an effect on the conclusion concerning the foreseeability of the violence/attack. Indeed, the manner of commission of the murder (with premeditation or as a result of a sudden incident) would not eliminate the existence of a clear risk of violence in the process involving threats and insults as mentioned above. The risk at issue was associated with the possibility of V.A. inflicting violence on S.E., and the existence of this risk cannot be said to depend on the process or manner of occurrence of the violence/attack.

152. Subsequent to this stage, it must be determined whether the public authorities took reasonable steps to adopt effective/practical measures expected from them in the context of the obligation to protect life. In other words, it must be determined whether the public authorities showed due diligence to prevent possible acts of violence against S.E. especially by adopting appropriate punitive and preventive measures.

153. In the relevant process, following the first incident which took place on 21 June 2013, the law enforcement authorities issued a preventive/protective measure imposing certain restrictions on V.A. including a prohibition on approaching S.E. within 100 metres in accordance with the Law no. 6284 and submitted this decision for the approval of the judge. However, the Family Court held that there was no need to issue a protective measure and thus ordered a preventive measure requiring that V.A. should not use any word or engage in any conduct containing violence, any threat of violence, insult, denigration or humiliation for a period of one month. This decision was served on V.A. within a reasonable time. Moreover, criminal proceedings were instituted against V.A. for the offences of defamation and threat in connection with the same incident.

154. Following the second incident which took place on 20 September 2013, the police officers again submitted the investigation documents to the judicial authority for the issuance of an interim measure. The Family

Court ordered a preventive measure requiring that V.A. should not use any word or engage in any conduct containing violence, any threat of violence, insult, denigration or humiliation and held that there was no need to order other measures. Furthermore, the statement of V.A. was taken upon the order of the Chief Public Prosecutor's Office after the issue had been reported to it by the police officers. V.A. was then released. It is not certain whether the interim measure ordered by the Family Court was served on V.A.

155. Following the third incident which took place on 14 November 2013, on the basis of the investigation documents submitted by the police officers, the Family Court ordered a measure, which would be valid for one month, requiring that "*V.A. should not use any word or engage in any conduct containing violence, any threat of violence, insult, denigration or humiliation against S.E., that he should not approach S.E. and her workplace within 100 meters, and that he should not disturb S.E. through communication devices for a period of one month*". The decision dated 15 November 2013 was not served on the addressee V.A. Furthermore, the statement of V.A. was taken upon the order of the Chief Public Prosecutor's Office after the issue had been reported to it by the police officers. V.A. was then released. Lastly, upon the petition of complaint filed by S.E. on 29 November 2013, the Izmir Chief Public Prosecutor's Office initiated an investigation, and an expert review was carried out on the phones indicated by S.E.

156. The Law no. 6284 contains detailed provisions for the prevention of violence against women, constitutes the basis for the necessary legal infrastructure within the framework of the State's obligation to protect and sets out a wide range of sanctions and protective/preventive measures including taking under protection, change of workplace, provision of financial support, change of identity documents, and even forced imprisonment of the person who violated the interim measure. This Law imposes on the relevant public authorities the duties of monitoring, ensuring the implementation of the measures and providing support services and also affords them the possibility of issuing interim measures by acting ex officio where necessary and/or applying to judicial authorities for the issuance of interim measures. Furthermore, the Regulation, which was issued pursuant to the Law no. 6284, provides that a protective interim

measure may be ordered even without a need for any evidence/document for the adoption of protective measures as soon as possible without any delay.

157. ŞÖNİM is an administrative unit set up to provide support services for the effective implementation of the measures adopted to prevent violence against women pursuant to the Law no. 6284. In other words, the reason for the existence of ŞÖNİM is to provide public services for the prevention of violence against women. ŞÖNİM is entrusted by law with the task of *coordinating the services to be provided for the prevention of violence and effective implementation of interim measures, making recommendations and providing assistance for the implementation of interim measures, following up the consequences of interim measures, and even applying to local civilian authorities/ judicial authorities for the issuance of interim measures where necessary*. The Law does not necessarily require the victim to lodge an application in this regard and, indeed, the interim measures supporting such legal status are notified to ŞÖNİM ex officio. Moreover, it is clear that the police are also responsible for the implementation of interim measures pursuant to the Law no. 6284 and must follow up the decisions in this regard. In addition, the police are also tasked with issuing interim measures ex officio, such as taking under temporary protection where necessary, accommodation or prohibition on approaching within a certain distance, and with submitting them for the approval of the relevant local civilian authorities or judicial authorities. In brief, it is clear that the public authorities in question are in a position to have first-hand contact with victims and to monitor the process.

158. As regards the process giving rise to the killing of S.E., it clearly appears that the interim measure issued on 15 November 2013, namely the sole measure entailing a prohibition on having close contact, was not served on V.A., that even the public authorities were not able to establish whether the interim measure issued on 24 September 2013 had been served on V.A., that V.A. continued to harass/threaten S.E. despite S.E.'s repeated complaints of having been insulted and threatened by her former husband (as documented by the decision of the Magistrate Court) and of fear for her life, that V.A. did not face a serious warning, restraint or sanction for the prevention of such behaviours and violence, that V.A.

was not subjected to forced imprisonment despite the alleged violation of the interim measures -there exists even no data indicating that an inquiry was carried out into this allegation-, that ŞÖNİM did not contact S.E. to provide support service to prevent violence against her, that the public authorities which had the possibility of issuing an interim measure ex officio and submitting it for the approval of the relevant authority even without a need for any evidence did not attempt to take such steps to prevent violence, and that the interim measures which had already been issued were not duly followed up.

159. Although the interim measure issued on 15 November 2013 had not been served on the former husband V.A., S.E. was killed during the handing over of the common child in the context of a parent-child meeting on the day of the expiry of the relevant order. The relevant public authorities tasked with following up the process could have applied for the issuance of an interim measure (preventing close contact and providing protection) in favour of S.E, who was understood to be under a real and imminent risk, in view of the incidents taking place since the divorce proceedings, and/or could have issued such measure and then submitted it for the approval of a judge. In this context, taking into consideration the fact that S.E. had lodged numerous complaints with the administrative and judicial authorities, maintaining that she feared for her life and that her former husband had violated the protection orders, the relevant public authorities could have taken her under protection ex officio and/or issued other measures within the powers vested in them by the Law no. 6284. As mentioned in the previous paragraph, the authorities' failure to make any attempt to issue effective interim measures to reduce contact, their failure to follow up the execution of the interim measures which had already been issued and the lack of any coercive sanction against V.A. despite the repeated complaints against him throughout the process indicate that the authorities remained inactive in this regard. S.E., who was killed on the day of the expiry of the relevant order issued on 15 November 2013, had lodged a complaint (while the interim measure was still in force) 16 days before her being killed and maintained that she had been threatened with death by her former husband as she had previously complained on repeated occasions. This is a concrete indication of the fact that the public officials should have taken an action to adopt a measure.

160. Moreover, pursuant to the Law no. 6284, the public authorities had the possibility of applying to judicial authorities ex officio for the adoption of measures such as the presence of an official to supervise the parent-child meeting or the limitation or prohibition of such meeting in order to reduce contact with the former husband. In this context, in view of the fact that S.E. had been killed during the handing over of the common child in the context of a parent-child meeting, the relevant public authorities' failure to make an assessment as to the handing over of the common child or the parent-child meeting by taking into consideration the relevant process constitutes another serious negligence/lack of diligence pointing to the fact that necessary measures had not been taken to prevent a risk to life and that steps had not been taken for the application of the Law no. 6284 in an effective and practical manner.

161. In the light of all these findings, the relevant public authorities cannot be said to have taken reasonable steps to ensure prevention of violence in the process at issue.

162. It is clear that the failure to adopt protective and preventive measures in a practical and effective manner in order to prevent violence against S.E. points to a serious negligence/lack of diligence on the part of the public authorities in the context of the positive obligation to protect life. Moreover, in view of the fact that the grievances in the process involving frequent incidents and complaints had been continuously brought before the law enforcement authorities and the judicial authorities and that the interim measures had been notified, on every occasion, to ŞÖNİM, which was tasked with following up the process, it cannot be said that an excessive burden would have been imposed on the public authorities if they had used the possibility of applying for protective measures in favour of S.E.

163. Consequently, the public authorities cannot be said to have exercised the public power supported by the legal/institutional infrastructure available them in an effective manner in line with the obligation to protect life pursuant to the Law no. 6284 and the applicable legislation. In other words, it is clear that the public authorities fell short of adopting and implementing measures capable of achieving results.

164. After this stage, due to its direct and close connection with the rule of exhaustion of legal remedies, an assessment must be made as to whether an effective judicial protection of the right to life was ensured. The case file does not contain any document indicating that the applicant brought compensation proceedings. The applicant did not make any statement on this issue, either. She alleged that the public officials who were allegedly at fault/guilty had not been held responsible for the incident and that the required criminal investigation had not been carried out against them.

165. When making an assessment in this regard, it must be reiterated that according to the Court's case-law, where the infringement of the right to life is not caused intentionally, the positive obligation to set up an effective judicial system may be satisfied if civil, administrative or even disciplinary remedies were available to the victims, but where the public authorities, fully realising the likely consequences, failed to take measures that were necessary and sufficient to avert the risks within the powers vested in them, 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 (see *Kadri Ceyhan* [Plenary], no. 2014/1924, 17 May 2018, § 89). The question needed to be ruled on at this point is which judicial remedy, within the scope of the State's positive obligation to put in place an effective judicial system, constitutes a sufficient judicial response required to be provided to such incidents resulting in deaths due to the authorities' failure to take reasonable measures as a result of a negligence despite the foreseeable dangers (see *Kadri Ceyhan*, § 92).

166. In view of the fact that S.E. had been repeatedly threatened by her former husband and lodged a complaint in this regard before the relevant authorities on every occasion, it is not possible to say that the killing of S.E. by her former husband resulted from a simple error or carelessness on the part of the public officials. Moreover, it must be underlined that the judicial response to be provided by the State to such incidents in the context of the prevention of violence against women is of importance for the prevention of similar incidents. In this connection, regard being had to the fact that violence against women has been addressed as a problem over which policies were developed for its resolution by the high-level public authorities, it has been concluded that the sole awarding of compensation

due to deaths taking place as a result of the authorities' failure to take effective and practical measures in favour of women who clearly face a serious and imminent risk would not be sufficient in the context of the State's obligation to provide effective judicial protection in such incidents involving individuals in need of protection.

167. In these circumstances, it has been considered that the compensation proceedings would not have an effect on the present application as regards the requirements of exhaustion of legal remedies and effective judicial protection.

168. Regard being had to all these facts as a whole, it has been concluded that the State's obligation to protect the life of the applicant's daughter S.E. was not duly fulfilled and that the right to life was violated as regards the obligation to protect.

169. On the other hand, since a violation of the obligation to protect has been found, an assessment must also be as to the obligation to conduct an effective investigation (as regards the public officials), namely the procedural aspect of the obligation to protect. In the process at issue, the relevant authorities did not grant permission for an investigation against the public officials against whom complaints had been lodged by the applicant, and the authorities dealing with objections upheld the decisions not to grant permission for an investigation. As regards the public officials against whom complaints had been lodged, the judicial process ended due to the authorities' refusal to grant permission for an investigation. The procedure concerning permission for an investigation has been designed to prevent public officials from facing unjustifiable charges related to the commission of an offence on account of their duties as well as to avoid any delay in the performance of their public duties. This procedure requires the conduct of a preliminary inquiry prior to the initiation of a criminal investigation into the offences allegedly committed by public officials on account of their duties and is intended for determining whether there is a ground to necessitate a criminal investigation. The procedure concerning the granting of permission for an investigation must not be abused to prevent the relevant persons from being brought before the investigating and trial authorities which will make the principal assessment as to

the criminal responsibility of those persons. 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 or to prevent the conduct of the investigation in an effective manner or to create the impression that the public officials are exempted from the criminal investigation. Otherwise, a doubt might arise as to the existence of an intention to prevent the establishment of the possible criminal responsibility of the officials exercising public power. The minimisation of the risks posed to the lives and physical integrity of the individuals, 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.

170. Since it has been concluded that the negligence/fault attributable to the public officials in the killing of S.E. by her former husband went beyond a simple error or carelessness, that the public officials fell short of adopting effective and practical measures despite the existence of a serious/imminent risk and, in brief, that the obligation to protect life was violated due to the actions/inactions of the public officials, it has been considered that the failure to grant permission for an investigation against the public officials and thus the prevention of identification of those responsible amounted to a violation of the obligation to conduct an effective investigation within the scope of the right to life.

171. During the fresh investigation process to be carried out due to the finding of a violation of the obligation to conduct an effective investigation, the discretion and the authority to establish the responsibilities of the authorities and public officials (*regardless of their having been involved in the previous investigation process*) lie with the authorities tasked with conducting the investigation, within the framework of the requirements of the judgment finding a violation.

172. In view of the foregoing reasons, it must be held that there has been a violation of the obligations to protect and conduct an effective investigation within the scope of the right to life guaranteed by Article 17 of the Constitution.

4. Application of Article 50 of Code no. 6216

173. 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 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."

174. The applicant requested the Court to find a violation and order a retrial, but did not seek compensation.

175. 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).

176. Where a violation of any fundamental right is found within the scope of an individual application, the basic rule for the redress of 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).

177. 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 the 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 redress 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; *Aligül Alkaya and Others (2)*, §§ 57-59, 66 and 67).

178. In the present application, it has been concluded that there was a violation of the obligations to protect and conduct an effective investigation within the scope of the right to life. The process taken as basis in the present application was the complaint process which had been concluded by the decisions of the 1st Administrative Law Chamber of the Izmir Regional Administrative Court dismissing the applicant's objection. In these circumstances, there is legal interest in conducting a retrial redressing the consequences of the violation of the positive obligation to protect life. Such retrial is intended for redressing the violation and the consequences thereof pursuant to Article 50 § 2 of the Code no. 6216 which contains a provision specific to individual applications as different from similar norms set out in the procedural law. In this scope, the procedure required to be conducted in the retrial process is primarily to revoke the

court decision giving rise to a violation of rights and to deliver a new decision eliminating the reasons leading the Court to find a violation 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 1st Administrative Law Chamber of the Izmir Regional Administrative Court for a retrial.

179. Moreover, a copy of the judgment must be sent to Izmir Governor's Office and the Izmir Chief Public Prosecutor's Office, which have the discretion and authority to establish the responsibilities of the authorities and public officials (*regardless of their having been involved in the previous investigation process*) during the fresh investigation process to be carried out as a result of the revocation of the decisions *not to grant permission for an investigation* in the context of the fulfilment of the requirements of the judgment finding a violation.

180. The total litigation costs of TRY 4,409.70 including the court fee of TRY 809.70 and the counsel fee of TRY 3,600, 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 29 September 2021 that

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

B. 1. The alleged violation of the right to life be DECLARED ADMISSIBLE as regards the process concerning the public officials;

2. The alleged violation of the right to life be DECLARED ADMISSIBLE as regards the obligation to conduct an effective investigation against the perpetrator V.A.;

C. The right to life guaranteed by Article 17 of the Constitution was VIOLATED in the context of the obligations to protect and conduct an effective investigation as regards the process concerning the public officials;

D. A copy of the judgment be SENT to the 1st Administrative Law Chamber of the Izmir Regional Administrative Court (Violation concerns the files with docket no. 2017/403, decision no. 2017/462 and docket no. 2017/510, decision no. 2017/546) for a retrial for the redress of the consequences of the violation of Article 17 of the Constitution;

E. A copy of the judgment be SENT to the Izmir Governor's Office and the Izmir Chief Public Prosecutor's Office;

F. The total litigation costs of TRY 4,409.70 including the court fee of TRY 809.70 and the counsel fee of TRY 3,600 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 TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

FATMA AKIN AND MEHMET EREN

(Application no. 2017/26636)

10 November 2021

On 10 November 2021, the Plenary of the Constitutional Court found violations of both substantial and procedural aspects of the right to life safeguarded by Article 17 of the Constitution in the individual application lodged by *Fatma Akın* and *Mehmet Eren* (no. 2017/26636).

THE FACTS

[9-74] The Gendarmerie Special Operations Team, upon receiving unconfirmed information in the evening that two terrorists had come to the house of Ş.A. located in his village, carried out an operation with the authorisation of the Mardin Governor. At around 8.20 p.m. - 9 p.m. the applicant Mehmet Eren and Y.A. who was holding a hammer drill which was mistaken for a weapon by the soldiers were shot and wounded after a stop warning. However, Y.A., who was the husband of the applicant Fatma Akın, lost his life at the hospital he was taken to.

At the end of the investigation, the Nusaybin Chief Public Prosecutor's Office issued a report for a criminal case to be initiated against some of the soldiers for reckless killing and bodily injury on the ground that they were responsible for the death of Y.A. and the injury of the applicant Mehmet Eren, as they had mistaken the image observed from the thermal camera as a weapon. The said report was sent to the Mardin Chief Public Prosecutor's Office.

Relying on the relevant report, the Mardin Chief Public Prosecutor's Office filed a criminal case against the suspects. The 1st Chamber of the Mardin Assize Court ("the assize court") held that there was no ground for sentencing the accused. The applicants' subsequent appellate request was dismissed by the 16th Criminal Chamber of the Gazinantep Regional Court of Appeal ("the criminal chamber") with final effect.

After the death of Y.A. and the injury of the applicant Mehmet Eren, the Mardin Gendarmerie Commando Battalion Command launched an administrative investigation. In the report issued by the Administrative Investigation Commission, it was stated that there had been no administrative fault or negligence in the incident attributable to the soldiers.

V. EXAMINATION AND GROUNDS

75. The Constitutional Court ("the Court"), at its session of 10 November 2021, examined the application and decided as follows:

A. The Applicants' Allegations

76. In their individual applications which they lodged separately, the applicants alleged, without indicating any detail, that the security forces had not taken any measure to prevent any harm to civilians while carrying out an operation in a civil settlement area and that the security forces had opened targeted fire in the impugned incident. In this connection, they complained that there had been a violation of the right to life. They also maintained that there had been no reason to use firearms in the incident.

77. The applicants also claimed that their rights to a fair trial, effective remedy and trial within a reasonable time had been violated, stating that the investigating authority had not gone to the crime scene in the immediate aftermath of the incident -as from the moment when the incident had taken place according to the applicants' statements-, that the crime scene had been secured by the members of the security forces who had been involved in the incident, that their rights to participate in the investigation and to submit evidence had been restricted due to the confidentiality order which had been issued during the investigation stage, that some pieces of evidence had been fabricated to protect the security forces, that the presence at the crime scene of the relevant members of the security forces had not been ensured during the procedure of reconstruction of the events conducted by the Chief Public Prosecutor's Office, that the Assize Court had not carried out the procedure of reconstruction of the events at the crime scene despite a request in this regard, that the anonymous witness had not been heard by the Assize Court, and that the investigation had not been carried out with reasonable diligence and promptness.

B. The Court's Assessment

78. 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 applicants'

allegations in essence relate to the death of the applicant Fatma Akın's husband and the injury of the applicant Mehmet Eren as a result of the use of unjustified force by the security forces and also to the conduct of an ineffective investigation and prosecution into the incident and that the force used endangered the life of the applicant Mehmet Eren even though it was not lethal as regards him, the application must be examined within the scope of the right to life as regards both applicants. It must be noted that the application may be examined within the scope of the right to life in some cases even if the death does not occur (see *Mehmet Karadağ*, no. 2013/2030, 26 June 2014, § 20) and that the degree and type of force used as well as the intention or aim behind the use of force may, among other factors, be relevant in assessing whether in those cases the application may be examined within the scope of the right to life (see *Mustafa Çelik and Siyahmet Şeran*, no. 2014/7227, 12 January 2017, § 69).

79. Article 17 §§ 1 and 4 of the Constitution, titled "*Personal inviolability, physical and moral existence of the individual*", which will be relied on in the assessment of the allegations, provides insofar as relevant as follows:

> *"Everyone has the right to life...*
>
> *...*
>
> *(Amended on 7 May 2004 by Article 3 of the Law no. 5170; on 21 January 2017 by Article 16 of the Law no. 6771) The act of killing in case of self-defence and, when permitted by law as a compelling measure to use a weapon... do not fall within the scope of the provision of the first paragraph."*

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

> *"The fundamental aims and duties of the State are … to 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

81. The alleged violation of the substantive and procedural aspects of the applicants' right to life must be declared admissible for not being manifestly ill-founded and there being no other grounds for their inadmissibility.

2. Merits

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

i. General Principles

82. Article 17 of the Constitution, which safeguards the right to life, when read in conjunction with Article 5 thereof in which the aims and duties of the State are set out, imposes certain negative and positive obligations on the State (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, § 50).

83. Within the scope of the State's negative obligation, the officers using force by exercising a public power are obliged to refrain from the intentional and unlawful taking of life of any individual within its jurisdiction (see *Serpil Kerimoğlu and Others*, § 51). This obligation applies not only to intentional killing but also to the use of force which may result, as an unintended outcome, in death (see *Cemil Danışman*, no. 2013/6319, 16 July 2014, § 44).

84. Moreover, the last paragraph of Article 17 of the Constitution provides that an interference with the right to life is considered lawful *in cases of absolute necessity* where the use of firearms is legally permitted "*in case of self-defence*", "*during the execution of arrest and detention warrants*", "*during the prevention of the escape of a detainee or convict*", "*during the quenching of a riot or insurrection*", or "*during the fulfilment of the orders of competent authorities in the course of the state of emergency*".

85. When the said provision is read in conjunction with Article 13 of the Constitution, which provides that 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 and that 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, it can be said that the officers using force by exercising a public power may be allowed to use armed force only where *absolutely necessary* when no other means are available to achieve the aims set out in the Constitution and in a manner *proportionate* to the force faced in line with the aim pursued (see *Cemil Danışman*, § 50).

86. When examining whether the force used by the officers exercising a public power was *absolutely necessary* and *proportionate*, the Court primarily takes into consideration the following principles:

i. In the assessment of the use of armed force, not only the actions of the officers exercising a public power but also all the surrounding circumstances including such matters as the planning and control of the actions must be taken into consideration (see *Nesrin Demir and Others*, no. 2014/5785, 29 September 2016, § 108). Moreover, the circumstances and course of the incident must be taken into consideration (see *Cemil Danışman*, § 57).

ii. The circumstances surrounding the incident resulting in death as well as the previous acts of the person against whom force was used and the danger posed by him must also be taken into account (see *Cemil Danışman*, § 63).

87. The inviolable nature of the right to life and the obligation to use lethal force only in cases set out in the Constitution and as a means of last resort when no other means of intervention is available require a very strict review of the necessity and proportionality in cases involving such use of force that might result in death (see *İpek Deniz and Others*, no. 2013/1595, 21 April 2015, § 117).

88. Lastly, it must be noted that the Court cannot substitute itself for the relevant investigating and prosecution authorities and assess the evidence concerning the death. This is under the authority and responsibility of the competent authorities conducting a first-hand examination of the incidents. However, the Court may make a different assessment on the basis of conclusive and convincing evidence (see *Cemil Danışman*, § 58).

ii. Application of Principles to the Present Case

89. The Assize Court ordered that there was no need to impose a sentence on the accused D.G., Ş.T., B.Y. and K.E. on the ground that they had been inevitably mistaken by supposing the hammer drill in Y.A.'s hand to be a weapon and had resorted to armed force as a result of the opening of a fire on them after they had issued a stop warning. The 16th Criminal Chamber of the Gaziantep Regional Court of Appeal ("the Criminal Chamber") considered this decision appropriate in view of the scope of the file. Therefore, the issue needed to be assessed as regards the present case is whether there existed conclusive and convincing findings requiring a departure from the conclusion reached by the Assize Court and whether the impugned criminal proceedings revealed that the force had been used where *absolutely necessary* and in a *proportionate* manner. At this juncture, it must be noted that it is for the courts of criminal jurisdiction to determine the criminal responsibility of individuals and that the examination made by the Court is limited to establishing whether the obligations imposed on the State by Article 17 of the Constitution have been fulfilled.

90. Upon receipt of an unconfirmed information in the evening hours on 20 December 2011 to the effect that two members of the terrorist organisation had come to Ş.A.'s house in the Heybeli village of the Nusaybin district of the Mardin province, it was decided that an operation would be carried out by a Gendarmerie Special Operations Team as from 7 p.m. the same day until 2 a.m. the next day upon approval of the Mardin Governor. During the conduct of the operation, the leading team consisting of K.E.O., Ş.T., B.Y. and D.G. approached Ş.A.'s house and 10 soldiers including Y.T.K., who were involved in the operation, followed the leading group by maintaining a certain distance. In the meantime, S.C., who had been monitoring the operation via a thermal camera at the Dallıağaç Gendarmerie Station located 4-5 kilometres from the Heybeli village, telephoned Y.T.K. and warned that there were persons going up and down the roof. According to the statements of the soldiers involved in the operation, the incident thereafter took place as follows:

- When monitoring the environment through the thermal camera in his hand, Y.T.K. detected a weapon-like object in the hand of one of two persons leaving the area where the house reported within the scope of the intelligence information was located. Y.T.K. notified the issue to K.E.O., who was in the leading group. Through the thermal cameras mounted on their rifles, B.Y., Ş.T. and D.G. saw a person holding his rifle at *port arms*, and B.Y. thus shouted "stop!" Then, a fire was opened towards the direction where the leading team was standing, and B.Y., Ş.T. and D.G. opened a counter fire towards the direction where they saw a person. It was subsequently understood that the object supposed to be a weapon had been in fact a hammer drill.

91. Although the applicants complained that the security forces had opened targeted fire, they were not able to provide convincing evidence to support their allegation. It has therefore been considered that the allegation at issue cannot be taken into account.

92. The applicants alleged that there had been no reason requiring the use of firearms. However, the statements of the applicant Mehmet Eren and the witness H.T. to the effect that they had heard three gunshots prior to serial gunshots, the eight empty cartridge cases measuring 7.62x39 mm found under the tree located only 31 meters away from the minibus belonging to Y.A., the empty cartridge case measuring 5.56 mm found 470 cm away from those cartridge cases, and the damages considered to have been caused by firearm bullets to the left side of the minibus pointing towards the direction where the empty cartridge cases were found confirm the statements of the soldiers involved in the operation to the effect that a fire had been opened towards the leading team. Although the applicants alleged that some pieces of evidence had been fabricated to protect the security forces, there was no concrete fact constituting the basis of such allegation. Moreover, the crime scene was secured by another Gendarmerie Special Operations Team and an Investigation Team which had no working relationship with the soldiers involved in the operation. In addition, it was established that the said eight empty cartridge cases had been fired from the weapon used by the members of the terrorist organisation during their attack on the Soylu Gendarmerie Station Command located in the Savur district of the Mardin province on 26 September 2011 and that they were

compatible, in terms of characteristic traces, with the four spent cartridge cases fired from the weapon used during the said attack. In the light of these explanations, it has been concluded that there was no conclusive and convincing evidence requiring a departure from the inferior courts' finding that fire had been opened on the leading group during the operation.

93. In view of the finding in the aforementioned paragraph, the relevant soldiers can hardly be said not to have used armed force where *absolutely necessary* to protect themselves against the attack and in a manner *proportionate* to the force faced in line with the aim pursued. However, the relevant soldiers made a mistake in identity of the person who had opened a fire towards them and caused the death of Y.A. and the injury of the applicant Mehmet Eren. The Assize Court concluded that the accused persons could not be held responsible as they had made an inevitable mistake. However, although the report drawn up on 12 January 2012 by the Laboratory indicated that the small holes on the coat belonging to Y.A. had been caused by shots fired at close range according to the dispersion of the gunshot residues around those holes and even though the issue explained in the report contradicted with the statements of the applicant Mehmet Eren concerning the distance between them and the soldiers, the Assize Court did not obtain a further report from the Laboratory or a report from another expert in order to eliminate this contradiction and did not carry out a reconstruction of the events at the crime scene. Indeed, a reconstruction of the events was necessary to ascertain the circumstances surrounding the incident. Therefore, in view of the findings in the impugned proceedings, the Court was not convinced that the accused persons' mistake had been inevitable.

94. Following these assessments, an examination must be made as to whether the operation was carried out in accordance with the rules and organised in such a manner as to minimise the risks associated with the use of lethal force and whether there was any negligence in the choice of measures taken by the authorities.

95. The operation order concerning the impugned operation noted that attention should be paid to the possibility of ambush being laid and improvised explosives being placed by terrorists, that the attention of

the residents of the village should not be drawn, that thermal cameras would be used to the utmost extent possible, that terrorists would be verbally warned to surrender, that in the event of the terrorists' failure to comply with the warning a shot would firstly be fired in the air and then towards the feet of the persons concerned, and that in the event of a fire being opened towards the security forces, a counter fire would be opened continuously without hesitation. In accordance with this plan, thermal binoculars were attached to the rifles belonging to D.G., Ş.T. and B.Y. On the other hand, Y.T.K. carried hand-held thermal binoculars. However, during the planning of the operation, attention was not paid to the fact that the denunciation contained unconfirmed information, that the information at issue was not precise, that the operation would be carried out in a village settlement area, and that there might be villagers in the street at the time of the operation. Indeed, the statement of the witness M.Ö. to the effect that the operation had been urgently launched on the day of the incident demonstrates that sufficient consideration had not been given to necessary measures for the protection of the life of third persons.

96. In view of the foregoing reasons, it must be held that the substantive aspect of the right to life was violated.

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

i. General Principles

97. The procedural aspect of the State's positive obligations within the scope of the right to life 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 death. The essential purpose of such investigation is to secure the effective implementation of the law safeguarding the right to life and to ensure accountability for the deaths occurring as a result of the intervention by or under the responsibility of public officials or taking place as a result of the acts of other persons (see *Serpil Kerimoğlu and Others*, § 54).

98. Moreover, the obligation of conducting an effective investigation is not an obligation of result but an obligation to use the appropriate means. Article 17 of the Constitution neither grants the applicants the right to

ensure prosecution or punishment of third persons for a criminal offence nor imposes on the State the duty to conclude all proceedings with a conviction (see *Serpil Kerimoğlu and Others*, § 56).

99. For a criminal investigation into a suspicious death to be considered to be effective as required by Article 17 of the Constitution:

- The investigating authorities must act ex officio as soon as they are informed of the incident and secure all the evidence capable of leading to the ascertainment of the death and the identification of those responsible (see *Serpil Kerimoğlu and Others*, § 57);

- The investigating authorities carrying out an investigation into deaths as a result of the use of force by public officers must be independent from those implicated in the events (see C*emil Danışman*, § 96);

- The investigation must be open to public scrutiny and must give the relatives of the deceased person the requisite degree of effective participation in the proceedings to enable them to protect their legitimate interests (see *Serpil Kerimoğlu and Others*, § 58);

- The investigation must be carried out with reasonable diligence and promptness (see S*alih Akkuş*, no. 2012/1017, 18 September 2013, § 30);

- The investigating authorities must conduct an objective analysis of the cause of the incident; 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 process; and where the incident involved the use of force, the decision at issue must also contain an assessment of whether the interference with the right to life was a proportionate one resulting from a compelling circumstance required by the Constitution (see *Cemil Danışman*, § 99).

100. Where the investigation carried out to establish the possible criminal responsibility has led to the institution of criminal proceedings, this stage must also satisfy the requirements of Article 17 of the Constitution (see *Filiz Aka* no. 2013/8365, 10 June 2015, § 30)

ii. Application of Principles to the Present Case

101. As regards the principle requiring the investigating authorities to act ex officio and immediately, the applicants did not submit any allegation and no deficiency was found in this regard, either.

102. Although the applicants alleged that their rights to participate in the investigation and submit evidence had been restricted on account of the confidentiality order, it appears that they were able to file petitions with the Chief Public Prosecutor's Office requesting the collection of the evidence they desired despite such order. Moreover, the applicants were afforded the possibility of having access to the investigation document after the acceptance of the indictment against the suspects. In these circumstances, the applicants, who were able to submit their complaints and evidence to the investigating authorities, participated in the trial process as civil parties and filed an appeal on points of law and facts against the decision of the Assize Court, cannot be said to have been unable to participate in the impugned criminal proceedings to a sufficient extent.

103. The applicants alleged that the investigating authority had not gone to the crime scene in the immediate aftermath of the incident, that the crime scene had been secured by the members of the security forces who had been involved in the incident, that some pieces of evidence had been fabricated to protect the security forces, and that the anonymous witness had not been heard by the Assize Court.

104. As mentioned above, the crime scene was secured by another Gendarmerie Special Operations Team which had nothing to do with the incident and an Investigation Team which had no working relationship with the soldiers involved in the operation. In this manner, the evidence was secured until the arrival of the chief public prosecutor. Moreover, the Investigation Team took photographs of the crime scene and its surroundings only a few hours after the incident. Therefore, the chief public prosecutor's failure to immediately get to the crime scene has not been considered as a deficiency which would affect the effectiveness of the criminal proceedings. Moreover, due to the applicants' failure to rely on a concrete fact, no attention has been paid to the allegation that certain

pieces of evidence were subsequently fabricated and that the investigation was not carried out impartially.

105. Regard being had to the absence of any allegation to the effect that the anonymous witness had knowledge about the circumstances in which the impugned incident took place and in view of the findings in the report drawn up by the Administrative Investigation Commission, the failure of the Assize Court to hear the anonymous witness did not constitute a deficiency which would affect the effectiveness of the criminal proceedings. It must be borne in mind that the investigating and prosecution authorities do not have to satisfy and pay regard to all requests and allegations of the relatives of the deceased person in relation to the occurrence of the incident and the obtaining of the evidence unless this prevents the ascertainment of the circumstances surrounding the death and the identification of those responsible, if any (see *Yavuz Durmuş and Others,* no. 2013/6574, 16 December 2015, § 62; *Mahpulah Özarslan*, no. 2016/12544, 15 September 2020, § 62).

106. It is understood that on the following day of the incident the chief public prosecutor carried out an examination at the crime scene together with an investigation team to establish the circumstances surrounding the incident and to identify those responsible, if any, and took the statements of the soldiers involved in the operation. Moreover, the crime scene investigation process was recorded on camera, the photographs of the crime scene and its surroundings were taken from many angles, and a simple sketch map of the crime scene was drawn up. Post-mortem examination and autopsy procedures were conducted within the scope of the investigation carried out by the Chief Public Prosecutor's Office and the exact cause of Y.A.'s death was established. A ballistic examination of the rifles belonging to the soldiers in the leading group, the empty cartridge cases recovered from the crime scene, the pieces of cartridge bullet jacket, the bullet cores and the clothes belonging to Y.A. and the applicant Mehmet Eren was conducted. The eight empty cartridge cases measuring 7.62x39 mm found under the tree located only 31 meters away from the minibus and the empty cartridge case measuring 5.56 mm found 470 cm away from those cartridge cases were examined. Moreover, the swabs taken from Y.A. and the applicant Mehmet Eren were analysed to

detect gunshot residues. The statements of the persons who might have knowledge about the incident were taken. Following the initiation of the criminal proceedings, the Assize Court questioned the accused persons, heard the applicants and took statements of the persons who might have knowledge about the incident. It also obtained the file concerning the administrative investigation into the incident. Correspondences were exchanged in relation to whether there was any record concerning the observations made through the thermal cameras, whether an investigation had been carried out against Ş.A., in whose house there had allegedly been terrorists, and whether Y.A. had been requested to appear at the Göllü Gendarmerie Station. In addition, a report was obtained from the Ballistic Branch in respect of close-range and long-range shots.

107. Despite these procedures, there were apparently significant deficiencies which affected the effectiveness of the criminal investigation.

108. First of all, although the report drawn up on 12 January 2012 by the Laboratory indicated that the small holes on the coat belonging to Y.A. had been caused by shots fired at close range according to the dispersion of the gunshot residues around those holes and even though the issue explained in the report contradicted with the statements of the applicant Mehmet Eren concerning the distance between them and the soldiers, the procedures such as obtaining a further report from the Laboratory or a report from another expert and carrying out a reconstruction of the events at the crime scene were not conducted in order to eliminate this contradiction. In addition, the applicants' request for a reconstruction of the events at the crime scene was not satisfied on the grounds of the current stage of the proceedings and the state of security. However, these procedures could have afforded the Assize Court the possibility of establishing the circumstances surrounding the incident more properly.

109. During the hearing dated 26 June 2014, the Assize Court ordered a reconstruction of the events at the crime scene on 8 September 2014 at 10 a.m. However, it did not conduct this procedure at the specified date on the ground that it would be more appropriate to conduct such procedure in the seasonal conditions similar to those at the date of the incident and at a time close to the time of the incident. Then, it revoked its interlocutory

decision to carry out a reconstruction of the events on account of the applicants' lawyer's withdrawal of the request in this regard. Since during the hearing dated 14 April 2015 the applicants' lawyer again requested a reconstruction of the events, the Assize Court held at the hearings dated 14 April 2015 and 11 June 2015, without specifying any date, that such procedure be conducted at the crime scene and that the date of such procedure be determined until the next hearing. Nevertheless, this procedure was not conducted. On 15 December 2015 the Assize Court revoked its interlocutory decision to carry out a reconstruction of the events on the grounds of the current stage of the proceedings and the state of security, but it did not provide any reason as to the difference between the previous and the present state of security.

110. Moreover, investigations and prosecutions into a death must be concluded within a reasonable time. In the present case, although the public prosecutor submitted the opinion on the merits on 25 February 2016, the Assize Court was only able to deliver its decision on 20 December 2016. Regard being had to the fact that the Criminal Chamber dismissed the applicants' request for an appeal on points of law and facts on 23 March 2017, it took 5 years 3 months and 3 days for the criminal proceedings to be concluded. However, no issue in the proceedings justified such prolongation of the proceedings. Therefore, it has been concluded that the impugned criminal proceedings were carried out not with reasonable diligence and promptness but in such a manner as to undermine the significant role in the prevention of similar future violations of the right to life.

111. In view of the foregoing reasons, it must be held that the procedural aspect of the right to life guaranteed by Article 17 of the Constitution was violated.

3. Application of Article 50 of Code no. 6216

112. 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 on...

(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."

113. The applicant Mehmet Eren requested the Court to find a violation and asked for TRY 100,000 in compensation for pecuniary damage and TRY 1,000,000 in compensation for non-pecuniary damage. The applicant Fatma Akın requested the Court to find a violation and asked for TRY 500,000 in compensation for pecuniary damage and TRY 1,000,000 in compensation for non-pecuniary damage.

114. 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).

115. 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).

116. In cases where the violation results from a court decision or where the court could not provide redress for the violation, 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 the 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 redress 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 decision 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; A*ligül Alkaya and Others* (2), §§ 57-59, 66 and 67).

117. In the present application, it has been concluded that the substantive and procedural aspects of the right to life were violated on the grounds, inter alia, that the accused persons had not been able to demonstrate the inevitable nature of their mistake on the basis of the existing findings, that the operation at issue had not been planned in such a manner as to secure the protection of the life of third persons, and that all the evidence capable of leading to the ascertainment of the death and the identification of those responsible could not be collected in the impugned criminal proceedings. Thus, it is understood that the violation resulted from a court decision.

118. In these circumstances, there is legal interest in conducting a retrial for redressing the consequences of the violation of the substantive and procedural aspects of the right to life. Such retrial is intended for redressing the violation and the consequences thereof pursuant to Article

50 § 2 of the Code no. 6216 containing a provision concerning individual applications. In this scope, the procedure required to be conducted is to deliver a new decision eliminating 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 Assize Court for a retrial.

119. Furthermore, it is clear that the finding of a violation in the present case would be insufficient for the redress of the damages sustained by the applicants. Thus, the applicants must each be awarded a net amount of TRY 175,000 in compensation for non-pecuniary damages to redress the violation of the substantive and procedural aspects of the right to life and the consequences thereof.

120. In order for the Court to award compensation in respect of pecuniary damage, there must be a causal link between the alleged pecuniary damage and the violation found. Since the applicants failed to provide any document to that effect, their claims for compensation in respect of pecuniary damage must be dismissed.

121. The court fee of TRY 257.50, which was paid by each applicant, must be individually reimbursed to the applicants, and the litigation costs including the counsel fee of TRY 3,600, as established on the basis of the documents in the case file, must be jointly reimbursed to the applicants.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 10 November 2021 that

A. 1. The alleged violation of the substantive aspect of the right to life be DECLARED ADMISSIBLE;

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

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

2. 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 the 1st Chamber of the Mardin Assize Court (docket no. 2012/209 and decision no. 2016/458) for a retrial to redress the consequences of the violations of the substantive and procedural aspects of the right to life;

D. A net amount of TRY 175,000 be individually PAID to the applicants in compensation for non-pecuniary damages and the remaining compensation claims be REJECTED;

E. The court fee of TRY 257.50, which was paid by each applicant, be SEPARATELY REIMBURSED to the applicants, and the litigation costs including the counsel fee of TRY 3,600 be JOINTLY REIMBURSED to the applicants;

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

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

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

EYÜP TOY AND SAADET TOY

(Application no. 2017/34841)

10 February 2021

On 10 February 2021, the First Section of the Constitutional Court found a violation of the procedural aspect of the prohibition of ill-treatment, safeguarded by Article 17 of the Constitution, in the individual application lodged by *Eyüp Toy and Saadet Toy* (no. 2017/34841).

THE FACTS

[7-32] The applicants are the parents of a high-school student who committed suicide (N.T.). On the day of incident, N.T. wished to take back her mobile phone from her friend in another classroom to whom she had previously given. At that time, N.T.'s teacher, having noticed the situation, went to the other classroom to take N.T.'s mobile phone. The suspected teacher stated on this matter that when she had taken N.T.'s mobile phone, she had noticed the incoming messages but had not read them; that she had shown these messages to the teacher at the other classroom; and that having seen that the sender of the messages had been another student studying at the same school, she had then delivered N.T.'s mobile phone to the deputy principal.

The applicants nevertheless claimed that the teacher had indeed read the messages. In this sense, three other students at the classroom where the suspected teacher took the mobile phone noted that the teacher had come in the classroom and taken N.T.'s mobile phone; that having glanced at it for a couple of minutes, the suspected teacher had then showed the mobile phone to the other teacher at the classroom. The teacher at the classroom, where the mobile phone was taken, stated that the teacher coming in the classroom had taken N.T.'s mobile phone from the relevant student, shown it to her and said that it had been switched on; and that neither she nor the suspected teacher had read the messages.

The deputy principle to whom the mobile phone was ultimately delivered talked to N.T., who admitted to have messaged with one of her schoolmates. Thereupon, the school principals phoned the parents of these two students so as to inform them of the situation. At the end of the school day, N.T. committed suicide by jumping off a building under construction. The incumbent chief public prosecutor's office ("the prosecutor's office) immediately initiated an investigation into N.T.'s suicide.

The applicants filed a criminal complaint with the prosecutor's office and sought the punishment of those responsible, maintaining that their daughter had been subjected to emotional pressure by the school principals and the relevant teacher and committed suicide on account of the embarrassment and fear she had suffered. However, the prosecutor's office issued a decision of non-prosecution with respect to the offences of breaching the privacy of private life, and inducing and helping someone to commit suicide. The applicant's challenge against the decision of non-prosecution was dismissed by the relevant magistrate judge.

IV. EXAMINATION AND GROUNDS

33. The Constitutional Court ("the Court"), at its session of 10 February 2021, examined the application and decided as follows:

A. The Applicants' Allegations

34. The applicants alleged that the Chief Public Prosecutor's Office ("the CPPO") had not conducted an effective investigation into the incident which had resulted in their daughter's suicide; in this connection, although their daughter N.T., whose private life had been exposed, had committed suicide due to the fact that the school administration and her teachers had administered emotional violence on her through mocking, those responsible for the incident had not been punished; N.T.'s telephone had been inspected without authorisation; and although the messages had obviously been read, this matter had not been enquired. On those grounds, they complained of the alleged violations of the principle of equality, the right to an effective remedy and the right to a fair trial, as well as other constitutional rights.

B. The Court's Assessment

1. Legal Qualification of the Allegations and the Scope of Examination

35. 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).

36. The applicants complained that the CPPO had failed to conduct an effective investigation into the incident involving their daughter's

suicide as a result of her exposure to psychological violence by the school administration and her teachers. In this context, the applicants did not maintain that the persons of whom they complained had engaged in a direct act in their daughter N.T.'s suicide but merely that their daughter had been driven to suicide due to events that had taken place at school and that they had failed to prevent the suicide. It has been understood that all the evidence was collected and a substantial inquiry was conducted by the investigating authority in the investigation into the suicide of N.T. that was conducted by the CPPO, at the end of which no causal link was detected between the suspects' acts and the suicide incident in the context of the suspected offences of incitement to or assistance in suicide. Thus, seeing that the suicide of the applicants' daughter had not been planned nor had it been foreseen that the events taking place at school would have ended in an act of suicide, there are no grounds for holding an examination from the standpoint of the right to life.

37. On the other hand, the applicants' complaints concerning an alleged failure to conduct an effective investigation despite their daughter's exposure to psychological violence should be examined under Article 17 of the Constitution as they fall within the scope of that article (i.e. the right to protection of corporeal and spiritual existence or the prohibition of ill-treatment).

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

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

39. Article 5 of the Constitution, titled "*Fundamental aims and duties of the State*", 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."

40. Although the allegations in the present application fall, by their composition, within the ambit of the right to protection of corporeal and spiritual existence or the prohibition of ill-treatment safeguarded under Article 17 § 1 or 17 § 3 of the Constitution, respectively, a treatment has to attain a minimum threshold in order to go from being a subject matter of the right to protection of corporeal and spiritual existence under the first paragraph of Article 17 to being a subject matter of the prohibition of ill-treatment under the third paragraph thereof.

This minimum threshold is relative and should be evaluated by taking into consideration the particular circumstances of each individual case. In this context, factors such as the duration of the treatment, its physical and mental effects, and the sex, age and health status of the victim are important. Further regard should be had to the motive and aim behind the treatment (see *Cezmi Demir and Others*, no. 2013/293, 17 July 2014, § 83).

42. According to the allegation raised in the present case, upon learning about a romantic relationship between a fifteen-year-old girl and a male student, the administration of the school she attended informed the families of the situation and disclosed private information pertaining to the students, thus making it an object of ridicule among the school administration, other students and their families and humiliating them. Moreover, the competent persons in the school administration allegedly acted in a manner tarnishing the children's honour when informing the families of the situation in a frivolous tone and, as a matter of fact, the applicants' daughter N.T. allegedly committed suicide after school by feeling overwhelming shame and fear due to the notification of this situation to her family.

43. Having regard to the psychological impact on N.T. of this incident, N.T.'s age and sex, the moral values of the community where she lived, and the disciplinary rules of her school, the Court considers that, even though the suicide of the applicants' daughter could not have been foreseen, there are arguable claims to the effect that the minimum threshold of severity was attained with the treatment allegedly displayed by the school administration and the teachers. Thus, it has examined the case from the standpoint of the prohibition of ill-treatment.

2. Admissibility

44. 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.

3. Merits

a. General Principles

45. According to main approach adopted by the Court in terms of the State's positive obligations within the scope of the prohibition of ill-treatment, in cases where the loss of life occurs under the conditions which can require the responsibility of the State, Article 17 of the Constitution imposes on the State the duty of taking effective administrative and judicial measures which will ensure that the legal and administrative framework that is formed in order to protect the right to life is duly applied and that the breaches of the right to prohibition of torture and ill-treatment are stopped and punished by making use of all available facilities in order to protect persons whose corporeal and spiritual existence is under threat (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, § 52).

46. Article 17 of the Constitution also places on the State the duty of taking measures to prevent individuals from being subjected to torture and torment or treatment or punishment incompatible with human dignity, even if they are administered by third persons (see *Cezmi Demir and Others*, no. 2013/293, 17 July 2014, § 82).

47. The State's positive obligation under the right to protection of the corporeal and spiritual existence of the individual also has a procedural

aspect. This procedural obligation requires the State to conduct an effective official investigation capable of leading to the identification and, if necessary, punishment of those responsible for any kind of physical and mental attack. 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).

48. Criminal investigations to be conducted must be effective and adequate in the sense that it is capable of leading to the identification and punishment of those responsible. An effective and adequate investigation requires that the investigation authorities take action *ex officio* and gather all the evidence capable of shedding light on the incident and identifying those responsible. Hence, an investigation into 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 (see *Cezmi Demir and Others*, § 114).

49. This is not an obligation of result, but of appropriate means. Nevertheless, the considerations given here do not mean, in any way, that Article 17 entails the right for an applicant to have third parties prosecuted or sentenced for a criminal offence or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence (see *Cezmi Demir and Others*, § 113).

50. Allegations of ill-treatment must be supported by appropriate evidence. The existence of reasonable proof beyond any doubt is necessary to establish the veracity of the alleged facts. Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this scope, further regard should be had to the attitudes of those concerned over the course of the process when assessing the evidence (see *Cezmi Demir and Others*, § 95).

b. Application of Principles to the Present Case

51. In the scope of the investigation that was initiated due to the suicide of their daughter N.T., the applicants maintained that their daughter had been subjected to *emotional violence* by the school administration and her teacher and that she had committed suicide due to the shame and fear she had felt and they requested the punishment of the persons responsible.

52. At the end of its investigation, the CPPO decided not to initiate criminal proceedings against the suspected public officials on charges of incitement to and assistance in suicide and violation of privacy because no causal link had been established between the acts of H.C.K. - the teacher of the class in question - as well as N.S. and S.G. - vice principals - and the suicide of N.T., nor had any evidence existed to prove if these persons had inspected the messages and call logs on the telephone.

53. It should first be indicated that the applicants had submitted an explicit complaint with the CPPO, contending that their daughter had been subjected to degrading treatment due to the acts of the suspected teacher and administrators, which the applicants describe as "*defamation and emotional violence*". Nonetheless, the CPPO conducted the investigation within the framework of simply the incident of suicide and the question of whether the information on N.T.'s telephone had been disclosed. To put differently, the inquiry performed by the investigating authority was limited to the matters of whether there had been any *intentional* liability of others in N.T.'s suicide, such as incitement/guidance or assistance, and whether there had been any [criminal] act in the context of violation of privacy.

54. In this sense, the Court has noted that no investigation was conducted to find out whether, prior to N.T.'s suicide, the suspected public officials working in the post of either a teacher or school administrator had displayed any treatment amounting to ill-treatment towards N.T. by abusing the influence derived from that post or whether N.T. had been subjected to degrading treatment.

55. Whereas, following the revelation of the messaging between the applicants' daughter and a male student, the *forbidden telephone incident*

had taken on a new dimension, no inquiry or assessment was made with regard to the school administration's attitude towards the incident (see §§ 15 and 25) and the impact of that attitude on N.T., i.e. on the question of whether it constituted an offence.

56. Even though part of the treatment towards N.T. by the suspected school officials was established thanks to the evidence and witness statements gathered within the scope of the investigation, no light was shed upon what had been the course of events and facts during the school administration's meetings/conversations with the students and their families. Finally, the investigation was completed by the CPPO without having carried out any inquiry in respect of the complaint giving rise to the present application within the context of the gathered/existing evidence.

57. Given that the inquiry of allegations of ill-treatment diligently by investigating authorities and being in an effort to arrive at the material truth constitute the foundation of the obligation to conduct an effective investigation, the Court has observed that the CPPO did not display such diligence that was expected thereof in the present case. It should be underlined at this juncture that a failure to conduct an effective investigation has been found, without reaching any conclusion as to whether or not the acts committed by public officials had constituted a criminal offence, but due to the absence of an investigation into a complaint to that effect, which is considered to be an arguable claim.

58. For these reasons, it must be ruled that there has been a violation of the procedural obligation within the scope of the State's positive obligation prescribed by Article 17 § 3 of the Constitution.

59. On the other hand, even though the applicants have an arguable claim to the effect that their daughter N.T. had been subjected to ill-treatment, no conclusion has been reached from the facts of the present application about the veracity of the alleged facts and events since a criminal investigation was not conducted from this aspect. Thus, the Court has found it impossible to hold an assessment with respect to the substantive aspect of the prohibition of ill-treatment.

C. Application of Article 50 of Code no. 6216

60. 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."*

61. The applicants requested a finding of violation and reopening of the investigation.

62. 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).

63. 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 redressed is to ensure restitution to the extent possible, that is to restore the situation to the state it was in prior to the violation. For this

to happen, the continuing violation needs to be ceased 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 redressed, where applicable the pecuniary and non-pecuniary damages caused by the violation need to be indemnified, and any other measures deemed appropriate in that scope need to be taken (see *Mehmet Doğan*, §§ 55, 57).

64. In cases where the violation originates from a court ruling or the [trial] court is unable to redress the violation, the Court decides 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 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 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 redress of the continuing violation (see *Mehmet Doğan*, §§ 58, 59; *Aligül Alkaya and Others (2)*, §§ 57-59, 66, 67).

65. Having examined the application, the Court has concluded that the prohibition of ill-treatment was violated. Thus, it has been understood that the violation of the procedural aspect of the prohibition of ill-treatment emerged from the CPPO's decision of non-prosecution.

66. In this situation, there is legal interest in conducting a new investigation in order to redress the consequences of the violation of the prohibition of ill-treatment. Anew investigation to be conducted in this scope aims to redress the violation and its consequences. In this regard, what is to be done is to conduct a new investigation in line with

the principles set out in the judgment finding a violation and capable of remedying the reasons that has led the Court to render the violation judgment. For this reason, a copy of the judgment must be remitted to the relevant chief public prosecutor's office for re-investigation.

67. The total litigation costs of TRY 3,857.50 including the court fee of TRY 257.50 and the counsel fee of TRY 3,600.00, as established on the basis of the documents in the case file, must be reimbursed jointly to the applicants.

V. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 10 February 2021 that

A. The alleged violation of the prohibition of ill-treatment be DECLARED ADMISSIBLE;

B. The procedural aspect of the prohibition of ill-treatment safeguarded by Article 17 § 3 of the Constitution was VIOLATED;

C. A copy of the judgment be REMITTED to the Düziçi Chief Public Prosecutor's Office for re-investigation to redress the consequences of the violation of the procedural aspect of the prohibition of ill-treatment;

D. The total litigation costs of TRY 3,857.50, including the court fee of TRY 257.50 and counsel fee of TRY 2,475.00, be REIMBURSED JOINTLY TO THE APPLICANTS;

E. 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, statutory 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 TÜRKİYE
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

FERİT KURT AND OTHERS

(Application no. 2018/9957)

8 June 2021

On 8 June 2021, the Second Section of the Constitutional Court found violations of both substantive and procedural aspects of the right to life and prohibition of ill-treatment, safeguarded by Article 17 of the Constitution, in the individual application lodged by *Ferit Kurt and Others* (no. 2018/9957).

THE FACTS

[8-62] The applicants' relative A.K. had been taken to the state hospital for appendicitis while in custody, but died on the same day. Some soldiers whose statements had been taken within the scope of the criminal investigation launched by the chief public prosecutor's office stated that A.K. had been tortured with a baton. The autopsy performed on the day of the incident and the report issued by the Forensic Medicine Institute revealed that the death had resulted from an infection caused by large intestine perforation.

The chief public prosecutor's office filed a criminal case before the assize court against 15 soldiers on the charge of murder by torture. At the end of the trial, the court concluded that the crime had been committed only by S.Ü. and sentenced him to aggravated life imprisonment on the charge of murder by torture and acquitted the other accused. Upon appeal, the Court of Cassation quashed the decision.

The court sentenced the accused to 16 years and 8 months' heavy imprisonment for committing involuntary manslaughter by torture. At the end of the appellate review made upon the request of the accused's lawyer, the Court of Cassation dismissed the case for the expiry of the statute of limitations. The accused was released on the same day.

V. EXAMINATION AND GROUNDS

63. The Constitutional Court ("the Court"), at its session of 8 June 2021, examined the application and decided as follows:

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

64. The applicants complained about an alleged violation of the right to life and the right to a fair trial, arguing that their relative had died as

a result of the torture inflicted on him and that the authorities' failure to establish and punish the perpetrators despite the passage of 26 years after the incident had not only cast doubt on the impartiality of the investigating authorities but also indicated that an effective investigation had not been carried out into the death, that a fair trial had not been conducted, that the principle of equality of arms had not been respected, and that the proceedings had not been concluded within a reasonable time.

65. The applicants also argued that the act resulting in the death of their relative had also amounted to a violation of the prohibition of ill-treatment.

66. Lastly, the applicants maintained that their deceased relative had not been allowed to benefit from any of his legal rights during the arrest and custody processes, that he had been held in the military unit consisting of the soldiers participating in the anti-terror operation, that none of the soldiers had reacted against the ill-treatment inflicted on him, that he had not been immediately transferred to a health centre in the aftermath of the treatment at issue, and that the police report drawn up and signed by some of his relatives indicated that he had been taken to the hospital upon his complaint of appendicitis. They thus complained that there had been a violation of the right to personal liberty and security.

67. In its observations, the Ministry stated in brief that S.Ü. had been held in detention pending trial for a long time and thus that there was no impunity. The Ministry then noted that it was at the discretion of the Court to make an assessment within the framework of the criteria adopted in similar applications.

B. The Court's Assessment

1. Legal Qualification and the Scope of the Examination

68. 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). The applicants' complaints concern in substance the death of their relative as a result of the alleged ill-treatment inflicted on him during his custody, the ineffectiveness of the investigation carried out into this incident, and the impunity of the perpetrators. The applicants did not clearly complain about a violation of any of the

guarantees provided by the right to personal liberty and security under Article 19 of the Constitution. Therefore, it has been concluded that it is necessary and adequate to examine all of the applicants' allegations within the scope of the right to life and the prohibition of ill-treatment, and the alleged violations have been assessed in the light of the circumstances in which the impugned incident took place.

69. 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.*
>
> *..."*

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

> *"The fundamental aims and duties of the State are … to 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."*

2. Admissibility

71. The alleged violations of the right life and the prohibition of ill-treatment must be declared admissible for not being manifestly ill-founded and there being no other grounds for their inadmissibility.

3. Merits

a. General Principles

72. Article 17 of the Constitution, which safeguards the right of the individual to protect and improve his corporeal and spiritual existence and 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*, when read in conjunction with Article 5 thereof in which the aims and duties of the State are set out, imposes certain negative and positive obligations on the State (see *Serpil Kerimoğlu and Others,* no. 2012/752, 17 September 2013, § 50).

73. The negative obligations in question entail that public authorities must not cause any physical or mental harm to persons in the ways set out in the third paragraph of the said article as a result of the State's obligation to respect for the individuals' physical and mental integrity while the positive obligations require public authorities to protect, through administrative and legal legislation, the physical and mental integrity of persons and to take reasonable measures to prevent a risk of ill-treatment which they knew or should have known (see *Cezmi Demir and Others,* no. 2013/293, 17 July 2014, § 81; *Şenol Gürkan*, no. 2013/2438, 9 September 2015, § 68).

74. Where a death or injury occurs when a person is under the State's control, such as during custody or detention, the obligation to provide a satisfactory and convincing explanation concerning such incident shall rest on the competent authorities since these authorities mostly have access to the information related to the circumstances surrounding the incident (see *Süleyman Deveci*, no. 2013/3017, 16 December 2015, §§ 89 and 91; *Cengiz Kahraman and Kenan Özyürek*, no. 2013/8137, 20 April 2016, § 95; *İpek Deniz and Others*, no. 2013/1595, 21 April 2016, § 136).

75. The procedural aspect of the State's positive obligation to protect the right to life and the right of the individual to protect his corporeal and spiritual existence requires that the State must ensure the conduct of an effective investigation capable of leading to the identification and, if necessary, punishment of those responsible for suspicious deaths and any

kind of physical and mental attacks provided that the person concerned has an arguable claim of having been subjected to ill-treatment in such a manner as to amount to a violation of Article 17 of the Constitution. The essential purpose of such investigation is to secure the effective implementation of the law safeguarding the right to life and the right of the individual to protect his corporeal and spiritual existence and to ensure accountability for the deaths and injuries occurring as a result of the intervention by or under the responsibility of public officials or taking place as a result of the acts of other persons (see *Serpil Kerimoğlu and Others*, § 55 and *Cezmi Demir and Others*, §§ 110 and 111).

76. The investigation required to be carried out into a death caused intentionally or resulting from an attack or ill-treatment or into a severe attack against physical and mental integrity must undoubtedly be of criminal nature (see *Serpil Kerimoğlu and Others*, § 55).

77. Moreover, the obligation of conducting an effective investigation is not an obligation of result but an obligation to use the appropriate means. In this regard, Article 17 of the Constitution neither grants the applicants the right to ensure prosecution or punishment of third persons for a criminal offence nor imposes on the State the duty to conclude all proceedings with a conviction (see *Serpil Kerimoğlu and Others*, § 56; *Cezmi Demir and Others*, § 113). However, the offences threatening life and the severe attacks against physical and mental integrity must not, under any circumstances, be allowed to go unpunished, be pardoned or become time-barred. Otherwise, the positive obligation of the State to protect, through legislation, the physical and mental integrity of persons would not be fulfilled (see *Cezmi Demir and Others*, § 77).

78. For a criminal investigation into a death caused intentionally or resulting from an attack or ill-treatment or into a severe attack against physical and mental integrity to be considered to have been carried out as required by Article 17 of the Constitution;

- The persons responsible for the investigation and carrying out the inquiries must be independent from those implicated in the events (see *Cemil Danışman*, no. 2013/6319, 16 July 2014, § 96; *Cezmi Demir and Others*, § 114);

- The investigating authorities must act ex officio as soon as they are informed of the incident and secure all the evidence capable of leading to the ascertainment of the incident and the identification of those responsible (see *Serpil Kerimoğlu and Others*, § 57; *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 *Serpil Kerimoğlu and Others*, § 58; *Cezmi Demir and Others*, § 115);

- The investigation must be carried out with reasonable diligence and promptness in order to secure adherence to the rule of law, prevent any appearance of collusion in or tolerance of unlawful acts, and maintain public confidence (see *Salih Akkuş*, no. 2012/1017, 18 September 2013, § 30; *Cezmi Demir and Others*,§ 119);

- The investigating authorities must conduct an objective analysis of the cause of the incident, and 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*, § 99).

79. Finally, it must be noted that where the stage of investigation has led to the institution of criminal proceedings to establish criminal responsibility, the whole process, including the trial stage before the first-instance court, must satisfy the requirements of Article 17 of the Constitution (see *Filiz Aka*, no. 2013/8365, 10 June 2015, § 30).

b. Application of Principles to the Present Case

80. The applicants' relative A.K. was taken into custody for aiding and abetting the members of the terrorist organisation. He got sick during his custody and died as a result of *toxi infection of peritoneum* associated with *rectum perforation*. In their statements taken within the scope of the criminal investigation launched following A.K.'s death, some of the soldiers declared that a truncheon had been pumped in and out of A.K.'s anus. The Diyarbakır Chief Public Prosecutor's Office initiated criminal proceedings before the Assize Court against 15 commissioned officers for killing by means of torture. Although there is no final conviction against

the accused persons, the 1st Criminal Chamber of the Court of Cassation, after examining the appeal against the conviction imposed on the accused S.Ü. on 10 December 2015 as a result of the proceedings in connection with the offence of killing beyond intent by inflicting torture, considered that the objection of the accused person's lawyer against the proof of the offence was unjustified. Moreover, the investigation and criminal proceedings carried out into the death of the applicants' relative could not reveal that A.K. had died due to a reason which could not be attributable to State officials. Therefore, the substantive aspects of both the right to life and the prohibition of ill-treatment were violated.

81. The applicants not only complained about the ill-treatment inflicted on their deceased relative but they also contended that none of the soldiers reacted against the alleged ill-treatment and that their relative had not been immediately transferred to a health centre in the aftermath of the treatment at issue. However, the applicants did not submit a complaint to the effect that their relative had died as a result of a delay in the transfer of their relative to a health centre, and they could not demonstrate that they had raised during the impugned proceedings their allegations concerning a violation of the substantive aspect of the prohibition of ill-treatment in the context of the obligation of prohibition. Therefore, it has not been considered necessary to make a separate assessment as to these allegations.

82. The issue needed to be addressed after the finding of a violation of the substantive aspects of the right to life and the prohibition of ill-treatment is to establish whether the criminal procedure system, which was required to secure the effective implementation of the law safeguarding the right to life and the right of the individual to protect his corporeal and spiritual existence and to ensure accountability for the deaths and injuries occurring as a result of the intervention by or under the responsibility of public officials or taking place as a result of the acts of other persons, had functioned properly in the present case, in other words, whether the procedural aspects of the right to life and the prohibition of ill-treatment had been violated.

83. In the present case, the Bismil Chief Public Prosecutor's Office initiated a criminal investigation into the death of the applicants' relative immediately in the aftermath of being informed about the incident and took actions to ascertain the cause of the death and the circumstances surrounding the death. In line with the investigation report issued by the Bismil Chief Public Prosecutor's Office, the Diyarbakır Chief Public Prosecutor's Office initiated criminal proceedings against 15 persons. The applicants participated in the proceedings before the Assize Court as civil parties. The accused S.Ü. was convicted several times for killing the applicants' relative beyond intent by inflicting torture on him, but those convictions were quashed on various legal grounds by the Criminal Chamber. Accordingly, it has been considered that the applicants' allegation about the lack of impartiality on the part of the investigating authorities is manifestly ill-founded.

84. Moreover, the process concerning the decision to initiate proceedings lasted approximately 3 years, and the Assize Court was able to issue a decision of lack of jurisdiction at the end of a period of more than 9 years from the beginning of the proceedings. Accordingly, at the end of a period of more than 25 years, the person accused of the act inflicted on the applicants' relative benefited from the expiry of the statutory limitation period, which constitutes a ground for absolute impunity. In this regard, the judicial authorities who were involved in the impugned proceedings failed to show due diligence in carrying out the proceedings with reasonable diligence and promptness, in contravention of their substantial roles in the prevention of similar violations of the right to life and the prohibition of ill-treatment. Therefore, the procedural aspects of the right to life and the prohibition of ill-treatment were violated.

85. For the reasons explained above, the Court found violations of both substantive and procedural aspects of the right to life and the prohibition of ill-treatment.

4. Application of Article 50 of Code no. 6216

86. 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 removed. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favour of the applicant or the remedy of filing a case before the general courts may be shown. The court which is responsible for holding the retrial shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."*

87. The applicants requested TRY 750,000 in respect of pecuniary damage and TRY 1,750,000 in respect of non-pecuniary damage.

88. 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).

89. 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).

90. In cases where the violation results from a court decision or where the court could not provide redress for the violation, 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 the 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 redress 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 decision 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).

91. In the present application, it has been concluded that the substantive and procedural aspects of the right to life and the prohibition of ill-treatment were violated. Although the violation of the substantive aspects of the right to life and the prohibition of ill-treatment resulted from the acts of the public officials, the judicial authorities were not able to redress the violation. Moreover, the violation of the procedural aspects of the right to life and the prohibition of ill-treatment stemmed from the negligence on the part of the judicial authorities.

92. In this case, there is a legal benefit in re-trial for the purpose of redressing violations concerning the right to life as well as the prohibition of ill-treatment. Regard being had to the fact that a decision to discontinue the proceedings was issued due to the expiry of the statutory limitation period and that pursuant to Article 38 § 2 of the Constitution a higher statutory limitation period prescribed for the relevant offence by the law which subsequently entered into force could not be applicable to such offence which had been committed in the past, it is not possible to hold that a copy of the judgment be sent to the Assize Court.

93. Moreover, it is clear that the finding of a violation in the present case would be insufficient for the redress of the damages sustained by the applicants. For the redress of the violation and its consequences within the scope of the principle of *restitution*, it must be decided that the applicants be jointly paid a net amount of TRY 500,000 in respect of non-pecuniary damages, which cannot be compensated merely by the finding of a violation, due to the violation of the substantive and procedural aspects of the right to life and the prohibition of ill-treatment.

94. For the Court to award compensation in respect of pecuniary damage, there must be a causal link between the alleged pecuniary damage and the violation found and the applicants must submit to the Court the documents concerning the alleged pecuniary damage. Although the applicants stated that they had lost the support of their deceased relative and enclosed with their application form an expert report, which was obtained within the scope of the compensation proceedings brought by other persons, with a view to being taken into consideration as regards their pecuniary damages, they were not able to provide any document capable of proving their alleged pecuniary damages. Moreover, the applicants did not prefer to bring an action before the judicial authorities to request compensation for their pecuniary damages. Therefore, the applicants' claims for compensation in respect of pecuniary damage must be rejected.

95. The total litigation costs of TRY 3,894.70 including the court fee of TRY 294.70 and the counsel fee of TRY 3,600, as established on the basis of the documents in the case file, must be reimbursed to the applicants jointly.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 8 June 2021 that

A. The alleged violations of both substantive and procedural aspects of the right to life and the prohibition of ill-treatment be DECLARED ADMISSIBLE;

B. The substantive and procedural aspects of the tight to life and the prohibition of ill-treatment safeguarded by Article 17 of the Constitution were VIOLATED;

C. A net amount of TRY 500,000 be jointly PAID to the applicants in compensation for non-pecuniary damage and that the remaining compensation claims be REJECTED;

D. The total litigation costs of TRY 3.894,70 including the court fee of TRY 294.70 and the counsel fee of TRY 3,600 be JOINTLY REIMBURSED to the applicants;

E. 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;

F. A copy of the judgment be SENT to the 3rd Chamber of the Diyarbakır Assize Court and to the 1st Criminal Chamber of the Court of Cassation for information; and

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

ALPER TUNGA KURU AND ÖZCAN KAYA GÜVENÇ

(Application no. 2016/2486)

17 November 2021

On 17 November 2021, the First Section of the Constitutional Court found a violation of the procedural aspect of the prohibition of ill-treatment, safeguarded by Article 17 of the Constitution, in the individual application lodged by *Alper Tunga Kuru ve Özcan Kaya Güvenç* (no. 2017/34841).

THE FACTS

[8-21] At the material time, when a press statement, organised by the Union of Chamber of Turkish Engineer and Architects, was being read out in Kızılay Square of Ankara, the applicants were sitting in a cafe where they were subjected to the physical and verbal violence by the police officers entering the cafe.

The applicants filed a criminal complaint with the Chief Public Prosecutor's Office, stating that while they had been sitting in a café, the police officers had sprayed pepper gas inside, that the police officers had taken them outside to the yard by force, and that they had been subjected to physical violence and beaten by truncheon. The forensic reports issued in respect of the applicants indicated that the applicants had allegedly been battered by the police officers. The reports in question also noted minor injuries on the first applicant's body and sensitivity on the second applicant's body.

The Chief Public Prosecutor's Office acknowledged that the applicants' injuries might have been caused by the police intervention. They then requested the opinion of the Forensic Medicine Institution to determine the severity of the applicants' injuries. The report issued by the latter revealed that the first applicant was slightly injured which could be treated by simple medical intervention. No lesion was found on the second applicant's body.

The Chief Public Prosecutor's Office issued a decision of non-prosecution in respect of the suspect "*Ankara Security Directorate*" on the ground that "*security officers did not exceed the limits of their authority to use force*". The applicants unsuccessfully challenged the decision of the Chief Public Prosecutor's Office.

V. EXAMINATION AND GROUNDS

22. The Constitutional Court ("the Court"), at its session of 17 November 2021, examined the application and decided as follows:

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

23. i. The first applicant alleged that while sitting in a cafe together with his friends he had been held in the yard of the cafe for a certain time due to the police intervention, that he had been injured as a result of the physical violence inflicted on him, that no effective investigation had been carried out into this incident, and that the relevant evidence had not been gathered. In this connection, he complained about an alleged violation of the right to hold meetings and demonstration marches, the prohibition of ill-treatment, the right to personal liberty and security and the right to a fair trial.

ii. The second applicant alleged that he had not been able to participate in the reading out of the press statement organised by the Union of Chamber of Turkish Engineer and Architects due to the police barricades which he had encountered during his attempts to arrive at the area where the press statement would be read out, that while having a rest in a cafe he had been held in the yard of the cafe for a certain time due to the police intervention, that he had been injured as a result of the use of excessive force, and that a decision of non-prosecution had nevertheless been issued against those responsible without an inquiry into his complaint about the incident. In this connection, he complained about an alleged violation of the right to hold meetings and demonstration marches, the prohibition of ill-treatment, the right to personal liberty and security and the right to a fair trial.

24. In its observations, the Ministry noted that the Ankara Chief Public Prosecutor's Office ("the Chief Public Prosecutor's Office") had taken necessary investigative steps to ascertain the impugned incident, that the applicants had been allowed to take part in the investigation, that the investigation had been concluded within a reasonable time of 15 months, and that the State had thus fulfilled its procedural obligation expected from it in the investigation of such incidents. The Ministry also stated that there was no factual or legal reason to depart from the conclusion

reached by the Chief Public Prosecutor's Office in respect of the facts and qualification and that the applicants had not brought a full remedy action.

25. In their reply to the Ministry's observations, the applicants reiterated their statements in their application form and also stated that the legal remedies had been exhausted after the completion of the investigation carried out by the Chief Public Prosecutor's Office and that the violence inflicted on them had been revealed by the medical reports and the witness statements.

B. The Court's Assessment

1. The Scope of the Examination

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

> *"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."*

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

> *"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."*

28. 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).

29. It has been understood that the first applicant's allegations to the effect that he had been held for a certain time in the yard during the police intervention and that he had been subjected to physical violence as well as

his complaints concerning the judicial process should be examined within the scope of the prohibition of ill-treatment. The second applicant's similar complaints should also be assessed within the same scope.

30. In its judgments on the individual applications of *Ali Rıza Özer and Others* ([Plenary], no. 2013/3924, 6 January 2015, § 62) and *Onur Cingil* (no. 2013/7836, 16 April 2015, § 62), the Court set out the principles for examining the applications where the applicants alleged that both the prohibition of ill-treatment and the right to hold meetings and demonstration marches had been violated on account of the police intervention in the meeting and demonstration march by using disproportionate force. In the said judgments, the Court emphasized that the criminal investigation process carried out by the judicial authorities upon the complaint about ill-treatment by the police officers and the alleged violation of the right to hold meetings and demonstration marches must be examined as a whole (see *Mehmet Güneş*, § 59).

31. The application form and the investigation file do not contain any data concerning the relevant meeting/press statement. Moreover, the assessments of the investigating authorities do not contain information concerning the manner of the intervention against the applicants for participating in the demonstration and the applicants' conduct prior to and after the intervention. There is also no official information indicating that there was a link between the impugned intervention and the alleged press statement. In these circumstances, contrary to the second applicant's allegation, there is no fact indicating that the applicants were prevented from participating in the reading out of the press statement despite their attempts in this regard.

32. In this respect, the application form and its annexes as well as the available evidence in the investigation file do not make it possible to conduct an assessment as to the right to hold meetings and demonstration marches. Accordingly, a separate assessment will not be made as to the right to hold meetings and demonstration marches.

2. Admissibility

33. 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.

3. Merits

a. General Principles

34. 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*, 2013/293, 17 July 2014, § 110).

35. 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).

36. 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 (see *Cezmi Demir and Others*, § 114).

37. Within the scope of the State's positive obligation, the lack of an investigation or the conduct of an inadequate investigation may in itself amount to ill-treatment. Thus, regardless of the circumstances, the authorities must act as soon as an official complaint has been lodged. Even when no complaint has been made, an investigation must be started if there are sufficiently clear indications that torture or ill-treatment has been used. In this context, it is necessary to immediately launch an investigation which should be independent, diligent, prompt, under public scrutiny, and effective as a whole (see *Cezmi Demir and Others*, § 116).

38. 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 a compelling circumstance required by the Constitution (see *Cemil Danışman*, no. 2013/6319, 16 July 2014, § 99).

b. Application of Principles to the Present Case

39. The applicants filed a criminal complaint with the Chief Public Prosecutor's Office. In their statements, they similarly alleged that while they had been sitting in a public place the police officers had sprayed pepper gas inside, that the police officers had taken them outside to the yard by force, and that they had been subjected to physical violence and beaten by truncheon. The forensic reports issued in respect of the applicants at the relevant date indicated that the applicants had allegedly been battered by the police officers. The reports in question also noted minor injuries on the first applicant's body and sensitivity on the second applicant's body. The Chief Public Prosecutor's Office acknowledged that the applicants' injuries might have been caused by the police intervention.

