THE CONSTITUTIONAL COURT OF TURKEY

SELECTED JUDGMENTS

2019

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(Individual Application)

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Selected Judgments 2019

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

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FOREWORD

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

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

Despite the relatively short time period, the Constitutional Court has built considerable case-law since the individual application started to operate in 2012. This volume of the book includes selected admissibility decisions and judgments rendered by the Constitutional Court in 2019 within the scope of individual application. These judgments, many of which attracted high public attention as well, bear significance with regards to the development of case-law. Sincerely wishing that this book will contribute to upholding the rule of law and protecting rights and liberties of individuals.

Prof. Dr. Zühtü ARSLAN
President of the Constitutional Court

INTRODUCTION

This book covers selected inadmissibility decisions and judgments which are capable of providing an insight into the case-law established in 2019 by the Plenary and Sections of the Turkish Constitutional Court through the individual application mechanism. In the selection of the decisions and judgments, several factors such as their contribution to the development of the Court's case-law, their capacity to serve as a precedent judgment in similar cases as well as the public interest that they attract are taken into consideration.

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

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

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

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

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

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and information. The applicants challenged that decision. The military court examined the challenge and dismissed it with final effect. Finding a violation, the Constitutional Court concluded that the investigation authorities had failed to carry out the initial procedures with due diligence as well as to make a comprehensive analysis of the evidence collected at the end of the investigation.

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The incumbent Patriarch of the Armenian community became incapacitated to fulfil his duties due to his illness. The applicants from the Civilian group applied to the Ministry of Interior to request that the elections be held for a new patriarch as the seat of the Patriarch had become *de facto* vacant. On the other hand, the Spiritual group proposed to hold elections for a new spiritual leader under the name of "Co-patriarch of the Armenians of Turkey" to exercise full power of the patriarch. Having examined the petitions submitted therewith and the existing legislation in this field, the İstanbul Governor's Office decided that the competent bodies of the Patriarchate could elect a "Patriarchal Vicar-general" to perform the religious and charitable affairs of the Patriarchate and the community. Thereupon, a "patriarchal vicar-general" was elected by the Spiritual General Assembly of the Armenians of Turkey. Finding a violation, the Constitutional Court concluded that the administration explicitly decided under which circumstances the Armenian Patriarch would be elected although it was not authorised to do so, save for the case of a pressing social need; and that nor did it demonstrate any pressing social need outweighing the Armenian customs and the Armenian community's will.

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She appealed the decision but her request was dismissed with final effect. Finding a violation, the Constitutional Court did not view the applicant's expressions as a praise of, or a support for, terrorism or as a direct or indirect incitement to violence, armed resistance or uprising.

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15. Zübeyde Füsun Üstel and Others [Plenary], no. 2018/17635, 26 July 2019 369

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A group of academics issued a declaration seeking to end the curfews and clashes during the operations carried out within the scope of the fight against terrorism in the East and Southeast of Turkey between 2015 and 2016. Applicants, who are academics at different universities also signed this declaration in order to support the other signatory academics. After it had been issued, the declaration was criticized heavily. Criminal investigations were launched and subsequently criminal cases were initiated

against the signatory academics, as well as some of them were dismissed from their offices. The applicants' challenges against the decisions on their conviction at the end of these proceedings were also dismissed. Finding a violation of the freedom of expression, the Constitutional Court concluded that the interference imposed on the applicants could not be proven to be proportionate to the aim of maintaining public order inherent in the fight against terrorism.

16. Sırrı Süreyya Önder [Plenary], no. 2018/38143, 3 October 2019 419

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The applicant, a member of parliament at the relevant time, delivered a speech addressing a crowd of people at the *Newroz* celebrations where he allegedly disseminated terrorist propaganda. By virtue of a provisional article added to the Constitution, his parliamentary immunity was lifted, and he was sentenced to 3 years and 6 months' imprisonment. His appellate request was also dismissed with final effect. Finding a violation, the Constitutional Court concluded that the inferior courts failed to provide relevant and sufficient reasons to justify that the applicant's conviction had served a pressing social need.

17. Wikimedia Foundation Inc. and Others [Plenary], no. 2017/22355, 26 December 2019 439

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The relevant unit of the Prime Ministry requested the Information and Communication Technologies Authority ("the Authority") to remove two articles with several claims against Turkey, or to block access thereto, or if not possible, to impose a blanket ban on access to the said website. The Authority, approving the said request, decided to block access to the entire website as the contents were not removed and it was not technically possible to block URL-based (content) access. The magistrate judge approved the decision issued by the Authority and dismissed the subsequent challenges in this regard. Finding a violation, the

Constitutional Court concluded that the inferior courts failed to provide relevant and sufficient grounds to demonstrate that the impugned restriction was justified by a pressing need and was not compatible with the requirements of a democratic society.

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Violation of the right to property for non-recognition of heirship due to lack of inter-state reciprocity

The applicant, who was a Turkish national, was deprived of Turkish citizenship by virtue of a Cabinet Decree for voluntarily acquiring citizenship of a foreign state without any permission. The applicant, a Greek who is still residing in Athens, became the only heir of an immovable located in İstanbul. However, the incumbent civil court assigned the whole inheritance to the State Treasury as the applicant was no longer a Turkish nation. The applicant filed an application with the incumbent civil court to obtain a certificate of inheritance, which was accepted by the civil court. However, his certificate was revoked upon the action filed by the Treasury. The applicant's subsequent challenges were dismissed. Finding a violation, the Constitutional Court concluded that the interference with the applicant's right to property due to non-recognition of his capacity as an heir lacked any foreseeable legal basis.

19. Erol Kesgin [Plenary], no. 2015/11192, 30 May 2019 491

No violation of the right to property for holding the applicant responsible for his company's debts to the public

The applicant received the payment order issued by the Provincial Directorate of the Social Security Institution for the social security contributions of the company where he was a shareholder and a Board member as well as for the incurred default interest. The applicant filed an action with the labour court for annulment of the payment order. Having an expert report obtained on the issue, the labour court dismissed the action relying on the expert

report as a ground. On the applicant's appeal, the first instance decision was upheld by the Court of Cassation. Finding no violation, the Constitutional Court concluded that the impugned interference with the right to property did not upset, to the applicant's detriment, the fair balance to be struck between the public interest and the said right.

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During the exit controls carried out by the officials at the Free Zone Customs Office, a sum of cash money was found in the car which the applicants were in. The customs officers seized the money. Upon the applicants' challenge, the seized money was returned to them. On the other hand, they were imposed administrative fines for having committed misdemeanour. They challenged the imposed fines; however, their challenge was dismissed. Their subsequent appeal was also rejected. Finding a violation, the Constitutional Court concluded that the interference with the applicants' right to property placed an excessive and extraordinary burden on them.

RIGHT TO AN EFFECTIVE REMEDY (ARTICLE 40)

21. Y.T. [Plenary], no. 2016/22418, 30 May 2019 533

Violation of the right to an effective remedy due to lack of an effective legal remedy to challenge the decision ordering the applicant's deportation to a country where he would face the risk of ill-treatment

The applicant, having entered Turkey legally, married to a Turkish woman. During a routine control, the law enforcement officers found out that an exclusion order had been issued in respect of him. His placement in administrative detention for deportation was ordered. He requested before the administrative court the stay of execution, stating that he was a Turkish national and came to Turkey for having been subjected to torture. However, it was rejected and his case was dismissed as being time barred,

without any assessment as regards the alleged ill-treatment. The Constitutional Court found a violation due to a lack of statutory guarantee which would eliminate the risk of deportation pending the outcome of a given case before the administrative court, which resulted from the new situation created by the legislative amendment.

CHAPTER ONE
ADMISSIBILITY DECISIONS

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

DECISION

AYDIN SEFA AKAY

(Application no. 2016/24562)

12 September 2019

On 12 September 2019, the Second Section of the Constitutional Court found the alleged violation of the right to personal liberty and security safeguarded by Article 19 of the Constitution inadmissible for being manifestly ill-founded in the individual application lodged by *Aydın Sefa Aka*y (no. 2016/24562).

THE FACTS

[7-43] The applicant, a retired ambassador, was serving as a Judge at the International Residual Mechanism for Criminal Tribunals ("IRMCT") at the material time. An investigation was initiated against him, following the coup attempt of 15 July, for his alleged involvement in the FETÖ/PDY hierarchical structure. In his statement, the applicant asserted that he enjoyed diplomatic immunity and that the conditions of detention had not been satisfied in his case. The applicant detained on remand by an order of the magistrate judge challenged his detention order; but his challenge was dismissed. Thereafter, he lodged an individual application with the Constitutional Court.

On the other hand, a criminal case was opened against him before the incumbent assize court by virtue of the bill of indictment issued by the chief public prosecutor's office. At the end of the proceedings before the assize court, the applicant was sentenced to 7 years and 6 months' imprisonment for his membership of the said armed terrorist organization. He then appealed his conviction before the Regional Court of Appeal, which dismissed his appeal on the merits. He further appealed the decision rendered by the Regional Court of Appeal. The appeal proceedings had been still pending by the date when his application was examined.

V. EXAMINATION AND GROUNDS

44. The Constitutional Court, at its session of 12 September 2019, examined the application and decided as follows:

A. Alleged Violation of the Right to a Fair Trial

1. The Applicant's Allegations

45. The applicant maintained that his right to a fair trial had been violated as the investigation process against him had been conducted without his diplomatic immunity being lifted and his challenges in this regard being assessed.

2. The Court's Assessment

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

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

47. Article 45 § 2 of Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, reads as follows:

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

48. Pursuant to the abovementioned provisions set forth in the Constitution and the Code, the individual application to the Constitutional Court is a remedy of subsidiary nature which may be resorted in case of the inferior court's failure to redress the alleged violations. As required by the subsidiary nature of the individual application mechanism, in order for an individual application to be lodged with the Court, ordinary legal remedies must primarily be exhausted (see *Ayşe Zıraman and Cennet Yeşilyurt*, no. 2012/403, 26 March 2013, §§ 16 and 17).

49. In the present case, the applicant lodged an individual application pending the investigation conducted against him, and thereafter, a criminal case was filed against him. It appears that by the date when his individual application was adjudicated by the Court, the proceedings conducted against him had been still pending. The applicant has indeed

had the opportunity to raise his complaints specified in the application form, and to have them examined, at the appellate stage during and subsequent to the proceedings. In this sense, it has been observed that the applicant brought his complaints, as to the alleged violation of the right to a fair trial pertaining to the investigation process, before the Court through the individual application mechanism without awaiting for the outcome of the first- and second-instance proceedings before the inferior courts.

50. For these reasons, as it has been observed that the alleged violations of the fundamental rights and freedoms were brought before the Court without the remedies before the first- and second-instance courts being exhausted, this part of the application must be declared inadmissible for *non-exhaustion of available legal remedies*.

B. Alleged Violations of the Right to Respect for Private Life and the Inviolability of Domicile

1. The Applicant's Allegations

51. The applicant maintained that an investigation could not be conducted against him due to the international diplomatic immunity he enjoyed in his capacity as a judge at the International Residual Mechanism for Criminal Tribunals ("the IRMCT"); that in this sense, unless his immunity was lifted, he could not be subjected to a body or home search or his properties could not be seized; and that therefore, there had been violations of his right to respect for private life, as well as of the inviolability of domicile.

2. The Court's Assessment

52. In its judgment in the case of *Hülya Kar* (no. 2015/20360, 27 February 2019), the Court has determined the scope of the examination to be conducted, through the individual application mechanism, as regards the alleged violations of the material rights which have resulted from the preventive measures. In this judgment, it is noted that the authorities imposing the preventive measure are afforded a wide margin of appreciation for being in a better position to make an assessment as

to the necessity of the application of the given measure; and that in this sense, only in cases where it is clear, to the extent that would be *prima facie* comprehensible, that the damage suffered due to the preventive measure in question has led to more severe results than that which is inevitable or that it has been applied in an arbitrary manner, a further examination on the merits is to be made (for these principles, see *Hülya Kar*, §§ 21-46).

53. In the present case, a search was conducted at the applicant's home and workplace by virtue of the search order issued by the investigation authorities. He accordingly alleged that his right to respect for private life and the inviolability of domicile had been violated due to this measure. It appears that the impugned searches were conducted with a view to gathering the evidence concerning the offence imputed to him.

54. As regards the complaints concerning preventive measures, the Court takes notice of the conditions of the period when the relevant order has been issued. The impugned preventive measure was applied with a view to revealing the material truth and in the case of suspicion of a criminal offence. The impugned measure was based on a foreseeable and precise provision of law. Besides, the applicant was provided with the opportunity to effectively put forth his challenges before the competent authorities, and the impugned measure was not applied on a continuous basis. It also appears that the impugned preventive measure did not last for a period longer than that was required by the exigencies of the situation or was not clearly appropriate to the aim pursued.

55. Given the type and duration of the impugned preventive measure, the way of its application and its effects on the applicant's life as a whole, it has not been considered that the damage sustained by the applicant was more severe than a degree which is inevitable or the impugned preventive measure was arbitrary. Nor did the applicant provide any explanation to the contrary in the application form.

56. As it is clear that there was no violation of the applicant's right to respect for private life as well as the inviolability of domicile, this allegation must be declared inadmissible for *being manifestly ill-founded*, without any further examination under the other admissibility criteria.

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

1. Alleged Unlawfulness of the Applicant's Arrest and Police Custody

a. The Applicant's Allegations

57. The applicant maintained that his right to personal liberty and security had been violated for having been arrested and taken into custody without any concrete evidence being adduced to prove his guilt and in breach of the safeguards laid down in the international law.

b. The Court's Assessment

58. The ordinary legal remedies must have been exhausted before an individual application is lodged with the Constitutional Court (see *Ayşe Zıraman and Cennet Yeşilyurt*, no. 2012/403, 26 March 2013, §§ 16, 17).

59. As regards the alleged excessive duration of the custody as well as the alleged unlawfulness of arrest and custody, the Court has concluded, referring to the relevant case-law of the Court of Cassation, that although the main proceedings were not concluded yet by the examination date of the individual application, the action for compensation stipulated in Article 141 of Code of Criminal Procedure no. 5271 ("Code no. 5271") was an effective legal remedy needed to be exhausted (see *Hikmet Kopar and Others* [Plenary], no. 2014/14061, 8 April 2015, §§ 64-72; *Hidayet Karaca* [Plenary], no. 2015/144, 14 July 2015, §§ 53-64; *Günay Dağ and Others* [Plenary], no. 2013/1631, 17 December 2015, §§ 141-150; and *İbrahim Sönmez ve Nazmiye Kaya*, no. 2013/3193, 15 October 2015, §§ 34-47).

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

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

62. Besides, any individual who has been arrested or taken into custody is entitled, by virtue of Article 91 § 5 of Code no. 5271, to file a challenge with the magistrate judge against the public prosecutor's written order for his arrest or custody in order to secure his immediate release. According to Code no. 5271, such a challenge may be filed not only by the individual arrested, but also by his defence counsel or legal representative, spouse, or first-degree or second-degree relatives by blood. There is no information or document in the application form and annexes thereto, which indicates that the applicant challenged the unlawfulness of his arrest or custody before the magistrate judge and that his challenge did not lead to any outcome (for the Court's assessments in the same vein, see *Gülser Yıldırım (2)* [Plenary], § 101).

63. For these reasons, this application must declared inadmissible for *non-exhaustion of legal remedies* insofar as it relates to the alleged unlawfulness of the applicant's arrest and custody, since it has been lodged without the exhaustion of the available judicial remedies.

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

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

64. The applicant maintained that his detention had been ordered in the absence of any criminal suspicion and any concrete fact or evidence in this respect; that there had been no risk of his tampering with the evidence and his fleeing; and that the decisions on his detention and on the challenge against his detention had lacked an examination as to his complaints, as well as reasoning. He accordingly alleged that his right to personal liberty and security had been violated.

65. He further alleged that he had been detained on remand in breach of the diplomatic safeguards emanating from his post. In this sense, he

stated that at the time of his detention, he had been indeed entitled to diplomatic immunity for holding office as a judge at the IRMCT; and that this immunity should have been lifted by the Secretary General of the United Nations for an investigation, prosecution to be initiated against him or for his being detained on remand.

66. In its observations, the Ministry noted that the professional immunity afforded to the applicant would not provide an absolute judicial immunity for him; that his professional status would be of no importance in respect of the issues which fall outside the scope of his profession and notably those which are a matter for the security of the Turkish State and for the Turkish judicial authorities; that the examination of the applicant's complaints through individual application must be conducted in accordance with Article 15 of the Constitution; that the individual application to the Constitutional Court was a subsidiary remedy; and that except for the cases giving rise to the violation of the fundamental rights and freedoms due to the interpretations manifestly contrary to the Constitution and any manifest arbitrariness in the assessment of evidence, it was within the discretion of the inferior courts to decide whether the imputed acts constituted an offence, as well as to interpret the provisions of law including those related to detention and to apply them to the given cases.

67. In his counter-statements against the Ministry's observations, the applicant stated that he held office as a judge until 1 July 2018; that he could not be subjected to a trial and detained on remand for being covered by an international diplomatic immunity; and that he was prevented from performing his profession for being detained on remand.

b. The Court's Assessment

68. 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."

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

"Everyone has the right to personal liberty and security.

...

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

70. The applicant's allegations in this part should be examined within the scope of the right to personal liberty and security under Article 19 § 3 of the Constitution.

i. Applicability

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

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

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

72. The Court has stated that in examining the individual applications against emergency measures, it would take into account the protection regime set out in Article 15 of the Constitution with respect to fundamental rights and freedoms (see *Aydın Yavuz and Others*, §§ 187-191). The accusation which was brought against the applicant by the investigation authorities and for which he was detained on remand is his alleged membership of the FETÖ/PDY stated to be the structure behind the coup attempt. The Court has considered that the impugned accusation is related to the incidents underlying the declaration of the state of emergency (see *Selçuk Özdemir* [Plenary], no. 2016/49158, 26 July 2017, § 57).

73. In this respect, the alleged unlawfulness of the applicant's detention would be reviewed under Article 15 of the Constitution. During such review, it would be primarily determined whether the applicant's detention on remand was in breach of the constitutional safeguards, notably those set forth in Articles 13 and19 of the Convention, and in case of a violation, it would be assessed whether the criteria set forth in Article 15 of the Constitution rendered such a violation lawful (see *Aydın Yavuz and Others*, §§ 193-195, 242; and *Selçuk Özdemir*, § 58).

ii. Admissibility

(1) General Principles

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

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

76. Pursuant to Article 19 § 3 of the Constitution, individuals *against whom there is strong indication of having committed an offence* may be arrested. In other words, this is a condition *sine qua non* for detention. For this, it is necessary to support an allegation with plausible evidence, which can be considered as strong. (see *Mustafa Ali Balbay*, no. 2012/1272, 4 December 2013, § 72).

77. Besides, it is provided in Article 19 § 3 of the Constitution that an individual may be detained for the purpose of preventing "*escape*" or "*tampering with evidence*". Article 100 of Code no. 5271 sets forth that detention may be ordered in cases where the suspect or accused has escaped, hidden or where there are concrete facts which raise the suspicion of escape or where the behaviours of the suspect or accused tend to show the existence of a strong suspicion of tampering with, altering, or concealing evidence, or attempting to put an unlawful pressure on witnesses, victims or other individuals. In the relevant provision, the offences regarding which the ground for arrest may be deemed to exist *ipso facto* are enlisted, provided that there exists a strong suspicion of having committed those offenses (see *Halas Aslan*, §§ 58 and 59).

78. It is also set out in Article 13 of the Constitution that the restrictions on fundamental rights and freedoms cannot be contrary to the principle of *proportionality*. In this scope, one of the issues to be taken into consideration is the proportionality of the detention, given the gravity of offence as well as the severity of the corresponding penalty (see Halas Aslan, § 72).

79. In every concrete case, it falls in the first place upon the judicial authorities deciding detention cases to determine whether the prerequisites for detention, i.e., the strong indication of guilt and other grounds, exist and whether the detention is a proportionate measure. As a matter of fact, the authorities which have direct access to the parties and evidence are in a better position than the Court in making such determinations (see *Gülser Yıldırım (2)*, § 123). However, it is for the Court to review whether the judicial authorities have exceeded the discretion conferred upon them. The Court's review must be conducted especially over the detention process and the grounds of detention order in view of the circumstances of the concrete case (see *Erdem Gül and Can Dündar* [Plenary], no. 2015/18567,

25 February 2016, § 79; and *Selçuk Özdemir*, § 76; and *Gülser Yıldırım (2)*, § 124).

(2) Application of Principles to the Present Case

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

81. The applicant was detained on remand, pursuant to Article 100 of Code no. 5271, within the scope of an investigation conducted into his alleged membership of an armed terrorist organisation, namely the FETÖ/PDY, the perpetrator of the coup attempt.

82. However, he maintained that his detention had been ordered in breach of the safeguards afforded by the diplomatic immunity he was entitled through his office.

83. Article 29 §§ 1 and 2 of the Statute of the International Residual Mechanism for Criminal Tribunals, where the privileges and immunities, exemptions and facilities accorded to judges holding office in the IRMCT are set forth, refers to the Vienna Convention on Diplomatic Relations and the Convention on the Privileges and Immunities of the United Nations. In this regard, it must be ascertained whether the applicant was entitled to such immunity pursuant to the provisions of these Conventions.

84. By Article 29 of the Law no. 3042 on the Adoption of the Vienna Convention on Diplomatic Relations dated 18 April 1961, it is set forth *"The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity"*. In Article 31 § 1 of the same Law, it is also indicated that diplomatic agents shall be exempted from the criminal jurisdiction of the relevant State. Article 31 § 4 also sets out *"The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State"*.

85. According to Section 15, Article IV of the Convention on the Privileges and Immunities of the United Nations, which sets forth *"The provisions of sections 11, 12 and 13 are not applicable as between a representative*

and the authorities of the State of which he is a national or of which he is or has been the representative", it is indicated that the immunities accorded by virtue of this Convention shall not be applicable in the face of the authorities of the state of origin.

86. Accordingly, those who take office as the judge at the UN IRMCT shall be, as a rule, entitled to the privileges, immunities, exemptions and facilities accorded to diplomatic representatives pursuant to the international law. However, it is inferred from the abovementioned provisions that these exemptions and immunities are accorded before the authorities of the receiving state to which diplomatic representatives are seconded. These exemptions and immunities cannot be claimed before the authorities of the State of origin, in other words, the State which has seconded the representative. Therefore, the investigation against the applicant would be conducted pursuant to general rules, and if necessary, his detention may be ordered by the magistrate judges, as the competent judicial authority. Besides, the offence imputed to the applicant and underlying his detention is not related to his office as a judge; but the imputed acts are in the form of a personal terror-related offence.

87. Accordingly, in the present case, the applicant's allegation that as being an IRMCT judge, his detention was unlawful for being in breach of the safeguards deriving from the international law is unfounded. It has been therefore considered that the applicant's detention had a lawful basis.

88. Prior to an assessment as to whether the applicant's detention, which had a lawful basis, had pursued a legitimate aim and was proportionate, it must be ascertained whether there existed *a strong indication of guilt*, the pre-requisite of detention.

89. In the investigation documents, indictment and the court decisions on the applicant's detention, it is stated that the applicant is a user of *ByLock*, an application used by and among the FETÖ/PDY members to ensure intra-organisational communication.

90. The Court has noted that given the features of *ByLock* application, the competent authorities may consider its use or its download to

electronic/mobile devices as an indication of a link with the FETÖ/PDY (see *Aydın Yavuz and Others*, §§ 106 and 267). Accordingly, the assessment, of the investigation authorities and the courts ordering detention, to the effect that the use of ByLock by the applicant, accused of being a member of the FETÖ/PDY, constituted *a strong indication* of guilt by the particular circumstances of the present case cannot be considered as unfounded or arbitrary (see *Selçuk Özdemir*, § 74; and *Neslihan Aksakal*, no. 2016/42456, 26 December 2017, § 57).

91. Besides, it must be assessed whether the applicant's detention, which satisfied the pre-requisite that there must exist a strong suspicion of criminal guilt, pursued a legitimate aim. In this assessment, all particular circumstances of the present case including the general conditions prevailing at the time when the detention order was issued must be taken into consideration.

92. Given the fear atmosphere created by the severe incidents that occurred during the coup attempt, the complexity of the organisational structure of the FETÖ/PDY , regarded as the perpetrator of the coup attempt, and the danger posed by this organisation (see *Aydın Yavuz and Others*, §§ 15-19, 26), the criminal or violent acts committed by thousands of FETÖ/PDY members in an organised manner, and the necessity to immediately launch investigations against thousands of people including public officials although they might not be directly involved in the coup attempt, the preventive measures other than detention may not be sufficient for the proper collection of evidence and for the effective conduct of the investigations (for the Court's assessments in the same vein, see *Aydın Yavuz and Others*, § 271; and *Selçuk Özdemir*, § 78).

93. The risk of escape of the persons who were involved in the coup attempt or who have a link with FETÖ/PDY, the terror organisation behind the coup attempt, by taking advantage of the turmoil in the aftermath of the coup attempt and the risk of their tampering with evidence are more likely, when compared to the crimes committed during the ordinary times. Besides, the facts that the FETÖ/PDY has organised in almost all public institutions and organisations within the country, that it has been carrying out activities in over 150 countries, and that it has

many important international alliances will greatly facilitate the escape and residence abroad of the persons who are under an investigation with respect to this organisation (for the Court's assessments in the same vein, see *Aydın Yavuz and Others*, § 272; and *Selçuk Özdemir*, § 79).

94. Membership of an armed terrorist organisation for which the applicant was detained on remand is among the offences prescribed to be punished severely within the Turkish legal system, and the severity of the punishment prescribed by the law for the imputed offence points to the risk of fleeing (for the Court's assessments in the same vein, see *Hüseyin Burçak*, no. 2014/474, 3 February 2016, § 61; *Devran Duran* [Plenary], no. 2014/10405, 25 May 2017, § 66). In addition, the imputed offence is among the crimes set forth in Article 100 § 3 of Code no. 5271 that are *ipso facto* presumed as a ground for detention (see *Gülser Yıldırım (2)*, § 148).

95. In the present case, in ordering the applicant's detention, the Ankara 2nd Magistrate Judge took into consideration the nature of the criminal act of being a member of an armed terrorist organisation, which was imputed to him, the severity of the corresponding sanction prescribed in the relevant law, the risk of his fleeing and tampering with evidence, as well as the nature of the criminal act in question as a catalogue offence laid down in Article 100 § 3 of Code no. 5271.

96. Therefore, regard being had to the general conditions prevailing at the time of detention order, the aforementioned circumstances of the present case and the content of the detention order issued by the Ankara 2nd Magistrate Judge as a whole, it has been considered that the grounds for the applicant's detention, such as the risk of fleeing and tampering with the evidence, had factual bases, notably given the gravity of the imputed offence and his ability to flee abroad in his capacity as a judge holding office at an international tribunal.

97. In addition, it must also be determined whether the applicant's detention on remand was proportionate. In the assessment of the proportionality of such a measure under Articles 13 and 19 of the Constitution, all particular circumstances of the case must be taken into consideration (see *Gülser Yıldırım (2)*, § 151).

98. First of all, to conduct investigations into terrorist crimes poses serious difficulties for public authorities. Therefore, the right to personal liberty and security should not be interpreted in a way that would make it extremely difficult for the judicial authorities and security officers to effectively fight the crimes –especially the organised ones– and criminality (for the Court's assessments in the same vein, see *Süleyman Bağrıyanık and Others*, no. 2015/9756, 16 November 2016, § 214; and *Devran Duran*, § 64). Considering the scope and nature of the investigations related to the coup attempt or the FETÖ/PDY, as well as the characteristics of the said organisation (i.e. confidentiality, cell-type structuring, being organised in all institutions, attributing holiness to itself, acting on the basis of obedience and devotion), it is clear that such kinds of investigations are much more difficult and complex than the other criminal investigations (see *Aydın Yavuz and Others*, § 350).

99. Regard being had to the aforementioned circumstances of the instant case, it cannot be said that it was arbitrary and unfounded for the Ankara 2nd Magistrate Judge to conclude that the applicant's detention was a proportionate measure and the conditional bail would be insufficient given the severity of the punishment prescribed for the alleged offence as well as the nature and gravity of the imputed act.

100. For these reasons, as it is clear that there is no violation as regards the alleged unlawfulness of the applicant's detention on remand, this part of the application must be declared inadmissible for being *manifestly ill-founded*.

101. Accordingly, since it has been concluded that the interference with the applicant's right to personal liberty and security through detention was not in breach of the safeguards enshrined in the Constitution (Articles 13 and 19), no further examination is required with respect to the criteria laid down in Article 15 of the Constitution.

3. Alleged Unreasonable Length of the Applicant's Detention on Remand

a. The Applicant's Allegations

102. The applicant claimed that his challenge against detention had been rejected without any justification; and that he had been deprived of

his liberty without the relevant constitutional guarantees being afforded and personalised, as well as without his challenges being taken into consideration.

b. The Court's Assessment

103. The Constitutional Court is not bound by the legal qualification of the facts by the applicants and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). In this respect, the Court considered that the applicant's complaint under this heading were related to the unreasonable length of detention and accordingly examined it under Article 19 § 7 of the Constitution.

104. As required by the subsidiary nature of individual application mechanism, in order for an individual application to be lodged with the Court, ordinary legal remedies must first have been exhausted (see *Ayşe Zıraman and Cennet Yeşilyurt*, § 17).

105. Unlike the continued detention on remand, in cases where the applicant raises a complaint that his detention exceeded the maximum period prescribed in the relevant law or the reasonable period after the discontinuation of his detention is ordered, he must exhaust the remedy -if any- which is capable of ensuring the establishment of the alleged violation and the award of compensation (see *Hamit Kaya*, no. 2012/338, 2 July 2013, § 46).

106. As regards the allegations that a given detention has exceeded a maximum period prescribed in the law or the reasonable period, the Court has concluded that although the main proceedings were not concluded yet by the date of examination of the individual application, the action for compensation stipulated in Article 141 of Code no. 5271 is an effective legal remedy needed to be exhausted (see *Erkan Abdurrahman Ak*, no. 2014/8515, 28 September 2016, §§ 48-62; and *İrfan Gerçek*, no. 2014/6500, 29 September 2016, §§ 33-45).

107. In the present case, the alleged unreasonable length of detention of the applicant, who was released on 14 June 2017 upon lodging an individual application, may be examined through an action to be brought under Article 141 of Code no. 5271. The competent court may also award

compensation in his favour at the end of the action to be brought under this provision if his detention is found to have exceeded a reasonable period. Accordingly, it has been concluded that the venue of action for compensation, specified in Article 141 of Code no. 5271, was an effective remedy applicable to the applicant's case and capable of offering an appropriate redress; and that the examination of the individual application lodged without the exhaustion of this ordinary remedy would be incompatible with the "subsidiary nature" of the individual application mechanism.

108. For these reasons, as the alleged unreasonable length of the applicant's detention was brought before the Court without the exhaustion of available legal remedies, this part of the application must be declared inadmissible for *the non-exhaustion of legal remedies*.

VI. JUDGMENT

For the reasons explained above, the Constitutional Court UNANIMOUSLY held on 12 September 2019 that

A. 1. The alleged violation of the right to a fair trial be DECLARED INADMISSIBLE for *the non-exhaustion of legal remedies*;

2. The alleged violations of the right to respect for private life as well as the inviolability of domicile be DECLARED INADMISSIBLE for *being manifestly ill-founded*;

3. The alleged violation of the right to personal liberty and security due to the unlawfulness of the applicant's arrest and detention orders be DECLARED INADMISSIBLE for *the non-exhaustion of legal remedies*;

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

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

B. The court expenses be COVERED by the applicant.

CHAPTER TWO
JUDGMENTS

RIGHT TO LIFE (ARTICLE 17 § 1)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

MAHİN PARJANİ AND OTHERS

(Application no. 2015/19219)

10 October 2019

On 10 October 2019, the Second Section of the Constitutional Court found a violation of the procedural aspect of the right to life safeguarded by Article 17 of the Constitution in the individual application lodged by *Mahin Parjani and Others* (no. 2015/19219).

THE FACTS

[7-59] The applicants, citizens of a neighbouring country, are relatives of S.K. who was killed. The incident occurred when S.K. and a group of his friends, who were trying to enter Turkey, came across the Turkish soldiers at the border and fled to a village. The chief public prosecutor's office that had launched an investigation into the incident sent the file to the military prosecutor's office as it had no jurisdiction. The latter issued a decision of non-prosecution on the basis of the relevant evidence and information, as well as the statements taken. Upon the applicants' challenge, the military court ordered an extension of the investigation and elimination of the certain shortcomings in the file. Thereupon, the military prosecutor's office obtained the requested documents. Subsequently, the military court dismissed the applicants' challenge with final effect, having regard, inter alia, to the outcome of the inquiries carried out within the scope the extended investigation.

V. EXAMINATION AND GROUNDS

60. The Constitutional Court, at its session of 10 October 2019, examined the application and decided as follows.

A. The Applicants' Allegations

61. The applicants alleged that their relative, who travelled to Turkey in order to visit his family, had been killed by the soldiers. The applicants expressed that even though their relative had entered Turkey illegally, there were kinship relationships between those living in the villages along the border; and that it was a known fact that the residents living in these villages within walking distance could travel between these villages without any need for passports and similar documents. The applicants alleged that their relative, who had been unarmed, was the victim of an extra-judicial execution by being shot in the back without any prior

warning shots; that the incident did not necessitate the use of a weapon and that the killing of their relative was disproportionate and unlawful. The applicants stated that the regulation on the use of weapons did not pay regard to the nature of the offence.

62. The applicants stated that a decision of non-prosecution had been issued through an incomplete examination at the end of the investigation into the incident; that the evidence obtained within the scope of the investigation had been classified inaccurately; and that the investigation authority had rendered a decision in the form of an acquittal verdict by substituting itself for the trial court. The applicants alleged that the decision of non-prosecution was based on the statements of the witness who had not told the truth; and that the military prosecutor's office had never questioned the veracity of the statements of the witness who had appeared out of nowhere. They also added that the decision of non-prosecution issued by the military prosecutor's office on the basis of only the witness statement, in disregard of all the other evidence in the investigation file, constituted an indication that no independent and impartial investigation had been carried out into the impugned incident. They alleged that the statements of the village residents had not been taken into account by the military prosecutor's office; and that no explanation was provided in the decision as to the reason why the statements of the residents had been disregarded. Furthermore, the applicants stated that although there was not a single piece of evidence indicating that there had been a firing within the village, they failed to understand how the military prosecutor's office had reached this conclusion. They further maintained that the decision of the incumbent military court rendered upon challenge was a repetition of the decision issued by the military prosecutor's office and lacked reasoning. The applicants further maintained that the decisions delivered at the end of the investigation phase proved that the military prosecutor's office and the military court lacked independency and impartiality, which was also supported by the argument that the accused soldiers played an active role in the investigation process. They alleged that there had been an attempt to tamper with the evidence following the incident; that although the names of the persons who had involved in the incident and the weapons assigned to them were reported to the prosecutor's office by

the military authorities, the relevant letter of notification did not include any information as to the specifications of the gun from which the bullet casings found at the scene had been fired and the name of the person using this weapon. The applicants also alleged that the soldiers had picked up the bullets and bullet casings that were the subject of the offence, thereby tampering with evidence.

63. The applicants claimed that the right to life and the right to a fair trial had been violated on account thereof.

B. The Court's Assessment

64. The Constitutional Court ("the Court") is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (*Tahir Canan*, no. 2012/969, 18 September 2013, § 16). It has been considered that the allegations raised by the applicants that their right to a fair trial was violated fall within the scope of the procedural aspect of the right to life safeguarded by Article 17 of the Constitution; and that therefore, an examination has been carried out by the Court within this scope.

65. The right to life, safeguarded by Article 17 of the Constitution, is an inviolable and indispensable fundamental right which, taken in conjunction with Article 5 of the Constitution, imposes positive and negative obligations on the State (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, § 50).

66. Within the scope of the negative obligation of the State with regard to the right to life, the officers who use force based on a public power have the duty not to end the life of any individual intentionally and unlawfully. As for the positive obligations, the State has the duty to protect the right to life of all individuals within its jurisdiction against the risks that may arise due to the acts of public officials, other individuals, or even the individual himself (*Serpil Kerimoğlu and Others*, § 51).

67. The positive obligations incumbent on the State within the scope of the right to life have both a substantive aspect with respect to protection, as well as a procedural aspect with respect to effective investigation.

68. In case of an alleged violation of the right to life enshrined in Article 17 of the Constitution, the Court must carry out a full examination on this matter (see *Hamdiye Aslan*, no. 2013/2015, 4 November 2015, § 93).

69. Besides, in order to confirm the accuracy of the facts submitted in respect of the alleged violations through a full examination, there must exist reasonable evidence beyond any kind of doubt. Evidence to this extent may also consist of sufficiently serious, clear, and consistent indications or certain irrebuttable presumptions (see *Hıdır Öztürk and Dilif Öztürk,* no. 2013/7832, 21 April 2016, § 107).

70. In the present case, the documents submitted to the Court and the information and documents available in the criminal investigation file, which is the subject-matter of the present application, do not contain sufficient information -as will be explained under the examination of the procedural aspect of the right to life- for an assessment of whether the substantive aspect of the right to life was violated. There are significant differences between the statements of the applicants and the acknowledgements of the investigation authorities as to the circumstances giving rise to the incident. Due to the deficiencies in the investigation, which will be explained below, it appears impossible to favour one of these statements against other beyond any reasonable doubt. For this reason, the Court limited its examination to the procedural aspect of the right to life insofar as it concerned the obligation to conduct an effective investigation.

1. Admissibility

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

2. Merits

a. General Principles

72. The positive obligations of the State within the scope of the right to life also have a procedural aspect. This obligation requires the State to carry out an effective investigation capable of leading to the identification,

and if necessary the punishment, of those responsible for any unnatural death (see *Serpil Kerimoğlu and Others*, § 54).

73. The purpose of the investigations carried out within the scope of the right to life is to ensure the effective implementation of the legal provisions protecting the right to life and to hold responsible persons accountable for the death. This is not an obligation of result, but of means (see *Serpil Kerimoğlu and Others*, § 56).

74. The fact that the obligation of investigation is not an obligation of result, but of means does not imply that every investigation must reach a conclusion which is in line with the victims' statements as to the facts. Rather, the investigation must be, in principle, capable of leading to the establishment of the circumstances surrounding the incident, as well as to identification and punishment of those responsible if the allegations are proved to be true (see *Doğan Demirhan*, no. 2013/3908, 6 January 2016, § 66).

75. In this context, the criminal investigations must be effective and sufficient so that they enable the identification and punishment of those responsible. In order for an investigation to be qualified as effective and sufficient, the investigation authorities must, ex officio, take an action so as to collect all the evidence capable of clarifying the circumstances surrounding the death and leading to the identification of those responsible. Any shortcoming in the investigation that undermines the possibility of identifying the cause of death or uncovering those responsible may entail a risk of falling foul of the rule of carrying out an effective investigation (see *Serpil Kerimoğlu and Others*, § 57).

76. In this context, the authorities must take all reasonable measures available to them in order to collect evidence with regard to the incident, including, among other evidence, witness statements and criminalistic expert examinations (see *Doğan Demirhan*, § 68).

77. Moreover, the persons in charge of the investigation are expected to be independent from those having involved, or suspected to have involved, in the incidents. This requires not only an absence of hierarchical or institutional links but also a de facto independence (see *Cemil Danışman*, no. 2013/6319, 16 July 2014, § 96).

78. The minimum threshold of the investigation's effectiveness may vary by the specific circumstances of a given investigation, which is the subject-matter of the application. The circumstances in question are assessed on the basis of all relevant facts, having regard to the practical realities of the investigation. For this reason, it is not possible to set a minimum list of investigative procedures or similar minimum criteria that apply in every case in terms of the effectiveness of the investigation (see *Fahriye Erkek and Others*, no. 2013/4668, 16 September 2015, § 68).

79. It is also necessary that the conclusion reached as a result of the investigation is based on a comprehensive, objective and impartial analysis of all findings obtained during the investigation and that this conclusion includes an assessment as to whether the interference with the right to life is a proportionate interference stemming from a mandatory situation prescribed in the Constitution (see *Doğan Demirhan*, § 70).

b. Application of Principles to the Present Case

80. The applicants alleged that the procedural aspect of the right to life had been violated due to the above-cited incidents.

81. It is incumbent on the administrative and judicial authorities to assess the evidence related to a case of death. Nevertheless, the Court may need to examine how the impugned incident has occurred in order to understand the manner how the impugned incident took place and to conduct an objective assessment as to whether the investigation authorities addressed the allegations that the impugned death was caused by security forces.

82. In the present case, the applicants alleged that their relative had been killed by the security forces. The soldiers, who had involved in the incident, stated that the applicants' relative might have been killed by a gun fired from within the village as gunfire sounds were heard from inside the village at the time of the incident and they did not fired any shot towards the village. They also stated that they had never entered the village. At the end of the investigation, the investigation authorities concluded that there was insufficient evidence to instigate criminal proceedings to suggest that the incident had been perpetrated by the security forces.

83. As stated herein under the heading of *General Principles*, in order to effectively investigate a suspicious death, it is of utmost importance for the investigation authorities to take action *ex officio* and immediately after being informed of the incident. In the present case, as noted in certain reports drawn up in respect of the incident, the impugned incident had taken place at around 5.30 a.m.. Having learned about the incident, the Saray Chief Public Prosecutor's Office ensured the incident scene investigation team of the Özalp District Gendarmerie Command to set out at around 7.00 am and to arrive at the scene at 7.50 a.m.. At around 9.00 a.m. the public prosecutor accompanied by a court clerk and a photography expert arrived at the village where the incident took place. In the report drawn up by the incident scene investigation team, it was indicated that when the team reached the village, they observed that the necessary safety measures had already been taken by the Saray District Gendarmerie Command teams. On the basis of this statement, it has been inferred that the Saray District Gendarmerie Command teams had arrived at the scene at 7.50 a.m. at the latest. Nevertheless, it has been understood from the reports drawn up about the incident that no explanation was provided as to what time the incident had been reported to the public prosecutor's office and the Saray District Gendarmerie teams and what time the Saray District Gendarmerie teams had arrived at the scene. Since these matters were not clarified in the records, it is almost impossible to know whether the investigation authorities were notified of the incident in a timely manner and, if so, whether they immediately took action to secure the evidence.

84. There are many grey areas in the present case, especially as regards what happened between 5.30 am, and 7.00 am. This may have resulted from the late reporting of the incident to the investigation authorities, or the late response of the investigation authorities, or the failure of the investigation authorities to conduct a comprehensive incident scene investigation with due diligence. As explained above, since it is not clear whether the investigation authorities were notified of the incident in a timely manner, and if so, whether they immediately took action to secure the evidence, it will be discussed whether an examination was carried out with due diligence, as required by the procedural aspect of the right to life, especially in the aftermath of the security forces' response.

85. The report drawn up on the day of the incident by the incident scene investigation team of Özalp District Gendarmerie Command noted that a total of nine long-barrelled gun bullet casings were found in the grassland, which was 120 meters away from the dead body. Even though there were 9 bullet casings found at the end of the incident scene investigation, the applicants alleged that the number of bullets fired during the incident was much more. The expressions of the villagers, whose statements were taken as witnesses, were also in support of the argument that the number of bullets fired during the incident was more than 9 and that the bullets were fired not by merely one soldier. As a matter of fact, in support of the applicants' claim, T.Ş. who was one of the accused persons, submitted in his statement taken by the prosecutor's office that they had fired 22 shots into the air with a Kalashnikov rifle when they saw the villagers pouring out on the soldiers. Similarly, some other soldiers whose statements were taken admitted that they had fired warning shots into the air. It has been understood from the documents submitted by the military authorities to the public prosecutor's office that the number of bullets fired during the incident was more than the number found during the incident scene investigation. As such, it is clear that some of the bullet casings could not be found at the incident scene. Some of the soldiers, whose statements were taken by the prosecutor's office, implied that the empty bullet casings at the scene might have been collected by children or villagers. Some of the villagers, whose statements were taken by the prosecutor's office, asserted that the empty cartridge cases had been collected by the soldiers. The investigation authorities failed to provide any reasonable explanation as to why the bullet casings fired from the weapons used by the soldiers could not be found and what happened to these bullet casing; to consider the possibility whether these bullets were fired from the village, as alleged by the soldiers, at the investigation stage and to conduct an investigation into this matter on the day of the incident.

86. The applicants alleged that their relative, who had been unarmed, was the victim of an extra-judicial execution by being shot in the back without any prior warning shots. Some of the villagers stated that some of the soldiers had fired in the air, while others had fired directly at the group including the applicants' relative. Meanwhile, the soldiers asserted that they had fired warning shots into the air. In such a case, it is of great

importance to conduct examinations on the walls, roofs and empty spaces of the houses in the designated direction with a view to ascertaining whether the group including the applicants' relative had been targeted by the soldiers, as alleged by the applicants and some of the villagers. To determine the weapon(s) from which the bullets were fired through a ballistic examination to be performed at a laboratory is highly important for elucidating the circumstances of the impugned incident and the way how it took place.

87. According to the report drawn up by the Özalp District Gendarmerie Command teams, examinations were performed on the walls and roofs of the houses in the relevant direction on the basis of the assumption that the shots had been fired towards the body from the location where the bullet casings were found, however, no bullets could be found as a result of the examination. In the report prepared as a result of the autopsy procedure, it was noted that no bullets were found on the dead body. As no bullets were found on the dead body as a result of the autopsy procedure, a search for bullet casings and bullets was carried out with metal detectors one day after the incident, namely, on 10 October 2013 in line with the instruction of the prosecutor's office. Although, as state in the application form and annexes thereto, metal detectors were used in the incident scene investigation carried out on the day after the incident, there is no information or document suggesting that a metal detector was used in the incident scene investigation carried out on the day of the incident. In the present case where it has been alleged that multiple guns were fired repeatedly, to conduct a search with metal detectors not on the first day but on the day after the incident is incompatible with due diligence required by the procedural obligation of the right to life.

88. The Saray Chief Public Prosecutor's Office started taking the statements of the soldiers who had been involved in the incident approximately 50 days after the incident.

89. It is clear that the investigation authorities should have acted more delicately in this matter as such a delay in taking the statements, despite the lack of information in the application form and annexes thereto suggesting that there was an obstacle to taking initial statements of soldiers, may

create the impression in the eyes of the victims and the public that there had been a covert agreement between the investigation authorities and the accused persons with a view to closing the investigation.

90. In cases of death or fatal injury, such delays in taking the statements of suspected perpetrators may also lead to the perception in the eyes of victims and the public that law enforcement officers are not responsible to anyone - including judicial authorities- for their actions and that they act in the vacuum of authority.

91. It is evident that the failure to promptly take the statements of the suspects may create a risk of a covert agreement among the suspects.

92. It has been concluded that taking the statements of persons considered to be the main suspects of the incident approximately 50 days after the incident was absolutely incompatible with the obligation of due diligence required by the procedural aspect of the right to life.

93. As regards the actions to be taken at the preliminary investigation stage, it is also worth mentioning that it must be ascertained whether there were radio and camera records of the incident. Information on whether there were radio and thermal camera recordings of the day of the incident was included in the investigation file on 9 June 2015, namely, 1 year and 8 months after the incident, as a result of the examinations carried out by virtue of the decision to broaden the scope of the investigation. In the letter they communicated to the public prosecutor's office, the military authorities stated that there had been no radio and thermal camera recordings of the incident. It cannot be, however, understood from the letter sent by the military authorities to the public prosecutor's office whether these recordings were never kept or whether they were deleted after a certain period of time. Nevertheless, the excessive delay in the examination of these records that would help to enlighten the incident is not reasonable within the circumstances of the present case.

94. Taking into account the foregoing, it has been concluded that the initial procedure carried out by the investigation authorities cannot be said to have been carried out with due diligence, as required by the procedural aspect of the right to life.

95. As mentioned under the heading of *General Principles* above, the conclusion reached as a result of the investigation must be based on a comprehensive, objective and impartial analysis of all findings obtained during the investigation.

96. In the examination of the present case within this scope, the military prosecutor's office delivered a decision of non-prosecution on 19 November 2014, putting an emphasis on the statement of the witness S.M., a citizen of the Islamic Republic of Iran, that the soldiers had not shot the deceased and the statements of the soldiers that the gunshots had been fired inside the village.

97. The applicants stated that the decision of non-prosecution was based on the statement of a pre-arranged false witness, that the military public prosecutor's office had never questioned the accuracy of the statements of this witness, who appeared out of nowhere, that the decision contained no explanation as to the reason why the statements of the villagers had been disregarded, and that the decision of the military court rendered upon the objection was a repetition of the decision issued by the military prosecutor's office and lacked reasoning. They added that the decision of non-prosecution of the military prosecutor's office issued on the basis of merely the witness statement in disregard of all the other evidence in the investigation file constituted a proof that an independent and impartial investigation had not been carried out.

98. Therefore, the question whether the conclusion reached by the investigation authorities were based on a comprehensive, objective and impartial analysis of all findings obtained during the investigation must be examined in the context of the applicant's allegations. It is apparent that the conclusions reached by the investigation authorities are to be subject to a stricter review, especially in the cases where the death was allegedly caused by the use of lethal force.

99. Before conducting such an examination, it must be emphasized that the evaluations made by the Court do not include an examination as to the innocence or guilt of the persons and that it would be examined whether the investigation authorities have objectively, impartially and comprehensively discussed in their reasoned decisions the evidence that

may be useful to identify the person(s) potentially responsible for the incident.

100. In the present case, the villagers whose statements were taken by the public prosecutor's office stated that S.K. had been shot by the soldiers. Some of the villagers whose statements were taken within the scope of the investigation stated that they had witnessed soldiers chasing four or five smugglers each of whom had scattered to a different direction. Whereas others stated that they had seen five smugglers coming towards the village and one of the smugglers on horseback had shouted *"oh, father!"* and had subsequently fallen from his horse and hit his head, and that whereupon they immediately provided assistance to him. On the other hand, the soldiers involved in the incident alleged that the death had been caused by a gunfire coming from within the village. In their statements, the soldiers stated in the brief that approximately 40-50 shots had been fired from within the village at the time of the incident. S.M., a citizen of the Islamic Republic of Iran, who was heard as a witness within the scope of the investigation, stated that the relevant person had not been shot by the soldiers. S.M., who alleged to have witnessed the incident, stated that there had been no gunfire sound for about fifteen minutes after the applicants entered the village with their relative, that subsequently, he had heard a single shot, that approximately thirty seconds after the gunfire sound, the applicants' relative had fallen to the ground, and that he had gone to see whether the person in question was alive, and then the citizens in the village had begun to gather around that person.

101. In the assessment of the statements of the villagers, soldiers and the Iranian citizen S.M., who witnessed the incident, it has been observed that there were serious discrepancies in the statements. The villagers stated in general that the person had been shot by the soldiers and did not mention any gunfire sound coming from the village. Whereas, the soldiers generally expressed that they had fired into the air at the time of the incident, during which they had heard 40-50 shots coming from the village. On the other hand, having asserted that the person in question had not been shot by the soldiers, the Iranian citizen S.M.'s explanation of the incident was neither similar to that of the villagers nor that of the soldiers. S.M. stated that there had been no gunfire sound for about fifteen minutes following the entry

of the persons concerned into the village, that subsequently, he had heard the sound of a single shot, and that approximately thirty seconds after the sound of the shot, the applicants' relative had fallen to the ground.

102. In such a case, it is evident that it is an important step required to be taken by the investigation authorities to take the statements of the villagers once again upon the statement of the Iranian citizen S.M. for the purposes of shedding light on the present case. The reasonable steps that should have been taken by the investigation authorities in order to shed light on the present incident were taking the statements of the villagers who witnessed the incident once again and asking them whether they had seen a third person alongside the deceased after the shooting, and if so, establishing whether this person was the Iranian Citizen S.M., and confronting these persons. However, in the present case, it has been observed that the investigation authorities rendered a decision without conducting an inquiry that could prove the authenticity of the statements of the Iranian citizen S.M. The investigation authorities issued decisions without questioning the authenticity of S.M.'s statements, which were indeed inconsistent with both the villagers' and the soldiers' statements.

103. Investigation authorities' failure to carry out reasonable inquiries to prove the authenticity of the statements of Iranian citizen S.M., to explain in their decisions in a reasonable and adequate manner why the statements of S.M., which overlapped neither with the statements of the villagers nor with the statements of soldiers, were taken into consideration. Furthermore, the reliance by the investigation authorities in their decisions merely on the statements of S.M. and the suspected soldiers, without sufficiently discussing the statements of the villagers, may give the impression that the investigation authorities lacked independence and impartiality. It must therefore be emphasized that the investigation authorities should have been more sensitive about this issue.

104. Lastly, it must be considered whether any investigation was conducted against the possible civilian perpetrator(s) of the death in the present case. In the decision of 19 November 2014 issued by the military public prosecutor's office, it was noted that the applicants' relative might have died due to a gun fired from inside the village and that the investigation conducted by the Saray Chief Public Prosecutor's Office

against possible civilian perpetrators was pending. The challenge against the decision of the military prosecutor's office, dated 19 November 2014, was rejected by the military court on 16 October 2015. However, according to the application form and the annexes thereto, following the decision of the military prosecutor's office, the Saray Chief Public Prosecutor's Office issued a decision of non-jurisdiction on 31 December 2014, stating that it was the military prosecutor's office that had the jurisdiction to investigate the incident, and accordingly transferred the file to the military prosecutor's office. Therefore, it appears that although it was stated that an investigation against civilian perpetrators had been pending, a decision of non-jurisdiction was rendered within the scope of the said investigation and no inquiry was carried out against the possible civilian perpetrators. As a matter of fact, on 28 January 2019, the Constitutional Court asked the Saray Chief Public Prosecutor's Office whether an investigation was conducted - with respect to the possible civilian perpetrator(s) - about the incident. The Saray Chief Public Prosecutor informed the Court that the investigation was closed by virtue of a decision of non-jurisdiction and the file was transferred to the military prosecutor. Accordingly, it has been concluded that although the military prosecutor's office delivered a decision of non-prosecution, noting that an investigation was being carried out by the Saray Chief Public Prosecutor's Office with respect to the civilians who might be the possible perpetrators of the incident, the investigation did not continue even in respect of the civilian(s) who were the possible perpetrators of the incident. It is evident that the failure to investigate the incident that caused the death of the applicants' relatives did not meet the requirements under the procedural aspect of the right to life.

105. In the light of the foregoing, it has been concluded that the initial procedures carried out by the investigation authorities lacked due diligence; that the investigation authorities failed to make a comprehensive analysis of the evidence obtained as a result of the investigation; that the incident ultimately remained uninvestigated; and that the procedural aspect of the right to life was violated due to the shortcomings in question.

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

3. Application of Article 50 of Code no. 6216

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

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

108. The applicants requested 100,000 Turkish Liras ("TRY") for each of the applicants, namely a total of TRY 500,000 Turkish Liras, in compensation for non-pecuniary damage, as well as the initiation of criminal proceedings against those concerned.

109. In the judgment of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court set the general principles as to the determination of how to eliminate the violation in the event of finding a violation.

110. In brief, it was emphasized in the judgment of *Mehmet Doğan* that the source of the violation must first be determined in order to identify the appropriate way of redress. Accordingly, in cases where a court decision leads to a violation, it is, in principle, ordered that a copy of the judgment finding a violation be sent to the relevant court for a retrial in order to redress the violation and its consequences in accordance with Article 50 § 2 of Code no. 6216 and Article 79 (a) of the Internal Regulations of the Court (see *Mehmet Doğan*, §§ 57, 58).

111. In cases where the Court orders a retrial in order to redress the violation found, inferior courts do not enjoy a discretionary power in the recognition of the existence of the grounds for retrial and the annulment of the previous decision, unlike the re-opening of the proceedings as set forth under the relevant procedural laws. As a matter of fact, in cases where a violation is found, it is not the inferior courts but rather the Court that has found a violation to enjoy the discretion regarding the necessity of a retrial. The inferior court is obliged to take the necessary actions to eliminate the consequences of the violation in accordance with the judgment finding a violation delivered by the Court (see *Mehmet Doğan*, § 59).

112. In the present case, it has been held that the procedural aspect of the right to life under Article 17 of the Constitution was violated due to the lack of an effective criminal investigation into the impugned death. Accordingly, it has been concluded that the violation stemmed from the acts and actions of the investigation authorities.

113. In this case, there is a legal interest in conducting a re-investigation in order to redress the consequences of the violation of the right to life. In the context of the execution of the judgment finding a violation, the step required to be taken by the incumbent chief public prosecutor's office is to annul its decision of non-prosecution and subsequently conduct a fresh investigation in such a way as to eliminate the shortcomings identified in the judgment finding a violation. However, this should not mean that criminal proceedings must be necessarily brought at the end of the re-investigation. It is indubitably the incumbent chief public prosecutor's office empowered to assess the evidence to be collected within the scope of the new investigation.

114. On the other hand, in the present case, ordering an investigation does not thoroughly compensate for all the damages sustained by the applicants. Hence, in order to redress the violation along with the consequences thereof, the applicants must be jointly awarded a net amount of TRY 36,600 in compensation for the non-pecuniary damages they sustained due to the violation of the procedural aspect of the right to life, which cannot be redressed by merely the finding of a violation and the conduct of a re-investigation.