40. Where an allegation of treatment in the hands of a State official in breach of Article 17 of the Constitution is submitted to the investigation authority, it is primarily necessary that such allegation must be arguable for the obligation to conduct an effective investigation to be triggered. For the allegation to be arguable, it must not only contain clear details concerning the facts but must also be supported by reasonable evidence (see, in the same vein, *Cihan Alpyürük,* no. 2017/37528, 29 September 2020, § 48).

41. When the applicants' petitions of complaint filed shortly after the incident and the medical reports submitted to support their injuries are assessed as a whole, it is clear that the applicants' allegations of ill-treatment were arguable. In these circumstances, it must be acknowledged that the applicants' expectation concerning the State's obligation to conduct an effective investigation was legitimate.

42. At this point, it must be noted that although medical reports constitute one of the most important evidence capable of establishing the material truth where allegations of ill-treatment are submitted, these reports alone would indisputably be insufficient to reveal the truth where the injuries remain at such a level as not to be established by a medical report or where such report is not obtained for a long time (similarly, see *Cihan Alpyürük*, § 50). Thus, it is clear that the finding of a sole sensitivity in the medical report issued in respect of the second applicant would not make his allegations no longer arguable.

43. It appears that an investigation was launched by the Chief Public Prosecutor's Office immediately upon the applicants' complaints and that the applicants' statements were taken to verify the complaints and evidence submitted by them. However, the sole inquiry conducted by the investigating authority was to request forensic opinion for the establishment of the nature of the applicants' injuries. In other words, the Chief Public Prosecutor's Office did not carry out an inquiry to establish the material truth and did not investigate whether there had been witnesses or camera footage showing the incident scene.

44. Furthermore, it is essential that the conclusions reached by investigating authorities must be based on an objective analysis of evidence so that confidence in justice should not be shaken and that there should not arise any doubt about the effective conduct of the investigation. Moreover, the attitude of the investigating authorities in the investigation into complaints concerning an alleged violation of the prohibition of ill-treatment due to the acts of public officials is of considerable importance to give the impression that such incidents will not be tolerated (see *Cihan Alpyürük*, § 55).

45. In the present case, having remained inactive in the identification of those responsible for the applicants' injuries, the Chief Public Prosecutor's Office neither ascertained the reason and manner of the police intervention against the applicants nor demonstrated the necessity of the intervention. Even though the decision of the Chief Public Prosecutor's Office noted that the police had intervened due to the applicants' "conduct disturbing public order", no explanation was made as to such conduct. Moreover, in view of the absence of any report, video footage or another evidence concerning the impugned intervention, the Chief Public Prosecutor's Office did not concretise the applicants' conduct requiring the police intervention.

46. At the end of the investigation, the Chief Public Prosecutor's Office concluded that the police officers' acts had fallen within the scope of their power to use force and thus issued a decision of non-prosecution against the relevant officers. In these circumstances, the Chief Public Prosecutor's Office considered that the acts causing injuries to the applicants had not constituted an offence, without discussing for which reason, how and at what level of severity force had been required to be used against the applicants.

47. Consequently, due to the shortcomings in the investigation, it is difficult at this stage to say that the conclusion reached by the investigating authorities was based on an objective assessment. It has been considered that the Chief Public Prosecutor's Office did not make necessary efforts to establish the material truth.

48. For these reasons, it must be held that the procedural aspect of the prohibition of ill-treatment guaranteed by Article 17 § 3 of the Constitution was violated.

49. In the light of the aforementioned findings, regard being had to the fact that there is no sufficient data (especially the nature of the medical reports) concerning the circumstances surrounding the incident complained of by the applicants due to the shortcomings in the investigation, it is not possible at this stage to make an examination of the substantive aspect of the prohibition of ill-treatment.

4. Application of Article 50 of Code no. 6216

50. 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 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."*

51. The applicants requested the initiation of a fresh investigation and compensation for pecuniary and non-pecuniary damages. The first applicant requested TRY 10,000 and TRY 15,000 in respect of pecuniary and non-pecuniary damages, respectively. The second applicant requested TRY 10,000 and TRY 80,000 in respect of pecuniary and non-pecuniary damages, respectively.

52. 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).

53. 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).

54. In cases where the violation results from the termination of the investigation due to reasons such as a decision of non-prosecution or a permanent search order, the Court holds that a copy of the judgment be sent to the relevant court for a fresh investigation with a view to redressing the violation and the consequences thereof pursuant to Article 50 § 2 of the 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 fresh investigation for redressing the violation. Therefore, in cases where the Court orders a fresh investigation in connection with its judgment finding a violation, the relevant chief public prosecutor's office does not enjoy any margin of appreciation in acknowledging the existence of a ground for a fresh investigation, as different from the practice of reopening of the proceedings set out in the procedural law. Thus, the chief public prosecutor's office to which such decision 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 fresh investigation (see *Mehmet Doğan*, §§ 58 and 59; *Aligül Alkaya and Others* (2), §§ 57-59, 66 and 67).

55. In the present application, it has been concluded that the procedural aspect of the prohibition of ill-treatment was violated due to lack of an effective investigation into the alleged use of unlawful force by the police officers. It has been understood that the violation of the procedural aspect of the prohibition of ill-treatment primarily resulted from the decision of the Chief Public Prosecutor's Office.

56. In these circumstances, there is legal interest in conducting a fresh investigation for redressing the consequences of the violation of the procedural aspect of the prohibition of ill-treatment. Such fresh investigation is intended for redressing the violation and the consequences thereof. In this scope, the procedure required to be conducted is to deliver a new decision eliminating the reasons leading the Court to find a violation and order a fresh investigation, 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 relevant chief public prosecutor's office for the conduct of a fresh investigation.

57. Moreover, it is clear that the finding of a violation of the prohibition of ill-treatment in the present case would be insufficient for the redress of the damages sustained by the applicants. For the redress of the violation and its consequences within the scope of the principle of *restitution*, it must be decided that the first applicant be paid TRY 15,000 in line with his request and the second applicant be paid TRY 27,000 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 ill-treatment.

58. For the Court to award compensation in respect of pecuniary damage, there must be a causal link between the alleged pecuniary damage and the violation found. Since the applicants failed to provide any document to that effect, their claims for pecuniary damage must be rejected.

59. The total litigation costs of TRY 3,839.50 including the court fee of TRY 239.50 and the counsel fee of TRY 3,600, as established on the basis of the documents in the case file, must be jointly reimbursed to the applicants.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 17 November 2021 that

A. The alleged violation of the prohibition of ill-treatment be DECLARED ADMISSIBLE,

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

C. A copy of the judgment be SENT to the Ankara Chief Public Prosecutor's Office (investigation no. 2013/107740) for the conduct of a fresh investigation so that the consequences of the violation of the prohibition of ill-treatment be redressed;

D. A net amount of TRY 15,000 be PAID to the first applicant and TRY 27,000 to the second applicant in compensation for non-pecuniary damages and that the remaining compensation claims be REJECTED;

E. The total litigation costs of TRY 3.839,50 including the court fee of TRY 239.50 and the counsel fee of TRY 3,600 be JOINTLY REIMBURSED to the applicants;

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

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

RIGHT TO PERSONAL LIBERTY AND SECURITY (ARTICLE 19)

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

KADRİ ENİS BERBEROĞLU (3)

(Application no. 2020/32949)

21 January 2021

On 21 January 2021, the Plenary of the Constitutional Court found violations of the right to stand for elections and engage in political activities as well as 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 (3)* (no. 2020/32949).

THE FACTS

[8-53] An investigation was launched against the applicant, who was a member of parliament (MP) at the material time, for disclosing certain information which was subsequently reported in a newspaper. 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 Türkiye ("GNAT") whereby Provisional Article 20 was added to the Constitution. The relevant article rendered the parliamentary immunity inapplicable for the investigations and prosecutions pending against MPs by its adoption date.

Following the lifting of the applicant's parliamentary immunity, the İstanbul Chief Public Prosecutor's Office indicted the applicant for various offences. At the end of the proceedings before the 14th Chamber of the İstanbul Assize Court and the regional court of appeal, the applicant was sentenced to 5 years and 10 months' imprisonment for collecting and disclosing confidential information relating to the security of the State.

While the applicant was detained pending trial, he was re-elected as an MP. Thereupon, he applied to the Court of Cassation for his release, stating that he was entitled to parliamentary immunity again. The Court of Cassation, in the first place, held that the applicant was not entitled to parliamentary immunity, and thus dismissed his request for stay of proceedings. Afterwards, the Court of Cassation upheld the decision of the regional court of appeal. The applicant lost his status as an MP after his sentence had been read out at the GNAT on 4 June 2020.

On 17 September 2020, the Plenary of the Court unanimously held that the applicant's right to personal liberty and security as well as his right to stand for elections and engage in political activities had been violated (no. 2018/30030).

The Court's judgment was sent to the 14th Chamber of the İstanbul Assize Court which subsequently held that there was no ground for a retrial. The applicant's lawyers appealed the decision. The 15th Chamber of the İstanbul Assize Court, having examined the appeal, concluded that there was no ground to make a decision on the appeal. The applicant ultimately filed an individual application for the third time.

V. EXAMINATION AND GROUNDS

54. The Constitutional Court ("the Court"), at its session of 21 January 2021, 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

55. The applicant maintained that following the judgment finding a violation in his case, which had been issued by the Court, the inferior courts should have put an end, without any hesitation, to the violation found; and that they, however, failed to do so, thus giving rise to a continued violation of his right to a fair trial and engage in political activities. The applicant further asserted that the refusal to execute the Court's violation judgment amounted to a manifest declaration of the constitutional provisions null and void.

56. The applicant maintained that the Court's violation judgments could not be, in constitutional or legal terms, subject to a constitutionality and lawfulness review by the inferior courts; and that in cases where the Court found a violation and ordered the redress of the consequences of this violation, the duty incumbent on the relevant authorities was to conduct a retrial in a way that would redress the violation and consequences thereof in consideration of the nature of the violation judgment. Accordingly, what was essential was to secure the immediate exercise of a given fundamental right that had been subject to an unjust and disproportionate interference. In this respect, any conflict or dispute among the judicial bodies cannot override this necessity. It was for the inferior court to eliminate and redress a given violation found and consequences thereof. The applicant further indicated that this necessity was not indeed tantamount to the fulfilment

of an order or instruction given to the courts within the meaning of Article 138 of the Constitution, but to the materialisation of the right of access to a court, in a state governed by rule of law, with a view to redressing the violation in question. He accordingly claimed that there had been a manifest violation of the right to a fair trial in conjunction with the right of access to a court, in breach of the relevant constitutional safeguards.

57. In its observations, the Ministry referred to the assessments included in the Court's violation judgment and the grounds specified in the decisions issued by the inferior courts. The Ministry also stated that there was no information demonstrating that the applicant had applied to the İstanbul Regional Court following the decisions of the incumbent assize courts.

58. In his counter-statements against the Ministry's observations, the applicant stated that the inferior courts procrastinated the redress of the violation through their decisions, which were issued following the Court's judgment finding a violation and were manifestly unconstitutional and unlawful; and that it would be unreasonable to expect him to file separate applications with different inferior courts so as to ensure the enforceability of the Court's violation judgment.

B. The Court's Assessment

59. 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 independently or in a political party, ….*
>
> *The exercise of these rights shall be regulated by 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 essence of the applicant's complaints under this heading is the alleged continued violation of the right to stand for elections and engage in political activities due to the inferior

courts' failure to execute the violation judgment previously rendered by the Court. Therefore, the Court has considered that the alleged violation of the right to a fair trial must be also examined under the right to stand for elections and engage in political activities.

1. Admissibility

61. In the Ministry's observations, it was noted that there was no information demonstrating that the applicant had applied to the 2nd Criminal Chamber of the İstanbul Regional Court. In this sense, it must be primarily ascertained whether the applicant exhausted the ordinary legal remedies.

62. For an individual application to be lodged with the Court, the ordinary legal remedies must be primarily exhausted. The individual application to the 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).

63. In the applicant's previous case, the Court found violations of his right to personal liberty and security due to his continued detention ordered in conjunction with his conviction decision although he had been entitled to parliamentary immunity, as well as of his right to stand for elections and engage in political activities due to his continued detention, the continuation of the proceedings and the upholding of his conviction. Having found that these violations resulted from a court decision, the Court ordered a retrial. It was also stated in the violation judgment that a copy of the judgment be sent to the 14th Chamber of the İstanbul Assize Court for a retrial, and the steps required to be taken by the first instance court were indicated therein.

64. However, the first instance court to which the violation judgment had been sent found no ground to conduct a retrial with respect to the applicant and accordingly ordered the continued execution of the applicant's conviction. Upon appeal by the applicant against the first instance decision, the 15th Chamber of the İstanbul Assize Court concluded that the competent authority to conduct a retrial was the 2nd

Criminal Chamber of the İstanbul Regional Court of Appeal, thus finding no ground to adjudicate the applicant's appeal.

65. As also stated in the violation judgment concerning the applicant, in cases where the Court orders a re-trial for the purpose of putting an end to the given violation, there is no need for a request by the applicant in order for a retrial to be conducted by the inferior courts. The judicial bodies receiving the Court's judgment finding a violation are to *ex officio* conduct a retrial (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 October 2019, §§ 58, 59; and *Kadri Enis Berberoğlu (2)*, §§ 134, 135). As a matter of fact, in the present case, the 14th Chamber of the İstanbul Assize Court decided whether to conduct a retrial not upon the applicant's request but following the communication of the Court's judgment finding a violation.

66. Besides, the applicant appealed the impugned decision of the 14th Chamber of the İstanbul Assize Court, thus having exhausted the ordinary legal remedy. Nor is there any finding that the applicant failed to fulfil any procedural requirement concerning the appellate process. Moreover, although the 15th Chamber of the İstanbul Assize Court, the appellate authority, found no ground to adjudicate the applicant's appeal request as the 2nd Criminal Chamber of the İstanbul Regional Court of Appeal was the competent authority to conduct a retrial, it neither made a decision on, nor took any step for, the referral of the applicant's case to the 2nd Criminal Chamber. Lastly, the 14th Chamber of the İstanbul Criminal Court did not also issue a decision to the effect that it was not the competent authority to deal with the applicant's request. Nor did it refer the applicant's case to the 2nd Criminal Chamber of the İstanbul Regional Court of Appeal.

67. In that case, there was no lack of due diligence attributable to the applicant in the inferior courts' refusal to conduct a retrial for the redress of the consequences of the violation found established by the Court with respect to the applicant. What is more, there is no available legal remedy that must be exhausted by the applicant so as to ensure the conduct of a retrial for putting an end to the violation. The applicant lodged an individual application within the prescribed time after he had appealed the first instance decision finding no ground to conduct a retrial and ordering the continued execution of his conviction, which was the ordinary legal remedy.

68. The alleged violation of the right to stand for elections and 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. Right to Stand for Elections and Engage in Political Activities

69. In its several judgments, the Court has stated that elections and political rights are among the requisites of the principle of a state governed by rule of law 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). It has made its assessments as to the right to elect, to stand for elections and to engage in political activities independently or in a political party, which is safeguarded by Article 67 of the Constitution, within this framework. Political rights also encompass the right to vote, to run as a candidate, to stand for elections, as well as to engage in political activities (see *Mustafa Ali Balbay*, no. 2012/1272, 4 December 2013, § 110; *Mustafa Hamarat* [Plenary], no. 2015/19496, 17 January 2019, § 45; and *Ömer Faruk Eminağaoğlu*, no. 2015/7352, 26 September 2019, § 52).

70. In democracies, 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*, § 127; and *Sebahat Tuncel (2)*, no. 2014/1440, 26 February 2015, § 39; and *Kadri Enis Berberoğlu (2)*, § 56). 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 act and take decisions on behalf of the people are parliamentary activities, and the performance of such duties by MPs is in pursuance of an overriding public interest and of crucial importance (see *Mustafa Ali Balbay*, § 128; and *Sebahat Tuncel (2)*, § 41).

71. 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 elections. In this context, the interference with the participation of an elected MP in legislative activities may constitute an interference not only with the 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; and *Kadri Enis Berberoğlu (2)*, § 59).

72. 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; *Sebahat Tuncel (2)*, § 42; and *Kadri Enis Berberoğlu (2)*, § 60).

ii. Whether the Court's Judgment Finding a Violation was Duly Executed

73. The failure to duly execute a judgment finding a violation, which has been issued by the Court, amounts to the continuation of the violation previously found. In this sense, it is also for the Court, which is authorised to examine individual applications, to deal with the alleged failure to duly execute a violation judgment of the Court (see *Şahin Alpay (3)*, no. 2018/10327, 3 December 2020, § 39; and *Aligül Alkaya and Others (2)*, § 52).

74. Therefore, the examination to be conducted by the Court will not involve a re-examination of the facts from the outset but will be confined to ascertaining whether the violation judgment that was already rendered has been duly executed and whether in this sense there has been a violation of the applicant's constitutional rights (see *Sıddıka Dülek and Others*, 2013/2750, 17 February 2016, § 70; *Mehmet Ali Ayhan (2)*, no. 2016/7967, 22 July 2020, § 54; and *Aligül Alkaya and Others (2)*, § 52).

75. The Plenary of the Court concluded on 17 September 2020 that there was a violation of the applicant's right to stand for elections and engage in political activities due to the continuation of the proceedings

against him, his continued detention ordered in conjunction with the conviction decision and the upholding of his conviction despite his being entitled to parliamentary immunity, which was contrary to Article 83 of the Constitution. The Court has also recalled therein that the incumbent first instance court was liable to conduct a re-trial, a procedure different from the practice of the re-opening of the proceedings employed in the procedural law, so as to eliminate the legal consequences arising from the upholding decision of the Court of Cassation without an examination as to the necessity of a retrial. It has been also pointed out that following the elimination of the consequences of the previous conviction decision, the discontinuation of the proceedings against the applicant be ordered in consideration of his being re-elected as a member of parliament as well as the inability to continue the proceedings pursuant to the imperative provision enshrined in Article 83 of the Constitution (see *Kadri Enis Berberoğlu (2)*, § 140).

76. In this sense, the Court ordered the circulation of a copy of the violation judgment to the 14th Chamber of the İstanbul Assize Court for a re-trial with a view to redressing the consequences of the violation. However, on 13 October 2020 the first instance court found no ground to conduct a retrial with respect to the applicant. Upon appeal, the 15th Chamber of the İstanbul Assize Court concluded that the venue to deal with any claim with respect to the re-trial request was the 2nd Criminal Chamber of the İstanbul Regional Court of Appeal and accordingly found no ground to make a decision as it was not entitled to do so as an appellate authority.

77. It therefore appears that the 14th and 15th Chambers of the İstanbul Assize Court failed to fulfil, on the basis of different considerations, the necessary constitutional and legal requirements concerning the execution of a violation judgment issued by the Court. Therefore, the applicant's conviction terminating his office as a member of parliament was not revoked, and the execution of his sentence was continued, thus leading to his continued conviction. As a result, it has been concluded that the inferior courts failed to duly execute the Court's judgment finding a violation in the applicant's case.

iii. Compliance with the Wording of the Constitution

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. 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. 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 (see *Kadri Enis Berberoğlu (2)*, §§ 68, 69).

80. As a matter of fact, along with its other tasks and duties set forth in Article 148 of the Constitution, the Court is entrusted with the task and authority to examine and adjudicate, through individual application, any alleged violation of fundamental rights and freedoms safeguarded by the Constitution, upon the exhaustion of the ordinary legal remedies. Article 153 of the Constitution points to the binding nature of the Court's decisions and judgments in terms of the legislative, executive, and judicial organs, the administrative authorities, as well as natural and legal persons. This provision stipulating the binding nature of the Court's decisions and judgments is an additional safeguard that is also applicable to the

constitutional rights and freedoms found to have been violated through individual application.

81. In the present case, the primary issue to be resolved is to assess whether the grounds raised by the inferior courts so as not to execute the Court's judgment finding a violation are compatible with the wording of the Constitution. If it is found that the grounds in question are incompatible with the wording of the Constitution and there has been a breach of Article 153 § 6 of the Constitution, it may be then concluded that the applicant's right to stand for elections and engage in political activities safeguarded by Article 67 of the Constitution was violated. As in the case of constitutionality review, the Court is the competent authority to interpret the constitutional provisions, in a final and binding manner, also in the examination of individual applications (see *Kadri Enis Berberoğlu (2)*, § 71).

iv. Failure to Execute the Judgments of the Court and Reaching a Verdict to the Contrary

(1) Relevant Constitutional Provisions

82. Article 11 § 1 of the Constitution titled *"Supremacy and binding force of the Constitution"* reads as follows:

> *"The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals."*

83. Article 138 § 5 of the Constitution titled *"Independence of the courts"* reads as follows:

> *"Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution."*

84. Article 48 of the Constitution titled *"Functions and powers"* reads, in so far as relevant, as follows:

> *"(Amended on 12 September 2010, by Article 18 of Law no. 5982) The Constitutional Court shall (…) decide on individual applications…*

…

(Paragraph added on 12 September 2010, by Article 18 of Law no. 5982) Everyone may apply to the Constitutional Court on the ground that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights, which are guaranteed by the Constitution, has been violated by public authorities. In order to make an application, ordinary legal remedies must be exhausted.

(Paragraph added on 12 September 2010, by Article 18 of Law no. 5982) The issues that are to be dealt with in appeal review cannot be subject of an examination through individual application.

(Paragraph added on 12 September 2010, by Article 18 of Law no. 5982) Procedures and principles concerning the individual application shall be regulated by law.

…"

85. The first sentence of paragraph one, and paragraph five of Article 153 of the Constitution titled *"Decisions of the Constitutional Court"* read as follows:

"The decisions of the Constitutional Court are final.

Decisions of the Constitutional Court shall be published immediately in the Official Gazette, and shall be binding on the legislative, executive, and judicial organs, on the administrative authorities, and on persons and corporate bodies."

(2) Duties and Powers of the Court within the scope of Individual Application

86. According to Article 148 § 3 of the Constitution and Article 45 § 1 of Law no. 6216, every person may apply to the Constitutional Court alleging that the public authorities have violated any one of his/her fundamental rights and freedoms safeguarded under the Constitution, which falls into the scope of the European Convention on Human Rights and its additional protocols, to which Türkiye is a party. Pursuant to

Article 148 § 1 of the Constitution, the Court is authorised to adjudicate these applications. In this sense, the Court is to examine and adjudicate individual applications involving alleged violations of any fundamental rights and freedoms that are within the joint protection realm of the Constitution and the Convention. The Court conducts such examination in line with the constitutional safeguards inherent in these fundamental rights and freedoms.

87. Article 49 § 6 of Law no. 6216 sets the limits of the powers of the Constitutional Court as to individual applications. Accordingly, the Court's assessment is confined to the ascertainment of *"whether a fundamental right is violated or not"* and *"the way how a given violation will be redressed"*. Pursuant to Article 50 § 1 of the same Law, in cases where a judgment finding a violation has been rendered, the steps required to be taken for the elimination and redress of the violation and its consequences are indicated; however, no assessment of expediency can be done. In addition, it should be recalled that as set forth in Article 148 § 4 of the Constitution and Article 49 § 6 of Law no. 6216, the issues that must be dealt with in appellate review cannot be subject-matter of individual application. This last rule prohibits, through constitutional and statutory provisions, the examination -by way of individual application mechanism- of any alleged unlawfulness falling outside the scope of individual application. However, this prohibition cannot be considered to concern the safeguards laid down in the Constitution with respect to fundamental rights and freedoms (see *Şahin Alpay (2)* [Plenary], no. 2018/3007, 15 March 2018, § 53).

88. In this regard, as also expressed by the Court in its several judgments, it is for the inferior courts to apply and interpret the statutory provisions and to establish the facts and assess the evidence unless there is an inference with fundamental rights and freedoms. 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 (see *Zübeyde Füsun Üstel and Others* [Plenary], no. 2018/17635, 26 July 2019, §§ 74-76; *Hakan Yiğit*, no. 2015/3378, 5 July 2017, § 47; *Ahmet Sağlam*, no. 2013/3351, 18 September 2013, § 42; *Sabahat Beğik and Others* [Plenary], no. 2014/3738, 21 December 2017, § 23 . 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 or an assessment of expediency (see *Şahin Alpay (2)*, § 53; *Ferhat Kara* [Plenary], no. 2018/15231, 4 June 2020, § 148; *M.B.* [Plenary], no. 2018/37392, 23 July 2020, § 82; *Nurettin Deniz*, no. 2018/17707, 21 July 2020, § 63).

89. Otherwise, the Court's power and duty to adjudicate individual applications would become dysfunctional, and this would not comply with the consideration that the individual application is an effective remedy, which is explicitly expressed in Article 148 of the Constitution and the legislative intent of the respective constitutional amendment. Considering an examination to be carried out within the scope of the safeguards pertaining to fundamental rights and freedoms enshrined in the Constitution as an appellate review will undoubtedly prevent the Court from fulfilling its duty to examine and adjudicate individual applications (see *Şahin Alpay (2),* § 54).

90. As a matter of fact, it is provided in Article 50 § 1 of Law no. 6216 that in conclusion of an examination to be made on the merits of an individual application, it will be decided whether the applicant's right has been violated or not; and that if a violation is found, the steps to be taken in order to redress the violation and its consequences will be indicated. Accordingly, the Court's powers and duties within the scope of individual applications are not limited to the determination of whether the right has been violated or not, but they also include the indication of the steps and actions to be taken in order to redress the violation and its consequences (see *Şahin Alpay (2)*, § 56; and *Aligül Alkaya and Others (2)*, § 53).

91. In the light of these considerations, the Court examining an action for annulment pertaining to Article 50 of Law no. 6216 has stressed that the remedy of individual application is not only an action for determination of whether a right has been violated or not, it is also an action that will have legal effects such as preventing the violation of the individuals' fundamental rights and freedoms by the public force, and

where a violation is found, redressing the consequences of the violation or redressing the damage occurred. It has been further stated therein that including in the Law the necessary procedural provisions applicable to the individual applications, the legislator has intended to enable the Constitutional Court not only to determine the violations but also to issue judgments that might redress these violations. It has been also noted that there is no rule in Article 148 of the Constitution which provides that the Constitutional Court's power in terms of individual applications is limited to finding a violation (see the Court's judgment no. E.2011/59, K.2012/34, 1 March 2012).

92. The relevant Law vests the Court with a broad discretion in determining the way to redress the violation and its consequences. The only limitation in respect thereof is the provision set out in Article 50 § 1 *in fine* of Law no. 6216 stating that the Constitutional Court cannot render decisions or judgments in the nature of an administrative act and action. Accordingly, such limitation implies that in determining the way to redress the violation and its consequences, the Court cannot perform an act by substituting itself for the administration (see *Şahin Alpay (2)*, § 57).

(3) Procedure of Duly Execution of the Court's Judgments Finding a Violation

93. After finding a violation in a given case and indicating the steps for the redress of the violation, the Court communicates its judgment to the relevant authorities to take the necessary steps. The execution of a judgment in which the Court finds a violation of any fundamental right and freedom is a necessity resulting from the Court's authority and duty to adjudicate the individual applications. A judicial remedy incapable of yielding final and binding decisions cannot be regarded as effective. Indeed, the ECHR, which concludes in its *Hasan Uzun v. Türkiye* judgment that the individual application to the Constitutional Court is a domestic remedy required to be exhausted before lodging an application with it, makes a reference to Article 153 § 6 of the Constitution therein and accordingly takes into account the binding effect of the Constitutional Court's judgments over all natural and legal persons, as well as the state organs (see above § 55; and *Şahin Alpay (2)*, § 67). In case of any act to

the contrary, it cannot be possible to achieve the objective sought to be attained by introducing individual application mechanism before the Court, namely to establish an effective domestic remedy for the alleged violation of fundamental rights and freedoms and, thereby, to decrease the number of applications before the ECHR against Türkiye.

94. It should be, however, underlined that the judicial bodies to implement the provisions of the procedural law regarding civil and criminal jurisdiction or administrative jurisdiction are the inferior courts and the supreme courts engaging in appellate review, namely the Court of Cassation and the Council of State. Therefore, the Court focuses in essence on the elimination and redress of any violation of fundamental rights and freedoms it has found and consequences thereof, rather than the ascertainment of the administrative body or judicial authority that will redress the given violation and its consequences. In this regard, the Court, in principle, leaves a margin of appreciation to the relevant authorities in respect of the questions as to how and by which means the violation and its consequences would be redressed (see *Savaş Çetinkaya*, no. 2012/1303, 21 November 2013, § 67). Having regard to the nature of the judgment finding a violation, the relevant authority takes necessary actions with a view to redressing the violation and its consequences.

95. In certain circumstances, the Court taking into account the nature of the concrete case may point out the principles as to how and by which means the violation and its consequences would be redressed (see *Bizim FM Radyo Yayıncılığı ve Reklamcılık A.Ş.* [Plenary], no. 2014/11028, 18 October 2017, §§ 71 and 72). In such case, the relevant authorities must act in line with these explicated principles. However, in exceptional cases, the relevant authorities may be left, by the very nature of the violation found, with a single choice for the redress of the consequences thereof. In such cases, the Court clearly points out the measure required to be taken for redress of the violation and its consequences, and the relevant authority accordingly takes this measure (see *Kenan Yıldırım and Turan Yıldırım*, no. 2013/711, 3 April 2014, § 82).

96. In this sense, in the present case, the Court has indicated two steps required to be taken by the relevant first instance court to which

it communicated its judgment finding a violation in the applicant's case for putting an end to the violation of his right to stand for elections and engage in political activities and redressing the consequences thereof. The first step required to be taken by the first instance court is to conduct a re-trial, and the other step is to order the discontinuation of the proceedings against the applicant (see *Kadri Enis Berberoğlu (2)*, §§ 134, 140).

97. The *retrial* ordered by the Court in conjunction with a violation judgment is a procedure different from the *re-opening of the proceedings* that is a procedure employed in the procedural law. In this context, the procedure of re-opening of the proceedings, which is set forth comprehensively in Articles 311-323 of the Code of Criminal Procedure no. 5271 (Law no. 5271), dated 4 December 2004, mainly involves these three aspects: First, the incumbent court receiving the request for the re-opening of the proceedings decides on whether to accept this request after completing the procedural processes laid down in the Law no. 5271. Second, in cases save for those set forth in Article 322, the court orders the holding of a hearing along with the re-opening of the proceedings pursuant to Article 321 § 2 of the Law no. 5271. Third, pursuant to Article 323 of the Law no. 5271, the court would either uphold the former verdict or revoke it and deliver a new verdict at the end of the proceedings to be re-opened.

98. The judicial procedure required to be performed by the inferior courts so as to put an end to, and redress, a continuing violation upon the Court's judgment finding a violation is called in its entirety *"retrial"* in Article 48 of Law no. 6216. The process of *retrial* ordered by the Court is different from the process of *re-opening of the proceedings* prescribed in the procedural laws and has the following characteristics:

i. In cases where the Court decides to communicate its violation judgment to the relevant inferior court to conduct a retrial for the redress of the violation and consequences thereof, the inferior court is liable to conduct a retrial without awaiting for an application by the relevant parties (see *Aligül Alkaya and Others (2)*, § 58; and *Kadri Enis Berberoğlu (2)*, § 134).

ii. The inferior court receiving the order to conduct a retrial has no discretion with regard to the existence of any ground justifying the retrial. Nor is there a 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; and *Kadri Enis Berberoğlu (2)*, § 134).

iii. That is because, as set forth in the first sentence of Article 50 § 1 of Law no. 6216, which provides for *"If the violation found by the Court results from a court decision, the case file shall be sent to the relevant court for holding the retrial so as to redress the violation and the consequences thereof"*, the Court is itself authorised to order a retrial in conjunction with a violation judgment.

iv. Therefore, there is no need for the inferior court to which the case-file has been sent for a retrial to decide to conduct a retrial. Instead, the inferior court automatically initiates the retrial procedure (see *Aligül Alkaya and Others (2)*, § 59; and *Kadri Enis Berberoğlu (2)*, § 135).

v. The retrial ordered by the Court could not be construed to necessarily entail the holding of a hearing. Pursuant to Article 50 § 2 *in fine* of Law no. 6216, which provides for *"the court, which is responsible for holding the retrial, shall deliver a decision over the case-file, if possible, in a way that will remove the violation and its consequences that the Constitutional Court has explained in its violation judgment"*, the violation found by the Court may be redressed either by performing the necessary judicial processes over the case-file or by conducting a retrial through a hearing, in consideration of the nature of process to be performed and the type of the actions required to be taken for the redress of the violation as indicated by the Court or the facilities and requirements of the respective judicial remedy. In determining through which means a given violation will be redressed, an assessment must be made in consideration of the nature of the violation (see *Aligül Alkaya and Others (2)*, § 59).

vi. The relevant authority may, in principle, determine the steps required to be taken for the redress of the violation and consequences thereof. However, as set forth in Article 50 § 1 of Law no. 6216, which provides for *"In cases where a violation judgment has been rendered, what is required for the redress of the violation and the consequences thereof shall be*

ruled", in cases where the Court indicates the steps required to be taken for the redress of the violation and its consequences in its judgment finding a violation, the first instance court or the bodies wielding public power has no discretion to assess the exigency or legitimacy of "*the steps to be taken"*. In the event that the Court clearly points out the measure required to be taken for redress of the violation and its consequences, the relevant authority is to take the necessary measure (see *Kenan Yıldırım and Turan Yıldırım*, § 82; and *Aligül Alkaya and Others (2)*, § 59).

vii. Accordingly, the court receiving such a judgment is constitutionally and legally obliged not to question the "expediency" or "legitimacy" of the violation judgments rendered by the Court, but to initiate the judicial processes within the scope of the facilities and necessities of the relevant procedural law so as to *redress the violation and its consequences* (see *Wikimedia Foundation Inc. and Others* [Plenary], no. 2017/22355, 26 December 2019, § 102; *Mehmet Doğan* [Plenary], no. 2014/8875, 7 June 2018, §§ 58, 59; and *Aligül Alkaya and Others (2)*, §§ 57-59, 66-67).

viii. Lastly, Article 304 of Code of Criminal Procedure no. 5271, titled *"the authority to which the judgments of the Court of Cassation will be communicated"* in essence regulates the relationship between the first instance courts and the Court of Cassation and does not have any direct binding effect with respect to the Constitutional Court. In Article 50 § 2 of the Law no. 6216, it is set forth that the court liable to conduct a retrial shall be determined by the Court. In this sense, pursuant to this provision, in cases where a retrial is ordered for the redress of the given violation and consequences thereof, the case-file must be communicated not to *the court that has issued the decision giving rise to the impugned violation*, but to *the relevant court*. Therefore, given the circumstances of a given case, nature of the violation and the consequences arising from by the violation and required to be redressed, the Court is entitled to determine the court that will conduct the retrial by also taking into consideration the provisions of relevant procedural law.

99. In the light of these explanations, given the particular circumstances of the present case, the step required to be taken by the first instance court to which the Court communicated its violation judgment is to initiate a

retrial and to revoke the decision on the applicant's conviction. In this context, as the appellate request was dismissed on the merits pursuant to Article 302 § 1 of Law no. 5271 on the ground that the judgment of the regional court of appeal, which had been appealed, was found lawful, the case-file was sent to the incumbent first instance court by the Court of Cassation pursuant to Article 304 § 1 of the same Law no. 304.

100. It is also evident that in order for the applicant to enjoy his right to stand for elections and engage in political activities, the stay of the proceedings against him must be ordered as per Article 83 § 4 of the Constitution. However, after the initiation of the retrial process, the relevant courts have the discretion with respect to the referral of the case-file to another authority, giving instruction to, or making a request from, the other authorities or the performance of other judicial acts and actions required by procedural law, for the purposes of taking the other steps indicated by the Court in its violation judgment for the redress of the violation.

(4) The Constitutional Consequences of the Failure to Execute the Court's Judgments

101. As stated in Article 2 of the Constitution, the Republic of Türkiye is a state governed by rule of law. In such state, court decisions concerning the settlement of disputes cannot be considered to be non-binding. Indeed, the last paragraph of Article 138 of the Constitution provides for that the legislative and judicial bodies, as well as the administration, are to comply with the court decisions. Moreover, the right to a fair trial is safeguarded by Article 36 of the Constitution. One of the elements inherent in this right is the right of access to a court, which also encompasses the right to bring a dispute before a court, as well as the right to the enforcement of a court decision. Although the enforcement of court decisions does not fall into the scope of trial, it is a supplementary element that ensures the materialisation of the outcome of the trial. In case of the non-enforcement of the decision, the trial would make no sense (see the Constitutional Court's decision no. E.2014/149 K. 2014/151, 2 October 2014; and *Ahmet Yıldırım*, no. 2012/144, 2 October 2013, § 28).

102. Rendering a final court decision, which is of a binding nature,

dysfunctional subsequently by other courts or other State organs wielding public power also sets aside the safeguards inherent in the right to a fair trial. In this context, the failure to enforce the Court's judgments undoubtedly amounts to a deliberate and gross breach of the right to a fair trial. As a matter of fact, Article 153 *in fine* leaves no discretion to the legislative, executive and judicial organs, as well as the administrative authorities, regarding the compliance with the Court's judgments and their full and proper enforcement without any alteration. Nor does it introduce any exception with respect thereto.

103. The non-enforcement, or the delayed enforcement, of judicial decisions in general and those of the Constitutional Court in particular by the relevant public authorities have a significant and deep bearing on the individual's life and the functioning of the State. Primarily, in case of any failure to duly enforce the judicial decisions, individuals cannot be ensured to fully enjoy rights and freedoms offered through judicial decisions (see *Şahin Alpay (2)*, § 61). In a state governed by rule of law, the failure to timely enforce the decisions of judicial authorities, which perform an essential duty for the maintenance of individuals' trust and respect for the legal system, and thereby rendering these decisions inconclusive cannot be accepted (see *Ferda Yeşiltepe* [Plenary], no. 2014/7621, 25 July 2017, § 36). In a state of law, the binding effect of the court decisions regarding the resolution of disputes and the necessity to duly enforce these decisions are unquestionable. Any consideration to the contrary will render it impossible to make mention of a state of law. Therefore, the State is bound to ensure the timely and proper enforcement of the judicial decisions and to prevent any loss of right or interest likely to occur to the detriment of the individuals, thus ensuring the maintenance of their trust and respect towards the legal system.

104. The second consequence of the failure to enforce the Court's judgments results from the impairment of the principle of rule of law. This principle cannot be realised by the mere determination of unlawfulness, it also requires elimination of all consequences thereof, as well as the enforcement of court decisions in a timely manner (see the Court's judgment no. E.2014/149 K. 2014/151, 2 October 2014). The non-enforcement of the judgments where the Court finds a violation

of fundamental rights and freedoms within the scope of the individual application mechanism would further deepen the inconsistency with the rule of law principle within the meaning of the right of access to a court. As a matter of fact, the individual application mechanism is a means of last resort through which those alleging that their fundamental rights and freedoms have been violated seek a remedy after exhausting all available remedies. The non-enforcement of judgments that are rendered through this mechanism impairs the trust of individuals and society in state of law (see *Şahin Alpay (2)*, § 62) and causes damage to basic constitutional order.

105. Undoubtedly, the Turkish Constitution embraces an understanding of democracy and rule of law protecting individuals' rights and freedoms especially against the bodies wielding public power. In this sense, the legislative intent of Article 2 of the Constitution where the Turkish Republic is defined, *inter alia*, as a democratic state clearly points out this consideration. Accordingly, the Constitution adopts *"a democratic regime which offers best protection to human dignity, ensures and guarantees it among the political regimes"*.

106. Another principle enshrined in the Turkish Constitution so as to secure the supremacy and binding nature of the constitution is to establish and structure the country's legal order by taking the hierarchy of norms as a basis, as the case for the other contemporary countries. As a natural consequence of the hierarchy of norms implicitly cited in Articles 137 and 138 of the Constitution, the superior provision of law is binding for all inferior provisions, which must comply with the superior laws. In Article 11 of the Constitution, titled *"Supremacy and binding force of the Constitution"*, which provides for *"The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals"*, it is explicitly stated that the Constitution is on the top of this hierarchy. The laws that are included within this hierarchical structure are abided by as they are considered to be constitutional. In the same vein, in democratic societies, the trust that the decisions of the bodies wielding public power comply with the Constitution, which is on the top of the hierarchy of norms, renders legitimate the decisions of these bodies. Such legitimacy

must be constantly ensured in all actions and decisions of the bodies wielding public power.

107. Therefore, as a consequence of the necessity for the continuous maintenance of democratic legitimacy, the individual application to the Court has been adopted as an effective judicial mechanism. The reason for its being an effective mechanism is not related merely to its capacity to overcome technical issues. It rather depends on the effectiveness of the Court itself, namely its capacity to redress a given violation of any fundamental rights and freedoms caused by the bodies wielding public power as well as the consequences thereof.

108. In cases where the Court cannot perform its function to protect the fundamental rights and freedoms, which is entrusted to the Court by the Constitution, an effective judicial mechanism cannot be ensured. More importantly, the failure of the public bodies to enforce the Court's judgments, despite the explicit provision pointing to the *"final"* and *"binding"* nature of these judgments as set forth in Article 153 § 6 of the Constitution, not only overshadows the constitutional legitimacy of the decisions of these bodies, but also renders dysfunctional the principle of *supremacy of the constitution*, which is the fundamental aim of the constitutional jurisdiction in a democratic state governed by rule of law and requires all actors wielding public power to act in accordance with the constitutional principles and norms.

109. For such crucial reasons, the Court is not designated, in the Constitution, as an organ delivering advisory opinions, as distinct from the other certain constitutional or legal institutions. As the decisions and judgments delivered by the Court are not in the form of recommendation or advisory resolutions that may be complied with by the public bodies and courts if they wish, a particular reference is made in the Constitution to the binding nature of the Court's decisions and judgments.

110. In Article 153 § 6 of the Constitution, it is prescribed that the Constitutional Court's judgments shall have a binding effect on the legislative, executive and judicial bodies, administrative authorities, as well as on natural and legal persons. The same provision is also set out in Article 66 § 1 of Law no. 6216. As distinct from Article 138 of the

Constitution, it is indicated in that provision that the Court's judgments shall have a binding effect also on the judicial authorities. In this respect, there is no hesitation in respect of the binding nature of the Court's decisions including those rendered through individual application mechanism. Indeed, regard being had to the judgments rendered by the Court of Cassation and the Council of State that emphasize the binding nature of the individual application judgments of the Constitutional Court, it also appears that, in this respect, there is no practical problem in the Turkish legal system (see above §§ 50-53).

111. In Article 153 § 1 of the Constitution, it is set forth that the Court's judgments are final. The same provision is included also in Article 66 § 1 of Law no. 6216. Neither the Constitution nor the above-mentioned Law points out an authority to which an application may be lodged against the Constitutional Court's judgments. Accordingly, the Constitutional Court is exclusively vested with the authority to examine and to adjudicate, in a final and binding manner, the acts, actions and omissions of the public authorities (see *Şahin Alpay (2)*, § 65).

112. In this context, in cases where the Court exercising jurisdiction on behalf of the Turkish nation through the power conferred upon it by Article 9 of the Constitution finds a violation of any fundamental rights and freedoms in an individual application, any authority has no capacity and power to examine and assess the constitutionality or lawfulness of this violation judgment. Any consideration to the contrary contradicts with the second sentence of Article 6 § 3 of the Constitution, which provides for *"No person or organ shall exercise any state authority that does not emanate from the Constitution"*.

(5) Final Assessments

113. In the present case, the 14th Chamber of the İstanbul Assize Court to which the Court's violation judgment had been communicated found no ground to conduct a retrial with respect to the applicant and ordered the continued execution of his conviction, asserting that the Court had interfered, through its violation judgment, with the jurisdiction of the inferior courts. On the applicant's appeal, the 15th Chamber of the İstanbul Assize Court examined the case and found no ground to adjudicate the

applicant's appeal on the ground that the competent authority to conduct a retrial was the 2nd Criminal Chamber of the İstanbul Regional Court of Appeal.

114. There is no exception to the provision regarding the binding nature of the Court's judgments, which is laid down in Article 153 of the Constitution. In the absence of any such provision introducing an exception, the courts as well as the other bodies wielding public power cannot abstain from enforcing or complying with the Court's judgments.

115. As is seen, the Constitution authorises neither the public authorities nor the 14th Chamber of the İstanbul Assize Court in the present case, which are bound to enforce the Court's judgment, to refuse the enforcement, or to question the binding nature, of the Court's judgments. The binding nature of the Court's judgments covers both the steps indicated by the Court for the redress of the violation and consequences thereof and the designation of the relevant authority that would redress the violation and its consequences, unlike what was asserted by the 15th Chamber of the İstanbul Criminal Court (see above § 98/viii). Given the explicit provision in the Constitution and the functions of the individual application mechanism, the refusal to enforce the Court's judgments and the failure to redress the violation and its consequences by following the methods envisaged by the procedural law are tantamount to an interpretation and practice, which are clearly contrary to the wording of Article 153 of the Constitution and against the will of the constitution-maker.

116. For these reasons, the inferior courts' failure to redress the violation and its consequences found in the applicant's case by conducting a retrial –despite the Court's judgment finding a violation of the applicant's right to stand for elections and engage in political activities safeguarded by Article 67 of the Constitution due to his continued detention pending appeal process and upholding of his conviction although he was re-elected as a member of parliament, which was in breach of Article 83 of the Constitution safeguarding parliamentary immunity– falls foul of the safeguards enshrined in Article 67 of the Constitution.

117. Consequently, the Court found a violation of the right to stand for elections and engage in political activities due to the non-enforcement of

the Court's violation judgment, which was also in breach of the safeguards inherent in the right of access to a court.

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

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

118. The applicant maintained that his right to personal liberty and security had been violated, stating that the inferior courts had failed, in a manifestly unlawful and arbitrary manner, to enforce the Court's violation judgment and refused to conduct a retrial, as well as ordered the continued execution of his sentence, which led to his continued placement as a convict in an open penitentiary institution.

119. In its observations, the Ministry referred to the Court's assessments with respect to the applicant in its violation judgment and to the grounds relied on by the inferior courts in their decisions.

120. In his counter-statements against the Ministry's observations, the applicant asserted that the inferior courts led to the procrastination in the redress of the violation found by the Court in his case through their decisions, which were blatantly unconstitutional and unlawful.

2. The Court's Assessment

121. Article 19 §§ 1 and 2 of the Constitution, titled *"Personal liberty and security"*, of the Constitution provides, in so far as relevant, 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; (…)"

122. The applicant's complaints under this heading are, in essence, related to his unlawful continued placement in the penitentiary institution as a convict as the inferior court found no ground to conduct a retrial and to order the stay of execution of his sentence despite the Court's violation

judgment necessitating the conduct of a retrial so as to the redress the violation and its consequences. Therefore, his allegations within this scope must be examined under the right to personal liberty and security within the context of Article 19 § 2 of the Constitution.

a. Admissibility

123. It is obvious that the conclusion to the effect that regarding the right to stand for elections and engage in political activities (see above §§ 65-69), the available legal remedies were exhausted on the grounds that the incumbent first instance court to which the violation judgment rendered by the Court in the applicant's case had been communicated refused to conduct a retrial and ordered the continued execution of his conviction and that the ordinary remedy whereby the first instance decision had been appealed was exhausted is applicable also with respect to the right to personal liberty and security.

124. For these reasons, 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

125. 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).

126. 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 by virtue of the conviction decisions to be issued by judicial authorities is

not in breach of the right to personal liberty and security (see *Tahir Canan (2)*, no. 2013/839, 5 November 2014, § 33).

127. On the other hand, in case of any circumstance affecting the lawfulness of the post-conviction detention, it may lead to the violation of the right to personal liberty and security even though the detention has been ordered for the *"execution of sentences restricting liberty and implementation of security measures ordered by courts"*. Especially in cases where there is an obstacle, emanating from the Constitution or laws, to the continued detention or a judicial decision necessitating the discontinuation of the detention, the link between the deprivation of liberty and conviction decision is no longer available. In such cases, the continued detention gives rise to the deprivation of liberty in the absence of a legal basis.

ii. Application of Principles to the Present Case

128. On 20 September 2018, the 16th Criminal Chamber of the Court of Cassation, dealing with the appellate review of the applicant's conviction, upheld his conviction but at the same time ordered his release by suspending the execution of the final conviction decision until the expiry of the applicant's term of office in his capacity as a member of parliament pursuant to Article 83 § 3 of the Constitution.

129. On 4 June 2020, when the applicant's conviction decision was read out at the General Assembly of the Turkish Parliament, he lost his status as a member of parliament. Then, his placement in the penitentiary institution was ordered by the prosecutor's office on 5 June 2020 for the execution of his conviction decision. Despite the violation judgment rendered by the Court with respect to the applicant, the first instance court refused to conduct a retrial and ordered the continued execution of his conviction, which led to the continued placement of the applicant in the penitentiary institution as a convict. In this sense, the subject-matter of the interference with the applicant's right to personal liberty and security in the present case is the continued execution of the applicant's conviction and thus of his status as a convict, despite the Court's judgment to the contrary. Besides, as the applicant is still a convict and the execution of his sentence is pending, his temporary leave from the penitentiary institution on

grounds of the ongoing pandemic does not put an end to the interference with his right to personal liberty and security.

130. The Court found violations of the applicant's right to personal liberty and security as well as right to stand for elections and engage in political activities due to the continuation of the proceedings conducted against the applicant pending his detention and upholding of his conviction, stating that the applicant should have been entitled to parliamentary immunity for being re-elected as a member of parliament following the entry into force of Provisional Article 20 of the Constitution. Accordingly, the Court concluded that a retrial must be conducted and thus the proceedings against him must be discontinued for putting an end to the violation of the right to stand for elections and engage in political activities.

131. However, the incumbent first instance court refused to conduct a retrial and ordered the continued execution of the applicant's conviction decision, stating that the Court's violation judgment amounted to an interference with its own jurisdiction and was in the form of an expediency assessment. On appeal, the first instance decision was upheld, and accordingly, the execution of the conviction decision with respect to the applicant was continued. Undoubtedly, the first instance court's decision ordering the continued execution of the applicant's conviction decision despite the Court's judgment finding a violation and also ordering a retrial for putting an end to the impugned violation (and the stay of execution on account of the parliamentary immunity re-acquired by the applicant) is contrary to the wording of the Constitution, as also explained above in the assessment as to the right to stand for elections and engage in political activities. In this sense, despite the Court's violation judgment, the continued placement of the applicant in the penitentiary institution as a convict pursuant to the first instance decision ordering the continued execution of the conviction decision also became devoid of a legal basis.

132. The questioning by a first instance court of the binding nature of the violation judgment of the Court, which is vested, by virtue of the Constitution, with the authority to render final and binding judgments with respect to individual applications, and the former's failure to enforce the violation judgment constitute a manifest and gross breach of the principles of *rule of law* and *legal security*. Besides, the continued

detention of individuals on account of such approach, albeit the Court's judgment, must be considered as a ground leading to the arbitrariness of the impugned detention.

133. As previously expressed by the Court, the right to personal liberty and security safeguarded by Article 19 of the Constitution 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], § 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* [Plenary], no. 2016/22169, 20 June 2017, § 347).

134. The first instance court's decision finding no ground to conduct a retrial with respect to the applicant and ordering the continued execution of his conviction, which was in manifest contradiction with the wording of the Constitution and even disregarded the constitutional provisions, and the applicant's continued placement in the penitentiary institution as a convict on account of this decision rendered meaningless and dysfunctional all safeguards inherent in the right to personal liberty and security. In this sense, individual application mechanism is the most effective national remedy of last instance for the protection of fundamental rights and freedoms, which is predicated directly upon the Constitution. The examination by the Court within the scope of individual application affords the highest level of protection to the individuals in the protection and improvement of fundamental rights and freedoms.

135. Consequently, despite the Court's judgment finding a violation in the applicant's case and ordering a retrial and the discontinuation of the proceedings against the applicant so as to redress the violation and consequences thereof, the continuation of the applicant's placement in the penitentiary institution as a convict on account of the first instance court's refusal to conduct a retrial and decision ordering the continuation of his conviction in a way which would be manifestly in breach of the wording of the Constitution and render dysfunctional constitutional safeguards

intended to preclude individuals from being arbitrarily deprived of liberty (and the upholding of the impugned decision upon appeal) was contrary to Article 83 of the Constitution regulating the parliamentary immunity, Article 153 as to the binding nature of the Court's judgments also in terms of judicial bodies, as well as to Article 19 embodying the safeguards related to the right to personal liberty and security.

136. For these reasons, the Court found a violation of the right to personal liberty and security enshrined in Article 19 of the Constitution.

C. Application of Article 50 of Code no. 6216

137. The applicant requested the Court to find a violation and to take the necessary actions for the discontinuation of his post-conviction detention. He did not claim any compensation.

138. It is requisite to redress all consequences of the violation found by the Court with respect to the right to stand for elections and engage in political activities in its judgment *Kadri Enis Berberoğlu (2)* and the duly enforce the judgment in question. In this regard, pursuant to the Court's judgment ordering a retrial with respect to the applicant, the incumbent first instance court is to initiate the relevant procedure to conduct *a retrial* and to order the discontinuation of the proceedings against the applicant for his being entitled to parliamentary immunity (see above § 100).

139. On the other hand, the applicant is still placed in an open penitentiary institution as a convict due to the continued execution of his conviction. The applicant's temporary leave from the open penitentiary institution is not tantamount to the discontinuation of his post-conviction detention. In this sense, given the nature of the violation of the applicant's personal liberty and security, it is necessary to stay the execution of the applicant's conviction and to ensure the termination of his status as a convict in order to redress the violation and its consequences.

140. Accordingly, it is *obligatory* to take the following steps with a view to redressing the violations found by the Court in its previous judgment *Kadri Enis Berberoğlu (2)* and in this judgment *Kadri Enis Berberoğlu (3)* and the consequences thereof:

i. To initiate the retrial proceedings;

ii. To stay the execution of the applicant's sentence;

iii. To relieve the applicant of his status as a convict; and

iv. To adjourn the proceedings pending the outcome of the retrial.

To that end, this judgment must be sent to the 14th Chamber of the İstanbul Assize Court.

141. The state of law, enshrined in Article 2 of the Constitution, is not just rhetoric. In a country where the principle of rule of law is not, *de facto*, applied and where the bodies, courts and individuals exercising public power act contrary to the law, the state of law ceases to exist. One of the constitutional provisions that are in pursuance of the principle of rule of law is Article 153 of the Constitution, which envisages the binding nature of the Constitutional Court's judgment in terms of the legislative, executive, and judicial organs, administrative authorities, as well as natural and legal persons. Despite the explicit provision included in Article 153 of the Constitution, the failure to enforce the said judgments on any ground results in grave violations of the principle of rule of law, as well as of the constitutional order based on this principle.

142. In this scope, arbitrary decisions, which mean to contravene the legal order prescribed by the Constitution, thereby resulting in the violations of the individuals' fundamental rights and freedoms and the continuation of the violations under various pretexts and unlawful attitudes and behaviours, are not acceptable in any legal system. It is clear that in case of a failure to comply with the constitutional provisions in a state of law, criminal, administrative and legal responsibilities will arise on the part of those concerned.

143. It is stressed in the Preamble of the Constitution that individuals and the society "*have the right to demand a peaceful life"* and *"every Turkish citizen shall exercise these fundamental rights and freedoms enshrined in the Constitution in conformity with the requirements of equality and social justice"*. The hope for such a life where fundamental rights and freedoms are safeguarded may be maintained only with the protection of constitutional

order where the rule of law principle prevails. As a matter of fact, it is also set forth in the Preamble *"sovereignty is vested fully and unconditionally in the Turkish Nation and that no individual or body empowered to exercise this sovereignty in the name of the nation shall deviate from the liberal democracy indicated in the Constitution and the legal system instituted according to its requirements"*.

144. It should be further noted that *the duty of maintaining the constitutional order has not been vested merely to the Constitutional Court*. The constitutional institutions, the organs exercising public power, as well as natural and legal persons are liable to protect the Constitution and to abide by the constitutional rules.

145. Accordingly, to redress the violations found by the Court in its judgments *Kadri Enis Berberoğlu (2)* and *Kadri Enis Berberoğlu (3)* and to enforce these judgments are a duty vested not only to the relevant inferior courts, but also to other bodies exercising public power, notably the Grand National Assembly of Türkiye, as well as to the Council of Judges and Prosecutors to the extent relevant. Therefore, this judgment finding a violation must be sent also to the relevant institutions.

146. The total litigation costs of TRY 4,046.90 including the court fee of TRY 446.90 and counsel fee of TRY 3,600, as established on the basis of the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For the reasons explained above, the Constitutional Court UNANIMOUSLY held on 21 January 2021 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. A copy of the judgment be SENT to the 14th Chamber of the İstanbul Assize Court (E.2016/205, K.2017/97) for conducting a retrial with respect to the applicant, ensuring the stay of execution of his conviction and his release from the penitentiary institution, and ordering the discontinuation of the proceedings against him, so as to redress the respective violations found by the Court in its judgments *Kadri Enis Berberoğlu (2)* and *Kadri Enis Berberoğlu (3)*;

D. The total litigation costs of TRY 4,046.90 including the court fee of TRY 446.90 and the counsel fee of TRY 3,600 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 Grand National Assembly of Türkiye, Ministry of Justice and the Council of Prosecutors and Judges.

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

MUSTAFA KARACA

(Application no. 2020/15967)

20 May 2021

On 20 May 2021, 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 *Mustafa Karaca* (no. 2020/15967).

THE FACTS

[8-33] The complainant, the applicant's ex-girlfriend, filed a criminal complaint against the applicant for being subjected to blackmailing, sexual harassment, insult and threats through messages, secretly taken photos and videos sent by the applicant to her by various foreign numbers.

An interim injunction was issued with respect to the applicant, for a period of 6 months, by the decision of Sivrihisar Civil Court, acting as a family court, pursuant to Article 5 of Law no. 6284 on the Protection of Family and Prevention of Violence against Women. Upon the complainant's request, the court sentenced the applicant to a forced confinement for 7 days pursuant to Article 13 of Law no. 6284 as he had breached the interim injunction. The applicant unsuccessfully challenged the court's decision before the Çifteler Civil Court. The applicant was then placed in a prison for 7 days for the execution of his forced confinement.

V. EXAMINATION AND GROUNDS

34. The Constitutional Court ("the Court"), at its session of 20 May 2021, examined the application and decided as follows:

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

35. The applicant maintained that pursuant to Article 38 of the Regulation for Implementation of Law no. 6284, the Sivrihisar Civil Court did not have jurisdiction to deal with an alleged breach taking place within the boundaries of Ankara province; that if the incident had been reported to the Polatlı Family Court, which was the competent court, he could have been entitled to a more fair trial. In support of this assertion, the applicant stated that the Polatlı Family Court had accepted his request and issued a restraining order against the complainant; and that the Sivrihisar Civil Court ordered his forced confinement, not on the basis of the prescribed

minimum threshold of punishment, in the absence of any justified ground. He accordingly claimed that there had been violations of the right to a fair trial, the right to a reasoned decision, as well as of the lawful judge principle. He also maintained that his right to personal liberty and security had been violated as he had been subjected to a forced confinement for 7 days by a non-competent court in breach of the procedure prescribed by law.

36. In its observations, the Ministry stated that the applicant had been placed in forced confinement due to the execution of a court decision; that he had been duly and sufficiently informed of the consequences of the failure to comply with a court decision; that as regards his objection concerning the lack of jurisdiction, the Çifteler Civil Court had stated that the jurisdiction as set forth in the Regulation for Implementation was not of a definite nature; and that according to the jurisdiction of the Court of Cassation, the competent authority to order a forced confinement was the court indicating an interim injunction. The Ministry further noted that in cases where the court ordering a forced confinement was considered to lack jurisdiction, the question whether this amounted to a gross or clear irregularity due to the applicant's placement in forced confinement would be at the discretion of the Court.

37. In his counter-statements against the Ministry's observations, the applicant indicated that there was a clear provision as to the jurisdiction not in the law but in the Regulation for Implementation; that the significance of the jurisdiction-related provision laid down in Article 38 of the Regulation for Implementation came to the forefront in the present case in that the Polatlı Court, which was the competent authority in his case, had issued an interim injunction in his favour; that if this court had been considered as the competent court, his forced confinement would not have been at stake; that in the judgment of the Court of Cassation, which was referred to in the Ministry's observations, the person in respect of whom forced confinement had been sought had gone to the victim's residence; however, in his case, the situation was exactly opposite; and that accordingly, the relevant case-law of the Court of Cassation was not applicable to his case. He also reiterated his claims he had previously raised in his petition.

B. The Court's Assessment

38. 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."*

39. Article 19 § 2 of the Constitution, titled *"Personal liberty and security"*, of the Constitution provides, in so far as relevant, as follows:

> *"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; (…)"*

40. 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). It has been concluded that the applicant's allegations concern the lawfulness of the forced confinement and that the application must be examined under the right to personal liberty and security within the meaning of Article 19 § 2 of the Constitution.

1. Admissibility

41. 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.

2. Merits

a. General Principles

42. The right to personal liberty and security is a fundamental right that 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).

43. 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).

44. One of the circumstances under which an individual may be deprived of liberty as set forth in Article 19 of the Constitution is the detention of an individual for the purposes of executing a court decision or fulfilling an obligation prescribed in the law, which is laid down in the second paragraph thereof.

45. There may be differences between these two forms of detention by the very nature of detention. Detention by virtue of a court decision may also serve the disciplinary purpose, whereas the detention to secure fulfilment of an obligation prescribed by law cannot be of such nature. Detention to secure fulfilment of an obligation prescribed by law may be effected merely for, and until, the fulfilment of the said obligation.

46. Pursuant to the general rule laid down in Article 19 § 2 of the Constitution, which provides for that the procedure and conditions of the circumstances under which the right to personal liberty and security may be restricted must be prescribed by law, the detention ordered to secure the enforcement of a court decision must be regulated by law. In this sense, as required by Articles 13 and 19 of the Constitution, which are in harmony with each other, any measure constituting an interference with personal liberty must have a legal basis, which necessitates the formal existence of a law (see *Ali Hıdır Akyol and Others* [Plenary], no. 2015/17510, 18 October 2017, § 56). The principles and procedures set forth in the domestic law, as required by this general rule to the effect that the circumstances under which the right to personal liberty and security may be restricted are to be prescribed by law, must be complied with. In this sense, the conditions under which an individual will be deprived of liberty must

be defined in the law in a clear and precise manner; the relevant law and its implementation must be foreseeable; and the relevant law must afford sufficient protection against arbitrariness.

47. Besides, Article 5 § 1 (b) of the European Convention on Human Rights ("Convention") refers to the non-compliance with the lawful order of a court, whereas Article 19 of the Constitution does not clearly set any criterion to the effect that such court order must be lawful. However, this must not pose an obstacle to the interpretation of Article 19 of the Constitution in accordance with the Convention. Besides, in a state governed by rule of law, the lawfulness of court orders and decisions is necessarily required by the Constitution. Any consideration to the contrary may give rise to an interpretation that the Constitution allows for the detention of individuals who have failed to comply with an unlawful decision, and such an interpretation is in no way acceptable in a state governed by rule of law. In this sense, the question whether the court order has been lawfully issued must be addressed within the framework of the criterion as to the lawfulness of detention. Accordingly, in cases where a court order that is not allegedly complied with is unlawful, then the detention effected in conjunction therewith will then become unlawful. However, such an examination of the Court is confined to ascertaining whether the given court order is manifestly unlawful.

48. The "order of a court", as indicated in Article 19 § 2 of the Constitution, is not in the form of a decision on merits of the case and does not cover the other court decisions issued with respect to the other forms of detention in Article 19 of the Constitution. These orders are related to the circumstances under which an individual may be deprived of liberty, regardless of any criminal charge or the commission of an offence. In this context, as regards the detention effected to secure the enforcement of a court order, the person concerned must be duly informed of the order and the consequences of the failure to comply therewith. The individual cannot be detained for his failure to comply with a court order of which he has not been informed.

49. The legitimate aim pursued by the interference in the form of detention to secure the enforcement of a court order is to ensure the

compliance with the order itself or the execution of the forced confinement. As a matter of fact, the detention of an individual to secure the enforcement of a court order is considered, in Article 19 of the Constitution, as a legitimate ground for the restriction of the right to personal liberty and security.

50. 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" (see *Halas Aslan*, no. 2014/4994, 16 February 2017, § 72). The principle of proportionality consists of three sub-principles, which are *suitability*, *necessity* and *commensurateness*. Suitability requires that a given interference be suitable for achieving the aim pursued; necessity requires that the impugned interference be 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 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.2016/13, K.2016/127, 22 June 2016, § 18; and *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 38).

51. In this sense, as required by the principle of proportionality, a fair balance must be struck between the aim pursued by enforcing the court order and the significance of the right to personal liberty and security. In this regard, the aim underlying the court order, the question whether it is possible to comply with the given court order, the situation of the person detained, particular circumstances leading to detention and duration of detention will be taken into consideration. The Court will conduct its examination in this regard on the basis of the duration of detention and the grounds necessitating detention by taking into consideration the conditions of the given case. However, the inferior courts have a wide discretionary power in this regard. Therefore, in conducting such an examination, the Court determines whether there is a manifest arbitrariness or a manifest error of judgment in the exercise of the discretionary power.

b. Application of Principles to the Present Case

52. An interim injunction was issued with respect to the applicant, for a period of 6 months, by the decision of Sivrihisar Family Court, dated 4

September 2019, pursuant to Article 5 § 1 (a), (c) and (f) of Law no. 6284. On 2 March 2020, the incumbent court sentenced the applicant to a forced confinement for 7 days pursuant to Article 13 of Law no. 6284 as he had breached the interim injunction, upon the request by the party in favour of whom the interim injunction had been issued. The applicant was then placed in a prison for 7 days for the execution of his forced confinement. Therefore, it is apparent that the applicant was deprived of his liberty.

53. In the present case, the forced confinement of the applicant was ordered as he had failed to comply with the interim injunction issued by the relevant court. Therefore, in the present case, the applicant's detention was ordered so as to secure the execution of a court order within the meaning of Article 19 § 2 of the Constitution.

54. In this scope, it must be primarily considered whether the applicant's detention had a legal basis and whether it was in accordance with the procedure prescribed by law. In the present case, it appears that the ground forming a basis for the applicant's detention is Article 13 of Law no. 6284, which provides for that an individual against whom an interim injunction has been ordered acts in breach of this injunction -even it constitutes an actual offence-, he shall be subjected to a forced confinement for a period of 3 to 10 days by a judge's decision, given the nature of the injunction and severity of the infringement. In the present case, the applicant was subject to the interim injunction for 6 months. It was also ordered therein that the applicant must stay away from the complainant. The applicant was subjected to a forced confinement for 7 days for having acted contrary to the requirements set forth in the injunction. Therefore, the applicant's detention had a legal basis.

55. On the other hand, in his challenge to the forced confinement, the applicant maintained that the Sivrihisar Civil Court was not the competent authority to order a forced confinement due to the alleged infringement taking place within the Polatlı district of Ankara, making a reference to Article 38 of the Regulation for Implementation of Law no. 6284. Article 38 § 2 of this Regulation provides for *"if the infringement of an interim injunction takes place within the jurisdiction of the court ordering the injunction, the forced confinement shall be ordered by the same court. However,*

if the infringement takes place within the jurisdiction of any other court, the court issuing the injunction shall be asked whether a forced confinement has been previously ordered in relation to the same injunction so as not to cause any repetitive sanction. According to the information provided, a decision shall be made given the nature of the infringement".

56. Pursuant to this provision, in case of infringement of an interim injunction within another jurisdiction, the decision ordering forced confinement will be issued by the court where the infringement takes place. In the present case, it has been observed that the applicant's forced confinement was ordered not by the relevant court having jurisdiction in respect of the place where the infringement took place, but by the Sivrihisar Civil Court (in its capacity as the family court) that at the very beginning imposed the interim injunction. In this regard, the Çifteler Civil Court dealing with the applicant's challenge as to the lack of jurisdiction in the present case noted that the jurisdiction as set forth in the Regulation was not of a definite nature. The Court of Cassation has also indicated in the relevant cases before it that the competent authority to order a forced confinement is the court issuing the interim injunction pursuant to Law no. 6284 and thus pointed to the manner in which Article 13 of the said Law should be applied. It is inferred from both Article 18 of the Code of Criminal Procedure no. 5271, dated 4 December 2004, and Article 19 of the Code of Civil Procedure no. 6100, dated 12 January 2011, the objection concerning jurisdiction is in the form of a preliminary objection. Therefore, in the Turkish law, the jurisdiction *ratione loci* in terms of the present case is not considered as an issue related to the public order. In this sense, the question by which court the applicant's forced confinement was ordered has not bearings on the lawfulness of his impugned detention. In fact, there is no difference between the courts in different places, which 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 judges in all courts are exactly afforded with the same guarantees (for considerations in the same vein, see *Yıldırım Turan* [Plenary], no. 2017/10536, 4 June 2020, § 145). In this sense, it must be accepted that the applicant's detention was in accordance with the procedure prescribed by law.

57. As regards the detention ordered to secure the enforcement of a court order, it is of importance that the applicant be informed of the relevant order and the consequences of the failure to comply therewith. In the interim injunction issued with respect to the applicant, there was a warning that if the applicant concerned acted contrary to this injunction, he would be subject to a forced confinement, and the injunction was served on him. It has been therefore concluded that the applicant was aware of both the interim injunction and the consequences of his failure to comply therewith.

58. It must be also assessed whether the impugned detention had a legitimate aim. In this sense, as set forth in Article 13 of the Law, an individual against whom an interim injunction has been issued acts in breach of this injunction -even it constitutes an actual offence-, he shall be subjected to a forced confinement for a period of 3 to 10 days by a judge's decision, given the nature of the injunction and severity of the infringement. The forced confinement is, by its legal nature, a disciplinary incarceration, which forces the person concerned to fulfil the obligation to comply with an interim injunction and is ordered in case of infringement of this obligation. Forced confinement is a sanction intended to effectively protect the victim of violence by urging the perpetrator to comply with the injunctions (see the Court's judgment no. E.2013/119 K. 2013/141, 28 November 2013). The applicant was detained pursuant to this provision, due to his failure to comply with an interim injunction issued by a court for affording protection to a woman considered to be a victim, and so as to secure the enforcement of the court order. Accordingly, the applicant's detention had a legitimate aim.

59. Finally, it must be determined whether the applicant's detention was proportionate. In this sense, it must be examined whether a reasonable balance was struck between the legitimate aim of the impugned court order and the right to personal liberty and security. In the present case, the applicant was subjected to a forced confinement for a period of 7 days as he had failed to comply with the order to stay away from the complainant. Pursuant to Article 13 of Law no. 6284, the forced confinement may be ordered from 3 to 10 days, varying by the nature of the measure that has been infringed and the severity of the infringement. In the present case,

the Sivrihisar Civil Court (in its capacity as the family court) examined the victim's complaint and ordered a forced confinement for a period of 7 days, which was within the range prescribed in the law but not the minimum penalty prescribed therein, in consideration of the particular circumstances of the case. The Çifteler Civil Court, examining the applicant's objection, concluded, in consideration of the circumstances of the present case, that the applicant's forced confinement was lawful. The inferior courts have a wide discretionary power in determining the duration of forced confinement, and it is undoubted that the inferior courts are in a better position than the Court in the assessment of the facts and circumstances of a case. It has been also observed that there is no manifest error of judgment or a manifest arbitrariness in the inferior courts' findings and assessments concerning the applicant's forced confinement. In this regard, given the inferior courts' assessments and the particular circumstances of the present case, the applicant's forced confinement for a period of 7 days was found proportionate.

60. For these reasons, the Court held that the applicant's right to personal liberty and security had not been violated.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 20 May 2021 that

A. The alleged violation of the right to personal liberty and security due to the forced confinement be declared ADMISSIBLE;

B. The right to personal liberty and security safeguarded by Article 19 of the Constitution was 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.

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

ONUR CAN TAŞTAN

(Application no. 2018/32475)

27 October 2021

On 27 October 2021, 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 *Onur Can Taştan* (no. 2018/32472).

THE FACTS

[9-32] The applicant, holding office as a research assistant at a university, was dismissed from public service pursuant to the Decree Law no. 672, which was published within the scope of the state of emergency, and his passport was cancelled pursuant to Article 5 of the Decree Law no. 667. He got an opportunity to work at a university abroad, but that he could not travel abroad as a result of the cancellation of his passport and the authorities' refusal to issue him with an ordinary passport.

The applicant's respective challenge before the administrative court against the cancellation of his passport was rejected. Upon his subsequent appeal, the regional administrative court dismissed the appeal, stating that the decision issued by the inferior court complied with the law and procedure.

The applicant lodged an individual application with the Constitutional Court on 31 October 2018.

V. EXAMINATION AND GROUNDS

33. The Constitutional Court ("the Court"), at its session of 27 October 2021, examined the application and decided as follows:

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

34. The applicant made the following submissions:

i. He stated that his service stamped passport had been cancelled, that his request for the issuance of an ordinary passport had not been processed by the Ministry of Interior without any inquiry in respect of him, that any report indicating his relation with a terrorist organisation or any information related to an investigation had not been submitted during

the trial stage, and that his request for the court to obtain information from the chief public prosecutor's office as to whether there had been any investigation against him had not been satisfied by the court. He emphasised that a decision of no need for a sanction had been issued as a result of a disciplinary investigation carried out by the Ankara University on account of his alleged reaction against the placement in custody of his colleagues during a demonstration held by a group of students, that his name had been reported to the Ministry of Interior within the scope of the said investigation, and that the disciplinary investigation in question had nothing to do with terrorism or violence.

ii. He stated that there had not been any criminal investigation or prosecution against him or any court decision prohibiting him from leaving the country and that the conditions set out in the Law no. 5682 had not been satisfied. He alleged that he had been unemployed, that it had been necessary for him to frequently go abroad to attend seminars and offer courses due to his profession as an academician, that he had been accepted for a job at a university in Germany where he would have served for a period of 24 months starting from 1 April 2017, but that he had been deprived of the opportunity of serving and exercising his profession abroad as a result of the authorities' refusal to issue him with a passport. In this connection, he alleged that his freedom of movement and his right to respect for private life had been violated.

35. In its observations, the Ministry recalled the amendment introduced to the Law no. 5682 by the Law no. 7188 and stated that among the individuals whose existing passports had been cancelled in accordance with the legal regulations which had entered into force during the period of the state of emergency, those who had satisfied the requirements set out in the said Law might be issued with a passport as a result of an investigation to be carried out in respect of them upon their application in this regard. It emphasised that 25,173 applications had been lodged in this context as of 20 March 2020 and that 16,348 persons had been issued with a passport. Moreover, it noted that there had been no obstacle for individuals to bring proceedings before the administrative courts of general jurisdiction in the event of the dismissal of their request for the issuance of a new passport within the scope of the relevant legal regulation. It thus indicated that it

would be appropriate to take into consideration, in the assessment as to admissibility, whether the applicant still had victim status and whether he had exhausted the legal remedies available.

36. In his counter-statements to the Ministry's observations, the applicant's lawyer stated that the administration should have made a decision after conducting an inquiry into whether there had been any obstacle preventing the issuance of a passport to the applicant and that the applicant's request for the issuance of a passport had been dismissed on the same day without an inquiry being conducted. The lawyer also stated that their requests for the inferior courts to obtain information from the relevant authorities as to whether there had been any criminal or administrative investigation against the applicant had not been satisfied and that the applicant had been aggrieved by the dismissal of the proceedings on an abstract ground which could not be linked to the present application. The lawyer further maintained that as a result of an arbitrary practice, the applicant had been deprived of an opportunity of serving and exercising his professional activities at a reputable university in Europe and that the law which had subsequently entered into force could not be considered as an effective remedy capable of redressing the applicant's grievances in this scope.