115. The total court expense of TRY 2,701.90 including the court fee of TRY 226.90 and the counsel fee of TRY 2,475, which is calculated over the documents in the case file, must be reimbursed jointly to the applicants.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 10 October 2019 that

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

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

C. A copy of the judgment be SENT to the Military Prosecutor's Office of the Gendarmerie Public Security Command (to the official and authorized chief public prosecutor's office to be designated in accordance with Provisional Article 21 § 1 (b) of the Constitution since the military courts were abolished in accordance with the Provisional Article 21 § 1 (e) thereof, which was introduced by Law no. 6771 and dated 21 January 2017) for reinvestigation in order to redress the consequences of the violation of the procedural aspect of the right to life;

D. A net amount of TRY 36,600 be PAID jointly to the applicants in compensation for non-pecuniary damage;

E. The total court expense of TRY 2,701.90 including the court fee of TRY 226.90 and the counsel fee of TRY 2,475 be REIMBURSED JOINTLY TO THE APPLICANTS;

F. The payments be made within four months as from the date when the applicants apply 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 TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

GÜLŞEN POLAT AND KENAN POLAT

(Application no. 2015/4450)

10 October 2019

On 10 October 2019, the Second Section of the Constitutional Court found violations of the right to life and prohibition of torture safeguarded by Article 17 of the Constitution in the individual application lodged by *Gülşen Polat and Kenan Polat* (no. 2015/4450).

THE FACTS

[7-93] The applicants' son M.P., shortly after having been put in the military penitentiary institution, had been taken to hospital, as his health condition had deteriorated. He afterwards died at the hospital. Within the scope of the investigation launched by the military prosecutor's office, statements of many people were taken. They stated that M.P., who had been beaten with a thick wooden stick for five or six minutes, had been taken to hospital, as the bleeding in his head had not stopped. He had been diagnosed with body and head trauma, and then he had lost his consciousness and could not be saved despite all medical efforts.

In subsequent stages of the investigation, the investigation file was sent to the chief public prosecutor's office for lack of jurisdiction. Within the scope of the subsequent criminal case, the assize court did not classify the offence as aggravated torture, but intentional murder. Hence, it sentenced the guardian H.G. to life imprisonment and reduced it to 25 years for the latter's good conduct. The assize court acquitted the other guardians as well as the military officers taking office in the institution, of torture.

The applicants unsuccessfully appealed against the assize court's decision, stating that their son had died as a result of torture. The Court of Cassation finally upheld the assize court's decision.

V. EXAMINATION AND GROUNDS

94. The Constitutional Court, at its session of 10 October 2019, examined the application and decided as follows.

A. The Applicants' Allegations

95. The applicants alleged that their son who had been under the supervision and surveillance of the administration had been killed as a

result of torture; that the State failed to fulfil its *obligation not to kill*; that their son had died as a result of the torture he had been subjected to in a place where persons had been systematically tortured; and that the act resulting in their son's death had been performed by government officials. The applicants maintained that the administration, which had failed to take protective measures, was clearly at fault in the incident that resulted in the death of their son.

96. The applicants further alleged that no sufficient investigation was conducted into the incident and that no sufficient evidence was collected. The applicants stated that only the prison warden H.G. was convicted of the offence of intentional killing with respect to their son's murder; that the acts committed against their son were characterized as acts carried out with individual intention even though it was found established that similar acts of torture had been carried on others as a result of the investigations carried out within the scope of the criminal investigation initiated after the incident that caused the death of their son. The applicants alleged that the torture room was isolated so as to insulate sounds; that fake reports were produced after the incident, and that those who wanted to use their right to file complaints were tortured and threatened. The applicants asserted that such incidents, evidently, could not have taken place without the knowledge of other officials in the Military Penitentiary Institution; that by not convicting H.G. of torture, other defendants were also protected. The applicants also brought forward that the proceedings had not been concluded within a reasonable time.

97. The applicants, through these allegations, claimed that the right to life, the prohibition of torture and the right to trial within a reasonable time had been violated.

B. The Court's Assessment

98. The Constitutional Court is not bound by the legal qualification of the facts by the applicants and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). Considering the application form and its annexes as a whole, it has been established that the applicants' allegations must be examined from the standpoint of the right to life and the prohibition of torture.

99. Article 17 § 1, 3 and 4 of the Constitution, titled *"Personal inviolability, corporeal and spiritual existence of the individual"*, reads as follows:

> *"Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence.*
>
> *(...)*
>
> *No one shall be subjected to torture or ill-treatment; no one shall be subjected to penalties or treatment incompatible with human dignity.*
>
> *The act of killing in case of self-defence and, when permitted by law as a compelling measure to use a weapon, during the execution of warrants of capture and arrest, the prevention of the escape of lawfully arrested or convicted persons, the quelling of riot or insurrection, or carrying out the orders of authorized bodies during a state of emergency, do not fall within the scope of the provision of the first paragraph."*

100. The relevant part of Article 5 of the Constitution 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 material and spiritual existence."*

1. Alleged Violation of the Right to Life

a. Scope of the Examination

101. The 5th Chamber of the Adana Assize Court made various assessments in terms of other allegations of ill-treatment in the Military Penitentiary Institution apart from the allegation that the applicants' son M.P. had been beaten to death, and made decisions against the alleged perpetrator(s).

102. There is no doubt that the applicants had victim status with regard to the death of their son M.P. and that they had the capacity to file an application in this regard. However, it is not possible to acknowledge that

the applicants have victim status in view of the other alleged ill-treatments in the Military Penitentiary Institution. The victims of these allegations of ill-treatment are not relatives of the applicants but third parties. For this reason, the incident which is the subject matter of the application will be examined in so far as it is related to the death of M.P. However, the data related to the other allegations of ill-treatment in the Military Penitentiary Institution will be relied on in the examination.

b. Whether the Applicants still have Victim Status

103. The 5th Chamber of the Adana Assize Court considered that the death of M.P. constituted the offence of intentional killing and sentenced the warden H.G. to 25 years' imprisonment. In addition to the alleged violations, the applicants alleged that the fact that H.G. was sentenced to 25 years' imprisonment for the offence of intentional killing was unlawful; and that the impunity of H.G. in view of the offence of torture aimed to protect several other defendants, including the administrators of the Military Penitentiary Institution.

104. It cannot be acknowledged that the applicants' victim status ended on account of the aforementioned decision of the 5th Chamber of the Adana Assize Court without taking account of the circumstances in which the relevant incident took place. For this reason, the applicants' allegations must be examined under Article 17 of the Constitution, considering the circumstances of the present incident.

c. Admissibility

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

d. Merits

106. The alleged violation of the right to life will be examined separately in terms of both the substantive and procedural aspects of the right to life in the following.

1) Alleged Violation of the Substantive Aspect of the Right to Life

2) General Principles

107. The right to life, safeguarded under Article 17 of the Constitution, is an inviolable and indispensable fundamental right, which, in conjunction with Article 5 of the Constitution, imposes positive and negative obligations on the State (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, § 50).

108. Within the scope of the negative obligation of the State with regard to the right to life, the officers who use public force have the duty not to end the life of any individual intentionally and unlawfully. When it comes to positive obligations, the State has the duty to protect the right to life of all individuals within its jurisdiction against the risks that may arise due to the acts of public officials, other individuals, or even the individual himself (see *Serpil Kerimoğlu and Others*, § 51).

109. In the event that a person who was placed in custody or a penitentiary institution in good health dies in a suspicious way, it is for the public authorities to provide a reasonable explanation regarding the circumstances of the incident that caused the death of the person in question. Public authorities are obliged to provide an explanation as to the suspicious deaths of these persons who are under the protection of the State.

110. The Constitutional Court has a subsidiary role in the examination of complaints with regard to individual applications. However, in case of alleged violations of the right to life and the prohibition of ill-treatment safeguarded under Article 17 of the Constitution, the Constitutional Court must carry a full examination. In view of the fact that it is, as a rule, the duty of public prosecutors and inferior courts to assess the evidence during the investigation and prosecution stages, it is not for the Constitutional Court to substitute its own assessment of material facts for that of the relevant authorities. The Constitutional Court does not have a duty to reach a finding with regard to criminality or guilt in the context of criminal liability. On the other hand, although the Constitutional Court is not bound by the findings of the inferior courts, under normal circumstances, there must be

strong reasons to depart from the conclusions of these courts in relation to the material facts (see *Elif Kaya*, no. 2014/266, 6 April 2017, § 39).

111. In order to confirm the accuracy of the facts submitted in respect of the alleged violations, reasonable evidence beyond any doubt is needed. Evidence to this extent may also consist of sufficiently serious, clear, and consistent indications or certain presumptions that cannot be proven otherwise (see *Hıdır Öztürk and Dilif Öztürk,* no. 2013/7832, 21 April 2016, § 107).

112. The duty of the Constitutional Court within the framework of individual applications regarding the right to life is not to determine the criminal liability of individuals. The duty of the Constitutional Court within this framework is to interpret whether the incident giving rise to the application violated the right to life protected under Article 17 of the Constitution against the backdrop of again the constitutional provisions.

(2) Application of Principles to the Present Case

113. The applicants, through the aforementioned allegations, claimed that the substantive aspect of the right to life was violated.

114. In the present case, on 27 June 2005 M.P. was brought to the Military Penitentiary Institution as per the detention warrant dated 17 June 2005 (Inquiry no. 2005/97) issued by the 1st Chamber of the İskenderun Magistrates' Court. It is undisputed that M.P. had been admitted to the Military Penitentiary Institution in good health. As a matter of fact, in the application form and the annexes thereto, there is no finding that M.P. had been subjected to ill-treatment before having been placed in the Military Penitentiary Institution. Likewise, such an allegation was not raised in the proceedings before the inferior courts. For this reason, it has been considered that in the particular circumstances of the present case, there is no reason to elaborate on this matter.

115. The incident, which is the subject matter of the present application, essentially concerns the developments following the placement of M.P. in the Military Penitentiary Institution.

116. M.P., who was taken to the Military Penitentiary Institution in good health on 27 June 2005, was taken to the hospital at around 6.30 pm on the

same day with the diagnosis of *head and general body trauma*. Despite all the treatments that he had received, M.P. died one month after the incident. As a result of the autopsy performed on the body, it was established that M.P. had a general body trauma; and that he died due to blunt head trauma as a result of *brain contusion, intraparenchymal haemorrhage* and their respective complications.

117. Having regard to these facts, it has been understood that following his admission into the Penitentiary Institution in good health, M.P. was hospitalized in very poor health and subsequently died. In view of this, it must be examined how the public authorities and inferior courts explained how the injuries in question that lead to the M.P.'s death had occurred.

118. Even though the wardens allegedly involved in the incident provided different statements about the course of the incident, it has been found established that M.P. died in the Military Penitentiary Institution as a result of the actions that he had been exposed to in a room that was used as a dressing room, which was also called as the wardens' room. This is the common aspect of the statements of the defendants and witnesses giving statements. While it was explained, creating no doubt, by the wardens allegedly involved in the incident as well as the witness A.S., that the incident had taken place in the dressing room, it has been observed that these people provided different statements with respect to the cause of the signs of injury on M.P.'s body before the inferior courts. The witness A.S. and a significant number of wardens allegedly involved in the incident stated that the warden named H.G. had battered M.P. with whom he had a verbal quarrel using a stick he had grabbed. H.G. on the other hand stated that the incident had occurred while they were trying to stop M.P. who was displaying aggressive behaviour. It has been considered that even though the wardens allegedly involved in the incident had different statements about the course of the incident, none of them could make reasonable explanation justifying the use of such heavy violence against M.P. In other words, it has been concluded that the application form and the annexes thereto did not include a convincing explanation demonstrating that the violence inflicted upon M.P. had been absolutely necessary in the circumstances specified in Article 17 § 4 of the Constitution. As a matter of fact, the inferior courts also established that the applicants' son M.P had

died as a result of the intentional ill-treatment. It has been concluded that the finding of the inferior courts alone would be essentially sufficient to hold the State accountable for M.P.'s death.

119. In view of the foregoing, it has been understood that M.P. had died as a result of the acts that could not be reasonably justified while he had been under the supervision and protection of the State.

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

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

(1) General Principles

121. The positive obligations of the State within the scope of the right to life have a procedural aspect as well as a substantive aspect with respect to protection. This obligation requires the State to conduct an effective investigation capable of leading to the identification of those responsible for any unnatural death and, if necessary, their punishment (see *Serpil Kerimoğlu and Others*, § 54).

122. The purpose of the investigations carried out within the scope of the right to life is to ensure the effective implementation of the legal provisions protecting the right to life and to hold responsible persons accountable for the death incident. This is not an obligation of result, but of means (see *Serpil Kerimoğlu and Others*, § 56).

123. The fact that the obligation of investigation is not an obligation of result, but of means, does not imply that every investigation must reach a conclusion which is in line with the victims' statements about the facts. However, the investigation, as a rule, must be capable of leading to the establishment of the circumstances of the incident and identification and punishment of those responsible in the event that the allegations are proved to be true (see *Doğan Demirhan*, no. 2013/3908, 6 January 2016, § 66).

124. In this context, criminal investigations must be effective and sufficient so as to enable the identification and punishment of those responsible. In order to call into question the effectiveness and sufficiency

of the investigation, the investigating authorities must, *ex officio*, collect all the evidence that could shed light upon the death and help identify those responsible. A shortcoming in the investigation that undermines the possibility of identifying the cause of the death or uncovering those responsible may contradict the rule of carrying out an effective investigation (see *Serpil Kerimoğlu and Others*, § 57).

125. In this context, the authorities must take all reasonable measures available to them in order to collect evidence with regard to the incident, including, among other evidence, witness statements and criminalistic expert examinations (see *Doğan Demirhan*, § 68).

126. Moreover, the persons in charge of the investigation are expected to be independent from those having involved or suspected to have involved in the incidents. This requires not only an absence of hierarchical or institutional links but also a tangible independence (see *Cemil Danışman*, no. 2013/6319, 16 July 2014, § 96).

127. One of the aspects that ensure the effectiveness of the criminal investigations to be conducted is that the investigation or its results are open to public scrutiny to ensure accountability in practice as well as in theory. Furthermore, in all cases, the deceased's relatives must be involved in this process insofar as necessary, to protect the legitimate interests thereof (see *Serpil Kerimoğlu and Others*, § 58).

128. The minimum level of examination that ensures the effectiveness of the investigation may vary according to the specific circumstances of the investigation which is the subject matter of the application. The circumstances in question are considered on the basis of all relevant facts, having regard to the practical realities of the investigation. For this reason, it is not possible to make a minimum list of investigation procedures or similar minimum criteria that apply in every case in terms of the effectiveness of the investigation (see *Fahriye Erkek and Others*, no. 2013/4668, 16 September 2015, § 68).

129. It is also necessary that the conclusion reached through the investigation is based on a comprehensive, objective and impartial analysis of all findings obtained during the investigation process and

that the conclusion in question includes an assessment as to whether the interference with the right to life is a proportional interference stemming from a mandatory circumstance sought by the Constitution (see *Doğan Demirhan*, § 70).

130. In addition to those listed above, there is an implicit necessity to carry out investigations with reasonable speed and due diligence. Indeed, there may be impediments or challenges that prevent the progression of the investigation or prosecution in some cases. However, prompt action by the authorities during the investigation and subsequent prosecution is of critical importance with a view to better enlightening the facts, maintaining people's commitment to the rule of law and avoiding a display of tolerance or indifference towards unlawful acts (see *Deniz Yazıcı*, no. 2013/6359, 10 December 2014, § 96).

(2) Application of Principles to the Present Case

131. The applicants, through the aforementioned allegations, claimed that the procedural aspect of the right to life was violated.

132. Assessment of evidence related to death incidents is the duty of administrative and judicial authorities. Nevertheless, the Constitutional Court may need to examine how the impugned incident has occurred in order to understand the manner in which the incident, the subject matter of the application, has occurred and to conduct an objective assessment as to whether the investigation authorities and inferior courts addressed the allegations of death as a result of torture.

133. In order for an effective investigation of a suspicious death, it is of utmost importance that investigation authorities take an action *ex officio* and immediately after being informed. In the present case, the applicants' son M.P. was evacuated from the Military Penitentiary Institution on 25 June 2005 *due to the diagnosis of head + general body trauma* and he was first taken to the military hospital and subsequently to the Çukurova University Faculty of Medicine Balcalı Hospital. Although both the officials of the Military Penitentiary Institution and the staff of the said Hospital knew about the injuries and bruises on M.P.'s body, the Military Prosecutor's Office took over the case file only when the criminal file opened by the

Military Penitentiary Institution in respect the wardens was sent to it on 7 July 2005. The fact that the Military Public Prosecutor's Office took over the case file ten days after the hospitalization of the applicants' son M.P. is a significant shortcoming within the particular circumstances of the present case. In fact, the applicants' son M.P. had not fallen into the vegetative state immediately after the incident. M.P. had been conscious during his hospitalization. M.P.'s consciousness had remained clear for several days after the incident. The failure of the Military Public Prosecutor's Office to immediately take an action *ex officio* resulted in the inability of the independent investigation authorities to take the statement of M.P., who had later fallen into the vegetative state and eventually died.

134. The said shortcoming in the investigation may have stemmed from the Military Penitentiary Institution and hospital officials' not informing the competent prosecutor of the incident as well as from the failure of the competent prosecutor who had been informed to immediately take over the case *ex officio*. Nonetheless, as there is a fault attributable to public authorities in both cases, nothing will change in terms of the State's responsibility under the obligation of carrying out an effective investigation.

135. Another significant component of an effective investigation is that the persons in charge of the investigation are expected to be independent of those having involved or suspected to have involved in the incidents. In the present case, the non-taking-over of the case file by the Military Public Prosecutor's Office *ex officio* resulted in a situation where those involved or suspected to have been involved in the incident to be considerably active at the incident scene for a certain period of time.

136. The fact that the Military Public Prosecutor's Office took over the case file 10 days after resulted in secret agreements made by some suspects, inability to take the statements of the perpetrator or perpetrators of the incident just after the incident, inability to keep the scene of the incident as it had been, and even hiding of the stick allegedly used in the incident for a certain period of time in the place called the warehouse.

137. Having regard to the foregoing, it has been understood that the Military Public Prosecutor's Office did not act *ex officio*, personally and

immediately and that for this reason, a significant number of shortcomings arose, including the inability to take statements of the direct victim of the incident.

138. Whether there had been a camera system in the Military Penitentiary Institution at the time giving rise to the incident was investigated approximately five years after the incident. As a result of this investigation, it had been understood that there had been a camera system during the mentioned period, but no camera recording of the time period in which the incident took place could be obtained. The importance of the role that camera recordings may play in revealing the incident and determining the responsible persons is evident. However, no investigation was carried out on this matter at the early investigation stage and camera recordings, if any, were not retrospectively included in the investigation file.

139. As mentioned under the *General Principles*, the conclusion reached as a result of the investigation must be based on a comprehensive, objective and impartial analysis of all findings obtained during the investigation.

140. In the examination of the present case within this scope, it has been observed that by the indictment of the Adana Chief Public Prosecutor's Office dated 6 April 2006, criminal proceedings were initiated against the wardens who had been in the dressing room during the incident, the senior military officers among the administrative staff of the Military Penitentiary Institution, and certain other wardens for torture and aggravated torture on account of its consequences; that the 5th Chamber of the Adana Assize Court, on the other hand, concluded that not the offence of torture and aggravated torture on account of its consequences but instead the offence of intentional killing had materialised; and that in this context, it was decided that the warden named H.G. be sentenced to 25 years' imprisonment for intentional killing, that R.G., M.K. and E.K. who had been in the dressing room during the incident be acquitted of the offence of aggravated torture on account of its consequences, that the proceedings against N.E. who had been in the dressing room during the incident be discontinued due to the death of the said person pending the proceedings, and that the senior military officers working at the Military Penitentiary Institution at the time giving rise to the incident be acquitted of the offence of torture. It has been understood that the 5th Chamber

of the Adana Assize Court already made examinations with respect to certain other battery incidents in the Military Penitentiary Institution and convicted some of the wardens for the offence of intentional injury and subsequently suspended the pronouncement of the respective judgments.

141. The applicants stated that only the prison warden H.G. was convicted of the offence of intentional killing with respect to their son's killing; that the acts committed against their son were characterized as acts carried out with individual intention, even though it was established that similar acts of torture had been committed against others as a result of the investigation launched after the incident resulting in their son's death; that it was evident that such incidents could not have taken place without the knowledge of other officials at the Military Penitentiary Institution; and that by not convicting H.G. of torture, other defendants were also protected. The applicants also maintained that the proceedings had not been concluded within a reasonable time.

142. Against this background, whether the conclusions reached by the inferior courts were based on a comprehensive, objective and impartial analysis of all findings obtained during the investigation must be examined in the context of the applicant's allegations. It is apparent that the conclusions reached by the inferior courts are to be subject to a stricter review, especially in applications where the death is allegedly caused by torture.

143. Before conducting such an examination, it must be emphasized that the assessments made by the Constitutional Court do not include an examination as to the innocence or guilt of the persons; and that the subject matter of the examination in question is whether the inferior courts have objectively, impartially and comprehensively discussed in their reasoned decisions the evidence that may be useful to identify the person(s) potentially responsible for the incident. In this context, it must also be reiterated that the duty of the Constitutional Court in cases where the right to life is at stake is not to determine which offence the act of the person(s) considered to be responsible for the incident constitutes.

144. In the present case, even though the Adana Chief Public Prosecutor's Office emphasized in its indictment dated 6 April 2006 that incidents similar to the battery of M.P. frequently occurred in the Military

Penitentiary Institution, that such actions were ongoing for a long time in the Military Penitentiary Institution, and that the said acts perpetrated against detainees and convicts in the Military Penal Execution Institution were almost the same and held that the offences of torture and aggravated torture had occurred in relation to M.P.'s death, the 5th Chamber of the Adana Assize Court concluded that M.P. had died due to an intention which emerged suddenly, without examining the said issues listed in the indictment. In the examination of the application form and the annexes thereto, it has been observed that the indictment of the Adana Chief Public Prosecutor's Office included important data invoking suspicion on the said matters; and that in the aforementioned period, the 5th Chamber of the Adana Assize Court even convicted a number of the wardens, some among whom were present in the dressing room during the death of M.P., for the offence of intentional injury in respect of certain battery incidents and subsequently suspended the pronouncement of the judgments in question. Thereby, the 5th Chamber of the Adana Assize Court must make a very comprehensive assessment on the matters stated in the indictment and reasonably explain why it disagreed with the points made in the indictment. However, it has been considered that in the present case, the 5th Chamber of the Adana Assize Court failed to make a comprehensive analysis.

145. The 5th Chamber of the Adana Assize Court acquitted R.G., M.K. and E.K. who had been in the dressing room during the incident of the offence of aggravated torture. The 5th Chamber of the Adana Assize Court found that there was no sufficient, convincing and conclusive evidence requiring the conviction of those persons, indicating that these persons were subordinates to the other defendant H.G., that there was a hierarchical relationship between these persons and H.G., and that these persons acted together an in agreement with H.G. with the intention of killing M.P. According to the conclusion reached by the 5th Chamber of the Adana Assize Court, H.G. first started to batter M.P. with a baton, then he continued to batter him with a wooden stick about 1 meter in length and 10 cm in diameter that fell from the closet in the dressing room. Some of the wardens in the dressing room at the time of the incident stated that H.G. battered M.P. for about five or six minutes.

146. Even though the 5th Chamber of the Adana Assize Court highlighted the relationship between these persons and H.G. when making an examination as to the responsibility of the wardens in the dressing room during the incident, it held that the failure to intervene sufficiently in a grave incident such as beating a person with a wooden stick which was approximately 1 meter in length and 10 cm in diameter for five or six minutes cannot be explained merely by hierarchical relationship; that H.S. was not the chief warden at the time of the incident; that it was of great importance to reach a conclusion by assessing separately the actions and reactions of all the wardens in the dressing room within the particular circumstances of the present case; and that such a comprehensive assessment was not made in the present case.

147. The 5th Chamber of the Adana Assize Court acquitted the senior military officers working at the Military Penitentiary Institution at the material time. It was stated in the indictment drawn up by the Adana Chief Public Prosecutor's Office that incidents similar to the battery of M.P. occurred frequently in the Military Penitentiary Institution; that a large amount of data in the investigation file indicated that the authorities of the Military Penitentiary Institution acted in an effort to protect the guards; that it had been impossible not to see the stick used in the incident during the searches; that officers and non-commissioned officers had given orders to batter the detainees and convicts; and that these persons used the guards as an intermediary in the commission of the offence. Nevertheless, the 5th Chamber of the Adana Assize Court concluded that there was no sufficient, convincing and conclusive evidence in the present incident to punish the persons in question, stating that the wardens had committed the imputed acts after working hours; that it was not possible to hear from the administrative section of the Military Penitentiary Institution the voices in the dressing room; that there was no instruction given in the Military Penal Execution Institution for the battery of detainees and/or convicts; and that some of the witnesses whose statements were taken described the Military Penal Institution as one of the penitentiary institutions where humanitarian conditions were provided at the top level.

148. According to the application form and the annexes thereto, it is obvious that certain wardens, whose statements were taken within the

scope of the inquiry initiated by the Military Penitentiary Institution following the incident, made false statements. The said wardens also made statements that did not reflect the truth before the military public prosecutor prior to their detention. The application form and the annexes thereto contain significant data which suggests that the statements alleged to have been taken by the Non-Commissioned Officer O.A. on 28 June 2005 were not taken on the said date. It has been clearly understood from the application form and the annexes thereto that the signatures in some minutes and statements drawn up within the scope of the inquiry initiated by the Military Penitentiary Institution were forged. Some of the wardens in the dressing room at the time of the incident stated before the inferior courts that their statements within the scope of the inquiry conducted by the Military Penitentiary Institution were directed by the administration and that they gave such statements because the administration wanted them to do so. Considering the foregoing, it is clear that the inferior courts should have investigated rigorously whether the senior military officers at the Military Penitentiary Institution were involved in the death of M.P. and whether they acted with the motive to protect the guards after the incident as alleged and that the data obtained as a result of this investigation must be subject to review. However, the 5th Chamber of the Adana Assize Court rendered its judgment without making an assessment as to why the signatures in certain reports and statements drawn up within the scope of the inquiry initiated by the Military Penitentiary Institution were turned out to be forged; whether the statements that were alleged to have been taken on 28 June 2005 had actually been taken on the said date; and if this is not the case, why this date was shown as the date when the statements were taken. The fact that these arguments, which were used in the indictment to prove that the officials of the Military Penitentiary Institution acted with the motive of protecting the wardens, were not addressed in the reasoned decision is an important shortcoming.

149. As mentioned above, in the application form and the annexes thereto, there is important data to suggest that similar battery incidents took place in the Military Penitentiary Institution prior to the battery of M.P. As a matter of fact, the 5th Chamber of the Adana Assize Court convicted a number of the wardens for the offence of intentional injury in respect of certain battery incidents and subsequently suspended the

pronouncement of the judgments in question. Certain guards stated that senior military officers gave the battery order. Some of the detainees and convicts expressed that senior military officers saw the swelling and bruises on their faces as a result of the battery incidents. In spite of all this, the inferior courts did not sufficiently elaborate on whether the senior military officers were aware of the battery incidents before M.P.'s death. In this connection, the inferior courts failed to provide a satisfactory reason as to why it had taken the death of the M.P. as an individual case independent of other incidents of battery.

150. The incident that is the subject matter of the present application must also be assessed in terms of the principle that investigations regarding the right to life must be carried out at a reasonable speed and with due diligence.

151. In the present case, it has been understood that the investigation into the incident taking place on 27 June 2005 ended with the decision of the 8th Criminal Chamber of the Court of Cassation dated 19 January 2015. Having regard to the importance of the subject matter of the case in terms of the applicants and that the applicants did not have any involvement in the prolongation of the case, it cannot be said that the period of approximately 9 years and 7 months is reasonable. For this reason, it has been concluded that the present case was not conducted at a reasonable speed, impairing the important role in preventing similar violations of the right to life that may arise afterwards.

152. Taking all these points into consideration, it has been concluded that the Military Prosecutor's Office's failure to take over the case *ex officio* and immediately resulted in a significant shortcoming in the collection and preservation of the evidence; that the evidence obtained as a result of the investigation was not subjected to a comprehensive analysis in the decisions of the inferior courts; that the investigation and prosecution into the incident were not carried out at a reasonable speed; and that the procedural aspect of the right to life was violated on account of these shortcomings.

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

2. Alleged Violation of the Prohibition of Torture

154. The applicants, through the aforementioned allegations, claimed that the prohibition of torture and ill-treatment was violated.

a. Admissibility

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

b. Merits

156. As explained in the part regarding the alleged violation of the right to life, the applicant's son M.P., who was completely under the protection of the State, died after having been subjected to a very intense physical violence considered to have been performed for intimidation and suppression, which could not be explained reasonably. Again, as stated above, no effective and comprehensive investigation was conducted into the incident. Having regard to the circumstances of the present case, it has been concluded that the alleged violation of the right to life overlaps the alleged violation of the prohibition of torture. For this reason, it has been held that the substantive and procedural aspects of the prohibition of torture were also violated for the reasons above.

157. Consequently, the Court has found a violation of the prohibition of torture safeguarded under Article 17 of the Constitution.

C. Application of Article 50 of Code no. 6216

158. Article 50 §§ 1 and 2 of 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."

159. In the judgment of *Mehmet Doğan* [Plenary] (no. 2014/8875, 7 June 2018) of the Constitutional Court, general principles as to the determination of how to redress the violation in the event of finding a violation were set out.

160. It was emphasized, in brief, in the judgment of *Mehmet Doğan* that in order to determine the appropriate way of redress, the source of the violation must be determined in the first place. Accordingly, in cases where a court decision leads to a violation, as a rule, it is decided that a copy of the decision be sent to the relevant court for retrial in order to redress the violation and its consequences in accordance with Article 50 § (2) of Code no. 6216 and Article 79 (1) (a) of the Internal Rules of Court of the Constitutional Court (see *Mehmet Doğan*, §§ 57, 58).

161. In the judgment of *Mehmet Doğan*, the Constitutional Court made explanations regarding the obligations of the inferior courts tasked with retrial and what should be done by inferior courts to redress the consequences of the violation. In cases where the Constitutional Court orders a retrial in order to redress the violation found, inferior courts do not enjoy a discretionary power in terms of the recognition of the existence of the grounds for retrial and the annulment of the previous decision, unlike the retrial concept regulated under the relevant procedural laws. As a matter of fact, in case of delivery of a violation judgment, not the inferior courts but the Constitutional Court which finds the existence of the violation enjoys the discretion regarding the necessity of retrial. The inferior court is obliged to take the necessary actions to redress the consequences of the violation in accordance with the judgment finding a violation delivered by the Constitutional Court (see *Mehmet Doğan*, § 59).

162. In this context, the inferior court must first annul the decision which has been found to have violated a fundamental right or freedom

or have failed to eliminate the violation committed against a fundamental right or freedom by the administrative authorities. Subsequent to the annulment of the decision, the inferior court must take the necessary actions in order to redress the consequences of the violation found in the judgment of the Constitutional Court. Within this framework, in the event that the violation stems from a procedural act or shortcoming, the procedural act in question has to be carried out again in such a way that redressed the violation of the said right (for the first time, in case it has not been carried out yet). On the other hand, in cases where the Constitutional Court determines that the violation is caused by the administrative act or action itself or the outcome of the decision or judgment of the inferior court (rather than the procedural actions taken or not taken by the inferior court), the inferior court must redress the consequences of the violation by rendering an opposite decision directly, on the basis of the case file as far as possible without taking procedural action (see *Mehmet Doğan*, § 60).

163. The applicants requested the finding of the violation, the redress of the consequences of the violation as well as the award of a total of TRY 100,000 compensation, including TRY 50,000 in respect of pecuniary damages and TRY 50,000 in respect of non-pecuniary damages.

164. In the present case, it has been concluded that both the right to life and the substantive and procedural aspects of the prohibition of torture were violated. In the present application, it has been understood that the violation of the right to life as well as substantive aspect of the prohibition of torture stemmed from the fault of the administration and the violation of the right to life as well as procedural aspect of the prohibition of torture from a number of shortcomings arising during the investigation and prosecution stages attributable to the investigation and prosecution authorities.

165. As there is a legal interest in retrial in order to redress the consequences of the violation of the right to life and the procedural aspect of the prohibition of torture, a copy of the judgment must be remitted to the 5th Chamber of the Adana Assize Court for retrial.

166. Non-pecuniary compensation of TRY 50,000 (net amount) in respect of the non-pecuniary damages suffered by the applicants which cannot be sufficiently compensated for by the finding of a violation of the

right to life and the prohibition of torture alone and by retrial must be paid jointly to the applicants.

167. For the Constitutional Court to award pecuniary compensation, there must be a causal link between the pecuniary damage alleged to be suffered by the applicant and the violation found. On account of the fact that the applicants did not submit a document in this regard, their pecuniary compensation claims must be rejected.

168. The total court expense of TRY 2,701.90 including the court fee of TRY 226.90 and the counsel fee of TRY 2,475, which is calculated over the documents in the case file, must be paid jointly to the applicants.

VI. JUDGMENT

The Constitutional Court UNANIMOUSLY held on 10 October 2019 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;

3. The alleged violation of the substantive aspect of the prohibition of torture be DECLARED ADMISSIBLE;

4. The alleged violation of the procedural aspect of the prohibition of torture be DECLARED ADMISSIBLE;

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

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

3. The substantive aspect of the prohibition of torture, safeguarded under Article 17 of the Constitution, was VIOLATED;

4. The procedural aspect of the prohibition of torture, safeguarded under Article 17 of the Constitution, was VIOLATED;

C. A copy of the judgment be SENT to the 5th Chamber of the Adana Assize Court for retrial in order to eliminate the consequences of the violation of the right to life and the prohibition of torture;

D. The applicants be PAID, jointly, in respect of non-pecuniary damages, TRY 50,000 and their other requests for compensation be REJECTED;

E. The total court expense of TRY 2,701.90 including the court fee of TRY 226.90 and the counsel fee of TRY 2,475 be REIMBURSED JOINTLY TO THE APPLICANTS;

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

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

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

B.P.O.

(Application no. 2015/19012)

27 March 2019

On 27 March 2019, the Plenary of the Constitutional Court found a violation of the right to protection of one's corporeal and spiritual existence safeguarded by Article 17 of the Constitution, but no violation of the right to a fair trial safeguarded by Article 36 of the Constitution in the individual application lodged by *B.P.O.* (no. 2015/19012).

THE FACTS

[8-41] The applicant, a Colombian woman, after arriving at Turkey, was taken to the police station by the police officers who became suspicious about her behaviours at the airport. During her body search, drugs were found on her. According to the applicant's allegation, which she raised before the court, she was also subjected to an internal body search by a female police officer in the toilet of the police station as a result of which drugs were found also in her vagina.

Upon finding drugs on the applicant's body, the police officers called the public prosecutor and received his instruction. In accordance with the written instruction of the public prosecutor, the applicant was subjected to an internal examination by the health officers at the hospital and as a result, drugs were found also in her abdomen. Subsequently, at the end of the judicial proceedings, the applicant was convicted of importing drugs or stimulants. The applicant's subsequent appeal was dismissed, and the decision that was upheld by the Court of Cassation became final.

She then lodged an individual application on 4 December 2015.

V. EXAMINATION AND GROUNDS

42. The Constitutional Court, at its session of 27 March 2019, examined the application and decided as follows.

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

1. The Applicant's Allegations

43. The applicant alleged that even though it was guaranteed under Article 17 § 2 of the Constitution that the corporeal integrity of the

individual shall not be violated except under medical necessity and in cases prescribed by law, the law enforcement officer had illegally violated her corporeal integrity. Claiming that her right to the protection of the corporeal and spiritual existence had been violated, the applicant complained that the law enforcement officer had manually searched her genitalia in the absence of any decision by a judge or public prosecutor, which was mandatory in accordance with the relevant legal provisions.

2. The Court's Assessment

44. The Article 17 §§ 1, 2, and 3 of the Constitution reads as follows:

> "*Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence.*
>
> *The corporeal integrity of the individual shall not be violated except under medical necessity and in cases prescribed by law; and shall not be subjected to scientific or medical experiments without his/her consent.*
>
> *No one shall be subjected to torture or ill-treatment; no one shall be subjected to penalties or treatment incompatible with human dignity.*"

a. Applicability

45. The incident, which is the subject-matter of the present application, concerns an alleged unlawful internal examination conducted by a law enforcement officer within the scope of a judicial search. It must first be assessed whether the alleged act should be examined under the prohibition of ill-treatment or the right to protect the corporeal and spiritual existence of the person.

46. A treatment must attain a minimum level of severity in order for it to fall within the scope of Article 17 § 3 of the Constitution. The minimum level in question is relative and must be assessed within the concrete circumstances of each incident. In this context, factors such as the duration of the treatment, its physical and mental effects, and the victim's gender, age and health status are of importance. In addition, the motive and purpose of the treatment must be taken into account. It must also be considered whether the treatment occurred at a time of strain and emotional intensity (see *Cezmi Demir and Others*, no. 2013/293, 17 July 2014,

§ 83). In the event that the impact of the act in question does not reach this minimum threshold of severity, even if an investigation cannot be carried out within the scope of the prohibition of ill-treatment, an examination may be made within the framework of the right to protect the corporeal and spiritual existence, depending on the particular circumstances of the given case.

47. Although all legal interests within the private sphere of life are guaranteed under Article 8 of the European Convention on Human Rights ("the Convention"), it is observed that these legal interests fall under the protection of various provisions of the Constitution. In this context, Article 17 § 1 of the Constitution provides that everyone has the right to protect and improve his/her corporeal and spiritual existence. This right set forth in this provision corresponds to the right to corporeal and spiritual integrity and an individual's rights to self-fulfilment and self-determination, which are enshrined in Article 8 of the Convention within the scope of the right to respect for private life. Moreover, Article 17 § 2 of the Constitution contains a special safeguard in terms of the right to physical and spiritual integrity by setting forth that the corporeal integrity of the individual shall not be violated except under medical necessity and in cases prescribed by law and no one shall be subjected to scientific or medical experiments without his/her consent (see *Halime Sare Aysal* [Plenary] 2013/1789, 11 November 2015, § 47).

48. As provided for in the abovementioned judgments of the European Court of Human Rights ("the ECHR"), which are in the same vein, in cases where a public authority carries out a strip or detailed search, many different variables such as the necessity of the act, the reasonable ground on which it is based, the way that the search is carried out, the search location and the genders of the applicant and the public officer in charge may be decisive in terms of the constitutional safeguard under which the given application must be examined. Specific cases may require the assessment of other criteria such as the consent of the person subjected to the search, whether force was used by the law enforcement officer during the search, the compliance of the search with the legislation, whether the hygiene rules were followed during the search, the attitude of the public officer towards the person searched, the frequency of the searches, etc.

49. In the present case, emphasising that the internal examination carried out by the law enforcement officer was unlawful, the applicant stated that there had been a violation of Article 17 § 2 of the Constitution, but did not mention any unbearable corporeal pain or psychological disruption that went beyond usual element caused by the impugned act. The medical report drawn up by the relevant hospital due to her arrest following the search indicated that there were no signs of injury on her body. It has been observed that neither before the inferior courts nor in her individual application, did the applicant raise complaints about the accuracy of the medical report. In addition to this, it has been understood from the applicant's allegations that the search was carried out by a police officer who was also female, in an environment invisible to third parties, by respecting hygiene rules. In the judicial process initiated upon the suspicion of the applicant's nervous behaviour, there were reasonable grounds for carrying out a detailed search on the applicant, who was noticed by law enforcement officers while trying to hide the drugs in her possession. For this reason, it can be concluded that the impugned search was based on the legitimate aim of combating drugs and preventing crime and was not intended to insult the applicant. Moreover, in her application, the applicant did not complain of any mental trauma she had suffered due to the anguish and suffering caused by the incident.

50. For these reasons, as it has been considered that the severity of the search, which is the subject-matter of the applicant's complaint, did not reach the minimum threshold necessitating an examination under the prohibition of ill-treatment, this part of the application must be examined within the framework of the right to protect the corporeal and spiritual existence safeguarded by Article 17 § 1 of the Constitution.

Mr. Zühtü ARSLAN, Mr. Engin YILDIRIM and Mr. Yusuf Şevki HAKYEMEZ disagreed with this opinion.

b. Admissibility

51. It has been observed that there is no remedy specifically exhausted by the applicant as regards the complaint to the effect that her right to protect corporeal and spiritual existence had been violated due to the law enforcement officer's interference with her corporeal integrity

in contravention of the law. For this reason, within the particular circumstances of this application, an assessment must be made as to the rule of exhaustion of the available remedies before lodging an individual application.

52. The Constitutional Court has rendered several decisions regarding the remedy that must be exhausted in terms of the right to protect corporeal and spiritual existence of the person safeguarded by Article 17 § 1 of the Constitution. Within the scope of the said constitutional guarantee, the Constitutional Court notes that it consideres the avenues of criminal or civil proceedings as an effective remedy regarding the right to the protection of honour and reputation (see *Ahmet Oğuz Çinko and Erhan Çelik* [Plenary], no. 2013/6237, 2 July 2015, § 63; and *C.K.* [Plenary], no. 2014/19685, 15 March 2018, § 42). In another application with respect to the right to honour and reputation, finding the exhaustion of merely the remedy of criminal investigation insufficient, the Court held that the civil remedy should also have been exhausted (see *Mehmet Seyfi Oktay* [Plenary], no. 2013/6367, 10 December 2015, § 35). Similarly, in the application of *Adan Oktar (3)* (no. 20131123, 2 October 2013, § 35), the Court held that the State's obligation to establish an effective judicial mechanism against interferences with the corporeal and spiritual existence did not necessarily require a criminal investigation; and that it was also possible for the applicant to obtain redress through an action for compensation to be filed due to an alleged interference, by third parties, with his right to honour and reputation.

53. On the other hand, in another application examined by the Court, it was noted that since the remedy of civil proceedings would not be effective in cases where the identity of the person who allegedly damaged the honour and reputation of the applicant was unknown, the remedy of criminal proceedings would be the only effective remedy (see *Mustafa Tepeli* [Plenary], no. 2014/5831, 1 March 2017 § 25). In another application filed in respect of alleged harassment (see *Ebru Bilgin* [Plenary], no. 2014/7998, 19 July 2018, § 77), despite the pending nature of the criminal proceedings conducted into the incident that was the subject matter of the application, the Court found the exhaustion of the remedy of administrative proceedings by the applicant sufficient, in consideration of the subjective characteristics of the given application. Another application involving an

alleged medical negligence, which was lodged upon the exhausting of the administrative remedy, was also found admissible (see *Hamdullah Aktaş and Others* [Plenary], 2015/10945, 19 July 2018, § 39).

54. The Court examined another application, concerning the taking of the applicant's saliva sample under duress within the scope of a criminal investigation, of which conditions are more similar to those of the present case within the scope of the right to protect the corporeal and spiritual existence (see *Sıtkı Güngör,* no. 2013/5617, 21 April 2016). In the application in question, it was established that the applicant had filed a criminal complaint, with the public prosecutor taking the applicant's statement for the first time, about the taking of a saliva sample from him under duress on the basis of a court decision yet had failed to initiate a separate criminal investigation (see *Sıtkı Güngör*, §§ 18, 19). As regards the complaints of the applicant, who had not exhausted any remedy including the criminal investigation with regard the alleged violation of the relevant rights, the Court did not nevertheless issue a decision on inadmissibility due to the non-exhaustion of the available remedies (see *Sıtkı Güngör*, § 49). Indubitably, this was because of the applicant's voicing of the alleged violations at a stage of criminal proceedings conducted with respect to her.

55. As understood from the above-mentioned decisions, there is not a sole legal remedy that must be exhausted in order to lodge an individual application in connection with the right to protect the corporeal and spiritual existence safeguarded by Article 17 § 1 of the Constitution. In other words, the Court requires an applicant to lodge an individual application after exhausting a remedy which is appropriate in terms of the nature of a given act leading to the alleged violations. In the present case, the law enforcement officer's act was brought before the public prosecutor, at least as indicated in the police report. There is no doubt that the public prosecutor is not only a judicial subject conducting the judicial investigation but also the judicial superior of the law enforcement officers. The authority to make an assessment as to whether the impugned act performed by the law enforcement officer will be categorised as an offence and will be the subject-matter of a criminal investigation, or whether the given act is an act that concerns disciplinary law for amounting to a breach

of professional rules lies with the public prosecutor, or other administrative authorities insofar as it relates to disciplinary law. In this respect, as regards the present application, the Court will not make any further assessment as to whether the criminal investigation or the disciplinary investigation was a more effective remedy capable of offering a prospect of success. Besides, any assertion to the contrary that the applicant failed to exhaust a remedy that should have been exhausted has not been raised before the Court.

56. Given the evidence stated in the indictment drawn up with respect to the applicant for the offence of importing narcotic or stimulant substances, it has been observed that the police reports did not explicitly and specifically mention 40 grams of cocaine, reportedly obtained from the applicant's genitalia. This may mean that the public prosecutor also knew and tacitly admitted that 40 grams of cocaine obtained by law enforcement officers from the applicant had not been obtained lawfully. It is also clear that, in her first defence submission before the court, the applicant alleged that her genitalia had been examined unlawfully. That being the case, it has been observed that the judicial authorities were aware, but failed to take the necessary steps to investigate, the allegation that the applicant's genitalia had been examined by law enforcement officers in such a way that was clearly in breach of the law. There is no doubt that this awareness imposes a positive obligation on the State in terms of protecting fundamental rights and freedoms. For this reason, it has been concluded that the applicant could not be required to specifically exhaust a remedy before lodging an individual application, and any case to the contrary would place an excessive burden on the applicant in terms of the right of access to a court.

57. For these reasons, the application must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

c. Merits

i. Existence of an Interference

58. The applicant stated that she had to go to the toilet under the supervision of the law enforcement officer in order to secure the evidence

within the scope of a judicial investigation conducted against her for the offence of importing narcotic or stimulant substances. The applicant further alleged that a manual search was carried out in her genitalia by the law enforcement officer. It has been observed that the applicant's allegations were partially (except for a manual search in her genitalia) confirmed in the incident scene report drawn up by the law enforcement officers. There is no doubt that the applicant was arrested by law enforcement officers on suspicion of an offence. As a rule, it must be considered sufficient for the applicant, who was taken under the custody of the State following her arrest, to support her allegation on the acts of public officials with reasonable evidence, and the burden to prove any consideration to the contrary then shifts to the State. It cannot be argued that the complaint raised by the applicant, whose allegation was partially confirmed by the public authorities, was not supported by reasonable evidence. In addition, within the scope of the present application, the Court has not come across any information or document that requires it to make any determination contrary to that of the applicant. Therefore, it has been concluded that there was a public interference with the applicant's right to protect the corporeal and spiritual existence.

ii. Whether the Interference Constituted a Violence

59. 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.*"

60. The above-mentioned constitutional provision is of fundamental importance in terms of the restriction and protection regime of rights and freedoms and sets out the criteria on the basis of which all the rights and freedoms enshrined in the Constitution may be restricted by the legislator. As the principle of constitutional holism necessitates the constitutional provisions to be applied in harmony and in view of the

general rules of law, it is clear that all the safeguards contained in the relevant provision, especially the condition of restricting by law, must be taken into account in determining the scope of the right enshrined in Article 17 of the Constitution (in the same vein, see *Sevim Akat Eşki*, no. 2013/2187, 19 December 2013, § 35). In this connection, an examination must be performed so as to ascertain whether the impugned interference by a public authority with the right to protect the corporeal and spiritual existence has a legal basis, serves a legitimate purpose, and is necessary and proportionate in a democratic society. These criteria are to be assessed in the order specified, and in the event of a finding of a violation under any of these criteria, it would not be necessary to proceed with the examination of the next criterion.

61. According to the order specified, it must be assessed in the first place whether the interference had a legal basis.

62. The criterion envisaging that the rights and freedoms may be restricted by law has an important place in the constitutional jurisdiction. In case of any interference with a given right or freedom, the matter to be addressed in the first place is whether there is a legal provision that authorises the interference, that is, a legal basis for the impugned interference (see *Sevim Akat Eşki*, § 36).

63. In order to accept that an interference made within the scope of Article 17 of the Constitution meets the requirement of legality, it is necessary for the interference to have a legal basis. However, it is not sufficient for the laws that restrict fundamental rights and freedoms to exist only in form. The criterion of legality also requires substantive content, and at this point, the nature of the law is important. The criterion envisaging that the rights and freedoms may be restricted by law refers to the accessibility, foreseeability and certainty of the restriction. It thereby prevents any arbitrariness on the part of the relevant authorities imposing restriction and facilitates individuals to have knowledge of the law, thereby ensuring legal security (see *Halime Sare Aysal*, § 62).

64. The law must be sufficiently accessible for it to be argued to comply with these requirements. In other words, citizens must have sufficient knowledge of the existence of legal rules applicable to a particular case,

the relevant norm must offer adequate protection against arbitrariness, and define with adequate clarity the breadth of the power conferred on competent authorities and the manner in which it can be exercised (see *Halime Sare Aysal*, § 63).

65. In assessing the legality, unless the inferior court's interpretation of the statutory provisions allowing for the interference and application of these provisions to the case involve an obvious error of discretion or obvious arbitrariness, the Court would not make an examination under this heading. However, in the context of the right to protect the corporeal and spiritual existence safeguarded under Article 17 § 1 of the Constitution, the Court takes into account in its assessment whether the rule that the right may be restricted only under the conditions prescribed by law, which is a safeguard in favour of the individual, has been violated by a public authority to an extent that can be understood *prima facie*.

66. In accordance with the above-mentioned legislation, it is natural for the law enforcement officers to follow the applicant due to her suspected nervous behaviour at the airport, to arrest and take her to the police station and to conduct a search on her body and her belongings. It has been observed that the applicant's being allowed to go to the toilet in the custody of a female police officer after she was noticed by law enforcement officers while trying to hide the drugs in her hand during the search had a legal basis. Indeed, as per the criteria of *reasonable suspicion* and *inability to attain the aim sought by any other means*, stipulated in the relevant regulation with reference to detailed search, the seizure of drugs on the applicant's body has justifiably led to an increased suspicion that she might carry other drugs on her body has increased, for legitimate reasons.

67. However, rather than the taking of measures against the risk of the applicant's hiding or destroying the evidence, the manual search of the applicant's genitalia on account of the suspicion that she might carry a larger amount of drugs inside the applicant's body was subject to the above-mentioned legal restrictions. The relevant statutory provision provides that the searches performed on genitalia are categorised as an internal examination; that such an examination may only be conducted upon the decision of a public prosecutor and/or a judge; and that no one other than a physician or medical officer can perform the examination.

The above-mentioned statutory provisions are directly related to how a constitutional right may be restricted and offer certain safeguards in favour of the individual. Therefore, the failure to comply with the said legal restrictions may be in breach of a constitutional right. In the incident giving rise to the present application, it appears prima facie that the relevant safeguards were not complied with and that no satisfactory explanation was provided in this regard by the public authorities. Indeed, it is clear that even in the case of a legitimate and strong suspicion that the applicant was carrying drugs inside her body, the law enforcement officers should have first secured the evidence, then immediately called the public prosecutor who was their judicial superior and acted in accordance with the instructions of the public prosecutor. Therefore, the act performed by the law enforcement officer in the present case cannot be said to have a legal basis.

68. As it has been understood, given the above-mentioned considerations, that the impugned interference did not meet the requirement of legality, the Court has not found it necessary to conduct a separate examination as to the other criteria.

69. Consequently, the Court has found a violation of the applicant's right to the protection of her corporeal and spiritual existence safeguarded by Article 17 § 1 of the Constitution.

Mr. Zühtü ARSLAN, Mr. Engin YILDIRIM, Mr. Hasan Tahsin GÖKCAN and Mr. Yusuf Şevki HAKYEMEZ expressed a concurring opinion.

B. Alleged Violation of the Right to a Fair Trial

1. The Applicant's Allegations

70. The applicant alleged that the 40 grams of cocaine secured through internal examination unlawfully performed on her was unlawful evidence. The applicant alleged that her right to a fair trial had been violated in conjunction with the prohibition of unlawfully obtained evidence and her right to legal assistance, stating that she had been convicted on the basis of the unlawful evidence and that the objections which she raised on this matter had not been addressed in any way, rendering her right to legal assistance meaningless.

2. The Court's Assessment

71. Article 36 § (1) of the Constitution provides as follows:

> "*Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through lawful means and procedures.*"

72. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). Since the essence of the applicant's allegations concerns the alleged violation of the right to a fair hearing, a safeguard inherent in the right to a fair trial, the examination would be made in this framework.

a. Admissibility

73. The 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

74. The purpose of criminal procedure is to reveal the material truth. However, the inquiries to be conducted so as to achieve this goal are not unlimited. It is mandatory for a fair administration of criminal justice to reveal the material truth lawfully. In this regard, the lawful collection of evidence in criminal proceedings is considered to be one of the basic principles of the rule of law. In that connection, Article 38 § 6 of the Constitution explicitly stipulates that findings obtained illegally cannot be accepted as evidence (see *Orhan Kılıç* [Plenary], no. 2014/4704, 1 February 2018, § 42).

75. In the legislative intent behind adding the notion of *fair trial* to Article 36 of the Constitution, it is emphasised that the right to a fair trial, which is also guaranteed by the international treaties to which Turkey is a party, is incorporated into the text of the provision. As a matter of fact, the right to a fair trial is enshrined under Article 6 § 1 of the Convention. In its several

judgments involving an examination under Article 36 of the Constitution, the Court also examined the alleged use of evidence obtained unlawfully or without a legal basis in trials from the standpoint of the right to a fair hearing, one of the safeguards inherent in the right to a fair trial. Article 38 § 6 of the Constitution is also taken into consideration in the assessments made on this matter under Article 36 of the Constitution (see *Orhan Kılıç*, § 43).

76. However, the substantiation of the facts of a given case, the interpretation and application of statutory provisions, the admissibility and examination of the evidence, as well as the fairness of the solution, as to its merits, offered by a first-instance court cannot be subject to an assessment through individual application. Therefore, the role of the Court in the present application is not to examine the lawfulness of the assessments made, and the conclusions reached, by the inferior courts. The authority to assess the evidence in a given case and to decide on the relevance of the available evidence to the given case is indeed conferred on the inferior courts (see *Orhan Kılıç*, § 44).

77. However, it must be borne in mind that the use, as the sole or decisive evidence, of any evidence which appears prima facie to have been collected without a legal basis or to be unlawfully collected or which is found to be unlawful by the inferior courts may cause problems in terms of the right to a fair hearing. In criminal procedure, the way in which evidence is obtained and the extent to which it constitutes the grounds for conviction may render the overall trial unlawful (see *Orhan Kılıç*, § 45).

78. From this aspect, it is not for the Court to establish whether certain elements of evidence have been obtained lawfully. The duty incumbent on the Court is to examine whether any evidence that appears prima facie to be unlawful, or that is found to be unlawful by the inferior courts has been used as the sole or decisive evidence in the trial, and the effects of this *unlawfulness* on the overall fairness of the trial (see *Yaşar Yılmaz*, no. 2013/6183, 19 November 2014, § 46).

79. In making an assessment in this regard, the Court must also consider whether the circumstances in which the evidence was collected cast doubt on their authenticity and reliability (see *Güllüzar Erman*, no.

2012/542, 4 November 2014, § 61). A fair hearing necessitates that doubts about the authenticity and reliability of the evidence be obviated and that the opportunity to effectively challenge the reliability and authenticity of the evidence be afforded (see *Orhan Kılıç*, § 47).

80. As regards the alleged unlawfulness of evidence, the Court examines whether the applicants were given the opportunity to challenge the authenticity of the evidence and to oppose its use; whether the principles of equality of arms and adversarial trial have been observed, as well as whether sufficient safeguards have been provided to the defence so as to protect their interests (see *Orhan Kılıç*, § 48).

81. In the examination under Articles 36 and 37 as to whether the admission of the evidence that appears prima facie to have been collected without a legal basis or to have been unlawfully collected, as well as of the evidence found to be unlawful by the inferior courts undermined the fairness of the trial, the particular circumstances of the given case must be taken into account in the entirety of the trial (see *Orhan Kılıç,* § 51).

ii. Application of Principles to the Present Case

82. The Constitutional Court will make an examination within the scope of the above-mentioned principles by taking into account respectively whether the impugned evidence was obtained unlawfully; whether the decision was based on this evidence; if so, whether it was the sole or decisive evidence, and finally, in the event that it was the sole or decisive evidence, whether the use of this evidence affected the overall fairness of the trial.

83. There is no dispute as to the fact that the applicant entered the country with packages and balloons of cocaine on her and inside her body. Furthermore, there is no complaint as to the unlawfulness of the 18 grams of the aforementioned drugs seized in the first place on the applicant, as well as the 130 grams of drugs seized as a result of the internal examination performed at the hospital by virtue of the public prosecutor's decision. The alleged unlawful seizure concerns the 40 grams of cocaine seized through a manual search of the applicant's genitalia by a law enforcement officer. Having regard to the trial process and the decision on

the applicant's conviction, it has been observed that there is no assessment as to the evidence obtained unlawfully through the search complained of by the applicant. However, it has been understood, prima facie, that the evidence in question was collected unlawfully.

84. It cannot be fully understood from the reasoning of the conviction decision (see § whether the 40-grams of the drugs alleged to have been obtained unlawfully was included among the seized drugs. Indeed, the court's failure to make a separate and clear assessment on this matter, in spite of the fact the applicant's allegation as to the unlawfully-obtained evidence, also led to an increased uncertainty. Therefore, it cannot be exactly said that the court convicting the applicant did not rely on, in its decision, the drug found to be obtained unlawfully. For this reason, the Court would make an assessment on the basis of an assumption that the unlawfully-obtained evidence was taken as basis for the conviction decision.