B. The Court's Assessment

37. Article 23 of the Constitution, titled "*Freedom of residence and movement*", in so far as relevant, provides 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.*
>
> *A citizen's freedom to leave the country may be restricted only by the decision of a judge based on a criminal investigation or prosecution."*

38. Article 20 of the Constitution, titled "*Privacy of private life*", which will be taken as basis in the assessment of the allegation, provides as follows:

> *"Everyone has the right to demand respect for his/her private and family life. Privacy of private or family life shall not be violated."*

39. Private life is a broad concept not susceptible to exhaustive definition. The legal value protected in this scope is in fact personal autonomy. In the determination of the scope of the right to respect for private life, the notions of *development and fulfilment of an individual's personality* are taken as basis. This right points to the right to live privately away from unwanted attention and also includes many legal interests compatible with the free development of an individual's personality. In this respect, Article 20 of the Constitution also guarantees the right to private social life (see *Serap Tortuk,* no. 2013/9660, 21 January 2015, §§ 31-36; *Bülent Polat*, no. 2013/7666, 10 December 2015, §§ 61-63; *Ata Türkeri*, no. 2013/6057, 16 December 2015, §§ 30-32; *Tevfik Türkmen* [Plenary], no. 2013/9704, 3 March 2016, §§ 50-52).

40. 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 applicant got accepted into a university for a position as an academician and that it was necessary for him to attend educational seminars held abroad as a requirement of his profession, it has been understood that the applicant had strong professional ties with the intended country of destination and that the authorities' refusal to issue him with an ordinary passport affected his professional life and thus his private life. Therefore, all of the applicant's complaints concerning the relevant administrative act, namely the refusal to process the applicant's request for the issuance of an ordinary passport, should be examined as a whole within the scope of the right to respect for private life safeguarded by Article 20 of the Constitution.

1. Applicability

41. Article 15 of the Constitution, titled *"Suspension of the exercise of fundamental rights and freedoms"*, in so far as relevant, 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...."*

42. In its judgment *Aydın Yavuz and Others* ([Plenary], no. 2016/22169, 20 June 2017), the Court pointed out that in the examination of individual applications concerning the measures taken during the periods when extraordinary administration procedures were applied, it would take into account the regime of protection of 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 related to the extraordinary situation, the examination shall be conducted in accordance with Article 15 of the Constitution (see *Aydın Yavuz and Others*, §§ 187-191).

43. On 15 July 2016 Türkiye experienced a military coup attempt, and on 21 July 2016 a state of emergency was thus declared throughout the country. On 19 July 2018 the state of emergency ended. On the basis of factual grounds, the public authorities and judicial organs considered that a structure, which had been continuing its activities in Türkiye for many years and which had been called as the Fetullahist Terrorist Organisation (FETÖ) and/or Parallel State Structure (PDY) in the recent years, was the perpetrator of the coup attempt (see *Aydın Yavuz and Others*, §§ 12-25).

44. During and in the aftermath of the coup attempt, investigations were carried out across the country by the chief public prosecutors' offices into the organisation of the FETÖ/PDY in public institutions, as well as its organisation in different fields such as education, health, trade, civil society and media, even if they were not directly related to the coup attempt, and in this scope, a high number of persons were placed in custody and detained on remand (see *Aydın Yavuz and Others*, § 51; *Mehmet Hasan Altan (2)* [Plenary], no. 2016/23672, 11 January 2018, § 12). Moreover, a large number of public officials serving at various institutions were dismissed

from public service pursuant to the Decree Laws on account of their membership, affiliation, connection, relation or contact with terrorist organisations or structures, entities or groups declared by the decision of the National Security Council to be acting against the national security of the State. Besides, many administrative measures were adopted within the scope of the fight against the terrorist organisation.

45. It is seen that the administrative act complained of by the applicant concerns the incidents requiring the declaration of a state of emergency. In this regard, the examination of the lawfulness of the measures applied in the context of the incidents giving rise to the declaration of a state of emergency will be made within the scope of Article 15 of the Constitution. 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 20 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 (for similar assessments, see *Aydın Yavuz and Others*, §§ 193-195; and 242).

2. Admissibility

46. 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.

Mr. Muammer TOPAL, Mr. Rıdvan GÜLEÇ and Mr. Basri BAĞCI disagreed with this opinion.

3. Merits

a. Existence of an Interference

47. Freedom of movement, which may be described as the right to move freely, covers a travel within the country and abroad. In the Turkish legislation, the procedures concerning entry into and exit from the country are governed by the Law no. 5682. Pursuant to Article 2 of the said Law, Turkish citizens and foreigners are obliged to present a duly issued and valid passport or a passport replacing document to the police authorities

at the passenger entry and exit gates to enter and leave Türkiye. This obligation is a universal formal requirement in the context of the exercise of the freedom of movement (see the Court's judgment, no. E.2004/100, K.2005/16, 5 April 2005).

48. Passport is a document issued by a public authority to persons wishing to go to foreign countries and taken as basis by the authorities of foreign countries to verify the identity of the holder. This document provides its holder with an opportunity of leaving the borders of his country of citizenship, crossing the borders of a foreign country and moving freely in that country. It is obvious that it is prohibited for an individual to cross borders in the event of the cancellation of his passport or the authorities' refusal to issue him with a passport. However, as regards individuals who have close personal, family, professional and economic ties with another country, the freedom of movement, and more specifically, the opportunity of crossing the borders can be said to be of importance for the development of their private lives.

49. On the other hand, it is obvious that administrative acts such as the cancellation of a passport or the refusal to issue a passport essentially fall within the scope of the freedom of residence and movement. Freedom of residence and movement, which is set out in Article 23 of the Constitution, is safeguarded by Article 2, titled "*Freedom of movement*, of the Protocol No. 4 to the European Convention on Human Rights ("the Convention"). In its previous judgments, the Court has reiterated that Türkiye is not a party to the Protocol in question and stated that the freedom at issue does not fall within the scope of the joint protection of the Constitution, the Convention and the additional protocols to which Türkiye is a party and thus falls outside the Court's jurisdiction *ratione materiae* (see *Mehmet Takımsu*, no. 2016/63712, 7 November 2013, §§ 78-80; *Sebahat Tuncel*, no. 2012/1051, 20 February 2014, § 53; and *Fevzi Doğaner*, no. 2014/6453, 20 December 2017, § 14).

50. However, where certain rights falling outside the scope of an individual application are essentially interrelated with the fundamental rights falling within the joint protection, an examination may be made by linking them to the relevant rights (in the context of the freedom of

expression, see *Özgür Sevgi Göral,* no. 2014/12112, 4 October 2017). Such examination will be made not essentially within the scope of the freedom of movement but as to whether there has been a violation of a fundamental right which is the subject of an individual application. In this regard, especially in cases where an individual has strong personal, family, economic and professional ties with the intended country of destination, it is possible that the individual applications concerning the measures prohibiting the individuals from leaving the country be examined within the scope of the right to respect for private and family life. However, for such examination to be made, the applicants must properly demonstrate, on the basis of concrete data, the negative consequences of the impugned measure on their private and family lives in their individual application forms.

51. Regard being had to the fact that in the impugned incident the applicant's attendance at foreign programmes as an academician was of importance for him to develop his professional knowledge and to have an opportunity to work abroad and that he had agreed to serve at a university as an academician for a period of two years, it has been understood that he had close professional ties with the intended country of destination and that the authorities' refusal to issue him with a passport had an impact on his private life. In these circumstances, it has been concluded that the dismissal of the applicant's request for the issuance of an ordinary passport amounted to a violation of his right to respect for private life guaranteed by Article 20 of the Constitution.

b. Whether the Interference Amounted to a Violation

52. 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."*

53. The aforementioned interference amounts to a violation of Article 20 of the Constitution unless it complies with the conditions set out in Article 13 thereof. Therefore, it must be determined whether the interference complied with the requirements of being prescribed by law, pursuing a legitimate aim and not being contrary to the principle of proportionality and the requirements of a democratic society order, which are relevant for the present application and laid down in Article 13 of the Constitution (see *Halil Berk*, no. 2017/8758, 21 March 2018, § 49; *Süveyda Yarkın*, no. 2017/39967, 11 December 2019, § 32; *Şennur Acar*, no. 2017/9370, 27 February 2020, § 34; *R.G.* [Plenary], no. 2017/31619, 23 July 2020, § 82).

i. Lawfulness

54. The criterion of restriction of rights and freedoms by law occupies an important place in the constitutional jurisdiction. Where there is an interference with a right or freedom, it must first be determined whether there exists a legal provision allowing such interference, namely a legal basis (see *Sevim Akat Eşki*, no. 2013/2187, 19 December 2013, § 36).

55. It has been understood that the relevant administrative act, namely the dismissal of the applicant's request for the issuance of an ordinary passport, was based on Article 22 of the Law no. 5682 and Article 5 of the Law no. 6749 on adoption, with certain amendments, of the Decree Law no. 667. In these circumstances, since the impugned administrative acts were based on the aforementioned legal provisions, it appears that the judicial decisions had a sufficient legal basis. In this respect, it has been considered that the interference with the applicant's right to respect for private life had a legal basis in the present case.

ii. Legitimate Aim

56. 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 as regards Article 20 § 1 of the Constitution. Although certain grounds for restriction are laid down in the second paragraph of the said article, these grounds are related merely to the search and seizure measures. Thus, it

does not seem possible for such grounds to be relied on as regards 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; *Ahmet Çilgin*, no. 2014/18849, 11 January 2017, § 40).

57. Although Article 20 of the Constitution prescribes no ground for the restriction of the right to respect for private life, this right cannot be said to be of an absolute nature, which cannot be restricted under any circumstances. Even the rights for which no special ground for restriction is prescribed have certain limits deriving from the very nature of the right, and these rights may also be restricted on the basis of the rules set out in other provisions of the Constitution. Accordingly, it is acknowledged that the rights and freedoms enshrined in other provisions of the Constitution as well as the duties incumbent on the State may set boundaries for 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; no. E.2016/37, K.2016/135, 14 July 2016, § 9; no. E.2013/130, K.2014/18, 29 January 2014; *Sevim Akat Eşki*, § 33; and *Ahmet Çilgin*, § 39).

58. In this context, regard being had to the fact that the applicant was not issued with a passport due to the measures taken within the scope of the fight against terrorist organisations, it has been understood that the interference with the applicant's right to respect for private life pursued the legitimate aims of protecting public order and national security.

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

(1) General Principles

59. In order for an interference with the fundamental rights and freedoms to be *compatible* with the requirements of a democratic society order, it must be proportionate and correspond to a pressing social need. It is clear that an assessment under this heading cannot be made independently from the principle of proportionality, which is based on the relationship between the aim of restriction and the means used to achieve such aim. This is because Article 13 of the Constitution involves two criteria, namely *not being contrary to the requirements of a democratic*

order and *not being contrary to the principle of proportionality*, which are parts of a whole having a close interplay with each other (see *Ferhat Üstündağ*, no. 2014/15428, 17 July 2018, § 45).

60. In order for a measure constituting an interference to correspond to a pressing social need, it must be capable of securing the achievement of the aim, must be applied as a last resort and must be 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 correspond to a pressing social need (see *Ferhat Üstündağ*, § 46).

61. Proportionality refers to the absence of an imbalance between the aim pursued by the restriction and the restrictive measure employed. In other words, proportionality requires a fair balance to be struck between the rights of an individual and the interests of the public or between the rights and interests of other individuals where the aim of the interference is to protect the rights of others. A problem in terms of the principle of proportionality may arise if, as a result of a balancing exercise, a clearly disproportionate burden is found to have been 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*, § 48).

62. Accordingly, an interference with the right to respect for private life cannot be considered compatible with the requirements of a democratic society if it does not correspond to a pressing social need or if it is not proportionate although it corresponds to a pressing social need.

(2) Application of Principles to the Present Case

63. It has been understood that on the basis of the provisions included in the Decree Law no. 677 and the Law no. 6749, the special stamped passports of the individuals who were considered to have a relation or affiliation with a terrorist organisation were cancelled within the scope of a general measure, that those individuals were not issued with an ordinary passport, and that the administrative act against the applicant also fell within the scope of such measure. First of all, in certain exceptional cases under the circumstances of the state of emergency, it is possible to adopt various temporary measures restricting entry into and exit from the

country as regards the individuals established to have connection with a terrorist organisation. However, the necessity of such measures for the protection of public order and safety must be sufficiently demonstrated by linking them to the personal situations of the individuals.

64. Moreover, in view of the circumstances of the state of emergency and especially the process subsequent to the coup attempt, the adoption of temporary measures to control the entry into and exit from the country as regards the individuals established to have relation with the said structures, with a view to preventing the terrorist organisations' activities in the country and abroad against national security and ensuring the effective conduct of administrative and judicial investigations within the scope of the fight against terrorist organisations, cannot be said not to be necessary for the protection of public order and safety and not to be suitable to achieve the aim pursued.

65. However, the measures restricting individuals' entry into and exit from the country must be temporary and must not be implemented in such a manner as to completely destroy the fundamental rights and freedoms, the grounds for the measure must be indicated in the relevant decisions by linking them to the situation of the individual subjected to such measure, and a reasonable balance must be struck between the public interest sought by the measure and the interests of the individual. Moreover, the measure must be applied for a limited period of time and it must be possible to make an assessment as to whether the conditions requiring the adoption of the measure still persist. In this context, it must be borne in mind that if the restriction on the right to respect for private life is prolonged for an indefinite period of time, its effects on private life will become more serious over time and, in any event, the balance between the public interest involved and the personal interests of the individual will be upset.

66. As a result of the assessment of the present incident in the light of these explanations, it has been understood that the applicant has performed professional activities as an academician in the universities abroad, that he got an opportunity to work at a university in Germany, but that his professional ties with the said country were broken due to

his inability to go there as a result of the cancellation of his passport and the authorities' refusal to issue him with an ordinary passport. It appears that there was not any criminal investigation or prosecution indicating that the applicant had relation with a terrorist organisation or had carried out activities posing a threat to national security. There was not any court decision prohibiting him from leaving the country, either. Thus, it has been considered that the restriction on the applicant's private life solely stemmed from an administrative act. Moreover, it is clear that the administration did not inform the applicant of the grounds for dismissal of his request for the issuance of an ordinary passport and that the necessity of the measure at issue was not concretely demonstrated by the grounds provided for the said administrative act at the trial stage and by linking it to the personal situation of the applicant.

67. On the other hand, it appears that when delivering its decision, the inferior court confined itself to the grounds provided by the administration for the cancellation of the applicant's special stamped passport and that the grounds for refusal to issue the applicant with an ordinary passport were not made concrete in the light of his circumstances. Therefore, in view of the continuing uncertainty of which acts or relations of the applicant prevented him from leaving the country and the effects of the relevant administrative act on his personal ties with the intended country of destination, it has been understood that a balance was not struck between the public interest sought and the interests of the applicant.

68. Moreover, it appears that the applicant's special stamped passport was cancelled on 16 August 2016, that his request filed on 3 March 2017 for the issuance of an ordinary passport was not processed, and that he was able to get an ordinary passport on 7 February 2020. In these circumstances, in view of the absence of a criminal investigation or prosecution against the applicant or a court decision prohibiting him from leaving the country, it has been concluded that the measure at issue was applied for a long time on the basis of an administrative act. Furthermore, it has been understood that the administrative and judicial authorities failed to conduct any inquiry or assessment as to whether the circumstances relied on for the adoption of the measure prohibiting the applicant from leaving the country still persisted and that this therefore caused the continued

application, for a long time, of a measure which had been supposed to be temporary.

69. On the other hand, although Additional Article 7 added to the Law no. 5682 by Article 2 of the Law no. 7188, which was subsequently repealed by the Court (it was ordered that the repealed provisions would take effect one year after the publication of the decision in the Official Gazette), provides that the individuals satisfying certain requirements has the right to request a passport, it appears that the margin of appreciation afforded to the Administration is still at stake as regards the issuance of a passport even if all requirements are satisfied. Moreover, it is clear that the said Law does not contain any provision concerning redress for the grievances resulting from the prolonged seizure of a passport or the refusal to issue a new passport. In this case, it has been understood that the interference with the right to respect for private life of the applicant, who was deprived of the opportunity to work abroad as a result of the authorities' refusal to issue him with a passport, was prolonged for an indefinite period of time and that the reassessment procedure set out in the Law no. 7188 did not constitute an effective remedy for the redress of his grievances. In these circumstances, the prolonged application of the measure imposed on the applicant solely on the basis of an administrative act despite the absence of a criminal investigation or prosecution constituting an obstacle for him to leave the country or a court decision prohibiting him from leaving the country cannot be said to be proportionate or necessary in a democratic society in view of his close professional ties with the intended country of destination.

70. Accordingly, since the measure against the applicant was, in ordinary times, contrary to the safeguards set out in Articles 13 and 20 of the Constitution, an examination must be made as to whether the measure was legitimate within the meaning of Article 15 of the Constitution, which governs the suspension and restriction of the exercise of the fundamental rights and freedoms in times of emergency.

4. As regards Article 15 of the Constitution

71. 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 in this regard. The measures contrary to the safeguards set out in other articles of the Constitution must not interfere with the 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 be 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, 344).

72. The right to respect for private life is not one of the core rights which are set out in Article 15 § 2 of the Constitution and which are inviolable even during the periods of war, mobilization and state of emergency when emergency administration procedures are adopted. It is therefore possible during the state of emergency to take measures as regards this right although they contravene the safeguards enshrined in the Constitution. Furthermore, it has not been established that the measure on the relevant right was in breach of any other obligation (any safeguard which is afforded protection even in times of emergency) stemming from the international law.

73. In this case, it must be determined whether the cancellation of the applicant's passport and the prolonged refusal to issue him with a new one were *to the extent required by the exigencies of the situation* within the meaning of Article 15 of the Constitution. In doing this, the characteristics of the incident leading to the declaration of the state of emergency in the country and the circumstances emerging upon the declaration of the state of emergency and changing during the process as well as the circumstances of the impugned incident and the applicant's attitude must be taken into consideration (for similar assessments, see *Aydın Yavuz and Others*, § 349).

74. The principle of proportionality set out in Article 15 of the Constitution requires that the means used to restrict or suspend the exercise of the fundamental rights and freedoms must be suitable to achieve the

aim pursued, must be necessary to this end and must be proportionate to the aim pursued (see the Court's judgment, no. E.1990/25, K.1991/1, 10 January 1991). Accordingly, a measure must be suitable to achieve the aim of eliminating a threat or danger constituting an emergency, must be necessary to this end and must be proportionate to the aim pursued, and there must not be disproportionality between the public interest associated with the aim pursued and the negative impact on the individual of the measure restricting a fundamental right or freedom (see *Aydın Yavuz and Others*, § 204; among many other judgments, the Court's judgment, no. E.2013/57, K.2013/162, 26 December 2013).

75. On the other hand, the duration, scope and severity of the measure which constitutes an interference with fundamental rights and freedoms should be taken into consideration in the assessment of proportionality. As a matter of fact, the longer the interference continuous, the higher the burden placed on an individual will be. However, a measure, even applied for a short period of time, may seriously affect fundamental rights and freedoms due to its scope or severity. Thus, the severity of the measure, regardless of its duration, may place an excessive burden on an individual (see *Aydın Yavuz and Others*, § 208).

76. On the other hand, it is necessary to provide individuals with procedural safeguards against disproportionate or arbitrary interferences with fundamental rights and freedoms. If individuals are deprived of these safeguards to a great extent, this will not be compatible with the principle of proportionality. Moreover, in issues of whether a measure is suitable to achieve the aim of eliminating a threat or danger constituting an emergency, whether it is necessary to this end, and whether it is proportionate to the aim pursued, the public authorities which face such threat or danger and are primarily responsible for combating it enjoy a wide margin of appreciation. However, it is the Court's task to examine whether the public authorities exceeded their margin of appreciation where an individual application concerning such measure is brought before it (see *Aydın Yavuz and Others*, §§ 209, 210).

77. In the assessment of the present case in this scope, it must be underlined that the applicant was not subjected to any criminal

investigation on the charge of having relation with the coup attempt, with the FETÖ/PDY, namely the structure behind the coup attempt, or with any terrorist organisation. Therefore, it cannot be said that the authorities acted to prevent the applicant from rendering ineffective the investigation and prosecution processes against him by absconding abroad. The applicant was solely subjected to a measure of dismissal from public office pursuant to a Decree Law issued within the scope of the state of emergency.

78. Although it may be considered justified under the circumstances of the state of emergency to restrict, for a certain period of time, the entry into and exit from the country as regards individuals suspected of having relation with certain structures or groups against national security, this must not be turned into a practice prolonged for an indefinite period of time, and the process of getting a passport must not be uncertain.

79. In this context, regard being had to the possible effect of the impugned measure on the applicant's private life, it has been considered that the obligations expected from the State should have been fulfilled even under the circumstances of the state of emergency. In this scope, it has been concluded that the prolongation, for an indefinite period of time, of the measure in the form of refusal to issue an ordinary passport on the basis of an administrative act without providing grounds specific to the applicant's situation was not absolutely necessary and proportionate.

80. In this regard, it has been considered that Article 15 of the Constitution, which governs the suspension and restriction of the exercise of the fundamental rights and freedoms in times of emergency, did not justify the impugned interference in the form of cancelling the applicant's passport and depriving him of the opportunity to get a passport for a long time in breach of the safeguards set out in Articles 13 and 20 of the Constitution.

81. For these reasons, the Court found a violation of the applicant's right to respect for private life safeguarded by Article 20 of the Constitution in conjunction with Article 15 thereof.

5. Application of Article 50 of Code no. 6216

82. 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 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 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."

83. The applicant requested the Court to find a violation, redress the consequences thereof and award him 250,000 Turkish liras ("TRY") and TRY 100,000 in compensation for pecuniary and non-pecuniary damages, respectively.

84. 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).

85. 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).

86. In the present application, the violation found essentially resulted from the acts of the administration, but the relevant court was not able to redress the violation. Thus, it has been observed that the violation resulted from both the acts of the administration and the court decision.

87. Nevertheless, in view of the fact that the applicant was issued with an ordinary passport on 7 February 2020, it has been considered that there is no legal interest in conducting a retrial for the elimination of the consequences of the violation.

88. On the other hand, it is clear that the finding of a violation in the present case would be insufficient for the redress of the damages sustained by the applicant. Thus, for the redress of the violation together with all its consequences, the applicant must be paid a net amount of TRY 13,500 in respect of non-pecuniary damages which cannot be compensated merely by the finding of a violation due to the interference with his right to respect for private life, and the remaining compensation claims must be dismissed.

89. The total litigation costs of TRY 3,894.70 including the court fee of TRY 294.70 and the counsel fee of TRY 3,600, 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 27 October 2021:

A. BY MAJORITY and by dissenting opinions of Mr. Muammer TOPAL, Mr. Rıdvan GÜLEÇ and Mr. Basri BAĞCI, that the alleged violation of the right to respect for private life be DECLARED ADMISSIBLE;

B. UNANIMOUSLY that the right to respect for private life safeguarded by Article 20 of the Constitution was VIOLATED;

C. That a net amount of TRY 13,500 be PAID to the applicant in compensation for non-pecuniary damage and the remaining compensation claims be DISMISSED;

D. That the total litigation costs of TRY 3,894.70 including the court fee of TRY 294.70 and the counsel fee of TRY 3,600 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; and

F. That a copy of the judgment be SENT to the 10th Chamber of the Ankara Administrative Court (E. 2017/820), the 10th Administrative Chamber of the Ankara Regional Administrative Court (E. 2018/790) and the Ministry of Justice for information.

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

The applicant was dismissed from his office at the university where he had been serving as an academician pursuant to the Decree Law no. 672, which was published within the scope of the state of emergency, and his passport was cancelled pursuant to Article 5 of the Decree Law no. 667.

A seizure or cancellation of a passport directly constitutes an interference with the freedom of movement (see *Baumann v. France*, no. 33592/96, 22/5/2001, *Sissanis v. Romania*, no. 23468/02, 23 January 2007). Since Article 2 of Protocol No. 4 to the Convention, which guarantees the freedom of movement, was signed but has not yet been ratified by Türkiye, this right does not fall within the scope of the rights which may be subject to individual application pursuant to Article 148 § 3 of the Constitution.

On the other hand, in the context of the freedom of movement, as an aspect of the private life, the European Court of Human Rights ("the ECHR") requires that the applicant must have strong family, professional and economic ties in the intended country of destination. It is remarkable that the ECHR takes into account the presence of close family members in the intended country of destination in cases where it examines the complaints concerning the seizure of a passport within the scope of the right to respect for private life instead of the freedom of movement.

In this scope, in its judgment in the case of *İletmiş v. Türkiye,* where the applicant had been prevented, for a period of fifteen years, from going to Germany where his wife and children had been living on account of the seizure of his passport, the ECHR considered it appropriate to examine the complaint in the context of the right to respect for private life. Similarly, in its judgment in the case of *Paşaoğlu v. Türkiye,* where the applicant, who had been living abroad, had been denied a passport for over a period of four years, the ECHR examined the complaint within the scope of the right to respect for private life since such denial had had a negative impact on the applicant's contact with his close family members living in Türkiye and abroad.

Within the framework of the aforementioned judgments of the ECHR, it is clear that for a right essentially falling within the scope of the freedom of movement to be examined in the context of private life, the person concerned must have strong family, professional and economic ties in the intended country of destination.

In its judgment in the case of *Denisov v. Türkiye,* the ECHR indicated that for an interference to be assessed in the context of private life, it had to attain a minimum level of severity, which would be established by a consequence-based approach, and that this issue had to be raised at the stages (see *Denisov v. Ukraine*, no. 76639/11, 25 September 2018).

However, in the present application, the applicant solely got an acceptance for a job from a university in the relevant country. He had no existing family, professional or economic ties in that country. In these circumstances, the complaint must be examined in the context of the freedom of movement, rather than the right to respect for private life.

As regards the freedom of movement, which does not fall within the common realm of protection, we are of the view that the complaint should have been declared inadmissible for incompatibility *ratione materiae*. Thus, we do not agree with the majority opinion to the contrary.

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

AHMET GÖDELOĞLU

(Application no. 2018/28616)

17 November 2021

On 17 November 2021, the First Section 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 *Ahmet Gödeoğlu* (no. 2018/28616).

THE FACTS

[7-20] The applicant was serving as an ophthalmologist at a private clinic. A criminal complaint was filed against him on the ground that he had not paid for the medical devices he had acquired through a financial leasing contract. At the end of the proceedings, he was sentenced to 10 months' imprisonment as well as subject to an administrative fine of 80 Turkish liras for abuse of trust in performing his profession. His imprisonment sentence was then suspended. The first instance decision became final with no appeal.

Subsequently, the applicant's work permit certificate was cancelled by the health directorate for being subject to imprisonment. The applicant unsuccessfully challenged this administrative act.

The applicant, lodging an individual application with the Constitutional Court on 4 October 2018, lost his life at a subsequent date.

V. EXAMINATION AND GROUNDS

21. The Constitutional Court ("the Court"), at its session of 17 November 2021, examined the application and decided as follows:

A. Preliminary Issue as to Whether the Application will Continue to be Examined due to the Applicant's Death

22. During the period subsequent to its judgment *Asya Oktay and Others* (no. 2014/3549, 22 March 2017), the Court examined the applications lodged by the applicant's heirs who expressed their will to pursue the application before the Court within a reasonable time after the date of death of the applicant, who died in the course of the proceedings, by taking into account whether they had an interest. In the Court's judgment *T.G.* (no. 2017/21163, 9 January 2019), the reasonable time in question was established as four months from the date of death, save for justifiable

excuses (see *T.G.*, § 20). In the present case, it appears that during the period until the date of the judgment the heirs of the applicant, who died on 23 January 2021, did not inform the Court of their intention to pursue the application. It is thus clear that a request to pursue the application was not lodged by the applicant's heirs within four months.

23. However, although the application may be struck out of the list in the circumstances set out in Article 80 § 1 of the Internal Regulations, the Court may continue the examination of the application if the implementation and interpretation of the Constitution or the determination of the scope and limits of the fundamental rights or the respect for human rights so requires pursuant to paragraph 2 of the said article. Nevertheless, where the Court has previously decided on complaints similar to those raised in the present application, implemented and interpreted the constitutional provisions in its decisions, and established the scope and limits of the fundamental rights and freedoms, there would remain no reason to justify the continuation of the examination of the application (see *T.G.*, § 22; *İrfan Gerçek (2)*, no. 2018/21744, 27 January 2021, § 23; *Ahmet Kaval*, no. 2018/5066, 7 April 2021, § 26; *Kemal Yüzbaşı*, no. 2018/27081, 26 May 2021, § 36). Lastly, where there are other pending applications concerning similar facts or where the application is not struck out of the list but is examined, it may not be necessary to continue the examination of the application if it is not possible to examine it on the merits since a *prima facie* issue arises as regards the admissibility criteria (see *Mehmet Girasun and Ömer Elçi* [Plenary], no. 2015/15266, 17 June 2021, § 45).

24. The present case is of importance for the determination of the limits of the practices which prohibit the practice of a profession or a trade without any limit of scope and duration as a consequence of a criminal conviction, as well as of their effects on the right to respect for private life. Indeed, the Court has never decided on a similar application concerning a permanent prohibition. Accordingly, the scope and limits of the right to respect for private life in the context of a permanent prohibition of the practice of a profession or a trade as a result of a criminal conviction have not been determined yet. For these reasons, it has been considered that the present application must continue to be examined due to the existence of

the reasons set out in Article 80 § 2 of the Internal Regulations to justify the continuation of the examination of the application.

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

1. The Applicant's Allegations

25. The applicant stated that while he had been serving as an ophthalmologist at a private clinic, he had been sentenced to 10 months' imprisonment for the offence of misconduct due to service and that the prison sentence had been suspended. He maintained that his work permit certificate had been permanently cancelled by the Directorate of Health upon finalisation of his conviction and that he had not able to exercise his profession which he had performed for twenty years. He alleged a violation of his right to work, stating that he had earned a livelihood for his wife and five children by exercising his profession as a medical doctor, that he had had financial difficulties as a result of the cancellation of his certificate, and that his reputation in his circle had also been undermined.

2. The Court's Assessment

26. 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).

27. It is indisputable that the professional life of individuals is closely interrelated with their private life and that the right to respect for private life may come into play in the proceedings involving any interference with, or any measure in the context of, professional life. In this sense, regard must be paid to the criteria set to determine under which circumstances such interferences with, or measures in the context of, professional life could be considered to fall within the scope of *private life* or which disputes brought before the Court could be considered applicable in this context (see *C.A. (3)* [Plenary], no. 2018/10286, 2 July 2020, § 88).

28. In its judgment *C.A. (3),* the Court has stated that *the right to respect for private life* is applicable in cases where the issues falling within the scope of private life are taken as basis in the acts and actions concerning the profession of the individual, and it has also made detailed assessments as to

the conditions required in order for the interferences with professional life -in the absence of any reason concerning private life- to be examined within the scope of the right to respect for private life (see *C.A. (3)*, §§ 90-96).

29. As a result of the assessment of the present case in view of the principles indicated in the said judgment, it has been understood that the applicant's allegations mainly concerned his inability to earn a livelihood for his family and a possibility of his reputation being undermined as a result of a permanent prohibition on the exercise of his rights and powers arising from his profession as a an ophthalmologist. In this respect, it has been concluded that the act involving the cancellation of the applicant's work permit certificate would have negative consequences on his financial situation and his reputation in the society and would thus affect his private life to a considerable extent.

30. As explained, it can be said that the restriction on the applicant's professional life in the present application seriously affected his *private life* and that such effect attained a certain level of severity. In this respect, it has been understood through a consequence-based approach that the present application may be examined within the scope of *the right to respect for private life* (for similar assessments, see *Özlem Kenan*, § 43).

31. Article 20 of the Constitution, which will be taken as basis in the assessment of the allegation, reads as follows:

> *"Everyone has the right to demand respect for his/her private and family life. Privacy of private or family life shall not be violated."*

a. Admissibility

32. 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.

b. Merits

i. Existence of an Interference

33. It has been concluded that there was an interference with the applicant's right to respect for private life due to the administrative act

permanently prohibiting him from exercising his rights and powers arising from his profession as a medical doctor and the dismissal of the proceedings brought against such act.

ii. Whether the Interference Amounted to a Violation

34. 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."*

35. The aforementioned interference amounts to a violation of Article 20 of the Constitution unless it complies with the conditions set out in Article 13 thereof. Therefore, it must be determined whether the interference complied with the requirements of being prescribed by law, pursuing a legitimate aim and not being contrary to the principle of proportionality and the requirements of a democratic society order, which are relevant for the present application and laid down in Article 13 of the Constitution (see *Halil Berk*, no. 2017/8758, 21 March 2018, § 49; *Süveyda Yarkın*, no. 2017/39967, 11 December 2019, § 32; *Şennur Acar*, no. 2017/9370, 27 February 2020, § 34; *R.G.* [Plenary], no. 2017/31619, 23 July 2020, § 82).

1) Lawfulness

36. It appears that Article 28 of the Law no. 1219 constituted the basis for the decision of the 8th Administrative Law Chamber of the İstanbul Regional Administrative Court ("the Chamber") which considered that the decision to cancel the applicant's work permit certificate had been lawful. In this context, it is evident that the interference with the applicant's right to respect for private life in the present case had a legal basis and that the judicial decisions had a sufficient legal basis.

2) Legitimate Aim

37. 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 as regards Article 20 § 1 of the Constitution. Although certain grounds for restriction are laid down in the second paragraph of the said article, these grounds are related merely to the search and seizure measures. Thus, it does not seem possible for such grounds to be relied on as regards 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).

38. Although Article 20 of the Constitution prescribes no ground for the restriction of the right to respect for private life, this right cannot be said to be of an absolute nature, which cannot be restricted under any circumstances. As laid down in Article 12 of the Constitution, the fundamental rights and freedoms also comprise 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 limits deriving from the very nature of the right. Besides, these rights may also be restricted on the basis of the rules set out in other provisions of the Constitution. Accordingly, it is acknowledged that the rights and freedoms enshrined in other provisions of the Constitution as well as the duties incumbent on the State may set boundaries for 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; no. E.2016/37, K.2016/135, 14 July 2016, § 9; no. 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 as regards every norm but according to the meaning in the Constitution as a whole (see the Court's judgment no. E.2017/130, K.2017/165, 29 November 2017, § 12).

39. Article 5 of the Constitution provides as follows: "*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, the State's fundamental aims and duties include ensuring the welfare, peace and happiness of the individuals and the society (see *Ö.N.M.*, no. 2014/14751, 15 February 2017, § 71). The prerequisite for ensuring welfare, peace and happiness of the individuals and the society is to maintain national safety and public order. In an environment where national safety and public order are not maintained, it is not possible to duly exercise the rights and freedoms and to respect the private lives of individuals. In this sense, the State is under a duty not only to protect rights and freedoms but also to maintain national security and public order (see *Ö.N.M.*, § 72).

40. In view of the role and importance, in the health service, of the profession of a medical doctor qualified as a public service, it may be considered that the purpose of the restriction on the exercise of a profession as a security measure is to ensure the continuity of the public service and to protect the reputation of the profession and those benefiting from such services. Therefore, as regards a restriction on a profession that constitutes an interference with the right to respect for private life, it is considered that the requirements of protecting national security and ensuring the 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, it has been 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 (for similar assessments, see *Özlem Kenan*, § 52).

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

(a) General Principles

41. In order for an interference with the fundamental rights and freedoms to be *compatible* with the requirements of a democratic society, it must be proportionate and correspond to a pressing social need. It is clear

that an assessment under this heading cannot be made independently from the principle of proportionality based on the relationship between the purpose of the restriction and the means used to achieve such purpose. This is because Article 13 of the Constitution involves two criteria, namely *not being contrary to the requirements of a democratic society* and *not being contrary to the principle of proportionality*, which are parts of a whole having a close interplay with each other (see *Ferhat Üstündağ*, no. 2014/15428, 17 July 2018, § 45).

42. In order for a measure constituting an interference to correspond to a pressing social need, it must be capable of securing the achievement of the aim, must be applied as a last resort and must be 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 correspond to a pressing social need (see *Ferhat Üstündağ*, § 46).

43. Proportionality refers to the absence of an imbalance between the aim pursued by the restriction and the restrictive measure employed. In other words, proportionality requires a fair balance to be struck between the rights of an individual and the interests of the public or between the rights and interests of other individuals where the aim of the interference is to protect the rights of others. A problem in terms of the principle of proportionality may arise if, as a result of a balancing exercise, a clearly disproportionate burden is found to have been 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*, § 48).

44. Accordingly, an interference with the right to respect for private life cannot be considered compatible with the requirements of a democratic society if it does not correspond to a pressing social need or if it is not proportionate although it corresponds to a pressing social need.

b) Application of Principles to the Present Case

45. In the present case, it appears that the present application concerns the practice concerning the permanent cancellation of the applicant's work permit certificate. The decisions of the Chamber and the Supreme Administrative Court were based on Article 28 of the Law no. 1219. As regards the exercise of the profession of a medical doctor, this provision

lays down a condition of not being sentenced to imprisonment for certain offences including breach of trust.

46. Since the profession of a medical doctor requires the provision of services for the benefit of society without any limitation in terms of place and time and aims at protecting human life, it must be considered normal that the legal and ethical limits applicable to medical doctors are regulated in a much more detailed and stricter manner as compared to many other professions.

47. Indeed, in the present case, the Law no. 1219, which constituted the basis for the cancellation of the applicant's work permit certificate, sets out in detail under which conditions the profession of a medical doctor may be exercised. It appears that Article 28 of the said Law lays down a condition of not being convicted for certain offences, limited in number, for the exercise of the profession of a medical doctor. The offences set out in the said article may be considered to be among those subject to social reaction and condemned by the majority of the society.

48. However, the notion of the requirements of a democratic society means that the restriction on the relevant right must constitute an absolutely necessary or exceptional measure, must be applied as a last resort and must be the most lenient measure available.

49. In the present case, the Chamber dismissed the proceedings on the ground that the imposition of a prison sentence for breach of trust even for a period of one day would constitute an obstacle to the exercise of the profession of a medical doctor. In the said decision, it appears that the decision on suspension of the sentence which was delivered pursuant to Article 53 of the Law no. 5237 and the rule requiring the termination of the security measures upon the execution of the sentence were ignored, that an assessment concerning a distinction between the private sector and the public sector was not made, and that the principle requiring the application of the measure as a last resort was not taken into consideration.

50. It has been considered that the grounds provided by the inferior courts were not convincingly relevant and sufficient to indicate that the interference corresponded to a pressing social need. Thus, the interference

in the present case cannot be said to be compatible with the requirements of a democratic society.

51. On the other hand, it must be determined whether the interference was proportionate. Thus, a fair balance must be struck between the rights and interests of the applicant and the burden placed on him as a result of the measures imposed for the protection of status and reputation of the profession of a medical doctor in the public interest. In the present case, it appears that the sanction imposed on the applicant would be applied without any limitation of place and duration and that the applicant would never be able to exercise his profession as a medical doctor not only in the public sector but also in the private sector as a result of such sanction. It may be considered normal that the requirements sought by the legislator for the exercise of a profession in the public sector -since employment in the public sector is not an absolute right- are stricter than those sought in the private sector. However, it has been concluded that a fair balance could not be struck between the severity of the burden placed on the applicant as a result of the prohibition on the exercise of his profession in the private sector and the general interest sought by such sanction, and that the interference with the applicant's private life was disproportionate.

52. For these reasons, it has been concluded that the impugned interference was not compatible with the requirements of a democratic society and did not satisfy the requirement of proportionality. It has therefore been concluded that the right to respect for private life safeguarded by Article 20 of the Constitution was violated.

C. 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, 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 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 the Court to find a violation and to order the reopening of the proceedings.

55. 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).

56. 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).

57. Although it has been understood that the right to respect for private life under Article 20 of the Constitution was violated on account of the administration's practice and that the consequences of such violation might be redressed by a retrial by the inferior courts, there is no legal interest in conducting a retrial due to the applicant's death and the Court is thus required to confine itself to the finding of a violation.

58. Despite the finding of a violation, it must be held that the litigation costs be covered by the applicant in view of the particular circumstances of the present case since it appears that the legal heirs of the applicant did not pursue the application.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 17 November 2021 that

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

B. The right to respect for private life guaranteed by Article 20 of the Constitution was VIOLATED;

C. The litigation costs be COVERED by the applicant; and

D. A copy of the judgment be SENT to the Ministry of Health, the 8th Administrative Law Chamber of the Istanbul Regional Administrative Court (E. 2017/1530, K. 2017/1542), and the Ministry of Justice for information.

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

ÖMER FARUK GERGERLİOĞLU

(Application no. 2019/10634)

1 July 2021

On 1 July 2021, the Plenary of the Constitutional Court found violations of the right to stand for elections and engage in political activities as well as freedom of expression, respectively safeguarded by Articles 67 and 26 of the Constitution, in the individual application lodged by *Ömer Faruk Gergerlioğlu* (no. 2019/10634).

THE FACTS

[10-44] The chief public prosecutor's office indicted the applicant on 4 August 2017 for the offence of disseminating propaganda on behalf of a terrorist organisation on the ground of having shared a news article on his social media account. The incumbent assize court sentenced the applicant to 2 years and 6 months' imprisonment for the imputed offence. Thereupon, the applicant appealed on points of law and facts against the assize court's decision. In the course of the appeal proceedings, the applicant, who was elected as a member of parliament (MP) from the People's Democratic Party (HDP) on 24 June 2018, filed an application with the Regional Court of Appeal, seeking the stay of proceedings against him pursuant to Article 83 § 2 of the Constitution. The latter dismissed the applicant's request for the stay of proceedings as well as his appeal on the merits with no right of further appeal.

Pending the execution of the applicant's final sentence, he became entitled to lodge an appeal on points of law as per Law no. 7188. Having reviewed the applicant's appeal, the Court of Cassation dismissed the applicant's request for stay of proceedings as well as his appeal on the merits, and ultimately upheld the applicant's imprisonment sentence. The applicant lost his status as an MP after his sentence had been read out at the Grand National Assembly of Türkiye on 17 March 2021. Afterwards, the Ankara Chief Public Prosecutor's Office took the necessary steps to proceed with the execution of the applicant's sentence, and the applicant was placed in the penitentiary institution on 2 April 2021.

The applicant filed to separate individual applications, which were be subsequently joined, with the Constitutional Court on 8 April 2019 and 3 March 2021.

V. EXAMINATION AND GROUNDS

45. The Constitutional Court ("the Court"), at its session of 1 July 2021, 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

46. The applicant complained that although he had been elected as a member of parliament (MP) pending the proceedings conducted against him, he had not been granted parliamentary immunity pursuant to Article 83 of the Constitution and the stay of the proceedings against him had not been ordered. The applicant's assertions under this heading are in brief as follows:

i. The ground for denial of parliamentary immunity is the unforeseeable interpretation of Article 14 of the Constitution, with a reference to Article 83 thereof, by the Court of Cassation. Article 14 of the Constitution is a legal provision of an unforeseeable nature. Besides, it is stated in the impugned decision of the Court of Cassation that there was no unity in the case-law pertaining to Article 14.

ii. Articles 83 and 14 of the Constitution should have been read together. In Article 83 of the Constitution, it is set forth that the *cases* laid down in Article 14 of the Constitution is an exception to Article 83. However, although the parliamentary immunity is related to criminal procedure and offences, Article 14 of the Constitution refers to any offence in its wording.

iii. As the many of the notions specified in Article 14 of the Constitution are vague, and it is very difficult to make an exact definition thereof, the *cases* to which a reference is made by Article 83 § 2 of the Constitution cannot be defined by way of interpretation. Even if it is maintained that some of the offences laid down in the criminal laws correspond, by analogy, to the notions specified in Article 14, the prohibition of analogy is applied in criminal law. Therefore, the exceptions based on Article 14 of the Constitution are, in any case, devoid of a legal ground.

iv. By the amendments made in 2001 to Article 14 of the Constitution, the abuse of right has been limited to the *"activities"*. In the legislative intent of this amendment, it is set forth that the aim is to qualify not the thoughts and opinions, but the acts and actions as being abused. Accordingly, as the act of disseminating propaganda of a terrorist organisation criminalises expression of thought, it does not fall into the scope of the notion *"activities"* specified in Article 14 of the Constitution. Unlike the common view in doctrine, the assessment that the dissemination of propaganda falls under the scope of the activities is also of an unforeseeable nature.

v. According to the European Court of Human Rights ("ECHR"), in cases where the courts make a sudden and unforeseeable change in their case-law or they apply a given law by improperly extending its scope, the criterion of foreseeability of the law cannot be met. Although the impugned decision of the Court of Cassation includes certain case-law, the referenced judgments of the ECHR and the Constitutional Court are of no relevance to the present case. They also involve findings and considerations that are contrary to the assertions in the impugned decision of the Court of Cassation. In the Court's judgment dated 29 January 2018, which is relied on in the impugned decision, it has been concluded that the expression of thoughts may be considered as an abuse under Article 14 of the Constitution; however, not every expression of thought but those constituting directly a clear and imminent threat to the democratic life are considered to fall within this scope. The said judgment of the Court is not, however, related to the parliamentary immunity and even to criminal law. This judgment is concerning the dissolution of a political party. In this case, the Court has stressed that the freedom of expression must be interpreted broadly, contrary to the assertion of the Court of Cassation.

vi. In the present case, pursuant to Article 83 § 2 of the Constitution as the offence imputed to the applicant fell into the scope of Article 14 of the Constitution, the Regional Court of Appeal and the Court of Cassation ordered the continuation of the proceedings conducted with respect to the applicant despite his being elected as an MP. However, this legal framework was not foreseeable. Nor was the relevant judicial case-law in support of this allegation.

vii. In its judgment *Kadri Enis Berberoğlu (2)* ([Plenary], no. 2018/30030, 17 September 2020), the Court has noted that any interferences with the engagement of an elected member of parliament in legislative activities would give rise to the violation of Article 67 of the Constitution. In the present case, there was an interference with his parliamentary immunity introduced so as to prevent any intervention with the legislative functions of the members of parliament, which was in breach of Article 67 of the Constitution.

viii. The applicant has become a target of the ruling party as he in his capacity as an MP and human-rights defender has voiced, both at and outside the parliament, gross human rights violations such as abduction, strip-search, torture and etc.. It is therefore clear that the upholding of the applicant's criminal conviction in a way disregarding all principles of law had a political motive. Therefore, the applicant's right to engage in political activities was violated due to the interference pursuing a political motive.

47. In its observations, the Ministry stated:

i. The right to elect, stand for elections and engage in political activities enshrined in Article 67 of the Constitution was formulated in a broader manner in comparison to the right to election enshrined in Article 3 of the Additional Protocol no. 1 to the European Convention on Human Rights ("Convention"). As Article 3 of the Additional Protocol no. 1 to the Convention, unlike the provision in the Constitution, did not place a clear obligation on the State to secure the right to engage in political activities, along with the right to elect and stand for elections, it should be taken into consideration, in making an assessment as to the jurisdiction *ratione materiae*, whether the applicant's complaint that indeed fell into the scope of a right safeguarded by the Constitution (the right to engage in political activities) fell into the scope of a right covered by the Convention.

ii. In the present case, the applicant, standing as a candidate in the parliamentary elections pending the criminal proceedings conducted against him, was elected as an MP. He assumed this office and became entitled to all rights and facilities deriving from the office of an MP. In this sense, the applicant did not raise any allegation that his right to stand

for elections had been undermined. The initiation of an investigation or the conduct of proceedings against an MP did not pose an obstacle to his engagement in the parliamentary acts and actions. Nor did the applicant raise any allegation, in the application forms, to the effect that he could not engage in political activities or he was precluded from exercising his right to engage in political activities due to the criminal proceedings conducted against him.

iii. It was asserted by the applicant that the offences in contravention of the basic principles set forth in Article 14 of the Constitution were not enumerated and that the scope of these offences were left to the discretion of the practitioners, namely the investigation and prosecution authorities. Although, it was left to the discretion of the practitioners, it was already acknowledged in the doctrine that the offences against the unity of the nation or directed at altering the political order prescribed in the Constitution would be necessarily considered to fall into this scope.

iv. The inferior courts found out that the offence of disseminating propaganda of a terrorist organisation, which was imputed to the applicant, had been subject to an investigation before his election as an MP; and that the said offence was among those in contravention of the basic principles set forth in Article 14 of the Constitution. Therefore, the inferior courts' conclusion was in accordance with the relevant provisions of the Constitution and reached by striking a fair balance between the conflicting rights.

48. In his counter-statements against the Ministry's observations, the applicant asserted that the decision on his conviction had not been read out at the Assembly although it had been upheld by the appeal court and thus become final; that upon the expiry of nearly ten months, the decision had been read out at the Assembly immediately after the upholding decision of the Court of Cassation, which reviewed the impugned decision following the relevant statutory amendment. He accordingly maintained that nor was it foreseeable when and under which conditions a decision would be read out at the Parliament.

2. The Court's Assessment

49. The Constitutional Court is not bound by the legal qualification of the facts by the applicants and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The Court has concluded that the applicant's complaints under this heading must be examined mainly under the right to stand for elections and engage in political activities safeguarded by Article 67 of the Constitution in the light of Articles 14 and 83 of the Constitution, respectively titled *"Prohibition of Abuse of Fundamental Rights and Freedoms"* and *"Parliamentary Immunity"*.

50. 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 independently or in a political party, ….*
>
> *The exercise of these rights shall be regulated by law."*

51. Article 14 of the Constitution, titled *"Prohibition of abuse of fundamental rights and freedoms"*, reads as follows:

> *"(Amended: On 3 October 2001- By Article 3 of Law no. 4709)*
>
> *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.*
>
> *No provision of this Constitution shall be interpreted in a manner that enables the State or individuals to destroy the fundamental rights and freedoms recognized by the Constitution or to stage an activity with the aim of restricting them more extensively than stated in the Constitution.*
>
> *The sanctions to be applied against those who perpetrate activities contrary to these provisions shall be determined by law."*

52. Article 80 of the Constitution, titled *"Representing the nation"*, reads as follows:

> *"Members of the Grand National Assembly of Türkiye shall not represent their own constituencies or constituents, but the nation as a whole."*

53. Article 83 of the Constitution, titled *"Parliamentary immunity"*, reads as follows:

> *" Members of the Grand National Assembly of Türkiye 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 Türkiye of the case immediately and directly.*
>
> *The execution of a criminal sentence imposed on a member of the Grand National Assembly of Türkiye 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 Türkiye shall not hold debates or take decisions regarding parliamentary immunity."*

54. Article 85 of the Constitution, titled *"Application for annulment"*, reads as follows:

"If the parliamentary immunity of a deputy has been lifted or if the loss of membership has been decided according to the first, third or fourth paragraphs of Article 84, the deputy in question or another deputy may, within seven days from the date of the decision of the Plenary, appeal to the Constitutional Court, for the decision to be annulled on the grounds that it is contrary to the Constitution, law or the Rules of Procedure. The Constitutional Court shall make the final decision on the appeal within fifteen days."

a. Admissibility

55. The Ministry asserted that Article 3 of Additional Protocol no. 1 to the Convention did not place on the State an obligation to secure the right to engage in political activities, along with the right to elect and stand for elections; and that therefore, the Court lacked jurisdiction *ratione materiae*.

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 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 Assembly (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; *Sebahat Tuncel*, no. 2012/1051, 20 February 2014, § 65; and *Kadri Enis Berberoğlu (2)*, § 56).

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; *Ömer Faruk Eminağaoğlu*, no. 2015/7352, 26 September 2019, § 52; and *Kadri Enis Berberoğlu (2)*, § 57).

58. The parliament, holder of the legislative authority, and deputies, as its members, are the representatives of different political views prevailing among 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; *Sebahat Tuncel (2)*, § 41; and *Kadri Enis Berberoğlu (2)*, § 58).

59. In consideration of the above-mentioned assessments, the Court has acknowledged in its judgments that 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 *Mustafa Ali Balbay*, §§ 125-134; *Sebahat Tuncel*, §§ 63-71; *Kadri Enis Berberoğlu (2)*, §§ 56-60).

60. Therefore, the alleged violation of the right to stand for elections and 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. In general, the Parliamentary Immunity

61. 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

Kadri Enis Berberoğlu (2), § 60; *Mustafa Ali Balbay*, § 129; *Sebahat Tuncel (2)*, § 42; and *Kadri Enis Berberoğlu (3)* [Plenary], no. 2020/32949, 21 January 2021, § 72).

62. In the present case, a criminal case was filed against the applicant, who would be elected as a member of parliament within a short period of time, on 4 August 2017 for allegedly disseminating propaganda of a terrorist organisation through his post in a social media. The Kocaeli Assize Court convicted the applicant for the imputed offence. The applicant challenged the first instance decision before the regional court of appeal. Pending the appeal proceedings, the applicant was elected as an MP on 24 June 2018 and applied to the 3rd Criminal Chamber of the İstanbul Regional Court of Appeal dealing with his appellate request, seeking the stay of the proceedings conducted against him pursuant to Article 83 § 2 of the Constitution. The 3rd Criminal Chamber rejected, with final effect, the applicant's request for the stay of the proceedings, as well as his appellate request on the merits. Pending the execution of the applicant's sentence, which had already become final, he became entitled to have his case subject to an appellate review by virtue of the Law no. 7188. He then filed an appellate request with the Court of Cassation, which ultimately upheld the applicant's conviction by dismissing the applicant's request for the stay of proceedings and his appeal on the merits. On 17 March 2021 when his conviction decision was read out at the General Assembly of the Grand National Assembly of Türkiye ("Assembly"), he lost his status as a member of parliament. Therefore, the parliamentary immunity should be scrutinised so as to resolve the complaints brought before the Court.

63. 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 Assembly. 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-i Esasi"*), was always enshrined in the subsequent constitutions, except for the 1921 Constitution, albeit certain changes this institution has undergone (see *Kadri Enis Berberoğlu (2)*, § 73).

64. The parliamentary immunity laid down in Article 83 of the Constitution is not an absolute assurance and affords temporary protection for the MPs against untimely criminal prosecutions that will hinder their physical presence in 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 (see *Kadri Enis Berberoğlu (2)*, §§ 74 and 75).

65. Such kind of immunity has two embedded functions: The existence of statutory provisions regarding parliamentary immunity is, above all, predicated on the need to maintain the principle of representative democracy. 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 (see the Court's judgment no. E.2017/124, K.2018/9, 14 February 2018; and *Kadri Enis Berberoğlu (2)*, § 75). Secondly, such kind of immunity aims to prevent notably the members of parliament in the minority in the Assembly and those who are opponent from being deprived of engaging in legislative activities even for a temporary period through an arbitrary criminal prosecution. It enables them to actually and duly perform their democratic functions as the elected representative of the people, without concern for any unnecessary interference. It is thereby ensured that the members of parliament reflect the will of the nation in the Parliament, thus duly realising the national will (see the Court's judgment no. E.1994/21, K.1994/40, 21 March 1994; and *Kadri Enis Berberoğlu (2)*, § 74).

66. 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 role for the proper functioning of representative democracy. The rights-oriented approach that should predominate over

the 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; *Mehmet Haberal*, no. 2012/849, 4 December 2013, § 99; and *Kadri Enis Berberoğlu (2)*, § 91).

ii. Trial Procedures Falling into the Scope of Immunity

67. Pursuant to Article 83 § 2 of the 1982 Constitution, the scope of the parliamentary immunity consists of the inability of *"being placed in custody"*, *"being interrogated"*, *"being detained"*, and *"being tried"* for any offence the members of parliament have allegedly committed before or after the elections. In the legal terminology of criminal procedure, there is indeed no institution as *"being placed in custody"*. However, the Constitution contains the terms *"detention"* and *"placement in custody"*. Given the literal and teleological interpretation of the provision, it may be said that *"placement in custody"* excludes detention while includes arrest and implies any kind of measure restricting the freedom of movement, which may preclude the MPs from engaging in legislative acts and actions. Therefore, the measure of arrest is also included within the scope of the immunity.

68. Another investigation act falling into the scope of immunity is *interrogation* that may be defined as the procedure whereby the person concerned is asked by the judge to explain his knowledge about an incident being investigated or prosecuted. Besides, it is undoubted that the interrogation, which is precluded by virtue of the Constitution in case of entitlement to parliamentary immunity, also involves the act of taking statement by the prosecutor's office and law-enforcement officers. The constitution-maker has also considered the measure of detention, which would lead to the preclusion of an MP from his legislative duties for a long period of time, to fall into the scope of the immunity, as in all other countries acknowledging the parliamentary immunity. The last

ban introduced within the meaning of the parliamentary immunity is the inability to subject an MP to any criminal trial including the proceedings before the appeal courts.

iii. Existence of an Interference

69. The applicant was elected as a MP at the 27th Term Parliamentary Elections held on 24 June 2018. Therefore, the applicant was indubitably entitled to parliamentary immunity. However, as the act imputed to the applicant was considered to fall into the scope of the exception set forth in Article 83 § 2 of the Constitution, the execution of the proceedings was continued, and the decision ordering his conviction was upheld, thus becoming final. It must be therefore accepted that the continuation of the proceedings against the applicant constituted an interference with his right to stand for elections and engage in political activities.

iv. Whether the Interference Constituted a Violation

70. In the present case, the İstanbul Regional Court of Appeal and 16th Criminal Chamber of the Court of Cassation dismissed the applicant's request for the stay of the proceedings conducted against him as he became an MP on the ground that *"the offence of disseminating propaganda of a terrorist organisation amounted to the abuse of a given right under Article 14 of the Constitution"*. The relevant inferior courts' assessments in the same vein are briefly as follows:

i. A member of parliament who has committed an offence *"falling under the scope of Article 14 of the Constitution"* before election cannot be entitled to the parliamentary immunity set forth in Article 83 § 2 of the Constitution. However, the law-maker has not made an exhaustive definition of the offences falling into the scope of this provision. It is for the practitioner to determine the scope thereof.

ii. It is out of question that any acts against the unity of the State and country and those against the constitutional order and proper functioning of this order fall into this scope. However, it should be discussed in doctrine whether the act of disseminating propaganda of an armed terrorist organisation founded to commit these offences would be considered to fall into the scope of Article 14 of the Constitution.

iii. By the amendment of 2001 to Article 14 of the Constitution, the provision to the effect that the rights and freedoms enshrined in the Constitution *"cannot be exercised for the purpose of"* undermining these rights and freedoms was replaced with the provision stating that these rights and freedoms cannot be exercised in the form of *"activities aiming to"* destroy the fundamental rights and freedoms enshrined in the Constitution. It should be discussed whether the notion *"activities"* included in the provision through the said amendment involves only the acts or rather covers the expression of thoughts. In doctrine, there are arguments to the effect that the notion *activities* cover only the acts, whereas there are some authorities who argue that this notion covers both acts and expressions.

iv. In its judgment dated 29 January 2008 (no. E.2002/1, K.2008/1), the Court has concluded that the expression of thoughts may be also considered as an abuse of right under Article 14 of the Constitution; but not all expression of thoughts but merely those posing a clear and imminent threat to the democratic life are included in this scope. In the established case-law of the 16th Criminal Chamber and 9th Criminal Chamber of the Court of Cassation, it is established that the offence of disseminating propaganda of a terrorist organisation is an abuse of right within the meaning of Article 14 of the Constitution.

v. In Article 17 of the Convention, it is prohibited that the rights and freedoms be set aside by the exercise of these rights and freedoms. The expressions and acts against the indivisible integrity of the State and constitutional order constitute an abuse of right within the meaning of Article 14 of the Constitution. The members holding office at the Assembly where the will of the nation is realised in the democratic governance commit to be bound by this system and are also obliged to preserve the system. Therefore, being deprived of parliamentary immunity in case of their involvement in any act or action against democratic system will comply with both the wording and the spirit of the Constitution.

71. On the other hand, the applicant maintained that the interpretation of Article 14 of the Constitution, which failed to fulfil the lawfulness requirement, by the 16th Criminal Chamber of Court of Cassation and the İstanbul Regional Court of Appeal was manifestly in breach of the

principle of parliamentary immunity, which was afforded special protection under Article 83 of the Constitution as well as of the right to stand for elections and engage in political activities safeguarded by Article 67 of the Constitution.

72. The above-mentioned interference would constitute a violation of Article 67 of the Constitution unless it complies with the conditions set forth in Article 13 of the Constitution. During this examination, the Court would primarily address whether the impugned interference satisfy the legality requirement.

(1) Whether the Interference was Prescribed by Law

73. In Article 13 of the Constitution regulating the regime of restricting the fundamental rights and freedoms, it is set forth as basic principle that fundamental rights and freedoms may be restricted *"only by law"*. In order to accept that an interference with Article 26 of the Constitution meets the requirement of lawfulness, the intervention must necessarily have a legal basis under Article 26 § 2 of the Constitution (see, for the judgments where basic principles of the lawfulness requirement are laid down in different contexts, *Tuğba Arslan* [Plenary], no. 2014/256, 25 June 2014, § 82; *Halk Radyo ve Televizyon Yayıncılık A.Ş.* [Plenary], no. 2014/19270, 11/7/2019, § 35; *Sevim Akat Eşki*, no. 2013/2187, 19 December 2013, § 36; *Hayriye Özdemir*, no. 2013/3434, 25 June 2015, §§ 56-61).

74. The Court has on many occasions stated that for an interference to be considered to have a legal basis, primarily the formal existence of a law is necessary (see *Tuğba Arslan*, § 96; *Fikriye Aytin and Others*, no. 2013/6154, 11 December 2014, § 34). The reason for the Constitution to entail the formal existence of a law constituting an interference with fundamental rights and freedoms is that this requirement is in form both the means of and antecedent to the state governed by rule of law. As a matter of fact, law as a legislative act is a product of the will of the Grand National Assembly of Türkiye and is enacted by it in compliance with the law-making procedures enshrined in the Constitution. Such an understanding affords a significant safeguard for fundamental rights and freedoms (see *Eğitim ve Bilim Emekçileri Sendikası ve diğerleri* [Plenary], no. 2014/920, 25 May 2017, § 54; and *Halk Radyo ve Televizyon Yayıncılık A.Ş.*, § 36). It is thereby intended

that the executive and the judiciary would be bound by the principles and boundaries set by the legislature and that the fundamental rights and freedoms cannot be restricted easily through regulations included in the laws in the legal order, which are enacted in line with the procedure prescribed in the Constitution. The Court has considered the non-existence of a law in form in case of any restriction on the fundamental rights and freedoms is a severe form of unconstitutionality (see *Tuğba Arslan*, § 98).

75. Besides, it cannot be categorically asserted that any interference with fundamental rights and freedoms directly on the basis of the Constitution fails to satisfy the *lawfulness requirement*. In the present case, the applicant's right to stand for elections and engage in political activities was interfered with under Article 14 of the Constitution. The inferior courts decided to deprive the applicant of his parliamentary immunity enshrined in Article 83 § 2 of the Constitution not on by interpreting and applying a provision of law enacted by the law-maker but directly on the basis of the relevant constitutional provision. As in the present case, the provision allowing for an interference is not necessarily a provision of law but may be also a provision included in the Constitution which is the hierarchically supreme norm and affords protection to the fundamental rights and freedoms much more than that afforded by the laws. In this framework, it should be overstressed that if the impugned interference is predicated on a constitutional norm that is eligible for making a precise and foreseeable interpretation and application, the lawfulness requirement has been satisfied in terms of the interference.

76. Nevertheless, the lawfulness requirement also encompasses a material content, and thereby, the quality of the wording of the law becomes more of an issue. In this sense, this requirement guarantees "accessibility" and "foreseeability" of the provision imposing restriction, as well as its "clarity" which amounts to its certainty (see *Metin Bayyar and People's Liberation Party* [Plenary], no. 2014/15220, 4 June 2015, § 56; *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 55; and *Halk Radyo ve Televizyon Yayıncılık A.Ş.*, § 37). In the same vein, if the restriction is based directly on a provision of the Constitution, it must be assessed whether the said provision has been interpreted in a precise and foreseeable manner.

77. Certainty means that content of a provision must not lead to arbitrariness. The statutory arrangements concerning the restriction of fundamental rights must be precise in terms of its content, aim and scope, as well as clear to the extent that the addressees could know their legal status. According to this principle, 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. They must also provide certain safeguards against arbitrary practices of public authorities. A statutory arrangement should demonstrate, to a sufficiently certain extent, the legal consequences corresponding to a given criminal act or action and thus the limits of interference that the public authorities may be subject to. In that case, the individuals may foresee their rights and obligations and accordingly perform acts and actions (see *Hayriye Özdemir*, §§ 56, 57; *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 56; *Halk Radyo ve Televizyon Yayıncılık A.Ş.*, § 38; *Metin Bayyar and People's Liberation Party*, § 57; and for explanations regarding certainty in the decisions of constitutionality-review cases, see among many other judgments, the Court's judgment no. E.2009/51, K.2010/73, 20 May 2010; the Court's judgment no. E.2011/18, K.2012/53, 11 April 2012).

78. The norms that do not enable individuals to foresee the obligations incumbent on them and to act accordingly undermines the principle of legal security, which precludes individuals, in all their acts and actions, from having confidence in the State. The uncertainty in the determination of legal statuses renders dysfunctional the safeguards inherent in the fundamental rights (see *Sara Akgül* [Plenary], no. 2015/269, 22 November 2018, § 108). However, even if a provision is complex or is of an abstract nature to a certain extent and could therefore become fully comprehendible only through legal assistance or the concepts used therein could be defined only after a legal assessment, this does not *per se* fall foul of the principle of legal foreseeability. Besides, the more the extent of the interference through the relevant legal arrangement with fundamental rights is, the higher the extent of certainty to be sought in this arrangement will be (see *Hayriye Özdemir*, § 58).

(2) Whether the Interpretation of Article 14 of the Constitution Satisfied the Lawfulness Requirement

(a) As regards the Scope of the Notion *"Cases specified in Article 14 of the Constitution"* Included in Article 83 § 2 of the Constitution

79. The right to stand for elections and engage in political activities may be restricted *"only by law"* pursuant to Article 13 of the Constitution. It is set forth in Article 67 § 1 of the Constitution that the citizens may exercise these rights *"in conformity with the conditions set forth in the law"*. It is also stated in the third paragraph of the same Article that *"The exercise of these rights shall be regulated by law"*. It thus appears that the "lawfulness" requirement introduced by the Constitution, through Article 13, with respect to the restriction of all fundamental rights and freedoms is also laid down in two separate paragraphs of Article 67 when the right to stand for elections and engage in political activities comes into play. Accordingly, as also expressed in the previous judgments of the Court, the interferences with the right to stand for elections and engage in political activities must have a legal basis, which must be precise and foreseeable within the framework of the interpretation made in the light of the principle of state governed by rule of law enshrined in Article 2 of the Constitution (see *Sebahat Tuncel*, § 71; and *Mustafa Ali Balbay*, § 131).

80. In the present case, the allegation that the proceedings initiated against the applicant before he was elected as an MP was continued in breach of Article 83 § 2 of the Constitution despite his being entitled to parliamentary immunity in his capacity as an MP will be examined in the light of the above-mentioned principles. In addition, it should be emphasised that as explained below, the parliamentary immunity is one of the safeguards inherent in the right to stand for elections and engage in political activities laid down in Article 67 of the Constitution in the context of securing the involvement of MPs in legislative acts and actions; and that therefore, the lawfulness criterion must be satisfied in a much stronger manner.

81. The basic framework of parliamentary immunity in the Turkish legal system is regulated in Article 83 § 2 of the Constitution where it is stipulated that MPs cannot be placed in custody, interrogated, detained

or tried unless the Assembly decides otherwise. However, parliamentary immunity is not regulated in absolute terms under the Constitution. Article 83 introduces certain exceptions and limitations to such immunity. Accordingly, the parliamentary immunity is, in principle, confined to the term of office of MPs. Nevertheless, during the term of office, the immunity of an MP may be lifted by the resolution of the Assembly in cases where he has allegedly committed an offence before or after the election. Besides, one of the exceptions to parliamentary immunity is the case of discovery *in flagrante delicto* entailing severe penalty. Lastly, the *"cases specified in Article 14 of the Constitution as long as an investigation has been initiated before the election"*, as laid down in Article 83 § 2 of the Constitution, are also excluded from parliamentary immunity.

82. It should be noted that the constitution-maker has not clearly designated the offences falling into the scope of the notion *"cases specified in Article 14 of the Constitution"*, which is laid down in Article 83 § 2 of the Constitution. Nor has the law-maker introduced any statutory arrangement so as to designate these offences. Therefore, the inferior courts assess whether a given offence, subject-matter of trial, falls into the scope of Article 14 of the Constitution, not by interpreting and applying a provision of law but by directly interpreting and applying the relevant provision of the Constitution. In this sense, it must be assessed whether the interpretation of Article 14 of the Constitution by the inferior courts satisfies the lawfulness criterion, which amounts to foreseeability and certainty. 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 (see *Kadri Enis Berberoğlu (2)*, § 71).

83. Pursuant to Article 83 § 2 of the Constitution, the exception enabling the lifting of the parliamentary immunity may be applied only when two conditions are satisfied concurrently. The first condition is the initiation of the investigation into the imputed offences before the election, whereas the second one is that the imputed offences fall into the scope of the cases specified in Article 14 of the Constitution. It is evident that there is no problem regarding the certainty and foreseeability of the first condition, namely *"the initiation of the investigation into the imputed offences before the*

election". It must be, however, assessed whether the second condition, *"the cases specified in Article 14 of the Constitution"*, satisfies the requirements of certainty and foreseeability in terms of Article 14 of the Constitution and the relevant laws.

84. Article 14 of the Constitution is included in the Chapter One titled *"General Provisions"* under the Part Two titled *"Fundamental Rights and Freedoms"*. In consideration of this systematics adopted, it has been considered that Article 14 of the Constitution is formulated so as to lay down certain general principles regarding the fundamental rights and freedoms. Therefore, it is evident that the said provisions are not formulated with a view to designating the offences exempted from the parliamentary immunity.

85. In Article 79 § 2 of the 1961 Constitution regarding parliamentary immunity, the mere exception to parliamentary immunity is considered as *"a case of discovery in flagrante delicto"*, whereas in Article 83 § 2 of the 1982 Constitution, *"the cases specified in Article 14 of the Constitution on condition of existence of an investigation initiated before the election"* are also accepted as an exception to the parliamentary immunity. In the legislative intent of the addition of this exception, it is set forth that *"those who committed any of the offences laid down in Article 14 of the Constitution cannot be entitled to parliamentary immunity on condition that an investigation has been already initiated with respect to the said offence before their election as an MP"*. Although it is specified in the legislative intent that *"the offences laid down in Article 14 of the Constitution"*, no offence is indeed enumerated therein. On the contrary, it is set forth in Article 14 § 3 of the Constitution by making a reference to the general provisions concerning certain prohibitions as to the fundamental rights and freedoms, which are laid down in the first two paragraphs, that *"The sanctions to be applied against those who perpetrate activities contrary to these provisions shall be determined by law"*. Besides, unlike the legislative intent with the phrase *"the offences laid down in Article 14 of the Constitution"*, the Constitution instead contains the phrase *"the cases specified in Article 14 of the Constitution"*.

86. The heading of Article 14 of the Constitution is *"Prohibition of abuse of fundamental rights and freedoms"*. It consists of three paragraphs. Pursuant

to the first paragraph, which provides for *"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"*, two conditions must occur concurrently in order to qualify a given act as an abuse. First of all, there must be an *exercise of a fundamental right and freedom enshrined in the Constitution*. Second, these fundamental rights and freedoms must be exercised in a way that would amount to *"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"*.

87. The interpretation of Article 14 § 1 of the Constitution, which has a reasonable meaning in itself, with respect to the phrase *"cases specified in Article 14 of the Constitution"*, which is laid down in Article 83 § 2 of the Constitution, gives rise to unreasonable outcomes as the reference is made to Article 14 as a whole. That is because, a member of parliament shall be deprived of parliamentary immunity on the allegation that he has conducted an activity 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 in exercising a fundamental right and freedom. However, he may continue to avail himself of parliamentary immunity even in cases where he has allegedly committed acts that do not fall into the scope of any fundamental right and freedom but give rise to more severe offences.

88. Consequently, Article 14 § 1 of the Constitution does not allow to duly elucidate, and thereby to interpret in a way ensuring certainty and foreseeability, the phrase *"cases specified in Article 14 of the Constitution"* embodied in Article 83 § 2 of the Constitution, thus the offences excluded from the parliamentary immunity for falling within the scope of Article 14 § 1, *solely through the decisions of judicial authorities*.

89. The second paragraph of Article 14 of the Constitution, which provides *"No provision of this Constitution shall be interpreted in a manner that enables the State or individuals to destroy the fundamental rights and freedoms recognized by the Constitution or to stage an activity with the aim of restricting*

them more extensively than stated in the Constitution", addresses both the State and individuals and prohibits them from engaging in any activity, by interpreting any provision of the Constitution, that aims at setting aside fundamental rights and freedoms or restricting them to the extent wider than that specified in the Constitution. Besides, it is also difficult to ascertain -through the general explanations in Article 14 § 2 of the Constitution- which offences will be considered to fall into this scope and thus constitute an exception to the parliamentary immunity.

90. In the legislative intent of the amendment made to Article 14 of the Constitution in 2001, it is specified *"It is intended to harmonise Article 14 of the Constitution with Article 17 of the European Convention on Human Rights and to preclude the abuse of the rights and freedoms by performing an act or through an expression"*. In Article 17 of the Convention, titled *"Prohibition of abuse of rights"*, it is set forth *"Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention"*. It is evident that this provision of the Convention that envisages the prohibition of the abuse of fundamental rights and freedoms is in parallel with Article 14 § 2 of the Constitution. Therefore, in order to interpret Article 14 § 2 of the Constitution in accordance with the will of the constitution-maker, it will be reasonable to dwell on the ECHR's case-law concerning Article 17 of the Convention, which is the source of the relevant provision of the Constitution.

91. The *abuse*, in so far it relates to individuals and groups, means the exercise of the rights and freedoms enshrined in the Convention by the individuals and groups in a way that would undermine or subvert the same rights and freedoms. On the other hand, in so far it relates to States, the *abuse* may be either in the form of an attempt to undermine the fundamental rights and freedoms in the same vein or result from the restriction by the States of the fundamental rights and freedoms to the extent wider than that is prescribed in the Convention.

92. According to the ECHR's case-law, the incitement to and justification of terrorism and war crimes (see *Roj TV A/S v. the Netherlands* (dec.), no.

24683/14, 17 April 2018); provocation to violence (see *Hizb ut-Tahrir and Others v. Germany* (dec.), no. 31098/08, 12 June 2012); and promotion of totalitarian ideologies (see *German Communist Party (KPD) v. Germany* (dec.) (Commission), no. 250/57, 20 July 1957); provocation to hatred (as for xenophobia and discrimination based on race, see *Glimmerveen and Hagenbeek v. the Netherlands* (dec.) (Commission), no. 8348/78, 8406/78, 11 October 1979; as for hatred towards ethnic groups, see *Pavel Ivanov v. Russia* (dec.), no. 35222/04, 20 February 2007; as for homophobia, see *Molnar v. Romania* (dec.), no. 16637/06, 23 October 2012; as for religious hatred, see *Norwood v. the United Kingdom* (dec.), no. 23131/03, 16 November 2004); denial of Jewish genocide (see Garaudy v. France (dec.), no. 65831/01, 24 June 2003) are considered as an abuse of the fundamental rights and freedoms by individuals and groups within the meaning of Article 17 of the Convention.

93. Given the interpretation of Article 14 § 2 of the Constitution in the light of the ECHR's case-law, for instance within the context of provocation to hatred, it may be considered that members of parliament, who *"have publicly provoked hatred or hostility in one section of the public against another section which has a different characteristic based on social class, race, religion, sect or regional difference"; "have publicly degraded a section of the public on grounds of social class, race, religion, sect, gender or regional differences"; or "have publicly degraded the religious values of a section of the public"*, as set forth in Article 216 of the Turkish Criminal Code no. 5237 and dated 26 September 2004, and who have been therefore subject to an investigation, before the elections, for the offence of inciting people to hatred and hostility or degrading should be deprived of parliamentary immunity. However, in its recent judgment (no. E.2018/4803, K.2019/647 and dated 28 January 2019), the 16th Criminal Chamber of the Court of Cassation did not find the said offence to fall into the scope of the *cases* specified in Article 14 of the Constitution. Even the Court of Cassation did not consider the given offence that may be asserted to indeed fall under Article 14 § 2 of the Constitution -given its interpretation in the light of the ECHR's case-law by means of a conscious reference of the constitution-maker- as one of the cases specified in Article 14 of the Constitution. It is a clear indication of the difficulty to determine which offences are under the scope of Article 14

§ 2 through its wording of a general nature.