85. In that connection, it must be assessed whether the 40 grams of cocaine, allegedly obtained unlawfully according to the applicant, was the sole or decisive evidence in the conviction decision. It has been observed that apart from the 40 grams of cocaine obtained unlawfully, the conviction decision also relied on the 148 grams of cocaine seized on the applicant, which was not alleged to be obtained unlawfully; and that an assessment was made to the effect that such an amount was sufficient to qualify the applicant's act as an offence. The inferior court further took into account the short duration of the applicant's travel plan to Turkey and the manner of the packaging of the cocaine seized. Having regard to these grounds specified in the conviction decision, it has been concluded that the aforementioned evidence was neither sole evidence nor one that was of a decisive nature.

86. Moreover, the applicant had the opportunity to challenge the authenticity and veracity of the evidence and to oppose the use of this evidence before both the first instance court and the Court of Cassation. During the applicant's trial, the principles of equality of arms and adversarial trial were respected. The inferior court examined the applicant's allegations on the merits and provided adequate reasoning in

its judgment. In view of all these considerations, even if it is assumed that the 40 grams of cocaine obtained unlawfully constituted the basis for the conviction decision, it has been concluded that this did not undermine the fairness of the trial.

87. For these reasons, it must be held that the right to a fair hearing under the right to a fair trial, which is enshrined in Article 36 of the Constitution, has not been violated.

C. Application of Article 50 of Code no. 6216

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

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

89. The applicant requested the finding of a violation and retrial but did not request any compensation in respect of pecuniary or non-pecuniary damages.

90. In the judgment of *Mehmet Doğan* (see [Plenary], no. 2014/8875, 7 June 2018), the Constitutional Court set the general principles as to the determination of how to eliminate the violation in the event of finding a violation.

91. As the applicant's internal examination by the law enforcement officers did not meet the requirement of legality, it was concluded that the applicant's right to protect her corporeal and spiritual existence was violated. Accordingly, it has been concluded that the violation in question was caused by the acts of law enforcement officers.

92. It is evident that the relevant violation found by the Constitutional Court cannot be redressed in the criminal proceedings before the inferior courts, which are the subject-matter of the present case. Indeed, in criminal proceedings against the applicant, the first instance court would not be able to award compensation in favour of the applicant due to the violation of the right to protect her corporeal and spiritual existence. On the other hand, the judgment finding a violation would not have an effect on the decision ordering the applicant's conviction for her having imported narcotic or stimulant substances. For this reason, there is no legal interest in a retrial.

As regards the interference with the right to protect the corporeal and spiritual existence, Mr. Zühtü ARSLAN, Mr. Engin YILDIRIM, Mr. Hasan Tahsin GÖKCAN and Mr. Yusuf Şevki HAKYEMEZ submitted a concurring opinion.

93. Since the applicant did not request compensation, no compensation was awarded by the Court.

94. The total court expense of TRY 2,701.90 including the court fee of TRY 226.90 and the counsel fee of TRY 2,475, which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 27 March 2019:

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

B. By MAJORITY and by dissenting opinions of Mr. Zühtü ARSLAN, Mr. Engin YILDIRIM and Mr. Yusuf Şevki HAKYEMEZ, that the applicant's complaint concerning the internal examination BE EXAMINED not under the Article 17 § 3 of the Constitution, but rather under Article 17 § 1;

C. 1. UNANIMOUSLY that the alleged violation of the right to protect the corporeal and spiritual existence be DECLARED ADMISSIBLE;

2.UNANIMOUSLY that the alleged violation of the right to a fair hearing under the right to a fair trial be declared ADMISSIBLE;

D. 1. UNANIMOUSLY that the right to protect the corporeal and spiritual existence safeguarded under Article 17 § 1 of the Constitution WAS VIOLATED;

2. UNANIMOUSLY that the right to a fair hearing falling under the scope of the right to a fair trial WAS NOT VIOLATED;

E. That the total court expense of TRY 2,701.90 including the court fee of TRY 226.90 and the counsel fee of TRY 2,475 be REIMBURSED to the applicant;

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

G. A copy of the judgment be SENT to the 11th Chamber of the Bakırköy Assize Court for information; and

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

DISSENTING AND ADDITIONAL OPINIONS OF PRESIDENT ZÜHTÜ ARSLAN

For the grounds explained below, (a) I do not agree with the majority opinion that the application must be examined within the scope of the right to protect the corporeal and spiritual existence safeguarded under Article 17 of the Constitution, (b) I also concur with the majority's conclusion finding a violation of the same right as I consider that there is also a violation of the procedural aspect of the said right.

A. DISSENTING OPINION

1. The applicant alleged that her corporeal integrity was violated for being subjected to an unlawful internal examination performed by the law enforcement officer. The majority of the Court concluded that as the interference against the applicant did not attain the minimum threshold of severity that would require an examination under Article 17 § 3 of the Constitution, an examination would be carried out within the scope of the right to protect the corporeal and spiritual existence safeguarded in the first paragraph of the same article.

2. In the present case, the applicant, who is a foreign female, was arrested by the law enforcement officers while passing through the security checkpoints at the İstanbul Atatürk Airport and then taken to the police station. At the police station, the substance considered to be cocaine stuffed in a balloon, which the applicant was trying to hide between the cushions of the seat where she was sitting, was secured. Subsequently, another 40 grams of cocaine was secured inside the body of the applicant, who was allowed to go to the toilet in the custody of a female police officer. The report drawn up by the law enforcement officers contained the following findings: "*As a result of the interview with the relevant person, it was suspected that she had drugs in her stomach, and following her request to use the bathroom, she was allowed to go to the bathroom, in the custody of a female police officer. In the bathroom, 40 grams of COCAINE stuffed in a white balloon was secured inside her body (vagina)* ".

3. Thereupon, by virtue of the decision issued by the chief public prosecutor for the existence of a case where delay was deemed prejudicial, which was subsequently approved by the magistrate judge, the applicant

underwent an internal examination at the hospital where capsules to be naturally discharged from the applicant's body were also secured. The applicant was sentenced to 25 years' imprisonment and a judicial fine of TRY 740 for importing narcotic and stimulant substances.

4. It has been observed that the applicant's allegations that her genitalia had been manually searched by law enforcement officers and that her body integrity had been violated for this reason were partially confirmed in the incident scene report; and that although these allegations had been raised during the investigation and prosecution stages, the public authorities failed to provide any information or document that would ensure to reach a conclusion to the contrary. Accordingly, as also found established by the majority of the Court, there is no doubt as to the existence of an interference with the applicant's corporeal integrity, as well as to the unlawfulness of this interference.

5. The point where I depart from the majority concerns the nature of the interference. The majority held that the minimum threshold of severity for ill-treatment was not attained on the grounds that the applicant did not complain of any "unbearable corporeal pain or psychological disruption" due to the interference and that the impugned act was performed by a female police officer, in accordance with hygiene rules, at a place invisible to third parties.

6. It must firstly be noted that the legislator specifically regulates internal examination and search performed so as to fight against crime. In accordance with Article 75 of Code of Criminal Procedure ("the Code no. 5271"), an internal examination on the suspect or the accused may be ordered in principle by the courts, and in cases where delay is deemed prejudicial by the public prosecutor, provided that it is submitted for the approval of the judge or the court within twenty-four hours. In accordance with the same article, internal examination (including those performed in the genitalia and anus) "may be performed only by a physician or another healthcare professional". Similarly, the Regulation no. 25832 on Physical Examination, Genetic Investigation and Determination of Physical Identity in Criminal Procedure, dated 1 June 2005, provides for significant safeguards in terms of internal examinations to be performed on the suspect and accused. Pursuant to Article 4 of the Regulation, "internal

examination may be performed only by a physician". Furthermore, in line with the same article, internal examination cannot be performed in case of the offences for which the upper limit of the prescribed penalty is less than 2 years.

7. These special provisions and the safeguards afforded to the person in the relevant legislation demonstrate that internal examination is of nature that may have severe consequences on the corporeal and spiritual integrity of the persons. Indeed, the condition that the examinations to be performed in the genitalia of individuals in relation to a criminal charge may be performed only by a physician is set forth as these examinations are a risky that may bear vital consequences on the health of the individuals subjected to such interference. In the present case, an internal examination/ search considered to have been performed by a police officer "wearing a glove" at the airport bathroom cannot be said to comply with hygiene and medical rules. It is not possible to associate such an approach with the vital importance and significance of the internal examination.

8. Furthermore, in reaching the conclusion that the minimum threshold of pain was not exceeded, it is not acceptable to rely on the argument that the applicant did not mention any "unbearable corporeal pain or psychological disruption". It could be clearly deduced from the application form that the applicant complained that her corporeal integrity had been violated as a result the interference by a law enforcement officer who had had no legal authority, even in a case where delay was deemed prejudicial, and that as a result, her "personal inviolability" had been violated. In this sense, it is not reasonable to expect the applicant to further mention any "unbearable corporeal pain or psychological disruption". At this point, it is the duty of the Court to make a qualification by taking into account the effects of the impugned interference on the person concerned.

9. Besides, for a treatment to be incompatible with human dignity, the pain caused by the treatment is not necessarily "unbearable" or its psychological effects does not necessarily reach the level of "disruption". Unlike other forms of ill-treatment, the decisive factor of treatment incompatible with human dignity is its humiliating and degrading character rather than the gravity of physical or mental suffering caused by the treatment. In the event that the treatment to which the person is

subjected causes a feeling of fear, abasement, or humiliation even in his own eyes, such treatment is incompatible with human dignity. It should also be noted that whether or not the perpetrator acted with the intention of abasing or humiliating is irrelevant for a treatment to be classified as being incompatible with human dignity.

10. In the light of all these considerations, the impugned interference cannot be said to be compatible with human dignity. A manual search of a person's genitalia against his/her will by a non-physician public officer, who has not been authorised by law, could have a traumatic or at least a painful effect on the person being subjected to the treatment, regardless of the legitimate purpose sought to be attained. Moreover, it is also evident that such treatment may lead to feelings of abasement and humiliation. Such an interference with the most intimate part of the human body must be described as a "treatment incompatible with human dignity" among the types of ill-treatment prohibited in Article 17 § 3 of the Constitution.

11. For the reasons explained above, I do not agree with the conclusion reached by the majority that the case must be examined within the scope of Article 17 § 1 of the Constitution, which safeguards the right to protect the corporeal and spiritual existence, since the threshold of pain required to be attained for an interference to be qualified as "ill-treatment" was not exceeded in the impugned incident.

B. ADDITIONAL OPINION

12. On the other hand, upon determining under which right the application would be examined, a preliminary issue in a sense, I concur with the majority opinion that the applicant's right to protect her corporeal and spiritual existence safeguarded under Article 17 § 1 of the Constitution was violated but I consider that there was also a violation of the procedural aspect of this right.

13. The State must take all the necessary measures in order to prevent the performance of an internal examination by unauthorised persons. Within this scope, so as to secure the right to protect the corporeal and spiritual existence, it is of vital importance to carry out an effective investigation and to impose sanctions on those responsible in such a way as to create a deterrent effect.

14. In the present case, although the applicant complained about the unlawful interference against her during the investigation and prosecution stages, no action was taken by the public authorities. As a matter of fact, the majority's finding in this matter within the scope of the admissibility examination is as follows: *"That being the case, it has been observed that the judicial authorities were aware, but failed to take the necessary steps to investigate, the allegation that the applicant's genitalia had been examined by law enforcement officers in such a way that was clearly in breach of the law. There is no doubt that this awareness imposes a positive obligation on the State in terms of protecting fundamental rights and freedoms"* (see § 56 above).

15. As a result of the logical consequence of these findings, a violation of a given right should have been found in the present case due to the failure to fulfil the positive obligation. Indeed, although the applicant raised this matter at the prosecution stage, no action was taken to investigate the complaint. What is more, it has been observed that even though it is clearly indicated in the report drawn up by the law enforcement officers in the aftermath of the interference that 40 grams of cocaine was secured inside the applicant's body, it was not mentioned in the indictment; and that although the first-instance decision also made a reference to this report, no assessment was made in this regard. Therefore, the procedural obligation required to be fulfilled under the right to protect the corporeal and spiritual existence was also violated.

16. On the other hand, the majority's conclusion finding a violation has indeed no effective consequences. However, had the Court decided that the procedural aspect of the right to protect the corporeal and spiritual existence had also been violated and that the judgment finding a violation would be sent to the investigation authorities so as to enable them to carry out an effective investigation, both the State's positive obligation would have been fulfilled and a deterrent effect should have been created in view of similar incidents.

17. Consequently, I concur with the majority's conclusion finding a violation of the right to protect the corporeal and spiritual existence, albeit on an additional ground.

DISSENTING OPINION OF VICE-PRESIDENT ENGİN YILDIRIM

1. The applicant, a female who is a citizen of the Republic of Colombia, was taken to the police station upon suspicion while entering Turkey through the İstanbul Atatürk Airport, and the narcotic substance considered to be cocaine was found on her body. The applicant, who requested to use the bathroom, was allowed to do so under the custody of a female police officer, and in the meantime, another 40 grams of cocaine was found inside the applicant's genitalia.

2. Thereafter, in accordance with the decision of the Chief Public Prosecutor's Office issued due to the existence of a case where delay was deemed prejudicial, which was then approved by the magistrate judge, the applicant was subjected to the internal examination at the hospital where capsules containing narcotic substances to be naturally discharged from the applicant's body were also found.

3. A manual search was performed inside the applicant’s genitalia in breach of the relevant legislation, which constituted an interference with her corporeal integrity. Considering that the interference did not reach the minimum threshold of severity required to be qualified as a "treatment incompatible with human dignity" under Article 17 § 3 of the Constitution, the Court’s majority held that the impugned interference fell within the scope of the right to protect the corporeal and spiritual existence safeguarded under Article 17 § 1 of the Constitution. The majority mainly relied on the considerations that the applicant had not mentioned any "unbearable corporeal pain or psychological disruption due to the act in question" and that the search had been carried out by a police officer, who was also female, at a place invisible to third parties and in pursuance of the hygiene rules.

4. In accordance with Article 75 of Code of Criminal Procedure (Code no. 5271), an internal examination of the suspect or the accused may be ordered, in principle, by courts, and by public prosecutor's office in cases where delay is deemed prejudicial, provided that it is submitted for the approval of the judge or the court within twenty-four hours. In accordance with the same article, internal examinations (including those performed in the genitalia and anus) "may only be performed by a physician or another

healthcare professional". Similarly, Regulation no. 25832 on Physical Examination, Genetic Investigation and Determination of Physical Identity in Criminal Procedure, dated 1 June 2005, affords significant safeguards in respect of the accused and defendant to undergo an internal examination. Pursuant to Article 4 of the Regulation, "internal examination may be performed only by a physician".

5. Raising the minimum threshold for an interference to be considered incompatible with human dignity by adopting the criteria such as "unbearable corporeal pain" or "psychological disruption" may limit the scope of the treatment incompatible with human dignity only to concrete, observable and measurable medical/biological criteria and may also cause the interferences -having rather spiritual consequences such as embarrassment, sorrow, offending, abasement, discrediting, loss of self-esteem, grief and anguish- not to be regarded as treatment incompatible with human dignity.

6. In case of any interference with personal inviolability and/or corporeal integrity, one may experience deep feelings of anguish, sorrow, grief, and embarrassment in the absence of any physical pain or a psychological trauma. Furthermore, as is the case with the present application, it is also possible for a foreign national to experience these feelings more intensely.

7. Ordering a female police officer to "put a glove on her hand, take the suspect to the bathroom, do not leave her alone and perform an internal examination" in breach of the relevant legal provisions amounts to the disregarding of the corporeal and spiritual adverse effects that might be caused due to an internal examination performed by an unauthorised and non-expert person. That is why the legislator has rendered such searches or examinations subjected to certain special conditions. The existence of a reasonable suspicion that a person committed an offence cannot constitute a fair and legitimate justification for obtaining the evidence affirming this suspicion in a such an unlawful manner that offends, abases, impairs self-esteem and impairs the dignity of the person concerned.

8. Even when it is assumed for a moment that the internal examination performed with gloves was, in itself, hygienic, the hygienic nature of this treatment, which was also invisible to third parties, cannot be considered

as proof that it did not constitute an ill-treatment incompatible with human dignity.

9. The human dignity is defined as follows in one of the judgments of the Court: *"The notion of human dignity represents the recognition of, and respect for, the value acquired by an individual for merely being human, regardless of the case and circumstances. This is a threshold of behaviour that any treatment thereunder dehumanises the victim"* (see the Court's judgment no. E. 1963/132, K. 1966/29, dated 28 June 1966).

10. People are dignified just because they are human beings. Human dignity expresses that humans are valuable and respectful beings having inherent, indispensable and inalienable rights that they acquire just because they are human. Human dignity, which has an inviolable nature, is an essential humanitarian value that everybody enjoys equally regardless of their position and must be protected and respected by the State.

11. Consequently, I am of the opinion that the interference with the most intimate parts of the applicant's body, even if being in pursuance of a legitimate aim, was incompatible with human dignity. For this reason, I disagree with the majority in that the examination should have been made under Article 17 § 1 of the Constitution safeguarding the right to protect the corporeal and spiritual existence.

ADDITIONAL OPINION

12. In the present application, I concur with the conclusion reached by the majority that there was a breach of the right to protect the corporeal and spiritual existence, albeit on an additional ground as expressed by the President Zühtü Arslan in his concurring opinion.

ADDITIONAL OPINION OF JUSTICE HASAN TAHSİN GÖKCAN

1. I concur with the conclusion reached by the majority that there was a violation of the right to protect and improve the corporeal and spiritual existence in the context of the right to respect for private life due to the internal examination unlawfully performed by the law enforcement officer.

2. The State also has positive obligations in terms of fundamental rights safeguarded under the Constitution. For example, this includes the obligation to carry out criminal investigation and prosecution in respect of the intentional violations of the right to life and the prohibition of torture and other ill-treatment. Furthermore, depending on the nature of the violation at stake, the obligation to carry out criminal investigation and prosecution may come into question also in terms of certain other rights.

3. In a precedent judgment, the Court emphasises that the positive obligation with respect to the right to respect for private life includes an obligation to carry out an effective investigation for the protection of the privacy of the individual. The Court expresses therein that the aforementioned obligation does not amount to an obligation of result, but it includes the identification of those responsible and the imposition of effective sanctions (see *Mehmet Arif Kılınç*, §§ 27, 28). In another application, the Court has concluded that the procedural aspect of the right to respect for private life regulated under Article 20 of the Constitution was violated due to the failure to conduct a criminal investigation against the perpetrator(s) due to the recording of the applicant's conversations with his visitor in the visits room through audio surveillance (see § 89). Similarly, in the application lodged by M. Seyfi Oktay, the Court has held that the procedural aspect of the freedom of communication was violated due to the failure to conduct an effective criminal investigation into the alleged violation of the privacy of the communication due to the publication of the communication records in the investigation file (see the Court's judgment no. 2013/6367, §§ 66-70).

4. In its judgments and decisions, the ECHR also notes that the public authorities have a positive procedural obligation to prevent the disclosure of personal data or communication records, as well as in case of an

interference with the privacy of communication due to the release of these records by the media, to conduct an effective investigation and ensure the punishment of those responsible (see *Craxi v. Italy* 2, §§ 73,74; *Cariello v. Italy*, no. 14064/07, 30 April 2013, §§ 83, 84; and *Apostu v. Romania*, § 118).

5. As required by the State's positive obligation, given that the judicial authorities were obliged to take the necessary steps for an effective investigation and prosecution after they became aware of the incident in the present application, merely the finding of a violation would not be sufficient in case of a violation of the procedural obligation inherent in the given right. Therefore, a retrial (for an investigation) should have been ordered.

6. Having regard to the finding in the majority opinion that the judicial authorities remained indifferent although they had learned about the impugned treatment that the applicant was subjected to, I concur with the majority of the Court in their finding of a violation but I consider that there was also a violation of the procedural aspect of the said right in the context of the positive obligation incumbent on the State; and that accordingly, a retrial (for an investigation) should have been ordered.

DISSENTING AND ADDITIONAL OPINIONS OF JUSTICE YUSUF ŞEVKİ HAKYEMEZ

1. After the applicant, a Colombian citizen, entered the country on 08 February 2015 by airline and went through passport and security checks, she was subsequently given chase by law enforcement officers on suspicion of her nervous behaviour at the İstanbul Atatürk Airport. The applicant was followed to the outside of the airport. As it was observed that she did not meet anybody, she was arrested by the law enforcement officers and taken to the police station. While the applicant's luggage and belongings were searched for control purposes at the police station, the police officers noticed that the applicant was trying to hide a white balloon in her hand between the cushions of a seat in the police station. It was established that there were a blue and an orange balloon inside the white balloon. A substance considered to be cocaine in view of its colour, odour and appearance was found in the balloons.

2. The applicant, who requested from the law enforcement officers to use the bathroom, was allowed to do so. Nevertheless, a female police officer accompanied her on the suspicion that there might be other narcotic substances inside her body. As maintained by the applicant, the police officer accompanying her gave an empty container and instructed her to defecate in it. Although the applicant stated that she was uncomfortable with using the toilet in the presence of the police officer, the latter refused to leave and performed an internal examination as explained in detail in the judgment. The incident scene report drawn up by the law enforcement officers also note that the 40 grams of cocaine stuffed in a white balloon were found inside the applicant's body (vagina).

3. The applicant's lawyer alleged that internal examination performed in breach of the provisions of Article 75 of the Code of Criminal Procedure was also against the principle that the corporeal integrity of the individual shall not be violated except in cases prescribed by law as provided for in Article 17 § 2 of the Constitution, entitled "Personal inviolability, corporeal and spiritual existence of the individual"; and that the right to inviolability of the individual, safeguarded by the Constitution, was violated as a result of the unlawful interference with the applicant's corporeal integrity due to the treatment in question.

4. The Court examined the application under the rights to a fair trial and to the protection of the corporeal and spiritual existence. Even though I concur with the conclusion reached by the Court in the context of the right to a fair trial, I do not agree with the majority's opinion that the alleged violation in the context of the right to protect the corporeal and spiritual existence must be assessed under Article 17 § 1 of the Constitution.

5. In the judgment, the majority has stated that the internal examination was not performed in the way as set forth in Article 75 of Code of Criminal Procedure where, as a matter of fact, searches performed inside genitalia are categorised as an internal examination that may be conducted only upon the decision of a public prosecutor and/or a judge, and no one other than a physician or medical officer can perform the examination. According to the Court, since the relevant provision is directly related to how a constitutional right may be limited and affords certain safeguards in favour of the individual. Therefore, any failure to comply with these legal restrictions may result in the violation of the given constitutional right.

6. It has been further concluded in the judgment that the applicant's right to protection of corporeal and spiritual existence safeguarded by Article 17 § 1 of the Constitution was violated on the grounds that the said interference failed to fulfil the requirement of legality:

"In the incident giving rise to the present application, it appears prima facie that the relevant safeguards were not complied with and that no satisfactory explanation was provided in this regard by the public authorities. Indeed, it is clear that even in the case of a legitimate and strong suspicion that the applicant was carrying drugs inside her body, the law enforcement officers should have first secured the evidence, then immediately called the public prosecutor who was their judicial supervisor and acted in accordance with the instructions of the public prosecutor. Therefore, the act performed by the law enforcement officer in the present case cannot be said to have a legal basis." (see, above, § 67).

7. It must be noted that the internal examination performed by the law enforcement officer in the present case, which is prima facie in breach of Article 75, titled "Physical examination of the suspect or accused and taking samples from the body", of the Code of Criminal Procedure not

only violated the right to protect the corporeal and spiritual existence safeguarded under Article 17 § 1 of the Constitution but also entailed a much more severe violation. In this regard, it is impossible to agree with the majority's opinion that the impugned internal examination did not reach the minimum threshold required for it to be examined within the scope of ill-treatment.

8. Indeed, the internal examination in the present case was performed in such a way that it was manifestly against the legal safeguards. Moreover, the search performed by unauthorised persons in breach of these safeguards has *per se* a very delicate nature in the context of human dignity. In that connection, the performance of the impugned examination by a police officer in violation of the explicit legal provisions amounts to a violation that corresponds to an ill-treatment.

9. In fact, due to the significance attributed to the internal examination in the context of personal inviolability, corporeal and spiritual existence of the individual safeguarded in Article 17 of the Constitution, the legislator has set forth the details of such an examination, which must be performed in case of a necessity, under Article 75 of the Code of Criminal Procedure along with the relevant safeguards. As a matter of fact, the process of the internal examination is regulated in a detailed manner under "the Regulation on Body Examination, Genetic Investigation and Physical Identification in Criminal Procedure" promulgated in the Official Gazette no. 25832, dated 1 June 2005.

10. In the present case, a woman's genitalia was manually searched by a law enforcement officer for her alleged possession of drugs. The law explicitly provides for that such a search is an internal examination. It must be taken into account that such internal examinations are performed in one of the most intimate parts of the body. In fact, taking into account exactly this aspect of the matter, the legislator has set out that such an examination may be performed only by authorised persons in pursuance of the procedures specified in the law.

11. As the legislation specifies in detail the procedure for performing very delicate practices in terms of human dignity such as internal examination, a law enforcement officer tasked with combating crime

cannot be considered to know the legal framework of this practice. Law enforcement officers must fulfil their duties in the light of the statutory provisions regulating the matters in their field of duty. Therefore, in the present case, it is clear that the police officer's performance of the said examination, in breach of the safeguards under Article 75 of the Code of Criminal Procedure Code, at the police station, that is to say, at a place under control, would lead to very adverse consequences in terms of the applicant's corporeal and spiritual existence. At this stage, the fact that the police officer performing the internal examination was a woman and the existence of strong suspicion that the applicant had drugs inside her body also does not reduce the severity of the violation.

12. Consequently, the impugned act itself, which has a delicate character as an internal examination, was performed by a police officer, an unauthorised person, instead of physician or other healthcare personnel, without obtaining a decision of a public prosecutor or a judge, despite and in violation of the explicit statutory arrangement. Such a performance amounts to the infringement of the safeguard under Article 17 § 3 of the Constitution which stipulates that no one can be subjected to a treatment incompatible with human dignity. For this reason, I do not agree with the majority's opinion that the alleged violation must be examined within the framework of Article 17 § 1 of the Constitution.

13. On the other hand, in the operative part of the judgment, the Court has found a violation of the right to protect the corporeal and spiritual existence safeguarded by Article 17 § 1 of the Constitution. Whereas, in my opinion, as a consequence of finding a violation of the prohibition of ill-treatment under Article 17 § 3 of the Constitution in the present case, a violation of the procedural obligation of Article 17 must also be found due to the failure to carry out an investigation against those considered to be responsible for this treatment within the framework of the State's positive obligations.

14. Indeed, the State is obliged to take an action *ex officio* when it becomes aware of the concrete findings with respect to the violation of the prohibition of torture or ill-treatment. In the present case, it cannot be argued that the investigation and prosecution authorities were not aware

of the ill-treatment to which the applicant was subjected. Hence, even in the absence of a complaint, it must be admitted that the public authorities who were aware of this incident had an obligation to ex officio conduct an investigation. Failure to ex officio launch an investigation despite this obligation entails a problem in terms of the procedural aspect of the prohibition of ill-treatment.

15. As a matter of fact, in the judgment of *Batı and Others v. Turkey*, the European Court of Human Rights made the following assessments: *"... Even when strictly speaking no complaint has been made, an investigation must be started if there are sufficiently clear indications that torture or ill-treatment has been used. The authorities must take into account the particularly vulnerable situation of victims of torture and the fact that people who have been subjected to serious ill-treatment will often be less ready or willing to make a complaint"* (see *Batı v. Turkey*, 33097/96 and 57834/00, 03 June 2004, § 133).

16. Similarly, the Constitutional Court, in its judgment, held the following: *"In the event that the individual has an arguable allegation that he/she has been subjected to unlawful treatment by a government official and in violation of Article 17 of the Constitution, Article 17 of the Constitution -taken together with Article 5 titled "Fundamental aims and duties of the State"-, requires the conduct of an effective official investigation. This investigation must be capable of ensuring the identification and punishment of those responsible. Otherwise, despite its importance, this provision would become ineffective in practice, and in some cases, it would be possible for the state authorities to exploit the rights of those under their control by taking advantage of de facto inviolability. As for the State's positive obligation, at times, lack of investigation or inadequate investigation may also constitute an ill-treatment by itself. In this context, the investigation must be initiated promptly, be carried out independently, diligently and expeditiously under public scrutiny, and be effective as a whole."* (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 25).

17. Therefore, since the treatment which is the subject matter of the present application is considered as a treatment incompatible with human dignity under Article 17 § 3 of the Constitution, it must also be clarified whether those responsible for this treatment were investigated at this stage. As a matter of fact, the violation in the concrete case concerns

the collection of evidence in breach of the explicit provision of law. The performance of the internal examination by the law enforcement officer on her own motion without taking into account the necessary rules also raises an issue under the procedural aspect of the prohibition of ill-treatment as set forth in Article 17 § 3 of the Constitution.