94. In Article 14 § 3 of the Constitution, it is set forth *"The sanctions to be applied against those who perpetrate activities contrary to these provisions shall be determined by law"*. Although the law-maker regulates several types of offences through criminal laws, there is no specific law, which is the will of the Grand National Assembly of Türkiye, to demonstrate that which offences are under the scope of Article 14 of the Constitution. The question which offences laid down in the criminal laws will be included into the scope of Article 14 of the Constitution and will be thus excluded from the scope of parliamentary immunity is determined on the basis of the practitioners' preference among the above-mentioned interpretations of the general expressions included in Article 14 §§ 1 and 2 of the Constitution.

95. As is seen, Article 14 of the Constitution contains general provisions concerning the purposes for which the fundamental rights and freedoms may be exercised on one hand and, on the other, intended for the preclusion of the interpretation of the constitutional provisions in a way that is broader than that prescribed in the Constitution. It is inferred that the activities prohibited by this Article are not limited to those constituting an offence; and that this provision indeed has a broad scope including all acts and activities, regardless of whether constituting an offence, which will be performed for certain purposes. It does not seem possible to make a reasonable interpretation of the notion *"cases specified in Article 14 of the Constitution"*, laid down in Article 83 § 2 of the Constitution, by the judicial bodies in the light of the general expressions in Article 14 of the Constitution, the original purpose of which is not to designate the offences falling outside the scope of parliamentary immunity, by ensuring certainty and foreseeability.

96. As a matter of fact, in its single judgment rendered in 1986, the Court could not make an interpretation that would resolve the above-cited problems as to the certainty and foreseeability (see the Court's judgment no. E.1985/30, K.1986/10, 18 March 1986). It appears that the Court of Cassation has interpreted the phrase *"cases specified in Article 14 of the Constitution"* included in Article 83 § 2 of the Constitution with reference to Article 14 § 1 of the Constitution or Article 14 § 2 thereof, which thus

leads to different conclusions. As a matter of fact, in its judgment cited above, the Court of Cassation determined the scope of the phrase in question merely with reference to Article 14 § 1 of the Constitution. It thus did not consider that the offence of inciting public to hatred or hostility and humiliation, which undoubtedly falls into the scope of the second paragraph of the same provision, was among the offences constituting an exception to the parliamentary immunity. It infers from the relevant judgments of the Court of Cassation included in the case-file that the Court of Cassation tends to consider that merely the terror-related offences fall into the scope of the *"cases specified in Article 14 of the Constitution"*. However, as specified above, the scope of Article 14 is indeed wider than the terror-related issues. Besides, it is not specified in these judgments that whether any terror-related offence committed without any fundamental rights being abused falls into the scope of parliamentary immunity, as well as whether it is certainly necessary that the offences excluded from parliamentary immunity be committed by abusing any fundamental rights and freedoms.

97. In the judgment where the Court of Cassation upheld the impugned conviction decision, it is stated that it is controversial in doctrine whether the offence of disseminating propaganda of an armed terrorist organisation would be considered to fall under Article 14 of the Constitution. Besides, it is evident that the interpretation by the Court of Cassation of the notion *"cases specified in Article 14 of the Constitution"* laid down in Article 83 § 2 of the Constitution in the light of Article 14 of the Constitution could attribute neither certainty nor foreseeability to the provision. It appears that neither the amendment of 2001 to Article 14 of the Constitution nor the relevant judgments of the Court of Cassation could eliminate the uncertainty in question.

98. The constitution-maker sets forth in Article 14 § 3 of the Constitution *"The sanctions to be applied against those who perpetrate activities contrary to these provisions shall be determined by law"* and in Article 67 § 3 thereof *"The exercise of these rights shall be regulated by law"*. As is seen, the constitution-maker has assigned the duty of clarifying the phrase *"cases specified in Article 14 of the Constitution"* laid down in Article 83 § 2 of the Constitution to the law-maker but has not granted an explicit power to the judiciary to

designate the offences falling under Article 14 of the Constitution by way of interpretation. Besides, as the judiciary is not a rule maker, it cannot define the scope of parliamentary immunity and thus the right to stand for elections and engage in political activities through interpretation (in the same vein, see *Kadri Enis Berberoğlu (2)*, § 89).

99. As a matter of fact, the Court has acknowledged since its judgment *Tuğba Arslan* -where it found a violation on account of the interference with the freedom of religion in terms of lawfulness- that the fundamental rights and freedoms cannot be restricted through the case-law of the Court and other courts in the absence of any law that is the will of the Grand National Assembly of Türkiye (see *Tuğba Arslan* § 80 *et seq.*; *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 54; *Halk Radyo ve Televizyon Yayıncılık A.Ş.*, § 36; *Süleyman Kurtel* [Plenary], no. 2016/1808, 22 January 2021, § 56).

100. Besides, through Article 14 of the Constitution amended in 2001, the aim is not to afford protection aginst not only the individuals abusing the fundamental rights and freedoms but also the State performing any act or action intended for setting aside the fundamental rights and freedoms enshrined in the Constitution or restricting such fundamental rights and freedoms to the extent broader than that is prescribed in the Constitution. Accordingly, the State's *"attempt to restrict fundamental rights and freedoms to the extent broader than that provided for in the Constitution"* will also be considered as an abuse. In other words, the State cannot engage in any activities intended to set aside the fundamental rights and freedoms enshrined in the Constitution and to impose restriction on them to the extent that is provided for in the Constitution.

101. Despite this new prohibition of *"abuse"* introduced in terms of the State, every instance of interpretation by the courts as to the phrase *"cases specified in Article 14 of the Constitution"* on the basis of Article 14 of the Constitution will inevitably infringe the lawfulness principle as well as the interdiction of analogy (*nullum crimen sine lege stricta*) as it is not possible for the courts to make an objective determination so as to determine to which offences the notions and principles set forth in the provision correspond in the criminal law. It will also run counter to the will of the constitution-maker intended for *precluding the restriction of*

fundamental rights and freedoms to the extent broader than that is provided for in the Constitution, which was manifested by the amendment of 2001.

102. In Article 83 § 2 of the Constitution, it is provided for that a deputy who is alleged to have committed an offence before or after election shall not be *placed in custody*, *interrogated*, *detained* or *tried* unless the Assembly decides otherwise. Considering the practice and tradition of the Assembly, the applicant, as an MP, cannot be reasonably expected to foresee during his term of office that the judicial authorities might conclude that he would not be entitled to parliamentary immunity, interfering with his freedom of expression, even if the investigation had been launched before his election. In this sense, it is explicit that there are no constitutional and statutory rules that are foreseeable to a sufficient extent that would demonstrate the scope of the cases specified in Article 14 of the Constitution and that would afford the safeguards inherent in the parliamentary immunity.

103. In view of all above, with reference to Article 14 § 3, and Article 67 § 3 of the Constitution whereby the right to elect, to stand for elections and engage in political activities is regulated, it has been concluded that certainty and foreseeability cannot be ensured through the interpretations of judicial authorities, *rather than a regulation introduced by the legislator*, as to which offences fall within the scope of the phrase *"cases specified in Article 14 of the Constitution"* stated in Article 83 § 2 of the Constitution.

(b) As regards the Determination by the Judicial Bodies of the Denial of Parliamentary Immunity

104. It is not possible to *place in custody, interrogate, detain* and *try a member of parliament,* who is on active duty and is still a member of parliament, on the basis of a criminal charge, without his parliamentary immunity being lifted. The parliamentary immunity is, in principle, lifted by the resolution of the Assembly. There are two exceptions, which derive from the Constitution and are cited above, to this rule. These exceptions are the case of discovery *in flagrante delicto*, as well as the cases specified in Article 14 of the Constitution provided that a criminal investigation has been already initiated before the elections.

105. It will be examined whether sufficient procedural and substantive safeguards against abuse in determining the lack of parliamentary

immunity due to any criminal investigation and prosecution falling under the scope of the *cases specified in Article 14 of the Constitution*. However, before proceeding to the examination of the said procedure, it will be useful to have a close look at the safeguards afforded in the lifting of parliamentary immunity by the Assembly.

(i) Lifting of Parliamentary Immunity by the Resolution of the Assembly and its Procedure

106. Parliamentary immunity is not of an absolute nature. Article 83 of the Constitution allows for the lifting of parliamentary immunities by the Assembly by citing *"unless the Assembly decides otherwise"*. However, it is not enumerated in the Constitution which type of offences will entail the lifting of parliamentary immunity. As the notion *"offence"* is specified in the Constitution, the MPs' parliamentary immunity provides immunity for all types of offences and may be lifted by the *Assembly* also on account of every offence. The Constitution affords a wide margin of appreciation to the Assembly in deciding to lift parliamentary immunity.

107. However, the Assembly does not need to take into consideration whether the given criminal charge is of a serious nature. For the determination of the level of severity in question, the Constitution and the Internal Regulations of the Assembly afford a series of procedural safeguards with respect to the motions submitted for the lifting of parliamentary immunity of an MP. First of all, the judicial bodies may issue a motion due to the prosecutions pending before them or investigations which have attained a certain level of severity and submit them to the Ministry of Justice. The Ministry then submits the motions along with a report it will prepare to the Assembly. The motions submitted for the lifting of parliamentary immunity are dealt with by three bodies, namely the Preparatory Commission, Joint Commission of the Assembly and, if necessary, Plenary of the Assembly (for detailed information, see Articles 131-134 of the Internal Regulations of the Assembly). As also stated in its previous judgment, the duty incumbent on the commissions is not to assess the evidence and to inquire whether the imputed offence has been indeed committed, but to decide whether the criminal charge is of a serious nature (see the Court's judgment no. E.1994/9, K.1994/28, 21 March

1994). According to the Constitution and the Internal Regulations of the Assembly, the Assembly should take into consideration the particular circumstances of the motion submitted for the lifting of the parliamentary immunity of an MP and the condition of the relevant MP. Thereby, the MPs should be provided with the opportunity to defend themselves before the Assembly.

108. At the last stage, on an application by the MP whose parliamentary immunity has been lifted, the Constitutional Court handles and examines the decision lifting the parliamentary immunity under Article 85 of the Constitution so as to ascertain whether it complies with the Constitution and the Internal Regulations of the Assembly under procedural and substantive aspects. There is no explanation, with respect to the purpose underlying the introduction of the facility to lodge an application with the Court against the decisions on the loss of the status of an MP, in the documents pertaining to the legislative process of the 1982 Constitution. However, in the legislative intent of Article 81 of the 1961 Constitution, where the procedure regarding the examination of the decisions on the lifting of parliamentary immunity, it is stated that *"As the lifting of parliamentary immunity bears significant political and legal consequences, an application may be lodged with the Court against these decisions"* (see the Court's judgment no. E.2017/152, K.2017/139, 7 September 2017 § 10).

109. The procedure concerning the applications lodged with the Court against the resolutions of the Assembly on the lifting of the parliamentary immunity or the loss of the status of an MP is set forth in Article 85 of the Constitution. In this context, the nature of the application lodged with the Court against the decision on the loss of status of an MP is defined in the legislative intent of the Law no. 4121 and dated 23 July 1995, which has made an overall amendment to Article 85 of the Constitution as follows: "… It is a political safeguard afforded through this amendment. It grants the right to apply with Constitutional Court so as to preclude any erroneous decision to be taken by the majority or prevent the relevant MP from facing a difficult situation due to any political motive and ground. It is neither a judicial remedy nor an objection. It is merely a procedural remedy (see the Court's judgment no. E.2017/152, K.2017/139, 7 September 2017, § 11).

110. In one of its judgment (the Court's judgment no. E.1998/38, K.1998/50, 31 July 1998), the Court has explained the procedure to be applied for the examination of the decisions on the lifting of parliamentary immunity:

> *In Article 85 of the Constitution, it is set forth that the decision on the lifting of parliamentary immunity shall be subject to examination as to its compatibility with the Constitution, Law and Internal Regulations. It is laid down in Article 2 of the Constitution that the Republic of Türkiye is a state governed by rule of law. Therefore, in the examination of the decisions on the lifting of parliamentary immunity, the objective tests expected from the State governed by rule of law must be taken as a basis.*
>
> *The application for the annulment of the decision on the lifting of parliamentary immunity must be dealt with in consideration of the severity of the criminal charge in question so as to ascertain whether it is predicated on political motives and ensure the protection of the honour and dignity of the given MP.*
>
> *Parliamentary immunity is intended for protecting the members of the legislature against undue charges that will prevent them from performing their duties in a proper and effective manner. However, in cases where the criminal charge is of a severe nature, it is requisite to provide those concerned with the right to a judicial remedy against such decisions in pursuance of the public interest and for the protection of the honour and dignity of the MPs.*
>
> *In the consideration of the motion, no. …. and dated …., which was issued by the …. Chief Public Prosecutor's Office, and the annexes thereto, it has been concluded that a criminal case had been filed against M.B. on account of the offences imputed to him before he was elected as an MP and that according to the evidence in the case-file, the criminal charge directed against him was of a severe nature.*
>
> *Regard being had to the behaviours and conducts displayed from the date of the request for lifting of parliamentary immunity to the resolution of the Assembly in this regard, the stance of the majority deciding on the lifting*

of the parliamentary immunity, the discussions at the relevant commission and the Plenary, the grounds put forth as to the nature and severity of the criminal charge underlying the lifting of parliamentary immunity as well as the evidence submitted to prove the criminal charge, and the methods and procedures applied in issuing the impugned resolution, it has been concluded that the lifting of parliamentary immunity did not have any political motive.

111. In its other relevant judgments, the Court has made assessments similar to those cited above. It has additionally stated *"For an acknowledgment that a given criminal charge is of a serious nature, the level of its severity does not suffice, but it should be also ascertained whether it conforms to the material truth* (see the Court's judgments no. , E.1997/72, K.1997/74, 31 December 1997 and E.1997/73, K.1997/73, 30 December 1997; as well as the Court's judgment no. E.1994/22, K.1994/41, 21 February 1994). Accordingly, the Court takes into consideration the following criteria in examining the resolutions on the lifting of parliamentary immunity by the Assembly:

i. The assessments as to the lifting of parliamentary immunity should be made in accordance with the objective tests, as expected from a state governed by rule of law.

ii. The members of parliament should be protected against any undue charges that would prevent them from properly performing their duties.

iii. The judicial process shall be initiated for the lifting of the parliamentary immunity only when the criminal charge directed against an MP is of a severe nature.

iv. The lifting of parliamentary immunity should be in pursuance of public interest and intended to protect the MP's honour and dignity.

v. The grounds put forth as to the nature and severity of the criminal charge resulting in the lifting of parliamentary immunity, the evidence submitted to substantiate such grounds and the methods applied in issuing the resolution to lift the immunity should be examined.

iv. It should be considered whether the lifting of parliamentary immunity has any political motive.

112. As is seen, significant *procedural and substantive* safeguards are afforded with respect to the procedure as to the lifting of parliamentary immunity as being of constitutional significance. In this regard, it is envisaged that the parliamentary immunity can be lifted only when the criminal charges directed against an MP are considered to be of severe nature firstly by the relevant commissions and Plenary of the Assembly and subsequently by the Court.

(ii) Determination as to the Lack of Parliamentary Immunity in cases specified in Article 14 of the Constitution

113. The principles required to be followed in the lifting of parliamentary immunity by the Assembly and set by the Constitutional Court are to be taken into consideration, in so far as relevant, also in deciding on the lack of parliamentary immunity due to a criminal investigation and prosecution conducted into the *cases specified in Article 14* of the Constitution. That is because the assertion that the principles set by the Court in line with the Constitution are not applicable to the procedure -whereby it is decided that the relevant MP is no longer entitled to parliamentary immunity due to a criminal investigation and prosecution falling under scope of *the cases specified in Article 14* of the Constitution- will render this sphere being deprived of the constitutional protection.

114. As regards the trial of an MP on account of an offence considered to fall into the scope of the *"cases specified in Article 14 of the Constitution on condition that a criminal investigation has been already initiated before the elections"*, which is set forth as one of two exceptions to the procedure of the lifting of parliamentary immunity by the Assembly and which is the subject-matter of the present application, there are no provisions embodying procedural and substantive safeguards in the Constitutions, laws or the Internal Regulation of the Assembly.

115. In this framework, it is specified that the single condition for depriving an MP of the parliamentary immunity on account of the offences considered to fall into the scope of the *cases specified in Article 14 of the Constitution* is the existence of an investigation that has been initiated before the elections. Accordingly, in the event that the imputed offence has been committed, or the investigation has been initiated, after the

elections, the provisions as to the lifting of the parliamentary immunity by the Assembly shall be applied.

116. The statistics provided by the Ministry of Justice, Directorate General for Criminal Records and Statistics also show that every criminal investigation does not necessarily result in a conviction. In that case, the condition requiring the existence of an investigation before the elections cannot be said to constitute a sufficient safeguard against the interferences with the right to stand for elections and engage in political activities, for ensuring the continuation of the parliamentary immunity, the main aim of which is to secure the proper performance of the democratic functions of the MPs, in consideration of the above-cited findings and conclusions regarding the uncertain nature of the *cases specified in Article 14 of the Constitution*.

117. The necessity set forth in the last sentence of Article 83 § 2 of the Constitution, which reads *"However, in such situations the competent authority has to notify the Grand National Assembly of Türkiye of the case immediately and directly."* does not have a constituent effect on the decision concerning the discontinuation of the parliamentary immunity. Therefore, this provision is not a safeguard in terms of the procedure whereby the judicial bodies decide to lift the parliamentary immunity.

118. Besides, it is not clearly indicated which authority is the *competent authority* responsible for reporting such a case to the Grand National Assembly of Türkiye. It is inferred that this competent authority may be either a public prosecutor authorised to conduct a criminal investigation or a judge authorised to conduct proceedings. It thus appears that by a decision to be taken by an authorised judge or prosecutor on this matter, a member of parliament may be detained on remand and prosecuted without the need for an authorisation from the Assembly, thus leading to the preclusion of an MP elected by the citizens from performing the legislative acts and actions even for a temporary period.

119. In this sense, the Court requires, pursuant to both Articles 67 and 83 of the Constitution, the competent judge or public prosecutor to make at least the following assessments in issuing a decision on the lifting of parliamentary immunity:

i. Whether there is a law revealing the scope of the phrase *"the cases specified in Article 14 of the Constitution"*, which is laid down in Article 83 § 2 of the Constitution;

ii. As set forth in the Court's case-law, whether the imputed criminal charge is severe to the extent that would lead to the MP's deprival of parliamentary immunity or amounts to an undue accusation that would prevent the MP from duly and properly performing his duties;

iii. Whether the criminal charges underlying the denial of parliamentary immunity have been raised merely for political motives and especially whether the real purpose underlying the criminal charges is to unfairly interfere with the MP and to pose a threat to his liberty and independence in performing his duty;

iv. Whether a proper investigation that is capable of proving the necessity for taking of the grounds underlying the criminal charges into consideration and confirming the facts has been conducted;

v. Whether the impugned act on the basis of which the parliamentary immunity has been lifted indeed falls into the scope of parliamentary immunity;

vi. Whether the impugned act falls into the scope of the fundamental rights and freedoms safeguarded by the Constitution, notably the freedom of expression, and for which reasons it has been classified as a threat to democratic system and thus as an abuse of a right;

vii. By the amendment to Article 14 of the Constitution in 2001, the provision, which provides for that the rights and freedoms enshrined in the Constitution *"cannot be exercised for the purposes of"* setting aside these rights and freedoms, was replaced with the provision, which reads that they cannot be exercised in the form of *"activities aiming to"* set aside them. Therefore, if the imputed offences are in the form of expression and dissemination of thoughts, whether they pose a direct, clear and imminent threat to democratic life, cause a real damage and finally whether the applicant's purpose is to set aside others' rights and freedoms;

viii. Whether the denial of parliamentary immunity is necessary for the protection of honour and dignity of the MP concerned as well as for

the prevention of any delay in the parliamentary acts and actions; and whether the conduct of the investigation and prosecution processes falling under the scope of parliamentary immunity –notably the preventive measures– may be postponed until the term of office of the MP or until the Assembly's resolution to lift the parliamentary immunity;

ix. In case of denial of the parliamentary immunity, whether the legal qualification of the imputed offences are likely to change subsequently and, if so, whether such a fresh legal qualification still falls into the scope of *"the cases specified in Article 14 of the Constitution"*;

x. The power conferred upon the State by Article 14 of the Constitution should be exercised *"to an extent strictly proportionate to the seriousness and duration of the threat against democratic system"*. Therefore, it should be examined whether the denial of an MP's parliamentary immunity as his acts amount to *"the cases specified in Article 14 of the Constitution"* is a measure of last resort that may be applied.

120. It appears that in the present case, neither the inferior courts nor the Court of Cassation made the above-mentioned assessments with respect to the merits of the question on the lifting of the applicant's parliamentary immunity. The incumbent regional court of appeal and the Court of Cassation merely acknowledged that the criminal act of disseminating propaganda of a terrorist organisation, which was imputed to the applicant, was one of the offences falling into the scope of *"the cases specified in Article 14 of the Constitution"* without making an assessment in terms of the above-mentioned criteria.

121. The courts consider that their duties in determining as to the denial of parliamentary immunity are confined to ascertaining whether the imputed offence is under the scope of *"the cases specified in Article 14 of the Constitution"*, which is -according to the Court- a phrase having no certain and precise scope and boundaries. The gravity of an offence to be imputed pursuant to Article 14 of the Constitution does not establish a presumption that the criminal charge in question is of a severe nature. However, in the procedure whereby the parliamentary immunity is lifted, the severity of the given criminal charge is subject to the scrutiny of both the Assembly and the Court. On the other hand, in case of discovery *in*

flagrante delicto, which is the other exception to the procedure of lifting of parliamentary immunity by the Assembly, there is a strong presumption that the criminal charge is of a severe nature.

122. Accordingly, in similar cases, the courts are entrusted not only with determining whether the imputed offence falls within the scope of one of the *"cases specified in Article 14 of the Constitution"* before continuing the proceedings, but also with establishing whether the imputed offence has attained the level of severity required for the offences to fall within the cases stipulated by the Constitution, which enables the withdrawal of parliamentary immunity.

123. A stance to the contrary does not comply with the logic of the immunity procedure as well as the guarantees it seeks to ensure, and it also prevents the courts from making assessments on the merits, such as whether the accusations are serious enough, whether the investigation and prosecution processes serve political purposes, or whether they are disproportionate to the importance of parliamentary immunity. This is an indication of the fact that it is impossible to get a result from the objections, if it is the judicial authorities to decide on the lack of the parliamentary immunity.

124. Besides, there is no law that entrusts the appellate authority, in the objections raised to the denial of parliamentary immunity, with the duty to conduct an inquiry and examination that the prosecutor conducting the investigation or the courts conducting the trial has not performed. There should be an independent judicial mechanism that weighs the gravity of the damage or threat to democratic life and the others' rights due to the impugned act of an MP, before proceeding to the investigation or prosecution. In the present case, there is no such mechanism, and nor is there any law that defines the way how the prosecutor's offices and the courts shall exercise their power to decide on the denial of parliamentary immunity and that also provides the judicial bodies, in deciding on the denial of parliamentary immunity, with the means which would enable them to assess whether their interference with the relevant MP's right to stand for elections and engage in political activities due to their decision is constitutional.

125. As the competent judicial bodies focus merely on the question whether the given criminal charge amounts to an offence falling under the scope of *"the cases specified in Article 14 of the Constitution"*, regardless of the nature, scope and severity of the criminal investigation or prosecution they conduct against the MPs, the current practice is not suitable for preventing any arbitrary and disproportionate interferences with the MPs' parliamentary immunity on account of a criminal investigation or prosecution. This practice that would lead the MPs to have the concern of, and be under pressure of, being subject to unnecessary interference amounts to a severe interference with their right to stand for elections and engage in political activities. It is also a method that should not be applied unless there are grounds justifying the non-application of the other available procedures attended by more safeguards, such as the lifting of parliamentary immunity by the Assembly or the prolongation of the proceedings until the expiry of term of office of the MP.

126. The explanation provided herein demonstrates that an MP, who is on active duty in his capacity as an MP, may be *placed in custody*, *interrogated* and *detained* by the public prosecutor as well as *tried* and be subject to judicial procedures associated with the proceedings or preventive measures by the decision of the first-instance judge on account of an offence considered by the *competent authority* to fall into the scope of *"the cases specified in Article 14 of the Constitution"*. It is evident that as the proceedings that are enumerated non-comprehensively are exempt from the parliamentary immunity enshrined in Article 83 of the Constitution, they constitute an interference also with the MP's right to stand for elections and engage in political activities.

127. The method employed for denial of the immunity does not include all procedural safeguards, which set out the margin of discretion granted to the judicial authorities and which are necessary to prevent arbitrary acts. This method, which does not afford guarantee to the same extent as in the procedure where the authority to decide on the withdrawal of the parliamentary immunity is the Assembly, does not contain a procedure that urges the judicial authorities to assess whether the interference with parliamentary immunity meets a pressing social need and whether it is proportionate.

128. In a legal system failing to afford sufficient safeguards so as to secure the parliamentary immunity, there will be severe and deterrent effect on the several fundamental rights and freedoms, notably the freedom of expression and the right to engage in political activities, which are indispensable for the elected representatives of the nation, who represent the voters, voice their demands and defend their interests. The MPs cannot therefore freely exercise these rights and freedoms.

129. However, the deputyship is of high public interest and significance, afforded by the democratic political life. That is the very reason for the MPs to be furnished with a constitutional protection. Any disproportionate interferences with the MPs' freedom of expression or other rights and freedoms they exercise in performing their duties as an MP will set aside the political representation power acquired through public will and prevent the representation of the voters in the Assembly (see *Mustafa Ali Balbay*, § 129).

130. In the light of these assessments, it is obvious that the current system, which does not contain sufficient guarantees to ensure parliamentary immunity, prevents the elected MPs from freely expressing the views of the people, and in this sense, the participation of certain individuals or groups in the political life of the country, thus rendering dysfunctional the former's right to stand for elections and engage in political activities.

131. As a matter of fact, in the present case, the applicant was punished for merely sharing a news article, which qualified the call addressing to the Government by the PKK terrorist organisation as an opportunity to put an end to the ongoing conflicts taking place within the scope of the armed struggle against the PKK in Türkiye.

132. The inferior courts failed to make an assessment as to whether the applicant's impugned explanations constituted a direct, clear and imminent threat to the democratic life (see the Court's judgment no. E.2002/1 K. 2008/1, 29 January 2008(dissolving of a political party)); whether the applicant's purpose was to set aside the others' rights and freedoms safeguarded by the Constitution; and thus whether there was a pressing need overriding the political immunity. Nor did they fulfil their obligation to carry out an assessment under the above-mentioned minimum criteria,

a step required to be taken for the lifting of parliamentary immunity of the MPs.

133. Both Article 83 of the Constitution whereby the parliamentary immunity is protected and Article 14 of the Constitution whereby the abuse of fundamental rights and freedoms is prohibited, become fully functional only as long as interpreted in a rights-based way in pursuance of democracy. The relevant courts failed to interpret the constitutional provisions in favour of freedoms. Nor has there been a legal system affording substantive and procedural safeguards that may ensure these courts to make such an interpretation.

134. It has been concluded that the applicant's conviction at the end of the proceedings being conducted despite his election as an MP and entitlement to the parliamentary immunity resulted in the violations of his rights safeguarded by Article 67 of the Constitution, and that the violation stemmed from the lack of a constitutional or legal regulation involving basic guarantees regarding the protection of parliamentary immunity and the right to stand for elections and engage in political activities, as well as ensuring certainty and foreseeability.

Mr. Yıldız SEFERİNOĞLU, Mr. Basri BAĞCI and Mr. İrfan FİDAN agreed with this conclusion by expressing a concurring opinion.

B. Alleged Violation of the Freedom of Expression

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

135. The applicant maintained the followings:

i. The post on his social media was in the form of a call intended for the peaceful settlement of the Kurdish question. His posting of the news articles published by the T24 news website, where the explanation of the said organisation for the re-initiation of the negotiation process for the resolution of the question and for the ensuring of a lasting peace was reported, via his social media account by also adding a comment *"This call should be taken into consideration properly, this is a question that has remained unsolved..! They assert that 'it will be overcome if Öcalan becomes involved in the process'"* fell into the scope of the freedom of expression.

ii. As set forth in the ECHR's case-law, the content and context of the impugned text should be primarily taken into consideration. If they do not incite violence and cause hatred, the impugned expressions should not be subject to a penalty. However, the incumbent inferior courts failed to make an examination as to the content thereof. According to the relevant case-law of the ECHR, it should be assessed by whom the impugned remarks were expressed, on which topic and how they were expressed, whether they provoked violence, and whether the impugned remarks might lead to violence.

iii. The image used in the news article, which was still publicly available, could not be assessed independently of the news article itself. Besides, he was not the person who had formulated the impugned article, taken the photo or published them. Therefore, he could not be held liable for the language used in the news article and the image used therein. His being sentenced to imprisonment for a term of 2 years and 6 months, which was increased on a presumptive basis, and exempted from the provision on the suspension, was in breach of the freedom of expression.

iv. In its judgment, the Court of Cassation did not make any concrete examination of the content and context of the news article posted by the applicant. None of the principles inherent in the case-law of the supreme courts was applied. The issues capable of having a bearing on the outcome of the proceedings were left unanswered. Therefore, there was a violation of his right to a reasoned decision.

136. In its observations, the Ministry made the following assessments:

i. The conduct of a criminal case against the applicant and his conviction due to his impugned acts, which praised, glorified and incited the violent acts and actions of the armed terrorist organisation, namely the PKK, could not be considered as an interference with his freedom of expression.

ii. If it was considered as an interference, it must be noted that the interference had a legal basis and pursued a legitimate aim.

iii. The applicant posted the impugned news article via his social media accounts so as to justify the acts and actions of the PKK, armed terrorist

organisation. He also posted the comment *""This call should be taken into consideration properly, this is a question that has remained unsolved..! They assert that 'it will be overcome if Öcalan becomes involved in the process'"* and shared the photo where the members of the PKK terrorist organisation were carrying long-barrelled weapons. His post thus glorified and praised the terrorist organisation and justified the acts and actions of the terrorist organisation's acts and actions involving violence and threat.

iv. In consideration of Article 5 of the Council of Europe Convention on the Prevention of Terrorism, which envisages the punishment for the act of public incitement to the commission of terrorist offence, as well as of the judgments recently rendered by the ECHR and the Court, the applicant's impugned acts that incited to violence, amounted to a call for violence and praised and glorified terror, terrorism and leader of the terror organisation could not be afforded protection within the meaning of the freedom of expression.

v. Finally, regard being had to the timing of the applicant's post praising, glorifying and inciting terrorism, which coincided with a period when terrorism was of a global issue and there were acts disturbing public order and security throughout the country upon the instruction of terrorist groups, the imprisonment sentence imposed on the applicant was proportionate.

137. In his counter-statements against the Ministry's observations, the applicant mainly reiterated his explanations in the application form, maintaining that the Ministry's observations were formulated in a one-sided manner and contained no assessment as to the content of the impugned news article.

2. The Court's Assessment

138. The Constitutional Court is not bound by the legal qualification of the facts by the applicants and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). It has been considered that the applicant's allegations under this heading must be examined under the freedom of expression.

139. 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, …."*

a. Admissibility

140. 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.

b. Merits

i. Existence of an Interference

141. The applicant was sentenced by the incumbent court to imprisonment for a term of 2 years and 6 months for disseminating the propaganda of a terrorist organisation due to posting a news article through his social media account. It must be therefore acknowledged that the said court decision constituted an interference with the applicant's freedom of expression.

ii. Whether the Interference Constituted a Violation

142. The aforementioned interference would constitute a breach of Article 26 of the Constitution unless it has satisfied the conditions set out in Article 13 of the Constitution. Relevant part of 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... These restrictions shall not be contrary to …, the requirements of the democratic order of the society and …."*

143. 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.

(1) Lawfulness

144. The applicant, an MP, was tried on account of the post on his social media under Article 7 § 2 of Anti-Terror Law no. 3713, and he was ultimately convicted by the first instance court. The applicant then filed an appeal with the regional court of appeal. Pending the proceedings before the regional court of appeal, the applicant was elected as an MP on 24 June 2018. Thereupon, he applied to the 3rd Criminal Chamber of the İstanbul Regional Court of Appeal, seeking the stay of proceedings against him under Article 83 § 2 of the Constitution. The 3rd Criminal Chamber rejected, with final effect, the applicant's request for the stay of proceedings as well as his appeal request on its merits, stating that the *offence imputed to the applicant fell under the scope of Article 14 of the Constitution*. While the applicant's finalised conviction was being executed, the applicant became entitled to file an appeal with the Court of Cassation by virtue of Law no. 7188. On the applicant's appeal, the Court of Cassation rejected the applicant's request for the stay of proceedings and his objections on the merits, as well as upheld his conviction.

145. It has been thereby observed that in the present case, in sentencing the applicant to 2 years and 6 months' imprisonment due to the impugned post, the inferior courts relied on *Article 7 § 2 of Anti-Terror Law no. 3713*; and that however, along with Article 7 § 2 of Law no. 3713, the interpretation of *Article 14* by the inferior courts by virtue of the reference made to Article 14 in Article 83 § 2 of the Constitution also allowed for the continuation of the proceedings against the applicant, his punishment, and thus the interference with his freedom of expression. Therefore, these two norms should be separately subject to an examination with respect to the lawfulness requirements.

146. It must be primarily noted that in its previous judgments, the Court has concluded that Article 7 § 2 of the Anti-Terror Law no. 3713 may be regarded as the legal basis of the impugned interferences (see, among many other judgments, *Sırrı Süreyya Önder*, § 52; *Meki Katar*, § 43; *Candar Şafak Dönmez* [Plenary], no. 2015/15672, 5 November 2020, § 45).

147. However, in the present case, the Court made a comprehensive assessment, under the heading on the alleged violation of the right to stand for elections and engage in political activities, concerning the question whether the phrase *"the cases specified in Article 14 of the Constitution"* laid down in Article 83 § 2 of the Constitution satisfied the requirements of certainty and foreseeability in consideration of Article 14 of the Constitution and the relevant laws. It has accordingly reached the conclusion that the impugned interference was in breach of the right to stand for elections and engage in political activities for not satisfying the lawfulness requirement (see above §§ 73-134). In this framework, the Court has found no ground to reach a different conclusion in terms of the interference with the freedom of expression and concluded that the finding to the effect that *the offence imputed to the applicant* due to sharing a post *fell under the scope of Article 14 of the Constitution* lacked a legal basis.

148. Nevertheless, an examination merely confined to the lawfulness requirement would not *per se* suffice for the resolution of the constitutional problems encountered in the practice as to the scope of the freedom of expression. Therefore, it has been considered that under the particular circumstances of the present case, it must be ascertained whether the safeguards inherent in the parliamentary immunity satisfied the criteria of legitimate aim and being compatible with the requirements of a democratic society.

(2) Legitimate Aim

149. It has been concluded that the decision whereby the applicant was punished was a part of the measure intended for maintaining public order and pursued a legitimate aim within the meaning of the fight against the said terrorist organisation and terrorism.

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

(a) Significance of Freedom of Expression in a Democratic Society

150. The freedom of expression refers to a person's ability to have free access to the news and information, other people's opinions, not to be condemned due to the opinions and convictions they have acquired and to freely express, explain, defend, transmit to others and disseminate these either alone or with others. The Court has previously expressed on many occasions that the freedom of expression has vital importance for the functioning of a democracy (see *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, §§ 33-35; *Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, §§ 42, 43; *Tansel Çölaşan*, no. 2014/6128, 7 July 2015, §§ 35-38).

(b) Whether the Interference Complied with the Requirements of a Democratic Society

151. In order for an interference with the freedom of expression to be considered as being *compatible* with the requirements of a democratic society, the interference must meet a pressing social need as well as be proportionate (see *Bekir Coşkun*, §§ 53-55; *Mehmet Ali Aydın*, §§ 70-72; and the Court's judgment no. E.2007/4, K.2007/81, 18 October 2007).

152. The measure giving rise to the impugned interference may be considered to meet a pressing social need only when it is convenient for attaining the aim pursued and appears to be in the form of the last remedy to be resorted to or the last measure to be taken (see, *mutatis mutandis*, *Bekir Coşkun*, § 51; *Mehmet Ali Aydın*, § 68; and *Tansel Çölaşan*, § 51). As regards the present case, if it is demonstrated that the thoughts expressed incited persons to commit terror-related offences, the impugned interference with the applicant's freedom of expression may be considered to meet a pressing social need. Then, the question required to be clarified is whether the inferior courts could plausibly demonstrate that the applicant incited, through the thoughts he had expressed, persons to commit terror-related offences.

153. The inferior courts should strike a fair balance between the individuals' right to express their thoughts and opinions and the

legitimate aims laid down in Article 26 § 2 of the Constitution (see *Bekir Coşkun*, §§ 44, 47, 48; *Hakan Yiğit*, no. 2015/3378, 5 July 2017, §§ 58, 61, 66). In striking such a balance and determining whether the interference with the freedom of expression met a pressing social need, the inferior courts enjoy a certain margin of appreciation. Undoubtedly, in cases where the impugned expressions are capable of inciting violence against individuals, public officers or a certain section of the society, the margin of appreciation afforded to the public authorities with respect to the freedom of expression is much wider. However, this margin of appreciation is subject to the Constitutional Court's review (see *Kemal Kılıçdaroğlu*, no. 2014/1577, 25 October 2017, § 57).

154. In conducting this review, the Court's role is not to substitute itself for the inferior courts but to review the expediency, from the standpoint of Article 26 of the Constitution, of the decisions issued by the inferior courts by exercising their margin of appreciation. In doing so, the Court takes into consideration the difficulties associated with the fight against terrorism, along with the particular circumstances of the given case (see *Zübeyde Füsun Üstel and Others*, § 76; *Candar Şafak Dönmez*, § 50).

(c) Incitement to Violence

155. The Court will take into consideration notably the challenges regarding the fight against terrorism in conjunction with the particular circumstances of the present case. Terrorism dates back to the history of humanity and today causes, by going beyond national boundaries, extensive devastation to the society and the State in social and economic terms. Terrorism, which aims at killing persons and striking fear and terror into their hearts through propagandistic acts and actions performed to attain a certain aim, poses a severe threat to individuals' fundamental rights and freedoms, especially the right to life as a basic right (see *Meki Katar*, § 59; and *Candar Şafak Dönmez*, § 59).

156. To make a legal definition of terrorism involves certain difficulties; however, it is not indeed the primary duty of the Court to assess whether an impugned act may be characterised as a *terrorist offence*. Nevertheless, it is out of question that the PKK terrorist organisation is a highly dangerous terrorist organisation conducting clashes against security officers.

157. Terrorist organisations and their supporters may resort to every kind of means to achieve the aims of disseminating their opinions within the society and ensuring their ideas to be deepened. It is also undoubted that disseminating propaganda of terrorism or terrorist organisations is one of these means. Terrorism is inimical to all values of a democratic society, notably the freedom of expression. Therefore, the expressions that justify, praise or incite terrorism and violence cannot be considered to fall into the scope of the freedom of expression (see *Zübeyde Füsun Üstel and Others*, § 79; *Ayşe Çelik*, § 43; *Sırrı Süreyya Önder*, § 61; and *Candar Şafak Dönmez*, § 61).

158. The Court has made certain assessments, in its judgment *Zübeyde Füsun Üstel and Others*, as to the offence of disseminating terrorist propaganda in the Turkish law. By the amendment made to Article 7 of Anti-Terrorism Act no. 3713, it has been primarily aimed to preclude the broad interpretation of the offence of disseminating terrorist propaganda in a way that would cover several and every kind of expressions and to thereby ensure legal certainty by defining it as the act of legitimising and praising the violent or threatening methods of terrorist organisations or encouraging the use of such methods. Secondly, the Court of Cassation has also stated on many occasions that in Turkish law, not every kind of expression of thoughts related to terrorism but merely disseminating the propaganda of terrorist organisations in a way that would justify and praise the violent or threatening methods of terrorist organisations or encourage the use of such methods is considered to constitute an offence (see *Zübeyde Füsun Üstel and Others,* 115-118; and for the relevant judgments of the Court of Cassation see *ibid.* §§ 54-57).

159. Expression of thoughts which do not include any statements inciting violence and lead to the risk of commission of any terrorist offences, but which are in parallel with a terrorist organisation's ideology, social or political aims as well as its opinions on political, economic and social matters –even though described as being ideological and harsh in nature– cannot be considered as a terrorist propaganda. The expression, dissemination, ensuring the adoption by others in an active, systematic and plausible manner, inspiration and promotion, of thoughts, which are related to the right and left ideologies, anarchist and nihilist movements,

social and political environment or socioeconomic instabilities, ethnic problems, the different demographic structure of the country, the request for further freedom or which are in the form of criticism towards the governance of the country are under the protection of the freedom of expression, despite being disturbing for the State's authorities or a significant part of the society (see *Zübeyde Füsun Üstel and Others*, § 81; *Ayşe Çelik*, § 44; and *Candar Şafak Dönmez*, § 63).

160. In Article 5 § 1 of the Convention on the Prevention of Terrorism, the criminal act of public provocation to commit a terrorist offence is laid down. This provision is intended for punishing the distribution, or otherwise making available, of a message to the public, which causes a danger, directly or indirectly, that a terrorist offence may be committed. As stated in the *explanatory report* of the Convention on the Prevention of Terrorism, in order to carefully analyse the potential risk of a restriction of fundamental freedoms, particular attention must be paid to the case-law of the European Court of Human Rights ("the ECHR") concerning the application of Article 10 § 2 of the European Convention on Human Rights as well as to the experience of States in the implementation of their national provisions on praise of and/or incitement to terrorism (see the explanatory report, § 88). The explanatory report recalls that certain restrictions on messages that might constitute an indirect incitement to violent terrorist offences are in keeping with the Convention (see the explanatory report, § 91).

161. In the explanatory report, the importance of the question where the boundary lies between indirect incitement to commit terrorist offences and the legitimate voicing of criticism is also indicated. It is also stated therein that the States are afforded margin of appreciation to a certain extent in determining the scope of indirect provocation; and that however, in order to characterise an act as an incitement to resort to violent or threatening methods of a terrorist organisation, the message sought to be disseminated by way of the impugned act must be intended for disseminating the message to the public in a way that would that would cause the risk of commission of one or several offences by promoting the commission of terrorist offences, for the purpose of provoking the commission of such offences (see the explanatory report, §§ 97-100). The propaganda in favour

of a terrorist organisation aims at the adoption, by others, of its methods involving coercion, violence or threat by promoting such methods to a certain degree (see *Zübeyde Füsun Üstel and Others*, § 119; and *Sırrı Süreyya Önder*, § 63).

162. The Court has noted on many occasions that that considering the act of dissemination of propaganda as an offence posing a danger *in abstracto* will probably place pressure on the constitutional rights and freedoms, notably on the freedom of expression. Therefore, as indicated above in Article 100 of the explanatory report, in order for punishing an act for amounting to dissemination of propaganda, it should be demonstrated that the impugned act has caused a danger to a certain degree in the particular circumstances of the given case (see, among many other judgments, *Zübeyde Füsun Üstel and Others*, § 84; *Ayşe Çelik*, § 47; *Sırrı Süreyya Önder*, § 64; and *Meki Katar*, § 53).

163. Given notably the difficulties faced while fighting terrorism and the complex and vague nature of the expressions in context of terrorism, it should be borne in mind that in ascertaining whether the expression of such kinds of thoughts amounted to incitement to violence, the context of the impugned expressions, the identity of the person making the statement, the time and the possible effects of the expressions and all other expressions within the statement must also be taken into account (see, for a judgment addressing the expressions of an MP in favour of the founder of a terrorist organisation during open-air meeting, *Sırrı Süreyya Önder*, §§ 67-87; for a judgment concerning the allegation that the speech delivered on a TV show amounted to the propaganda of a terrorist organisation, *Ayşe Çelik*, §§ 49-51; ; for a judgment concerning the seizure of a book allegedly disseminating terrorist propaganda, *Abdullah Öcalan* [Plenary], no. 2013/409, 25 June 2014,, §§ 100,101; for a newspaper article which allegedly amounted to terrorist propaganda, *Ali Gürbüz and Hasan Bayar*, no. 2013/568, 24 June 2015,§ 64; and for a judgment concerning a press statement turning into propaganda of a terrorist organisation, *Mehmet Ali Aydın*, § 77).

(d) Application of Principles to the Present Case

164. In the present case, given the grounds relied on by the inferior courts, it has been observed that the applicant was convicted of posting *"a*

photo of the members of the terrorist organisation with weapons at their hands" and posting *"a news article including a statement with expressions legitimising and promoting the violent acts of the terrorist organisation, which was issued by the armed terrorist organisation, namely the PKK"*. The applicant was therefore sentenced to 2 years and 6 months' imprisonment for disseminating the propaganda of the said terrorist organisation.

165. It should be primarily noted that any expression of opinion, albeit by terrorist organisations or their members, cannot be excluded categorically from the protection of the freedom of expression by being subject to an examination irrespective of its content, context and objective meaning. In this sense, the Court will take into consideration the content and context of the news article leading to the applicant's punishment and the interpretation thereof.

166. In the applicant's impugned post, a news article published by a news website, which is still accessible, was shared. In the impugned news article, it is stated that the PKK issued a statement where it was stressed that the State should take a step for the resolution of the *"Kurdish question"* and no longer subject this matter to a voting; and that in case of a step taken by the State, *"the peace would be secured and a settlement could be reached by fraternity within one month"*. This news article also refers to the opinions *"hope for re-initiation of the reconciliation process"* expressed by İdris Baluken, Group Deputy Chairman of the Peoples' Democratic Party (HDP), regarding the statement. It is also noted therein that the statement issued by the PKK *"criticised the dismissal of the Dolmabahçe Reconciliation and the placement of the organisation leader Abdullah Öcalan in isolation"*. It also refers to the opinions of Bülent Arınç, former Deputy Prime Minister and former Speaker of the Parliament, to the effect that they were acting *"in good faith"* during the reconciliation process, whereas *"HDP and Kandil were acting in bad faith"*, which led to the discontinuation of the reconciliation process.

167. Although the incumbent first instance court noted in its reasoning that *"the impugned article formulated by the applicant on the website"*, it is evident that the impugned news article was not formulated, but merely posted, by the applicant. Besides, in the impugned news article, the PKK's statement was not directly and fully quoted. Instead, it was summarised

by the use of reporting techniques, and the PKK's call for the State was quoted. The news article further cited the opinion of an opponent MP, as one of the actors of the reconciliation process, about the statement, as well as the considerations of an official of the Government, who had also involved in the reconciliation process, to the effect that the PKK's statements regarding the Kurdish question were not sincere. Thereby, in the impugned online content, the terrorist organisation PKK's call, for the Government, to initiate a fresh process for the resolution of the Kurdish question was reported, and the opinions of two politicians, one from the ruling party and the other from an opposing party, were separately cited for being relevant therewith.

168. Given the impugned news article, it appears that it contained no statement that might be regarded as an incitement to violence and that might directly or indirectly lead to the risk of committing a terrorist offence. Neither the manner in which the applicant had shared the news nor the expression he had used contained an element constituting an incitement to violence. The applicant construed the impugned article and the statement cited therein by saying *"This call should be considered properly. This is an infinite question..! They consider that if Öcalan steps in the process, it will yield a result"*, by also reflecting his own political perspective. He thus merely stated that the terrorist organization's statement to the effect that the reconciliation process should have started again was to be considered seriously.

169. Moreover, the photograph accompanying the *news article posted* by the applicant should be considered separately. First of all, it should be noted that the photograph was not chosen by the applicant himself but was accompanying the said news. Second, it is undoubted that the posting of a photograph -where the uniformed members of the terrorist organisation were holding weapons at their hands- in a way that would *justify or praise the violent or threatening methods of the terrorist organisation, or incite the recourse to such methods* will constitute the offence of disseminating the propaganda of a terrorist organisation. However, the said photograph should not be considered independently of the news article it accompanies. In other words, regard being had to the fact that the language used in the news had no aspect of inciting violence, the purpose of using the said

photograph, when considered together with the manner it had been used and the relevant context, was not to justify, praise or incite the methods used by the terrorist organization that involved violence, force or threat, but to make the news more attractive and convincing, as a reporting technique that is commonly used in the national publications. As a matter of fact, similar photographs are frequently featured in the national written and visual media organs.

170. The first instance court and the Court of Cassation also put emphasis on the period when the impugned news article was posted by the applicant. In most instances, the time when a statement is made is of critical importance in determining the content thereof and thus ascertaining whether the expression of thought may be construed as an incitement to violence. However, in the present case, the relevant inferior courts failed to provide any explanation as to how the applicant's post, which was shared *"long after the termination of the reconciliation process"*, *"in the period when the State's forces were engaged in the fight against terrorism in the south-eastern region of the country"* and *"after the discontinuation of the trench events"*, was regarded as the dissemination of terrorist propaganda in a way that would justify, praise or incite the methods used by the terrorist organizations that involved violence, force or threat.

171. So indeed, both the PKK's statement and the publication of the news article by T24 website, as well as the applicant's post all coincided with the period when the armed clashes conducted by the security forces against the said terrorist organisation intensified. Intense clashes took place following the discontinuation of democratic reconciliation process, and the security forces reduced the efficiency of the terrorist organisation to a significant extent during the period called trench events, which lasted until the time when the impugned statement by the PKK was made. This statement was published exactly within this period.

172. It has been considered that in the relevant part of the news article consisting of the following three sentences, there was no statement inciting violence: *"PKK has published a statement whereby it assessed the stage reached with respect to the Kurdish question, as well as the following process. It was asserted therein that for the resolution of the Kurdish question, the State should*

take a step, and if such a step is taken, the peace will be secured within one month. It was further noted therein that when the Kurdish question was no longer used as a means and subject to voting, the question could be resolved in fraternity with the people living in Türkiye".

173. Therefore, it cannot be said that the applicant's post was intended for inciting and promoting the commission of terrorist offences or posed a risk of commission of terrorist offences, given the content of the impugned news article and timing of the applicant's post. Nor could the inferior courts demonstrate in their reasoning that how such a news article and post incited and promoted the recourse to the methods of terrorist organisation involving coercion, force or threat.

174. The Court of Cassation acknowledged that the applicant's sharing, via his social media account, the link of the news article where the impugned statement of the PKK terrorist organisation was published amounted to *"embracement of the statement"* and *"an attempt to justify the PKK terrorist organisation"*. The Court of Cassation considered that the posting of a news article including the statement of a terrorist organisation pursued the aims of *"increasing the political or social efficiency of the organisation; making its voice heard by the masses; creating the impression before the public that the organisation is an undefeatable force capable of achieving its goal; and increasing public sympathy to the organisation and receiving active support of the people"*. The criteria laid down in the above-cited judgments of the Court and used in ascertaining whether an impugned expression could be qualified as an incitement to violence were applied by establishing no link with the present case and going beyond the intended purpose. The applicant was ultimately punished.

175. It should be overemphasised that an expression of thought may be interfered on the grounds of increasing the political or social efficiency of the organisation, making its voice heard by the masses, increasing public sympathy to the organisation and receiving active support of the people only when it poses the risk of commission of terrorist offences through direct or indirect means, advises recourse to violent acts or bloody attacks, justifies the conduct of terrorist acts and incites recourse to violence with deep and unreasonable hatred towards certain persons. However, the

Court of Cassation failed to make any assessment in this regard. Nor did it elucidate how the applicant's post created the impression before the public that the organisation was an undefeatable force or it could attain its goal.

176. As regards the reasoning of the Court of Cassation, it should be primarily underlined that any interference with freedom of expression cannot be automatically justified merely because the impugned statement belongs to an illegal organisation. That is because such kinds of expressions, which do not incite violence, may be a part of the ongoing political discussions in the country. The restriction and hindrance of political discussions render impossible the existence of a democratic society. However, in democracies, any kind of news and opinions is allowed to be expressed so long as they do not praise the terrorist acts and recourse to violence or encourage unlawful conducts and behaviours.

177. Türkiye has been undergoing, for over forty years, tough processes on account of several terrorist organisations, notably the PKK. The threat of terrorism has been always the prioritised subject of the politics and the public. Therefore, in a democratic society, everyone is entitled to be aware of the impugned statement and similar explanations that are undoubtedly newsworthy and cannot be considered to provoke hatred and hostility. It should be borne in mind that the endeavours to disclose and disseminate information regarding not only the social and political issues but also the scope of the justified struggle of the State against the terrorist organisations, as well as the intent and motive of the spiral of violent acts caused by terrorism may also fall into the scope of the freedom of expression.

178. Within the context of the ground relied on by the Court of Cassation, the expressions and acts, which may undermine security within the country due to the terrorist acts and actions intensifying especially in the southern-eastern region of the country but taking place in the past in almost all regions of the country, notably in the metropolitans, and likely to take place also in future, cannot be tolerated. As a matter of fact, the Court has stated in its several judgments that Articles 26 and 28 of the Constitution do not afford unlimited freedom of expression. The obligation to comply with the restrictions laid down in Article 26 § 2 of the Constitution brings

along certain *tasks and responsibilities* regarding the exercise of the freedom of expression, which are applicable both for individuals and the press (see *Erdem Gül and Can Dündar* [Plenary], no. 2015/18567, 25 February 2016, § 89; *R.V.Y. A.Ş.*, no. 2013/1429, 14 October 2015, § 35; and *Hakan Yiğit*, § 50). Therefore, in publishing the views of the terrorist organisations resorting to violence against the State or their members or heads, the media outlets should act with due diligence.

179. Although the press is to comply with the limitations set for it, it should be borne in mind that it is required to provide information on matters of public concern and regarding the State within the meaning of its main duty to ensure the proper functioning of democracy. As a matter of fact, the aforementioned freedom not only allows the press to disseminate ideas and information, but also enables the public to reach them (see *İlhan Cihaner (2)*, no. 2013/5574, 30 June 2014, §§ 56-58, 82; and *Nihat Özdemir* [Plenary], no. 2013/1997, 8 April 2015, §§ 45-47, 57-58). The freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of the relevant actors and forming a conviction regarding the issues of general interest such as terrorism. In any case, in the event that there is a risk of any violent acts, it is particularly important to strike a diligent balance between the freedom of expression and the public's right to information as well as the necessity to ensure security.

180. In the present case, the alleged interference with the sharing of the impugned news -which contained any statement that could be interpreted as an incitement to violence-, by *"qualifying it as embracement of the statement"* on the sole ground that the said statement belonged to an illegal organization or to a criminal, resulted in the violation of the freedom of expression. The qualification of a statement belonging to a terrorist organization, which was undoubtedly newsworthy and thus reported as news along with the views of opposing politicians, as *"an attempt to have the terrorist organization conceived as legitimate"* may hinder the performance of the primary duty of the press as well as the journalism.

181. As regards the ground relied on by the Court of Cassation, it should be thirdly noted that the interferences with news articles and

expressions, which are undoubtedly under the protection of the freedoms of expression and the press and inform the society regarding an ongoing issue from a different perspective, cannot be justified on the sole ground that these news articles and expressions are not tolerated by the State officials or a large part of the society. As the views reflected in the impugned news articles cannot be qualified as an incitement to violence, the bodies wielding public power and the courts should not restrict the public's right to receive news by imposing a sanction on account of similar news articles and expressions for the purposes of maintaining national security and preventing offences and disorders.

182. The applicant was sentenced to imprisonment on the sole ground that he had shared a news article that had been previously published on a national news portal. It was ignored by the judicial authorities that the impugned statement of the terrorist organization had already been made public at the material time. Nor was there any finding that an investigation had been launched or measures had been taken regarding the impugned news article. It is even still accessible, though the applicant was punished for having posted it. Accordingly, considering that the said news has not been the subject of any accusations since its publication in 2016, it has been understood that the grounds relied on by the courts in punishing the applicant were insubstantial.

183. In the present case, the first instance court convicted the applicant in consideration of the *"content of the applicant's post and the photograph accompanying it"*. The 16th Criminal Chamber of the Court of Cassation convicted him on the ground that the impugned post *"contained expressions justifying and encouraging the violent acts of the organisation"*. The instance courts and the Court of Cassation failed to demonstrate, in a concrete manner, which expressions justified, praised or encouraged the methods of the terrorist organisation involving force, violence or threat. They concluded without taking into consideration the actual effects thereof that the impugned statement, amounted -irrespective of its content and categorically- to the offence of disseminating propaganda of a terrorist organisation for merely being issued by a terrorist organisation.

184. In consideration of these explanations, it cannot be considered that the instance courts and the Court of Cassation demonstrated with *relevant*

and *sufficient* reasons that the applicant's conviction for disseminating the propaganda of the said terrorist organisation *met a pressing social need*.

185. In this sense, it has been concluded that the interference with the applicant's freedom of expression was incompatible with the requirements of a democratic society, which was in breach of Article 26 of the Constitution.

C. Other Alleged Violations

186. As the Court has found violations of the right to stand for elections and engage in political activities as well as the freedom of expression, it has not found it necessary to examine the other complaints the applicant raised under the right to a fair trial.

D. Application of Article 50 of Code no. 6216

187. 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, 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."*

188. The applicant requested the Court to find a violation, order a retrial and award him compensation for his pecuniary and non-pecuniary damage.

189. 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 above-mentioned 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).

190. 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).

191. Before indicating the steps required to be taken for the redress of a given violation and consequences thereof, the source of the violation must be identified. Accordingly, a violation may result from administrative acts and actions, judicial acts or legislative acts. The identification of the source of the violation is of importance for the determination of the appropriate means of redress (see *Mehmet Doğan*, § 57).

192. In the present case, the violation of the right to stand for elections and engage in political activities resulted from the continuation of the criminal proceedings conducted against the applicant and his ultimate conviction although he had been elected as an MP on 24 June 2018 during the 27th Term Parliamentary Elections, whereas the violation of the freedom of expression resulted from the imprisonment for a period of 2 years and 6 months imposed on the applicant by the inferior courts for his having disseminated propaganda of a terrorist organisation.

193. In cases where the violation results from a court decision or the court cannot redress the violation, 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.

194. In its judgment *Kadri Enis Berberoğlu (3)*, the Court has provided certain explanations regarding the procedure whereby the requirements of the violation judgments are fulfilled (see *ibid.* § 98). The judicial procedure required to be performed by the inferior courts so as to put an end to, and redress, a continuing violation upon the Court's judgment finding a violation is called, as a whole, *"retrial"* in Article 48 of Law no. 6216. The process of *retrial* ordered by the Court is different from the process of *re-opening of the proceedings* prescribed in the procedural laws and has the following characteristics:

i. In cases where the Court decides to communicate its violation judgment to the relevant inferior court to conduct a retrial for the redress of the violation and consequences thereof, the inferior court is liable to conduct a retrial without awaiting for an application by the relevant parties (see *Aligül Alkaya and Others (2)*, § 58; and *Kadri Enis Berberoğlu (2)*, § 134).

ii. The inferior court receiving the order to conduct a retrial has no discretion with regard to the existence of any ground justifying the retrial. Nor is there any 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; and *Kadri Enis Berberoğlu (2)*, § 134).

iii. That is because, as set forth in the first sentence of Article 50 § 1 of Law no. 6216, which provides for "If the violation found by the Court results from a court decision, the case file shall be sent to the relevant court for holding the retrial so as to redress the violation and the consequences thereof", the Court is itself authorised to order a retrial in conjunction with a violation judgment.

iv. Therefore, there is no need for the inferior court to which the case file has been sent for a retrial to decide to conduct a retrial. Instead, the inferior court automatically initiates the retrial procedure (see *Aligül Alkaya and Others (2)*, § 59; and *Kadri Enis Berberoğlu (2)*, § 135).

v. The retrial ordered by the Court could not be construed to necessarily entail the holding of a hearing. Pursuant to Article 50 § 2 *in fine* of Law no. 6216, which provides for *"the court, which is responsible for holding the retrial, shall deliver a decision over the case-file, if possible, in a way that will remove the violation and its consequences that the Constitutional Court has explained in its violation judgment"*, the violation found by the Court may be redressed either by performing the necessary judicial processes over the case-file or by conducting a retrial through a hearing, in consideration of the nature of process to be performed and the type of the actions required to be taken for the redress of the violation as indicated by the Court or the facilities and requirements of the respective judicial remedy. In determining through which means a given violation will be redressed, an assessment must be made in consideration of the nature of the violation (see *Aligül Alkaya and Others (2)*, § 59).

vi. The relevant authority may, in principle, determine the steps required to be taken for the redress of the violation and consequences thereof. However, as set forth in Article 50 § 1 of Law no. 6216, which provides for *"In cases where a decision of violation has been made what is required for the redress of the violation and the consequences thereof shall be ruled"*, in cases where the Court indicates the steps required to be taken for the redress of the violation and its consequences in its judgment finding a violation, the first instance court or the bodies wielding public power has no discretion to assess the exigency or legitimacy of "the steps to be taken". In the event that the Court clearly points out the measure required to be taken for redress of the violation and its consequences, the relevant authority is to take the necessary measure (see *Kenan Yıldırım and Turan Yıldırım*, § 82; and *Aligül Alkaya and Others (2)*, § 59).

vii. Accordingly, the court receiving such a judgment is constitutionally and legally obliged not to question the "expediency" or "legitimacy" of the violations judgments rendered by the Court, but to initiate the judicial

processes within the scope of the facilities and necessities of the relevant procedural law so as to redress the violation and its consequences (see *Wikimedia Foundation Inc. and Others* [Plenary], no. 2017/22355, 26 December 2019, § 102; *Mehmet Doğan* [Plenary], no. 2014/8875, 7 June 2018, §§ 58, 59; and *Aligül Alkaya and Others (2)*, §§ 57-59, 66-67).

viii. Lastly, in Article 50 § 2 of the Law no. 6216, it is set forth that the court liable to conduct a retrial shall be determined by the Constitutional Court. In this sense, pursuant to this provision, in cases where a retrial is ordered for the redress of the given violation and consequences thereof, the case-file must be communicated not to the court that has issued the decision giving rise to the impugned violation, but to the relevant court. Therefore, the Court is entitled, given the circumstances of a given case, nature of the violation and the consequences arising from by the violation and required to be redressed, to determine the court that will conduct the retrial by also taking into consideration the provisions of relevant procedural law (*Kadri Enis Berberoğlu (3)*, § 98).

195. In the light of these explanations, given the particular circumstances of the present case, the steps required to be taken by the first instance court to which the Court communicated its violation judgment for the redress of the violations of the right to stand for elections and engage in political activities as well as of the freedom of expression are as follows:

i. To initiate the retrial proceedings;

ii. To stay the execution of the applicant's conviction decision and secure his release from the penitentiary institution; and

iii. To relieve the applicant of his status as a convict; and

iv. To order the stay of execution during the re-trial to be conducted (see, in the same vein, *Enis Berberoğlu (3)*, §§ 99, 100 and 140).

196. In this sense, during the *retrial* to be conducted when the applicant's parliamentary immunity is lifted, a fresh decision that eliminates the reasons on account of which the Court found a violation of the freedom of expression and complies with the principles laid down in the violation judgment should be issued.

197. Therefore, a copy of the judgment must be sent to the 2nd Chamber of the Kocaeli Assize Court to conduct a retrial.

198. On the other hand, the violation of the right to stand for elections and engage in political activities found in the present case resulted from the lack of a constitutional or statutory provision, which is clear and precise to the extent that would enable the public prosecutor's offices or inferior courts to make an interpretation as to parliamentary immunity in compliance with the Constitution.

199. For the effective application, in the legal sphere, of the method whereby the competent judicial bodies find that the person concerned is not entitled to parliamentary immunity due to an investigation and prosecution conducted into an offence falling into the scope of the *cases specified in Article 14* of the Constitution, it is the legislature that has the discretionary power with respect to both the determination of the offences falling into the scope of *cases specified in Article 14* and the establishment of a legal system affording procedural and substantive safeguards.

200. However, the non-enactment of such a statutory regulation would not cause a constitutional gap. That is because the procedure allowing for the lifting by the Assembly of the parliamentary immunity, enshrined in Article 83 § 2 of the Constitution, is applicable to all types of offences.

201. In this sense, it has been considered that as the applicant was an MP during the proceedings, the subject-matter of the present application constitutes one of the exceptions to the parliamentary immunity and the Court has already demonstrated the constitutional and legal uncertainty on this matter, a copy of the judgment must be submitted to the legislature for information.

202. On the other hand, the mere finding of a violation would apparently remain insufficient for the redress of the damage sustained by the applicant. Accordingly, the applicant must be awarded a net amount of 30,000 Turkish liras ("TRY") in compensation of his non-pecuniary damage, which could not be redressed by merely finding of violations of the freedom of expression and the right to stand for elections and engage in political activities, so as to redress the violation and all consequences thereof within the framework of the *restitution* procedure.

203. For the Court to award pecuniary compensation, a causal link must be established between the material damage alleged to be suffered by the applicant and the established violation. Therefore, the applicant's claim for pecuniary compensation must be rejected as he did not submit any document on this matter.

204. The total litigation costs of TRY 4,452.20 including the court fee of TRY 852.20 and counsel fee of TRY 3,600, as established on the basis of the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For the reasons explained above, the Constitutional Court UNANIMOUSLY held on 1 July 2021 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 freedom of expression 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 freedom of expression safeguarded by Article 26 of the Constitution was VIOLATED;

C. A copy of the judgment be SENT to the 2nd Chamber of the Kocaeli Assize Court (no. E.2017/490, K.2018/80) for a retrial so as to redress the violations of the right to stand for elections and engage in political activities and the freedom of expression and the consequences thereof, for the stay of the execution of the applicant's conviction, as well as for ordering the stay of proceedings during the retrial to be conducted;

D. A copy of the judgment be SUBMITTED to the Grand National Assembly of Türkiye for information;

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 total litigation costs of TRY 4,452.90 including the court fee of TRY 852.20 and the counsel fee of TRY 3,600 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; and

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

CONCURRING OPINION OF JUSTICES YILDIZ SEFERİNOĞLU, BASRİ BAĞCI AND İRFAN FİDAN

We consider that although the legislature has not ascertained to which offences the "cases specified in Article 14 of the Constitution", set forth in Article 83 § 2 of the Constitution and one of two circumstances where the lifting of parliamentary immunity is not necessary to conduct a criminal investigation and prosecution, correspond, the provision is, in its current form, convenient to be applied by the investigation and prosecution authorities.

Undoubtedly, the formation of a list by the legislature in consideration of certain criteria so as to ascertain the offences that fall under the scope of Article 14 is a more preferable option in terms of certainty and foreseeability.

In the absence of such a list, the determination of these offences through judicial decisions leads to uncertainty partially. However, such uncertainty is of a temporary nature, which could be eliminated when the case-law on the issue is established.

Besides, the difficulties related to the uncertainties resulting from the content of the constitutional provision in question are also at stake for the legislature. Any kind of determination to be made by the legislature with respect to this provision may cause debates at the constitutional level.

Although it is the Court that is competent to ultimately interpret the Constitution, several authorities, institutions, bodies and persons are to interpret and implement the constitutional provisions in so far as these provisions fall into the scope of their duties. Therefore, the judicial bodies may reasonably interpret the constitutional provisions when necessary.

On the other hand, it is evident that the constitutional provisions are, by their very nature, more general arrangements in comparison to the provisions of law. Such general nature should not be a ground for their inapplicability.

This issue may be exemplified as follows:

The "case of discovery *in flagrante delicto* entailing severe penalty", which was not discussed in the present case as being out of the scope of examination, appears *prima facie* to be a provision that is more clear and easy-to-apply. However, it indeed embodies several vague issues in its content. The Code of Criminal Procedure no. 5271 defines the case of discovery *in flagrante delicto*; however, its version entailing severe penalty is not definite.

Especially by the taking effect of the Turkish Criminal Code no. 5237 in 2005, the aggravated imprisonment was excluded from the Turkish legislation. In this sense, it can be no longer said that the criminal acts entailing heavy imprisonment sentence fall into the scope of the case of discovery *in flagrante delicto* entailing severe penalty.

Besides, the acknowledgment to the effect that the offences falling into the scope of the jurisdiction of assize courts are tantamount to the case of discovery *in flagrante delicto* entailing severe penalty will also give rise to some uncertainties. Given the procedure that any kind of offences committed by the lawyers in relation to their duties shall be tried by the assize courts, every criminal charge in respect of which the provisions concerning the case of discovery *in flagrante delicto* apply may be considered, in respect of lawyers, as a case of discovery *in flagrante delicto* entailing severe penalty.

Despite a series of difficulties resulting from the application of the constitutional provision on account of these uncertainties, this situation cannot be a ground for the inapplicability of this provision. For instance, it is undoubted that a criminal act of killing falls into the scope of the case of discovery *in flagrante delicto* entailing severe penalty.

There is also no hesitation that in determining the offences that will be included in the scope of Article 14 of the Constitution, the judicial decisions will be decisive. That is because also in the systems where jurisprudence is predominantly applied, the clarification of the very significant notions in the criminal law is ensured through judicial decisions.

A similar procedure is also employed in Türkiye. As is known, there is not legally designated procedure whereby a formation is classified as a terrorist organisation. It has been acknowledged for years that a formation may be qualified as a terrorist organisation through judicial decisions.

Although a partial and periodical uncertainty and even unforeseeability are at stake for those who have involved in the activities of a formation that is not accepted as a terrorist organisation until the issuance of the first judicial decision with respect thereto, such uncertainty and unforeseeability are eliminated through the initial case-law established by the courts.

What is important at this point is the existence of a minimum legal substructure where case-law may be predicated on.

As for Article 14 of the Constitution, it is evident that there are certain criteria sufficient to the extent that would form a basis for the procedure in question.

First of all, the condition requiring the initiation of an investigation into the imputed offence prior to elections is a concrete and foreseeable criterion. This criterion also affords an objective guarantee for those concerned. Malevolently, an investigation may probably be initiated against a person, who may be elected as an MP, before the elections pursuant to Article 14 of the Constitution so as to preclude him from becoming an MP. However, it does not seem so possible under the normal course of life.

The second significant criterion is that the activities under investigation must be related to the classification of offences concerning the cases defined in Article 14 of the Constitution.

As the cases, in so far as they concern Article 14 of the Constitution, entail an assessment as to the lifting of the parliamentary immunity, there is no hesitation that the notion "cases" correspond to offences.

The content of the provision contains information that gives prioritise to certain offences, which are clearly the acts and actions against the indivisible unity of the State with its territory and nation and aiming at overthrowing the democratic and secular republic based on human rights.

Besides, the preference of the constitution-maker, in the wording of the provision, the notion "activities" -or in the former wording the notion "acts"- also points to the requirement that the material facts likely to be subject of the criminal charges must attain a certain threshold of intensity.

In the light of these assessments, there is undoubtedly no absolute necessity for the legislature to involve in the process in the application of Article 14 of the Constitution, and the issue may be clarified also by way of judicial decisions.

Any consideration to the contrary, which argues that the judiciary cannot perform this function and expects the legislature to intervene in the process for the necessary step, will render Article 14 of the Constitution inapplicable until the statutory arrangement to be introduced by the legislature.

Such consideration will also run counter to the *raison d'être* of the Constitutional Court, which is vested with the duty to ensure the implementation of the Constitution with its wording and spirit. This will also undermine the principle of supremacy of the Constitution.

On the other hand, nor is there any constitutional provision, which requires in absolute terms the legislature to introduce statutory arrangement for ensuring the materialisation of the reference made by Article 83 § 2 of the Constitution to Article 14 thereof.

The last paragraph of Article 14 of the Constitution and Article 67 § 3, which are relied on as a ground in respect thereof by the majority of the Court, are not related directly to the determination of the exceptions to the parliamentary immunity. The last paragraph of Article 14 entails the lawfulness in imposing a sanction in case of any acts contrary to the cases specified therein. Article 67 of the Constitution entails that the arrangements as to the right of election be introduced by law.

The majority's opinion when interpreted as a necessity to lift the parliamentary immunity for each accusation likely to fall under the scope of Article 14 of the Constitution until a statutory arrangement is introduced will give rise to more serious legal problems.

However, in introducing the exception to the cases specified in Article 14 of the Constitution, the constitution-maker has made a conscious preference when excluding the person concerned from the protection afforded by the parliamentary immunity. It is possible to set certain reasonable criteria in the materialisation of this preference. However, the setting of such criteria in a way that would create an alternative immunity will not be compatible with this preference of the constitution-maker.

By the last amendment made to Article 14 of the Constitution in 2001, it was intended to bring the provision, notably its second paragraph, into conformity with Article 17 of the European Convention on Human Rights. This section of the provision concerns the interpretation of the rights and freedoms. The section of the provision that is more related to the acts and thus the phenomenon of offence is the regulations laid down in the first paragraph thereof. In this sense, the tendency in the judicial decisions to make an assessment mainly related to the issues regulated in the first paragraph is also an indication of consistency.

Besides, it is evident that Article 14 of the Constitution is of an applicable nature and enables the making of assessments on the basis of every concrete case.

As regards the present case, the impugned act, which did not involve any incitement to violence and did not even constitute an act and which did not lead to the exercise of a right set forth in Article 14 § 2 of the Constitution or restriction of such right to an extent broader than the foreseeable degree, was considered to form the offence of disseminating the propaganda of a terrorist organisation, and the applicant was accordingly sentenced to 2 years and 6 months' imprisonment.

The impugned act, which was in form of a short comment made with respect to the news quoted from another new website, did not constitute an "activity", as laid down in Article 14 of the Constitution and pointing to by its content a certain degree of intensity, and formed a single act.

In this sense, in the present case, we agree with the conclusion reached by the majority but on these grounds.

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

KESKİN KALEM YAYINCILIK VE TİCARET A.Ş. AND OTHERS

(Application no. 2018/14884)

27 October 2021

On 27 October 2021, the Plenary of the Constitutional Court found violations of the freedoms of expression and the press safeguarded respectively by Articles 26 and 28 of the Constitution, as well as of the right to legal remedies safeguarded by Article 40 thereof in the individual application lodged by *Keskin Kalem Yayıncılık ve Ticaret A.Ş. and Others* (no. 2018/14884).

THE FACTS

[10-71] The applicants challenged the court decisions blocking access to 129 news articles published in a web-site of a nation-wide journal and other certain online news sites. Upon the rejection of their challenges by the relevant inferior courts, the applicants separately lodged individual applications with the Court.

V. EXAMINATION AND GROUNDS

72. The Constitutional Court ("the Court"), at its session of 27 October 2021, examined the application and decided as follows:

A. Alleged Violations of the Freedoms of Expression and the Press

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

73. The applicants' assertions are as follows:

i. The press, being conscious of its duties and responsibilities, is liable to disseminate every issue of public interest. The news articles to which access was blocked are in conformity with the apparent truth, and some of them are related to social issues, whereas the remaining ones serve the purpose of ensuring public scrutiny of the functioning of various institutions, acts and actions performed by public officers and activities of the politicians, which thus involve public interest.

ii. The Court has previously concluded in both individual application and constitutionality review cases that the orders blocking access issued under Law no. 5651 are in the form of interim measures. It has on many occasions stated that the procedure of blocking access laid down in Article 9 of Law no. 5651 does not afford the relevant procedural safeguards; that it is therefore difficult to strike a balance between the conflicting rights;

and that this procedure must be employed only in exceptional cases when it could be *prima facie* realised that a given online content is manifestly in breach of the personal rights.

iii. However, in the present case, neither the magistrate judge ordering the blocking of access nor the one dealing with the challenges to these orders comply with the principles laid down through the Court's case-law. Nor did they present any ground to explain why they had not abided by these principles. Although there was no *prima facie* indication of a manifest violation in the impugned contents, the magistrate judges failed to demonstrate how and why the impugned new articles, which were of public interest, had factual basis and conformed to the apparent truth, constituted a *prima facie* violation of the personal rights of the complainants; how the unlawfulness was so apparent; and the necessity to immediately redress the damage sustained by the complainants.

iv. Despite the documents and the detailed petition they submitted to the appeal authorities so as to demonstrate that the news articles to which access had been blocked indeed fell within the scope of their freedoms of expression and the press, the appellate authorities rejected their appeal requests without making any assessment. Therefore, the impugned blocking orders, which thus became final, and the blocking of access to the news articles for an indefinite period of time constituted a disproportionate interference with their freedoms of expression and the press.

v. Despite the consistent case-law of the Constitutional Court, the procedure laid down in Article 9 of Law no. 5651 is not employed exceptionally but, to the contrary, as an established practice. The decisions of the magistrate judges which ordered the blocking of access to several websites and rejected the requests for the lifting of the blocking of access through the same decision did not involve relevant and sufficient grounds, and the grounds specified therein consisted merely of a single sentence. The decisions established no link with the present case and contained vague expressions.

vi. The interferences -in the form of blocking access to online contents- with the freedom of expression, which are allowed under Article 9 of Law no. 5651 for the protection of personal rights become unforeseeable and

unclear on account of the decisions issued by the magistrate judges. The said provision of law does not offer any safeguards against the arbitrary practices. Therefore, their freedoms of expression and the press as well as the right to a reasoned decision were violated. They requested the Court to apply the pilot judgment procedure.

74. In its observations, the Ministry, taking the applications of Çiğdem Toker Taştan and Yeni Gün Haber Ajansı Basın ve Yayıncılık A.Ş., among the other applications, as a basis for its examination, referred to the Court's judgments where the Court assessed whether a fair balance had been struck by the judicial bodies in the resolution of disputes involving a conflict between the freedom of expression and the right to the protection of honour and dignity. The Ministry stated that in its examination of the present case, the Court should take into account the reasoning of the magistrate judge's decision allegedly constituting an interference with the applicants' freedom of the press, the content of the impugned news articles and the Court's established case-law on the matter.

75. In their counter-statements against the Ministry's observations, the applicants reiterated their previous allegations.

2. The Court's Assessment

76. 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). The alleged violation of the applicants' right to a reasoned decision must be examined under the freedoms of expression and the press, which are enshrined in Articles 26 and 28 of the Constitution.

77. 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 …, 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."

78. Article 28 of the Constitution, titled *"Freedom of the press"*, in so far as relevant, reads as follows:

"The press is free, and shall not be censored…

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

In the limitation of freedom of the press, the provisions of Articles 26 and 27 of the Constitution shall apply…"

a. Admissibility

79. The alleged violations of the freedoms of expression and the press must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

i. Existence of an Interference

80. Pursuant to Article 26 of the Constitution, titled *"Freedom of expression and dissemination of thought"*, everyone has the right to express and disseminate his 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 any interference by official authorities. In this provision, the means likely to be used in exercising freedom of expression are specified as *"speech, writing, picture or other media"*. It is thereby intended to imply with the notion of *"other media"* that every means to express an opinion and idea is afforded constitutional protection (see *Emin Aydın*, no. 2013/2602, 23 January 2014, § 43).

81. Online news reporting must be considered to fall into the scope of the freedom of the press so long as it fulfils the main function of the press (see *Medya Gündem Dijital Yayıncılık Ticaret A.Ş.* [Plenary], no. 2013/2623, 11 November 2015, §§ 36-42; *Önder Balıkçı,* no. 2014/6009, 15 February 2017, § 39; and *Orhan Pala,* no. 2014/2983, 15 February 2017, § 45). Internet freedom is considered, when the press is at stake, to fall into the scope of the freedom of expression and dissemination of thought, whereas it is considered, in terms of the Internet users, to fall under the right to receive news and ideas safeguarded by the Constitution and inherent in the freedom of expression.

82. Having regard to its accessibility, the duration and capacity of storage of news and thoughts, and the opportunity of imparting news and thoughts of large volumes, Internet plays an important role in the enhancement of imparting news and information to the public. It provides an opportunity of great importance for everyone to reach news and ideas or disseminate thoughts without any limitations. This situation creates a vast avenue in terms of freedom of expression (see *Medya Gündem Dijital Yayıncılık Ticaret A.Ş.*, § 34).

83. Internet, which is now a basic source of information and reference thanks to the information it contains, provides individuals with the opportunity to make free choices among millions of contents and ensures their active participation in public debates. Internet is an indispensable means in the exercise of the freedom of expression through its structure open to mutual interaction and broad opportunities it provides for receiving and imparting ideas (see *Wikimedia Foundation Inc. and Others* [Plenary], no. 2017/22355, 26 December 2019, § 68). Therefore, all kinds of restrictions imposed on websites or measures such as blocking of access to news available on websites have a real bearing on the freedom of receiving and imparting information. It must be borne in mind that the press offers one of the best means of conveying different ideas and positions and helping to form public opinion with respect thereto (see *İlhan Cihaner (2)*, no. 2013/5574, 30 June 2014, § 63).

84. In the present case, the incumbent magistrate judges ordered to block access to the news articles published on the news websites where

the applicant Keskin Kalem Yayıncılık ve Ticaret A.Ş. and the other applicants were a publisher, as well as on the website of the Cumhuriyet daily newspaper, of which the applicant Yeni Gün Haber Ajansı Basın ve Yayıncılık A.Ş. was the publisher. These court decisions had an impact on the accessibility of the Internet as a significant means of expression. Besides, as Article 26 of the Constitution secures not only the right to impart and disseminate information but also the public's right to receive such information, the blocking of access to these news articles constituted an interference with both the applicants' right to impart news and views and the public's right to receive these news and views.

ii. Whether the Interference Constituted a Violation

85. The abovementioned interference would constitute an interference of Article 26 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"*, reads, 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."*

86. 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.

(1) Lawfulness

(a) General Principles

87. In Article 13 of the Constitution setting out the regime concerning the restriction of fundamental rights and freedoms, it is laid down as a basic principle that the rights and freedoms may be restricted *"only by law"*.

In order for an interference with any right safeguarded under Article 26 of the Constitution to be considered to meet the lawfulness requirement, the impugned interference necessarily had a legal basis within the meaning of Article 26 § 2 of the Constitution (for other outstanding judgments concerning the other aspects of the lawfulness requirement, see *Sevim Akat Eşki*, no. 2013/2187, 19 December 2013, § 36; *Tuğba Arslan* [Plenary], no. 2014/256, 25 June 2014, § 82; *Hayriye Özdemir*, no. 2013/3434, 25 June 2015, §§ 56-61; and *Halk Radyo ve Televizyon Yayıncılık A.Ş.* [Plenary], no. 2014/19270, 11 July 2019, § 35).

88. The Court has on many occasions stated that as regards the restrictions on fundamental rights and freedoms, the lawfulness requirement primarily necessitates the formal existence of a law. (see *Tuğba Arslan,* § 96; and *Fikriye Aytin and Others*, no. 2013/6154, 11 December 2014, § 34). Law, as a legislative act, is a product of the will of the Grand National Assembly of Türkiye ("GNAT") and is enacted by the GNAT in compliance with the law-making procedures enshrined in the Constitution. Such an understanding affords a significant safeguard for fundamental rights and freedoms (see *Eğitim ve Bilim Emekçileri Sendikası and Others* [Plenary], no. 2014/920, 25 May 2017, § 54; and *Halk Radyo ve Televizyon Yayıncılık A.Ş.*, § 36).

89. Nevertheless, the lawfulness requirement also encompasses a material content and, thereby, the quality of the wording of the law becomes more of an issue. In this sense, this requirement guarantees "accessibility" and "foreseeability" of the provision regarding restrictions as well as its "clarity" which refers to its certainty (see *Metin Bayyar and People's Liberation Party* [Plenary], no. 2014/15220, 4 June 2015, § 56; *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 55; and *Halk Radyo ve Televizyon Yayıncılık A.Ş.*, § 37).

90. Certainty means that content of a provision must not give way to arbitrariness. The statutory arrangements concerning the restriction of fundamental rights must be precise in terms of its content, aim and scope and also clear to the extent that the parties concerned may know their legal status. This principle means that the statutory arrangements 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 offer certain safeguards against arbitrary practices of public authorities. A provision of law must certainly indicate the legal consequences of the given acts or facts and in this sense, the extent and scope of the power of interference afforded to the public authorities in such cases. Only then individuals may be able to foresee their rights and obligations and act accordingly (see *Hayriye Özdemir*, §§ 56, 57; *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 56; *Halk Radyo ve Televizyon Yayıncılık A.Ş.*, § 38; *Metin Bayyar and People's Liberation Party*, § 57; and among many other decisions in constitutionality review cases regarding certainty, see the Court's decisions, no. E.2009/51, K.2010/73, 20 May 2010 and no. E.2011/18, K.2012/53, 11 April 2012).

(b) Whether Article 9 of Law no. 5651 Satisfied the Lawfulness Requirement

91. In the present case, the freedoms of expression and the press were interfered on account of the blocking access to 129 news articles published on a website of a national newspaper and on certain news websites. The legal basis of the impugned interference is Article 9 of Law no. 5651. There is no hesitation as to the accessibility of the provision.

92. In the absence of any hesitation as to the formal existence of a law and the accessibility thereof, it must be then assessed whether the relevant provision of law satisfied the requirements of legal security and certainty. Article 9 of Law no. 5651 regulates the procedure concerning the examination of requests, by those alleging that their personal rights have been violated, for the removal of a given content complained of by the content providers or hosting service providers or for the blocking of access to these contents directly by virtue of the magistrate judges' decisions. In the present case, the impugned interferences with the applicants' freedoms of expression and the press were effected directly by the magistrate judges' decisions to block access to the relevant contents. Therefore, the assessments as to the quality of the wording of the given law would be confined to the procedure of blocking of access.

93. One of the requirements for the existence of a law in substance is that the aim, scope and extent of a given law allowing for the interference

must be determined in a sufficiently clear manner. In the general legislative intent of Law no. 5651, it is stated that the aim underlying the need for a law that is specific to Internet is not to form a new category of cybercrimes or to envisage criminal and administrative sanctions to be imposed in case of such offences; and that such law is necessary as *the current statutory regulations applied in the offline environments have become insufficient, due to the fast-flowing developments in the information technologies, for the prevention of publications which are available on the Internet and contents of which constitute an offence.* It is also stated therein that the aim underlying the establishment of an institutional structure, which technically and scientifically monitors the electronic publications and is responsible for the coordination of electronic communication and Internet sector is *the need for an institutional structure that will effectively and promptly combat against the cybercrimes in that the difficulty in revealing these crimes, albeit the swift increase in and facility of the commission of such offences, may probably lead to irreparable damages in societal terms.*

94. As a matter of fact, in Article of the said Law, titled *"Objective and scope"*, the objective and scope of the Law is defined as the regulation of the obligations and responsibilities of the content providers, hosting providers, access providers and public use providers *as well as of the principles and procedures as to the combat against certain offences committed through Internet on the basis of content, hosting and access providers.* The Law no. 5651 adopted by the General Assembly of the GNAT on 4 May 2007 has been amended for 8 times since its adoption. However, no amendment was made to Article 1 thereof, which sets forth the objective and scope of the Law. Accordingly, the objective of the Law is designated as the regulation of the obligations and responsibilities of the actors of the Internet environment, as well as the determination of the principles and procedures regarding the combat against certain offences. Its scope is confined to the combat against certain offences committed through Internet. Accordingly, pursuant to Article 1 of Law no. 5651, any content that is available on the Internet but does not constitute an offence falls outside the scope of the Law.

95. In the original wording of the Law no. 5651, the online content in respect of which blocking of access may be ordered in case of a sufficient

suspicion that the impugned online content constitutes an offence was listed in a limited manner in Article 8 thereof, titled *"Order to block access and its execution"*. In the original text of the Law, there was no statement to the effect that blocking of access may be ordered in case of an alleged violation of personal rights. However, it was set forth in Article 9, titled *"Removal of the impugned content and right of reply"*, that those who allege that their respective rights have been infringed due to an impugned content shall be entitled to request the removal of the content by applying to the content provider, or if content provider cannot be accessed, to the hosting provider, as well as the publication of the reply they have formulated for a period of one week on the Internet. The requesting party may apply to the magistrate judge only when the content or hosting provider fails to take the necessary action within the period specified in the Law. In this sense, the decision that may be issued by the magistrate judge is confined to the issue whether the impugned content would be removed and whether the reply of the requesting party would be published on the Internet for a period of one week.

96. Article 9 of Law was amended in a comprehensive manner on 6 February 2014 by Article 93 of Law no. 6518. Accordingly, the heading of the provision was formulated as *"Removal of the content and blocking of access"*. The amendment has also enabled those alleging a violation of their personal rights to directly file an application with the magistrate judge and seek the blocking of access to the impugned content, along with the opportunity to request the content provider or hosting provider to remove the content. Thereby, any content giving rise to infringement of personal rights is also added, as a ground necessitating the blocking of access, to Law no. 5651, in addition to any contents constituting the offences laid down in Article 8 thereof.

97. Undoubtedly, the State has a wide margin of appreciation in determining the measures required to be taken in interfering with the relationship between individuals. As a matter of fact, both criminal and legal protective remedies have been introduced in Türkiye in respect of any interference by third persons with the personal rights. Pursuant to Article 24 of the Turkish Civil Code no. 4721, dated 22 November 2001, those who allege that their personal rights have been infringed are entitled

to bring a civil action against any unlawful interference. However, for an attack against personal rights to be subject to a criminal trial, it must constitute an offence pursuant to criminal laws.

98. The law-maker has also developed certain specific and rapid procedures for the protection of personal rights, along with the procedures of bringing an action or filing a complaint with the prosecutor's office. One of these procedures is the blocking of access, which is laid down in Article 9 of Law no. 5651. It is inferred from Article 1 of the said Law that the scope of the procedure of blocking of access is confined to the online content involving a criminal suspicion. Accordingly, blocking of access may be ordered in case of an infringement of personal rights only in case of a suspicion that the impugned online content constitutes an offence under the criminal laws. However, despite Article 1 of the Law, there is no expression in Article 9, which demonstrates that the scope of blocking of access is limited to the criminal online content. Nor is any threshold specified as to the severity that the tortious act directed towards personal rights is to attain.

99. In addition to the above-cited findings, in assessing whether Article 9 of Law no. 5651 is sufficiently precise and foreseeable, the legal nature of the means allowing for an interference with the freedom of expression, which is set forth in this provision, must be also examined. By Article 94 of Law no. 6518, which was adopted on 6 February 2014, Article 9/A, titled *"Blocking of access to an impugned content on account of intimacy of private life"*, was added to the Law no. 5651, whereas by Article 29 of Law no. 6639, which was adopted on 27 March 2015, Article 8/A, titled *"Removal of content and/or blocking of access thereto in case delay is deemed prejudicial"*, was added thereto. Thereby, two new categories have been added to the types of online contents access to which may be blocked. Thus, four provisions in the Law no. 5651, namely Article 8, 8/A, 9 and 9/A, are devoted to the procedures of the blocking of access.

100. It is explicitly set forth therein that the procedure of blocking of access to a given content, which is laid down in Article 8, is a *protective measure*, whereas the procedure in Article 9/A is in the form of a *measure.* It is further indicated that the procedure in Article 8/A is a remedy that may be resorted in cases delay is deemed prejudicial, whereas there is no

clear expression as to the nature of the procedure of blocking of access introduced in Article 9. The principles and procedures of the method to block access are determined exclusively for each provision. However, in parallel to the requirements that interim measures *may be indicated only by certain authorities* and *must not be procrastinated*, it is envisaged in every provision that the decisions to block access be issued ultimately by judicial authorities, and that these decisions be subject to the challenge procedure laid down in the Code of Criminal Procedure no. 5271. It is also prescribed that the removal of any content found prejudicial from the Internet environment and the decisions to block access to such content be effected immediately within a short period of time. In parallel to the principle as to the proportionality of protective measures, it is set forth in the relevant provisions that the decisions to block access under every category may be issued merely with respect to the given publication, section or part constituting an infringement of personal rights. Besides, given the general legislative intent of the Law, according to which the procedure of blocking of access introduced in Law no. 5651 is in the form of a measure, and Article 1 thereof, which confines the scope of the Law to *the aim of combating, in a swift and effective manner, with the offences committed through Internet*, it gives the impression that the procedures of blocking of access, which are introduced by Law no. 5651, are all in the form of a measure.

101. On the other hand, Article 9 of the Law does not stipulate, following the decision to block access, the initiation of a criminal investigation and prosecution against those publishing the impugned content or impose an obligation on the complainants -seeking the blocking of access to a given content for alleged infringement of their personal rights- to apply to the relevant civil or criminal trial procedures. Therefore, it has been observed that the remedy introduced in Article 9 of the Law is not an intermediary remedy designed to prevent any irreparable risk of damage likely to take place during a criminal or civil proceedings; but, to the contrary, a remedy with distinctive features, which is formed independently of the current trial procedures in the legal system, and necessitates the conduct of a trial as to the merits of a dispute resulting from the restriction of the freedom of expression due to an alleged violation of the personal rights. In other words, this remedy is designed not as a means of temporary nature -due

to the lack of an adversarial trial to be initiated subsequently- for securing the proper functioning of the main proceedings but as an autonomous means that yields a final decision in form. In this sense, the legal nature of the procedure of blocking of access laid down in Article 9 of the Law no. 5651 varies by the examination of the law as a whole and independent examination of Article 9 thereof.

102. In the light of the above-mentioned explanations, it is apparent that the scope, aim and limitations of the restriction imposed through Article 9 of the Law on the freedom of expression as well as the legal nature of the means employed to impose restriction have given rise to certain hesitations concerning the lawfulness of the interference. However, under the particular circumstances of the present case, it would not be reasonable to consider the Court's assessments as to the lawfulness requirement independently of the examination whether the inferior courts' decisions are compatible with the requirements of a democratic society. Therefore, it has been considered that instead of a final assessment as to the lawfulness, it must be first addressed whether the interference with the applicants' freedom of expression was compatible with the requirements of a democratic society and it must be then accordingly ascertained whether the drawback resulted from the law.

(2) Legitimate Aim

103. It has been concluded that the decisions to block access to the impugned news articles and columns are a part of the measures taken for the *protection of others' reputation or rights*, thus pursuing a legitimate aim.

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

(a) General Principles

104. 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; *Mehmet Ali Gündoğdu and Mustafa Demirsoy*, no. 2015/8147, 8 May 2019, § 41; and *Levon Berç Kuzukoğlu and Ohannes Garbis Balmumciyan* [Plenary], no. 2014/17354, 22 May 2019, § 89).

105. 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 that 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 *Wikimedia Foundation Inc. and Others*, § 65; *Ferhat Üstündağ*, § 46; *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, § 51; *Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, § 68; and *Tansel Çölaşan*, no. 2014/6128, 7 July 2015, § 51).

106. Commensurateness points to the necessity for a reasonable balance between the aim pursued and the means employed. In other words, commensurateness entails the striking of a fair balance between an individual's right and the public interests or, if the aim of interference is to protect the others' rights, between the individual's right and the other individuals' rights as well as interests. If it is found out that a disproportionate burden has been imposed on the holder of the right, who was subject to an interference, in comparison to the public interest or other individuals' interest that is on the other side of the scales, a problem with respect to the principle of commensurateness may come into play (see *Ferhat Üstündağ*, § 48).

(b) The Court's Case-law as to the Procedure of Blocking Access under Article 9 of Law no. 5651

107. The Court addressed, for the first time, an impugned interference with the freedom of expression, namely the blocking of access to certain contents under Article 9 of Law no. 5651, in its judgment *Medya Gündem Dijital Yayıncılık Ticaret A.Ş.* and concluded that the interference was

incompatible with the requirements of a democratic society as the inferior courts' decisions blocking access to the online contents did not provide relevant and sufficient ground to justify the impugned interference. In the subsequent judgments rendered following this first judgment on the matter issued by the Plenary of the Court, the procedure concerning the removal of an impugned content or blocking of access thereto, which is laid down in Law no. 5651, was examined elaborately. The Court has stated that this procedure is a remedy in the nature of a preventive measure, which is designated for ensuring more effective struggle against the offences committed through Internet and for securing the swift and efficient protection of private life and personal rights and which is capable of yielding particular and rapid results. The Court has consistently pursued this approach (see, among many other judgments, *Ali Kıdık*, no. 2014/5552, 26 October 2017, §§ 55-63; *Miyase İlknur and Others*, no. 2015/15242, 18 July 2018, §§ 32-35; *Yeni Gün Haber Ajansı Basın ve Yayıncılık A.Ş.*, no. 2015/6313, 13 September 2018, §§ 25-28; and *IPS İletişim Vakfı*, no. 2015/14758, 30 October 2018, §§ 27-30).

108. The Court has made the following findings with respect to the blocking of access, the procedure introduced by Article 9 of Law no. 5651, in its above-cited judgments:

> *"According to Article 9 of Law no. 5651 which is applied in cases of violation of personal rights, natural persons and legal entities alleging a violation of their personal rights may request the removal of that content by means of sending a warning to the content provider or, if the content provider cannot be contacted, to the hosting provider, or such persons/entities may also apply directly to the magistrate judge so as to seek the blocking of access to the content. The judge who receives such a request is obliged to issue a decision on the request within 24 hours without holding a hearing. The necessary action for the decision on blocking of access to the content submitted by the Access Providers Union ("the Union") to the access provider must be performed immediately, within 4 hours at the latest, by the access provider.*
>
> *It is not clear in Article 9 of Law no. 5651 whether a judicial investigation will be launched against the perpetrators following the decision to block access. Where an investigation is launched for the interference with personal*

rights, judicial authorities may render a decision as to the consequence of the blocking of access measure according to the outcome of the investigation or prosecution. On the other hand, if an investigation is not launched, the measure in question will prevent Internet users from accessing the blocked content for an indefinite period of time.

As is seen, upon the request for blocking of access to content, the magistrate judge carries out an examination on the basis of the documents submitted by the person who filed the request. Accordingly, the relevant media organ and those responsible are not informed of the application that was filed. Moreover, the relevant officials from the website, against which the request for blocking of access was filed, cannot be present at the hearing, contrary to the principle of adversarial proceedings, since a hearing will not be held. As the judge is obliged to issue the decision within 24 hours, he cannot send a notification to the other party and ask them to submit written statements. The other party cannot defend themselves, they cannot have information or make comments on the evidence, opinions and observations submitted for the purpose of influencing the judge.

As the remedy of blocking of access envisaged under Law no. 5651 is a non-contentious legal remedy, namely as there is not an adverse party, the representatives of the media organ which would be affected by the decision and those responsible cannot benefit from the principle of the equality of arms. Nor can they have reasonable and acceptable opportunities to present their defence, including the possibility of submitting evidence against the allegations of the person filing the request. In summary, the judge issues his decision on the basis of the case file, namely on the basis of the information and documents submitted by the person filing the request; and the submissions of the other party cannot be taken in the course of these proceedings."

109. The Court has accordingly concluded that in consideration of the threat likely to be posed to the freedom of expression by this procedure where it is difficult to strike a balance between the conflicting rights as the representatives of media organs that will be bound by the decision on blocking of access cannot be provided with the procedural safeguards inherent in the proceedings, this procedure is an exceptional remedy to be

employed only when the relevant online publication is considered *prima facie* to be manifestly in breach of personal rights (such as the disclosure of naked photographs or videos of a person). In this regard, the procedure laid down in Article 9 must be employed in a way that would not encroach upon the freedoms of expression and the press as well as the press members' rights to impart news and to criticise and that would on the other hand protect the interests of the right holder. In order to avoid any arbitrary and disproportionate interference, the inferior courts must demonstrate that there is a need for the elimination, in an immediate and swift fashion and without conducting an adversarial trial, of the unlawful interference with the complainant's honour and dignity due to the impugned online content (see *Miyase İlknur and Others*, §§ 33-34, 40; *Yeni Gün Haber Ajansı Basın ve Yayıncılık A.Ş.*, §§ 26-27, 31; and *IPS İletişim Vakfı*, §§ 28-29, 35).

110. The Court has also endeavoured, with a view to guiding the inferior courts in their practices, to explain whether a given content, access to which has been blocked, could be considered within the scope of the doctrine of *prima facie violation* by striking a balance between the applicant's freedom of expression due to the blocking of access and the complainant's right to honour and dignity encroached due to the expressions of thoughts and ideas published on a website. In this sense, the Court has considered the relevant criteria necessary for striking a balance between the conflicting rights – such as whether the impugned online publication has contributed to a debate on a matter of high public interest; the identity of the targeted person; the conditions under which the impugned content is published; its capacity to inform the public; the existence of any public attention and whether the subject-matter is a current issue; whether the expressions included in the online publication have a factual basis; whether the addressee has the opportunity to reply the ideas expressed through the publication; and the effects of the impugned publication on the life of the targeted persons and etc. – under the particular circumstances of the present case. The Court has consequently held that the impugned content, access to which was blocked by the magistrate judges' decisions, was not among those which could be considered to fall under the scope of the doctrine of *prima facie violation* (see *Miyase İlknur and Others*, §§ 36-38, 40; *Yeni Gün Haber Ajansı Basın ve Yayıncılık A.Ş.*, §§ 29, 31; and *IPS İletişim Vakfı*, §§ 33, 35).

111. The Court has employed the above-explained method of assessment in its several judgments. It has on many occasions reiterated the issues that must be taken into account by the judicial authorities in respect of the interferences in the form of blocking of access to an impugned content under Article 9 of Law no. 5651 (see, among many other judgments, *Kemal Gözler*, no. 2014/5232, 19 April 2018; *Barış Yarkadaş*, no. 2015/4821, 17 April 2019; *Kemalettin Bulamacı*, no. 2016/14830, 4 July 2019; *Aykut Küçükkaya*, no. 2014/15916, 9 January 2020; *Özgen Acar and Others*, no. 2015/15241, 31 October 2018; and *Medya Gündem Dijital Yayıncılık Ticaret A.Ş.* (3), no. 2015/16499, 3 July 2019).

(c) Application of Article 9 of Law no. 5651 in the Present Cases

112. Given the factual and legal link among the cases, nine separate individual applications were joined under the case no. 2018/14884. In these applications, the applicants complained of the blocking of access to 129 URL addresses in total, by the magistrate judges' orders, upon the request of those who claimed that their right to honour and dignity had been violated on account of the expressions included in the impugned online contents.

113. The contents, access to which was blocked, were different from one another. They all consisted of the news articles published on a website of a national newspaper or on an Internet news portal. The complete texts of the contents of the news articles are not given herein; however, these contents are related to the following issues:

- The news articles, subject-matter of the individual application no. 2018/14884, referred to the motion submitted by the main opposition party to the Parliament for the formation of an *ad hoc* investigation commission with respect to child abuse, as well as to the reply of the Parliament on this matter.

- The news articles, subject-matter of the individual application no. 2019/3462, were related to the allegations that an educational institution under which several schools were operating failed to pay the salaries of the teachers working at these schools and that the parents who had enrolled to these schools but then decided not to send their children to these schools could not receive the amounts they had already paid.

- The news articles, subject-matter of the individual application no. 2019/12282, were related to the revocation of the tender made for the transportation of the historical pieces at the Hasankeyf district that would be submerged under the Batman dam lake, and the investigation initiated against certain public officers on account thereof.

- In the column, subject-matter of the individual application no. 2019/14680, it was stated that the then investigation authorities failed to conduct an inquiry into the allegations that a journalist found dead in 1993 had been kidnapped and killed by the security officers. It was further noted therein that the Court found a violation in that case as the Elazığ Chief Public Prosecutor's Office had failed to conduct an effective investigation.

- In the news article, subject-matter of the individual application no. 2019/24541, the political background of a political party leader and his activities at the social sphere were cited with a reference to the legal action brought before the assize court. It was further maintained therein that he was the leader of a religious community; and that upon the complainants' claims during the criminal proceedings that they had been financially exploited by that community, the incumbent assize court placed an injunction on the assets of the party leader, who was allegedly a community leader, and ordered a ban on travel abroad.

- The news article, subject-matter of the individual application no. 2019/39731, was concerning the reactions of the public figures to the expressions of the mayor of a district in Istanbul with respect to the person nominated to stand as the mayor of the Istanbul Metropolitan Municipality, which were broadcasted on a TV channel.

- The news articles, subject-matters of the individual applications no. 2020/24330 and 2020/24333, were related to the alleged unlawfulness of an appointment made to the Directorate General for Agricultural Credit Cooperatives Union of Türkiye, as well as to the irregularities and embezzlements allegedly taking place therein.

- In the news article, subject-matter of the individual application no. 2020/27927, it was maintained that the Ministry of Agriculture and

Forestry imposed several fines on the firms, founding-partner of which was appointed as the acting general director of Tarım Kredi Birlik A.Ş. under which Agricultural Credit Markets were operating, for improperly manufacturing foods; and that however, these firms were still engaging in these activities.

114. The politicians, high-profile figures and public officers and institutions whose names were cited in the impugned news sought blocking of access to these news articles, by claiming that their personal rights had been violated due to the expressions included therein. The magistrate judges, examining these requests, ordered the blocking of access to the URL addresses, where these news articles were published, by providing these general grounds *"the impugned contents have tarnished the honour and prestige of the complainants, and the expressions that were in the nature of humiliating the complainants were tantamount to an explicit attack on their personal rights"*.

115. It appears that the magistrate judges failed to demonstrate, in their decisions, the need for the rapid elimination, without an adversarial trial being conducted, of the unlawful interference with the complainants' right to honour and dignity due to the online contents in question. Nor could it be observed that the magistrate judges' decisions struck a fair balance between the competing rights. As these reasoned decisions contain general statements, which are independent of the particular circumstances of the given cases, it could not be ascertained how the magistrate judges concluded that the impugned online publications had constituted a *prima facie* and manifest violation of the personal rights.

116. It is also the case for the decisions issued by the magistrate judges that examined the challenges to the impugned decisions on blocking of access. These decisions are also based on the grounds formulated in a single sentence to the effect that the first instance decisions were lawful and the challenges were thus rejected. Therefore, the first instance decisions on blocking of access were not examined so as to ascertain whether they satisfied the doctrine of *prima facie* violation. The allegations raised in the petitions submitted by the applicants for the revocation of the decisions on blocking of access and the annexes thereof were not examined, and nor were the challenges raised by the applicants taken into consideration.

117. Some of the news articles, subject-matters of the decisions on blocking of access, were related to issues of public concern and served the purpose of raising public awareness of these issues; whereas some of them facilitated the citizens' involvement in the decision-making processes by reporting the politicians, their activities and expressions as news, and the remaining ones served the purpose of rendering the activities of the press and the persons and institutions exerting public power subject to public scrutiny. In this regard, the impugned new articles that closely concern the interests of the public indubitably fall into the scope of the duty and responsibility of the press to impart news. Nor are there any findings in the magistrate judges' decisions that the press acted contrary to their duties and responsibilities and maliciously distorted the truth.

118. Besides, any criminal investigation and prosecution were initiated following the blocking of access to any of these articles. Therefore, it appears that access to the impugned news articles was blocked for an indefinite period of time. As these decisions, in the form of a measure, which are taken in the absence of a relevant and sufficient ground, have a bearing lasting for an indefinite period of time, the interference with the applicants' freedoms of expression and the press cannot be considered proportionate (see, in the same vein, *Kemal Gözler*, § 74; and *Aykut Küçükkaya*, § 71).

119. Consequently, in consideration of the particular circumstances of the present case as a whole, it has been concluded that the interference, on account of the impugned decisions blocking of access, with the freedoms of expression and the press safeguarded respectively by Articles 26 and 28 of the Constitution did not meet a pressing social need that was of an overriding nature.

(d) Whether the Violation resulted from Article 9 of Law no. 5651

120. The decisions issued by the magistrate judges of different jurisdictions demonstrate that the procedure of blocking of access, set forth in Article 9 of Law no. 5651, was not employed only in cases where there was a *prima facia* violation of the personal rights; and that these decisions failed to purse the principles set in the Court's case-law.

121. The procedure of blocking access, subject-matter of the present applications and laid down in Article 9 of Law no. 5651, is designated by the law-maker as a different procedure than the current trial procedure in the legal system. Also due to the specific characteristic of the procedure of blocking of access, the decision on blocking of access becomes final when the challenge, if any, raised against this decision is rejected; and despite being defined as a kind of *measure*, the blocking of access to the given online contents is then ordered and applied for an indefinite period of time. It is evident that such restrictions for an indefinite period pose great dangers to the freedoms of expression and the press. In a state governed by rule of law, a given freedom cannot be restricted to the extent that would unreasonably prevent its exercise -whatever the aim pursued- (see *Aykut Küçükkaya*, § 67). Therefore, a provision that is, in form, capable of bearing all the same consequences with a final decision and having a bearing for an indefinite period of time must certainly offer certain protective safeguards against any arbitrary and disproportionate interferences.

122. The Court has stressed on many occasions that the freedom of expression enshrined in Article 26 of the Constitution and the freedom of the press, another form of the freedom of expression, which is subject to special safeguards enshrined in Article 28 of the Constitution, constitutes one of the main pillars of a democratic society and conditions *sine qua non* for the progress of the society and the improvement of individuals. It is evident that the freedom of the press affords one of the best means for the conveyance of various ideas and attitudes to the public and forming an opinion with respect thereto. In this sense, the freedoms of expression and the press are applicable for everyone and of vital importance for the proper functioning of the society (see *Mehmet Ali Aydın*, § 69; and *Bekir Coşkun*, §§ 34-36).

123. As in the present case, if the media organ publishing the impugned expressions and those responsible are caused to encounter great difficulties in submitting their defence submissions during a legal action brought against them and if the applicants are not provided with the opportunity to substantiate their allegations included in these expressions, their freedoms of expression and the press will be then violated (for the ECHR's judgments on the matter, see *Castells v. Spain*, no. 11798/85, 23 April 1992,

§§ 47, 48; and *Colombani and Others v. France*, no. 51279/99, 25 June 2002, § 66). Therefore, a given provision imposing restriction on the freedoms of expression and the press should primarily afford the procedural safeguards of a trial against arbitrary and disproportionate interferences.

124. However, the procedure of the blocking of access laid down in Article 9 of the Law in question does not afford the procedural safeguards of a trial, as also found by the Court in its previous judgments. As a matter of fact, in the present cases, upon the request of the persons raising an alleged violation of their rights and on the basis of the documents submitted by them, the magistrate judges ordered the blocking of access to the impugned contents within 24 hours and without holding a hearing. No notification was made to the applicants as to the requests for the blocking of access to the contents published on the news websites. As the applicants were not enabled to involve in the process during which the decisions on blocking of access were taken, they could not have the opportunity to have knowledge of the evidence and submissions adduced by those requesting the blocking of access, as well as to submit their counter-statements.

125. Even if the inability of a procedure -that has been introduced for ensuring the rapid and effective protection of an individual's personal rights in certain cases when required by the severity of a given interference- to offer certain procedural safeguards at the initial stage may be deemed reasonable, such deficiencies must be certainly eliminated and remedied at the subsequent stages of the proceedings so as not to vitiate the rights of the party suffering a violation of the freedom of expression due to the employment of this procedure. Therefore, a diligent and effective review mechanism must necessarily exist.

126. It is set forth in Article 9 of Law no. 5651 that the decisions on blocking of access may be appealed pursuant to relevant provisions of Code of Criminal Procedure no. 5271 (Law no. 5271). Accordingly, the single body -which may offer the relevant procedural safeguards to the persons whose freedom of expression has been restricted due to the blocking of access, the procedure laid down in Article 9 of Law no. 5651 and which may provide these persons with the opportunities to submit their defence submissions including their counter-evidence, to be heard

and to have an adversarial trial- is the appellate authority that will address the challenges.

127. Pursuant to Article 268 § 3 (a) of Law no. 5271, review of the challenges against the decisions of the magistrate judges shall be carried out by the magistrate judges but other than the one issuing the challenged decision. In Article 271 of the same Law, it is stated that the challenge will be adjudicated without a hearing being held. However, no specific time-limit is provided therein for the adjudication of the challenge by the appellate authority. Moreover, Article 207 of the Law does not vest the appellate authority with the power to conduct an investigation and inquiry or have such an investigation and inquiry conducted, even if the margin of appreciation is granted to the judge. Accordingly, there is no obstacle before the appellate authority to afford the basic safeguards, which have not been offered to the opposing party during the application of the procedure set forth in Article 9 of Law no. 5651, by means of examining the evidence submitted by both parties and eliminating the deficiencies in the file by conducting an *ex-officio* inquiry, as well as to strike a balance between the competing rights of the parties.

128. However, Article 270 of Law no. 5271 does not require the appellate authorities to exercise the power it has vested in them for any case. In all cases examined by the Court so far, including the present cases, there is no finding that the appellate authorities exerted the power vested in them by virtue of Article 270 of Law no. 5271 (see, among many other judgments, *Aykut Küçükkaya*, § 14; *Kemal Gözler (2)*, no. 2015/5612, 10 December 2019, § 16; *Enver Kaya (2)*, no. 2015/13180, 11 September 2019, § 14; *Kemalettin Bulamacı*, § 13; *Medya Gündem Dijital Yayıncılık Ticaret A.Ş. (3)*, § 14; *Barış Yarkadaş*, § 14; *Kemal Gözler*, § 18; *Miyase İlknur and Others*, § 13; *Yeni Gün Haber Ajansı Basın ve Yayıncılık A.Ş.*, § 12; *Özgen Acar and Others*, § 13; and *IPS İletişim Vakfı*, § 13). Nor did the reasoned decisions issued by the appellate authorities demonstrate that the basic safeguards that could not be afforded, at the stage when the decisions on blocking of access were issued, due to the limited period of time had been afforded at the appellate stage; that the direct and indirect effects of the blocking of access had been addressed, and the necessity of the restrictions on the Internet access had been discussed; that all parties to the case had been heard so as to ensure

an adversarial trial; and that a decision had been taken on the merits of the case by striking a balance between the competing interests of the parties.

129. As a matter of fact, also in the present cases, the appellate authorities failed to take into consideration even the essence of the applicants' allegations and to make an assessment as to the merits of the applicants' complaints. Nor did they strike a balance between the competing interests by explaining the necessity of blocking of access to the impugned contents. Besides, the judicial bodies are given a wide margin of appreciation due to the vague nature of the scope and extent of Article 9 of Law no. 5651, which demonstrates that it is not impossible but difficult to obtain an outcome from the challenge raised against the decision on blocking of access.

130. On the other hand, the magistrate judges that are indeed entrusted with the duty of taking decisions on interim measures inherent in the criminal trial procedure cannot be expected to conduct a trial on the merits of a given dispute unless specifically set forth in the respective laws, as also expressed in the Law no. 5235 on the Establishment, Tasks and Jurisdiction of Courts of Appeal and First Instance Civil and Criminal Courts, dated 26 September 2004. Nor is there any special provision with respect to the steps required to be taken by the appellate authority dealing with the challenges to the decisions on blocking of access, which has been introduced by Law no. 5651, save for the provisions in Law no. 5271 concerning the functioning of the appellate procedure. In other words, Law no. 5651 does not assign the appellate authority with the duty to conduct an examination in a way that will eliminate the deficiencies of the procedural safeguards that could not be afforded during the first instance proceedings. In this sense, the appellate authority does not offer an adversarial trial enabling the active involvement of the parties of the decisions on blocking of access in the proceedings and to eliminate deficiencies occurring at the initial stage of the proceedings.

131. Secondly, although the provision laid down in Article 9, which is prescribed as a part of the measures for the protection of others' reputation or rights, provides a legitimate ground for restriction, it does not define how this power shall be exercised by the magistrate judges. Nor does it offer to the magistrate judges the means that would enable

them to take decisions, which are compatible with the requirements of a democratic society and proportionate, in imposing a restriction.

132. Article 9 does not offer a method of imposing a gradual restriction with respect of a given online content in case of any encroachment upon personal rights but designates the procedure of blocking of access to the impugned content as the single method of intervention, regardless of the nature and extent of the encroachment. Although it is set forth in paragraph 4 of Article 9 that this procedure may be applied only to the publication, section or chapter which infringes the personal rights and that unless necessary, blocking of access to the whole publication on the website cannot be ordered, this rule is not *per se* convenient to preclude the arbitrary and disproportionate interferences with the freedom of expression. Although it is asserted that the restriction is applied merely with respect to a certain content and has limited effects, it is indeed a severe means of interference as it precludes access to the impugned content within the boundaries of a certain country for an indefinite period of time by the date when the decision is issued. Therefore, such a severe means must not be resorted so long as it is possible to struggle against prejudicial online contents through other available means. Accordingly, in its current form, Article 9 affords neither the procedural safeguards of trial nor the safeguards that would ensure the taking of decisions that are compatible with the requirements of a democratic society and proportionate, with a view to preventing arbitrary acts and practices by narrowing the margin of appreciation granted to the public authorities.

133. In the light of these assessments, the Court has concluded that the impugned interference found not to be compatible with the requirements of a democratic society and proportionate was in breach of the applicants' rights safeguarded by Articles 26 and 28 of the Constitution; and that the violation resulted directly from law for not offering the basic safeguards as to the protection of the freedoms of the expression and the press.

134. For these reasons, the Court found violations of the applicants' freedoms of expression and the press, which are safeguarded respectively by Articles 26 and 28 of the Constitution.

135. In the examination of the present case, the reports concerning the regulation of Internet contents, which are issued by the international institutions of which Türkiye is also a member and the internationally-accepted non-governmental organisations, the legislations of the foreign countries, as well as the methods employed in certain European countries so as to combat with the illegal online contents were also taken into consideration. It has been accordingly observed that the States' tendency in this field is to take measures so as to prevent the accessibility and dissemination of any illegal content via online platforms. The States have developed certain methods to prevent the dissemination of any content posing a threat to the democratic order of the society, such as the sexual abuse of child, hate speech, provocation to terrorism.

136. Undoubtedly, the measures taken by the State to combat with the online contents available on the Internet result from a compulsory need, namely the fight against crime. However, it should be borne in mind that the measures to be taken and the methods to be used are associated with the respect paid in a country to democracy and human rights. The evolving standards of human rights tend to accept the States' direct intervention with the online contents as a censorship. Therefore, nowadays, the contemporary democratic States abstain from intervening with the online environment directly by the bodies wielding state power, but instead prefer acting in cooperation with all actors of the Internet environment in fighting against any illegal content and adopt the methods in which the State itself is less involved.

137. Within the framework of the abovementioned assessments and given the fact that the decisions issued by the inferior courts under Article 9 of Law no. 5651, which point to a systematic problem, result directly from a provision of law, it is clear that there is a need to readdress the currently operating system in the country for the prevention of similar future violations. It is indubitably at the legislature's discretion to make the statutory arrangements, which are a significant part of the State policy to be pursued in the arrangement of the Internet environment. The Parliament may, of course, introduce new statutory arrangements by not departing from the current system. In such case, the following recommendations as to the minimum standards regarding the new statutory arrangements,

which will be introduced so as to ensure that any interference with the online contents would be compatible with the requirements of a democratic society pursuant to Article 13 of the Constitution and would not give rise to a violation of Article 26 of the Constitution, should be taken into consideration:

i. Article 9 of the relevant Law should be ensured to be foreseeable. In this sense, it should be re-formulated in a way to ensure that the scope and legal nature of the procedure of blocking of access, laid down in Article 9, should be sufficiently clear and precise.

ii. In determining the scope of the procedure of blocking of access laid down in Article 9, the laws that regulate the restriction of Internet should be designated in a way that would leave a narrow room for manoeuvre; and Article 9 should be applied only in cases of a pressing social need. In this sense;

- Article 9 should be aligned with Article 1 where the objective and scope of the Law are defined.

- Article 9 should be sufficiently foreseeable to demonstrate the legal consequences of the relevant acts and actions, as well as the scope and extent of any justified intervention by the public authorities. In this context, the limits of the protection offered by Article 9 for the protection of personal rights should be clarified, and necessary criteria for the employment of the procedure of blocking of access, such as the determination of a threshold as to the gravity that a tortious act must attain, should be set.

iii. In regulating the legal nature of the procedure of the blocking of access laid down in Article 9;

- If it is considered that the decisions taken under this provision is a protective measure, the proceedings should be conducted in line with the provisions regarding the protective measure, which are set forth in Law no. 5271; and the continued application of the measure of blocking of access should be determined at the end of an adversarial proceedings to be conducted.

- It should be also emphasised that it cannot be possible to get in contact with those who are actually responsible for the publication of

illegal contents, namely the content provider or hosting provider. The elements such as the opportunity to remain anonymous, which is ensured by Internet, huge number of contents created via Internet, and the fact that the victim and the perpetrator are not usually within the same jurisdiction render difficult to monitor and fight against the offences and perpetrators, increase the costs, and in some instances render impossible to obtain a result (see *Mustafa Tepeli,* no. 2014/5831, 1 March 2017, § 29). Therefore, the public authorities cannot be held liable to initiate an investigation and conduct an adversarial trial in every case when the measure of blocking of access is taken.

- In this sense, given the difficulties stemming from the very nature of the Internet, the law-maker's preference to establish a remedy that is not directly linked to the current trial procedures applicable in the legal system cannot be found unjust. However, such remedy must necessarily involve the procedural safeguards so that this remedy imposing a restriction on the freedom of expression would not give rise to arbitrary practices and would not be to the extent that would disproportionately preclude the exercise of the said freedom.

iv. For the procedure of blocking of access, which is laid down in Article 9 of Law no. 5651, to be considered to afford the relevant procedural safeguards, the following issues should be taken into account:

- As is also noted above, the difficulties inherent in the Internet do not place a positive obligation on the State to conduct an adversarial trial automatically in every case. On the other hand, when access to an impugned online content is blocked upon the request of those who raise an allegation that their personal rights have been violated and when those on whom the decision on blocking of access has a bearing challenge this decision, they automatically become the parties to the case. At this very stage, the State is liable to set up a judicial mechanism whereby the parties may find the opportunity to submit their defences including the adducing of their counter-evidence and be entitled to the rights to be heard and to an adversarial trial. In other words, an adversarial trial, which could not be conducted by the first instance court on account of its obligation to make an assessment, by acting swiftly, as to the request for blocking of access

to the Internet, must be necessarily ensured by the appellate authority *in cases where there is a challenge to* the decision on blocking of access. *In cases where no challenge is raised against such decision*, it will become final and thus the State's obligation to set a judicial mechanism whereby the relevant persons may exercise their rights to be heard and to an adversarial trial in so far as it concerns this decision will be no longer at stake. A provision may be added to the current wording of Article 9, and the appellate authority may be thereby assigned with a duty to offer an adversarial trial enabling the active involvement of the relevant parties in the proceedings and to eliminate the deficiencies that were encountered at the initial stage of the proceedings. However, in that case, as it is the first time that the merits of the dispute will be examined and adjudicated, it becomes necessary to establish an effective judicial review mechanism to review the decision of the appellate authority. Undoubtedly, Articles 26, 28, 36 and/or 40 of the Constitution does not place on the State a general obligation to set up a review mechanism, which may be resorted to challenge the decisions issued by the appellate authority and guarantees a third-instance trial. It should be, however, borne in mind that regard being had to the facts that a decision on the merits of the dispute will be taken for the first time and that the case-law of the high courts is a guidance to the inferior courts in the establishment and application of the human-rights standards, making the decisions issued by the appellate authority subject to a judicial review is of vital importance for the protection of violations of the freedoms of expression and the press, which are indispensable for a democratic order.

v. It should be also taken into account that the blocking of access to an online content is a severe means of interference as it precludes access to the impugned content within the boundaries of a certain country for an indefinite period of time as from the issuance of the decision and it is a method must not be applied so long as it is possible to struggle against prejudicial online contents through other available means. In this sense, in cases requiring the restriction of an online content, the provisions that will guide the magistrate judge should be introduced. In the provisions to be introduced so as to preclude any disproportionate and arbitrary practices, it should be stated that the decision on blocking of access is a compulsory or exceptional measure of last resort. In the statutory arrangement to

be made, an impact assessment should be made before resorting to the measure of blocking of access to the Internet, the need for blocking access to an online content should be justified, the obligation to strike a reasonable balance between the means to be employed and the legitimate aim sought to be achieved should be introduced, and the means alternative to the method of blocking of access should be embodied.

B. Alleged Violation of the Right to an Effective Remedy in conjunction with the Freedom of Expression

1. The Applicants' Allegations

138. The applicants maintained that the appellate authorities failed to address any of their allegations raised in the petitions where they had provided comprehensive explanations to the effect that the content access to which had been blocked indeed fell into the scope of their freedom of the press, to take into account their requests, as well as to assess the evidence they had asserted in the annexes of their petitions. The applicants alleged that there had been a violation of the right to an effective remedy in conjunction with the freedom of expression, stating that the decisions whereby the incumbent magistrate judges rejected their request for appeal without conducting an examination on the merits of the dispute were of a final nature and that there was no other authority before which they could challenge these decisions.

2. The Court's Assessment

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

> *"Everyone whose constitutional rights and freedoms have been violated has the right to request prompt access to the competent authorities.*
>
> *The State is obliged to indicate in its proceedings, the legal remedies and authorities to which the persons concerned should apply and the time limits of the applications.*
>
> *Damages incurred to any person through unlawful treatment by public officials shall be compensated for by the State as per the law. The State reserves the right of recourse to the official responsible."*

a. Admissibility

140. The alleged violation of the right to an effective remedy in conjunction with the freedom of expression must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

141. The right to an effective remedy may be described as ensuring that everyone who claims to have suffered a violation of one of his constitutional rights are provided with an opportunity to submit applications with administrative and judicial remedies that are reasonable, accessible, and capable of preventing the violation from occurring or ceasing its continuation 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 (see *Y.T.* [Plenary], no. 2016/22418, 30 May 2019, § 47; and *Murat Haliç*, no. 2017/24356, 8 July 2020, § 44).

142. The existence of effective legal remedies capable of enabling an examination on the merits of the complaints and, when necessary, affording appropriate redress is a requisite of the exercise of the right to an effective remedy. Accordingly, the mere existence of legal remedies designed to afford redress in the relevant legislation is not *per se* sufficient, and such remedy must offer reasonable prospects of success also in practice. In assessing whether the conditions sought to be fulfilled for having a recourse to these remedies are satisfied under the particular circumstances of given cases, the arguable claims resulting from an impugned act, action or negligence must be considered in a comprehensive manner; and if it is concluded that the necessary conditions are not satisfied, the incumbent tribunals must provide relevant and sufficient grounds to justify their decisions (see *İlhan Gökhan*, no. 2017/27957, 9 September 2020, §§ 47, 49).

143. The examination to be conducted with respect to the applicants' complaints that their right to an effective remedy enshrined in Article 40 of the Constitution is based on the same facts that are subject-matter of the examination made above regarding the complaint raised under the

freedoms of expression and the press safeguarded by Articles 26 and 28 of the Constitution. Besides, within the scope of the present application, Articles 26 and 28 of the Constitution as well as Article 40 thereof entail the existence of a tribunal before which the parties affected from a given decision may be heard and challenge the decision in a way that would enable an adversarial trial.

144. The absence of such a trial, which is directly related to the restriction of fundamental rights and freedoms, would mean that the provision of law forming the basis of a given interference does not afford the procedural safeguards of a trial, which will violate the substantial right. Besides, the absence of a tribunal would mean that the public authorities fail to provide an effective remedy whereby an applicant may resort to obtain a redress with respect to his infringed right.

145. The formulation of the opportunity to challenge the decision on blocking of access in Article 9 of Law no. 5651 is not *per se* sufficient, and it must offer prospect of success also in practice. In the present case, the applicants could find the opportunity to challenge the decisions on blocking of access issued pursuant to Article 9 of Law no. 5651 before the designated appellate authorities, which was an ordinary legal remedy. However, the appellate authorities did not take into consideration the applicants' claims and evidence in their reasoned decisions. Nor did they endeavour to strike a balance between the conflicting interests and assess whether the interference due to the blocking of access to the online contents was compatible with the requirements of a democratic society and proportionate. Accordingly, the Court has reached the conclusion that under the particular circumstances of the present case, the appellate authority was not effective.

146. For these reasons, the Court found a violation of the right to an effective remedy safeguarded by Article 40 of the Constitution in conjunction with Article 26 thereof.

C. Application of Article 50 of Code no. 6216

147. 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, 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."

148. The applicants requested the Court to find a violation in their case and to order a retrial. In addition, the applicants Çiğdem Toker Taştan, Şevket Uzun, Yeni Gün Haber Ajansı Basın ve Yayıncılık A.Ş., And Gazetecilik Yayıncılık Sanayi ve Ticaret A.Ş., Arti Media Gmbh and Gelenek Basım Yayım ve Ticaret Ltd. Şti. claimed compensation for their non-pecuniary damage.

149. 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).

150. 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).

151. Before ruling on the steps to be taken for the redress of 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 means of redress (see *Mehmet Doğan*, § 57).

152. 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, then the violation stems not from the application of the law but directly from the law itself. In this case, 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 so as to say that the violation has been redressed with all of its consequences. Moreover, in certain circumstances the annulment of the impugned provision of law may not be sufficient, by itself, in order to redress all the consequences of the violation. In that case, certain measures might need to be taken within the scope of individual application, which could redress the pecuniary and non-pecuniary damages suffered by victims due to the violation (see *Y.T.*, § 68).

153. One of the ways that ensure the removal of the violation and its consequences pursuant to Article 50 of Code no. 6216 is the pilot judgment procedure envisaged by Article 75 of the Internal Regulations. In cases where the violation is found to be stemming from a structural problem and that it is leading to more applications, in other words to further violations, or where it is foreseen that this situation might lead to further violations, the mere finding of a violation in respect of the case in question will be far from offering a real protection for the fundamental rights and freedoms (see *Y.T.*, § 69).

154. In such a situation, the Court can initiate the pilot judgment procedure *ex officio* or upon request of the Ministry or the applicant. When the pilot judgment procedure is initiated, the structural problem must be identified and possible solutions thereto must be put forward (see *Y.T.*, § 70).

155. The foremost purpose of adopting the pilot judgement procedure is to ensure that the structural problem be corrected and the source of the violation be eliminated through resolution of similar applications by administrative authorities instead of judgments finding violations (see *Y.T.*, § 71).

156. In this framework, the Court may prescribe a period of time for the elimination of the structural problem identified by its pilot judgment and the resolution of similar applications, while in the meantime postponing the examination of other applications during this period. However, in such a case, the persons concerned must be informed of the decision on postponement. If the relevant authorities are unable to eliminate the structural problem and resolve the applications falling within that scope by the end of the period of time prescribed by the Court, it will become possible to rule collectively on the applications in the same vein (see *Y.T.*, § 72).

157. It has been concluded that in the present case, the interference due to the blocking of access to 129 news websites on the basis of Article 9 of Law no. 5651 was in breach of the applicants' freedoms of expression and the press safeguarded respectively by Articles 26 and 28 of the Constitution. As noted above, the violations directly stemmed from the relevant law for not affording the basic safeguards for the protection of the freedoms of expression and the press.

158. Therefore, many further individual applications involving the alleged violations of the freedoms of expression and the press, as in the present case, are brought day by day before the Court through individual application mechanism due to the blocking of access to online contents pursuant to Article 9 of Law no. 5651.

159. Even if it is aimed to set aside the decisions on blocking of access to online contents by rendering new violation judgments with respect to

the pending applications within the framework of the principles set forth in the Court's previous judgments, this will prevent neither the lodging of further similar applications nor the blocking of access to online contents of similar nature by the inferior courts. It has been thus concluded that the provision of law resulting in the violation should be revised so as to redress the violation and its consequences and prevent the similar future violations. Therefore, a copy of the judgment must be sent to the legislature.

160. Besides, the Court has decided to postpone the examination of the applications of similar nature that have been pending until the date of this judgment, as well as of those that will be lodged thereafter with the Court for a period of one year as from the date when this judgment is published on the Official Gazette pursuant to Article 75 § 5 of the Internal Regulations of the Court. It has accordingly decided that the respective applicants would be informed of this postponement by way of announcing their application numbers on the Court's website.

161. However, the mere finding of a violation does not afford complete redress for the damage sustained by the applicants on account of the violation found by the Court in the present case. The Court has herein determined the structural problem stemming from the law in dealing with the merits of the present case and found the interferences in the present cases incompatible with the requirements of a democratic society and disproportionate. Therefore, there is a legal interest in conducting a retrial for the redress of the violations of the freedoms of expression and the press as well as the consequences thereof.

162. 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); and *Kadri Enis Berberoğlu (3)*, no. 2020/32949, 21 January 2021, §§ 93-100). The retrial to be conducted is intended for redressing the violation and its consequences pursuant to Article 50 § 2 of Code no. 6216. In this scope, the step required to be taken is to revoke the court decision resulting in the violation and to issue, in line with the principles in the violation judgment, a fresh decision. Accordingly, a copy of the judgment must be sent to the relevant magistrate judges to conduct a retrial.

163. Moreover, it is explicit that the mere finding of a violation in the present case would remain insufficient for the redress of the damage sustained by the applicants. Therefore, the applicants Çiğdem Toker Taştan, Şevket Uzun, Yenigün Haber Ajansı Basın ve Yayıncılık Anonim Şirketi, And Gazetecilik Yayıncılık Sanayi ve Ticaret Anonim Şirketi, Arti Media Gmbh and Gelenek Basım Yayım ve Ticaret Limited Şirketi must be paid separately a net amount of 8,100 Turkish liras (TRY) in respect of the non-pecuniary damages which they sustained on account of the violations of their freedoms of expression and the press and which cannot be compensated merely by the finding of a violation.

164. Accordingly, the following litigation costs, established on the basis of the documents in the case files, must be reimbursed to the applicants: the total litigation costs of TRY 3,894.70 including the court fee of TRY 294.70 and the counsel fee of TRY 3,600 must be reimbursed to the applicant Keskin Kalem Yayıncılık ve Ticaret A.Ş.; the total litigation costs of TRY 3,964.60 including the court fee of TRY 364.60 and the counsel fee of TRY 3,600 must be reimbursed to the applicant Birgün Yayıncılık ve İletişim Ticaret A.Ş.; the total litigation costs of TRY 4,329.20 including the court fee of TRY 729.20 and the counsel fee of TRY 3,600 must be reimbursed to the applicant And Gazetecilik Yayıncılık Sanayi ve Ticaret A.Ş.; the total litigation costs of TRY 3,964.60 including the court fee of TRY 364.60 and the counsel fee of TRY 3,600 must be reimbursed to the applicant Gelenek Basım Yayım ve Ticaret Ltd. Şti.; the total litigation costs of TRY 4,493.80 including the court fee of TRY 893.80 and the counsel fee of TRY 3,600 must be reimbursed to the applicant Şevket Uzun; the total litigation costs of TRY 4,046.90 including the court fee of TRY 446.90 and the counsel fee of TRY 3,600 must be reimbursed to the applicant Arti Media Gmbh. The total litigation costs of TRY 3,964.60 including the court fee of TRY

364.60 and the counsel fee of TRY 3,600 must be reimbursed jointly to the applicants Çiğdem Toker Taştan and Yeni Gün Haber Ajansı Basın ve Yayıncılık A.Ş..

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 27 October 2021 that

A. 1. The alleged violations of the freedoms of expression and the press be DECLARED ADMISSIBLE;

2. The alleged violation of the right to an effective remedy be DECLARED ADMISSIBLE;

B. 1. The freedoms of expression and the press safeguarded respectively by Articles 26 and 28 of the Constitution were VIOLATED;

2. The right to an effective remedy safeguarded by Article 40 of the Constitution was VIOLATED;

C. As the violation has stemmed from a structural problem, the PILOT JUDGMENT PROCEDURE BE APPLIED;

D. The situation necessitating an amendment for the elimination of the structural problem be NOTIFIED to the Grand National Assembly of Türkiye;

E. The examination of the applications on the same matter that have been already lodged until, and will be lodged after, the delivery of this judgment be POSTPONED FOR 1 YEAR as from the publication of the judgment in the Official Gazette;

F. The persons concerned whose applications fall within the scope of the pilot judgment be INFORMED of the situation via the announcement of their application numbers on the Court's website;

G. A copy of the judgment be REMITTED to the Ankara Magistrate Judge no. 2 (no. 2018/1962), the Ankara Magistrate Judge no. 3 (no. 2018/8196), the Ankara Magistrate Judge no. 8 (nos. 2018/101, 2020/4487, 2020/5837 and 2020/3284), the Ankara Magistrate Judge no. 1 (no.

2019/2126), the Bakırköy Magistrate Judge no.5 (no. 2018/8347) and the Bakırköy Magistrate Judge no.3 (no. 2019/3349) to conduct a retrial to redress the consequences of the violations of the freedoms of expression and the press;

H. A net amount of TRY 8,100 be separately paid to the applicants Çiğdem Toker Taştan, Şevket Uzun, Yenigün Haber Ajansı Basın ve Yayıncılık A.Ş., And Gazetecilik Yayıncılık Sanayi ve Ticaret A.Ş., Arti Media Gmbh and Gelenek Basım Yayım ve Ticaret Ltd. Şti. in respect of non-pecuniary damage, and other compensation claims be REJECTED;

I. The total litigation costs of TRY 3,894.70 including the court fee of TRY 294.70 and the counsel fee of TRY 3,600 must be reimbursed to the applicant Keskin Kalem Yayıncılık ve Ticaret A.Ş.; the total litigation costs of TRY 3,964.60 including the court fee of TRY 364.60 and the counsel fee of TRY 3,600 must be reimbursed to the applicant Birgün Yayıncılık ve İletişim Ticaret A.Ş.; the total litigation costs of TRY 4,329.20 including the court fee of TRY 729.20 and the counsel fee of TRY 3,600 must be reimbursed to the applicant And Gazetecilik Yayıncılık Sanayi ve Ticaret A.Ş.; the total litigation costs of TRY 3,964.60 including the court fee of TRY 364.60 and the counsel fee of TRY 3,600 must be reimbursed to the applicant Gelenek Basım Yayım ve Ticaret Ltd. Şti.; the total litigation costs of TRY 4,493.80 including the court fee of TRY 893.80 and the counsel fee of TRY 3,600 must be reimbursed to the applicant Şevket Uzun; the total litigation costs of TRY 4,046.90 including the court fee of TRY 446.90 and the counsel fee of TRY 3,600 must be reimbursed to the applicant Arti Media Gmbh. The total litigation costs of TRY 3,964.60 including the court fee of TRY 364.60 and the counsel fee of TRY 3,600 must be reimbursed jointly to the applicants Çiğdem Toker Taştan and Yeni Gün Haber Ajansı Basın ve Yayıncılık A.Ş..

J. 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; and K. A copy of the judgment be SENT to the Ministry of Justice.

RIGHT TO HOLD MEETINGS AND DEMONSTRATION MARCHES (ARTICLE 34)

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

HAMİT YAKUT

(Application no. 2014/6548)

10 June 2021

On 10 June 2021, the Plenary of the Constitutional Court found a violation of the right to hold meetings and demonstration marches safeguarded by Article 34 of the Constitution in the individual application lodged by *Hamit Yakut* (no. 2014/6548).

THE FACTS

[9-57] The applicant, participating in a demonstration held in front of a political party's premises, was taken into custody as a result of the incident that had occurred, for committing an offence on behalf of a terrorist organisation without being a member of it. He was released after 3 days.

The chief public prosecutor's office indicted the applicant and four other suspects. The 6th Chamber of the Diyarbakır Assize Court, authorised by Article 250 of the Code of Criminal Procedure, ("court") sentenced the applicant to 3 years and 9 months' imprisonment for the imputed offence. The court also sentenced the applicant to 6 months' imprisonment for participating in an illegal demonstration and refusing to disperse despite the warnings of the officers; however, it suspended the pronouncement of the judgment.

The applicant's subsequent appeal against his conviction for committing an offence on behalf of a terrorist organisation without being a member of it was upheld by the 9th Criminal Chamber of the Court of Cassation.

The applicant lodged an individual application with the Constitutional Court on 6 May 2015.

V. EXAMINATION AND GROUNDS

58. The Constitutional Court ("the Court"), at its session of 10 June 2021, examined the application and decided as follows:

A. Alleged Violation of the Right to Hold Meetings and Demonstration Marches

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

59. The applicant made the following submissions:

i. He stated that he had not participated in the meeting and demonstration march giving rise to his conviction, that he had been in the area of the meeting purely by chance since he had had something to do, and that he had been sentenced for the offence of committing an offence on behalf of a terrorist organisation without being a member of it due to an act falling within the scope of the right to hold meetings and demonstration marches, even if he was presumed to have taken part in such meeting.

ii. He noted that the websites providing a platform for the calls of the terrorist organisation were not accessible from Türkiye, that the inferior courts had presumed that he had been informed of the call of the terrorist organisation, that they had not made an assessment on this issue, and that even if an act had been established to have been committed within the knowledge and at the request of the terrorist organisation, his alleged knowledge of such issue was completely presumptive. He alleged that the burden of proof laid on the prosecution and that the assessment by the prosecution of whether the demonstration had been compatible with the interests of the organisation instead of proving whether he had acted upon the call of the organisation amounted to a violation of many fundamental rights. He argued that on the basis of such reasoning he might be sentenced on the ground that all meetings and demonstrations, other than those held in favour of the ruling party, impaired the State or accorded with the interests of the organisation, and he claimed that the convictions based on assumptions and fictions amounted to a violation of the presumption of innocence.

iii. He maintained that the first-instance court had not carried out the proceedings fairly and impartially on the ground that it had not assessed whether he had been aware of the call of the terrorist organisation, that it had solely relied on the police report drawn up on the day of the incident, that it had dismissed all the requests of the defence, and that it had imposed a severe sentence by relying on, as the sole evidence, the news published on the websites which were not accessible from Türkiye.

iv. Lastly, he alleged a violation of his right to hold meetings and demonstration marches, stating that the decision delivered in 2008 by the

Plenary of the Criminal Chambers of the Court of Cassation and relied on by the first-instance court for his conviction had not been accessible to and foreseeable for him and that the prison sentences imposed on him had not been necessary in a democratic society even if he was presumed to have participated in the protest indicated in the decision.

60. In its observations, the Ministry noted that Article 314 § 2 of the Law no. 5237 on the basis of Article 220 § 6 thereof and Article 32 § 1 of the Law no. 2911 constituted the legal basis for the alleged interference in the present application and that the impugned interference pursued the legitimate aims set out in Article 34 § 2 of the Constitution. The Ministry also stated that the notion of peaceful assembly did not cover the demonstrations attended or organised by individuals proven on reasonable grounds to have violent intentions although they had not started to carry out any act of violence yet. Having emphasised that in the present case the applicant had participated in the unlawful demonstration held upon the call of the PKK terrorist organisation, the Ministry further noted that slogans had been chanted in favour of the PKK/KCK during the said demonstration, that posters had been hung, that attacks had been carried out on the law enforcement officers, and that damage had been caused to public and private buildings. In its observations, the Ministry lastly noted that the said meeting could not be considered to be peaceful, that the applicant's conviction thus corresponded to a pressing social need, and that the applicant's right to hold meetings and demonstration marches had not been violated.

61. In his submissions in response to the Ministry's observations, the applicant argued that he had been sentenced in the absence of sufficient evidence, that even if he was presumed to have participated in the meeting at issue, there was no evidence indicating that he had participated in the said meeting upon the call of the PKK, that he had not acted together with the group involved in violent acts, and that the sentence imposed on him had been disproportionate. He also stated that his conviction for the offence of membership of an organisation on account of his alleged participation in a meeting had not been foreseeable.

2. The Court's Assessment

62. Article 34 §§ 1 and 2 of the Constitution, titled "*Right to hold meetings and demonstration marches*", provide as follows:

> *"Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission.*
>
> *The right to hold meetings and demonstration marches shall be restricted only by law on the grounds of national security, public order, prevention of commission of crime, protection of public health and public morals or the rights and freedoms of others."*

63. 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 essentially complained about his conviction for having participated in a meeting and demonstration march. He was not able to concretise his complaint concerning the alleged violation of the presumption of innocence to such an extent as to require a separate examination. Therefore, his complaints will be examined as a whole within the scope of the right to hold meetings and demonstration marches (see *Metin Birdal* [Plenary], no. 2014/15440, 22 May 2019, § 44; and *Ferhat Üstündağ*, no. 2014/15428, 17 July 2018, § 30).

a. Admissibility

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

b. Merits

i. Importance of the Right to Hold Meetings and Demonstration Marches in a Democratic Society

65. The right to hold meetings and demonstration marches is among the most fundamental values of a democratic society and aims at protecting the opportunity for individuals to come together in order to defend their common ideas and announce them to others. This right, which is exercised collectively and affords individuals who wish to

express their thoughts by peaceful methods that exclude violence, guarantees the emergence, protection and dissemination of different ideas that are essential in the development of pluralist democracies. This right is a special form of the freedom of expression. Notwithstanding its autonomous role and particular sphere of application, the right to hold meetings and demonstration marches must also be considered in the light of the freedom of expression. The importance of the freedom of expression in a democratic and pluralistic society also applies to the right to hold meetings and demonstration marches (for explanations concerning the importance of the right to hold meetings and demonstration marches in a democratic society, see *Metin Birdal*, §§ 54-58; *Ferhat Üstündağ*, § 40; *Dilan Ögüz Canan* [Plenary], no. 2014/20411, 30 November 2017, § 36; and *Eğitim ve Bilim Emekçileri Sendikası and Others* [Plenary], no. 2014/920, 25 May 2017, § 79).

ii. Existence of an Interference

66. In the present case, it was acknowledged that the applicant had committed an offence on behalf of a terrorist organisation without being a member of it due to his refusal, despite warnings, to disperse during a meeting and demonstration march in which he had allegedly participated. He was accordingly sentenced under Article 314 § 2 of the Law no. 5237 governing the offence of membership of a terrorist organisation on account of a reference made in the relevant legislative provision.

67. The applicant alleged that he had not participated in the meeting relied on for his conviction and that he had been at the scene purely by chance since he had had something to do on the same day. When making its examination, the Court, as a rule, is not concerned with the inferior courts' assessments as to the material facts. In this regard, the issue of whether the commission of an offence was proven or whether the evidence collected was sufficient to prove the commission of the offence falls outside the sphere of the Court's examination (see *Yılmaz Çelik* [Plenary], no. 2014/13117, 19 July 2018, § 45; see also *Ferhat Üstündağ*, § 65).

68. In the present application, there is no reason requiring the Court to depart from the general approach in this regard. Therefore, it is not necessary to assess the inferior courts' acknowledgement concerning the

proof of the occurrence of the incident. Thus, in the present application, an assessment will be made as to whether the applicant's conviction solely on account of his participation in a meeting, as acknowledged by the inferior courts, amounted to a violation of the right to hold meetings and demonstration marches (for a similar assessment, see *Umut Kılıç*, no. 2015/16643, 4 April 2018, § 36; and *Emre Soyaslan*, no. 2014/11306, 18 April 2019, § 45).

69. In the impugned incident, in view of the nature of the imputed offence, the applicant was sentenced for the offence of committing an offence on behalf of a terrorist organisation without being a member of it on account of his participation in a demonstration organised upon the call of the PKK terrorist organisation. The Court has previously noted that investigations carried out against individuals by judicial authorities and convictions imposed on them as a result of criminal proceedings on account of their participation in certain meetings or demonstrations have a deterrent effect (see *Ferhat Üstündağ*, § 59; *Osman Erbil*, no. 2013/2394, 25 March 2015, § 71; and *Ömer Faruk Akyüz,* no. 2015/9247, 4 April 2018, § 60). Therefore, in the present application, it has been acknowledged that there was an interference with the applicant's right to hold meetings and demonstration marches.

iii. Whether the Interference Amounted to a Violation

70. The aforementioned interference amounts to a violation of Article 34 of the Constitution unless it complies with the conditions set out in Article 13 thereof. Article 13 of the Constitution, 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 requirements of the democratic order of the society and ... the principle of proportionality."*

71. It must be determined whether the impugned interference complied with the requirements of being prescribed by law, being based on one or more justifiable reasons set out in Article 34 § 2 of the Constitution and not

being contrary to the principle of proportionality and the requirements of a democratic society, which are relevant for the present application and laid down in Article 13 of the Constitution.

72. The applicant was sentenced for committing an offence on behalf of the PKK terrorist organisation. The PKK is a terrorist organisation which has been carrying out acts of violence causing death of many civilians and security forces for approximately 40 years throughout the country, especially in the eastern and south-eastern regions. The PKK carried out its activities at the material time and is continuing to do so. Thus, the PKK poses a considerably intense, serious and concrete danger to the society. In this regard, it must be acknowledged that fighting against terrorism in our country is a very sensitive issue and that the units involved in such fight against terrorism are afforded wide margin of appreciation (see *Metin Birdal*, § 74).

73. In the present case, the first-instance court considered that calls for protests and press statements had been issued through the news and announcements on the websites publishing contents in line with the aims of the PKK terrorist organisation, that the meetings and demonstration marches organised upon those calls had turned into acts of violence, that the applicant had participated in one of those meetings and demonstration marches which had been organised upon such calls, and that he had been in a group of demonstrators who had not dispersed despite the issuance of warnings and the use of force by the security forces.

74. Having refused to disperse despite the issuance of warnings and the use of force by the security forces, the applicant committed the offence of acting in breach of Article 32 § 1 of the Law no. 2911 according to the assessment of the first-instance court. In this connection, the first-instance court concluded that the applicant had committed the offence of acting in breach of Article 32 § 1 of the Law no. 2911 on behalf of the PKK terrorist organisation. It also convicted him for committing an offence on behalf of a terrorist organisation and sentenced him under Article 220 § 6 of the Law no. 5237, which was relevant for his act. However, the first-instance court did not accept the allegations that the applicant had resorted to violence and resisted the security forces. It thus ordered his acquittal of these offences.

75. Having denied all of the charges, the applicant alleged that there existed no evidence, beyond assumption, indicating that he had been aware of the call of the terrorist organisation and acted on behalf of it. He complained that after his conviction for the offence of acting in breach of Article 32 § 1 of the Law no. 2911 he had been additionally sentenced for committing an offence on behalf of a terrorist organisation on the ground that the demonstration at issue had been considered to be held for the benefit of the said organisation. It remains unsettled whether Article 220 § 6 of the Law no. 5237, which was applied in the applicant's case, afforded the applicant the opportunity to reasonably foresee the consequences of a particular act of him and thus to regulate his conduct accordingly. Therefore, in the present application, an examination will firstly be made as to whether the alleged interference complied with the requirement of lawfulness.

(1) The Court's Case-Law concerning the Lawfulness of the Interference

76. Where there is an interference with the fundamental rights and freedoms, it must first be determined whether there exists a legal provision allowing such interference pursuant to the imperative provision of Article 13 of the Constitution. For an interference with a right protected by Article 34 of the Constitution to comply with the requirement of lawfulness, the interference at issue must have a legal basis under Article 34 § 2 of the Constitution (for other judgments drawing attention to the requirement of lawfulness in other contexts, see *Tuğba Arslan* [Plenary], no. 2014/256, 25 June 2014, § 82; *Halk Radyo ve Televizyon Yayıncılık A.Ş.* [Plenary], no. 2014/19270, 11 July 2019, § 35; *Sevim Akat Eşki*, no. 2013/2187, 19 December 2013, § 36; and *Hayriye Özdemir*, no. 2013/3434, 25 June 2015, §§ 56-61).

77. As regards the restriction of fundamental rights and freedoms, the requirement of lawfulness primarily necessitates the formal existence of a law (see *Tuğba Arslan*, § 96). Law, as a legislative act, is a product of the will of the Turkish Grand National Assembly and involves processes carried out in compliance with the law-making procedures set out in the Constitution. This understanding affords an important safeguard in the context of fundamental rights and freedoms (see *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 54; and *Halk Radyo ve Televizyon Yayıncılık A.Ş.*, § 36).

78. However, the criterion of lawfulness also requires material content and thus the quality of the law becomes important at this point (see *Tuğba Arslan,* § 97). In this respect, the criterion of lawfulness guarantees the *accessibility* and foreseeability of the rule concerning a restriction as well as its *certainty* which refers to its precision (see *Metin Bayyar and Halkın Kurtuluş Partisi* [Plenary], no. 2014/15220, 4 June 2015, § 56; *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 55; and *Halk Radyo ve Televizyon Yayıncılık A.Ş.*, § 37).