18. In the operative part of the present judgment, the Court has concluded that there was a violation only of Article 17 § 1 of the Constitution. However, the failure to conduct an investigation, despite it was clear that the violation in question stemmed from an unlawful treatment, amounts to a failure to comply with a manifest procedural obligation. For this reason, I concur with the majority's opinion that Article 17 of the Constitution was violated, I however consider that the procedural aspect of the prohibition of ill-treatment was also violated as the State failed to fulfil its obligation to effectively investigate the prohibition of ill-treatment.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

K.Ş.

(Application no. 2016/14613)

17 July 2019

On 17 July 2019, the Second Section of the Constitutional Court found a violation of the right to protect one's corporeal and spiritual existence safeguarded by Article 17 of the Constitution in the individual application lodged by *K.Ş.* (no. 2016/14613).

THE FACTS

[8-24] The applicant, a form teacher serving at the same public institution with her ex-husband, was battered and stabbed by the latter. Accordingly, several sets of criminal proceedings were brought against the ex-husband.

The incumbent family court granted a protection order sought by the applicant and indicated an interim measure, pursuant to the Law no. 6284 on the Protection of Family and Prevention of Violence against Women. The interim measures indicated in favour of the applicant were prolonged by the orders issued by the family courts on various dates.

The applicant also filed a request with the relevant Provincial Directorate of National Education for change of her workplace due to her life-safety concerns. The Ministry dismissed her request as no decision ordering an interim measure for the change of her workplace had been submitted to it.

She then filed an application with the family court, seeking an order for the change of her workplace. However, the family court, noting that the request was of an administrative nature, rejected it. The applicant's challenge against the family court's decision was also dismissed.

The applicant filed an individual application with the Constitutional Court on 16 August 2016.

V. EXAMINATION AND GROUNDS

25. The Constitutional Court, at its session of 17 July 2019, examined the application and decided as follows.

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

26. Having expressed that her life was at risk, the applicant alleged that in spite of many acts of violence perpetrated by the applicant's ex-husband including injury by knife and the explicit provisions of Law no. 6284, the refusal of her request for a change of workplace on the ground that it was of an "administrative nature" had been in breach of the right to life and the right to protect the corporeal and spiritual existence. The applicant alleged that the principle of equality and the right to a fair trial were violated on the ground that even though the 7th Chamber of the İzmir Family Court had granted another person's request for a change of workplace, her request was rejected.

27. In the Ministry's opinion, it was stated that the legal system set up under Law No. 6284 was sufficient and that it must be assessed whether reasonable measures were taken to the extent required by the particular circumstances of the case in the present application.

B. The Court's Assessment

28. Article 17 § 1 of the Constitution, titled "Personal inviolability, corporeal and spiritual existence of the individual" to be taken as a basis in the assessment of the alleged violations, is as follows:

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

29. The relevant part of Article 5 of the Constitution 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 material and spiritual existence."*

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

31. Article 17 § 1 of the Constitution sets forth that everyone has the right to protect and improve her corporeal and spiritual existence. This provision corresponds to the right to protection of physical and mental integrity guaranteed under Article 8 of the European Convention for Human Rights within the scope of respect for private life.

32. The applicant's allegations concern the fact that she was not protected against threats to her bodily integrity. Although the applicant alleged that the principle of equality had also been violated, it has been observed that the applicant based the alleged violation exclusively on the outcome of the decision rendered by the family court. Having regard to the previous decisions of the Constitutional Court on similar issues, all the complaints of the applicant were examined within the scope of the right to protect the corporeal and spiritual existence enshrined inArticle 17 § 1 of the Constitution (see *Eylem Çetin Demir*, no. 2014/2302, 9 November 2017, § 28; *A.Z.Ö.*, no. 2014/546, 19 December 2017, § 60; and *Ö.T.*, no. 2015/16029, 19 February 2019, § 25).

1. Admissibility

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

2. Merits

a. General Principles

34. The right to life and the right to protect and improve one's corporeal and spiritual existence are safeguarded under Article 17 of the Constitution. Taken in conjunction with Article 5 of the Constitution, the right to protect the corporeal and spiritual existence imposes positive and negative obligations on the State (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, §§ 50-51).

35. The positive obligations in question require that measures be taken to ensure respect for the rights even in the field of interpersonal relations (see *Marcus Frank Cerny* [Plenary], no. 2013/5126, 2 July 2015, §§ 36 and 40).

36. The relevant positive obligation of the State includes the liability to set up effective mechanisms, to introduce legal procedures providing the necessary procedural safeguards within this framework, and thereby to ensure that the judicial and administrative authorities render effective and equitable decisions with regard to disputes between the individuals and the administration or private persons (see *Semra Özel Üner* no. 2014/12009, 26 October 2016, § 36; and *Ö.T.*, § 29).

b. Application of Principles to the Case

37. In the present case, an examination must be carried out on the positive obligations of the public authorities within the context of the right to protect the corporeal and spiritual existence due to the refusal of the applicant's request for the change of her workplace, which is one of the protective measures set forth in Law no. 6284.

38. In this regard, within the particular circumstances of the present case, it must be examined in the first place whether the State fulfilled its positive obligation to set up an effective legal system in respect to the above-mentioned fundamental rights.

39. For the purposes of adopting an effective and immediate method to protect the family and to prevent violence against women, and protecting without delay those subjected to violence or those at the risk of being subjected to violence, the legislator enacted and put into effect the provisions of Law No. 6284 in accordance with the standards set forth by the international conventions to which Turkey is a party. It has been observed that under Law no. 6284, the procedures, principles, and sanctions with respect to the measures to be implemented in order to protect women, children and family members who have been subjected to, or are at the risk of, violence and to prevent violence against these persons are laid down. Accordingly, it has been held that the necessary legal infrastructure has been established within the framework of the State's obligation to protect; and that the legal system set up to protect those who are exposed to violence or who are at the risk of violence is not inadequate (in the same vein, see *Semra Özel Üner*, § 39; *A.Z.Ö.*, § 76; and *Ö.T.*, § 32).

40. The issue to be examined in the second place is whether reasonable practical measures were taken within the scope of the current administrative and legal legislation to the extent required by the present case.

41. In Article 4 § (1) of Law no. 6284, it is set forth that the judge may order the change of the victim's workplace within the scope of protective measures. Article 10 § (7) of Law no. 6284 provides that an interim measure on change of workplace delivered by a judge shall be implemented by the competent authority or person in accordance with the relevant legislation provisions to which the person concerned is subject. In accordance with the Implementation Regulation, an interim measure ordered by a judge within this scope is notified to the workplace of the person under protection so that it is implemented by way of taking into account the most favourable conditions for this person. The decision is implemented by the competent institution or person. If an interim measure on the change of workplace is lifted, the relevant decision is notified to the workplace. In such a case, in order to protect the victim of violence, when necessary, the judge may decide on the change of the workplace within or outside the province.

42. In the present case, it is clear that after the applicant filed an application with the relevant authority, stating that she was subjected to violence by her husband with whom she was in the process of divorce, the family court ordered protective measures; that the duration of these measures was extended by decisions issued on various dates; and that the said protective measures were also in effect at the time when the applicant requested a change of her workplace as a measure. As a matter of fact, the 7th Chamber of the İzmir Family Court, which rejected the applicant's request to change the workplace as a measure, ruled on the continuation of the protective measures previously ordered.

43. On the other hand, the applicant demonstrated, on concrete grounds, her allegations that her life was in danger, stating that her ex-husband also used the route she used every day to go to the school where she worked; that the bank branch from which she withdrew her salary, the district education directorate and the places that she needed to go in order to continue her life were very close to the workplace of her husband; and that therefore she was constantly in fear. It has been understood that

the applicant first submitted the request for her workplace change to the administration where she worked; that the administration rejected this request as there was no protective measure order; and that following the rejection, the applicant was injured by being stabbed by her husband.

44. In the present case, in spite of the explicit provisions stipulating that the victim's workplace may be changed as a measure, which are laid down in Article 4 § (1) and Article 10 § (7) of Law no. 6284as well as of the relevant leading decisions of family courts, which were presented by the applicant, it has been understood that no concrete explanation, assessment or justification was provided as to the serious life risks against the applicant given the behaviours of her divorced husband towards her; and that the applicant's request was rejected by the 7th Chamber of the İzmir Family Court on the ground that it was of an "administrative nature". Accordingly, it has been held that the grounds provided in the decision were not relevant and adequate in the context of the applicant's right to protect her corporeal and spiritual existence. It has been understood that even though the applicant first informed the institution where she worked that her life was at risk and then brought this complaint before the judicial authorities on concrete grounds, the Ministry of National Education and the 7th Chamber of the İzmir Family Court failed to act in accordance with their positive obligations to take measures in order to protect the applicant who was a victim of violence. In this case, it cannot be concluded that the positive obligations of the State within the meaning of the right to protect the corporeal and spiritual existence were duly fulfilled.

45. Consequently, the Court has found a violation of the right to protect the applicant's corporeal and spiritual existence safeguarded by Article 17 of the Constitution.

3. Application of Article 50 of Code no. 6216

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

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

finding a violation has been rendered, what is required for the resolution of the violation and the consequences thereof shall be ruled on...

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

47. In the judgment of *Mehmet Doğan* (see [Plenary], no. 2014/8875, 7 June 2018), the Constitutional Court has set forth the general principles as to the determination of how to eliminate the violation in the event of finding a violation.

48. In brief, it was emphasized in the judgment of *Mehmet Doğan* that the source of the violation must first be determined in order to determine the appropriate way of redress. Accordingly, in cases where a court decision leads to a violation, as a rule, it is decided that a copy of the judgment be sent to the relevant court for retrial in order to eliminate the violation and its consequences in accordance with Article 50 § (2) of Code no. 6216 and Article 79 (1) (a) of the Internal Rules of Court of the Constitutional Court (see *Mehmet Doğan*, §§ 57, 58).

49. In the judgment of *Mehmet Doğan*, the Constitutional Court has provided explanations regarding the obligations of the inferior courts tasked with retrial and what should be done by inferior courts to eliminate the consequences of the violation. In cases where the Court orders a retrial in order to eliminate the violation found, inferior courts do not enjoy a discretionary power in terms of the acceptance of the existence of the grounds for retrial and the annulment of the previous decision, unlike the re-opening of the proceedings regulated under the relevant procedural laws. As a matter of fact, in cases where a violation is found by the Court, it is not the inferior courts but the Constitutional Court which finds the violation enjoys the discretion regarding the necessity of retrial. The

inferior court is obliged to take the necessary actions to eliminate the consequences of the violation in accordance with the Court's judgment finding a violation delivered (see *Mehmet Doğan*, § 59).

50. In this context, the inferior court must first annul the decision which is found to be in breach of a fundamental right or freedom or has failed to eliminate the violation of a fundamental right or freedom committed by the administrative authorities. Subsequent to the annulment of the decision, the inferior court must take the necessary actions in order to eliminate the consequences of the violation found in the judgment of the Constitutional Court. Within this framework, in the event that the violation stems from a procedural act performed during the trial or from a procedural deficiency, the procedural act in question has to be performed again (or for the first time if it has not been performed yet) in such a way that eliminates the violation of the right in question. On the other hand, in cases where the Constitutional Court determines that the violation is caused by the administrative act or action itself or the outcome of the decision of the inferior court (rather than the procedural actions taken or not taken by the inferior court), the inferior court must eliminate the consequences of the violation by directly rendering a decision to the contrary, on the basis of the case file as far as possible without taking any procedural action (see *Mehmet Doğan*, § 60).

51. The applicant requested the Court to find a violation and to award her 10,000 Turkish liras ("TRY") in compensation for non-pecuniary damages.

52. In the present application, it has been concluded that the right to protect the applicant's corporeal and spiritual existence was violated on account of the failure of the inferior courts to provide relevant and adequate grounds. Thus, it has been held that the violation stemmed from court decisions. Moreover, it has been held that the violation also stemmed from the action of the administration on account of the fact that the applicant's request for the change of her workplace, whereby she advanced on concrete grounds that her life was at risk, was rejected by the Ministry of National Education.

53. As there is a legal interest in conducting a retrial in order to eliminate the consequences of the violation of the right to protect the applicant's

corporeal and spiritual existence, a copy of the judgment must be remitted to the 7th Chamber of the İzmir Family Court for retrial. Moreover, a copy of the judgment must be sent to the Ministry of National Education.

54. Furthermore, within the context of the present case, ordering a retrial does not thoroughly compensate for all the damages sustained by the applicant during the proceedings that led to the violation. Hence, in order to eliminate the violation with all of its consequences within the framework of the restitution rule, the applicant must be paid a net amount of TRY 10,000 in respect of the non-pecuniary damages that she sustained due to the violation of the said right which cannot be adequately compensated by merely the finding of a violation and retrial.

55. The total court expense of TRY 2,714.50, including the court fee of TRY 239.50 and the counsel fee of TRY 2,475 calculated on the basis of the case file, must be paid to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 17 July 2019 that

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

B. The alleged violation of the right to protect the applicant's corporeal and spiritual existence be DECLARED ADMISSIBLE;

C. The right to protect her corporeal and spiritual existence safeguarded by Article 17 of the Constitution WAS VIOLATED;

D. A copy of the judgment be SENT to the 7th Chamber of the İzmir Family Court for retrial in order to eliminate the consequences of the right to protect the corporeal and spiritual existence (as regards the decision no. E.2016/135, K.2016/134 and dated 31 May 2016);

E. A net amount of TRY 10,000 be PAID to the applicant in compensation for non-pecuniary damages;

F. The payment be made within four months as from the date when the applicant applies to the Ministry of Finance following the notification

of the judgment. In case of any default in payment, legal INTEREST ACCRUE for the period elapsing from the expiry of the four-month time limit to the payment date;

G. The total court expense of TRY 2,714.50 including the court fee of TRY 239.50 and the counsel fee of TRY 2,475 be REIMBURSED to the applicant;

H. A copy of the judgment be SENT to the Ministry of National Education; and

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

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

DOĞUKAN BİLİR

(Application no. 2014/15736)

29 May 2019

On 29 May 2019, the First Section of the Constitutional Court found violations of the substantive and procedural aspects of the prohibition of inhuman or degrading treatment safeguarded by Article 17 § 3 of the Constitution in the individual application lodged by *Doğukan Bilir* (no. 2014/15736).

THE FACTS

[9-38] The applicant, who was a university student and living in Eskişehir with his family at the material time, complained that he had been heavily beaten by police officers and a civil person at a demonstration he had participated in within the scope of the Gezi Park events. In this regard, he obtained a medical report from the military hospital, stating that he had been battered and thus suffered loss of teeth. The chief public prosecutor's office ("the prosecutor's office") launched an investigation into the incident. As a result of the disciplinary investigation conducted against the police officers, three officers who had been involved in the incident were given disciplinary punishment of suspension of promotion.

The prosecutor's office issued a decision of non-prosecution with espect to four police officers who had allegedly injured the applicant. The applicant, whose challenge against the decision of non-prosecution was dismissed by the magistrate judge, lodged an individual application.

In addition, as a result of the criminal case, a police officer was acquitted; two police officers were imposed judicial fines but the pronouncement of the said judgment was suspended; and the civil person in question was imposed a judicial fine. The sentences of all accused were reduced by 1/6 through discretionary mitigation in accordance with Article 62 of the Turkish Criminal Code. The applicant's appeal against the suspension of the pronouncement of judgment was dismissed by the assize court.

The applicant lodged an individual application in this regard. He also challenged the acquittal of a police officer as well as the final conviction of the civil person.

V. EXAMINATION AND GROUNDS

39. The Constitutional Court, at its session of 25 May 2019, examined the application and decided as follows.

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

40. The applicant maintained;

i. that following the investigation initiated by the public prosecutor's office regarding the incident during which he was seriously injured by law enforcement officers and a civilian, the writ addressed to the Security Directorate for the identification of the perpetrators and their arrest dated 10 June 2013 was not answered; that following the failure to respond to the second writ dated 6 February 2014, the applicant's denunciation of misconduct was concluded with a decision for non-prosecution; and that the Security Directorate's failure to provide the requested information rendered the investigation ineffective;

ii. that the conduct of the investigation by police officers working in the same judicial and administrative law enforcement unit as the perpetrators did not comply with the principle of independence and impartiality; that the indifference, especially in the collection of evidence, such as the facts that the CCTV footage was not collected, that no effort was made to identify the witnesses, and that a crime scene investigation was not carried out, proved this point;

iii. that the decision of non-jurisdiction rendered by the Criminal Court on the grounds that the relevant act constituted the offence of torture was annulled without stating any grounds;

iv. that the imposition of the judicial fines at the lower limit for all the defendants and the suspension of the pronouncement of judgment in respect of the defendants who were police officers amounted to a sanction far from deterrence seeking to protect the torturers, and that such a sanction was a disappointment for a legal order based on human rights, as well as, for the applicant himself;

v. that the decision rendered upon his appeal against the judgment on the suspension of the pronouncement of judgment lacked reasoning;

vi. that the non-prevention of the other defendants' acts by the police officer at the incident scene in respect of whom an acquittal decision was delivered was against the State's obligation to protect the applicant, that the acts of the person in question amounted to misconduct or failure of the civil servant to report an offence;

vii. and lastly, that even though the perpetrators' acts constituted the offence of torture, they were considered as if they had been acts of simple injury, that alongside his right to a fair trial, both the substantive and procedural aspects of the prohibition of ill-treatment had been violated on account of the failure of appellate authorities to address his legal arguments brought forward against this assessment.

41. In its observations, the Ministry stated that the prosecutor's office had secured the CCTV footage without delay; that the Inspection Board of the Security Directorate had initiated an investigation against the relevant police officers; that a criminal case had been filed against three police officers and a civilian who were found to have battered the applicant; that the investigation had been completed in eleven months, and as a result, the defendant H.E. had been acquitted while the other three defendants, namely, two police officers and one civilian had been convicted; that the pronouncement of judgment had been suspended with respect to the police officers; that due to the criminal background of the civilian, such a decision had not been rendered in respect of him; and that the investigation had been effective and adequate.

B. The Court's Assessment

42. Article 17 of the Constitution, in so far as relevant, is as follows:

"Personal inviolability, physical and moral existence of the individual

Article 17 - 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."

43. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). Since the alleged violation of the applicant's right to a fair trial falls within the scope of the procedural aspect of the prohibition of ill-treatment, no separate examination has been made in terms of the right to a fair trial.

1. Admissibility

a. As regards the Decision of Non-Prosecution Issued in Respect of the Officers Not Responding to the Writ of the Public Prosecutor's Office and as regards the Acquitted Police Officer

44. The applicant alleged that the prohibition of ill-treatment had been violated on account of the decision of non-prosecution issued within the scope of the investigation initiated into his injury during the Gezi Park incidents, where the public prosecutor's office communicated a writ dated 10 June 2013 to the Security Directorate requesting the identification and arrest of the perpetrators, as well as on account of the acquittal of the police officer H.E. as a result of the proceedings brought against him.

45. Within the scope of the prohibition of ill-treatment, in the event that the individual has an arguable claim within the framework of the State's procedural obligation to conduct an effective investigation, the State must carry out an effective official investigation capable of identifying and punishing those responsible. The main purpose of such an investigation is to ensure the effective implementation of the law preventing such attacks and to hold the perpetrators accountable (see *Cezmi Demir and Others,* no. 2013/293, 17 July 2014, §§ 110, 111).

46. On the other hand, any allegation of ill-treatment cannot be expected to avail of the protection provided by Article 17 § 3 of the Constitution and the positive obligations imposed on the State pursuant to Article 5 of the Constitution. In this context, the claims of ill-treatment must be substantiated with appropriate evidence. In order to confirm the accuracy of the allegations, existence of evidence beyond any reasonable doubt is necessary. Evidence to this extent may consist of sufficiently serious, clear, and consistent indications or certain presumptions that have not been proven otherwise (see *Cezmi Demir and Others*, § 95).

47. The purpose of the criminal investigations is to ensure that the legal provisions protecting the corporeal and spiritual existence of the individual are effectively implemented and that those responsible are held accountable. This is not an obligation of result, but of means. On the other hand, the assessments mentioned here do not necessarily mean that Article 17 of the Constitution confers on the applicants the right to request the trial or punishment of third parties for a criminal offence or the duty to conclude all trials with a decision on conviction or a decision proving for a certain punishment (see *Cezmi Demir and others*, § 77).

48. It has been understood that the applicant was injured in various parts of his body while returning home from a demonstration held within the scope of the Gezi Park evets, and that an official investigation was initiated immediately. It has been observed that the said investigation was joined with the investigation no. 2013/15785 carried out regarding the Gezi Park events; that within the scope of the joined investigation file, a total of seven files were dealt with together, and attempts were made by the public prosecutor's office to identify the suspected police officers. Mobile Electronic System Integration (MOBESE/CCTV) footage of the incident scene, cell phone signal data of the parties were examined and the statements of the suspects and victims were taken. The public prosecutor's office requested that the relevant procedure be implemented with regard to the unanswered writ.

49. In the report issued on 28 February 2014, it was stated that the submission report of the Inspection Board of the Security Directorate was erroneously included in another file and that the public prosecutor in charge of the relevant file noticed this situation and appended the report to the correct file. In the investigation conducted by the public prosecutor's office on the said incident, it was established that this error did not cause loss of rights in a way such as the expiry of the statutory limitation period and that the courthouse and police officers did not have an intent of misconduct.

50. There is no footage captured by the cameras indicating that the police officer H.E., who was acquitted, battered the applicant and the Hotel Operator, who was the only eyewitness to the incident, stated that

the third police officer who came later had not taken any action against the applicant. The other two convicted police officers also stated that H.E. had not battered the applicant.

51. Having regard to the facts that there is no indication suggesting that these grounds laid down in the decision of non-prosecution of the public prosecutors' office and in the judgment of the Court on acquittal did not comply with the information and findings in the investigation; and that the applicant expressed that he was unable to physically describe the perpetrators, there is no reason requiring departure from the conclusion reached by the first instance judicial authorities.

52. The applicant alleged that even though the acquitted police officer H.E. did not commit any act that constituted ill-treatment, his indifference towards other defendants' actions was not compatible with the State's obligation to protect. As it has been understood from the statements of the witness E.G. that H.E. who was a goitre patient, who had undergone an appendicitis surgery approximately two months ago and who had difficulty wearing the gas mask, which he did not know exactly how to use, was having difficulty in moving due to his health condition, the alleged violation of the obligation to protect could not be substantiated.

53. For the reasons explained above, this part of the application must be declared inadmissible *for being manifestly ill-founded* without any examination in terms of other admissibility criteria.

b. As regards the Convicted Accused

54. In the present case, it must be examined whether the suspension of the pronouncement of judgment in respect of the two police officers and the judicial fine imposed on a civilian as a result of the criminal proceedings, provided a sufficient and effective redress in respect of the applicant, i.e. whether the applicant lost his victim status.

55. As protectors of the laws enacted to protect the lives and physical and mental integrity of persons within their jurisdiction, judicial authorities need to be determined to impose sanctions on those responsible and not to allow explicit disproportionality between the severity of the imputed offence and the sentence imposed. Otherwise, the positive obligation of

the State to protect the physical and mental integrity of individuals by way of laws will not be fulfilled (see *Cezmi Demir and Others*, § 77).

56. In accordance with this principle explained above, inasmuch as the admissibility examination as to whether the applicant's victim status continues overlaps with the examination on the merits, it has been concluded that these examinations should be carried out together.

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

2. Merits

58. The principles of the Court with regard to the prohibition of ill-treatment during the use of force in meetings and demonstrations marches were explained in the case of *Özge Özgürengin* (see ibid. § 46-54, 70-80).

59. The 9th Chamber of the Eskişehir Criminal Court convicted the applicants for the offence of simple injury. As indicated thereby, it was found established that the applicant was subjected to ill-treatment by three persons, two of whom were law enforcement officers. The Court has found no reason to depart from the conclusion of the inferior courts that acknowledged the ill-treatment.

60. The applicant's other allegations under this head concern the conduct of the investigation against the law enforcement officers by other law enforcement officers under the same administrative structure, who were neither independent nor impartial, resulting in indifference in the evidence-collecting procedure, such as the failure to obtain the CCTV footage, lack of effort to identify the witnesses, and failure to carry out a crime scene investigation. The last part of the applicant's allegations focused on the point that though the relevant act constituted the offence of torture, the imposition of judicial fine as an alternative sanction for the offence of intentional injury at the lower limits raised a serious issue in terms of the deterrence of the said sanction.

61. Therefore, the scope of the examination has been limited to whether the obligations as per the admissibility and merits within the context of

the prohibition of ill-treatment were fulfilled, depending on whether the sanction imposed on the perpetrators was sufficient.

62. In the present application, the applicant alleged that he had been battered by some law enforcement officers and civilians while he was returning home after participating in the demonstration held in Eskişehir within the scope of the Gezi Park events. The medical reports indicating signs of battery and coercion on various parts of the applicant's body and *luxation* on his three teeth, as well as the CCTV footage demonstrate that the applicant's allegations reached an arguable level. In addition, the initiation of an investigation and the filing of the criminal proceedings by the public prosecutor's office also confirm this.

63. The police officers took the applicant's statement at the hospital where he was treated immediately after the incident. This shows that an investigation was initiated *ex officio* and immediately.

64. It has been understood that the police officers working under the same administrative structure as the suspected law enforcement officers took part in the investigation and that the statements were taken by police officers. Even though the applicant alleged that the commission of the investigation against the police officers, again to police officers resulted in an incomplete collection of evidence, CCTV footage of the incident scene and security camera footage of a hotel and a bakery were provided. It has been considered that the applicant's allegation that the investigation had been carried out incompletely remained abstract as it has been understood that the applicant had no explanation as to which witnesses had not been identified and that the deficiencies mentioned by the applicant were eliminated by the statements of other persons identified by the prosecutor's office.

65. There was no evidence indicating that the applicant was not able to effectively participate in the investigation.

66. The applicant alleged that even though the act to which he had been subjected constituted the offence of torture pursuant to Law no. 5237, the fact that the perpetrators were convicted of the offence of intentional injury, the penalty for which is much lighter, demonstrated that the ill-treatment was tolerated.

67. As regards the allegations of ill-treatment, in the event that the case is before the the inferior courts, liability within the meaning of criminal law should be separated from the liability within the meaning of the Constitution and international law. The jurisdiction of the Constitutional Court is limited to the fundamental rights and freedoms enshrined in the Constitution and those within the scope of the European Convention on Human Rights and the protocols thereto to which Turkey is a party (see *Cezmi Demir and Others*, § 96). Therefore, an examination as to which offence in criminal law constitutes the act recognized as ill-treatment in the context of human rights does not directly fall within the jurisdiction of the Constitutional Court.

68. Although the Constitutional Court is not bound by the findings of the inferior courts, under normal circumstances, there must be strong reasons to depart from the conclusions of these courts in relation to the material facts (*see Cezmi Demir and others*, § 96). In accordance with the Court of Cassation's case-law under the title "Relevant Domestic Law", it has been understood that the act that caused the applicant to lose his tooth constituted the offence of qualified injury. The determination of which act of the perpetrator had caused the said injury is an important element that may directly affect the amount of sentence, hence the limits with regard to the suspension of the pronouncement of judgment and suspension of the execution of sentence.

69. As noted in Court's judgments, -for the purposes of prevention and improvement- the rules in the provisions regarding criminal sanctions must be proportionate and fair (see the Court's Judgment, no. E.2010/104, K.2011/180, 29 December 2011). The principle of proportionality requires a reasonable relationship between the protection of the victim and the punishment of the perpetrator. In other words, in the provisions providing for deprivation of rights, a balance must be struck between the unlawful act and the sanction imposed in accordance with the principles of justice and equality. Moreover, the aim pursued by the sanctions in question is to ensure the individual's rehabilitation and subsequent reintegration into society following the offence he/she has committed. As a matter of fact, whereas Article 13 of the Constitution provides that the restrictions on the fundamental rights and freedom's restrictions shall not be contrary to

the requirements of the democratic order of the society and the principle of proportionality, Article 3 of Law no. 5237 stipulates that the offender may be subject to punishment and imposition of security measures in proportion with the severity of the acts committed. (see *Tahir Canan*, § 36).

70. In the assessment as to whether the suspension of the pronouncement of judgment, a concept introduced by the legislator for the individual's reintegration into society, will be applied, the deterrence of the sanction must be interpreted in proportion to the nature of the offence and to the extent to which the victim is affected by the offence in question within the framework of the particular circumstances of each case, without overlooking whether the victim status of the victim of ill-treatment has disappeared or not.

71. Among the notions of torture, inhuman or degrading treatment and treatment incompatible with human dignity categorized under Article 17 § 1 of the Constitution, it must be determined where the act suffered by the applicant, who was injured in more than twenty parts of his body and lost his three teeth, falls into. As a result of this finding, it must be considered whether the sanction imposed by the inferior court is proportional to the act of ill-treatment.

72. Having regard to the fact that the act in question was committed in the middle of the street by more than one person with sticks and batons, which are considered as weapons; that the fractures and dislocations in the applicant's teeth, *per se*, were of the nature that could not be treated with simple medical intervention; and that this situation might further damage the honour of the applicant, even though the injuries of the applicant might be treated with simple medical intervention except for those on his teeth, it has been concluded that the act in question falls within the scope of the prohibition of inhuman or degrading treatment.