79. Certainty means that a rule is formulated in such a manner as not to give rise to arbitrariness. A legal regulation concerning the restriction of fundamental rights must be certain in terms of its content, aim and scope and must also be clear to such an extent as to enable the persons concerned to understand their legal status. According to this principle, legal regulations must be clear, non-ambiguous, comprehensible and applicable without any hesitation and beyond any doubt on the part of the administration and individuals, and they must afford a set of safeguards against arbitrary practices of public authorities. In a legal regulation, which conducts or acts will be considered to constitute an offence and the legal consequences corresponding to these conducts and acts, as well as in this context, what kind of interference by the public authorities will be permissible must be specified with a certain degree of precision. In this manner, it may be possible for individuals to foresee their rights and obligations and to regulate their conduct accordingly. Thus, legal certainty is ensured, and the bodies exercising public power are prevented from performing arbitrary acts (see *Hayriye Özdemir*, §§ 56 and 57; *Eğitim ve Bilim Emekçileri Sendikası and Others,* § 56; and *Halk Radyo ve Televizyon Yayıncılık A.Ş.*, § 38; for explanations as to certainty in the judgments concerning constitutionality review, see, among many others, the Court's judgment, no. E.2009/51, K.2010/73, 20 May 2010; and the Court's judgment, no. E.2011/18, K.2012/53, 11 April 2012).

80. The norms which do not afford individuals to foresee their obligations and regulate their conduct undermine the principle of legal certainty and this prevents them from having confidence in the State in all their acts and actions. An uncertainty in the assessment of legal status renders the safeguards within the scope of the fundamental rights ineffective (see *Sara*

Akgül [Plenary], no. 2015/269, 22 November 2018, § 108). However, even if a rule is complex or of abstract nature to a certain extent and therefore becomes fully understandable through legal assistance or if the definitions of the concepts used therein are revealed as a result of a legal assessment, this does not *per se* fall foul of the principle of legal foreseeability. Besides, the more the extent of the interference by the relevant legal regulation with fundamental rights is, the higher the extent of certainty to be sought in the said regulation will be (see *Sara Akgül*, § 109; and *Hayriye Özdemir*, § 58).

81. Lastly, regard being had to the fact that the issue constituting the subject-matter of the present application concerns offences and penalties, the vital importance of the requirement to ensure the certainty of the offence and the penalty due to the severity of the sanction will become apparent. The principle of certainty of offences and penalties, which is one of the most important elements of the principle of "*no punishment without a law*" guaranteed by Article 38 of the Constitution and expressed in Latin as "*nullum crimen nulla poena sine lege"*, requires the definition of the type of the offence and the penalty in a manner that would not cause any confusion and constitutes a safeguard for individual rights and freedoms. Thanks to the principle of certainty applicable to the types of offences and the scope of the penalties prescribed for them, the offences and penalties are determined beforehand and thus the limits of individual freedoms are set.

82. At this stage, the Court must assess whether Article 220 § 6 of the Law no. 5237, which regulates the offence of committing an offence on behalf of an organisation without being a member of it, is a legislative provision which prevents arbitrary actions of authorities exercising public power and which is accessible, foreseeable and precise to the extent that would help individuals know the law as required by Article 13 of the Constitution (see *Tuğba Arslan*, § 91; and *Sara Akgül*, § 110).

(2) The Offence of Committing an Offence on behalf of a Terrorist Organisation without Being a Member of It

83. Persons may establish a relation with a criminal organisation by means of their acts albeit not being a part of its hierarchical structure and

may have a role in the danger posed by such organisation. As a result of this view, the legislator introduced the offence of committing an offence on behalf of a terrorist organisation without being a member of it under Article 220 § 6 of the Law no. 5237. The offence in question was not included in the former Turkish Criminal Code (Law no. 765 of 1 March 1926), which remained in force until 1 June 2005. It is a new type of offence with no normative equivalent in the Italian, German and French criminal codes. The offence of committing an offence on behalf of a terrorist organisation without being a member of it requires an additional sentence besides the one prescribed for the offence committed on behalf of the said organisation. In other words, a person who commits an offence on behalf of an armed terrorist organisation despite not being a member of it shall be sentenced both for the offence committed by him and additionally for being a member of it. However, the additional sentence may be reduced by half at the discretion of the court.

84. For the existence of the offence of committing an offence on behalf of a terrorist organisation without being a member of it, there must first be an armed terrorist organisation and a person must commit an offence on behalf of such organisation, but without being a member of the organisation. In the legislative intent of the relevant article, the legal value protected by the introduction of this offence is indicated as public peace and safety, and everyone who is not a member of an organisation on behalf of which an offence is committed may be a perpetrator of such offence. The perpetrator may commit the offence of committing an offence on behalf of an organisation either to obtain benefit or without any benefit. For this offence to be constituted, the perpetrator must be aware of the existence of the organisation, the armed nature of it, and the commission of the offence on behalf of it. Article 220 § 6 of the Law no. 5237 does not contain any limitation concerning the offences committed on behalf of the organisation. However, following the legislative amendments, certain offences were removed from the scope of the offence of committing an offence on behalf of an organisation without being a member of it.

(3) Whether Article 220 § 6 of the Law no. 5237 Satisfies the Requirement of Lawfulness

85. In the light of the aforementioned explanations, it is beyond doubt that Article 220 § 6 of the Law no. 5237 was accessible. As regards the requirement of certainty, a rule constituting the basis for criminal responsibility must not only be formulated in sufficiently clear terms but must also, and more importantly, provide protection against arbitrary interferences by authorities exercising public power and against the extensive application of a restriction to any party's detriment. It must also afford individuals the opportunity to foresee their rights and obligations and to regulate their conducts accordingly.

86. Since the impugned sentence constituted an interference with a right safeguarded by the Constitution, an assessment must be made as to whether the applicant's criminal conviction was foreseeable within the meaning of Article 34 § 2 of the Constitution. In this scope, in view of the explanations made by the courts as to the foreseeability of the rule set out in Article 220 § 6 of the Law no. 5237, its connection with Article 314 of the same Law and lastly its scope and essence, an examination will be made below as to whether the rule in question provided sufficient protection against arbitrary practices.

87. In this context, it must be emphasised that in the individual applications lodged with the Court, the interpretation of a rule by authorities exercising public power and inferior courts shall be subject to constitutional review in so far as it constitutes an interference with fundamental rights. The effect of the interpretation and implementation of a rule on the fundamental rights and freedoms of individuals may be considered unconstitutional even if such rule is not considered to contravene the Constitution in an abstract review. Accordingly, through its decisions on the individual applications lodged with it, the Court contributes to the compliance of authorities exercising public power and inferior courts with the Constitution.

88. At the beginning of the assessments concerning the foreseeability of Article 220 § 6 of the Law no. 5237, it must first be noted that the law does not contain any explanation as to what is meant by the expression

"*offence committed on behalf of an organisation*". In addition, the Court of Cassation also makes its assessments regarding this expression in view of the particular circumstances of each case. However, in its decision dated 4 March 2008 and in its subsequent decisions, the Court of Cassation elaborated the meaning of the aforementioned expression and, in general, the meaning of Article 220 § 6 of the Law no. 5237 in the context of demonstrations.

89. In its decisions concerning the meetings and demonstration marches held solely upon the call of an organisation, the Court of Cassation considered sufficient the existence of a *call*, albeit being of general nature, to acknowledge that the offence had been committed on behalf of the organisation. In addition, it appears that in some of the decisions of the Court of Cassation, the meetings and demonstration marches held in connection with the days and events deemed important by the organisation were considered to fall within the scope of the offence at issue, even in the absence of a call. This approach of the Court of Cassation causes an indefinite extension of the criteria introduced by the judicial case-law in relation to an offence involving a considerably severe charge and penalty. In the practice based on the case-law of the Court of Cassation in relation to Article 220 § 6 of the Law no. 5237, an individual's mere participation in a demonstration held upon a call of an armed terrorist organisation and his clear manifestation of a positive attitude towards the said organisation are considered as a sufficient indication of his having committed an offence *on behalf of an organisation*. This allows the person concerned to be sentenced like a real member of the organisation albeit the application of a certain reduction in his sentence.

90. According to the said provision, an individual, if considered to have committed an offence on behalf of an organisation, is deemed to be a member of the organisation and punished for the offence of membership of the organisation. This constitutes another aspect of the provision which causes uncertainty. Pursuant to Article 2 of the Law no. 3713, those who commit an offence on behalf of a terrorist organisation without being a member of it shall be considered as *terrorist offenders*. In the legislative intent of Article 220 § 6 of the Law no. 5237, it is noted that a person who commits an offence on behalf of an organisation without having a

hierarchical relationship within it must be *considered as a member of the said organisation* and thus be held responsible in this regard. Likewise, in the legislative intent of the amendment introduced by the Law no. 6352, it is emphasised that a person who commits an offence on behalf of an organisation without being a member of it is "*considered as a member of the said organisation*". The Court of Cassation has also noted that a person who commits an offence without being a member of it is "*therefore a member of the said organisation*".

91. For a person to be convicted beyond any doubt for the offence of membership of a terrorist organisation under Article 314 of the Law no. 5237, the *continuity, diversity* and *intensity* of his acts must be taken into consideration, and it must also be sufficiently proven that the person concerned has knowingly and intentionally been involved in the hierarchical structure of the organisation (see *Metin Birdal*, § 67). A person's activities, each of which indicates a part concerning the membership of a terrorist organisation and which are accepted as evidence, must be examined together to understand the overall circumstances of the case. As a result of the collective examination of the evidence indicating a person's involvement in the hierarchical structure of a terrorist organisation, the validity of the pieces of evidence must be tested and each of them must be assessed in view of the aim of the terrorist organisation, its nature, its level of recognition, the type and intensity of the violence used by it as well as other relevant circumstances of the case. The activities of persons, which are considered as evidence, must be tested against each other and verified to establish whether they complement each other and whether they contain any contradiction (see *Metin Birdal*, § 72).

92. As is seen, for a person to be convicted for the offence of membership of a terrorist organisation, his acts and conducts during a certain period of time are examined and a detailed assessment is made to establish his involvement in the hierarchical structure of an armed terrorist organisation. In other words, pursuant to Article 314 of the Law no. 5237, for a person to be sentenced like a member of a terrorist organisation, the continuity, diversity and intensity of his acts must be taken into consideration. It must also be demonstrated that the person concerned has an organic link with the said terrorist organisation and acts knowingly and intentionally

within the hierarchical structure of the organisation. However, as in the applicant's case, when Article 314 of the Law no. 5237 is applied on the basis of Article 220 § 6 thereof, the issue of whether a person acts within a hierarchical structure is excluded from the assessment, and a person is convicted of membership of an armed organisation where he is merely considered to act on behalf of the PKK terrorist organisation.

93. In brief, certain conditions required for the existence of the offence of membership of a terrorist organisation are not sought in respect of an individual who is not a member of the organisation but commits an offence on behalf of it. However, the individuals in both categories are punished as members of the organisation. In such case, individuals face severe penalties for committing an offence alleged to have connection, albeit weak, with a terrorist organisation. Besides, where the offence concerns the exercise of fundamental rights, as in the present case, an overly broad interpretation of the expression "*on behalf of an organisation*" would have a strong deterrent effect on the fundamental rights such as the freedom of expression, the right to hold meetings and demonstration marches, the freedom of association and the freedom of religion and conscience. It is obvious that the conditions for conviction sought under Article 314 § 2 of the Law no. 5237, when applied in conjunction with Article 220 § 6 thereof, are extended indefinitely to the detriment of the persons alleged to have committed an offence on behalf of an organisation.

94. In the impugned incident, -according to the assessments of the inferior courts- the applicant neither resorted to violence nor resisted the security forces. As acknowledged by the inferior courts, the applicant refused to disperse despite the warnings of the security forces. In these circumstances, the sole condemnable act of the applicant was his refusal to disperse despite the warnings during a demonstration which had not been held in accordance with the procedures set out in the law and had subsequently become non-peaceful due to the acts of violence.

95. The punishment imposed, as prescribed by the laws, on persons who organise unlawful and non-peaceful meetings and demonstration marches, who refuse to leave the area of the meeting and demonstration despite the warnings or who make the demonstration non-peaceful by

resorting to acts of violence cannot in itself be considered to contravene the Constitution just because those persons have the right to hold meetings and demonstration marches.

96. Indeed, in its judgment *Ali Rıza Özer and Others* ([Plenary], no. 2013/3924, 6 January 2015, § 147), the Court held that the intervention against one of the applicants who had been clearly found to have resorted to violence had corresponded to a pressing social need and that the degree of the intervention had been proportionate. However, as regards all the remaining applicants in the said application, the Court held that the intervention had not corresponded to a pressing social need since it had not been established that those applicants had resorted to violence (for other judgments where the Court held that the intervention against the violent demonstrators had corresponded to a pressing social need, see *Medine Eren*, no. 2016/14588, 12 February 2020, § 66-70; *Gülşah Öztürk and Others*, no. 2013/3936, 17 February 2016, §§ 76-86; and *Ali Ulvi Altunelli*, no. 2014/11172, 12 June 2018, §§ 110 and 111).

97. In the judgment *Metin Birdal*, namely one of the applications lodged in the context of the demonstrations held in line with the instructions of the PKK terrorist organisation, the Court held that on the basis of the visual records and other pieces of evidence, the applicant had been established to have organised the relevant acts of violence and that these acts of the applicant could be relied on as an indication of his membership of the organisation and thus the continuity of his acts (see *Metin Birdal*, §§ 75, 76, 82). In the individual application of *Ferhat Üstündağ*, the Court held that acting in such a manner as to support the PKK, namely a terrorist organisation adopting violence as a method to achieve its aims, during the meetings and demonstration marches which turned into propaganda for the PKK posed a serious threat to a democratic society (see *Ferhat Üstündağ*, § 68).

98. Any kind of acts of force and violence called as terrorism and committed as a method for forcing the will of the people to accept the will of a minority by means of violence or for changing the established order, attempts such as armed insurrection and coup, or any support provided for such acts can in no way be considered as ordinary and legitimate.

However, in view of severe legal sanctions prescribed for terrorist offences, considerable diligence is expected both in the legal regulations and in the assessments of the public authorities and inferior courts in this regard (see *Yılmaz Çelik*, § 57) .

99. Turning to the circumstances of the present case, it appears that the inferior courts, in accordance with the case-law of the Court of Cassation and the general practice, linked any act of the applicant deemed to constitute an offence on behalf of a terrorist organisation with the status of membership of a terrorist organisation and the sanction prescribed for such status, without any need for the public prosecutor's office to submit concrete evidence proving the real membership. Besides, in the present case, the condition of committing an offence *on behalf of a terrorist organisation* was interpreted in such considerably extensive and flexible manner as not to provide protection in respect of the fundamental rights in accordance with the relevant case-law. Despite the establishment of the applicant's non-involvement in any act of violence, it was acknowledged that the sole condemnable act of the applicant, namely his refusal to disperse despite the warnings during a demonstration held upon the organisation's call, had been committed on behalf of the organisation, within its knowledge and in line with its demands, and it was held that the applicant be subjected to an additional sentence for the offence of membership of the PKK terrorist organisation besides the one entailed by his principal act.

100. As it appears in the present case, since there is no clear limitation as to potential acts or actions entailing the application of a severe criminal sanction, such as a prison sentence, pursuant to Article 220 § 6 of the Law no. 5237, the offence of committing an offence on behalf of an organisation may be constituted in the event of the commission of any kind of offence on behalf of an organisation. In fact, as in the present case, the interpretation of the relevant provision to such a broad extent to make it applicable to persons, who have not been found by the courts to have resorted to violence, constitutes an important element which would make it less foreseeable in terms of its content and especially its scope.

101. Although in doctrine there are views to the effect that the offences which may be committed on behalf of a terrorist organisation only include

those (absolute and relative terrorist offences) listed in Articles 3 and 4 of the Law no. 3713, in practice it is decided that all offences may be committed on behalf of an organisation without any distinction in this regard. In order to prevent the resulting harms, the legislator has, more recently, introduced a series of legislative amendments and intended to limit the scope of application of Article 220 § 6 of the Law no. 5237.

102. One of those amendments is the addition of the fifth paragraph by Article 8 of the Law no. 6459 to Article 7 of the Law no. 3713. Pursuant to the rule in question, persons who commit one of the three offences set out in the law shall not be additionally punished for the offence of committing an offence on behalf of an organisation without being a member of it under Article 220 § 6 of the Law no. 5237. The offences excluded from the scope of the relevant article by the said rule contain the following:

i. The offence of organising, leading or participating in unlawful meetings and demonstration marches;

ii. The offence of disseminating propaganda in favour of a terrorist organisation; and

iii. The offence of printing or publishing leaflets or statements of terrorist organisations.

103. In the legislative intent behind the amendment introduced to Article 7 § 5 of the Law no. 3713, it is underlined that the said amendment was introduced in general *for the purpose of securing criminal justice*. In the legislative intent of the law, it is firstly noted that the penalties prescribed by law for the aforementioned offences excluded from the scope of the relevant provision are more lenient than those prescribed by law for the offence of committing an offence on behalf of an organisation. According to the legislative intent, unfair consequences arise since the penalty imposed on a person for the principal offence committed by him is much more lenient than the one to be imposed for the offence of committing an offence on behalf of an organisation. In the legislative intent of the law, it is secondly noted that the perpetrator shall be additionally punished in the event of his committing the offences of possessing explosive substances, causing damage to property, causing intentional injury, resisting to

prevent officers from performing their duties or intentionally endangering public security.

104. The offences excluded from the scope of Article 220 § 6 of the Law no. 5237 generally concern the acts falling within the scope of the freedom of expression guaranteed by Article 26 of the Constitution and the right to hold meetings and demonstration marches safeguarded by Article 34 of the Constitution as a special form the freedom of expression. It is understood that the legislator has thus intended to prevent individuals from facing sentences more severe than those prescribed by law due to meetings or expressions of thoughts.

105. Another development which is closely related to the issue at hand is the addition of Article 34/A to the Law no. 2911 on 22 July 2010. Following the relevant amendment, a juvenile who commits one of the three offences set out in the law shall not be additionally punished for the offence of committing an offence on behalf of an organisation without being a member of it. The offences excluded from the scope of the relevant article as regards minors include the following (for details, see the decision of the 9th Criminal Chamber of the Court of Cassation, no. E.2010/6577, K.2012/15349, 19 December 2012):

i. The offence of insisting on not dispersing despite the warnings and the use of force during an unlawful meeting or demonstration march under Article 32 § 1 of the Law no. 2911 titled "*Resistance*";

ii. The offence of resisting the police officers by means of coercion or threat despite the warnings and the use of force during an unlawful meeting or demonstration march under Article 32 § 2 of the Law no. 2911 titled "*Resistance*"; and

iii. The offence of resisting to prevent officers from performing their duties under Article 265 of the Code of Criminal Procedure dated 4 December 2004 (Law no. 5271).

106. In the legislative intent of the law, it is noted that due to their "*additional conviction for membership of an organisation*" besides the penalties which are relevant for the offences committed by them, the minors

who participated in meetings and demonstration marches under the influence of mass psychology face considerably severe sentences which are disproportionate to their offences, and that the amendment at issue is intended "*for avoiding this wrong practice*".

107. By means of the aforementioned amendments, the legislator has intended to secure criminal justice, as clearly expressed in the legislative intent of the amendments to the laws. In so far as an offence constitutes injustice, a criminal sanction is a means for the redressing of the injustice. The principal factor affecting the severity of a criminal sanction is the severity of the injustice, in other words, the meaning and the degree of severity of the injustice in the context of a democratic society. If the requirement of justice in the society is satisfied, then punishment will be approved in the consciences of people and considered fair by everyone. When exercising legislative power in a state of law, the legislator enjoys, in compliance with constitutional principles, a margin of appreciation in determining the acts which will be considered as an offence or the type and extent of criminal sanctions applicable to such acts depending on social needs (see, among many other judgments, the Court's judgment, no. E.2018/161, K.2019/13, 14 March 2019). However, when regulating a criminal norm, the safeguards which will ensure foreseeability of the proscribed acts and will not give rise to uncertainty or arbitrariness in the implementation of the rule must be observed as a requirement of the principle of state of law. In the assessment in the context of the present case, it must be taken into consideration that there is a close relationship between the constitutional principles required to be observed in the exercise of legislative power and the legislator's aim of securing criminal justice by means of the above-mentioned legislative amendments.

108. The range of offences considered to be committed on behalf of an organisation, as set out in Article 220 § 6 of the Law no. 5237 as currently in force, is so broad that the wording of the legal provision, including its extensive interpretation by the inferior courts, cannot afford sufficient protection against arbitrary interferences of public authorities and cannot prevent individuals from being additionally punished, in an unforeseeable manner, for the offence of committing an offence on behalf of an organisation besides their principal offences.

109. As a matter of fact, in the context of the present case, the applicant was acquitted of the offence of acting in breach of Article 33 of the Law no. 2911 since his involvement in any act of violence could not be demonstrated. On account of his failure to disperse despite the warnings during an unlawful demonstration, he was sentenced to 6 months' imprisonment under Article 32 § 1 of the Law no. 2911, which could be considered as a relatively less severe penalty, and the pronouncement of the judgment was suspended on the grounds that he had not previously committed an offence, not caused a public damage and not been involved in an act of violence. However, he was ultimately sentenced to 3 years and 9 months' imprisonment since he was considered to have committed, on behalf of an organisation, the offence giving rise to the judgment whose pronouncement had been suspended.

110. The applicant was subjected to a severe sentence on the basis of an offence, which was not excluded from the scope of the relevant article and which in fact carries a much more lenient sentence than the one imposed for the offence of committing an offence on behalf of an organisation. Besides, regard must also be paid to the fact that where a minor commits the offence defined in Article 32 § 1 of the Law no. 2911, he shall not be punished for the offence of committing an offence on behalf of an organisation. Thus, in the present case, the legislator cannot be said to have achieved the intended purposes of securing criminal justice and diminishing the deterrent effect on certain fundamental rights through the aforementioned amendments.

111. Another important issue is that on account of the applicant's conviction for his acts falling within the scope of the right to hold meetings and demonstration marches guaranteed by Article 34 of the Constitution, there remained no distinction between a peaceful demonstrator and an individual who had committed terrorist offences within the structure of the PKK, as also found by the European Court of Human Rights ("the ECtHR"). One of the reasons for this is that pursuant to Article 2 of the Law no. 3713, the perpetrator is considered as a terrorist offender, albeit not being a member of a terrorist organisation, on the basis of a quite vague interpretation even if he has committed the least serious offence in the scale of numerous offences.

112. In the light of all the assessments above, it must be acknowledged that the more the extent of the interference by the relevant legal regulation with fundamental rights is, the higher the extent of certainty to be sought in the said regulation will be. When demonstrators, such as the applicant, are put on trial for the offence of committing an offence on behalf of a terrorist organisation, they risk an additional sentence of between 3 years and 9 months' and 15 years' imprisonment in an unforeseeable manner. Indeed, the applicant was subjected to an additional sentence of 3 years and 9 months' imprisonment besides a sentence of 6 months' imprisonment imposed on him for the offence considered to be constituted by his failure to comply with the police officers' warnings to disperse during the meeting in which he had participated. It is obvious that the sanction at issue was considerably severe and grossly disproportionate to the conduct of the persons who had not been involved in any act of violence, like the applicant.

113. Moreover, in the present case, the first-instance court decided to suspend the pronouncement of the judgment as regards the offence of *refusing to disperse of his own will despite the warning during an unlawful meeting and demonstration march.* Pursuant to Article 231 § 5 of the Law no. 5271, the suspension of pronouncement of the judgment means that the judgment does not bear any legal consequences in respect of the accused person. Within this framework, the fact that the decision to suspend the pronouncement of the judgment, which would bear no legal consequences as provided for by the clear legal provision, was taken as basis for an offence giving rise to the applicant's conviction for the offence of membership of a terrorist organisation, as in the present case, is another issue indicating how extensively the offence under Article 220 § 6 of the Law no. 5237 was interpreted.

114. Such extensive interpretation of a legal provision leads to the punishment of a person for being a member of a terrorist organisation, in the absence of any concrete evidence of such membership, merely due to his act which, in ordinary times, would not directly give rise to such a severe criminal charge as membership of an organisation due to the exercise of fundamental rights and freedoms.

115. As mentioned previously, the conviction of persons for the offences committed during the exercise of their constitutional rights and freedoms, as a result of such application of Article 220 § 6 of the Law no. 5237, would inevitably have a particularly chilling effect on the exercise of the rights to freedom of expression and assembly (for assessments to the effect that the imposition of penalties may have a deterrent effect on the individuals' participation in similar meetings and demonstration marches see, *mutatis mutandis*, *Gürkan Demirtaş*, no. 2016/12475, 28 November 2019, § 37; and *Hayriye Özde Çelikbilek*, no. 2016/13542, 24 October 2019, § 37). The application of the provision at issue would not only deter those who were previously found criminally liable from re-exercising their rights under Articles 26 and 34 of the Constitution, but would also undoubtedly deter other members of the public from freely expressing their views and attending meetings and demonstration marches. The deterrent effect caused by the fear of punishment gives rise to the silencing of different voices in the society and public and indisputably prevents the maintenance of a pluralistic society (see *Zübeyde Füsun Üstel and Others* [Plenary], no. 2018/17635, 26 July 2019, § 135; and *Ergün Poyraz (2)* [Plenary], no. 2013/8503, 27 October 2015, § 79). Such punishments cannot be considered justified due to their considerable deterrent effect on the exercise of constitutional rights.

116. In the light of all the assessments above, Article 220 § 6 of the Law no. 5237 governing the offence of committing an offence on behalf of a terrorist organisation without being a member of it, as applied in the present case, cannot be said to comply with the requirement of certainty in terms of its content, purpose and scope. Indeed, the said provision did not afford the applicant legal protection against an arbitrary interference with the constitutional right safeguarded by Article 34 of the Constitution. Consequently, the Court considers that the interference, which was based on the application of Article 220 § 6 of the Law no. 5237, did not comply with the requirement of lawfulness.

117. Since it has been understood that the impugned interference did not comply with the requirement of lawfulness, there is no need to separately examine whether the alleged interference complied with other criteria with respect to safeguards.

118. For these reasons, the Court found a violation of the applicant's right to hold meetings and demonstration marches safeguarded by Article 34 of the Constitution.

B. Other Alleged Violations

119. Since it has already been found that the applicant's right to hold meetings and demonstration marches was violated, there is no need to make a separate examination on the admissibility and merits of other complaints about alleged violations of the right to a reasoned judgment and the right to a trial by an independent and impartial court.

C. Application of Article 50 of Code no. 6216

120. 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 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 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."*

121. The applicant requested the Court to find a violation, order a retrial and award him 200,000 Turkish liras ("TRY") separately in respect of pecuniary and non-pecuniary damages.

122. 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).

123. 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).

124. The cause of the violation must be established before deciding on the steps required to be taken so that the violation and its consequences can be redressed. Accordingly, the violation may result from administrative acts and actions, judicial acts or legislative acts. The establishment of the cause of the violation is of importance for the determination of appropriate means of redress (see *Mehmet Doğan*, § 57).

125. If the violation results from the implementation by the administrative authorities or the inferior courts of a legal provision having such clarity that does not enable them to interpret it in accordance with the Constitution, then the violation stems not from the implementation of the law but directly from the law itself. In such case, for the violation to be said to have been redressed along with all its consequences, the legal provision giving rise to the violation must either be abolished or amended in a way that will not lead to further violations. Moreover, in certain cases, the mere abolishment of the relevant legal provision may not be sufficient for the redress of all the consequences of the violation. In that case, it may also be necessary to take certain measures capable of redressing pecuniary and non-pecuniary damages sustained by victims

due to the violation within the scope of an individual application (see *Y.T.* [Plenary], no. 2016/22418, 30 May 2019, § 68).

126. The pilot judgment procedure envisaged by Article 75 of the Internal Regulations constitutes one of the remedies capable of redressing the violation and its consequences pursuant to Article 50 of Code no. 6216. In cases where the violation is established to have stemmed from a structural problem and to have given rise to other applications, in other words, to further violations or, where this situation is foreseen to possibly lead to further violations, the finding of a violation solely in the context of the present case would be far from offering a real protection for the fundamental rights and freedoms (see *Y.T.*, § 69).

127. In such case, the Court may initiate the pilot judgment procedure of its own motion or at the request of the Ministry or the applicant. If the pilot judgment procedure is initiated, the structural problem must be identified and possible solutions must be put forward (see *Y.T.*, § 70).

128. The purpose of adoption of the pilot judgment procedure is to ensure, on the one hand, that applications be resolved by administrative authorities instead of the delivery of judgments finding a violation after an examination of all similar applications and, on the other hand, that the structural problem be resolved through the elimination of the cause of the violation (see *Y.T.*, § 71).

129. Within this framework, the Court may prescribe a period of time for the elimination of the structural problem identified in its pilot judgment and for the resolution of similar applications and may adjourn the examination of other applications during this period. However, in such case, the persons concerned must be informed of the decision to adjourn. If the relevant authorities are unable to eliminate the structural problem and resolve the applications falling within that scope by the end of the period of time prescribed by the Court, it will become possible to rule collectively on similar applications (see *Y.T.*, § 72).

130. In the present application, in view of the fact that the applicant's conviction for the offence of committing an offence on behalf of a terrorist organisation without being a member of it did not comply with the

requirement of *lawfulness*, it has been concluded that his right to hold meetings and demonstration marches was violated.

131. As explained by reasons above, it is understood that the violation stemmed from a structural problem arising from the wording of the legal provision itself and the extensive interpretation of the said provision by the inferior courts. On the other hand, it is a known fact that as regards a large number of case files where the accused persons had been convicted for the offence of committing an offence on behalf of an organisation without being a member of it, individual applications were lodged with the Court in connection with the fundamental rights and freedoms under constitutional protection, such as the right to hold meetings and demonstration marches and the freedom of expression and association in the context of the present application.

132. Since the relevant legal provision is in force, it will not be possible for the violation to be redressed by way of a retrial by the inferior courts. Accordingly, it has been understood that the legal provision giving rise to the violation must be reviewed for the redress of the violation and its consequences and for the prevention of similar violations. Therefore, a copy of the judgment must be communicated to the legislative organ.

133. It has been considered appropriate that a copy of the judgment should be sent, for information, to the court to which the files (E. 2011/367, K. 2012/742) of the 6th Chamber of the Diyarbakır Assize Court (abolished) were transferred.

134. On the other hand, it must be held that the examination of similar applications lodged until the date of this judgment and further applications to be lodged thereafter be ADJOURNED for a period of 1 year from the publication of the judgment in the Official Gazette pursuant to Article 75 § 5 of the Internal Regulations, and that the persons concerned be informed of this issue by means of the announcement of the application numbers on the Court's website.

135. In addition, it is clear that the finding of a violation in the present case would be insufficient for the redress of the damages sustained by the applicant. In this regard, the applicant must be paid a net amount of TRY

6,000 in respect of non-pecuniary damages which cannot be compensated merely by the finding of a violation due to the violation of his right to hold meetings and demonstration marches.

136. Since the applicant was not able to substantiate his pecuniary damage, his claim for compensation in respect of pecuniary damage must be dismissed.

137. The total litigation costs of TRY 3,806.10 including the court fee of TRY 206.10 and the counsel fee of TRY 3,600, 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 10 June 2021 that

A. The alleged violation of the right to hold meetings and demonstration marches be DECLARED ADMISSIBLE;

B. The right to hold meetings and demonstration marches safeguarded by Article 34 of the Constitution was VIOLATED;

C. The PILOT JUDGMENT PROCEDURE BE APPLIED since the violation has been understood to have stemmed from a structural problem;

D. The legislative organ be INFORMED of the necessity for the resolution of the structural problem;

E. The examination of similar applications already lodged until the date of this judgment and further applications to be lodged thereafter be ADJOURNED FOR A PERIOD OF 1 YEAR from the publication of the judgment in the Official Gazette and the persons concerned be INFORMED of this issue by means of the announcement of the application numbers on the Court's website;

F. A copy of the judgment be SENT to the court to which the files (E. 2011/367, K. 2012/742) of the 6th Chamber of the Diyarbakır Assize Court (abolished) was transferred;

G. A net amount of TRY 6,000 be PAID to the applicant in compensation for non-pecuniary damage and the remaining compensation claims be DISMISSED;

H. The total litigation costs of TRY 3,806.10 including the court fee of TRY 206.10 and the counsel fee of TRY 3,600 be REIMBURSED to the applicant;

I. 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

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

RIGHT TO PROPERTY
(ARTICLE 35)

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

VEDAT OĞUZ

(Application no. 2018/35120)

15 September 2021

On 15 September 2021, 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 *Vedat Oğuz* (no. 2018/35120).

THE FACTS

[7-29] The applicant participated in a tender organised by the Enforcement Office and purchased an automobile. The said vehicle was reclaimed from him after the police had found that its chassis number had been changed and that it was a stolen vehicle. Thereupon, the applicant brought an action against the administration, requesting the compensation of his damage arising from the stolen status of the vehicle and the deletion of the records indicating him as the owner of the vehicle. The first-instance court accepted the applicant's action and consequently held that the vehicle price and the expenses incurred by the applicant be reimbursed to him. Upon an appeal on points of law and facts against this decision, the regional court of appeal considered that there had been no fault on the part of the Enforcement Office since the said change in the vehicle's chassis number could only be revealed by an expert. It thus revoked the decision of the first-instance court and dismissed the action.

The applicant lodged an individual application with the Constitutional Court on 22 November 2018.

V. EXAMINATION AND GROUNDS

30. The Constitutional Court ("the Court"), at its session of 15 September 2021, examined the application and decided as follows:

A. The Applicant's Allegations

31. The applicant complained that the vehicle duly purchased by him by way of a tender in which he had participated by completely trusting the State institutions and where there had been no fraud or fault on the part of him had been reclaimed from him without any payment due to a change in the chassis number which could only be established by an expert. He maintained that the absence of any fault on his part had been

acknowledged as a result of the proceedings and that it was thus not fair for the court to dismiss his claim for compensation due to the absence of any fault on the part of the administration as well. Consequently, he stated that he had purchased the vehicle by way of a tender organised by a State agency and claimed that his rights to a fair trial and property had been violated due to the reclamation of the vehicle and the lack of compensation for his damage although the change in the chassis number had engaged the State's responsibility.

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. 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).

34. Although the applicant also alleged a violation of his right to a fair trial, it has been understood that his complaint about the reclamation, without reimbursement of the related expenses, of the vehicle which he had purchased by way of a tender essentially concerned the right to property. Thus, it has been considered that the applicant's complaint must be examined within the scope of the right to property.

1. Admissibility

35. Article 148 § 3 of the Constitution and Article 45 § 2 of Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court dated 30 March 2011 provide that all the administrative and judicial remedies provided for by the law in respect of the procedure, act or negligence which constitutes the basis of the alleged violation must be exhausted before lodging an individual application. It is primarily

for the inferior courts to redress violations of fundamental rights, which necessitates the exhaustion of legal remedies (see *Necati Gündüz and Recep Gündüz*, no. 2012/1027, 12 February 2013, § 19-20; and *Güher Ergun and Others*, no. 2012/13, 2 July 2013, § 26).

36. For the requirement of exhaustion of domestic remedies to apply, the legal system must provide for an administrative or judicial remedy available to a person claiming to be the victim of a violation. Moreover, such legal remedy must not only be effective, capable of redressing the consequences of the alleged violation and accessible to the applicant with a reasonable amount of effort, but it must also be available both in theory and in practice. The applicant cannot be expected to exhaust a remedy which is not available. Similarly, the applicant is not obliged to exhaust legal remedies that are not legally or practically effective, not capable of redressing the consequences of a violation or not accessible and applicable in practice due to the existence of certain formalistic requirements which are excessive and extraordinary (see *Fatma Yıldırım*, no. 2014/6577, 16 February 2017, § 39).

37. In the present case, as regards the vehicle purchased by him by way of a tender organised by a State agency, the applicant alleged that the said vehicle's involvement in an offence prior to the tender had engaged the responsibility of the administration and thus complained that no responsibility had nevertheless been attributed to the administration as a result of the proceedings. In these circumstances, it must be determined whether, apart from the impugned proceedings, there was an effective legal remedy available for the applicant's complaint at issue and capable of providing prospects of success in an objective manner.

38. Article 12 of the Code of Administrative Procedure (Law no. 2577 of 6 January 1982) introduced the possibility for the persons concerned to directly bring a full remedy action before administrative courts on account of administrative acts such as a tender decision concerning the sale of a property with legal defect or a false traffic registration.

39. In this case, it can be said that it was possible for the applicant to bring a full remedy action against the administration, seeking compensation for the alleged damage resulting from the judicial sale by auction of the

vehicle involved in an offence. However, the examination of the relevant case-law did not reveal any concrete data indicating that a full remedy action to be brought under Article 12 of the Law no. 2577 would succeed. Therefore, the exhaustion of the remedy of filing a full remedy action under Article 12 of the Law no. 2577 cannot be said to be mandatory as regards the allegation raised in the present application.

40. 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

41. In the present case, the applicant participated in a tender organised by the Enforcement Office and purchased an automobile for 4,200 Turkish liras ("TRY"). He alleged that he had made certain expenses in respect of the said vehicle, including tender price and other expenses. The said vehicle was reclaimed from him after the police had found that its chassis number had been changed and that it was a stolen vehicle. Thereupon, the applicant brought an action against the administration, requesting the compensation of his damage arising from the stolen status of the vehicle and the deletion of the records indicating him as the owner of the vehicle. The first-instance court accepted the applicant's action in accordance with the principle of the State's strict liability. Upon an appeal on points of law and facts against this decision, the Chamber considered that there had been no fault on the part of the Enforcement Office since the said change in the vehicle's chassis number could only be revealed by an expert. It thus revoked the decision of the first-instance court and dismissed the action.

42. The applicant's complaint was based on the reclamation of the said vehicle, which he had purchased by way of a tender and which had subsequently turned out to be stolen, without reimbursement of the tender price and other expenses made by him in this scope. The applicant had recourse to public power by bringing an action for the compensation of his damage resulting from the Enforcement Office's failure to duly fulfil its duties, stating that the Enforcement Office should have established whether there had been any legal or material defect in the vehicle by exchanging necessary correspondences with the relevant

Traffic Registration Office. The role of judicial authorities in such cases is to settle the dispute by establishing the state of the administration's practices within the framework of the principles of fault liability and strict liability. Accordingly, the activities conducted during the judicial processes for the settlement of legal disputes over the negative effects of the system setup and acts, actions and activities of the administration on the individuals' legal status within the framework of the principle of good governance as well as the complaints concerning the practices of the administration itself must be examined within the scope of the State's positive obligations.

a. Existence of a Property

43. For an examination to be made within the scope of Article 35 of the Constitution, the existence of a *property* in the present case must first be determined. The right to property safeguarded by Article 35 of the Constitution covers the right to any asset having an economic and monetary money (see the Court's judgment, no. E.2015/39, K.2015/62, 1 July 2015, § 20).

44. After the conduct of the debit transaction for the transfer of ownership of a movable property, the transfer of the possession of the property (legal act) must be effectuated. Such act is performed by direct delivery of the property or vehicle to, or its placement under the actual control of, the buyer. Motor vehicles, which are movable properties, are subjected to stricter formalistic requirements by the legal order due to the importance and risk involved with them as different from the form of transfer of ownership applicable to other movable properties (see *Bekir Yazıcı* [Plenary], no. 2013/3044, 17 January 2012, §§ 43, 44).

45. Traffic register is an official registration system that contains records kept *ex officio* by the State and indicating technical and physical characteristics of motor vehicles as well as the rights in rem, especially the property right, and the restrictions in respect of them. Traffic register is considered among formal registers set out in Article 7 of the Law no. 4721, and vehicle registration documents (vehicle license) issued on the basis of such register are considered as formal deeds under the same article. Thus, they constitute proof for the accuracy of the facts documented by them.

Traffic register constitutes a presumption of the accuracy of the issues contained therein (see *Bekir Yazıcı*, §§ 45 and 46).

46. In the present case, the ownership of the vehicle which the applicant had purchased by way of a tender organised on 11 October 2015 by the Enforcement Office was transferred to the applicant upon the finalisation of the tender process on 18 October 2015.

47. The scope of the notion of ownership within the meaning of Article 35 of the Constitution is not limited to the notion of ownership set out in the Law no. 4721, and the ownership of a vehicle registered in the traffic register indisputably falls within the scope of the guarantee under Article 35 of the Constitution.

48. On the other hand, the applicant alleged that he had made certain expenses in addition to the tender price paid by him in respect of the vehicle, which he had purchased by tender. It is obvious that the expense items at issue must also be examined within the scope of the right to property.

b. General Principles

49. The genuine and effective exercise of the right safeguarded as a fundamental right under Article 35 of the Constitution does not depend merely on the State's duty not to interfere. Pursuant to Articles 5 and 35 of the Constitution, the State also has positive obligations to protect the right to property. These positive obligations may require the State to take certain measures necessary to protect the right to property even in the context of disputes between private individuals in certain cases (see *Eyyüp Boynukara*, no. 2013/7842, 17 February 2016, §§ 39-41; and *Osmanoğlu İnşaat Eğitim Gıda Temizlik Hizmetleri Petrol Ürünleri Sanayi Ticaret Limited Şirketi*, no. 2014/8649, 15 February 2017, § 44).

50. However, it must now be noted that the State's positive and negative obligations cannot be distinguished from each other in certain circumstances. Besides, regardless of whether positive or negative obligations of the State are concerned, the applicable principles are mostly similar to a considerable extent (see *Hesna Funda Baltalı and Baltalı Gıda*

Hayvancılık San. ve Tic. Ltd. Şti. [Plenary], no. 2014/17196, 25 October 2018, § 70).

51. The positive obligations imposed on the State by virtue of the right to property may require the State to take protective and remedial measures. Protective measures refer to measures capable of preventing an interference with the right to property while remedial measures cover legal, administrative and practical measures capable of remedying, in other words, redressing the effects of the interference. Positive obligations are not absolute, and the type of protective and remedial measures entailed by them and the degree of such acts may be determined in the particular circumstances of each case (see *Osmanoğlu İnşaat Eğitim Gıda Temizlik Hizmetleri Petrol Ürünleri Sanayi Ticaret Limited Şirketi*, § 47).

52. While the scope of the obligation to protect must be determined in the light of the subjective and objective circumstances of the case, this cannot be understood as imposing on the State certain duties, which cannot be fulfilled by human and financial resources of the administrative apparatus. In this regard, the obligation to protect cannot be interpreted as requiring the prevention of any interference resulting from human and financial resources of the public in an abstract manner. A violation of the obligation to protect may be at stake in exceptional cases where the administration tasked with adopting protective measures has the opportunity of preventing an interference by third persons by taking measures which it can take in the context of its ordinary functioning. Except for such cases, the competent authorities must not be expected to adopt measures beyond ordinary ones. In this regard, where the circumstances of the case do not require the State to take a special measure, as in the context of sudden and unforeseeable interferences, the State's positive obligation cannot be said to have been violated due to the existence *in abstracto* of the obligation to protect (see *Osmanoğlu İnşaat Eğitim Gıda Temizlik Hizmetleri Petrol Ürünleri Sanayi Ticaret Limitet Şirketi*, § 48).

53. The protective measures required to be taken by the State within the scope of its positive obligations also include the administration's obligation to act in compliance with the principle of *good governance*. The principle of *good governance* requires that where an issue in the general

interest is at stake, the public authorities must act in good time and in an appropriate and above all consistent manner (see *Kenan Yıldırım and Turan Yıldırım*, no. 2013/711, 3 April 2014, § 68). In this regard, the consequences of the errors made by the administration must be borne by the administration itself and must not be remedied at the expense of the individuals concerned (see *Reis Otomotiv Ticaret ve Sanayi A.Ş.* [Plenary], no. 2015/6728, 1 February 2018, § 100).

c. Application of Principles to the Present Case

54. The applicant complained that the vehicle duly purchased by him by way of a tender in which he had participated by completely trusting the State institutions and where there had been no fraud or fault on the part of him had been reclaimed from him without any payment due to a change in the chassis number which could only be established by an expert. He further complained that the expenses made by him in respect of the said vehicle had not been reimbursed to him.

55. Enforcement offices are public institutions, which are set up as required by the positive obligations imposed on the State by virtue of the right to property and which collect unpaid debts of private individuals in accordance with the procedures prescribed by law and, where necessary, by applying compulsory procedures and pay them to creditors. The acts and actions carried out by enforcement offices during the execution of the aforementioned duties are of a nature to involve the exercise of public power, and the alleged violations of the rights and freedoms due to such acts and actions or inactions must be assessed independently from the debt-creditor relationship constituting the basis for the enforcement proceedings (see *Fatma Yıldırım*, § 55).

56. Compulsory enforcement authorities, which are set up for the collection of the debts that have not been paid with consent and are thus equipped with public powers in this context, may be required to take certain measures to protect the property subject to enforcement proceedings and the interests of all parties including creditors, debtors and persons who purchased the seized property. The measures required to be taken may vary depending on the particular circumstances of each case (for similar assessments, see *Fatma Yıldırım*, §§ 57 and 58).

57. However, for an examination to be made within the scope of the positive obligations, it must first be established, in view of the circumstances of the present case, whether the relevant State agencies, especially the Enforcement Office, had a positive obligation to ensure that the seized vehicle, which was the subject of the sale by tender, be free from legal and material defects.

58. It cannot be said that the existence of a legal and material defect in the vehicle during its sale by way of an official tender could not be associated with the positive obligations imposed on the State. In this scope, it is clear that the acts, actions and inactions prior to the enforcement and tender processes and attributable to the administration, such as an inconsistency between the material fact and the traffic registry records due to the authorities' failure to keep those records accurately and the resulting ineffective nature of the principle of confidence in registry records, are linked to the positive obligations of the administration. In other words, the State's positive obligations require that traffic registry records of a vehicle be kept accurately and that the right to property of bona fide persons who act by having confidence in such records be protected.

59. In this context, in the present case the tenderers clearly had a legitimate expectation that before putting out the seized vehicle to tender, the officials of the Enforcement Office, which had organised the tender, would establish the characteristics of the vehicle and indicate them in the tender specifications. Indeed, the satisfaction of such expectation is of importance for the development of sufficient confidence in the enforcement and tender processes as regards all parties and for the fulfilment of the function expected from the enforcement and bankruptcy mechanism itself.

60. On the other hand, the public officials who were obliged to act in good time and in an appropriate and above all consistent manner in accordance with the principle of *good governance* had at their disposal certain instruments to prevent the parties to the tender being aggrieved as dictated by the principle in question. In this scope, the public officials who had been involved in the processes of vehicle registration, vehicle inspection and tender had an obligation to act in line with the principle of *good governance* and to ascertain the irregularity in the vehicle, and they

thus had the opportunity of preventing the tender process from being concluded as in the present case. It must not be ignored that the applicant, who hardly had the opportunity of carrying out similar examination and ascertainment processes, participated in the tender by trusting that the public officials acted in compliance with their obligations.

61. Indeed, pursuant to the Law no. 2918, vehicle owners are obliged to have their vehicles registered by authorised institutions in accordance with the principles set out in the Regulation and to obtain a registration certificate. It must be noted that such authorised institutions include the Security General Directorate and the affiliated traffic registration institutions. Accordingly, it is obvious that the administration had the authority and capability to prevent the registration of the stolen vehicle at that stage in line with the requirements of the principle of confidence in registry records. Consequently, the applicant was not prevented from suffering damage due to the administrative authorities' inability to benefit from administrative and legal instruments available to them. Accordingly, it appears that the State authorities did not make every effort to protect the applicant's right to property and that the administration neglected its *obligation to control* and supervise.

62. The right to property safeguarded by Article 35 of the Constitution stipulates that certain opportunities should be available to balance the interest of the owner of the property even in the context of lawful interferences having a legal basis. The payment of compensation is also among such opportunities. While the inferior courts have a margin of appreciation in establishing the necessity of the payment of compensation, the degree of culpability of the parties and the existence or absence of the conditions for strict liability on the part of the administration, making the payment of compensation conditional upon an individual fault prevents, from the very beginning, the conduct of a review of proportionality as required by Article 35 of the Constitution (for similar assessments, see *Recep Tarhan and Afife Tarhan*, no. 2014/1546, 2 February 2017, § 76).

63. In the present case, the first-instance court interpreted the relevant legislation and concluded that the State had had strict liability for the resulting damage, considering that the organisation of the relevant tender

by an official institution had enabled the applicant to have confidence in it. However, the Chamber's interpretation, which limited the administration's responsibility to the condition of the existence of a fault on the part of the officers at the Enforcement Office, prevented the alleviation and counterbalancing of the burden imposed on the applicant as a result of an act in connection with which there was no fraud or fault on his part. On the other hand, in view of the absence of another effective remedy whereby the alleged administrative fault could be examined in such case, it may be necessary to discuss whether the administration's organisation of a tender for a vehicle incompatible with the tender specifications without establishing the characteristics of the vehicle and providing the tenderers with the opportunity of being informed of those characteristics could be considered as a fault from the aspect of administrative functioning, albeit the absence of individual fault on the part of the officers at the Enforcement Office.

64. Consequently, the applicant was deprived of the opportunity of obtaining compensation and thus ensuring the counterbalancing of the burden imposed on him, by proving the damage allegedly sustained by him and the existence of a causal link between the alleged damage and the acts and actions of the administration, as a result of the Chamber's interpretation to the effect that the administration did not have an obligation to compensate since the change in the vehicle's chassis number could only be established by an expert in the field and there was no fault on the part of the Enforcement Office. Accordingly, despite the organisation of a tender for the sale of a vehicle incompatible with the tender specifications and the reclamation of the stolen vehicle, which had been delivered to the applicant after he had purchased it in good faith in an auction held by the administration, no amount was paid to him. In this regard, it has been understood that such failure in payment constituted an interference with the applicant's right to property and that the damage resulting from the interference was not compensated. Thus, it has been concluded that an excessive individual burden was placed on the applicant by the interference, that the fair balance between the public interest sought to be achieved and the protection of the right to property was upset to the detriment of the applicant, and that the interference was not proportionate.

65. For these reasons, the Court found a violation of the right to property safeguarded by Article 35 of the Constitution.

C. Application of Article 50 of Code no. 6216

66. 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 removed. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favour of the applicant or the remedy of filing a case before the general courts may be shown. The court which is responsible for holding the retrial shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."*

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

68. 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).

69. 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).

70. In cases where the violation results from a court decision or where the court could not provide redress for the violation, 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 the 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 A*ligül Alkaya and Others* (2), §§ 57-59, 66 and 67).

71. In the present application, it has been concluded that there has been a violation of the right to property within the scope of the State's positive obligations inherent therein. Thus, it is evident that the violation resulted from the decision of the Chamber.

72. In these circumstances, there is legal interest in conducting a retrial for the redress of the consequences of the violation of the right to

property. Such retrial is intended for eliminating the violation and the consequences thereof pursuant to Article 50 § 2 of the Code no. 6216 containing a provision concerning individual applications. In this scope, the procedure required to be conducted is to deliver a new decision eliminating 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 4th Chamber of the Batman Civil Court for a retrial.

73. Since it has been understood that a retrial would provide sufficient redress for the elimination of the violation and its consequences in the present case, the applicant's compensation claim must be dismissed.

74. The litigation costs including the court fee of TRY 294.70, 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 September 2021 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 had been VIOLATED;

C. A copy of the judgment be SENT to the 4th Chamber of the Batman Civil Court (E. 2016/436, K. 2018/89) for a retrial for the elimination of the consequences of the violation of the right to property;

D. The applicant's compensation claim be DISMISSED;

E. The litigation costs including the court fee of TRY 294.70 be REIMBURSED to the applicant;

F. The payments be made within four months as from the date when the applicant applies to the Ministry of Finance following the notification of the judgment. In case of any default in payment, legal INTEREST

ACCRUE for the period elapsing from the expiry of four-month time-limit to the payment date; and

G. A copy of the judgment be SENT to the 4th Civil Chamber of the Gaziantep Regional Court of Appeal (E. 2018/627) and to the Ministry of Justice for information.

RIGHT TO A FAIR TRIAL (ARTICLE 36)

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

CAHİT TAMUR AND OTHERS

(Application no. 2018/12010)

24 February 2021

On 24 February 2021, the Second Section of the Constitutional Court found a violation of the right of access to a lawyer under the right to a fair trial safeguarded by Article 36 of the Constitution in the individual application lodged by *Cahit Tamur and Others* (no. 2018/12010).

THE FACTS

[7-28] The applicants were sentenced to life-imprisonment sentence by the decision of the 6th Chamber of the Diyarbakır Assize Court (authorised by Article 250 of the Code of Criminal Procedure and subsequently abolished) for having engaged in armed actions so as to withdraw the whole or a part of the territory from the State's administration. Upon appellate review by the Court of Cassation, the first instance court decision became final.

The applicants lodged an application with the European Court of Human Rights ("ECHR"), which found a violation of the right of access to a lawyer in their case. Invoking the ECHR's judgment finding a violation, the applicants requested a retrial. However, the 6th Chamber of the Diyarbakır Assize Court rejected their request. The applicants' challenge was also dismissed by the 7th Chamber of the Diyarbakır Assize Court.

V. EXAMINATION AND GROUNDS

29. The Constitutional Court ("the Court"), at its session of 24 February 2021, examined the application and decided as follows:

A. The Applicants' Allegations

30. The applicants maintained that the request for retrial, which they had made in accordance with the violation judgment of the European Court of Human Rights ("ECHR"), was rejected unlawfully. They accordingly alleged that there had been a violation of the right to a fair trial.

B. The Court's Assessment

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

Canan, no. 2012/969, 18 September 2013, § 16). The Court accordingly examined the applicants' allegations within the scope of the right to legal assistance.

1. Admissibility

32. The alleged violation of the right to legal assistance must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

a. General Principles

33. Securing the right to defence in criminal proceedings is among the basic principles of a democratic society (see *Erol Aydeğer*, no. 2013/4784, 7 March 2014, § 32). Defence ensures the fair functioning of the criminal justice system. Unless a person is provided with the opportunity to put forward his defence against an allegation, it is not possible to carry out a trial compatible with the principles of equality of arms and of adversarial proceedings, as well as to reveal the material truth (see *Yusuf Karakuş and Others*, no. 2014/12002, 8 December 2016, § 69).

34. It is not sufficient to provide the suspect or the accused merely with the right to defence. In making his defence, the suspect and the accused must also avail of the *legitimate means and procedures* specified in Article 36 of the Constitution. The most significant one of the legitimate means and procedures referred to in Article 36 of the Constitution for the suspect and the accused is the exercise of the right to legal assistance. In other words, the right to legal assistance falls within the scope of the notion of *legitimate means and procedures* specified in Article 36 of the Constitution. In this respect, it is clear that the right to legal assistance is included within the scope and context of the right to a fair trial and is a natural consequence of this right. Hence, under the right to a fair trial, the person accused of an offence has the right to personally defend himself or to avail himself of the legal assistance of a defence counsel of his own choice (see *Yusuf Karakuş and Others*, § 72).

35. On the other hand, in the legislative intent for the addition of the phrase, *fair trial,* in Article 36 of the Constitution, it is stressed that the right to a fair trial, which is also guaranteed by the international conventions to which Türkiye is a party, was incorporated into the legal text. In fact, Article 6 § 3 (c) of the European Convention on Human Rights ("the Convention") stipulates that everyone charged with a criminal offence has the right to defend himself in person or through legal assistance of a defence counsel of his own choosing or, if he has not sufficient means to afford legal assistance, to be given it free when the interests of justice so require (see *Yusuf Karakuş and Others*, § 73).

36. This right must be, in principle, afforded to the suspect by the time when he is questioned for the first time by the law-enforcement officers. Ensuring the suspect to have legal assistance of a lawyer by the time of his first questioning by the law-enforcement officers is necessary not only as a requirement of the privilege against self-incrimination and the right to remain silent, but also in general for securing that the right to a fair trial could offer an effective protection. That is because the evidence obtained at this stage determines the framework under which the impugned offence will be considered to fall during the proceedings. As the legislation concerning criminal proceedings become more complicated notably during the stages when evidence is collected and used, the suspects may find themselves vulnerable at this very stage of the criminal proceedings. Such vulnerability may be duly offset merely through legal assistance of a defence counsel (see *Aligül Alkaya and Others* [Plenary], no. 2013/1138, 27 October 2015, §§ 118, 135; and *Sami Özbil*, no. 2012/543, 15October 2014, § 64).

37. The accused possesses direct and immediate information on the incident. Hence, it is clear that the statements of the accused are tremendously significant in terms of clarifying the matter. In this respect, in any and all substantial cases, it is imperative to examine whether the person imputed with criminal offence issued self-incriminating statements in the absence of a defence counsel, whether the confessions were used against him, whether the court drew negative conclusions from his silence and whether he was oppressed in any way. Within the course of criminal proceedings, the privilege against self-incrimination

and the right to refuse to give evidence indicate the obligation to prove the accusations through the evidence obtained by force or against the will of the accused. In the event that the confession of the accused under the supervision of law-enforcement officers in the absence of a defence counsel is relied on in his conviction, this shall lead to an irredeemable infringement of the right to defence. In the event that the confession, obtained during the investigation, is disaffirmed for having been obtained under torture and ill-treatment, the reliance on this confession by the court without considering the disaffirmation points to a significant absence of due diligence (see *Yusuf Karakuş and Others*, § 79).

38. As regards the right to legal assistance, the ECHR noted that depriving the suspects, who had been under custody on account of an offence falling within the jurisdiction of the state security courts, of legal assistance was a systemic problem and found a violation thereof in the relevant cases (see *Salduz v. Türkiye* §§ 56-63; and *Bayram Koç v. Türkiye*, no. 38907/09, 5 September 2017 § 23).

39. The Convention signed on 4 November 1950 for the protection and improvement of fundamental rights and freedoms was ratified by the Grand National Assembly of Türkiye through Law no. 6366 and dated 10 March 1954 and took effect in terms of Türkiye after the certificate of ratification had been deposited to the Secretary General of the Council of Europe on 18 May 1954. By virtue of the resolution of the Council of Ministers dated 22 January 1987 and no. 87/11439, the right to lodge an individual application with the European Commission on Human Rights was introduced, and by virtue of the resolution dated 25 September 1989 and no. 89/14563, the compulsory jurisdiction of the ECHR was recognised by Türkiye. Thereby, Türkiye has undertaken the liability to secure the fundamental rights and freedoms enshrined in the Convention and afforded all individuals within its jurisdiction the right to lodge an application with an international tribunal, which is capable of rendering legally binding judgments finding a violation (see *Sıddıka Dülek and Others*, no. 2013/2750, 17 February 2016, § 68).

40. The fundamental rights and freedoms that are safeguarded under the Convention may be effectively protected only when the violation

judgments rendered by the ECHR are duly executed in the domestic law. The failure to duly execute the ECHR's violation judgments in the domestic law means that the fundamental rights and freedoms safeguarded by the Convention could not be effectively protected in practice (see *Sıddıka Dülek and Others*, § 69). In this regard, a violation judgment rendered by the ECHR is accepted, by virtue of the Code of Criminal Procedure no. 5271 ("Law no. 5271"), as a ground for a retrial with a view to ensuring effective protection of the fundamental rights and freedoms both in theory and in practice. The Law no. 5271 does not grant any discretion to the relevant judicial authorities and accordingly envisages that a given case which has been adjudicated with a final verdict will be re-heard through the re-opening of the proceedings (see *Nihat Akbulak* [Plenary], no. 2015/10131, 7 June 2018 § 37).

41. It is for the Constitutional Court to examine, through individual application mechanism, any alleged violation of the fundamental rights and freedoms under the joint protection realm of both the Constitution and the Convention. Any consideration to the contrary would be incompatible with the constitutional objective that envisages the effective protection, through individual application mechanism, of the fundamental rights and freedoms that are safeguarded jointly by the Constitution and the Convention. Therefore, the question whether a violation judgment rendered by the ECHR has been duly executed must be examined by the Court. However, such an examination by the Court will not involve a re-examination of the facts from the outset but will be confined to the question whether the violation judgment rendered by the ECHR has been duly executed (see *Sıddıka Dülek and Others*, § 70).

b. Application of Principles to the Present Case

42. The applicants requested a retrial on the basis of the ECHR's judgment finding a violation of the right to legal assistance. Their request was dismissed on the grounds that the evidence relied on by the incumbent courts in convicting them did not solely consist of their statements taken by the law-enforcement officers in the absence of a defence counsel, they had been convicted in consideration of the other available evidence, the decision convicting them had been subject to an

appellate review by the Court of Cassation and thus become final, and the requirements for conducting a retrial, which were laid down in Article 311 of Law no. 5271, had not been satisfied in the applicants' case.

43. In the present case, the question to be examined is whether the allegations raised by the applicants, who had applied to the incumbent inferior court for a retrial in line with the ECHR's judgment finding a violation in their case, within the scope of the right to legal assistance were addressed in an effective and sufficient manner and whether the violation judgment issued by the ECHR was duly executed. In other words, it will be examined whether the violation of the right to legal assistance safeguarded by Article 36 of the Constitution was redressed.

44. In the applicants' case where the ECHR found a violation, it appears that the applicants were not provided with an opportunity to have legal assistance of a defence counsel during their custody period as legal assistance could not be, in principle, provided to persons accused of offences falling within the jurisdiction of the State Security Courts until a certain stage. It has been further observed that the applicants' statements allegedly taken in the absence of a defence counsel during the custody were admitted as evidence in the assessment of the criminal acts imputed to the applicants.

45. In this regard, the ECHR notes that the rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction (see *Salduz v. Türkiye*, § 55).

46. In the judgment where the ECHR found a violation in the applicants' case, the ECHR made a reference to its previous judgments in the cases of *Salduz v. Türkiye*, *İbrahim and Others v. the United Kingdom* ([GC], no. 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016) and Bayram Koç v. Türkiye and noted that the systematic denial of the applicant's access to a lawyer, in terms of the offences falling within the jurisdiction of the State Security Courts, during the custody period pursuant to the relevant applicable legislation was *per se* sufficient to reach the conclusion that the requirements set forth in Article 6 of the Convention had been disregarded. The ECHR did not also find it

necessary to make any further examination as to the other allegations raised by the applicants under the right to a fair trial. It was further indicated that if requested, to conduct a retrial would be an appropriate remedy for the redress of the given violation.

47. The denial of access to a lawyer during custody on the basis of an established practice stemming from the relevant legislation and the reliance on the statements obtained at this stage as a basis for the conviction lead to the violation of the right to legal assistance. Any statements taken by the law-enforcement officers, which are not subsequently confirmed before a judge or court and taken in the absence of a lawyer, must not be taken as a basis for conviction. In the present case, it is evident that the applicants were convicted of the imputed offence on the basis of, *inter alia the other evidence*, their statements that were taken in the absence of a defence counsel and not subsequently confirmed before the court; and that these statements taken under custody were relied on as decisive evidence for their conviction. For the redress of the impugned violation in the present case, these statements must not be relied on as evidence for conviction, which is the sole step required to be taken for the redress of the violation. Consequently, it has been observed that although the ECHR's judgment finding a violation affected the soundness of the final decision, which thus constituted a justified ground necessitating a retrial, the inferior courts' interpretation of Law no. 5271 fell foul of the ECHR's judgment and did not involve an examination conducted with due diligence to the extent required by Article 36 of the Constitution; and that the violation judgment of the ECHR was not duly enforced; and that the violation of the right to legal assistance could not be redressed.

48. For these reasons, the Court found a violation of the right to legal assistance safeguarded by Article 36 of the Constitution.

3. Application of Article 50 of Code no. 6216

49. 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."*

50. The applicants requested a retrial and claimed pecuniary compensation of 500,000 Turkish liras ("TRY") and non-pecuniary compensation of TRY 500,000 for each of them.

51. 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 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).

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 damage resulting therefrom, 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 inferior 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 steps to redress the consequences of the continuing violation (see *Mehmet Doğan*, §§ 58, 59; and *Aligül Alkaya and Others (2)*, §§ 57-59, 66, 67).

54. In the present case, as the applicants' request for a retrial had been rejected despite the ECHR's judgment finding a violation, there was a violation of the right to legal assistance under the right to a fair trial. It therefore appears 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 legal assistance. The retrial to be conducted is for the elimination and redress 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 incumbent court operating in place of the (abolished) Diyarbakır 6th Assize Court to conduct a retrial.

56. The applicants' claims 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.

57. This judgment finding a violation in the applicants' case should not be considered to imply that the applicants should be acquitted or convicted. It is within the incumbent court's discretion to issue a fresh decision by making a re-assessment of the case in line with the grounds relied on by the Court in finding a violation.

58. The total litigation costs of TRY 3,894.70 including the court fee of TRY 294.70 and counsel fee of TRY 3,600, 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 24 February 2021 that

A. The alleged violation of the right to legal assistance be declared ADMISSIBLE;

B. The right to legal assistance 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 incumbent court operating in place of the (abolished) Diyarbakır 6th Assize Court (E.2005/106) to conduct a retrial for the redress of the violation of the right to legal assistance;

D. The applicant's claims for compensation be REJECTED;

E. The total litigation costs of TRY 3,894.70 including the court fee of TRY 294.70 and the counsel fee of TRY 3,600 be REIMBURSED JOINTLY to the applicants;

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.

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

ADNAN ŞEN

(Application no. 2018/8903)

15 April 2021

On 15 April 2021, the Plenary of the Constitutional Court found no violation of the *nullum crimen, nulla poena sine lege* principle safeguarded by Article 38 of the Constitution in the individual application lodged by *Adnan Şen* (no. 2018/8903).

THE FACTS

[10-73] The applicant, holding office as a chief of police, was dismissed from public office pursuant to the Decree-Law no. 670 on the Measures Taken under the State of Emergency ("Decree-Law no. 670). An investigation was initiated against him for his alleged connection with the Fetullahist Terrorist Organisation/Parallel State Structure ("FETÖ/PDY").

In the indictment issued by the incumbent chief public prosecutor's office, it was stated that as revealed by two separate reports of the Security General Directorate, Department of Anti-Smuggling and Organised Crime, the applicant had been using ByLock communication app. through two GSM numbers registered in his name. The chief public prosecutor's office indicted the applicant before the 1st Chamber of the relevant Assize Court ("the court") on the charge of being a member of an armed terrorist organisation, namely the FETÖ/PDY, in consideration of his ByLock subscription, the nature of the criminal denunciation against him and his dismissal from public office. At the end of the proceedings, the applicant was sentenced to 7 years and 6 months' imprisonment due to his membership of the said armed terrorist organisation.

The applicant's challenge against the decision on conviction -whereby his continued detention was ordered as well- was dismissed by the 2nd Chamber of the Assize Court, and his appeal against the decision on conviction was also dismissed by the regional court of appeal. On appeal in cassation, the Court of Cassation upheld the decision.

V. EXAMINATION AND GROUNDS

74. The Constitutional Court ("the Court"), at its session of 15 April 2021, examined the application and decided as follows:

A. Request for Legal Aid

75. The applicant stated that he could not afford to pay the litigation costs and accordingly sought legal aid with respect to his joined application no. 2018/31172.

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

1. Alleged Unlawfulness of Detention

a. The Applicant's Allegations

77. The applicant maintained that he had been detained on remand in the absence of any criminal guilt of his having committed the imputed offence and although he had not performed any act that was criminalised by law, which was in breach of the presumption of innocence and the principle of *nullum crimen, nulla poena sine lege*.

b. The Court's Assessment

78. 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's allegation that he was unjustly detained must be examined from the standpoint of the right to personal liberty and security.

79. 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.

80. In the event that an individual application involving the complaints concerning detention on a criminal charge is lodged upon a decision ordering continued detention after conviction, 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).

81. In the present case, the applicant was detained on remand on 25 July 2016. At the hearing where the applicant was present, the incumbent court ordered his conviction as well as his continued detention by its decision of 15 August 2017. Accordingly, by the first instance decision of 15 August 2017, which ordered the applicant's conviction, his detention status thus ended. The applicant's appeal against this decision was dismissed by the 2nd Chamber of the Şırnak Assize Court on 22 August 2017. However, this dismissal decision was not served on the applicant.

82. In this sense, in the application file no. 2018/8903, the applicant declared that he had become aware, on 18 September 2017, of the decision where his appeal against the decision ordering his continued detention had been dismissed. In the light of these findings, it has been concluded that the individual application involving the complaints regarding the applicant's detention should have been lodged within 30 days following 18 September 2017, when the applicant became aware of the dismissal decision. However, it was lodged on 19 March 2018. Therefore, it has been found to be lodged out of time.

83. For these reasons, this part of the application must be declared inadmissible as being *out of time*.

2. Alleged Failure to Conduct Judicial Review of the Applicant's Detention by Bringing him before a Judge/Court

a. The Applicant's Allegations

84. The applicant maintained that his right to personal liberty and security had been violated, stating that all judicial reviews of his detention

had been conducted over the case-file and that neither he nor his defence counsel had been heard during these reviews.

b. The Court's Assessment

85. 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.

86. The complaint that the judicial reviews of detention were conducted before being brought before a judge/court is not an interference of continuous nature as the complaint regarding the unreasonable length of detention. Such interference ceases to exist when the person concerned is brought before a judge/court. In that case, the individual application must be lodged within 30 days following the date when he was brought before a judge/court.

87. In the present case, the applicant's detention was reviewed, for the first time, at the hearing of 15 August 2017. The applicant lodged his application with the Court on 19 March 2018, after the thirty-day time-limit had expired.

88. For these reasons, this part of the application must be declared inadmissible as being *out of time*.

3. The Complaints as to the Post-Conviction Detention

a. The Applicant's Allegations

89. The applicant asserted that the assize court conducting his trial had been established by virtue of the decision of the Council of Judges and Prosecutors (CJP); and that although the courts with special powers had been abolished, certain courts had been entrusted with special powers by the decisions of the CJP.

90. He further maintained that the expressions of the President, some officials of the Government and the high-level officials of the CJP, as well as the certain acts and actions performed by the CJP, explicitly revealed that the incumbent tribunal was not independent and impartial; and that for these reasons, neither the trial court in his case nor the higher courts to

review the lawfulness of the decision to be issued by the trial court could be said to satisfy the natural judge principle and thus to be independent and impartial. He accordingly claimed that his right to personal liberty and security had been violated.

b. The Court's Assessment

91. The Court is not bound by the legal qualification of the facts by the applicants and it makes such assessment itself (see *Tahir Canan*, § 16). It has been concluded that the alleged violations in the present case in essence concern the complaints that the courts that would review the lawfulness of the post-conviction detention did not satisfy the natural judge principle and were not impartial and independent. Therefore, the applicant's allegations under this heading were examined under Article 19 of the Constitution.

92. The Court has previously examined the complaints that the assize court authorised to deal with the cases related to terrorist offence, which ordered detentions or examined the appeals against such detention orders, failed to fulfil the natural judge principle as well as to be impartial and independent. In consideration of the establishment of these courts, the determination of their jurisdiction and the status of the judges sitting at these courts, the Court has concluded that these complaints were manifestly ill-founded (see *Mustafa Başer and Metin Özçelik*, §§ 119-133; and *Süleyman Bağrıyanık and Others*, §§ 183-197).

93. In the present case, there is no ground requiring the Court to depart from its conclusions in the above-mentioned judgments with respect to the similar allegations regarding the structure of the assize courts dealing with terrorist offences. This conclusion is applicable also in terms of the structure of the relevant criminal chambers of the Regional Court of Appeal and the Court of Cassation examining appellate requests.

94. 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 (see *Murat Narman*, no. 2012/1137, 2 July 2013, § 42).

95. 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).

96. Although the cases where personal liberty is restricted for the execution of conviction decisions issued by the courts fall into the scope of Article 19 § 2 of the Constitution, this provision entails the lawfulness, not of the conviction decision, but of the detention. Therefore, within the scope of this assurance, the expediency or proportionality of an imprisonment sentence imposed on the person concerned cannot be subject to an examination (see *Günay Okan*, no. 2013/8114, 17 September 2014, § 18).

97. In the present case, the applicant was convicted of the membership of an armed terrorist organisation by the court decision of 15 August 2017, and his conviction became final upon being upheld at the appellate review.

98. Accordingly, the applicant was deprived of his liberty as from the date when he was convicted in the form of *a post-conviction detention*. The rule set forth in Article 19 § 2 of the Constitution covers the deprivation of liberty in the form of *post-conviction detention*.

99. For these reasons, as it is apparent that there is no violation with respect to the applicant's post-conviction detention, this part of the application must be declared inadmissible for *being manifestly ill-founded*.

C. Alleged Violation of the Principle of *Nullum Crimen, Nulla Poena Sine Lege*

1. The Applicant's Allegations

100. The applicant stated that the structure previously known as the *"Gülen Movement"* was declared as a terrorist organisation by the

resolution of the National Security Council ("MGK"), dated 26 May 2016, and prior to this decision, this structure had been never called as a terrorist organisation in any decision; that as he was accused of being a member not of a parallel structure but of a terrorist organisation, the only ground that may be relied on in this sense was the resolution of the MGK and the explanations of the politicians; and that before that date, the said structure had not performed any act of violence that would demonstrate that it was a terrorist organisation. He further maintained that the acts imputed to him (depositing money into a bank account, enrolling his child in a school, being a member of an association, participating in peaceful meetings/gatherings and etc.) were legal acts and did not constitute an offence at the time when they were performed; and that therefore, his conviction due to these acts was in breach of the principle of *nullum crimen, nulla poena sine lege*.

2. The Court's Assessment

101. Article 38 § 1 of the Constitutions reads as follows:

> *"No one shall be punished for any act which does not constitute a criminal offence under the law in force at the time committed; no one shall be given a heavier penalty for an offence other than the penalty applicable at the time when the offence was committed."*

a. Admissibility

102. The Court has declared the alleged violation of the principle of *nullum crimen, nulla poena sine lege* admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

i. General Principles

103. In the relevant parts of the Constitution regarding fundamental rights and freedoms, the principle of being prescribed by law is set forth separately in several articles. Likewise, in the general principles with respect to the restriction of fundamental rights and freedoms, which are laid down in Article 13 thereof, it is also envisaged that the restrictions

may be imposed *only by law*. Article 38 of the Constitution, which regulates the principles relating to offences and penalties, specifically enshrines the principle of *nullum crimen, nulla poena sine lege* (see *Karlis A.Ş.*, no. 2013/849, 15 April 2014, § 31).

104. The *nullum crimen, nulla poena sine lege* principle is among the constituent elements of a state governed by rule of law. The lawfulness principle entails a basic safeguard generally in respect of all rights and freedoms and is of a special importance for the designation of offences and penalties. It accordingly precludes any arbitrary accusation and punishment of persons due to any acts that are not prohibited or subject to a sanction by law. It also enables the retroactive application of the statutory arrangements that are in favour of the accused (see *Karlis A.Ş.*, § 32).

105. As required by the *nullum crimen, nulla poena sine lege* principle enshrined in Article 38 of the Constitution, the acts that are prohibited and the corresponding penalties must be designated by law in a way that will give rise to no doubt, and the relevant statutory provision must be clear, comprehensible and set precise limits. This principle intended for ensuring individuals to know beforehand the criminal acts aims at protecting the fundamental rights and freedoms (see the Court's judgment no. E.2019/9, K.2019/27, 11 April 2019, § 13).

106. The use of public authority and the power to impose a penalty as a consequence thereof for arbitrary and unlawful purposes may be prevented only through the strict interpretation of the lawfulness principle. In this sense, the legislative, executive and judicial organs representing the public authority must act in compliance with this principle. Accordingly, the legislative organ must precisely set the boundaries of the statutory arrangements concerning offences and penalties, and the executive organ must not criminalise an act and designate a corresponding penalty through its regulatory acts in the absence of an authority not prescribed by law (see *Karlis A.Ş.*, § 33).

107. However, no matter how clear and comprehensible the provisions where criminal acts and penalties are prescribed, they may be nevertheless required to be interpreted by judicial bodies (see *Mehmet*

Emin Karamehmet and Others, no. 2017/4902, 28 January 2020, § 47). However, such an interpretation must not infringe the very essence of the given provision and must be foreseeable. It should be also borne in mind that notably in terms of terrorist offences, there is no universally accepted definition of terror or terrorism. However, in cases where terrorist offences are under prosecution and penalised, this situation must not be construed in a manner, which would hamper the safeguards inherent in the *nullum crimen, nulla poena sine lege* principle, set forth in Article 38 of the Constitution. In assessing the issues related to the criminal acts or penalties with respect to all offences including the terrorist ones and notably determining which acts constitute an offence, the judicial bodies must refrain from acting in an unforeseeable manner that would render dysfunctional the *nullum crimen, nulla poena sine lege* principle.

108. As a requirement of legal certainty and legal security, the retroactive application of any law to the accused person's detriment is prohibited pursuant to Article 38 § 1 of the Constitution, which provides for *"…no one shall be given a heavier penalty for an offence other than the penalty applicable at the time when the offence was committed"*. This rule that regulates the application of criminal norms in temporal terms is defined as the prohibition of retroactive application of any law to the disadvantage of the accused, which is the sub-principle of the lawfulness principle. This prohibition is in the form of a safeguard in pursuance of the personal liberty (see the Court's judgment no. E.2019/9, K.2019/27, 11 April 2019, § 16).

109. It should be finally noted in this regard that it is not for the Court to examine the legal issues with respect to the scope of the individuals' criminal liabilities; and that it has been left to the inferior courts' discretion. In the same vein, to deliver guilty or not-guilty verdicts or to impose a more lenient or a heavier sentence are not among the Court's duties (see *Tahir Canan*, § 35). The Court's role in examining the individual applications is not to substitute itself for the inferior courts. The findings and conclusions constituting no interference with the rights and freedoms falling under the joint protection realm of the Constitution and the European Convention on Human Rights (Convention) and involving no manifest error of judgment or manifest arbitrariness are excluded from the Court's examination.

ii. Application of Principles to the Present Case

110. The legal basis of the imprisonment imposed on the applicant for his being a member of a terrorist organisation is Article 314 of the Turkish Criminal Code no. 5237. The applicant maintained that the structure, of which he was allegedly a member, had been declared as a terrorist organisation by virtue of the decision of the MGK; and that prior to the date of that decision, there had been no acts of violence performed by the impugned structure to demonstrate that it was indeed a terrorist organisation. In other words, the applicant asserted that the judicial assessments with respect to his membership of a terrorist organisation were incompatible with the very essence of the offence and were not foreseeable. He also maintained that his conviction was also predicated on certain acts that did not indeed constitute an offence. The main issue in the present case is whether the reliance, by the inferior courts, on certain acts committed in relation to the Fetullahist Terrorist Organisation / Parallel State Structure ("FETÖ/PDY") prior to the coup attempt in ordering conviction for the offence of membership of a terrorist organisation or similar offences infringes the *nullum crimen, nulla poena sine lege* principle. That is because, it is asserted that as regards certain acts committed before the coup attempt, it has not been known yet by the public that the FETÖ/PDY, the perpetrator of the coup attempt, is an illegal structure or the FETÖ/PDY is conducting legal activities in the civil sphere so as to conceal itself.

111. In Turkish law, a structure may be qualified as a terrorist organisation only through a court decision. Before this structure was accepted to be a terrorist organisation by a court decision, the threat posed by the FETÖ/PDY to the national security had been also stated in the resolutions of the MGK. Since the beginning of 2014, the MGK has defined this structure as *"the structure threatening public peace and national security"*, *"the illegal structure within the State"*, *"the parallel structure disturbing public peace and conducting illegal activities at home and abroad through its structure appearing to be legal"*, *"the parallel state structure"*, *"the parallel state structure acting in collaboration with terrorist organizations"* and as *"a terrorist organization"*. Each of the MGK's resolutions in question were announced to the public through press release (see *Aydın Yavuz*

and Others, § 33). The MGK's resolutions concerning the FETÖ/PDY were issued pursuant to the former Article 118 of the Constitution, which was amended by Law no. 6771 and dated 21 January 2017. They are in the form of a recommendation submitted for the assessment of the Council of Ministers. Besides, in 2014, the FETÖ/PDY was characterised as the *"Parallel State Structure"* under the heading *"Illegal Structures Seeming to Be Legal"* in the National Security Policy Document.

112. The assessments that the FETÖ/PDY is an armed terrorist organisation, which have been made by the investigation authorities and judicial bodies, are not limited merely to those made during the investigations and prosecutions conducted in the course and aftermath of the coup attempt. Also at various dates before the coup attempt, those who were considered to be a member of the FETÖ/PDY and to have committed offences within the scope of the activities of this organisation were subject to investigations by judicial authorities. At the end of these investigations, criminal cases were brought against those concerned for membership of the said organisation and committing the other offences they allegedly committed within the scope of the organisational activity.

113. As a matter of fact, some of these investigations and prosecutions were brought before the Court through the individual application mechanism. Accordingly;

i. In the incident taking place in 2015 prior to the coup attempt and brought before the Court in the case *Mustafa Başer and Metin Özçelik*, at the end of the proceedings conducted against the applicants by the decision of 5 October 2015, the 16th Criminal Chamber of the Court of Cassation in its capacity as the first instance court convicted the applicants of the offence of *being a member of the FETÖ/PDY*. On appeal, the decision was upheld by the General Assembly of Criminal Chambers of the Court of Cassation by the decision no. E.2017/16.MD-956, K.2017/370 and dated 26 September 2017. In the case of *Mustafa Başer and Metin Özçelik*, the Court had found lawful the applicants' detention due to *their membership of the FETÖ/PDY terrorist organisation* also on 20 January 2016, a date prior to the coup attempt. It should be accordingly overemphasised that also prior to the coup attempt, the Court did not find any unlawfulness, in

constitutional terms, with respect to the findings and assessments of the investigation authorities and judicial bodies to the effect that the said structure was a terrorist organisation.

ii. The stoppage and search of the trucks loaded with materials of the National Intelligence Agency ("MİT") in Kırıkhan district of Hatay on 1 January 2014 and in Ceyhan district of Adana on 19 January 2014 were considered, by the public authorities, investigation authorities and courts, as an organisational activity performed by the judicial officers and law-enforcement officers found to be in connection with FETÖ/PDY so as to forge public opinion that the Turkish State was providing assistance to the terrorist organisation and to thus make the Government's officials subject to trials. Subsequently, the judicial members and law-enforcement officers involved in these operations were subject to administrative/judicial measures and sanctions before the coup attempt. In its judgments *Süleyman Bağrıyanık* and *Gökhan Bakışkan*, the Court found lawful the detention of certain judicial members and law-enforcement officers taking role in the investigation processes of the impugned incident. In the same vein, in the bill of indictment issued by the Ankara Chief Public Prosecutor's Office before the coup attempt on 6 June 2016, it was stated that the impugned acts of stopping and search of MİT trucks had been performed by the members of the FETÖ/PDY in line with the aims of the organisation (see the Court's judgment no. E.2016/6, K.2016/12, 4/8/2016, § 16; *Süleyman Bağrıyanık and Others*, § 88).

114. On the other hand, it cannot be considered that in the period during which no court decision was rendered yet to the effect that the FETÖ/PDY was a terrorist organisation or such a decision did not become final yet, the organisational acts and actions performed by the members of the said organisation would not constitute an offence. Otherwise, until a structure is found, by the judicial bodies, to be a terrorist organisation, no one can be subject to a trial and convicted. In this sense, a criminal syndicate may be an illegal structure founded originally to commit criminal acts. However, in some cases, a lawfully-operating non-governmental organisation may also subsequently degenerate into a criminal syndicate and even into a terrorist organisation. Accordingly, although a structure, which has already existed but has not been known to public yet due to the absence

of a decision to that end, may be qualified as a terrorist organisation only through a court decision, the leader, heads or members of this structure would be held accountable under criminal law as from its foundation date or the date when the structure originally founded for legitimate purposes turned into a criminal syndicate (see, *mutatis* mutandis, 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).

115. The FETÖ/PDY performed legitimate activities in the different social, cultural and economic fields, notably in the educational and religious spheres. It thus attained significant efficiency in civilian sphere by operating private teaching institutions, schools, universities, associations, foundations, trade unions, professional chambers, economic foundations, financial institutions, newspapers, journals, TV channels, radio channels, web-sites and hospitals. Besides, there is an illegal structure either hidden behind these legal institutions or organized and operated separately and independently from the legal structure, especially for carrying out activities in public sphere (see *Aydın Yavuz and Others*, § 26).

116. The judicial bodies have acknowledged in many judgments that the FETÖ/PDY was organized in parallel to the current administrative system with a view to taking over the constitutional institutions of the State for re-shaping the State, society and citizens in accordance with its ideology and for managing the economy and social and political life through an oligarchic group; and that this organisation was the perpetrator of the coup attempt staged on 15 July 2016 (see *Selçuk Özdemir*, §§ 20, 21; and *Alparslan Altan*, § 10).

117. However, it is not possible to say that everyone is aware that the FETÖ/PDY conducting its activities both within the country and abroad for years has been an illegal structure from the very beginning. That is because the FETÖ/PDY that was defined itself as a religious group engaging in activities in the socially-benefitted fields, notably in the education, for long years, thereby aiming to gain legitimacy within the society has been called as *"Community"*, *"Service Movement"*, *"Volunteers' Movement"* and *"Fellowship"*. Due to its extroverted structure, a significant part of the society promoted its development and institutionalisation in

the social and economic fields, as well as its activities, without knowing the illegal nature of this structure (see *Mustafa Baldır*, § 76).

118. However, according to the judicial bodies, in cases where the individuals assert that they have not been aware that the formation or structure of which they are allegedly a member is indeed a terrorist organisation, it should be borne in mind that the offence of membership of an armed terrorist organisation may be considered to have been committed with deliberate intent. It is accordingly assessed whether the persons accused of being a member of an armed terrorist organisation may avail themselves of Article 30 of the Turkish Criminal Code no. 5237 concerning negligence and recklessness. In this assessment, the factors such as the positions of such persons in the structure classified as a terrorist organisation, the nature of the acts constituting an offence and whether by the time when these acts were performed, the real purpose of this organisation and its terrorism-related activities were known are taken into consideration. In this context, in determining the criminal culpability, the inferior courts, notably the Court of Cassation, have taken into consideration, during the proceedings related to the FETÖ/PDY, the support given to this organisation for its institutionalisation and its activities in the social and economic fields albeit not knowing the illegal aspect of the organisation.

119. In this framework, the Court has also dealt with the alleged violation of the right to personal liberty and security due to the alleged unlawfulness of detention in certain cases regarding the investigations and prosecutions conducted with respect to the FETÖ/PDY. In some of these judgments, *A.L.* (no. 2016/63999, 9 January 2020) and *M.O.* (no. 2016/22180, 10 June 2020), the Court has concluded that unless proven with concrete evidence and facts that they, by their very nature and scope, served the aim pursued by the armed terrorist organisation, the acts and activities, -which had been performed before the period when the operations were started to reveal the real purpose of the FETÖ/PDY, this structure became a topic of discussion by public and media, there were findings and warnings expressed, by the high-level Government officials and public officers, to the effect that this structure was a *parallel structure* or *terrorist organisation*, and the MGK also made assessments in the same

vein- cannot be considered to fall into the scope of an organisational activity (see *A.L.*, § 65; and *M.O.*, § 48). The following findings are included in some of the Court's judgments on the matter:

i. Unless proven, with concrete facts, to have been performed for organisational purposes, merely being a member of a non-governmental organisation found to belong to the FETÖ/PDY or to have relation or connection with the organisation, following the social media accounts and websites known to disseminate the propaganda of the FETÖ/PDY, and watching certain audio and video records and reading news and comments shared via these accounts and websites cannot be considered as a fact revealing the relation of allegiance between the applicant and the FETÖ/PDY (see *Mustafa Özterzi* [Plenary], no. 2016/14597, 31 October 2019, §§ 105, 114; and *Ömer Çıtak*, no. 2016/58614, 12 January 2021, § 52).

ii. In its judgment *İhsan Yalçın* (no. 2017/8171, 9 January 2020) where the Court made an assessment with respect to an applicant studying for a while at a school associated with the FETÖ/PDY, it has concluded that the mere act of studying at a school of such nature cannot be considered as a strong indication of criminal guilt unless the establishment of the facts demonstrating that this act was performed within the scope of an organisational relationship. It has accordingly stressed that studying at any school or private teaching institution, which is associated with the FETÖ/PDY, may be considered as an organisational conduct only when the aim is to aid the organisation, provide financial assistance to it or receiving organisational training (see *İhsan Yalçın*, § 49). In its judgment *Şahin Binici* (no. 2017/30993, 1 July 2020, § 38), the Court has reached the same conclusions. Likewise, in its judgment *Recep Baş* (no. 2017/22400, 18 November 2020), the Court making a reference to the judgments of the Court of Cassation in the same vein has concluded that in the absence of any finding to the effect that the applicant enrolled his child in school associated with the FETÖ/PDY for an organisational purpose, the impugned act cannot be considered as a strong indication of criminal guilt (see *Recep Baş*, § 48).

iii. On the other hand, the Court has found neither unfounded nor arbitrary the inferior courts' assessments that the depositing of money

into the Bank Asya, found to be the financial resource of the FETÖ/PDY and to have financed the organisation in this manner, upon the calls of the organisation leader and heads was a strong indication of criminal guilt under the particular circumstances of a given case (see *Metin Evecen*, no. 2017/744, 4 April 2018, § 58). The *particular circumstances of the case* specified in the cited judgment were addressed in the judgment *İ.C.*. The Court has stated therein that being a holder of a bank account opened in the Bank Asya may be considered as an organisational activity only when it is proven that the bank account was opened upon the instruction of the said terrorist organisation; and that otherwise, the strong indication of criminal guilt is considered to exist only on the basis of an assessment based on a presumption. Under the particular circumstances of that case, the Court has concluded that as there was no finding to the effect that the applicant, holder of an account in Bank Asya, had not acted in line with an organisational instruction, the applicant's and his wife's being a holder of an account in Bank Asya cannot be accepted as an organisational activity and thus considered as a strong indication of criminal guilt within the meaning of an organisational link (see *İ.C.*, no. 2016/41492, 13 February 2020, § 62).

iv. In its judgments *İlhan İşbilen* (no. 2016/3704, 29 May 2019, § 49), *Mehmet Özdemir* (no. 2017/37283, 29 November 2018, § 84), *Mustafa Ünal* (no. 2017/21149, 28 November 2018, § 62) and *Fevzi Yazıcı* (no. 2016/59786, 13 September 2018, § 49), the Court took into consideration the applicants' holding office in the Zaman daily newspaper, as a general manager, chief editor, Ankara representative or visual arts director-graphics designer, in assessing whether there was a strong indication of criminal guilt for an organisational link, by also taking into account that this daily newspaper was accepted, by the public authorities and judicial bodies, as the media outlet of the FETÖ/PDY. However, the Court has noted in its judgment *Sait Ayaz* (no. 2016/35488, 30 September 2020), with a reference to the judgments of the Court of Cassation in this regard, that the subscription to the daily newspapers or journals associated with the organisation (to Zaman daily newspaper in that case) cannot be considered as an organisational activity. The Court has also stated that in case of any effort to have someone else subscribed to the Zaman daily newspaper, it may

be considered to involve an organisational aspect; however, in the given case, there is no finding or allegation as to such effort on the part of the applicant; and that therefore, the applicant's impugned subscription cannot be considered as a strong indication of criminal guilt (see *Sait Ayaz*, § 49).

120. In the present case, the applicant complained *inter alia* that he had been convicted on account of his acts such as depositing money into a bank account, enrolling his child in a school, being a member of an association and participating in peaceful meetings/conversations. In consideration of the conviction decision issued with respect to the applicant, it has been observed that his conviction was based not on such acts, as he maintained, but on his use of the ByLock application. The incumbent court convicted the applicant not for his use of the ByLock application but for his membership of the said organisation. In this sense, the use of ByLock application cannot be classified as an offence. The inferior court accepted the applicant's use of ByLock as evidence of his membership of the organisation. The Court has previously examined the allegations that the ByLock data had been obtained in the absence of a legal basis or unlawfully and that the use of ByLock application cannot be relied on as a sole or decisive evidence in ordering convictions. It consequently found no violation of the right to a fair trial. In that judgment, it has been noted that it is not for the Constitutional Court to assess the evidence with respect to a particular case as well as the relevance of the evidence adduced with the case. Therefore, it is at the discretion of the inferior courts to decide whether the sole evidence suffices to prove the criminal act of membership of an organisation. 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 as well as of opposing its use in accordance with the principles of the equality of arms and adversarial proceedings (see *Ferhat Kara*, § 141).

121. The incumbent court took into account, with respect to the FETÖ/PDY, the aim of the organisation, its action plan, and whether the

organisation resorted to violence in pursuing its action plan. According to the court, the offence of membership of an armed terrorist organisation entails an organic link with the organisation, as well as the performance of acts and actions of a continuous, diversified and intensive nature. Having regard to all features of the ByLock application and its differences from the commonly-used applications, the court concluded that this application was designated exclusively for the members of the FETÖ/PDY by the beginning of 2014 when it was first introduced into the market; and that the members of the organisation had used this application from the very beginning to conceal their identities and to ensure organisational communication. The court thus concluded that the applicant's impugned act of using the ByLock application was an organisational activity of a diversified, intensive and continuous nature. It held that the applicant had used the ByLock application, designated for the members of the FETÖ/PDY for the inter-organisational communication, for organisational purposes; that therefore, the applicant had been aware of the criminal nature of the FETÖ/PDY. The court accordingly disregarded the applicant's defence submissions. It appears that these conclusions reached by the inferior court did not lead to the extension of the scope of the impugned act prohibited by the law-maker in a way that would violate the *nullum crimen nulla poena sine lege* principle, nor did they infringe the very essence of the criminal provision regarding membership of an organisation; and that they were also foreseeable. In clarifying the elements of the imputed offence, the inferior court paid due regard to the foreseeability requirement and the criterion of being compatible with the very nature of the offence. Accordingly, the conclusion reached to the effect that for using the ByLock application for organisational purposes, the applicant was in a position to be aware of the criminal intent of this structure and the elements of the imputed offence of being a member of an organisation was not unfounded.

122. It has been further observed that as Article 314 of the Turkish Criminal Code no. 5237 was in force at the relevant time, the applicant was punished on account of this act that was criminalised under the law applicable at that time; and that there is no situation contrary to the prohibition on the retroactive application of a law to the detriment of persons charged with offences.

123. For these reasons, the Court found no violation of the *nullum crimen nulla poena sine lege* principle enshrined in Article 38 of the Constitution.

D. Alleged Violation of the Right to a Fair Trial

1. Alleged Violation of the Right to a Fair Hearing

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

124. The applicant maintained that the ByLock data had been obtained unlawfully and through the intelligence activities conducted by the MİT; and that therefore such data were in the form of prohibited evidence and should not have been relied on in his conviction decision. He accordingly claimed that his right to a fair trial had been violated.

125. In its observations, the Ministry stated:

i. At the hearing, the applicant had the opportunity to express, in a detailed manner, his opinions about the admissibility of the ByLock data as evidence. The letters sent by the Security Directorate General, Department of Anti-Smuggling and Organised Crime were read out in his presence, and thus the applicant was enabled to have knowledge of the documents included in the case-file. He was also provided with the opportunity to submit his own counter-statements.

ii. After making a comprehensive examination and assessment, the court reached the conclusion to the effect that the ByLock application was the covert communication means of the organisation. It was also thoroughly discussed by the inferior court whether the data obtained from the ByLock application were admissible as evidence.

iii. The Ministry also referred to the assessments and findings as to the ByLock communication application, which are included in the judgments of the 16th Criminal Chamber of the Court of Cassation and the General Assembly of Criminal Chambers of the Court of Cassation as well as in the Court's judgments *Aydın Yavuz and Others* and *Ferhat Kara*.

iv. After referring to the case-law of the European Court of Human Rights and the Court regarding the admissibility of evidence, the Ministry noted that the applicant was represented by a legal representative

throughout all proceedings; that the information and documents included in the case-file were also provided to him and he could thereby have the opportunity to submit his comments on these information and documents. The Ministry further indicated that the applicant was provided with all procedural safeguards during the proceedings.

v. It was further stressed that in cases where the use of the ByLock application was found established, the extent of the need for supportive evidence would reduce. In the present case, the incumbent court supported his personal conviction with the ByLock Inquiry and Examination Report containing information on the user-ID, username and password, and the first instance decision was upheld by the Court of Cassation. Accordingly, the Ministry was of the opinion that the conclusion reached by the inferior court did not involve any manifest arbitrariness in a way that would undermine justice and common sense.

126. The applicant did not submit any counter-statements against the Ministry's observations.

b. The Court's Assessment

127. Article 36 § 1 on 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."

128. 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). In this sense, the applicant's allegations were examined from the standpoint of the right to a fair hearing, which falls within the scope of the right to a fair trial.

i. Admissibility

129. 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.

ii. Merits

(1) General Principles

130. In its several judgments, 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 and has set forth the principles in this regard (see *Orhan Kılıç* [Plenary], no. 2014/4704, 1 February 2018, § 42-51; and *Yaşar Yılmaz*, no. 2013/6183, 19 November 2014, §§ 38-60). Accordingly, it is not for the Court to determine whether certain evidentiary elements were obtained lawfully. The duty incumbent on the Court is to examine whether the evidence that could, *prima facie*, be considered to be unlawful or that has been found by the inferior courts to be unlawful has been relied on in the proceedings as sole or decisive evidence and whether the impugned unlawfulness has undermined the overall fairness of the proceedings (see *Orhan Kılıç*, § 46). In the present case, there is no situation requiring the Court to depart from these principles.

(2) Application of Principles to the Present Case

(a) As regards the Data Obtained from ByLock Server

131. In its judgment *Ferhat Kara*, the Court examined whether the process whereby the data obtained from the ByLock server had been delivered to the judicial authorities gave rise to the violation of the right to a fair hearing (see *Ferhat Kara,* §§ 126-136). The Court has therein cited the relevant provisions of the State Intelligence Services and the National Intelligence Act no. 2937 and dated 1 November 1983 (Law no. 2937) and stated 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. The Court has also pointed to the inevitable need, in democratic societies for the protection of fundamental rights and freedoms, for intelligence agencies and the methods employed by such agencies so as to effectively fight against very complex structures such as terrorist organisations and

track such organisations through covered methods (see *Ferhat Kara*, §§ 129 and 130).

132. In this judgment, the Court has pointed to the nature of the investigations conducted into the FETÖ/PDY, the investigations subsequently initiated with respect to the operations performed by the organisation by wielding the juridical power in line with its own aims as well as its role in the coup attempt. It has also underlined that 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 (see *Ferhat Kara*, §§ 131 and 132). It has been noted that 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*. It has been emphasised that the MİT 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 MGK, started to perceive the FETÖ/PDY as a threat to the national security (see *Ferhat Kara,* § 133). It has been underlined that 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 (see *Ferhat Kara,* § 134).

133. It has been further noted that the delivery of the data concerning the ByLock app., 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 did not involve

any *prima facie* unlawfulness; and that nor did the inferior courts make any determination to that effect. It has been accordingly concluded that 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 a practice involving a manifest error of judgment or manifest arbitrariness (see *Ferhat Kara,* § 136).

134. In the present case, there is no ground requiring the Court to depart from the conclusions it has reached in the case of *Ferhat Kara*.

(b) As regards the Process following the Submission of the ByLock Data to the Judicial Authorities

135. A criminal case was filed against the applicant for his alleged membership of the FETÖ/PDY. In two separate reports of 3 February 2017 titled "Result of New ByLock Inquiry", which was submitted to the relevant court by the Security General Directorate, Department of Anti-Smuggling and Organised Offences ("EGM-KOM"), it is indicated that the applicant used ByLock app. through two GSM subscriptions registered in his name. The first time he signed up for the app. in one of these GSM subscriptions with a mobile phone is 11 August 2014. Through his other GSM subscription, he signed up for the app. with two different mobile phones and the first time he signed up is 13 August 2014. The applicant was convicted of being a member of an armed terrorist organisation by the court decision of 15 August 2017. In its conviction decision, the court relied on the applicant's use of ByLock app. with his username *23626* over the user-ID no *1658*, which was found to be created through IP numbers of one of these GSM subscriptions. This finding was based on the ByLock Report submitted by the EGM-KOM to the incumbent court. It is further indicated in the decision ordering the applicant's conviction that the use of this communication app. is *per se* an indication of having committed the offence of being a member of an organisation. The incumbent court stressed that as the contents of the applicant's correspondence via ByLock app. would not have a bearing on the outcome of the proceedings, there was no need to await the submission of the contents for adjudicating the case.

136. Accordingly, the decisive evidence relied on in the applicant's conviction is his use of the ByLock app.. The applicant claimed that the ByLock data were unlawful and could in no way be relied on as ground for his conviction.

137. In the judgment *Ferhat Kara*, the Court's assessment with respect to the process following the submission of the ByLock data to the judicial authorities is as follows (see *Ferhat Kara*, §§ 139 and 140):

> *"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."

138. 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 app. and opposing its use in accordance with the principles of the equality of arms and adversarial proceedings (in the same vein, see *Ferhat Kara*, § 141).

139. 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.

140. For these reasons, the Court 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.

2. Allegation that the Bylock Data cannot be Relied on as the Sole or Decisive Evidence for Conviction

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

141. The applicant stressed that the ByLock data could not be *per se* relied on as evidence and accordingly alleged that his right to a fair trial had been violated.

142. 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.

143. The applicant did not submit any counter-statements against the Ministry's observations.

b. The Court's Assessment

144. 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 judgments, *Ahmet Sağlam*, no. 2013/3351, 18 September 2013).

145. 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).

146. 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 these 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 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 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 (see *Ferhat Kara*, §49).

147. 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 this 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 that 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 assessments with respect thereto must be taken into consideration (see, in the same vein, *Ferhat Kara,* § 150).

148. In its judgment *Ferhat Kara*, the Court has made the following assessments with respect to the reliance on the ByLock data in the applicant's conviction (see *Ferhat Kara,* §§ 151-160):

> *"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 Türkiye 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 signup 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."

149. In that judgment, 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 that 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 (see *Ferhat Kara*, § 161).

150. In the present case, the sole evidence relied on by the inferior court in ordering the applicant's conviction for his membership of a terrorist organisation is his being a user of the ByLock app.. Although he contested, at all stages of the proceedings before the inferior courts, the allegation that he was a user of the ByLock app., he did not maintain that the GSM subscription through which the ByLock server had been connected did not indeed belong to him or this GSM subscription had been used by any person other than himself. On the contrary, the applicant acknowledged that both GSM lines (SIM cards), found to have ByLock app. at the investigation stage, were in his possession and used by him. He, however, alleged that he had not downloaded and used the impugned app.. He accordingly asserted that it should have been inquired how his being user of the ByLock application had been found established; and that however, the incumbent court had failed to do so.

151. 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 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. 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 that 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.

152. For these reasons, this part of the application must be declared inadmissible for being *manifestly ill-founded*.

3. Alleged Violations of the Principles of Equality of Arms and Adversarial Proceedings

a. Allegation that No Expert Examination was Performed and ByLock Servers might have been Connected, against the User's Will, merely through "*Morbeyin*" *software*

i. The Applicant's Allegations

153. The applicant maintained that the incumbent court had issued its decision without the CGNAT records being obtained and subject to an expert examination; that he had not therefore had the opportunity to verify the accuracy of the information in the ByLock Report and to effectively raise a challenge to this Report; and that he might have been considered to be a user of the ByLock application due to *Morbeyin* software or similar programs. He accordingly alleged that there had been a violation of the right to a fair trial.

ii. The Court's Assessment

154. The submission and evaluation of evidence, including the right to have witnesses heard, during the proceedings fall into the scope of the principle of equality of arms, which is considered as one of the elements inherent in the right to a fair trial. This right is among the concrete aspects of the right to a fair trial. In its several judgments involving an examination under Article 36 of the Constitution, the Court has interpreted the relevant provision in the light of Article 6 of the Convention and the ECHR's case-law on the matter and has enshrined the principles and rights such as the equality of arms and adversarial proceedings, which are laid down in the wording of the Convention and incorporated into the right to a fair trial in Article 36 of the Constitution through the ECHR's case-law (see *Muhittin Kaya and Muhittin Kaya İnşaat Taahhüt Madencilik Gıda Turizm Pazarlama Sanayi ve Ticaret Ltd. Şti.*, no. 2013/1213, 4 December 2013, § 25).

155. The principle of equality of arms aiming at ensuring an equitable balance between the parties means that parties of the case must be subject to the same conditions in terms of the rights and freedoms that the parties are entitled before the court and that such balance must be preserved at every stage of the proceedings. As required by this procedural safeguard, both parties of a given dispute must be afforded a reasonable opportunity to present their evidence, the main basis of the defence submissions (see *Yüksel Hançer*, no. 2013/2116, 23 January 2014, § 18).

156. The principle of adversarial proceedings, one of the elements inherent in the right to a fair trial, entails that the parties be granted the opportunity to have knowledge of, and comment on, the materials of the case file and thus requires the active involvement of the parties in the proceedings as a whole. In this sense, the cases where the court does not hear the parties and afford them the opportunity to challenge the evidence against them may make the proceedings inequitable (see *Ahmet Türko*, no. 2013/5949, 12 March 2015, § 33). The principle of adversarial proceedings is closely interrelated with the principle of equality of arms. These two principles complement each other. That is because in case of infringement of the principle of the adversarial proceedings, the balance between the parties in terms of their defence rights will be impaired. The applicability

of the adversarial proceedings also in the cases regarding the civil rights requires the parties of a case regarding a civil right to actively participate in the proceedings as a whole, including to be present at the hearing (see *Tahir Gökatalay*, no. 2013/1780, 20/3/2014, § 25).

157. The Court's examination from the standpoint of the principles of equality of arms and adversarial proceedings is the ascertainment of the overall fairness of the proceedings (see *Yüksel Hançer*, § 19).

158. In the judgment *Ferhat Kara*, it is stated that the data available on the ByLock server and the CGNAT records could not be fully obtained; and that 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 (see *Ferhat Kara*, § 162). It is further noted therein that as a result of the detailed examination as to the address and applications called *Morbeyin*, it has been determined that the users of 11.480 GSM numbers, which had similar features in terms of connection and data parameters, were directed to the IPs on the ByLock server outside their will; and that for this reason, they were ultimately removed from the ByLock-users lists (see *Ferhat Kara*, § 37).

159. In the present case, the technical examinations have revealed that the user-ID no. 1658 was associated with the IP numbers through which the applicant connected to the ByLock server. All recoverable data with respect to this user-ID are also included in the ByLock report. According to the incumbent court, the respective data included in the ByLock Data, namely GSM number, roster and log records, verify one another in a way that would cause no hesitation that the applicant was a ByLock user. The ByLock Report in question was provided to the applicant, and thereby he was afforded the opportunity to put forth his challenges thereto. Therefore, regard being had to the facts that the applicant did not maintain that the said GSM number had been used by any person other than him or there is no element in the case-file giving rise to such doubt and that there may be insubstantial differences between the log records obtained on the basis of user-ID and CGNAT records due to the inability to fully recover the data, it has been concluded that having the CGNAT records examined by an expert does not lead to reaching a decision that is

contrary to the above-mentioned conclusion.

160. Besides, nor was it subsequently found out that the applicant was included in the list pertaining to those who had been found to be directed, against their will, to the IP addresses of the ByLock server through *"Morbeyin" applications*. Moreover, the user-ID no. 1658 was also found to match with the IP numbers of the GSM in the applicant's possession. Therefore, it has been concluded that it was not possible to consider that the IP numbers assigned to the applicant's GSM were directed to the IP addresses of the ByLock server outside the applicant's will; and that as stated in the ByLock Report, the applicant had connected to the ByLock server within his own knowledge and by his own will.

161. Consequently, it is evident that in the present case, there was no violation of the principles of equality of arms and adversarial proceedings, with respect to the challenges that CGNAT records had not been subject to an expert examination and the applicant had directed, against his own will, to the ByLock servers through the *"Morbeyin"* applications.

162. For these reasons, this part of the application must be declared inadmissible for *being manifestly ill-founded*.

b. Alleged Failure to Submit the Relevant Digital Data before the Incumbent Court

i. The Applicant's Allegations

163. The applicant maintained that the hard disk and flash memory submitted to the EGM-KOM by the Ankara Chief Public Prosecutor's Office had not been submitted to the incumbent court; and that nor had been their backup delivered to him for examination. He accordingly alleged that there had been a violation of his right to a fair trial.

ii. The Court's Assessment

164. As required by the subsidiary nature of the individual application mechanism, the allegations that have not been raised, and new information and documents that have not been previously submitted, before the inferior courts and through the ordinary legal remedies cannot

be brought before the Constitutional Court (see *Bayram Gök*, no. 2012/946, 26 March 2013, § 20).

165. In the present case, it appears that the applicant did not make an explicit request, during the trial and appeal proceedings, to the effect that the hard disk and flash memory including the ByLock data had been subject to an expert examination and that he was to be provided with their backup. Nor did the applicant allege that he had raised such a request but it had been dismissed by the incumbent court. Therefore, this part of the application cannot be subject to an examination by the Court as the available legal remedies were not duly exhausted.

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

4. Alleged Violation of the Right to Be Present at the Hearing

a. The Applicant's Allegations

167. The applicant maintained that he had attended the trial conducted as a single hearing through the audio and video transmission system; and that his right to a fair trial had been violated as he could not be present at the hearing.

b. The Court's Assessment

168. As required by the subsidiary nature of the individual application mechanism, the allegations that have not been raised, and new information and documents that have not been previously submitted, before the inferior courts and through the ordinary legal remedies cannot be brought before the Constitutional Court (see *Bayram Gök*, no. 2012/946, 26 March 2013, § 20).

169. It appears that in the present case, the applicant did not raise this allegation at his trial and appeal proceedings; and that he did not submit any information or document in support thereof. It has been therefore concluded that he failed to duly exhaust the available legal remedies.

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

5. Other Alleged Violations regarding the Right to a Fair Trial

a. The Applicant's Allegations

171. The applicant asserted that as a result of the proceedings conducted with respect to the other persons in a similar position with him for the same offence, the penalty was imposed on the basis of the minimum limit, whereas he had been subject to a penalty not on the basis of the minimum limit as a result of the erroneous evaluation of the evidence in his case; and that nor had been his challenges in this regard taken into consideration at the appellate stage. He accordingly claimed that there had been a violation of the prohibition of discrimination.

b. The Court's Assessment

172. 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 *Ahmet Sağlam*, § 42).

173. The applicant's allegation is in essence related to the inappropriateness of the first instance decision, thus to the outcome of the decision. However, there is no element in the decisions of the first instance court, regional court of appeal and the Court of Cassation, forming a manifest error of judgment or manifest arbitrariness in the establishment of impugned facts, the assessment of the evidence, the interpretation and implementation of provisions of law.

174. As the alleged violations raised by the applicant are in the form of complaints required to be considered at the appellate stage pursuant to the above-cited case-law, this part of the application must also be declared inadmissible for *being manifestly ill-founded*.

E. Alleged Violation of the *Ne Bis In Idem* Principle

1. The Applicant's Allegations

175. The applicant maintained that his dismissal from the public office and his being sentenced to imprisonment on account of the same acts had been in breach of the right not to be tried or punished twice (*ne bis in idem* principle).

2. The Court's Assessment

176. The Additional Protocol no. 7 to the Convention enshrines the right not to be tried or punished twice. The Law no. 6684 on the Ratification of the Additional Protocol no. 7 to the Convention was enacted by the Grand National Assembly of Türkiye on 13 March 2016. Upon being ratified, the Law no. 6684 was promulgated in the Official Gazette on 25 March 2016. The Protocol was adopted by the Council of Ministers on 28 March 2016 and took effect in respect of Türkiye on 1 August 2016. Accordingly, the Additional Protocol no. 7 to the Convention is applicable to the incidents taking place after 1 August 2016.

177. In its judgment *Ünal Gökpınar*, the Court has held that the right not to be tried or punished twice is afforded constitutional guarantee within the scope of the right to a fair trial, which is safeguarded by Article 36 of the Constitution (see *Ünal Gökpınar*, §§ 40-50. The Court has stated therein:

> *"49. The ne bis in idem principle safeguards that, as explained above, individuals would not be tried or punished twice for the very same act if there has been already criminal proceedings conducted with respect thereto. It is thereby aimed at ensuring the legal security with respect to the criminal procedures under the right to a fair trial, as a requirement of the principle of the state governed by rule of law. It has been thereby concluded that the ne bis in idem principle inherent in the principle of*

the state governed by rule of law is an element of the right to a fair trial enshrined in Article 36 of the Constitution (§§ 29-30).”

178. As also indicated in the above-mentioned judgment, in terms of the *ne bis in idem* principle, there must be a set of proceedings in the criminal sphere. In its judgments *D.M.Ç.*, *B.Y.Ç.* and *Selçuk Özbölük*, the Court has addressed, in making an examination under Articles 36 and 38 of the Constitution, the notion of *criminal sphere* in an autonomous manner, by also taking into consideration the relevant criteria set forth in the ECHR’s judgments. As a result of this examination, the disciplinary penalties are not considered to fall into the scope of *criminal sphere*. As a matter of fact, in the case of *B.Y.Ç.*, the Court issued a decision on lack of jurisdiction *ratione materiae* in respect of the right to a fair trial in so far as it concerned a disciplinary sanction.

179. On the other hand, the legal nature of the sanction of dismissal from office, which has been introduced by virtue of a decree-law put into practice following the coup attempt, has been also addressed in the judgment, no. E.2016/6, K.2016/12 and dated 4 August 2016, whereby the Court found appropriate the dismissal of its two former justices.

180. As also stated by the Court, pursuant to Articles 3 and 4 of the Decree-Law on Measures to be taken under State of Emergency, which was promulgated in the Official Gazette dated 23 July 2016 and no. 29779, and formed the basis of the dismissal of these two justice from office, (Decree-Law no. 667), for the application of the measures of dismissal from public office or a profession, the existence of a link with a terrorist organisation, terrorist activities and also with the person(s) involved in the coup attempt is not certainly necessary; but the link with any *structures, formations* or *groups*, which are found by the MGK to perform acts and activities against the national security of the State is deemed sufficient. Besides, for the application of these measures, such a link must not be necessarily *membership of* or *affiliation to* such structures, formations or groups, and it may be also in the form of *having connection* or *relation* therewith (see the Court’s judgment no. E.2016/6 (Miscellaneous), K.2016/12, 4 August 2016, §§ 84-86; *Mustafa Baldır*, § 68; and *Mustafa Özterzi*, § 102).

181. The Court has stated that the dismissal from public office or a profession under Articles 3 and 4 of the Decree-Law no. 667 is an *extraordinary measure*, which differs from the measures applied in case of any criminal offence or disciplinary offence, which aims at eliminating the existence, at the public institutions and organisations, of the terrorist organisations and other structures found to have performed acts and activities against national security and which is not of a temporary nature and bears final consequences. The Court has also noted that the assessment to be made in this scope is not in the nature of an investigation of criminal offence or a disciplinary offence; and that the conclusion to be reached at the end of such assessment is independent from the determination of any criminal charge (see the Court's judgment no. E.2016/6 (Miscellaneous), K.2016/12, 4 August 2016, §§ 79, 86, 96; *Mustafa Baldır*, § 69; and *Mustafa Özterzi*, § 103).

182. In that case, the conclusion reached by the Court, in line with the principles laid down in the above-mentioned principles, to the effect that the dismissal of members of certain professions, which are subject-matter of its judgment on the measure of dismissal from office, is a measure of *an extraordinary nature* is applicable also in terms of the relevant provision of the Decree-Law no. 670 embodying regulations in the same vein by the purpose, legal nature and consequences of the impugned measure and forming a basis for the applicant's dismissal from office.

183. Therefore, the applicant's dismissal from public office in the present case cannot be classified as a sanction in the *criminal sphere*. Consequently, it must be acknowledged that the alleged violation of the *ne bis in idem* principle due to the applicant's imprisonment for his membership of a terrorist organisation falls outside the scope of the protection afforded by Article 36 of the Constitution.

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

F. Other Alleged Violations

1. The Applicant's Allegations

185. The applicant maintained that there had been violations of the right to property, the right to hold meetings and demonstration marches, as well as the freedom of association.

186. He further alleged that the questions put to him during his questioning by the law-enforcement officers during the investigation stage had breached his presumption of innocence, freedom of expression and right to respect for private and family life.

2. The Court's Assessment

187. Article 48 § 2 of Code no. 6216 on the Establishment and Rules of Procedure of the Constitutional Court, titled *"Conditions for and examination of the admissibility of individual applications"*, explicitly sets forth that the Court shall declare inadmissible the manifestly ill-founded applications. In this sense, the complex or contrived complaints, complaints that are to be raised at the appellate stage, the applications where the applicant fails to substantiate the alleged violations, and as well as the complaints manifestly involving no interference with fundamental rights and freedoms may be declared manifestly ill-founded.

188. As is seen, the Court shall deal with only individual applications, which are sufficiently substantiated. The applicants are under the obligation to substantiate their complaints in both material and legal terms. In so far as it relates to concrete grounds, the applicants are obliged to provide an explanation concerning the facts and circumstances underlying their complaints and to submit the relevant evidence to the Court. In so far as it relates to legal grounds, they are obliged to demonstrate, in essence, which one of the fundamental rights and freedoms have been violated and the grounds giving rise thereto (see *Cemal Günsel* [Plenary], no. 2016/12900, 21 January 2021, § 22).

189. In the examination of individual applications, the duty incumbent on the Court is not to make an *ex officio* examination, in constitutional terms, of the acts and actions performed by public bodies and the court

decisions. Besides, the Court's duty is confined to an examination within the scope of the grounds raised by the applicants in the application form. Therefore, in order for the applicant to have his application examined on the merits by the Court, he is to *substantiate his allegations*, *to explain the facts underlying the allegations* and to *put forward the relevant evidence*. The Court is not tasked with substantiating the alleged violations, establishing the facts of the case and collecting evidence, by substituting itself for the applicant (see *Cemal Günsel*, §§ 24 and 25).

190. In case of any failure on the part of the applicants to fulfil these obligations, their complaints may be found manifestly ill-founded. In cases where those failing to fulfil these obligations present a plausible ground to justify such failure or the Court infers such a situation from the very nature of the case are exceptions to this rule (see *Cemal Günsel*, § 26).

191. In the present case, the applicant raised his allegations of the right to property, right to hold meetings and demonstration marches, as well as of the freedom of association *in abstracto* without establishing any link with an incident. Besides, he put forth the alleged violations of the presumption of innocence, the freedom of expression, as well as of the right to respect for private and family life by using expressions of an abstract and general nature. Nor did he explain how and for which grounds the questions put to him during his questioning by the law-enforcement officers had breached the said rights and freedom. As a result, the applicant failed to fulfil the obligations to explain the facts giving rise to his complaints and to demonstrate which one of the fundamental rights and freedoms has been violated in his case and the grounds thereof. He failed to substantiate the alleged violations he raised.

192. For these reasons, this part of the application must be declared inadmissible for *being manifestly ill-founded*.

VI. JUDGMENT

For the reasons explained above, the Constitutional Court UNANIMOUSLY held on 15 April 2021 that

A. The request for legal aid be ACCEPTED in so far as it related to the individual application no. 2018/31172.

B. 1. The alleged violation of the right to personal liberty and security due to the unlawfulness of detention and the failure to conduct judicial review of the applicant's detention by bringing him before a judge/court be DECLARED INADMISSIBLE for being *out of time*;

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

3. The alleged violation of the *nullum crimen, nulla poena sine lege* principle be DECLARED ADMISSIBLE;

4. The alleged violation of the right to a fair hearing be DECLARED ADMISSIBLE;

5. The allegation that the Bylock data cannot be relied on as the sole or decisive evidence for conviction be DECLARED INADMISSIBLE for being *manifestly ill-founded*;

6. The alleged violations of the principles of equality of arms and adversarial proceedings under the right to a fair trial as no expert examination was performed and it was not inquired whether the ByLock servers might have been connected, against the user's will, merely through *"Morbeyin"* software be DECLARED INADMISSIBLE for being *manifestly ill-founded*;

7. The alleged violations of the principles of equality of arms and adversarial proceedings under the right to a fair trial as the digital materials were not brought before the court be DECLARED INADMISSIBLE for *non-exhaustion of legal remedies*;

8. The alleged violation of the right to be present at the hearing under the right to a fair trial be DECLARED INADMISSIBLE for *non-exhaustion of legal remedies*;

9. The alleged violations raised under the right to a fair trial be DECLARED INADMISSIBLE for being *manifestly ill-founded*;

10. The alleged violation of the *ne bis in idem* principle be DECLARED INADMISSIBLE for lack of jurisdiction *ratione materiae*;

11. The other alleged violations be DECLARED INADMISSIBLE for being *manifestly ill-founded*;

C.1. The *nullum crimen, nulla poena sine lege* principle safeguarded by Article 38 of the Constitution was NOT VIOLATED;

2. The right to a fair hearing under the right to a fair trial safeguarded by Article 36 of the Constitution was NOT VIOLATED;

D. The litigation costs incurred with respect to the individual application no. 2018/8903 be COVERED by the applicant;

E. 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, the applicant be COMPLETELY EXEMPTED from payment of the litigation costs; and

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

NECLA YAŞAR

(Application no. 2020/35444)

14 September 2021

On 14 September 2021, the Second Section of the Constitutional Court found a violation of the right to a reasoned decision under the right to a fair trial, safeguarded by Article 36 of the Constitution, in the individual application lodged by *Necla Yaşar* (no. 2020/35444).

THE FACTS

[8-23] The applicant was imposed an administrative fine of 3,150 Turkish liras (TRY) in accordance with the Record of Decision on Administrative Sanction no. 493 issued by the Bismil District Security Directorate and with Article 282 of the Public Health Law no. 1593, for breaching the social distancing rule set within the scope of coronavirus pandemic.

The applicant's appeal against the impugned administrative sanction was dismissed by the Bismil Magistrate Judge. The applicant's lawyer requested the annulment of the sanction, stating that it was the civil administrator who had jurisdiction to decide with regard to the impugned administrative sanction, that the law enforcement officers could not determine a penalty and serve it to the person concerned without obtaining approval from the civil administrator, and that it had been ruled as such in a similar case by the Adana 4th Magistrate Judge (no. 2020/2751 miscellaneous), and that for these reasons, the decision of the Bismil Magistrate Judge did not comply with the procedure and the law. The applicant's appeal was dismissed by the Diyarbakır 3rd Magistrate Judge on 30 September 2020 with final effect.

V. EXAMINATION AND GROUNDS

24. The Constitutional Court ("the Court"), at its session of 14 September 2021, examined the application and decided as follows:

A. Alleged Violation of the Right to a Reasoned Decision

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

25. The applicant alleged that her right to a fair trial had been violated as it had been disregarded during the proceedings that the Record of Decision on Administrative Sanction (*İdari Yaptırım Karar Tutanağı*) under

Article 282 of the Law no. 1593, on account of her act of violation of the social distancing rule, had been issued and notified by unauthorised law enforcement officers instead of the civil administrator. She also asserted that different decisions had been rendered in similar cases.

26. In its observations, the Ministry [of Justice] indicated that there were cases where the Constitutional Court had already interpreted constitutional rules in relation to alleged violations similar to those raised in the present case. It added that the applicant did not make any explanation either to the effect that the administrative sanction at issue had damaged her financial situation or as to how important it was for her. Against that background, the Ministry asserted that the application could be declared inadmissible for lack of constitutional and personal significance.

27. In its observations, the Ministry further indicated that the impugned social distancing measure was part of various measures taken by the state in response to the COVID-19 pandemic within the scope of its positive obligation to protect the lives of individuals. Accordingly, this measure was taken in compliance with the Law no. 1593 by the Provincial Public Health Board (*İl Hıfzısıhha Kurulu*) concerned and the legal basis for application of an administrative fine for non-compliance with the social distancing measure was the Law no. 1593.

28. The applicant duly submitted her counter-arguments against the observations of the Ministry.

2. The Court's Assessment

29. Article 36 § 1 of the Constitution provides as follows:

> *"Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures."*

30. 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 did not raise any allegation to the effect that the act of violating the social distancing rule

did not have a legal basis or a sanction corresponding to that act in the relevant law. For this reason, the Court has considered it appropriate to examine the applicant's complaint, as regards the alleged failure to take account of her objection about the issuance of the Record of Decision on Administrative Sanction by an unauthorised body during the proceedings, in the framework of the right to a reasoned decision within the scope of the right to a fair trial guaranteed under Article 36 of the Constitution.

a. Admissibility

31. Considering the nature of the alleged violations raised by the applicant, the application must be examined from the standpoint of the requirement of "constitutional and personal significance", which is one of the admissibility criteria.

32. The Court laid down the principles applicable to the requirement of "constitutional and personal significance" within the scope of the right to a reasoned decision in cases stemming from administrative fines in the cases of *Mustafa Mümin Bulun* (no. 2016/6890, 25 December 2016, §§ 11-23); *F.N.G.* (no. 2014/11928, 21 June 2017, §§ 29-61); *Emek Yapı Yat. İnş. Tic. Ltd. Şti.* (no. 2014/19521, 5 December 2017, §§ 15-29); and *Ali Rıza Ak* (no. 2015/15965, 27m June 2018, §§ 15-27). However, the present case is considered to have some differences to the above-mentioned cases in terms of constitutional significance. The present case concerns the dismissal of an objection filed against an administrative sanction decision - without holding any assessment as to which public body was authorised to impose such sanction - that had been issued due to an alleged violation of the measures taken by the public power within the scope of the measures to combat the COVID-19 outbreak that had taken our country by storm along with the rest of the world. It can be said that there is constitutional significance in examining the proceedings at the end of which the impugned administrative sanction decision became final because, in view of their prevalence, variety and intensity, the measures implemented within the scope of the fight against COVID-19 concern a matter which have not yet been interpreted by the Court through the individual application mechanism.

33. The alleged violation of the right to a reasoned decision must be declared admissible for not being manifestly ill-founded and there being no grounds for its inadmissibility.

b. Merits

i. General Principles

34. Article 36 § 1 of the Constitution provides for everyone's right to a fair trial but it does not explicitly mention a right to a reasoned decision. On the other hand, the reasoning of the legislative bill to add the phrase "*… and the right to a fair trial"* to Article 36 of the Constitution emphasised that the right to a fair trial, which is also guaranteed by the international conventions to which Türkiye is a party, was being incorporated into the text of the article. In fact, the European Court of Human Rights ("the ECtHR") underlined in several judgments that the right to a reasoned decision is included in the right to a trial on an equitable basis under Article 6 § 1 of the European Convention on Human Rights ("the Convention"). Therefore, it must be acknowledged that the right to a fair trial under Article 36 of the Constitution also encompasses the right to a reasoned decision (see *Abdullah Topçu*, no. 2014/8868, 19 April 2017, § 75).

35. Article 141 § 3 of the Constitution, the text of which reads "*The decisions of all courts shall be written with a reasoning*.", places an obligation on the courts to provide reasons/justifications for their decisions. As a requirement of the principle of constitutional integrity, the said constitutional norm should also be kept in mind when holding an assessment on the right to a reasoned decision (see *Abdullah Topçu*, § 76).

36. The right to a reasoned decision aims to ensure and oversee that persons are tried fairly. This right is also necessary for the parties to know whether their claims have been examined in accordance with the rules when reaching a ruling and to make sure that the society learns about the reasons for a judicial decision given on their behalf in a democratic society (see *Sencer Başat and Others* [Plenary], no. 2013/7800, 18 June 2014, §§ 31 and 34).

37. The aforementioned obligation of the courts cannot be construed as to mean that any and every allegation and defence raised during the

proceedings must be responded in a detailed manner in the reasoning of the decision. However, even though the inferior courts (courts of instance) are not obliged to address all allegations raised before them (see *Yasemin Ekşi*, no. 2013/5486, 4 December 2013, § 56), it must be inferred from the reasoned decision that the main problems of the case were examined.

38. The question of exactly which elements must be in a decision depends on the nature and circumstances of the case. Especially where the allegations and defences raised expressly and specifically during the proceedings have an effect on the outcome of the proceedings, i.e. capable of changing the result of the trial, courts are required to respond with reasonable grounds to such matters that are directly related to the proceedings (see *Sencer Başat and Others*, §§ 35 and 39).

39. On the other hand, if the first-instance court reaches a different conclusion than that of another judicial decision with regard to the same material or legal fact, it will be expected show the reasons therefor in its reasoned decision. The principle of a state governed by the rule of law, which is prescribed as a fundamental principle to be upheld in the interpretation of all the rights and freedoms enshrined in the Constitution, requires that judicial bodies refrain as much as possible from rendering contradicting decisions with regard to the same material or legal facts. Ruling differently on the same material or legal facts might not only undermine the principle of a state governed by the rule of law and also weaken the people's trust in law. For this reason, in cases where there is a standing judicial decision concerning a material or legal fact that has been rendered in favour of a person but the judicial body arrives at a different conclusion on the same fact than this decision, it must explain the reasons for this conclusion. The judicial body's obligation to show reasons in such cases is vital in order not to prejudice the people's trust in law (see *Mehmet Köz*, no. 2018/23430, 27 January 2021, § 27; and, *mutatis mutandis*, *Mehmet Okyar*, no. 2017/38342, 13 February 2020, § 29).

40. The fact that an appellate body reaches the same conclusion as the trial court and that it reflects its position by using the same reason or referring to it in its decision is sufficient for the requirement to provide

a reasoning (see *Yasemin Ekşi*, § 57). Nevertheless, the failure of a body in charge of examining an objection or appeal to respond to allegations related to the procedural or substantive aspect, which require a separate and explicit response during the examination upon objection or appeal, may cause a violation of the right to a reasoned decision (see *Caner Kandırmaz*, no. 2013/3672, 30 December 2014, § 31).

41. In order for the parties to a case to understand and evaluate for what reason they are found to be in the right or in the wrong by the legal order, it is obligatory, in terms of "the right to a reasoned decision", that a justification section, which is duly formulated, which shows the content and scope of the judgment and what the court takes or does not take into account while delivering this judgment, whose expressions are meticulously selected and which is clear in a way that will not leave any space for doubt, and the paragraphs of provisions compliant therewith be included (see *Sencer Başat and Others*, § 38).

ii. Application of Principles to the Present Case

42. A Record of Decision on Administrative Sanction was issued in respect of the applicant on the basis of Article 282 of the Law no. 1593 due to her non-compliance with the social distancing rule that had been put into effect across the province by a decision dated 4 April 2020 of the Diyarbakır Provincial Public Health Board. The applicant requested the Bismil Magistrate Judge (in Criminal Matters) to annul the Record of Decision on Administrative Sanction, alleging that she had not breached the social distancing rule on the incident date and that the sanction had been imposed unlawfully.

43. The Bismil Magistrate Judge dismissed the objection by holding that, in addition to the Law Enforcement Record stating that the applicant had committed the imputed misdemeanour, there were also video images corroborating that record, from which it was found that the applicant had acted in contravention of the social distancing rule along with other individuals.

44. In her objection against this ruling, the applicant contended that it was the civil administrator who had jurisdiction to decide with regard to

the impugned administrative sanction, that the law enforcement officers could not determine a penalty and serve it to the person concerned without obtaining approval from the civil administrator, and that it had been ruled as such in a similar case by the Adana 4th Magistrate Judge (no. 2020/2751 miscellaneous). The body with the jurisdiction to examine the objection definitively dismissed the objection on the ground that the dismissal rendered by the Judge conducting the trial was in compliance with the procedure and the law, without having carried out an assessment with respect to these claims that had been raised for the first time within the scope of the legal remedy of objection.

45. Given the text of Article 294 § 2 of the Law no. 1593, which reads "*The administrative fines prescribed under this Law shall be imposed by the local civil administrator.*", the Court considers that the alleged unlawfulness of the Record of Decision on Administrative Sanction issued under Article 282 of the same Law would have had an effect on the result in the context of the examination upon objection, i.e. it was capable of changing the outcome of the proceedings.

46. In its judgment, the Bismil Magistrate Judge did not hold any assessment on the lawfulness of the administrative sanction in terms of the element of authority. Nor can it be understood from the reasoned decision of the Diyarbakır 3rd Magistrate Judge, which held an appellate review, that it took account of and examined the substantial claims about the alleged unlawfulness of the administrative sanction in terms of the element of authority and the alleged ruling of the Adana 4th Magistrate Judge in favour of the claimant in a similar case, which were raised for the first time in the application for the legal remedy of objection.

47. In its reasoning for dismissal, the body examining the objection neither meticulously selected expressions to indicate what it had or had not taken into account among the claims which the applicant had raised for the first time at the legal remedy of objection, nor did it provide a separate and explicit response to the said substantial claims of the applicant, thereby giving rise to the doubt that it failed to examine allegations capable of affecting the outcome of the proceedings. Thus, considering the proceedings as a whole, the Court concludes that there has been a violation of the applicant's right to a reasoned decision.

48. For these reasons, it must be held that there has been a violation of the applicant's right to a reasoned decision within the scope of the right to a fair trial protected under Article 36 of the Constitution.

B. Other Alleged Violations

49. Since it has already found a violation of the applicant's right to a reasoned decision, the Court finds it unnecessary to separately examine the admissibility and merits of the other complaints concerning the finalisation process of the decision on administrative sanction.

C. Application of Article 50 of Code no. 6216

50. 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."

51. The applicant requested the Court to find a violation, rule for a retrial, and award TRY 10,000 as non-pecuniary compensation.

52. 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).

53. 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 redressed is to ensure restitution to the extent possible, that is to restore the situation to the state it was in prior to the violation. For this to happen, the continuing violation needs to be ceased 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 redressed, where applicable the pecuniary and non-pecuniary damages caused by the violation need to be indemnified, and any other measures deemed appropriate in that scope need to be taken (see *Mehmet Doğan*, §§ 55, 57).

54. In cases where the violation originates from a court ruling or the [trial] court is unable to redress the violation, 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 the Law 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 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 redress of the continuing violation (see *Mehmet Doğan*, §§ 58, 59; *Aligül Alkaya and Others (2)*, §§ 57-59, 66, 67).

55. Having examined the application, the Court has concluded that the right to a reasoned decision has been violated. It has thus been understood that the violation stemmed from a court (judge) ruling.

56. In such cases, there is legal interest in holding a retrial in order to remove the consequences of the violation of the right to a reasoned decision. A retrial to be conducted in this scope aims to remove the violation and its consequences according to Article 50 § 2 of the Law 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 by the Diyarbakır 3rd Magistrate Judge 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. Thus, a copy of the judgment must be sent to the Diyarbakır 3rd Magistrate Judge.

57. 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 a reasoned decision.

58. The total litigation costs of TRY 4,087.60 including the court fee of TRY 487.60 and the counsel fee of TRY 3,600.00, 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 14 September 2021 that

A. The alleged violation of the right to a reasoned decision be DECLARED ADMISSIBLE;

B. The right to a reasoned decision within 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 REMITTED to the Diyarbakır 3rd Magistrate Judge (no. 2020/3201 miscellaneous) for a retrial to redress the consequences of the violation of the right to a reasoned decision;

D. The applicant's claims for compensation be REJECTED;

E. The total litigation costs of TRY 4,087.60, including the court fee of TRY 487.60 and counsel fee of TRY 3,600.00, 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 TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

MURAT BEYDİLİ

(Application no. 2019/14642)

17 June 2021

On 17 June 2021, 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 *Murat Beydili* (no. 2019/14642).

THE FACTS

[9-31] A curfew was declared in the district where the applicant was residing due to the ditch events taking place at the relevant time. Maintaining that he had to leave his residence during the period of curfew declared on account of the terrorist events in his district and that his family order had been disturbed and financial situation had deteriorated, the applicant applied to the Ministry of Interior, seeking the redress of the non-pecuniary damage he had sustained. The Ministry of Interior returned his application on the ground that it was the relevant governor's office that would address the issue.

The full remedy action brought by the applicant, raising the same allegations, for being awarded non-pecuniary compensation was dismissed by the incumbent administrative court (the court). In the reasoning of the decision, the court noted that the non-pecuniary damage sustained by the applicant did not involve any aspect of extraordinary nature, which might be considered as distinct from the damage sustained by the other individuals within the society. The applicant's appeal against this decision was dismissed by the regional court of appeal.

The applicant lodged an individual application with the Constitutional Court on 16 April 2019.

V. EXAMINATION AND GROUNDS

32. The Constitutional Court ("the Court"), at its session of 17 June 2021, examined the application and decided as follows:

A. Request for Legal Aid

33. The applicant claimed that he could not afford to pay the individual application fee and expenses and accordingly requested to be granted legal aid.

34. It has been understood that the applicant is unable to afford to the litigation costs without suffering a significant financial burden. Therefore, in accordance with the principles set out by the Court in the case of *Mehmet Şerif Ay* (no. 2012/1181, 17 September 2013), his request for legal aid is not manifestly ill-founded and should be accepted.

B. Alleged Violation of the Right to Property

1. The Applicant's Allegations

35. The applicant asserted that his house had been destroyed during terrorist incidents, as a result of which he had been forced to leave his house. Indicating that he did not receive any payment to reimburse the damage to his possessions, the applicant alleged that his right to proper had been violated.

2. The Court's Assessment

36. Pursuant to Article 148 § 3 of the Constitution and Article 45 § 2 of the Law on the Establishment and Rules of Procedures of the Constitutional Court (Law no. 6216, dated 30 March 2011), the ordinary legal remedies must be exhausted in the first place in order for an individual application to be lodged with the Court.

37. Therefore, individual application is a subsidiary remedy which can be availed of where the alleged violations of rights are not remedied by first instance courts. As a requirement of this 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. According to this principle, the 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).

38. In order to speak of a requirement to exhaust legal remedies, the legal system should first provide for an administrative or judicial avenue that could be pursued by a person who raises an alleged violation of

his rights. Moreover, this legal remedy must be effective, capable of eliminating the consequences of the alleged violation, accessible through a reasonable effort by the applicant, and practically function rather than being formulated in law. An applicant cannot be expected to exhaust a legal remedy that does not exist, nor is there an obligation to exhaust avenues that are ineffective *de jure* or *de facto*, incapable of remedying the consequences of a violation, or far from being actually accessible and practical due to certain excessive or unusual formalistic requirements (see *Fatma Yıldırım*, no. 2014/6577, 16 February 2017, § 39).

39. In the present case, the applicant complained that the administration had not made any payments to him for the household furniture and goods, which had been destroyed during terrorist incidents. In addition, despite complaining of a denial of redress for his pecuniary damages, the applicant also claimed non-pecuniary compensation in the proceedings he brought against the administration and he made this set of proceedings a subject-matter of the individual application. From this standpoint, a deliberation should be made as to whether there was an effective remedy applicable to the said complaint raised by the applicant.

40. Article 7 of the Law no. 5233 lists the pecuniary damages that can be covered within the scope of that Law. According to this provision, any damage inflicted on animals, trees, products, other movable and immovable properties shall be compensated. Moreover, in the event of disability or death, the damages incurred as well as the treatment and funeral expenses shall be reimbursed. Lastly, the pecuniary damages stemming from persons' inability to access their assets due to counter-terrorism activities shall be covered under this Law. Accordingly, there was no obstacle preventing the applicant from claiming compensation for damages by means of submitting an application with the administration under this Law in respect of his household goods that had been destroyed during terrorist incidents.

41. As regards the compensation of damages stemming from the fight against terrorism, the applicant could have also brought a full-remedy action before an administrative court against the administration pursuant to Article 13 of the Law no. 2577. As such, the applicant has the right

to claim redress for his loss through a full remedy action against the administration. Therefore, it must be acknowledged that the said avenue constitutes an effective and accessible legal remedy, which the applicant can pursue against the administration in order to obtain redress for the damages that he allegedly sustained because of terrorism.

42. In conclusion, the Court has observed that the applicant did not submit with the individual application file any information or document indicating that he had pursued the said legal remedy. In this regard, it is not possible to say that the available legal remedies were exhausted with respect to the complaint under the right to property, namely the claim for compensation of pecuniary damages allegedly incurred. Thus, in view of the subsidiary nature of the individual application mechanism, the Court cannot examine an application lodged without first having exhausted such legal remedies that offer an effective and accessible prospect of success.

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

C. Alleged Violation of the Right to a Fair Hearing

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

44. The applicant asserted the following:

i. The trial court indicated findings in its reasoned judgment to the effect that he had been displaced from his residence, that the education of his children had been interrupted for a while, and that he had thus been aggrieved. Those findings demonstrated the pecuniary and non-pecuniary damages he had sustained. Since the fact that there were so many of explosives, ditches and barricades in his district was the result of a service fault on the part of the administration, his non-pecuniary damages should have been compensated by virtue of the principle of fault liability. His non-pecuniary damages should have been redressed according to the principle of social risk, as well, as the Law no. 5233 was drafted on the basis of this principle. The terrorism-related pecuniary

damages incurred by citizens living in his district were reimbursed under the Law no. 5233. The fact that the pecuniary damages were being reimbursed on the basis of that Law meant that the conditions for the principle of social risk actually emerged.

ii. He left his home; the places where he had been born and raised were ruined to the extent of being unrecognisable; he had to live somewhere else for a long time; he could not work during that time; he became impoverished as he had to acquire new furniture etc. and pay rent; the educational lives of his children were interrupted; his home was destroyed along with the sentimental values it hosted. Thus, the trial court's reasoning, which found that his non-pecuniary damages were not distinguishable from the damages incurred by other members of the society or had no extraordinary aspect, was in contravention of the procedure and the law.

iii. The justification in the trial court's ruling which read that "*the requirements of being a social state should not be interpreted in a way that will financially incapacitate the state by placing an excessive burden on it*" was against the law because, otherwise, the pecuniary damages arising over the course of the process would not be covered, either. He complained that the trial court had substituted itself, in a sense, for the administration in rejecting the case, which contravened the principle of independence of the judge. Lastly, the decision was delivered at the end of an incomplete inquiry and examination process; his allegations and objections were not assessed; and his case was rejected for unjust and unlawful reasons despite the emergence of the conditions necessary for an award of non-pecuniary compensation. Thus, his right to a fair trial was violated.

45. In its observations, the Ministry emphasised that the curfew measure, declared from 14 March 2016 until 25 July 2016 within the context of the fight against the acts of violence and terrorism that had been increasing and spreading in Nusaybin district, had been put in place with a view to protecting the citizens from the barricades and ditches trapped with mines and explosives by members of the terrorist organisation. According to the Ministry, the relevant public institutions were conducting a fight, within the boundaries of the rules of law, against

acts of terrorism that threatened national security and public order and targeted the safety of life and property of the citizens as well as the security forces. The Ministry also reiterated, with reference to the court ruling in question, the findings to the effect that the administration had no fault liability, strict liability or any liability based on the principle of social risk within the framework of an activity conducted against the acts of members of the terrorist organisation. Comparing the legitimate aim pursued in the implementation of the measure and the alleged burden giving rise to the applicant's claim for non-pecuniary compensation, the Ministry noted that the fair balance was not upset significantly to the detriment of the applicant.

46. In response to the Ministry's observations, the applicant maintained that the non-pecuniary damages he had incurred due to the declaration of a curfew should have been compensated pursuant to fault liability, strict liability and liability based on the principle of social risk as required by the relevant provisions of law; therefore, he could not accept the opinion to the contrary.

2. The Court's Assessment

47. Article 36 § 1 of the Constitution provides as follows:

> *"Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures."*

48. 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). Considering the applicant's complaint as a whole, the Court has understood that the complaint concerns the trial court's interpretation on the administration's liability. Thus, it appears that the essence of the complaint pertains to the question of whether this interpretation of the trial court prejudiced the fairness of the proceedings and the application should, therefore, be examined from the standpoint of the right to a fair hearing.

49. In the present case, having examined the applicant's claim for

compensation both in terms of fault liability and liability based on the principle of social risk, the Court has found that the conditions did not arise for either of them. It has understood from the application form that the applicant's principal complaints are related to the trial court's considerations about the liability based on the principle of social risk. From this standpoint, the considerations made and the conclusion reached in the trial court's decision with regard to fault liability will be excluded from the scope of this examination.

a. Applicability

50. The right to a fair trial, guaranteed under Article 36 of the Constitution, is applicable not only to proceedings related to a criminal charge but also in the determination of one's *civil rights and obligations*. For the application of Article 36 § 1 of the Constitution to *civil* matters, there must be a *right* at stake that a person is afforded by the legal order or at least has an arguable basis and this right must have a *civil* character. Secondly, there has to be a dispute that affects the person's interest in relation to that right. Then, this dispute must have a decisive nature with regard to the determination of the right at stake and its enjoyment (see, *mutatis mutandis*, *Mehmet Güçlü and Ramazan Erdem*, no. 2015/7942, 28 May 2019, § 28).

51. As regards the present case, whether or not the complaint giving rise to the application is a *dispute* related to *civil rights and obligations* is important for ascertaining the scope of the right to a fair trial. The essence of the applicant's complaint concerns the non-reimbursement, within the framework of the principle of social risk, of the damages incurred during terrorist incidents.

52. There is no provision of law that stipulates the reimbursement by the State of non-pecuniary damages incurred during acts of terrorism under the principle of social risk. It may be understood from the applications brought before the Court that non-pecuniary damages are not covered by the Law no. 5233, which was enacted so that the State would reimburse the damages incurred due to acts of terrorism or counter-terrorism activities (see, among many other judgments, *Özden Sayar and Deren Dilara Sayar*, no. 2013/4022, 13 April 2016, §§ 51-75). On

the other hand, the State's liability based on the principle of social risk has been recognised in the aforementioned and well-established case-law of the Supreme Administrative Court. Accordingly, the burden of the damages which take place in the administration's area of activity, are not a direct consequence of public service but are specific and extraordinary damages that a person sustains for simply being a member of the society must be shared by the whole society. With this approach, the Supreme Administrative Court has acknowledged that it is not possible to speak of any fault attributable to the individuals who incur damages due to acts of terrorism that are essentially targeted at the State and aimed at abolishing the constitutional order. Also, setting out from the State's obligation to prevent such incidents, it has held that the damage in question should be distributed among the whole society.

53. In the present case, the applicant contends that he sustained non-pecuniary damages due to the terrorist organisation's activities and the security measures imposed in order to put an end to those activities. He maintains that those damages should be compensated by the State within the scope of the principle of social risk. In view of the Supreme Administrative Court's well-established case-law, it cannot be said that the applicant's alleged entitlement to non-pecuniary compensation within the scope of the principle of social risk does not have any arguable basis in the Turkish legal system. Indeed, the trial court examined the applicant's claim for non-pecuniary compensation on the merits. Having regard to all of these circumstances, the Court has arrived at the opinion that there is a dispute related to one the of the applicant's rights having a basis that is arguable before courts. Moreover, there is no doubt as to the fact that the right to non-pecuniary compensation is of a civil nature. Therefore, the Court concludes that the right to a fair trial guaranteed under Article 36 of the Constitution is applicable to the present case.

b. Admissibility

54. The complaint concerning an 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

55. The right to a fair trial guaranteed under Article 36 of the Constitution includes safeguards aimed at securing formal justice and not material justice. From this perspective, the right to a fair trial does not offer a guarantee for the conclusion of the proceedings in favour of either party. The right to a fair trial essentially ensures that the trial process and its procedure are conducted in a fair manner (see *M.B.* [Plenary], no. 2018/37392, 23 July 2020, § 80).

56. In Article 148 § 4 of the Constitution, it is set out that 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 judgments, *Ahmet Sağlam*, no. 2013/3351, 18 September 2013).

57. However, in cases where there is an interference with the fundamental rights and freedoms, it is the 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).

58. Besides, the Court may, in very exceptional cases, 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 due to manifest arbitrariness and the procedural safeguards inherent in the right to a fair trial have thereby become dysfunctional, this situation - indeed related to the outcome of the proceedings - turns into a procedural safeguard itself. Therefore, the Court's examination as to whether the inferior courts' 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 (see *Ferhat Kara* [Plenary], no. 2018/15231, 4 June 2020, § 149; and *M.B.*, § 83).

59. The right to a fair trial does not guarantee that the interpretation of provisions of law which would ensure a favourable conclusion for the applicant be taken as a basis. Interpreting the provisions of law applicable to the dispute fall, as indicated above, within the discretion of the inferior courts. That being said, the inferior courts must bear in mind the principle of a state governed by the rule of law - one of the characteristics of the Republic as listed in Article 2 of the Constitution - when interpreting provisions of law. In fact, the rule of law is a principle that must absolutely be taken into consideration in the interpretation of all articles of the Constitution. In this context, the requirements of the rule of law must be respected when interpreting the scope and content of the right to a fair trial under Article 36 of the Constitution (see *M.B.*, § 84).

60. In this regard, the principle of legal certainty is one of the requirements of the rule of law. Aimed at ensuring the legal safety of persons, the principle of legal certainty requires that legal norms are foreseeable, that individuals can trust the state in all of their acts and actions, and that the state avoids using any methods which would undermine this trust in their legislative acts. The certainty principle means that legislative acts must be sufficiently clear, non-ambiguous, comprehensible and applicable 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.2013/39, K.2013/65, 22 May 2013; E.2020/80, K.2021/34, 29 April 2021, § 25).

61. Since the interpretation of provisions of law applicable to the civil rights of the applicants in a manifestly arbitrary manner or in a way that avoids reinstatement of the right (i.e. in defiance of justice) would render the procedural guarantees meaningless, it would be possible to speak of a breach of the right to a fair trial. Because the inferior court's interpretation cannot be foreseen by the applicant in such a case and the unforeseeable interpretation of legal norms would prejudice the rule of law (see *M.B.*, § 86).

62. In the case of *Kenan Özteriş* (no. 2012/989, 19 December 2013), the Court held that the interpretation of the Supreme Military Administrative Court ("the SMAC") was in contravention of the clear provision in Article 95 of the former Turkish Criminal Code (Law no. 765 of 1 March 1926) and found a violation of Article 36 of the Constitution because, despite the existence of an explicit provision of law with respect to the consequences of postponement of the conviction that had been rendered in respect of the applicant and the obvious nature of how that provision was to be construed, the Second Chamber of the SMAC had drawn an unusual meaning from the clear provision of law and had applied it accordingly, as a result of which the decision had become *unforeseeable* and involved a *manifest error of judgment*.

63. Similarly, in the case of *Mehmet Geçgel* (no. 2014/4187, 18 April 2019), the Court found a violation of the applicant's right to a fair hearing due to the manifest error of judgment in the administrative court's decision because the latter had rejected the applicant's claim for compensation as a result of an assessment as if there had been an actual conviction even though there had not been a conviction according to the principles of criminal law since the applicant's sentence had been postponed within the scope of the Law on Conditional Release and Suspension of the Proceedings and Sentences as regards the Offences Committed before 23 April 1999 (Law no. 4616 of 21 December 2000).

64. Furthermore, in the case of *M.B.*, lodged by a lawyer who had been dismissed from public office, the Court considered that the annulment of the applicant's registration with the bar association had been based on a broad and unforeseeable interpretation of the relevant provision of law. Such interpretation had rendered dysfunctional the procedural safeguards in the proceedings concerning the applicant's civil right. Therefore, the Court found a violation of the applicant's right to a fair hearing. In this context, the Court emphasised that the interpretation to the effect that self-employed attorneys practising law would also fall within the scope of the provision "*Those dismissed from office under paragraph one may no longer be employed in public service.*" under Article 4 § 3 of the Law on Adoption of the Decree with the Force of Law on the Measures taken within the scope of the State of Emergency (Law no. 6749 of 18 October 2016) was an interpretation straying from the essence of the law.

ii. Application of Principles to the Present Case

65. The applicant filed an action for non-pecuniary compensation by stating that he had been forced to leave his district due to the ditch events (*hendek olayları*), experienced difficulties in settling down into the place he had moved to, his family order had been disrupted, and the education of his children was interrupted. The principal issue to be deliberated on in the said case was whether the applicant had sustained non-pecuniary damages and, if so, the conditions had emerged for the reimbursement of the damages by the State as per the principle of social risk.

66. It must be underlined that the trial court acknowledged in part that the applicant had sustained non-pecuniary damages. Moreover, it also deliberated on whether or not the conditions had emerged for a non-pecuniary compensation under the principle of social risk. At the end of its assessment, however, the trial court concluded that the conditions had not emerged for reimbursement of this non-pecuniary damage by the State as per the principle of social risk.