73. In the reasoning for the decision, it was not stated on what grounds the imposition of judicial fines at the lower limits were favoured for three of the perpetrators among the alternative sanctions of imprisonment and judicial fines. Moreover, the amount of the fine imposed was calculated on the basis of the minimum limit of TRY 20 per day. Applying discretionary mitigation provisions, the relevant court imposed a fine of TRY 3,000,

yet suspended the pronouncement of the judgment in respect of the defendants who were police officers, thereby concluding the proceedings. Pronouncement of the judgment in respect of the applicant who was not a civil servant was not suspended on account of his criminal records.

74. It has been established that the application of judicial fines or the suspension of the pronouncement of judgment in respect of the law enforcement officers by way of repeating the reasons in the law in an abstract manner was a sanction that was not proportionate with the prohibition of inhuman or degrading treatment on account of the unnecessary battery of the applicant, in respect of whom no investigation was initiated as there had been no finding that he had disrupted the peaceful nature of the demonstration march while dispersing, by the law enforcement officers tasked with maintaining the order at night and who represent the State on the streets.

75. In the event of disproportionality between the offence committed and the sentence imposed, or of impunity, there would be no deterrent effect that would prevent such actions, and as a result, the State's positive obligation to protect the physical and mental integrity of persons through administrative and legal legislation would not be fulfilled.

76. Accordingly, as it has been established in the present case, that a judicial fine was imposed disproportionately and the pronouncement of the judgment was suspended in such a way that would mitigate the consequences of the act rather than emphasizing that the acts that constitute ill-treatment cannot be tolerated, it must be decided that the procedural obligation to effective investigation under the prohibition of inhuman or degrading treatment was violated.

77. On account of the fact that the decision on suspension of the pronouncement of judgment in respect of the two police officers and the judicial fine imposed on the civilian perpetrator S.K. did not afford sufficient redress to the applicant, it cannot be stated that the applicant lost his victim status. For this reason, even though it has been established that the applicant suffered damages as a result of the decisions of the inferior courts in breach of the State's negative obligation, it must be decided that the substantive aspect of the prohibition of inhuman or degrading treatment has also been violated, due to the fact that it has been

understood that the defendants faced insufficient sanction in view of their acts. Thus, the applicant did not lose his victim status.

78. Consequently, the Constitutional Court has found violations of the substantive and procedural aspects of the prohibition of inhuman or degrading treatment safeguarded by Article 17 of the Constitution.

3. Application of Article 50 of Code no. 6216

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

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

80. The applicant requested TRY 200,000 for non-pecuniary damages on account of the violation of the prohibition of ill-treatment.

81. In the judgment of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court set out the general principles as to the determination of how to eliminate the violation in the event of finding a violation.

82. It was emphasized, in brief, in the judgment of *Mehmet Doğan* that in order to determine the appropriate way of redress, the source of the violation must be determined in the first place. Accordingly, in cases where a court decision leads to a violation, as a rule, it is decided that a copy of the decision be sent to the relevant court for retrial in order to

redress the violation and its consequences in accordance with Article 50 § (2) of Code no. 6216 and Article 79 (a) of the Internal Rules of Court of the Constitutional Court (see *Mehmet Doğan*, §§ 57, 58).

83. In the present application, it has been concluded that the substantive and procedural aspects of the prohibition of inhuman or degrading treatment regulated under Article 17 of the Constitution were violated.

84. In this connection, in order to eliminate the consequences of the violation of the prohibition of inhuman or degrading treatment, a copy of the judgment must be sent to the 9th Chamber of the Eskişehir Criminal Court (abolished) (E.2014/805, K.2014/737) for the retrial of the defendants S.B., Ş.G. and S.K.

85. In the present application, on account of the violation of the prohibition of ill-treatment under its both substantive and procedural aspects, the applicant must be paid the net amount of TRY 25,000 in respect of his non-pecuniary damages which cannot be sufficiently compensated by the sole finding of a violation.

86. The total court expense of TRY 3,147.50, including the court fee of TRY 672.50 and the counsel fee of TRY 2,475 calculated on the basis of the case file, must be paid to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 29 May 2019 that

A. 1. Alleged violation of the prohibition of inhuman or degrading treatment in respect of the officers not responding to the writ of the public prosecutor's office and the police officer who was acquitted be DECLARED INADMISSIBLE;

2. Alleged violation of the prohibition of inhuman or degrading treatment in respect of the defendants who were convicted be DECLARED ADMISSIBLE;

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

C. A copy of the judgment be REMITTED to the (abolished) 9th Chamber of the Eskişehir Criminal Court (E.2014/805, K.2014/737) for retrial in order to redress the consequences of the violation of the prohibition of inhuman or degrading treatment;

D. The applicant be AWARDED, in respect of non-pecuniary damages, TRY 25,000, and her other requests for compensation be REJECTED;

E. The total court expense of TRY 3,147.50 including the court fee of TRY 672.50 and the counsel fee of TRY 2,475 be REIMBURSED to the applicant;

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

G. A copy of the judgment be SENT to the Ministry of Interior for its notice; and

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

RIGHT TO PERSONAL LIBERTY AND SECURITY (ARTICLE 19)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

AYŞE NAZLI ILICAK

(Application no. 2016/24616)

3 May 2019

On 3 May 2019, the Plenary of the Constitutional Court found no violations of the right to personal liberty and security as well as the freedoms of expression and the press in the individual application lodged by *Ayşe Nazlı Ilıcak* (no. 2016/24616).

THE FACTS

[8-43] The applicant, a journalist, was detained on remand for her alleged membership of an armed terrorist organization within the scope of the investigation conducted into the FETÖ/PDY's media formation. As regards the existence of strong suspicion of the applicant's guilt, it was indicated in the detention order issued by the Magistrate Judge that she had been writing articles and sharing posts through the media outlets of the FETÖ/PDY and in line with its organizational aims.

At the end of the judicial proceedings, the Istanbul Assize Court sentenced the applicant to aggravated life imprisonment and ordered the continuation of her detention on remand for the offence of attempting to abolish, replace or prevent the implementation of, through force and violence, the constitutional order of the Republic of Turkey. On the date of examination of the individual application, the case was still pending before the Court of Cassation and the applicant was still detained on remand.

V. EXAMINATION AND GROUNDS

44. The Constitutional Court, at its session of 3 May 2019, examined the application and decided as follows:

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

1. Alleged Unlawfulness of the Applicant's Detention

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

45. The applicant maintained that her detention had been ordered in the absence of any concrete evidence; and that the evidence underlying her detention merely consisted of her columns, which should have been

indeed considered to fall into the scope of the freedom of expression but had been however considered to constitute an offence.

46. She further claimed that there had been no ground justifying her detention; that the decisions on her detention and continued detention had lacked justification; and that the conditional bail provisions had not been applied to her case although she was 72 years old. She accordingly alleged that her right to personal liberty and security had been violated.

47. Besides, according to the applicant, she was detained on remand for political motives, which went beyond those specified in the Constitution. The underlying aim was indeed to punish her due to her criticisms directed towards the way how the Government and the President ruled the country. She accordingly maintained that there had been a violation of Article 18 of the European Convention on Human Rights in conjunction with the right to personal liberty and security.

48. In its observations, the Ministry noted that the charges against the applicant were based on concrete evidence; and that in consideration of the state of emergency declared following the coup attempt, her detention was not unfounded and arbitrary.

49. In her counter-statements against the Ministry's observations, she stated that the charges against her were not based any concrete evidence but merely related to her journalistic activities.

b. The Court's Assessment

50. 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."*

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

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

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

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

"Everyone has the right to personal liberty and security.

...

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

53. The applicant's allegations in this part should be examined within the scope of the right to personal liberty and security under Article 19 § 3 of the Constitution. The Court's examination in this context will be confined to the assessment as to the alleged unlawfulness of the applicant's detention, irrespective of the investigation and prosecution conducted against her, as well as of the possible outcomes of the proceedings. Besides, in assessing whether Article 19 § 3 of the Constitution was violated, every application would be assessed under its particular circumstances.

i. Applicability

54. The Court has stated that in examining the individual applications against emergency measures, it would take into account the protection regime set out in Article 15 of the Constitution with respect to fundamental rights and freedoms (see *Aydın Yavuz and Others*, §§ 187-191). The accusation which was brought against the applicant by the investigation authorities and for which she was detained on remand is her alleged membership of the Fetullahist Terrorist Organisation/Parallel State Structure ("the FETÖ/PDY"), the structure behind the coup attempt. The Court has considered that the impugned accusation is related to the incidents underlying the declaration of a state of emergency (see *Selçuk Özdemir* [Plenary], no. 2016/49158, 26 July 2017, § 57).

55. In this respect, the alleged unlawfulness of the applicant's detention would be reviewed under Article 15 of the Constitution. During such review, it would be primarily determined whether the applicant's detention on remand was in breach of the constitutional safeguards notably those set forth in Articles 13 and 19 of the Convention, and in case of any violation, it would be assessed whether the criteria set forth in Article 15 of the Constitution rendered such a violation lawful (see *Aydın Yavuz and Others*, §§ 193-195, 242).

ii. Admissibility

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

iii. Merits

(1) General Principles

57. The Court comprehensively sets forth the general principles that it will take into consideration in the examination of the lawfulness of a journalist's detention from the standpoint of the right to personal liberty and security safeguarded by Article 19 of the Constitution in its judgment of *Şahin Alpay* (§§ 77-91) as follows:

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

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

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

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

81. Accordingly, detention of a person primarily depends on the presence of a strong indication of having committed an offence. This is a sine qua non sought for detention. For this, it is necessary to support

an allegation with plausible evidence which can be considered as strong. The nature of the facts which can be considered as convincing evidence is to a large extent based on the particular circumstances of the case (see Mustafa Ali Balbay, no. 2012/1272, 4 December 2013, § 72).

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

83. In cases where serious allegations indicate, or circumstances of the present case reveal, that the acts imputed to suspect or accused fall within the ambit of fundamental rights and freedoms that are sine qua non for a democratic society such as the freedom of expression, the freedom of the press, the right to trade-union freedom and the right to engage in political activities, judicial authorities ordering detention must act with more diligence in determining the strong suspicion of guilt. The question as to whether due diligence has been shown is subject to the Court's review (see Gülser Yıldırım (2) [Plenary], no. 2016/40170, 16 November 2017, § 116, and for a violation judgment rendered at the end of such review, see Erdem Gül and Can Dündar [Plenary], no. 2015/18567, 25 February 2016, §§ 71-82; and for inadmissibility decisions, see Mustafa Ali Balbay, § 75; Hidayet Karaca [Plenary], no. 2015/144, 14 July 2015, § 93; İzzettin Alpergin [Plenary], no. 2013/385, 14 July 2015, § 46; and Mehmet Baransu (2), no. 2015/7231, 17 May 2016, §§ 124, 133 and 142).

84. Besides, it is provided in Article 19 of the Constitution that an individual may be detained for the purpose of preventing "escape" or

"tampering with evidence". However, the constitution-maker, by using the expression of "…as well as in other circumstances prescribed by law and necessitating detention", points out that the grounds for detention are not limited to those set forth in the Constitution and sets forth that the grounds for detention other than those provided in the relevant Article can only be prescribed by law (see Halas Aslan, § 58).

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

86. It is also set out in Article 13 of the Constitution that the restrictions on fundamental rights and freedoms cannot be contrary to the "principle of proportionality". The expression of "requiring detention" set out in Article 19 § 3 of the Constitution points out the proportionality of detention (see Halas Aslan, § 72).

87. The principle of proportionality consists of three sub-principles, which are "suitability", "necessity" and "commensurateness". Suitability requires that the interference envisaged is suitable for achieving the aim pursued; the necessity requires that the impugned interference is necessary for achieving the aim pursued, in other words, it is not possible to achieve the pursued aim with a less severe interference; and commensurateness requires that a reasonable balance is struck between the interference with the individual's right and the aim sought to be achieved by the interference (see the Court's judgment

no. E.2016/13, K.2016/127, 22 June 2016, § 18; and Mehmet Akdoğan and Others, no. 2013/817, 19 December 2013, § 38).

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

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

90. In every concrete case, it falls in the first place upon the judicial authorities deciding detention cases to determine whether the prerequisites for detention, i.e., the strong indication of guilt and other grounds exist, and whether the detention is a proportionate measure. As a matter of fact, those authorities which have direct access to the parties and evidence are in a better position than the Constitutional Court in making such determinations (see Gülser Yıldırım (2), § 123).

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

(2) Application of Principles to the Present Case

58. The applicant was taken into police custody on 26 July 2016 and then brought before the magistrate judge after the necessary procedures before the security directorate and the prosecutor's office had been completed. On 29 July 2016 the İstanbul 1st Magistrate Judge hearing the applicant ordered her detention.

59. In the present case, it must be ascertained whether the applicant's detention had a legal basis. The applicant was detained on remand, pursuant to Article 100 of the Code of Criminal Procedure no. 5271 ("Code no. 5271"), for her alleged membership of an armed terrorist organisation, within the scope of an investigation conducted into the media structure of the FETÖ/PDY. Accordingly, the applicant's detention had a legal basis.

60. Secondly, it must be determined whether there existed a strong indication of guilt, which is a prerequisite for detention.

61. It is undoubted that a military coup attempt was staged in Turkey on 15 July 2016; and that the public and judicial authorities considered -relying on factual grounds that the perpetrator of this coup attempt was the FETÖ/PDY (see *Aydın Yavuz and Others*, §§ 12-25).

62. In this sense, it is known that several investigations were conducted into the FETÖ/PDY's structures operating in different areas; and that a great number of persons were taken into custody and subsequently detained on remand. Within the scope of the investigations conducted in relation with the FETÖ/PDY's media structure, the applicant's detention was ordered. At the end of the criminal proceedings, the applicant was convicted by the incumbent court.

63. In the detention order issued with respect to her, the İstanbul 1st Magistrate Judge referred, as the existence of the strong suspicion of guilt, to her articles and social posts in line with the aims of the FETÖ/PDY, perpetrator of the coup attempt of 15 July 2016, which were made public through the media outlets owned by this organisation (newspapers, journals and TV channels).

64. The applicant's posts which was published on 16 July 2016, the date when the coup attempt was still going on but then ultimately averted are as follows: *"The corruption operation is not a coup attempt. We experienced the coup attempt at that night. Have you noticed the difference? (Yolsuzluk operasyonu darbe girişimi değildir, darbe girişimini o akşam yaşadık. Aradaki farkı gördünüz mü?)"*, *"CNN says: One military prosecutor and 46 military officers were responsible for the coup attempt. Is it so easy to disturb the peace within the country? Only a handful of military officers may achieve this? (Bir askeri savcı ve 46 subay darbe girişiminden sorumlu diyor CNN. Memleketi karıştırmak bu kadar kolay mı? Bir avuç asker bunu yapabilir mi?)"*; *"They would rescue CNN TÜRK, as did they in favour of TRT, then what nonsense it is (TRT yi kurtardıkları gibi CNN TÜRK'ü de kurtaracaklar, öyleyse ne bu saçmalık.)"*; *"Both the Prime Minister and Recep Tayyip Erdoğan would probably demonstrate, with concrete evidence, the link between these persons and the community (Herhalde Başbakan ve RTE bu İsimlerin cemaatle ilişkisini somut delillerle ortaya koyacaktır)"*; *"They have Semih Terzi, who was appointed by them as a brigadier general on 30 August 2014, staged a coup in line with the instruction of Gülen. Where is the evidence? We have experienced a witch-hunt many times, haven't we? (30 Ağustos 2014 te Tuğgeneralliğe terfi ettirdikleri Semih Terzi'ye Gülen'in emri ile darbe yaptırıyorlar. Nerede delil? Cadı avı yetmedi mi?"*; *"Act with justice! 2nd and 3rd Army Commanders are also from the parallel structure?. It is so clear that you have tried to collect actors for your witch-hunt. ("İnsaf 2. Ve 3. Ordu komutanları da mı parallel. Buradan Cadı avınıza malzeme devşirmeye çalıştığınız çok açık."*; *"You continue telling this tale all the more so as long as there are people believing in what you say. ("Her dediğinize inananlar oldukça bu masala daha çok anlatırsınız")*; *"A justice of the Constitutional Court is also a member of the FETÖ. This is a great opportunity for you to discharge those who have refused to submit themselves to you. The authority appointing the justice in question is Mr. Gül, is not he? (Anayasa Mahkemesi üyesi de Fetöcüymüş, fırsat by fırsat biat etmeyeni tasfiye et, onu atayan Gül değil miydi?)"*; *"They are stirring up a hornet's nest; you are scratching the wounds (Arı kovanına çomak sokuyorlar yaraları hep kaşıyorsunuz)"*; *"In this case, how is it a coup attempt staged by FETÖ? Are these two force commanders from the community? Otherwise, is the intention different? (Bu durumda nasıl FETÖ darbesi oluyor? O iki kuvvet komutanı da cemaatçi mi? Yoksa niyet mi başka?)"*; *"Be smart and*

notice the game! It seems that a conspiracy is now in place. Is this considered as an excellent opportunity for engaging in a discharge? (Akıllı olan ve oyunu görün! Asıl şimdi bir kumpas kuruluyor gibi geliyor. Fırsat bu fırsat tasfiyeye mi girişildi?"; "Be smart and keep an eye out for manipulation. Do not let a plot laid against Turkey (Akıllı ol… Manipülasyona karşı uyanık ol. Türkiye'nin başına çorap örülmesine izin verme)"; "If our nation had been indeed bound by democracy, they would not have allowed an Islamic regime supporting fascism to settle down the country (Milletimiz gerçekten demokrasiye bağlı olsaydı islamcı soslu faşizm bozuntusu bir rejimin ülkeye çöreklenmesine izin vermezdi)"; "The coup attempt was averted not by the people pouring into the streets but by the command staff who did not join the plotters. As a matter of fact, the people poured into the streets upon recognising this fact (Darbeyi halkın sokağa çıkması değil komuta heyetinin darbecilere katılmaması engelledi. Zaten halk sokağa bu durumu anlayınca çıktı)"; "Those who are against the coup and take a stand in support of RTE cannot be considered to protect democracy. That is why the Justice and Development Party (AKP) represents not democracy but absolute obedience (Darbeye karşı olup RTE nin yanında yer alanlar demokrasiye sahip çıkmış olmaz. Zira AKP demokrasiyi değil otoriterliği temsil ediyor)"; "Neither through a military coup nor through a civilian coup! You will have embraced democracy when you strive for rule of law and freedom of the press (Ne askeri darbe ne de sivil darbe! Hukukun üstünlüğü, basın özgürlüğü derseniz ancak o zaman demokrasiye sahip çıkmış olursunuz)"; and "The AKTrolls' endeavours to prevent disclosure of the truth by way of swearwords and insults are sufficient to consider that every stand against coup is not democracy (Aktrollerin küfür ve hakaretle doğruların söylenmesini engellemeye çalışması her darbe karşıtı duruşun demokrasi olmadığını anlamaya yeter)". Her posts concerning the custody of 2745 judges and prosecutors -along with the link of karşıgazete.com.tr website- are as follows: *"This is an act of the civilian coup. There is a difference. The military one failed as an attempt but the civilian one has succeeded (Bu da sivil darbenin bir eylemi. Bir fark var askeri darbe teşebbüs olarak kaldı bu gerçekleşti)"; "Democracy cannot be embraced by pitting the people against the soldiers and having the latter lynched by the people. In fact, the commanders foiled the coup (Halkı askerle karşı karşıya getirmek, linç ettirmekle demokrasiye sahip çıkılmaz. Zaten darbeyi komutanlar engelledi)"; "H.A., Chief of the General Staff will you not say something about this act of lynching? (Genel Kurmay Başkanı H.A., bu linç eylemine bir şey*

demeyecek misiniz?)"; and *"Those days would be over. While they would suffer for disgraceful offences they committed and pay the consequences therefore, those fighting for freedom would be treated with great respect (Bugünler geçecek onlar yüz kızartan suçlarının ayıbını yaşar ve cezasını çekerken, özgürlük mücadelesi verenler baş tacı edilecek)"*.

65. It was stated by the investigation authorities that the abovementioned posts shared by the applicant were in line with the aims pursued by the FETÖ/PDY attempting to stage a coup on 15 July 2016. It has been observed that these posts giving rise to the applicant's investigation were shared in the period when the coup attempt was still going on and subsequently averted. Besides, by the time when these posts were shared, it was undoubtedly known that the perpetrator of the coup attempt was the FETÖ/PDY. In this regard, given the applicant's status, the period when these posts were shared, as well as their contents and contexts, it cannot be said that it was unfounded and arbitrary for the investigation authorities to consider the impugned posts as a strong indication of the applicant's having committed an offence in relation with the FETÖ/PDY.

66. In addition, it must be considered whether the applicant's pre-trial detention, for which the prerequisite in the form of strong suspicion of guilt existed, pursued a legitimate aim. All particular circumstances of the present case including the general conditions at the material time when the detention order was issued must be taken into account in such an assessment.

67. It has been observed that in ordering the applicant's detention, the competent authorities relied on the length of the sentence prescribed in the relevant law for the imputed offence, the risks of concealing and tampering with the evidence and putting pressure on the witnesses, the risk of fleeing, as well as the insufficient nature of the conditional bail measures.

68. Membership of an armed terrorist organisation for which the applicant was detained on remand is among the offences punishable by imprisonment sentence, the most severe sanction prescribed within the Turkish legal system. The severity of the punishment prescribed by

the law for the imputed offence points to the risk of fleeing (see *Hüseyin Burçak*, no. 2014/474, 3 February 2016, § 61; *Aydın Yavuz and Others*, § 275). In addition, the said offence is among the offences regarding which the "*ground for detention*" may be deemed to exist *ipso facto* under Article 100 § 3 of Code no. 5271.

69. It has been further noted that the applicant could not be found at her home located in İstanbul during the search; that thereupon, an arrest warrant was issued in respect of her; that nor was she found at her home located in Bodrum; and that she could be finally caught in Bodrum on 26 July 2017. This fact cannot be regarded as insignificant in terms of the risk of fleeing.

70. Due to the conditions prevailing in the aftermath of the coup attempt, the preventive measures other than detention may not be sufficient for ensuring the proper collection of the related evidence and for conducting the investigations in a secure manner. The risk of fleeing by taking advantage of the turmoil in its aftermath, and the possibility of tampering with evidence are more likely when compared to the crimes committed during the ordinary times (for the Court's assessments in the same vein, see *Aydın Yavuz and Others*, §§ 271, 272; and *Selçuk Özdemir*, §§ 78, 79).

71. Therefore, regard being had to the general conditions prevailing at the time when the applicant's detention was ordered, the abovementioned particular circumstances of the present case, and the content of the detention order issued by the İstanbul 1st Magistrate Judge, it cannot be said that the reasons for the applicant's detention, notably the risk of fleeing and tampering with the evidence, lacked the factual basis.

72. Lastly, it must be determined whether the applicant's detention was proportionate. In determining whether a given detention is proportionate under Articles 13 and 19 of the Constitution, all circumstances of the given case must be taken into consideration (see *Gülser Yıldırım (2)*, § 151).

73. It should be primarily noted that in conducting an investigation into terrorist offences, the public authorities confront with significant

difficulties. Therefore, the right to personal liberty and security must not be constructed in a way that would seriously hamper the judicial authorities' and security forces' effective struggle against offences -particularly organised crimes- and criminality (for the Court's assessment in the same vein, see *Süleyman Bağrıyanık and Others*, § 214; and *Devran Duran*, § 64).

74. Regard being had to the abovementioned circumstances of the present case, the conclusion reached by the İstanbul 1st Magistrate Judge –to the effect that the detention measure was proportionate and the conditional bail would remain insufficient on the basis of the severity of punishment prescribed for the imputed offences and the gravity of the acts committed by the applicant- cannot be regarded as unfounded or arbitrary.

75. For these reasons, the Court has concluded that the applicant's right to personal liberty and security safeguarded by Article 19 § 3 of the Constitution was not violated.

76. Accordingly, it appears that the impugned interference with the applicant's right to personal liberty and security due to her detention was not in breach of the safeguards enshrined in the Constitution (in Articles 13 and 19); therefore, no separate examination is needed under the criteria laid down in Article 15 of the Constitution.

2. Alleged Unreasonable Length of Detention

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

77. The applicant maintained that her right to personal liberty and security had been violated, stating that she had been detained on remand for over 3 months, which exceeded the reasonable period.

78. In its observations, the Ministry indicated that the applicant was detained on remand for about 3,5 months between the date of her arrest and the date when she lodged an individual application with the Court; that this period must be taken into consideration; that in addition, the indictment was issued and thereby the investigation was completed within 8,5 months, which was reasonable given the comprehensive

nature of the investigation conducted against her; that the judicial reviews of detention were conducted at reasonable intervals, and the grounds justifying her detention were provided in such reviews; that due attention and diligence were displayed in the conduct of trial in the applicant's case; and that given the complex nature of her case, the length of her detention was reasonable.

79. In her counter-statements against the Ministry's observations, the applicant did not provide any additional explanation as to her allegations under this heading.

b. The Court's Assessment

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

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

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

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

82. Pursuant to the said provisions, individual application to the Constitutional Court is a remedy of subsidiary nature which may be resorted to in case of inferior courts' failure to redress the alleged violations. As required by the subsidiary nature of individual application mechanism, in order for an individual application to be lodged with the Court, ordinary legal remedies must first be exhausted (see *Ayşe Zıraman and Cennet Yeşilyurt*, no. 2012/403, 26 March 2013, §§ 16 and 17).

83. As regards the alleged length of the detention exceeding the maximum period prescribed in the law or exceeding the reasonable period, the Court has concluded, referring to the relevant case-law of the Court of Cassation, that the action for compensation stipulated in Article 141 of Code no. 5271 is an effective legal remedy needed to be

exhausted if the applicant has been released by the examination date of the individual application although the main proceedings have not been concluded yet (see *Erkam Abdurrahman Ak*, no. 2014/8515, 28 September 2016, §§ 48-62; and *İrfan Gerçek*, no. 2014/6500, 29 September 2016, §§ 33-45).

84. If a person is convicted by the decision of the first instance court at the end of the proceedings conducted against him without being released, his pre-trial conviction discontinues by the time of his conviction (see *Korcan Polatsü*, no. 2012/726, 2 July 2013, § 33). If the applicant has been already released or convicted, a judgment finding a violation, which would be rendered by the Constitutional Court due to the unreasonable length of detention or the detention in excess of the maximum period prescribed by law, will not secure his release. In this case, the Court would merely find a violation with respect to the impugned detention and if necessary, award a certain amount of compensation. Therefore, it is required that the legal remedies capable of affording the same kind of redress with respect to such alleged violations be primarily exhausted and that if these remedies are to no avail, then an individual application should be lodged (see *Ahmet Kubilay Tezcan*, no. 2014/3473, 25 January 2018, § 26).

85. In the present case, the applicant was not released but convicted by the decision of 16 February 2018, which was issued by the first instance court. Therefore, the alleged unreasonable length of the detention of the applicant, who was convicted on 16 February 2018 upon lodging an individual application, may be examined through an action to be brought under Article 141 of Code no. 5271. If it is found established through such an action to be brought under this provision that the applicant's detention exceeded a reasonable period, the competent court may also award compensation in her favour. Accordingly, the remedy provided by Article 141 of the Code no. 5271 is an effective remedy capable of offering redress for the applicant's complaints; and that the examination by the Court of the individual application lodged without exhaustion of this ordinary remedy does not comply with the "subsidiary nature" of the individual application system.

86. For these reasons, this part of the application has been declared inadmissible for *non-exhaustion of available legal remedies*.

3. Alleged Lack of Independence and Impartiality of Magistrate Judges

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

87. The applicant maintained that the magistrate judges ordering her detention lacked independency and impartiality.

88. In its observations, the Ministry did not provide any explanation on the applicant's allegations under this heading.

b. The Court's Assessment

89. In several judgments, the Court has dealt with the allegations that the magistrate judges undermined the natural judge principle and lacked independence and impartiality; and that the conduct of judicial reviews of the challenges against detention by these judicial tribunals precluded the opportunity to raise an effective challenge against the deprival of liberty. It has however concluded in consideration of the structural characteristics of magistrate judges that these allegations are manifestly ill-founded (see *Hikmet Kopar and Others* [Plenary], no. 2014/14061, 8 April 2015, §§ 101-115; and *Mehmet Baransu (2)*, no. 2015/7231, 17 May 2016, §§ 64-78 and 94-97).

90. In the present case, as regards the allegations of the same nature, there is no ground to require a departure from the conclusion reached by the Court in these judgments.

91. For the reasons explained above, as it is clear that there has been no violation with respect to the applicant's allegations under this heading, this part of the application must be declared inadmissible *for being manifestly ill-founded.*

4. Alleged Restriction of Access to the Investigation File

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

92. The applicant claimed that the presumption of innocence and the right to personal liberty and security had been violated, stating

that she could not be fully informed of the allegations against her due to the restriction order regarding the investigation file, and that she had been therefore deprived of the opportunity to effectively challenge her detention.