67. It is primarily within the jurisdiction of the inferior courts (i.e. the courts of instance) to interpret the provisions of law applicable to the dispute and assess the evidence. In this connection, it is primarily for the

inferior courts to determine whether the conditions were satisfied for the emergence of a liability based on the principle of social risk in the present case. The assessment to be performed by the Court shall be confined to examining whether the inferior court's assessment was arbitrary and unforeseeable to the extent that avoided reinstatement of the right.

68. The principle of social risk, the framework of which is drawn in the case-law of the Court of Cassation by setting out from paragraphs one and seven of Article 125 of the Constitution, is a principle of administrative responsibility that aims to distribute among the society the burden of the specific and extraordinary damages which stem from the circumstances of the society, take place in the administration's area of activity but not as a direct consequence of the public service, occur as a result of the materialisation of a risk that is social in nature, and are sustained for simply being a member of the society. The Supreme Administrative Court has pointed out in its case-law that the acts qualified as *terrorist incidents* are targeted at the State, aim to overthrow the constitutional order, and do not originate from a personal hostility towards the persons or establishments incurring damages in such incidents; thus, it is a requirement of fairness that the administration, which has failed to prevent terrorist incidents despite its obligation to do so, compensates the damages occurring as a result of such incidents, in view of their specific and extraordinary character, by means of distributing the burden among the society. Accordingly, in order for the emergence of the State's liability based on the principle of social risk, there are certain conditions that must be met simultaneously, which are: the damage must take place within the context of acts of terrorism or counter-terrorism activities; the aggrieved party must not contribute to the occurrence of those incidents; and the damage must be specific and extraordinary.

69. There is no doubt as to the fact that the damage acknowledged by the trial court in the present case had taken place as a result of acts of terrorism and counter-terrorism activities. Moreover, the trial court reached no finding to the effect that the applicant had contributed to the occurrence of the incident leading to the damage. Nevertheless, the trial court considered that the damage incurred by the applicant was not specific or extraordinary. The trial court pointed at the emergence

of a general state of unrest within the society because dozens of security officers had been martyred in the clashes which had been spreading to an area consisting of multiple provinces and involved the use of heavy weaponry. According to the trial court, in this extraordinary situation where the infrastructure and superstructure of cities were greatly damaged, the State took measures aimed at evacuating the citizens and meeting their needs for food, shelter and healthcare; however, despite those measures, the applicant had to leave his home. While acknowledging that the applicant had sustained certain damages due to the difficulties he had faced in settling into new surroundings after having been forced to leave his home under such circumstances, the trial court did not consider that this damage had any aspect to make it extraordinary or distinguishable from the damages incurred by other members of the society.

70. In this case, the principal matter to be examined within the context of individual application is whether or not the court's assessment to that effect involved any manifest error of judgment or arbitrariness to the extent of disregard for justice and common sense. Even though the trial court pointed at the emergence of a general state of unrest within the society because dozens of security officers had been martyred in the clashes which had been spreading to an area consisting of multiple provinces and involved the use of heavy weaponry, it should be underlined that it did not attribute any fault to the applicant in the occurrence of those incidents.

71. In addition, the trial court placed emphasis on the fact that the State had taken a range of measures in order to evacuate and satisfy the daily needs of the inhabitants of the region where the security operations had been taking place. Without a doubt, the measures taken by the State within the scope of its constitutional duties with a view to protecting the safety of life and property of the said region's inhabitants can be regarded as factors reducing the applicant's non-pecuniary damages or - at least - preventing even more damages. Nevertheless, it is quite hard to say that the implementation of such measures rendered the applicant's damages any less specific or extraordinary.

72. Lastly, there is no question about the fact that the applicant encountered certain difficulties, both personally and in terms of his family, when building a new life in a new place after having had to leave his house - where he had established a life and had been living within a certain order - due to terrorist incidents. It is also not open to discussion that the said issues would cause pain and suffering in a person. Furthermore, the whole society was certainly affected by the incidents in question to a certain degree. However, it is not a reasonable and acceptable interpretation to say that other members of the society incurred damages to the same extent as the applicant, who was forced to leave his living environment and his home and thus experienced profound stress, worry and suffering, and that the damage incurred by the applicant was therefore not specific or extraordinary.

73. Having regard to all of the foregoing as a whole, the Court considers that the inferior court's interpretation to the effect that the damage incurred by the applicant was not specific or extraordinary was made on the basis of a manifest error of judgment. This interpretation by the inferior court based on a manifest error of judgment with regard to the conditions for the administration liability rendered the procedural guarantees dysfunctional, deprived the applicant of his right to non-pecuniary compensation, and prejudiced, as a result, the fairness of the proceedings as a whole.

74. For these reasons, the Court found a violation of the applicant's right to a fair hearing safeguarded by Article 36 of the Constitution.

D. Other Alleged Violations

75. Stating that he was poor and had become even poorer due to what he had gone through and he had only been able to file his case with legal aid, the applicant complained of an alleged violation of his right of access to a court because the trial court had ordered him to bear the attorney's fees of the respondent party even though it was clear that he could not afford it. The applicant also raised an alleged violation of the right to education as his children had been unable to attend school for a long time and experienced difficulties in adapting to the new school to which they had to enrol.

76. The Court has concluded that the applicant's right to a fair hearing was violated and that a retrial must be conducted in order to eliminate the consequences of the violation. In this scope, the rulings rendered by the trial court and the Regional Administrative Court will have been set aside with the order for a retrial.

77. Therefore, the attorney's fees pertaining to the respondent party, which the applicant was ordered by the trial court to pay in the present case, will be automatically be removed in connection with the consequence of the violation. For this reason, the Court has found no reason to hold an examination on the alleged violation of the right of access to a court at this stage.

78. Lastly, as regards the claim for non-pecuniary compensation due to the interruption of his children's education, which the applicant put forward when filing his action for compensation against the administration, it will be possible for the inferior courts to re-evaluate this matter upon the order for a retrial. Thus, the Court has found no reason to hold an examination on the alleged violation of the right to education at this stage.

E. Application of Article 50 of Code no. 6216

79. 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."

80. The applicant requested a finding of violation and claimed compensation.

81. The general principles on how to eliminate 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).

82. 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).

83. In cases where the violation results from a court decision or the [trial] court is unable to eliminate the violation, the Court decides 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 Law no. 6216 and Article 79 § 1 (a) of the Internal Regulations. 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

orders 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; and *Aligül Alkaya and Others (2)*, §§ 57-59, 66, 67).

84. Having examined the application, the Court has concluded that the right to a fair hearing was violated. It has thus been understood that the violation stemmed from a court decision.

85. In such cases, there is legal interest in holding a retrial in order to remove the consequences of the violation of the right to a fair hearing. A retrial to be conducted in this scope aims to remove the violation and its consequences according to Article 50 § 2 of the Law no. 6216, which contains a provision that is specific to the individual application mechanism. In this regard, the step required to be taken 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 remitted to the 2nd Chamber of the Mardin Administrative Court for retrial.

86. The applicant's claim for compensation, on the other hand, must be rejected as the Court considers that ordering a retrial to redress the violation along with its consequences offers the applicant sufficient redress.

87. The litigation costs consisting of the counsel fee of 3,600 Turkish liras ("TRY"), 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 June 2021 that

A. The request for legal aid be ACCEPTED;

B. 1. The alleged violation of the right to property be DECLARED INADMISSIBLE for *non-exhaustion of the available legal remedies*;

2. The alleged violation of the right to a fair hearing be DECLARED ADMISSIBLE;

C. The right to a fair hearing within the scope of the right to a fair trial safeguarded by Article 36 of the Constitution was VIOLATED;

D. There is NO NEED TO EXAMINE separately, at this stage, the alleged violations of the right of access to a court and the right to education;

E. A copy of the judgment be REMITTED to the 2nd Chamber of the Mardin Administrative Court (E.2017/3697, K.2018/1192) for a retrial to redress the consequences of the violation of the right to a fair hearing within the scope of the right to a fair trial;

F. The applicant's claims for compensation be REJECTED; and

G. The litigation costs consisting of the counsel fee of TRY 3,600 be REIMBURSED to the applicant;

H. 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

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

ÜMMÜGÜLSÜM SALGAR

(Application no. 2016/12847)

21 October 2021

On 21 October 2021, the Plenary of the Constitutional Court found a violation of the right to a reasoned decision under the right to a fair trial safeguarded by Article 36 of the Constitution in the individual application lodged by *Ümmügülsüm Salgar* (no. 2018/28616).

THE FACTS

[5-39] The applicant, having successfully passed the exam for being a police officer, enrolled for the vocational training. As a result of the security clearance investigation conducted against the applicant during the training period, it was found that her husband had been imposed a punishment for forgery of official documents, the pronouncement of which had been suspended. Thereupon, the applicant's status as a candidate student was terminated under Article 7 of the repealed Regulation on Admission to the Police Vocational Training Centres ("the Regulation"), and she was dismissed from the Police Vocational Training Centre for no longer being entitled to be a candidate student. The applicant's challenge against her dismissal was rejected by the administrative court. Upon appeal, the decision was upheld by the Supreme Administrative Court, and the applicant's subsequent request for rectification was also rejected.

The applicant lodged an individual application with the Constitutional Court within the prescribed period of time.

V. EXAMINATION AND GROUNDS

40. The Constitutional Court ("the Court"), at its session of 21 October 2021, examined the application and decided as follows:

A. Alleged Violation of the Principle of Individual Nature of Criminal Liability

1. The Applicant's Allegations

41. The applicant alleged that criminal liability is of individual nature and no one may be punished for the criminal acts of someone else, that she had been punished despite the absence of any act or offence

committed by her, and that there had been therefore a violation of the principle of individual nature of criminal liability.

2. The Court's Assessment

42. Pursuant to Article 148 § 3 of the Constitution and Article 45 § 1 of the Law on the Establishment and Rules of Procedures of the Constitutional Court (Law no. 6216, dated 30 March 2011), in order for an individual application to be examined, the right allegedly violated by the public power has to be guaranteed by the Constitution and fall within the scope of the Convention and additional protocols to the Convention to which Türkiye is a party, as well. The applications involving an alleged violation of rights outside the joint protective realm of the Constitution and the Convention do not fall within the scope of the individual application mechanism (see *Onurhan Solmaz*, no. 2012/1049, 26 March 2013, § 18).

43. In this scope, the Court's jurisdiction to hold an examination under Article 38 of the Constitution within the context of an individual application is not so wide as to cover any sanction falling within the normative area of the said article but is actually limited to sanctions that may qualify as a *criminal charge* within the framework of the Convention. In other words, the Court has jurisdiction to review in an individual application case whether only the sanctions qualifying as a *criminal charge* falling within the joint protection realm of the Constitution and the Convention caused a violation of the guarantees under Article 38 of the Constitution, not all sanctions that fall within the ambit of that article (see *D.M.Ç.*, no. 2014/16941, 24 January 2018, § 33).

44. Article 38 § 7 of the Constitution, titled "*Principles relating to offences and penalties*", provides as follows:

"Criminal liability shall be individual."

45. The principle of individual nature of criminal liability has been adopted and clearly afforded constitutional provision by the provision "*Criminal liability shall be individual*." in Article 38 § 7 of the Constitution. The legislative intent of this article indicates that the said paragraph has

introduced the rule that "*no one other than the offender may be punished for an offence*" and that it is a fundamental and indispensable rule that is well-rooted in criminal law and a part of the principle of "*criminal liability based on fault*".

46. The individual nature of criminal liability is one of the basic rules of criminal law. The aim of the individual nature of criminal liability is to ensure that a person cannot be punished for an act they have not committed. In other words, it means not holding a person liable for someone else's acts. Since no distinction is made between administrative and judicial penalties in Article 38 of the Constitution, administrative fines are also subject to the principles envisaged by this article (see the Court's judgment no. E.2012/93, K.2013/8, 10 January 2013, § 33). In this connection, it is clear that the rule about the individual nature of criminal liability under Article 38 § 7 of the Constitution is only applicable to *sanctions of criminal/punitive nature*.

47. In the present case, the applicant was subjected to dismissal from the Police Vocational Training Centre ("the POMEM") due to the negative outcome of her security investigation because her spouse had been sentenced to 1 year and 8 months' imprisonment for the offence of forgery of official documents, which was then suspended. Pursuant to the above-mentioned legislation, persons concerned are admitted to police vocational training at the POMEM in order to train police officers for the national police. The Court observes that the applicant lost her chance to become a police officer as a result of the termination of the police vocational training, which is a prior condition for admission to the police officer status, before even having attained that status.

48. It is the applicant's allegation that she was punished unjustly as she was dismissed (i.e. expelled) from the POMEM due to a court decision in respect of her spouse, namely a decision to suspend pronouncement of the judgment in relation to the offence of forgery in official documents, even though she had not committed any offence. Accordingly, she complained of an alleged violation of the principle of individual nature of criminal liability.

49. In this scope, what should be assessed first is whether the applicant's dismissal from the POMEM bore a *criminal/punitive* nature. Thus, regard must be had to whether the said act of dismissal was issued after a conviction ordered because of a criminal offence, what the nature of the act was and whether it pursued a punitive aim, and how severe the act was.

50. In the case giving rise to the present application, the applicant was dismissed not because of an act/activity of hers that was deemed to be in contravention of law according to the legal order, but due to a subsequent discovery of her failure to satisfy one of the conditions required from candidates applying to the POMEM. Thus, it is clear that the public authority's interference in the present case consists of the termination of the applicant's candidacy status on account of her failure to meet the conditions sought for admission to *the relevant public office*.

51. The act of dismissal in respect of the applicant was neither performed upon a conviction rendered within the scope of a set of criminal proceedings against the applicant, nor was she accused of having committed any act defined by criminal laws as an offence or described by laws as administrative unjustness or a misdemeanour under administrative law.

52. The act of dismissal in respect of the applicant was issued due to non-satisfaction of the conditions for admission to a certain professional group. The said condition does not affect anyone who is not a part of that professional group or does not wish to be admitted to that professional group. Moreover, the act performed in respect of the applicant does not result in a custodial sentence, nor does it pursue the aim of punishing the applicant due to any unlawful act of hers. Lastly, the act in question is simply limited to dismissing her from the POMEM due to her failure to meet the conditions but this act has clearly not involved any prohibition on the applicant's employment in other fields of public service or in the private sector.

53. In this context, seeing that the public interference was not related to a criminal charge, was not issued because of any behaviour against the administrative order but due to non-satisfaction of the POMEM's

admission conditions, and did not involve any prohibition on the applicant's employment in other fields of public service or in the private sector, it is not possible to qualify this interference to be of a *criminal/punitive nature*. Thus, it has been deemed unnecessary to hold an examination with regard to the applicant's allegations, which clearly fall outside the ambit of the *principle of individual nature of criminal liability*.

54. For these reasons, this part of the application must be declared inadmissible for being incompatible *ratione materiae*, without any further examination as to the other admissibility criteria.

B. Alleged Violation of the Right to a Reasoned Decision

1. The Applicant's Allegations

55. The applicant alleged that her right to a reasoned decision had been violated since the appellate decision did not contain reasons and her objections were rejected without any justification.

2. The Court's Assessment

56. 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."*

57. 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."*

58. Article 70 § 1 of the Constitution, titled "*Entry into public service*", reads as follows:

"Every Turk has the right to enter public service."

59. Article 141 § 3 of the Constitution, titled "*Publicity of hearings and the necessity of reasoning for decisions*", provides as follows:

"The decisions of all courts shall be written with a reasoning."

a. Applicability

60. The right to a fair trial, guaranteed under Article 36 of the Constitution, is applicable not only to proceedings related to a criminal charge but in the determination of one's *civil rights and obligations*. For the application of Article 36 § 1 of the Constitution to *civil* matters, there must be a *right* at stake that is a person is afforded by the legal order or at least has an arguable basis. Also, there has to be a dispute that affects the person's interest in relation to that right. Then, this dispute must have a decisive nature with regard to the determination of the right at stake and it enjoyment (see *Mehmet Güçlü and Ramazan Erdem*, no. 2015/7942, 28 May 2019, § 28).

61. It is beyond dispute, pursuant to Article 70 of the Constitution and Article 48 of the Law on Civil Servants (Law no. 657, dated 14 July 1965), that every Turkish citizen has the right to enter public service. Moreover, there is no doubt as to the actionable nature of acts of non-admission to civil service in Turkish law. In the present case, the applicant brought an action against the decision to dismiss her from the POMEM on account of her failure to satisfy the conditions envisaged by the Regulation. The substance of the dispute was whether the applicant bore the qualifications sought in the students to be accepted into the POMEM. From this standpoint, the action was capable of annulling the impugned act involving the applicant's dismissal from the POMEM. Thus, it has been concluded that the case giving rise to the individual application had a decisive nature in respect of the applicant's civil rights and obligations and that all the guarantees inherent in the right to a fair trial should be applicable in this case.

b. Admissibility

62. The complaint concerning an alleged violation of the right to a

reasoned decision must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

c. Merits

i. General Principles

63. Article 36 § 1 of the Constitution provides for everyone's right to a fair trial but it does not explicitly mention a right to a reasoned decision. On the other hand, the reasoning of the legislative bill to add the phrase "*… and the right to a fair trial"* to Article 36 of the Constitution emphasised that the right to a fair trial, which is also guaranteed by the international conventions to which Türkiye is a party, was being incorporated into the text of the article. In fact, the European Court of Human Rights ("the ECHR") has underlined in several judgments that the right to a reasoned decision is included in the right to a fair hearing under Article 6 § 1 of the Convention. Therefore, it must be acknowledged that the right to a fair trial under Article 36 of the Constitution also encompasses the right to a reasoned decision (see *Abdullah Topçu,* no. 2014/8868, 19 April 2017, § 75).

64. Article 141 § 3 of the Constitution, the text of which reads "*The decisions of all courts shall be written with a reasoning*", places an obligation on the courts to provide reasons for their decisions. As a requirement of the principle of constitutional integrity, the said constitutional norm should also be kept in mind when holding an assessment on the right to a reasoned decision (see *Abdullah Topçu,* § 76).

65. The right to a reasoned decision aims to ensure and oversee that persons are tried fairly. This right is also necessary for the parties to know whether their claims have been examined in accordance with the rules when reaching a ruling and to make sure that the society learns about the reasons for a judicial decision given on their behalf in a democratic society (see *Sencer Başat and Others* [Plenary], no. 2013/7800, 18 June 2014, §§ 31 and 34).

66. The aforementioned obligation of the courts cannot be construed as to mean that any and every allegation and defence raised during the proceedings must be responded in a detailed manner in the reasoning

of the decision. However, even though the inferior courts (courts of instance) are not obliged to address all allegations raised before them (see *Yasemin Ekşi*, no. 2013/5486, 4 December 2013, § 56), it must be inferred from the reasoned decision that the main issues of the case were examined.

67. The question of exactly which elements must be included in a decision depends on the nature and circumstances of the case. Especially where the allegations and defences raised expressly and specifically during the proceedings have an effect on the outcome of the proceedings, i.e. capable of changing the result of the trial, courts are required to respond with reasonable grounds to such matters that are directly related to the proceedings (see *Sencer Başat and Others,* §§ 35 and 39).

68. Moreover, where an appellate body finds the trial court's judgment appropriate, it is sufficient for it to include this conclusion in its decision either by using the same reasoning or making a reference. The important thing here is for the appellate body to demonstrate that it has examined the main elements stated in the appeal in any manner, and that it has examined and upheld or quashed the decision of the court of instance (see *Yasemin Ekşi*, § 57).

69. In cases where the court of instance failed to address substantial claims or respond to them with reasonable grounds, there will not be any assessment by first-instance court that the former could refer to if the same claims are raised before it, as well. In that case, the appellate body are constitutionally obliged to hold an assessment on those points, which directly relate to the proceedings, and respond to them with reasonable grounds.

70. On the other hand, due to the subsidiary nature of the individual application mechanism, it is primarily for the inferior courts to interpret the relevant legislation. What the Court examines in the context of an individual application is whether the interpretation that constituted the basis for the inferior court's reasoning caused a violation of the fundamental rights and freedoms enshrined in the Constitution (see *Şeyma Kayaoğlu,* no. 2014/5491, 5 July 2017, § 53).

ii. Application of Principles to the Present Case

71. In the present case, an act was issued to dismiss the applicant from the POMEM on grounds of a discovery - reached during the security investigation while her police vocational training was on-going - of the fact that her spouse had been sentenced to 1 year and 8 months' imprisonment for the offence of forgery of official documents and that a decision had been rendered to suspend pronouncement of the judgment in respect of her spouse.

72. The trial court indicated in its reasoned judgment that the Regulation stipulated that an absence of conviction of certain offences was necessary to become a student at the POMEM, even if a decision to suspend pronouncement of the judgment was rendered, and that these conditions had to be met by the POMEM student's *spouse, as well*. Noting that the legislation contained a clear provision on this matter and considering the importance and nature of the post, the trial court found no contravention of law or legislation in the impugned act.

73. In her petition for action, the applicant alleged that a decision to suspend pronouncement of the judgment bore the same result as an acquittal after completion of the probation period, that the decision to suspend pronouncement of the judgment had a debatable nature, and that the regulatory provision constituting the basis for the act imposed in her respect was in contravention of not only international law but also its domestic foundations, namely the Law no. 3201 and the Constitution. No explanation was provided with regard to the said allegations in the first-instance court's reasoned judgment. The applicant raised the same points in her petition for appeal, as she had done in her petition for action, but the said allegations were not addressed by the appellate body, either.

74. The applicant complained of the lack of reasoning in the appellate decision and the rejection of her objections without any justification. In the framework of the aforementioned general principles, it must first be examined whether the said allegations of the applicant were of such substantial nature that could change the outcome of the proceedings and whether those allegations needed to be responded to explicitly.

75. Article 70 of the Constitution provides for entering the public service as a fundamental right and Article 13 of the Constitution indicates that fundamental rights and freedoms may be restricted only by law. In the present case, on the basis of the relevant provision of the now-repealed Regulation, the applicant was dismissed from the POMEM on the ground that she did not satisfy the conditions required of candidates applying to the POMEM.

76. The Law no. 3201, which empowered the now-repealed Regulation in governing the conditions to be sought for becoming a student at the POMEM, did not contain any provision with regard to the qualifications of POMEM students but it simply confined itself to indicating in Additional Article 24 thereof that the conditions to be sought in students to be admitted to the POMEM would be governed by a regulation.

77. Article 7 § 1 (f) of the now-repealed Regulation, which was prepared on the basis of Additional Article 24 of the Law no. 3201, indicated that one of the conditions to be sought in students to be admitted to the POMEM was not being convicted of an intentional offence and sentenced to imprisonment for a term longer than six months or, even if it was pardoned or the forfeited rights have been reinstated, not being convicted, or be the subject of a decision to suspend pronouncement of the judgment, of the offence of forgery. Sub-paragraph (g) of the same paragraph stipulated that the condition in question would also be sought in the POMEM candidate's *spouse, as well*. Moreover, a similar provision is also included in the currently-applicable Regulation on Admission to Police Vocational Training Centres, which entered into force upon its promulgation in the Official Gazette (no. 29378, dated 6 June 2015) and repealed the former Regulation at issue.

78. Accordingly, without drawing any framework or providing for any rules regarding the conditions to be sought in persons to be admitted as students to the POMEM, the Law no. 3201 simply leaves it directly to the relevant regulation to lay down provisions on the said matter. Thus, the condition that was not required or provided for by law was stipulated by a regulation.

79. It is observed from the case-law of the Supreme Administrative Court cited above that, in the disputes related to requests for annulment of administrative acts that are issued by virtue of a regulatory act, bodies of administrative justice should also examine whether the impugned regulatory act contravenes the superior legal norms, i.e. the Constitution and the law, and to reach a conclusion by relying on the provisions of the superior legal norm if the regulatory act contains provisions that run counter to those superior norms.

80. In other respects, a decision to suspend pronouncement of the judgment, according to Article 231 of the Law no. 5271, refers to the practice of postponing the pronouncement of a conviction decision rendered at the end of criminal proceedings, contingent upon certain conditions. In case of a decision to suspend pronouncement of a judgment, the accused is held subject to a five-year probationary period. If the person concerned does not commit another intentional offence during the probationary period, their conviction shall be set aside and the case discontinued.

81. The practice of suspension of pronouncement of the judgment is one of the institutions of individualising judgments and sentences, such as postponement or alternative sanctions to short-term prison sentences. The judge, while establishing a conviction decision in respect of the accused, does not pronounce that judgment and places the person under supervision for a prescribed period of time. As long as the accused does not commit an intentional offence within that period of supervision and acts in compliance with the probation measure set out by the court, the judgment whose pronouncement was suspended shall be set aside.

82. The nature of the practice of suspension of pronouncement of the judgment was reviewed in the aforementioned decisions of the Plenary of the Court of Cassation in Civil Matters, which has held that a ruling which is established with a decision to suspend pronouncement of the judgment does not constitute a judgment in respect of the accused for a certain period of time and that it does not entail any consequences. Moreover, it has pointed out that this practice leaves the accused as is: the person concerned remains in the same position as someone currently

on trial and the proceedings are temporarily suspended. In its view, even though the "accused" status of the person on trial continues throughout the suspension period, that person cannot be regarded as a "convict" in any way.

83. The Law no. 5271 indicates that the suspension of pronouncement of the judgment means that the judgment does not create a legal consequence in respect of the accused. The case-law of the Court of Cassation states that a ruling established with a decision to suspend pronouncement of the judgment does not constitute a judgment in respect of the accused for a certain period of time, that the proceedings stay temporarily suspended, and that it does not entail any consequences.

84. A decision to suspend pronouncement of the judgment is a facility afforded with certain conditions in order to ensure that people who have not been convicted of an intentional offence before are not stigmatised as criminals and that they are re-integrated into society as benevolent individuals (see the Court's judgment no. E.2015/23, K.2915/56, 17 June 2015).

85. Indeed, the Court has held in several cases (see, for instance, *Ali Gürsoy*, no. 2012/833, 26 March 2013) that, where a sentence is imposed on the accused in connection with a criminal charge at the end of the trial, a decision to suspend pronouncement of the judgment means the postponement of the pronouncement of that judgment, subject to certain conditions. It has emphasised that a decision to suspend pronouncement of the judgment may be rendered according to Article 231 of the Law no. 5271 in cases where the sentence ruled at the end of the proceedings is imprisonment for a term of two years or less or a judicial fine; the suspension of pronouncement of the judgment means that the judgment does not create a legal consequence in respect of the accused according to paragraph 5 of the said article; and the suspension of pronouncement of the judgment is not listed among the rulings considered as a judgment in Article 223 § 1 of the same Law. It has concluded that a decision to suspend pronouncement of the judgment does not involve a ruling on the merits of the dispute, it is not a kind of decision that concludes the proceedings with a judgment, and it does not create, therefore, a final

outcome. In this connection, the Court has drawn attention to the risk of potential breaches of fundamental rights, notably the presumption of innocence, in the event that a decision to suspend pronouncement of the judgment were to be considered a ruling that established guilt.

86. In the case giving rise to the present application, despite the provision in the Law no. 5271 to the effect that a ruling issued together with a decision to suspend pronouncement of the judgment would not create any legal consequence in respect of the accused, the applicant's status as a candidate student was terminated and she was dismissed from the POMEM - based on the now-repealed Regulation - on the ground that her husband was the subject of a decision to suspend pronouncement of the judgment.

87. The applicant asserted both in her petition for action [before the first-instance court] and her petition for appeal [before the Court of Cassation] that the regulatory provision that had been relied on in issuing the impugned act was in contravention of superior legal norms; furthermore, she maintained that the decision to suspend pronouncement of the judgment was not a final decision, that its nature was debatable, and that it would entail the same result as an acquittal after completion of the probation period.

88. Accordingly, the applicant's allegation that the impugned provision of the now-repealed Regulation, which had a decisive nature in respect of her civil rights and obligations and a capacity to directly affect and restrict her right to enter public service, was in contravention of the laws and the Constitution, in view of the aforementioned case-law of the Supreme Administrative Court, is clearly a claim of such substantial nature that could change the outcome of the proceedings. Moreover, the question of whether an exception could be brought by a regulation to the evaluation of a decision to suspend pronouncement of the judgment in spite of the statutory provision as well as the jurisprudence to the effect that a decision to suspend pronouncement of the judgment is not a kind of decision that concludes the proceedings with a judgment and does not create, therefore, a final outcome in respect of the accused, who was not the applicant herself but her spouse in the present case, and the

applicant's claims regarding the nature of the practice of suspension of pronouncement of the judgment are clearly serious. Thus, in addition to the applicant's ability to raise her above-mentioned allegations before courts, the latter must address the substantial claims in their decisions as a requirement of the right to a reasoned decision.

89. In the instant case, it is the Court's understanding that the first-instance court did not examine the principal arguments in question which had been raised by the applicant and might have affected the outcome and it did not make any assessment in its reasoned judgment about the said matters. In this scope, the principal issues related to the dispute were not deliberated upon by the first-instance court in the reasoned judgment.

90. Similarly, the Court has observed that the appellate body did not provide any explanation or establish a reasoning in regard to the matters at issue, even though the applicant had submitted similar allegations in her request for appeal. It may be considered reasonable, in principle, for the appellate body to hold an assessment by referring to the first-instance court's judgment if the latter contains sufficient reasons for matters related to the substance of the case. In cases where the first-instance court's judgment does not provide any reasoning, the appellate body should address and respond, with reasons, to the substantial pleas raised by the applicants. In the present case, the Court notes that, although the applicant's principal allegations had not been deliberated on or responded to with reasons in the first-instance decision, the substantial claims raised by the applicant were not subsequently addressed by the appellate body, either. Therefore, the proceedings were found, as a whole, unfair.

91. For these reasons, the Court found a violation of the applicant's right to a reasoned decision within the scope of the right to a fair trial safeguarded by Article 36 of the Constitution.

C. Application of Article 50 of Code no. 6216

92. 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."*

93. The applicant requested the Court to find a violation, order a retrial, and award 10,000 Turkish liras ("TRY") as non-pecuniary compensation.

94. The general principles on how to eliminate 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).

95. 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 redressed, where applicable the pecuniary and non-pecuniary damages caused by the violation need

to be indemnified, and any other measures deemed appropriate in that scope need to be taken (see *Mehmet Doğan*, §§ 55, 57).

96. In cases where the violation results from a court ruling or the [trial] court is unable to redress the violation, the Court decides 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 Law 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 orders 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; and *Aligül Alkaya and Others (2)*, §§ 57-59, 66, 67).

97. The Court has found a violation of the right to a reasoned decision due to the inferior court's failure to deliberate on and respond to a substantial claim raised by the applicant for the resolution of the dispute. It has thus been understood that the violation in the present case stemmed from a court ruling.

98. In such cases, there is legal interest in holding a retrial in order to redress the consequences of the violation of the right to a reasoned decision. A retrial to be conducted in this scope aims to eliminate the violation and its consequences according to Article 50 § 2 of the Law no. 6216, which contains a provision that is specific to the individual application mechanism. In this regard, the step required to be taken 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 remitted to the relevant court for retrial.

99. The applicant's claim for compensation, on the other hand, must be rejected as the Court considers that ordering a retrial to redress the violation along with its consequences offers the applicant sufficient redress.

100. The total litigation costs of TRY 3,839.50 including the court fee of TRY 239.50 and counsel fee of TRY 3,600.00, 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 21 October 2021 that

A. 1. The alleged violation of the principle of individual nature of criminal liability be DECLARED INADMISSIBLE for being incompatible *ratione materiae*,

2. The alleged violation of the right to a reasoned decision be DECLARED ADMISSIBLE;

B. The right to a reasoned decision within 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 REMITTED to the 13th Chamber of the Ankara Administrative Court (E.2014/373, K.2014/1501) for a retrial to redress the consequences of the violation of the right to a fair trial;

D. The applicant's claim for compensation be REJECTED;

E. The litigation costs of TRY 3,839.50, including the court fee of TRY 239.50 and counsel fee of TRY 3,600.00, 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 TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

MUSTAFA ALTIN

(Application no. 2018/10018)

27 October 2021

On 27 October 2021, the Plenary of the Constitutional Court found violations of the right to a fair trial and the right to property respectively safeguarded by Articles 36 and 35 of the Constitution in the individual application lodged by *Mustafa Altın* (no. 2018/10018).

THE FACTS

[8-47] The applicant working in a public bank on a contractual basis filed an action against the bank, seeking to be awarded additional pay. The civil court, in its capacity as a labour court, rule in favour of the applicant. On appeal, the first instance decision became final. The applicant was paid the relevant amount on the basis of this final decision.

Upon the respondent party's request for rectification of material error, the Court of Cassation held that the fact that the respondent bank had made bonus payments to the applicant during his employment had been overlooked; therefore, the initial upholding decision had been rendered on the basis of a material error. On that ground, it set aside the existing upholding decision and decided to quash the first-instance decision so that the question of whether or not bonus payments had been made to the claimant could be determined. The case was dismissed at the end of the trial conducted by the first-instance court in compliance with the quashing judgment and, finally, the dismissal was upheld and became final. The applicant was to pay back the amount he had received following the initial upholding decision.

The applicant lodged an individual application with the Constitutional Court on 6 April 2018.

V. EXAMINATION AND GROUNDS

48. The Constitutional Court ("the Court"), at its session of 27 October 2021, examined the application and decided as follows:

A. Alleged Violation of the Right to a Fair Trial

1. The Applicant's Allegations

49. The applicant asserted that there had been a violation of his right to a fair trial because a final decision had been quashed by making an examination on the merits upon a petition [for rectification] of material error through a procedure that did not exist in the legal order; the trust in final decisions had been prejudiced; and the duration of the proceedings had been prolonged.

2. The Court's Assessment

50. 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."

51. 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 is a requirement of the right to a fair trial for a court decision which has become final via due procedure to be recognised by the legal order along with all of its consequences. Once a final ruling exists, the consequences to be entailed by that decision in the legal order should not be called into question. Therefore, the revocation of a final decision through a means that does not exist in the legal order would result, in and of itself, in an issue of non-enforcement of the decision. Deprivation of a person, who has been accorded a right by a final decision, of a benefit provided by that decision as a result might lead to consequences in contravention of the right to a fair trial. In the present case, a final court decision was revoked through a method that was not compatible with due procedure, as a result of which the individual was deprived of the rights accorded by the decision. For this reason, the Court has adopted the view that the complaint should be examined from the standpoint of the right to a fair trial.

a. Admissibility

52. The complaint concerning an alleged violation of the right to a fair trial must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

i. General Principles

53. The right to legal remedies and the right to a fair trial prescribed by Article 36 of the Constitution is such a right that encompasses not only the right to raise claims and present a defence before judicial bodies as a claimant or respondent parties, but also obtaining what one is entitled to at the end of the proceedings (see the Court's judgment no. E.2009/27, K.2010/9, 14 January 2010).

54. In cases that are brought before the Court through the avenue of constitutionality review, it has held that the principle of legal security and certainty is a component of the rule of law and that a state governed by the rule of law within the meaning of Article 2 of the Constitution is a state whose acts and procedures are in compliance with law, which is based on human rights, which protects and strengthens those rights and freedoms, which establishes, maintains and improves a legal order that is just and fair in every area, which complies with law and the Constitution in all of its activities, and whose procedures and acts are subject to supervision by an independent judiciary (see the Court's judgments nos. E.2006/61, K.2007/91, 30 November 2007; and E.2014/73, K.2014/98, 22 May 2014).

55. The Court has defined these concepts in its case-law and accordingly stated that the principle of legal security, aiming to ensure the legal safety of persons, requires that legal norms are foreseeable, that individuals can trust the state in all of their acts and actions, and that the state avoids using any methods which would undermine this trust in their legislative acts. The certainty principle means that legislative acts must be sufficiently clear, non-ambiguous, comprehensible and applicable 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 judgment no. E.2013/64, K.2013/142, 28 November 2013).

56. The Court has clearly explained in several of its judgments that rules must be foreseeable as a requirement of the principle of legal

certainty; pointed out that legal certainty is the common value protected by guarantees of fundamental rights and freedoms; and indicated that legal norms must be foreseeable and individuals should be able to trust the state in all acts and procedures in a state governed by the rule of law (see theCourt's judgment no. E.2008/19, K.2010/17, 28 January 2010).

57. The *res judicata* principle, i.e. the principle of respect for final decisions, prevents a matter already determined in accordance with the applicable rules from being re-examined between those concerned by that matter, other than an exceptional situation such as a retrial envisaged by the law. This legal institution - integrated into various laws - is bound to the aim of ensuring stability in the judicial sphere. The elements of this institution whose formal and objective definitions have been made are the facts that it is a characteristic accorded to judicial decisions, that this characteristic is recognised by laws, and that it is mandatory to comply with a judicial decision (see the Court's judgment no. E.1988/36, K.1989/24, 2 June 1989).

58. The *res judicata* principle and the binding effect of the final decision means that all the courts, including the one that has delivered the decision, and all the other relevant institutions are bound by that decision. If a binding final decision that has been delivered by the judiciary is rendered inoperative in respect of one of the aggrieved parties, the safeguards offered by the right to a fair trial will become meaningless (see *Alba İnşaat Tic. Ltd. Şti.*, no. 2013/1313, 26 February 2015, §§ 53 and 54; and *Arman Mazman*, no. 2013/1752, 26 June 2014, § 65).

59. The binding nature of a final decision means that all the courts, including the one that rendered the decision, and all the other relevant institutions are bound by that decision. The courts are bound by a final decision that was rendered in a previous case concerning the same parties on the same subject matter and based on the same grounds for litigation. Accordingly, they cannot hear the same case again. The absence of a final decision on a case is one of the conditions for filing a case and the parties have a right to file a procedural objection in this regard (see *Alba İnşaat Tic. Ltd. Şti.*, § 54).

60. Generally, there are three conditions sought for a court ruling to attain the character of a final decision. Firstly, there must be a court ruling that is considered to be a final decision. Declaratory and interim measure decisions and enforcement court decisions do not have the binding power of a final decision. Secondly, the finalised ruling must be rendered with a view to resolving a standing dispute between the parties. Thus, certain probate proceedings that are uncontested and do not resolve a dispute are not of the character of a final decision. Thirdly, the ruling must be final. The final nature of a ruling means that the court has heard the parties' claims and defences, assessed the evidence, and eventually reached an ultimate decision on the matter. In order for a ruling to have the character of a final decision in the material sense and for a final decision objection to be raised in this regard, the parties, the subject matter and the grounds for the proceeding must be the same (see *Alba İnşaat Tic. Ltd. Şti.*, § 54).

61. If, within the legal order, there are provisions or practices that render final court decisions inapplicable to the extent that it entails consequences to the detriment of one of the parties or if the enforcement of court decisions is hindered in any way, then *the right to a court* would also become meaningless (see *Mustafa Ekşi*, no. 2014/7711, 24 January 2018, § 27).

62. *Res judicata*, i.e. respect for final decisions, is acknowledged to be a general principle of the particular law of the international legal order. The obligation to enforce judicial decisions without delay, as prescribed by the last paragraph of Article 138 of the Constitution, is a requirement of the *res judicata* principle, that is also regarded to be one of the general principles of law (see *Arman Mazman*, § 65).

63. The *res judicata* principle - linked to the right to a fair trial - requires that the status (rights and liabilities) accorded to individuals via a finalised court decision not be interfered with by the legal order, apart from in certain exceptional cases. As a result thereof, courts are also bound by a decision delivered in respect of the same parties on the same subject matter and based on the same grounds for litigation. The principle of respect for final decisions is not absolute. Legal systems may

allow for interference with a final decision in some exceptional cases. In fact, certain practices (clarification, rectification or completion of the judgment, retrial, appeal in the interest of law) are prescribed in the procedural law to be pursued to that end in limited cases. Interferences other than these must not entail a result where the evidence are re-assessed and the final judgment is re-examined on the merits like an ordinary judicial process.

64. In its assessment on the matter of non-enforcement of a final court decision as being considered null and void, the Court has held that rendering a final and binding court decision inoperative in respect of one of the parties would prejudice the right to a fair trial; however, as it should be considered within the circumstances of each individual case, the final decision that is expected to be obeyed must not be rendered in a manner that contravenes the basic principles of law, equity and justice (see *Remzi Saldıray*, no. 2016/2377, 24 February 2021, § 44). Otherwise, the constant questioning of finalised court decisions would undermine the principles of legal security and certainty, and the people's trust in the legal system might be weakened.

65. On the other hand, where the existence of important and pressing circumstances necessitating an interference with a finalised court decision can be proven with concrete reasons (e.g. where the decision was rendered in manifest contravention of the basic principles of law), it is also clearly necessary that procedural institutions/practices are set up by law with a view to enabling the application of the exceptional circumstances in question so that the final decision may be interfered with. In other words, it is mandated by the principles of legal certainty and foreseeability that the conditions and procedures for setting aside a final decision are prescribed explicitly by law. In this context, the question of within what time-frame this avenue can be resorted to must be demonstrated beyond any doubt in the law and the time-limit in question must not exceed what is reasonable.

ii. Application of Principles to the Present Case

66. In the present case, the case brought for collection of labour claims was accepted and this decision became final after an appellate review. The

applicant was paid the amount he claimed on the basis of this finalised decision. Upon the respondent party's request for rectification of material error, the Court of Cassation held that the fact that the respondent bank had made bonus payments to the applicant during his employment there had been overlooked; therefore, the upholding decision dated 12 April 2016 had been rendered on the basis of a material error. On that ground, it set aside the existing upholding decision and decided to quash the first-instance decision so that the question of whether or not bonus payments had been made to the claimant could be determined. The case was dismissed at the end of the trial conducted by the first-instance court in compliance with the quashing and, finally, the dismissal was upheld and became final.

67. According to the Code of Civil Procedure, the first-instance decisions can be challenged via the ordinary legal remedies of appeal on points of fact and law (*istinaf*), appeal on points of law (*temyiz*) and rectification (*karar düzeltme*), as well as the extraordinary legal remedies of retrial (*yargılamanın yenilenmesi*) and appeal in the interest of law (*kanun yararına temyiz*). The now-repealed Law no. 5521, which was in force at the material time, did not provide for the legal remedy of rectification against labour court decisions. Thus, pursuant to the applicable legislation at the time, it was not possible to subject a finalised court decision to an appellate legal-remedy review by holding an assessment of evidence once again under the name of reviewing a material error, in a manner capable of altering the merits of the decision.

68. According to Article 304 § 1 of the Law no. 6100, only *the clerical errors and errors of calculation and similar other clear mistakes* can be corrected through the remedy of rectification of material errors. The remedy of rectification of material errors is strictly limited to correcting *the material errors* in the court decision. Therefore, it is not possible under a review of material errors to set aside the existing decision and hold a retrial in a way that will render a ruling anew on the merits of the dispute.

69. Two main points have been emphasised in the case-law of the Court of Cassation in the context of interference with formally-finalised decisions due to the existence of a clear material error: Accordingly,

the upholding/quashing decision rendered by the Court of Cassation needs to address merely the material error that is clearly and distinctly comprehensible at first sight and does not involve any examination in terms of the law or the assessment of evidence, and this error should also contain mistakes that greatly affect the outcome of the proceedings. In that case, there will be no emergence of acquired rights as to procedure in favour of the other party; the material truth cannot be disregarded in such clear errors; and the decision can be interfered with. However, the Court of Cassation has also drawn the limits of the interference to be performed in this way, as well. It is not possible, under the name of review of material errors, to assess the evidence or to interfere with a final court decision on account of an error in the legal characterisation.

70. From this perspective, as regards formally-finalised decisions that have gained the power of a final judgment in the material sense, it is not possible to subject the case to a legal-remedy review once again under the name of reviewing a material error by means of re-conducting an assessment of evidence and to set aside a final decision in this way. Accordingly, the Court has understood that, in the present case, an interference with a final court decision was enabled under the name of *a* [review of] *material error, without any objective criteria prescribed by law*. This meant the creation of a new legal remedy that nullifies the authority of a final decision but does not exist in the law.

71. Over the course of the trial in question, the respondent party never put forward that it had paid bonuses to the applicant along with the evidence thereof. Moreover, it did not raise this point during the ordinary appellate review, either. The Chamber [of the Court of Cassation] held an assessment within that scope and upheld the judgment. However, the Court of Cassation re-opened the file and held an examination on the merits on the basis of a petition of material error submitted by the respondent bank, some time after the judgment became final, relying on a claim which should have actually been raised during the trial and assessed by the trial court on its merits.

72. The Court has concluded that the Chamber rendered a quashing decision in a manner that removed the ruling and the consequences of a final and binding court decision, which was in favour of the applicant,

through a method that is not prescribed by the procedural law and in the absence of a legal basis and also without proving the existence of pressing and exceptional circumstances necessitating an interference with a finalised decision within the framework of the institutions/practices envisaged by the procedural law, as well, to an objective and acceptable extent. In other words, the Court has found that the applicant's right to a fair trial was breached as the enforceability of a final court ruling was nullified by a new court ruling.

73. For these reasons, the Court found a violation of the applicant's right to a fair trial safeguarded by Article 36 of the Constitution.

B. Alleged Violation of the Right to Property

1. The Applicant's Allegations

74. The applicant asserted that, even though the proceedings he had filed to collect his additional pay (*ilave tediye*) claims had originally resulted in his favour, he had subsequently been deprived of that sum of money - which he had been paid on the basis of a finalised court ruling - as a result of a new assessment made in breach of the final decision by the Court of Cassation upon the respondent bank's petition for rectification of a material error. Therefore, he contended that there had been a violation of his right to property under Article 35 of the Constitution.

2. The Court's Assessment

75. Article 35 of the Constitution, entitled "*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."*

a. Admissibility

76. The complaint concerning an 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.

b. Merits

i. Existence of Property

77. 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 judgment 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 rights *in rem* 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). An applicant who claims a breach of their right to property under Article 35 of the Constitution has to prove the existence of such a right (see *Cemile Ünlü*, no. 2013/382, 16 April 2013, § 26).

78. There is no doubt as to the fact that the payment made to the applicant on the basis of a final court decision constituted property within the meaning of Article 35 of the Constitution.

ii. Existence of an Interference and its Type

79. 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).

80. 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).

81. Having regard to the case giving rise to the application as a whole, the Court has understood that the applicant was forced to return the sum he had been awarded via a court ruling, thereby being deprived of a right which should have been protected within the scope of enforcing a final court decision. The Court has examined similar complaints about non-enforcement of judicial decisions within the framework of the general rule concerning the principle of peaceful enjoyment of possessions (see, in the same vein, *Necdet Çetinkaya*, no. 2013/7725, 24 March 2016, § 57). There is no reason requiring departure from this principle in the present case.

iii. Whether the Interference Amounted to a Violation

(1) General Principles

82. 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."

83. 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).

84. The Court has held in various cases that the non-enforcement of a final judicial decision in regard to the right to property had caused a violation. Accordingly, it emphasised that, if the public authorities entrusted with the duty of implementing the court decision hindered the enforcement of the decision or failed to show due diligence for its enforcement, this would mean a breach of Article 35 of the Constitution (see *Kenan Yıldırım and Turan Yıldırım*, no. 2013/711, 3 April 2014, §§ 55-75; and *Mehmet Hocaoğlu*, no. 2013/3207, 15 October 2015, §§ 59-74).

(2) Application of Principles to the Present Case

85. In the present case, the trial court handling the proceedings - filed by the applicant with a claim for additional pay - awarded the applicant 19,033.56 Turkish liras (TRY), holding that the respondent Bank had the character of a public institution and that the employees working for institutions falling within the ambit of the Law no. 6772 should be given additional pay for each year. After having collected this sum, the applicant paid it back to the respondent bank due to the quashing of the final decision by the Court of Cassation.

86. The applicant was consequently forced to return the compensation that he had obtained via a court ruling.

87. It is beyond doubt that the said final judicial decision, as per its consequences, is binding on all of the parties to the case and judicial bodies. It was not proven that the final decision that had been expected to be obeyed had been rendered in manifest contravention of the principles of justice and equity. In the end, the impugned set of proceedings was concluded with the rejection of the applicant's claim for additional pay by means of interfering with a finalised judicial decision, without due

regard to the above-mentioned points (see §§ 20, 66), on account of the finding that the bank had paid bonuses equal to the monthly salary four times a year. The Court has thus arrived at the conclusion that the requirement of lawfulness was not satisfied in the interference in the form of ruling for the return of the sum of money - paid [to the applicant] on the basis of a final court decision - by means of setting aside a final decision through a practice that has no legal basis.

88. For these reasons, the Court found a violation of the right to property safeguarded by Article 35 of the Constitution.

C. Application of Article 50 of Code no. 6216

89. 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."*

90. The applicant requested the Court to find a violation and order a retrial, as well as claiming TRY 19,033.56 in respect of pecuniary and TRY 15,000 in respect of non-pecuniary compensation.

91. The general principles on how to eliminate 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).

92. 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).

93. In cases where the violation results from a court ruling or the [trial] court is unable to eliminate the violation, the Court decides 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 Law no. 6216 and Article 79 § 1 (a) of the Internal Regulations. 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 orders 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; and *Aligül Alkaya and Others (2)*, §§ 57-59, 66, 67).

94. In the present case, the Court has found violations of the applicant's right to a fair trial safeguarded by Article 36 of the Constitution and his right to property. Thus, it has been understood that the violation stemmed from a judgment rendered by the relevant chamber of the Court of Cassation.

95. In such cases, there is legal interest in holding a retrial in order to redress the consequences of the violations of the right to a fair trial and the right to property. A retrial to be conducted in this scope aims to redress the violation and its consequences according to Article 50 § 2 of the Law no. 6216, which contains a provision that is specific to the individual application mechanism. In this regard, the step required to be taken 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 remitted to the Gümüşhacıköy Civil Court of General Jurisdiction (acting as a labour court) for referral to the relevant chamber of the Court of Cassation for retrial.

96. The applicant's claims for compensation, on the other hand, must be rejected as the Court considers that ordering a retrial to redress the violation along with its consequences offers the applicant sufficient redress.

97. The court fee of TRY 294.70, 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 27 October 2021 that

A. 1. The alleged violation of the right to a fair trial be DECLARED ADMISSIBLE;

2. The alleged violation of the right to property be DECLARED ADMISSIBLE;

B. 1. The right to a fair trial safeguarded by Article 36 of the Constitution was VIOLATED;

2. The right to property safeguarded by Article 35 of the Constitution was VIOLATED;

C. The applicant's claims for compensation be REJECTED;

D. A copy of the judgment be REMITTED to the Gümüşhacıköy Civil Court of General Jurisdiction (acting as a labour court) (E.2017/40, K.2017/292) for referral to the relevant chamber of the Court of Cassation for a retrial to redress the consequences of the violations of the right to a fair trial and the right to property;

E. The court fee of TRY 294.70 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.

RIGHT TO EDUCATION (ARTICLE 42)

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

ŞEHMUS ALTUĞRUL

(Application no. 2017/38317)

13 January 2021

On 13 January 2021, the Second Section of the Constitutional Court found a violation of the right to education safeguarded by Article 42 of the Constitution in the individual application lodged by *Şehmus Altuğrul* (no. 2017/38317).

THE FACTS

[8-23] The applicant succeeded in the exam held for being admitted to the postgraduate education programme offered by the Institute of Social Sciences of the relevant university. A third person brought an action requesting the cancellation of the said exam. In the relevant proceedings, a stay of execution was ordered. The decision ordering a stay of execution was communicated to the university in a short period of time. The applicant continued and completed his education in the course of the proceedings. A short while after the applicant's successful completion of his education, the exam at issue was cancelled by the decision of the 1st Chamber of the Diyarbakır Administrative Court. The applicant, who had successfully completed his education, was not granted a diploma by the administration on the ground of the decision ordering the cancellation of the exam.

The action brought by the applicant against the Institute's refusal to grant a diploma was dismissed by the incumbent court. His subsequent appeal was also dismissed, with final effect, by the regional administrative court.

He thus lodged an individual application with the Constitution Court on 17 November 2017.

V. EXAMINATION AND GROUNDS

24. The Constitutional Court ("the Court"), at its session of 13 January 2021, examined the application and decided as follows:

A. The Applicant's Allegations

25. The applicant stated that he had successfully completed the postgraduate education programme offered by the Department of Kurdish Language and Culture of the Institute of Social Sciences at the

Dicle University, but that he had not been granted a diploma on the ground of the cancellation of the postgraduate entrance exam by the Administrative Court. He also maintained that he had not in any way been informed of the process concerning the cancellation of the exam, that he had completed his education by fulfilling all his obligations before the delivery of a judicial decision in respect of the exam, and that he had thus been entitled to obtain a diploma.

26. The applicant further alleged that he had become entitled to obtain a diploma upon the completion of his education, that this constituted an acquired right, and that he had not been granted a diploma despite the absence of any fault attributable to him. Lastly, he claimed that he had ranked first in the field of Kurdish language and culture in the Public Personnel Selection Examination ("KPSS") held in 2015 in Türkiye, but that he had not been able to submit a request for an appointment due to the administration's refusal to grant him a diploma. For all these reasons, the applicant alleged a violation of his right to education.

27. In its observations, the Ministry first made explanations as to whether the ordinary legal remedies had been exhausted. According to the Ministry, where no fault was established to be attributable to the applicant as regards the impugned interference with his right to education on account of the administration's refusal to grant him a diploma after the completion of his postgraduate education, the compensation of the resulting damage would be at issue as required by Article 125 of the Constitution. It stated that the compensation of such damage would only be possible by means of a full remedy action to be brought before an administrative court.

28. The Ministry further noted that the achievement of a favourable outcome of a full remedy action did not depend on the outcome of the annulment action. At this point, the Ministry lastly noted that there were numerous decisions of the Supreme Administrative Court in relation to compensation of damages and that the present application should be declared inadmissible for non-exhaustion of legal remedies due to the applicant's failure to bring a full remedy action, as an effective ordinary legal remedy, before lodging the present application.

29. The Ministry then touched upon the merits of the application. It noted that following the cancellation of the postgraduate programme entrance exam, the administration had been under an obligation to revoke the annulled administrative act and all other acts related to such act together with all their legal consequences. According to the Ministry, as a requirement of such obligation, it had also been necessary for the administration to delete the applicant's registration following the decision ordering a stay of execution and the subsequent annulment decision. The Ministry noted that the dispute in the present case did not relate to this issue, but concerned whether the student status, which the applicant had acquired as a result of an error on the part of the administration, could be considered as an acquired right.

30. Subsequent to this finding, the Ministry stated that the introduction of the requirement of succeeding in an exam for admission to a university constituted a permissible restriction on the right to education and that the applicant had not satisfied the said requirement in the present case. It noted that the student status acquired as a result of an error without satisfaction of the relevant requirement could not be requested not to be withdrawn. Lastly, the Ministry emphasised that as noted in the court decision, the applicant could have been granted a diploma after passing the re-exam to be conducted. It noted that these explanations should be taken into consideration during the examination of the applicant's complaints.

B. The Court's Assessment

1. Admissibility

31. The Ministry noted that the legal remedies had not been exhausted since the applicant could have brought a full remedy action.

32. Article 148 § 3 of the Constitution and Article 45 § 2 of Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, provide that ordinary legal remedies must firstly be exhausted in order to lodge an application with the Court.

33. 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 (see *İsmail Buğra İşlek*, no. 2013/1177, 26 March 2013, § 17).

34. For the requirement of exhaustion of domestic remedies to apply, the legal system must provide for an administrative or judicial remedy available to a person claiming to be the victim of a violation. Moreover, such legal remedy must not only be effective, capable of redressing the consequences of the alleged violation and accessible to the applicant with a reasonable amount of effort, but it must also be available both in theory and in practice. The applicant cannot be expected to exhaust a remedy which is not available. Similarly, the applicant is not obliged to exhaust legal remedies that are not legally or practically effective, not capable of redressing the consequences of a violation or not accessible and applicable in practice due to the existence of certain formalistic requirements which are excessive and extraordinary (see *Fatma Yıldırım*, no. 2014/6577, 16 February 2017, § 39; and *Erol Aksoy (2)* [Plenary], no. 2016/11026, 12 December 2019, § 50).

35. In the present case, the applicant requested the administration to grant him a diploma after the completion of his education. However, despite the applicant's successful completion of his education, the administration refused to grant him a diploma on the ground of the cancellation of the entrance exam by the decision of the 1st Chamber of the Diyarbakır Administrative Court. The administration's refusal to grant the applicant a diploma constituted the subject of the alleged violation. In these circumstances, a remedy capable of ensuring the applicant, who successfully completed his education, to obtain a diploma could be considered effective in the context of the present case. In other words, a legal remedy compatible with the principle of *restitutio in integrum* could be considered as an effective remedy in the context of the present case. It is beyond doubt that the legal remedy compatible with the principle of *restitutio in integrum* was an annulment action capable of ensuring that

the administrative act of refusal to grant a diploma could be revoked in the legal sphere.

36. The purpose of an annulment action brought against an administrative act is to ensure the establishment of the unlawfulness of the administrative act, the revocation of such act and the restoration of the situation prior to the act. The annulment decision issued in an annulment action brought against an individual act has a retroactive effect and leads to the retroactive revocation of the administrative act in the legal sphere. In other words, an administrative act, if annulled by an administrative court, is deemed to have never been carried out (see *Erol Aksoy (2)*, § 52). However, while a full remedy action constitutes a remedy capable of ensuring the compensation of pecuniary and non-pecuniary damages resulting from an administrative act or action, it is not capable of leading to the revocation of the administrative act in the legal sphere.

37. Consequently, it has been understood that an annulment action constituted a remedy capable of redressing the consequences of the administrative act in the form of refusal to grant the applicant a diploma, which gave rise to the alleged violation, and that the outcome of a full remedy action would not have an effect on the administrative act of refusal to grant a diploma which rendered the applicant's education invalid. Therefore, in view of the fact that the applicant lodged the present individual application after exhausting the remedy of bringing an annulment action, it has been considered that he exhausted the effective legal remedy in question.

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

2. Merits

a. Scope of the Right and Existence of an Interference

39. Article 42 § 1 of the Constitution provides as follows:

"No one shall be deprived of the right of education."

40. Education is a right which enjoys direct protection under the Constitution. Furthermore, as a very particular type of public service, education does not merely have direct benefits but also serve broader societal functions. It is obvious that in a democratic society, the right to education has a fundamental contribution and is indispensable to the furtherance of human rights (see *Mehmet Reşit Arslan and Others*, no. 2013/583, 10 December 2014, § 66). On previous occasions the Court has held that the right to education also covers higher education (see *Hikmet Balabanoğlu*, no. 2012/1334, 17 July 2013, § 28; and *İhsan Asutay*, no. 2012/606, 20 February 2014, § 36), that this right guarantees access to educational institutions existing at a given time (see *Mehmet Reşit Arslan and Others*, § 68), and that it imposes on public authorities a negative duty not to prevent individuals from receiving education and teaching (see *Adem Öğüt and Others*, no. 2014/20527, 22 November 2017, § 44; and *Yüksel Baran,* no. 2012/782, 26 June 2014, § 36).

41. However, access to educational institutions constitutes only a part of the right to education. For that right to be effective, it is further necessary that an individual who is the beneficiary should have the possibility of *drawing profit from the education received.* For the individual to have such possibility, the studies which he has completed in conformity with the rules in force in a State must be officially recognised by the official authorities of the State (see *Rauf Bekiroğlu,* no. 2014/127, 19 July 2017, § 25).

42. The applicant's request for a diploma at the end of his education was a necessity for him to draw benefit from the education received and for his education to be recognised by the official authorities in the country. Otherwise, the applicant's education would be rendered invalid since he had not drawn benefit from the education received. Therefore, the administration's refusal to grant the applicant a diploma after the completion of his education and thus the invalidation of his education amounted to a violation of his right to education.

b. Whether the Interference Amounted to a Violation

43. 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... These restrictions shall not be contrary to ... the requirements of the democratic order of the society and ... the principle of proportionality."*

44. The aforementioned interference amounts to a violation of Article 42 of the Constitution unless it complies with the conditions set out in Article 13 thereof. Therefore, it must be determined whether the restriction complied with the requirements of being prescribed by law, being based on one or more justifiable reasons set out in Article 42 or other relevant provisions of the Constitution and not being contrary to the principle of proportionality and the requirements of a democratic society order, which are relevant for the present application and laid down in Article 13 of the Constitution.

i. Lawfulness

45. The interference with the applicant's right to education in the form of refusal to grant him a diploma was based on the cancellation of the postgraduate programme entrance exam by the administrative court. The administration refused to grant the applicant a diploma in line with the decision ordering cancellation of the exam pursuant to Article 28 § 1 of the Law no. 2577. In this scope, it has been concluded that Article 28 § 1 of the Law no. 2577 met the requirement of *restriction by law*.

ii. Legitimate Aim

46. In spite of its importance, the right to education, by its nature, may be subject to certain regulations. Admittedly, the rules regulating educational institutions may vary according to the needs and resources of the community and the distinctive features of different levels of education. Therefore, it must be acknowledged that the State enjoys a certain margin of appreciation in the practices and regulations in this sphere (see *Ünal Yıldırım*, no. 2013/6776, 5 November 2014, § 42; and *Savaş Yıldırım*, no. 2013/6258, 10 June 2015, § 42). The State's margin of appreciation in this domain increases with the level of education, in inverse proportion to the importance of that education for those

concerned and for society at large (see *Mehmet Reşit Arslan and Others*, § 67). The margin of appreciation afforded to the State covers the abolishment of the existing educational institutions or the change of their statuses depending on the needs of the society. When acting within this margin of appreciation, the State will undoubtedly be expected to make changes based on a legitimate aim (see *Melih Sivas*, no. 2016/15634, 28 June 2018, § 58).

47. Article 42 of the Constitution does not contain any provision concerning the restriction of the right to education. However, the right to education cannot be considered to be an absolute and unlimited right. Indeed, a margin of appreciation is afforded to the State by the sentence reading "*the scope of the right to education shall be defined and regulated by law*" in the second paragraph of Article 42 of the Constitution. In view of the fact that the right to education is regulated in the chapter of the Constitution titled *Social and Economic Rights,* it is understood that the margin of appreciation afforded to the State also essentially covers the power to *restrict*. On the other hand, the Constitution does not set out a list of certain legitimate aims binding upon the legislator for the restriction of the right to education, unlike other rights. Thus, it can be said that the legislator has a wide margin of appreciation in the restriction of the right to education. However, it is clear that such margin of appreciation is subject to the review of the Court (see *Adem Öğüt and Others,* § 53).

48. The principle of execution of court decisions constitutes one of the fundamental principles of the Constitution, as set out in the last paragraph of Article 138 thereof, which provides as follows: "*Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution*." In the present case, the interference in the form of the administration's refusal to grant the applicant a diploma was based on a constitutional provision requiring the execution of court decisions. Therefore, it has been concluded that the interference in the present case pursued the legitimate aim of executing court decisions (for a similar assessment, see *Özcan Özsoy*, no. 2014/5881, 15 February 2017, § 43).

iii. Proportionality

(1) General Principles

49. The principle of proportionality consists of three sub-principles: *suitability*, *necessity* and *commensurateness.* 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 *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).

50. Accordingly, for an interference with the right to education 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 which will 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 where 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.

51. On the other hand, any interference with the right to education must be proportionate. 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 requires a fair balance to be struck between the aim and the means. Accordingly, there must be a reasonable relationship of proportionality between the legitimate aim pursued by the restriction on the right to education and the applicant's individual interest in benefiting from the right to education. The burden imposed on the individual by the restriction must not be excessive and disproportionate to the public interest to be served by the achievement of the intended purpose.

52. The finding that the means chosen imposes on the individual a burden disproportionate to the aim pursued may not be sufficient in itself for the finding of a violation. It is also of great importance whether there are mechanisms counterbalancing the burden imposed on the individual. Where there are legal mechanisms alleviating the burden imposed on the individual on account of the choice of the remedy which is considered to be suitable and necessary, a violation may not be found.

53. In the assessment of the proportionality of an interference with the right to education, regard is also paid to whether any fault can be attributable to the applicant and the administration. The factors taken into consideration in this context include what legal obligations the parties had, whether there was any negligence on the part of them during the fulfilment of those obligations, and if so, whether such negligence had an effect on the unlawful result.

54. On the other hand, the administration has an obligation to act in compliance with the principle of *good governance*. The principle of *good governance* requires that where an issue in the general interest is at stake, the public authorities must act in good time and in an appropriate and above all consistent manner (for a similar assessment in the context of the right to property, see *Kenan Yıldırım and Turan Yıldırım,* no. 2013/711, 3 April 2014, § 68; and *Ayten Yeğenoğlu*, no. 2015/1685, 23 May 2018, § 44).

55. The factors which are of importance in the assessment of the proportionality of the interference with the right to education on account of an erroneous act of the administration include the attitude of the administration towards its erroneous act, the time spent to realise the

error, the method chosen to correct the error, and the severity of the burden imposed on the applicant (for similar assessments as regards the right to property, see *Tevfik Baltacı*, no. 2013/8074, 9 March 2016, § 71). In this context, the remedying of the erroneous act must not place an excessive burden on the individual concerned (for similar assessments in the context of the right to property, see *Kırca Mühendislik İnş. Turz. Tic. ve San. A.Ş.*, no. 2014/6241, 29 September 2016, § 75; and *Kuddis Büyükakıllı*, no. 2014/3941, 5 October 2017, § 63). In the light of all these assessments, where the administration also has a role in the erroneous act, a different approach must be adopted and it must be established whether an excessive and disproportionate burden has been imposed on the applicant. Especially where the error is largely attributable to the administration, a more sensitive approach must be adopted as regards the burden imposed on the individual concerned (for similar assessments in the context of the right to property, see *Ayten Yeğenoğlu*, § 46).

56. The existence of procedural safeguards may have an important role in the assessment of proportionality. In this context, the absence of legal remedies whereby an individual can challenge the lawfulness of an interference or seek compensation in respect of pecuniary and non-pecuniary damages arising from the alleged interference may be considered as a factor aggravating the burden imposed on the individual in certain cases. In this regard, an effective examination of the alleged unlawfulness by a court is of importance for the proportionality of the interference.

(2) Application of Principles to the Present Case

57. In the present case, the applicant attended and succeeded in the postgraduate programme entrance exam held by the University. A third person brought an action requesting the cancellation of the said exam. In the relevant proceedings, a stay of execution of the act was ordered. The decision ordering a stay of execution was communicated to the University in a short period of time. The applicant continued and completed his education in the course of the proceedings. A short while after the applicant's successful completion of his education, the exam at issue was cancelled by the decision of the 1st Chamber of the Diyarbakır

Administrative Court. The applicant, who had successfully completed his education, was not granted a diploma by the administration on the ground of the decision ordering the cancellation of the exam.

58. All kinds of acts and actions of the State must be subject to judicial review to ensure the legal security and the rule of law. Indeed, this issue is guaranteed by the first sentence of Article 125 § 1 of the Constitution, which provides that "*recourse to judicial review shall be available against all actions and acts of administration*". However, in order to ensure the legal certainty and the rule of law, it is not sufficient for the State's acts and actions to be subject to judicial review, but it is also necessary for judicial decisions to be executed without any delay. The failure to execute a decision ordering the annulment of an act despite the establishment of its unlawfulness as a result of a judicial review would make the remedy of judicial review against the State's acts and actions meaningless. Indeed, the legal certainty and the rule of law may be ensured not only by the establishment of the unlawfulness but also by the elimination of all consequences thereof (see the Court's judgment, no. E.2012/73, K.2013/107, 3 October 2013).

59. Pursuant to Article 138 § 4 of the Constitution, legislative and executive organs and the administration shall comply with court decisions. As regards compliance with court decisions and execution of them without any alteration, this provision does not contain any exception in favour of legislative and judicial bodies or administrative authorities. In a State where judicial decisions are not executed in a timely manner by the relevant public authorities, it is not possible for individuals to fully enjoy the rights and freedoms afforded to them by such decisions. Accordingly, the State is obliged to prevent any loss of right likely to arise to the detriment of individuals by ensuring the timely execution of judicial decisions and thus to maintain the individuals' confidence in and respect for the public authorities and the legal system. Therefore, a failure in the timely execution of the decisions of judicial authorities, which perform an indispensable duty for the protection of the individuals' confidence in and respect for the public authorities and the legal system as a requirement of the principle of the rule of law provided for by Article 2 of the Constitution, and thus rendering such

decisions inconclusive cannot be accepted (see, *mutatis mutandis*, *Arman Mazman*, no. 2013/1752, 26 June 2014, § 61).

60. It is accepted without hesitation that the execution of an annulment decision is a constitutional obligation. However, in certain cases, the manner of execution of the decision may not be clear. In such cases, it must be acknowledged that the administration enjoys a certain margin of appreciation in determining how the court decision will be executed. However, the administration's margin of appreciation does not under any circumstances cover the preference of a method avoiding the implementation of the act. The administration is under an obligation to develop the most appropriate method of solution by also taking into consideration the reasoning of the court decision. Where the execution of the court decision has a potential of affecting the rights of third persons who are not parties to the case, the administration must adopt a manner of execution which would not impair the rights of those persons or would impair them to the minimum extent possible.

61. In the present case, in order to execute the court decision, the administration invalidated the applicant's education which he had completed on the basis of the cancelled exam. It is clear that due to the administration's failure to duly make an announcement of the exam, the individuals failing to attend the relevant exam had an interest in the execution of the annulment decision of the administrative court. There is no doubt that the conduct of a re-exam constituted a suitable means for the protection of the interests of the individuals failing to attend the relevant exam. However, the case file does not indicate whether the administration conducted a re-exam but reveals that the administration invalidated the applicant's education. There are grounds for doubting whether the invalidation of the applicant's education constituted a suitable means for the execution of the annulment decision and the protection of the interests of the individuals failing to attend the first exam due to the administration's failure to duly make an announcement. In other words, it is doubtful whether the invalidation of the applicant's education would ensure the achievement of the aim of protecting the interests of the individuals having an interest in the conduct of a re-exam. Indeed, those individuals could acquire their rights by means of

the conduct of a re-exam with the same conditions as the previous one. However, it has been considered that it would be more appropriate to discuss this issue under the necessity test.

62. It is of great importance that the administration should grant a further right to the individuals failing to attend the exam held on 22 January 2013 due to the administration's failure to duly make an announcement. For the protection of the rights of those individuals, it was indisputably necessary for the administration to conduct a re-exam with the same conditions as the previous one. However, the invalidation of the education of those who had duly completed their studies after succeeding in the previous exam constituted a considerably severe interference. Therefore, it was necessary for the administration to have recourse to such severe interference as a means of last resort only in the absence of a less severe alternative means.

63. It appears that in the present case the administration did not scrutinise whether there was an alternative means constituting a less severe interference. The administration failed to reveal the reasons why the conduct of a re-exam with the same conditions as the previous one had not been sufficient for the protection of the rights of individuals who had failed to attend the previous exam and why it had been necessary to invalidate the education of those who had attended the previous exam. It has been understood that the administration did not make an assessment as to whether it had been possible to choose another means which would place a lesser burden on the applicant. On the other hand, the inferior court did not discuss this issue, either. Although the inferior court stated that the execution of the annulment decision required the deletion of the applicant's registration from the education programme, it must be emphasised that such view was far from observing the rights of individuals who had succeeded in the said exam and who were not parties to the annulment action. This conclusion in the court decision was reached irrespective of the availability of less intrusive means which would not cause grievances on the part of those individuals including the applicant, and it was acknowledged that the nature of the annulment decision required the deletion of the registration of those who had been in the same position as the applicant. Such manner of execution which

relieved the administration from the obligation to strike a balance between the interests of the parties was neither compatible with Article 13 of the Constitution nor prescribed by Article 138 thereof. Therefore, under these circumstances, it is difficult to say that the invalidation of the applicant's education constituted a necessary means.

64. Lastly, an examination must be made as to the proportionality of the interference. One of the factors to be taken into consideration in the examination of proportionality is whether an effective judicial review was carried out. In the present case, the applicant was able to submit his allegations and complaints concerning the impugned act before the inferior court and was not put in a disadvantaged position in the proceedings. Moreover, the inferior court delivered its decision by taking into account the applicant's substantial allegations.

65. The second factor to be taken into consideration in the examination of proportionality is whether the applicant's own conduct had any effect on or contribution to the interference. In the present case, the applicant had no fault in the cancellation of the exam. He unquestionably satisfied the requirements for participation in the exam, albeit indicated otherwise in the court decision. The administration's failure to duly make an announcement of the exam did not cause a deficiency in the requirements for the applicant's participation in the exam. The applicant satisfied all requirements set out in the legislation and indicated in the exam announcement. Although the deficiencies in the exam announcement affected the validity of the exam, they did not change the reality that the applicant had satisfied the requirements for participation in the exam. Therefore, it has been established that the applicant committed no act which would justify the imposition of a burden requiring him to endure the outcome of invalidation of his education.

66. The conduct of the administration is another factor to be taken into account in the examination of the proportionality of the interference with the right to education. In the present case, the main reason for the cancellation of the exam is the conduct of a re-exam without a proper announcement following the decision to postpone the exam. It is clear that the responsibility to duly make an announcement of the exam rested with the administration. Thus, the administration bore the main

responsibility for the cancellation of the exam due to its failure to duly make an announcement. On the other hand, the administration cannot be said to have acted with sufficient promptness to execute the decision ordering the cancellation of the exam. After having been notified of the decision ordering a stay of execution, the administration did not take any step to correct its act and allowed the applicant to complete his education, but notified the applicant of the invalidity of his education approximately 2 years and 5 months after the completion of his education. In these circumstances, it is understood that the administration did not act in compliance with the principle of good governance.

67. Consequently, the administration failed to demonstrate that the severe interference with the applicant's right to education in the form of invalidation of his postgraduate education constituted a means of last resort for the protection of the individuals having interest in the execution of the court decision ordering the cancellation of the exam. Moreover, in view of the fact that the applicant had no fault in the cancellation of the exam, that all fault in this regard was attributable to the administration, that the administration attempted to correct the situation long time after the completion of the applicant's education in contravention of the principle of good governance, and that there was no justifiable ground requiring the applicant to endure such outcome, it has been concluded that a fair balance could not be struck between the public interest in the execution of the decision ordering the cancellation of the exam and the individual interest in the recognition of the applicant's postgraduate education.

68. For these reasons, the Court found a violation of the right to education safeguarded by Article 42 of the Constitution in the present case.

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 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 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 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."

70. The applicant requested the Court to find a violation and order a retrial.

71. In its judgment *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).

72. 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).

73. In cases where the violation results from a court decision or where the court could not provide redress for the violation, the Court holds that

a copy of the judgment be sent to the relevant court for a retrial with a view to eliminating the violation and the consequences thereof pursuant to Article 50 § 2 of the 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).

74. In the present application, it has been concluded that the right to education was violated. It is understood that the interference in the form of refusal to grant the applicant a diploma despite the completion of his education resulted from an act of the administration. However, the inferior court also failed to redress the violation.

75. In these circumstances, there is legal interest in conducting a retrial for the redress of the consequences of the violation of the right to education. Such retrial is intended for eliminating 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 eliminating 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 Diyarbakır Administrative Court for a retrial.

76. On the other hand, it is clear that the finding of a violation in the present case would be insufficient for the redress of the damages

sustained by the applicant. Although for the redress of the violation together with all its consequences within the framework of the principle of *restitutio in integrum*, the applicant must be awarded compensation in respect of non-pecuniary damages, which cannot be compensated merely by the finding of a violation of the right to education, it has been held that no amount be awarded under this heading due to the absence of any compensation claim of the applicant in this regard.

77. The litigation costs including the court fee of TRY 257.50, 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 13 January 2021 that

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

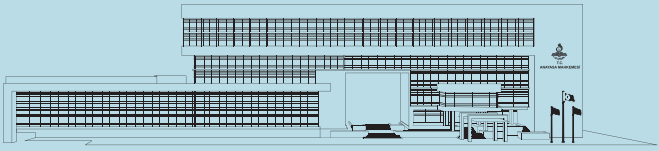
B. The right to education safeguarded by Article 42 of the Constitution was VIOLATED;

C. A copy of the judgment be SENT to the 2nd Chamber of the Diyarbakır Administrative Court (E. 2016/410, K. 2016/1245) for a retrial for the redress of the consequences of the violation of the right to education;

D. The litigation costs including the court fee of TRY 257.50 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.



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