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

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

b. The Court's Assessment

95. Article 19 § 8 of the Constitution, titled "*Right to personal liberty and security*", provides as follows:

> *"Persons whose liberties are restricted for any reason are entitled to apply to the competent judicial authority for speedy conclusion of proceedings regarding their situation and for their immediate release if the restriction imposed upon them is not lawful".*

96. 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). As the applicant's complaint in essence concerns the alleged inability to effectively challenge her detention order due to the restriction order, it must be examined under the right to personal liberty and security enshrined in Article 19 § 8 of the Constitution.

i. Applicability

97. The charge against the applicant, which were included in the investigation file where the restriction complained of by the applicant

had been imposed, was related to the events leading to the declaration of a state of emergency in Turkey. Therefore, whether the impugned restriction was lawful, in other words, its effects on the applicant's right to personal liberty and security will be reviewed within the scope of Article 15 of the Constitution. During this review, whether the impugned restriction was in breach of the guarantees set forth in Article 19 of the Constitution will be determined, and in case of any violation, it will be assessed whether the criteria set forth in Article 15 of the Constitution rendered such a violation lawful (see *Aydın Yavuz and Others*, §§ 193-195, 242).

ii. Admissibility

98. The Constitutional Court has examined, in many judgments, the effect of the restriction orders issued with respect to access to investigation files on the detainees' right to challenge their detention. In these judgments, the Court has noted that those arrested or detained shall be promptly notified of the grounds for their arrest or detention and the charges against them; and that however, such obligation to notify does not cover all information and evidence related to the charges. In this sense, the Court has taken into consideration whether the applicant was aware of the basic issues as to the charges underlying the detention (see *Günay Dağ and Others* [Plenary], no. 2013/1631, 17 December 2015, §§ 168-176; *Hidayet Karaca* [the Plenary], no. 2015/144, 14 July 2015, §§ 105-107; and *Süleyman Bağrıyanık and Others*, §§ 248-257).

99. It is stated in the application form that a confidentiality order was issued regarding the investigation file, but there is no explanation as to the authority issued this order as well as the date of its issuance. The Ministry noted that there was a restriction order regarding the investigation files; however, the existence of such an order did not preclude the applicant's right to an effective remedy against her detention on remand.

100. The application form or its annexes contain no document or information as to whether the restriction order was subsequently lifted. However, it appears that by 3 May 2016 when the indictment was accepted by the 26th Chamber of the İstanbul Assize Court, the impugned

restriction had automatically expired pursuant to Article 153 § 4 of Code no. 5271.

101. It appears that the contents of the main charges against the applicant had been explained to the applicant during the statement-taking process before the İstanbul Chief Public Prosecutor's Office; and that she provided comprehensive explanations with respect to these charges in her statement.

102. Besides, the request for the applicant's detention issued by the İstanbul Chief Public Prosecutor's Office on 21 September 2016 was read out to the applicant by the İstanbul 1st Magistrate Judge before her interrogation. It was also indicated in the interrogation report that the imputed acts were read out and explained to her. During her interrogation, the applicant gave information about the imputed acts and answered the questions that were put to her. In the detention order, the magistrate judge also made comprehensive assessments about the accusations (imputed acts) forming a basis for her detention. Moreover, in the applicant's petition whereby her detention was challenged, detailed defence submissions as to the procedural and substantive aspects were provided. It has been therefore revealed that both the applicant and her lawyers had access to the charges as well as information underlying her detention both prior and subsequent to the interrogation.

103. In this respect, considering the fact that the main elements forming a basis for the charges and the information on the basis of which the lawfulness of detention was assessed were notified to the applicant or to her lawyers and that the applicant was provided with the opportunity to make her defence accordingly, it could not be accepted that the applicant could not effectively challenge her detention merely due to the impugned restriction order.

104. For the reasons explained above, as it is clear that there has been no violation in terms of the applicant's allegation that she could not effectively challenge her detention due to the restriction order, this part of the application must be declared inadmissible *for being manifestly ill-founded.*

105. Accordingly, as it is seen that the interference with the applicant's right to personal liberty and security by the restriction order within the investigation file was not in breach of the safeguards provided in the Constitution (in particular, Article 19 § 8), no further examination is needed in accordance with the criteria specified in Article 15 of the Constitution.

5. Alleged Judicial Review of Detention without a Hearing

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

106. The applicant claimed that her right to personal liberty and security had been violated, stating that her challenge against detention had been reviewed without a hearing, which was in breach of the principle of equality of arms.

107. The Ministry, in its observations, stated that if each judicial review of detention had been carried out by holding a hearing, the system would have been blocked, and that the applicant had the opportunity to make, in written, any legal evaluations regarding, and to challenge, the grounds for detention.

108. The applicant, in her counter-statements, provided no further explanation concerning the allegations in this regard.

b. The Court's Assessment

i. Applicability

109. The state of emergency continued at the time when the applicant's challenge –who was accused within the scope of the events leading to the declaration of a state of emergency in Turkey– to her detention on remand was reviewed. In this respect, the effect of the review of the applicant's detention without holding a hearing on the right to personal liberty and security will be reviewed under Article 15 of the Constitution. During this review, whether the impugned restriction was in breach of the guarantees set forth in Article 19 of the Constitution will be determined, and in case of any violation, it will be assessed whether the criteria set forth in Article 15 of the Constitution rendered such a violation lawful (see *Aydın Yavuz and Others*, §§ 193-195, 242).

ii. Admissibility

(1) General Principles

110. One of the fundamental safeguards enshrined in Article 19 § 8 of the Constitution is the right to request for an effective review of detention before a judge. In this sense, a detained person should be given the opportunity to orally raise his related complaints, his allegations as to the content or qualification of the evidence underlying his detention as well as his arguments against the opinions and considerations both in favour of and against him before a judge/court, which would secure a more effective challenge against his detention. Therefore, a detained person should be able to exercise this right by being heard before a judge at certain reasonable intervals (see *Firas Aslan and Hebat Aslan*, no. 2012/1158, 21 November 2013, § 66; and *Devran Duran*, § 88).

111. Moreover, decisions on detention that is rendered either e*x officio* or upon request within the scope of Articles 101 § 5 and 267 of Code no. 5271 may be challenged before a court (see *Süleyman Bağrıyanık and Others,* § 269). As regards the review of detention orders, Article 271 sets forth that the challenge shall be in principle concluded without a hearing; however, if deemed necessary, the public prosecutor and subsequently the defence counsel may be heard. Accordingly, in case that a review of detention or challenge against detention is made through a hearing, the suspect, the accused or the defence counsel must be heard (see *Devran Duran*, § 89).

112. However, holding a hearing for reviewing challenges to detention orders or assessing every request for release may lead to the congestion of the criminal justice system. Therefore, safeguards enshrined in the Constitution as to the review procedure do not necessitate a hearing for review of every single challenge against detention unless the special circumstances require otherwise (see *Firas Aslan and Hebat Aslan*, § 73; and *Devran Duran*, § 90).

(2) Application of Principles to the Present Case

113. The applicant was detained on remand by the İstanbul 1st Magistrate Judge on 29 July 2016 following her questioning, and she

challenged this decision on 4 August 2016. The İstanbul 2nd Magistrate Judge dismissed, with final effect, the applicant's challenge on 12 August 2016. On 25 August 2016, the applicant challenged against her detention and also requested to be released. In her petition, she requested that the review be conducted with a hearing. However, the İstanbul 5th Magistrate Judge dismissed the applicant's challenge on 29 September 2016 over the case-file, without holding a hearing.

114. Accordingly, a period of only 1 month and 29 days elapsed between the date on which the applicant was heard by the İstanbul 1st Magistrate Judge, the statements and requests of the applicant and her lawyers were received orally, and the detention order was read out to the applicant (29 July 2016) and the date on which the İstanbul 5th Magistrate Judge reviewed the applicant's challenge against her detention without a hearing (26 September 2016).

115. In one of its previous judgments, the Constitutional Court held that the judicial review of the challenge against detention without a hearing 1 month and 28 days later was not in breach of Article 19 § 8 of the Constitution (see *Mehmet Haberal*, § 128).

116. All decisions regarding detention, which are issued *ex officio* or upon request, may be challenged before another court. In such a system; in the present case, the judicial review of all challenges by holding a hearing will amount to repeated proceedings regarding detention before the appeal court. Therefore, the review of the applicant's challenge against her detention, which was carried out 1 month and 29 days after her detention had been ordered, without holding a hearing cannot be said to have been in breach of the principle of adversarial proceedings.

117. For these reasons, since it is clear that there was no violation regarding the applicant's allegation that the review of her challenge against detention had been made without a hearing, this part of the application must be declared inadmissible as being *manifestly ill-founded*.

118. Accordingly, as it is seen that the interference with the applicant's right to personal liberty and security through the review of her challenge against her detention on remand without a hearing was not in breach of

the safeguards provided in the Constitution (in particular, Article 19 § 8), no further examination is needed in accordance with the criteria specified in Article 15 of the Constitution.

B. Alleged Violations of the Freedoms of Expression and the Press

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

119. The applicant maintained that the evidence against her within the scope of the investigation and underlying her detention was comprised of only the articles written by her as a part of her professional activity; and that her detention on account of these articles was in breach of the freedoms of expression and the press.

120. Referring to the decisions already rendered by the Court, the Ministry indicated in its observations that the applicant's complaint that she had been detained due to her statements falling within the ambit of the freedom of expression fell essentially under the scope of the allegation that her detention lacked any strong suspicion of her guilt; that the applicant's detention had a legal basis; that the relevant law was clear and foreseeable; and that the said measure pursued a legitimate aim for the purposes of public order and security. The Ministry further noted that the applicant had not been detained on the sole ground of her journalistic activities and that she had been taken into custody and then detained for her acts constituting an offence. The Ministry also stressed that the measure taken was necessary in a democratic society, considering that the applicant had long been consciously contributing to the aims of the said terrorist organisation in directing the public opinion through the media and staging a coup.

121. The applicant, in her counter-statements, stated that the impugned acts underlying her detention were merely consisted of her expressions and articles, which did not indeed involve any violence, threat or insult.

2. The Court's Assessment

122. Article 26 of the Constitution, titled *"Freedom of expression and dissemination of thought"*, in so far as relevant, reads as follows:

"Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities…

The exercise of these freedoms may be restricted for the purposes of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.

(…)

The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law."

123. Article 28 of the Constitution, titled *"Freedom of the press"*, in so far as relevant, reads as follows:

"*The press is free, and shall not be censored…*

(…)

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

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

Anyone who writes any news or articles which threaten the internal or external security of the State or the indivisible integrity of the State with its territory and nation, which tend to incite offence, riot or insurrection, or which refer to classified state secrets or has them printed, and anyone who prints or transmits such news or articles to others for the purposes above, shall be held responsible under the

law relevant to these offences. Distribution may be prevented as a precautionary measure by the decision of a judge, or in case delay is deemed prejudicial, by the competent authority explicitly designated by law. The authority preventing the distribution shall notify a competent judge of its decision within twenty-four hours at the latest. The order preventing distribution shall become null and void unless upheld by a competent judge within forty-eight hours at the latest.

(…)".

a. Applicability

124. The charge resulting in the applicant's detention on remand was related to the incidents leading to the declaration of a state of emergency. Therefore, the effect of the applicant's detention on remand on her freedoms of expression and the press will be reviewed within the scope of Article 15 of the Constitution. During this review, whether the impugned interference was in breach of the guarantees set forth in the Constitution, especially in Articles 26 and 28 of the Constitution, will be determined, and in case of any violation, it will be assessed whether the criteria set forth in Article 15 of the Constitution rendered such a violation lawful (see *Aydın Yavuz and Others*, §§ 193-195, 242).

b. Admissibility

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

c. Merits

ii. Application of Principles to the Present Case

126. In examining the effects of detention measure upon the fundamental rights and freedoms such as the freedoms of expression and the press, the freedom of association as well as the rights to stand for election and engage in political activities, the Court firstly assesses whether the detention is lawful and/or whether it has exceeded a reasonable time. The Court then ascertains whether there has been

a violation of any other fundamental rights and freedoms by also taking into account its conclusion as to the lawfulness of detention and reasonableness of the detention period (see *Erdem Gül and Can Dündar*, §§ 92-100; *Hidayet Karaca,* §§ 111-117; *Mehmet Baransu*, §§ 157-164; *Günay Dağ and Others*, § 191-203; *Mehmet Haberal,* §§ 105-116; *Mustafa Ali Balbay*, §§ 120-134; *Kemal Aktaş and Selma Irmak*, no. 2014/85, 3 January 2014, §§ 61-75; *Faysal Sarıyıldız*, no. 2014/9, 3 January 2014, §§ 61-75; *İbrahim Ayhan,* no. 2013/9895, 2 January 2014, §§ 60-74; and *Gülser Yıldırım,* no. 2013/9894, 2 January 2014, §§ 60-74).

127. In the present case, as regards the alleged unlawfulness of the applicant's detention, it has been concluded that there was convincing evidence giving rise to suspicion that the applicant might have committed an offence; and that there were also grounds requiring her detention which was proportionate. Regard being had to the assessments made in this regard, there is no circumstance which would require the Court to reach a different conclusion in respect of the allegation that the applicant had been under investigation and subsequently detained on remand merely on account of her acts falling within the scope of the freedoms of expression and the press.

128. For these reasons, the Court has found no violation of the freedoms of expression and the press safeguarded by Articles 26 and 28 of the Constitution.

129. Accordingly, as it is seen that the interference with the applicant's freedoms of expression and the press due to her detention was not in breach of the safeguards provided in the Constitution (in particular, Articles 26 and 28), no further examination is needed in accordance with the criteria specified in Article 15 of the Constitution.

VI. JUDGMENT

For the reasons explained above, the Constitutional Court UNANIMOUSLY held on 3 May 2019 that

A. 1. The alleged violation of the right to personal liberty and security due to the unreasonable length of the applicant's detention be DECLARED INADMISSIBLE for *the non-exhaustion of legal remedies*;

2. The alleged violation of the right to personal liberty and security due to the magistrate judges' being in breach of the principles of an independent and impartial judge be DECLARED INADMISSIBLE for *being manifestly ill-founded*;

3. The alleged violation of the personal liberty and security due to the restriction on access to the investigation file be DECLARED INADMISSIBLE for *being manifestly ill-founded*;

4. The alleged violation of the personal liberty and security due to the judicial review of the challenge against detention without a hearing be DECLARED INADMISSIBLE for *being manifestly ill-founded*;

5. The alleged violation of the personal liberty and security due to the unlawfulness of detention be DECLARED ADMISSIBLE;

6. The alleged violations of the freedoms of expression and the press be DECLARED ADMISSIBLE;

B. The right to personal liberty and security safeguarded by Article 19 of the Constitution was NOT VIOLATED;

C. The freedoms of expression and the press safeguarded respectively by Articles 26 and 28 of the Constitution were NOT VIOLATED; and

D. The court expenses be COVERED by the applicant.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

İLKER DENİZ YÜCEL

(Application no. 2017/16589)

28 May 2019

On 28 May 2019, the Second Section of the Constitutional Court found violations of the right to personal liberty and security safeguarded by Article 19 of the Constitution as well as of the freedoms of expression and the press safeguarded respectively by Articles 26 and 28 thereof in the individual application lodged by *İlker Deniz Yücel* (no. 2017/16589).

THE FACTS

[7-48] The security directorate received an e-mail that a hacker group named Redhack had hacked a minister's e-mail account; and that the hacked e-mails had been forwarded to a new e-mail account created by the terrorist group. It was further maintained that a person in relation with this terrorist group opened up a chat room on Twitter where certain persons including the applicant were involved in the chat, the hacked e-mails were transferred and these persons discussed how to disclose the e-mails.

At the end of the inquiries conducted by the security directorate, the applicant was identified to be among those who were using the chat room. Thereafter, these persons were taken into police custody upon the public prosecutor's instruction.

The prosecutor's office indicted the applicant for contributing to the initiatives to legalize the terrorist organization, namely PKK/KCK, by interviewing with one of its heads Cemil Bayık, for not criticizing the acts performed by the terrorist organization in his articles as well as for giving an unfavourable impression as to the operations and acts carried out by the security forces.

The magistrate judge ordered his detention for disseminating terrorist propaganda and inciting the people to hatred and enmity. The applicant's appeal against his detention order was dismissed.

A decision of non-prosecution was issued in respect of the applicant. Nevertheless, a criminal case was opened against him. At the hearing conducted by the incumbent assize court, his release was ordered. His case is still pending at first instance.

V. EXAMINATION AND GROUNDS

49. The Constitutional Court, at its session of 28 May 2019, examined the application and decided as follows.

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

1. Alleged Unlawfulness of the Applicant's Custody

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

50. The applicant claimed that his right to personal liberty and security had been violated, stating that his custody had been unlawful and he had been placed in custody for a long period of time despite not being necessary; that he had not been immediately brought before a judge; and that there had been no available remedy whereby he could raise the complaint of excessive length of his custody.

51. The Ministry did not submit any observations under this heading.

b. The Court's Assessment

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

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

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

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

54. Pursuant to the said provisions, in order for an individual application to be lodged with the Court, ordinary legal remedies must first be exhausted. Respect for fundamental rights and freedoms is the constitutional duty of all organs of the State, and it is the duty of administrative and judicial authorities to redress the violations of rights

resulting from the neglect of this duty. For this reason, it is required that the alleged violations of fundamental rights and freedoms be first brought before, and evaluated and ultimately resolved by, the inferior courts. Accordingly, individual application to the Constitutional Court is a remedy of subsidiary nature which may be resorted to in case of inferior courts' failure to redress the alleged violations (see *Ayşe Zıraman and Cennet Yeşilyurt*, no. 2012/403, 26 March 2013, §§ 16 and 17).

55. Article 141 § 1 of Code of Criminal Procedure no. 5271, the provision where the claim for compensation is set out, provides that individuals -who have been arrested without or with an arrest warrant against the statutory provisions, or who have been detained or whose continued detention has been ordered against the statutory conditions; who have not been brought before a judge within the statutory period of custody; or who have not been tried obtained a judgment within a reasonable time even though being arrested in conformity with the statutes- may claim their pecuniary and non-pecuniary damages from the State. Given this provision, it has been observed that there is a legal remedy in this regard. Besides, Article 142 § 2 thereof, which sets the conditions for the claims for compensation, provides that a claim for compensation may be filed within three months after the notification of the final decisions or judgments to the related parties, or in any case within one year after the finalisation date of decisions or judgments (see *Zeki Orman*, no. 2014/8797, 11 January 2017, § 27).

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

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

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

59. It has been accordingly concluded that the remedy provided by Article 141 of the CCP no. 5271 is an effective remedy capable of offering redress for the applicant's complaints; and that the examination by the Court of the individual application lodged without exhaustion of this ordinary remedy does not comply with the *subsidiary nature* of the individual application system (see, in the same vein, *Neslihan Aksakal*, no. 2016/42456, 26 December 2017, §§ 30-37).

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

61. Regard being had to the conclusion reached, the Court has found no reason to make a separate examination as to the applicant's allegation that there had been no effective remedy whereby he could raise his complaint concerning the alleged excessive length of his custody period.

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

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

62. The applicant claimed that the acts imputed to him did not indeed constitute an offence; that his detention was ordered on the basis of his news reports and articles in the absence of any reasonable suspicion that he had committed an offence; that as regards his news reports and articles, the statutory time-limit of 4 years to bring an action, which was specified in the Press Law no. 5187 and dated 9 June 2004, had expired; that his articles had not been accurately translated and thereby gave rise to his detention; that there were no grounds to justify his detention; that no explanation was provided to show why the measures of conditional bail would remain insufficient; and that the issues raised by him as to the unlawfulness of detention in his petition whereby he challenged his detention had not been taken into consideration. He accordingly maintained that his right to personal liberty and security had been violated. He further claimed that there had been a violation of Article 18 of the European Convention on Human Rights ("the Convention") in conjunction with the right to personal liberty and security, asserting that his detention had been ordered for motives other than those specified in the Constitution.

63. The Ministry, in its observations, noted that the applicant's articles and posts referred to by the investigation authorities and the other evidence were of the nature which would satisfy an objective observer that the applicant had committed the imputed offences. Given the state of emergency declared after the coup attempt, the impugned process whereby the applicant was arrested and taken into custody cannot be said to be unfounded and arbitrary.

64. In his counter-statements against the Ministry's observations, the applicant stated that all charges against him were based on assumptions

of intents and thoughts; that his articles had been extracted from their contents in bad faith and inaccurately translated. He asserted that his detention had been unlawful for the reasons similar to those raised in the application form.

b. The Court's Assessment

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

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

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

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

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

i. Applicability

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

> *"In times of war, mobilization, martial law or a state of emergency, the exercise of fundamental rights and freedoms may be partially or*

entirely suspended, or measures which are contrary to the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated.

…

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

69. The Court has stated that in examining the individual applications against the measures taken under state of emergency, it would take into account the protection regime set out in Article 15 of the Constitution with respect to fundamental rights and freedoms. Accordingly, besides the existence and declaration of a state of emergency, in cases where the measure constituting an interference with the fundamental rights and freedoms –subject-matter of the individual application– is related to the state of emergency, the examination would be made in accordance with Article 15 of the Constitution (see *Aydın Yavuz and Others* [Plenary], no. 2016/22169, 20 June 2017, §§ 187-191).

70. One of the charges laid against the applicant by the investigation authorities and underlying his detention is his alleged dissemination of the propaganda of the Fetullahist Terrorist Organisation/Parallel State Structure ("the FETÖ/PDY"), the perpetrator of the coup attempt. It has been therefore considered that the said charge was related to the incidents giving rise to the declaration of the state of emergency.

71. In this respect, the lawfulness of the applicant's detention will be reviewed under Article 15 of the Constitution. Prior to such review, whether the applicant's detention on remand was in breach of the guarantees set forth in Articles 13, 19 and in other Articles of the Constitution will be determined, and if there is any violation, it will be

assessed whether the criteria set forth in Article 15 of the Constitution rendered such a violation lawful (see *Aydın Yavuz and Others*, §§ 193-195, 242; and *Selçuk Özdemir* [Plenary], no. 2016/49158, 26 July 2017, § 58).

ii. Admissibility

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

iii. Merits

(1) General Principles

73. The Court comprehensively sets forth the general principles that it will take into consideration in the examination of the lawfulness of a journalist's detention from the standpoint of the right to personal liberty and security safeguarded by Article 19 of the Constitution in its judgment of *Şahin Alpay* ([Plenary], no. 2016/16092, 11 January 2018, §§ 77-91). These principles are as follows:

> *"77. It is set forth in Article 19 § 1 of the Constitution that everyone has the right to personal liberty and security. In addition to this, the circumstances in which individuals may be deprived of liberty with due process of law are laid down in Article 19 §§ 2 and 3 of the Constitution. Accordingly, the right to personal liberty and security may be restricted only in cases where one of the situations laid down in this Article exists (see Murat Narman, no. 2012/1137, 2 July 2013, § 42).*
>
> *78. In addition, an interference with the right to personal liberty and security will lead to a violation of Article 19 of the Constitution in the event that it does not comply with the conditions prescribed in Article 13 of the Constitution where the criteria for restricting fundamental rights and freedoms are set forth. For this reason, it must be determined whether the restriction complies with the conditions set out in Article 13 of the Constitution, i.e., being prescribed by law, relying on one or more of the justified reasons provided in the relevant articles of the Constitution, and not being in breach of the principle of proportionality (see Halas Aslan, no. 2014/4994, 16 February 2017, §§ 53-54).*

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

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

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

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

83. In cases where serious allegations indicate, or circumstances of the present case reveal, that the acts imputed to suspect or accused fall within the ambit of fundamental rights and freedoms that are sine qua non for a democratic society such as the freedom of expression, the freedom of the press, the right to trade-union freedom and the right to engage in political activities, judicial authorities ordering detention must act with more diligence in determining the strong suspicion of guilt. The question as to whether due diligence has been shown is subject to the Court's review (see Gülser Yıldırım (2) [Plenary], no. 2016/40170, 16 November 2017, § 116, and for a violation judgment rendered at the end of such review, see Erdem Gül and Can Dündar [Plenary], no. 2015/18567, 25 February 2016, §§ 71-82; and for inadmissibility decisions, see Mustafa Ali Balbay, § 75; Hidayet Karaca [Plenary], no. 2015/144, 14 July 2015, § 93; İzzettin Alpergin [Plenary], no. 2013/385, 14 July 2015, § 46; and Mehmet Baransu (2), no. 2015/7231, 17 May 2016, §§ 124, 133 and 142).

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

85. Article 100 of Law no. 5271 regulates the grounds for detention and sets forth these grounds. Accordingly, detention may be ordered in cases where the suspect or accused escapes or hides or there are concrete facts which raises the suspicion of escape or where the behaviours of the suspect or accused tend to show the existence of a strong suspicion of tampering with evidence or attempting to put an unlawful pressure on witnesses, victims or other individuals. In the relevant Article, the offences regarding which the ground for arrest may be deemed to exist ipso facto are enlisted, provided that there exists a strong suspicion of having committed those offenses (see Ramazan Aras, no. 2012/239, 2 July 2013, § 46; and Halas Aslan, § 59). However, for an initial

detention, it may not be always possible, by the very nature of the case, to present concretely all grounds for detention set forth in the Constitution and the Law (see Selçuk Özdemir [Plenary], § 68).

86. It is also set out in Article 13 of the Constitution that the restrictions on fundamental rights and freedoms cannot be contrary to the "principle of proportionality". The expression of "requiring detention" set out in Article 19 § 3 of the Constitution points out the proportionality of detention (see Halas Aslan, § 72).

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

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

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

90. In every concrete case, it falls in the first place upon the judicial authorities deciding detention cases to determine whether the prerequisites for detention, i.e., the strong indication of guilt and other grounds exist, and whether the detention is a proportionate measure. As a matter of fact, those authorities which have direct access to the parties and evidence are in a better position than the Constitutional Court in making such determinations (see Gülser Yıldırım (2), § 123).

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

(2) Application of Principles to the Present Case

74. In the present case, it must be primarily ascertained whether the applicant's detention had a legal basis. The applicant's detention was ordered on 27 February 2016 by the İstanbul 9th Magistrate Judge, pursuant to Article 100 of Code no. 5271, for having disseminated the propaganda of the said terrorist organisation and incited people to hatred and hostility. Accordingly, the applicant's detention had a legal basis.

75. Before proceeding with the examination as to whether the applicant's detention, appearing to have a legal basis, pursued a legitimate aim and was proportionate, it must be determined whether there existed a strong indication of his guilt, which is a pre-requisite of detention.

76. In the detention order, it was indicated that the applicant had interviewed with Cemil Bayık; and that in the interview titled *"When his dream to become a President failed, he set to revenge ('Başkanlık hayali suya*

düşünce intikama sarıldı')", the terrorist organisation, namely the PKK, was presented as a legal organisation and the expressions of the organisation leader, Cemil Bayık, about the President were cited. Primarily, reporting news through interviews is one of the most important means that would ensure the press to fulfil its duty to protect public interest. Punishing or charging a journalist for assisting in the dissemination of statements made by another person would seriously hamper the contribution of the press to discussions of matters of public interest.

77. Besides, it appears that the title of the impugned interview is not *"When his dream to become a President failed, he set to revenge"*, as asserted by the investigation authorities, but rather *"Yes, there were executions within the organisation ('Evet örgüt içi infazlar oldu')"*. During the impugned interview, the applicant reminded the interviewee, who explained that the killing of two police officers in Ceylanpınar had not been performed by the organisation, that the organisation had not condemned the murder; that there was a State TV channel broadcasting in Kurdish; and that people were speaking Kurdish in the public offices in the region. The applicant then asked him whether the organisation undertook responsibility for the loss of life of teachers and village guards killed along with their families, as well as of 35.000 persons and the accuracy of the claim whether the number of organisation members who were executed within the organisation itself was higher than that of those died during clashes and as a result of torture. Moreover, it was not proven that the applicant acted in a way that endorsed the interviewee's expressions and put leading questions to the interviewee so as to enable him to disseminate propaganda of the said terrorist organisation. In consideration of the interview as a whole, it appears that there were also questions as to whether the organisation may intend to cease fire and how the clashes would end. It has been accordingly observed that the inferior courts failed to demonstrate the claims that the interview had been made by the applicant not as a journalistic activity but rather for the purpose of disseminating terrorist propaganda.

78. In the detention order, it was asserted in the second place that through his articles of 26 October 2016, the applicant publicly incited

both the Turks and Kurds, who were sister communities, to hatred and hostility by referring to an anecdote. It should be primarily underlined that the article containing the impugned anecdote was intended for directing criticisms towards the foreign policy of Turkey. In his article, the applicant notably criticised Turkey's policy of Syria and Mosul and recommended Turkey to end its problems with the Syrian Kurds and to take enhanced measures against the DAESH. He criticised Turkey's preference not to do so. He explained the anecdote allegedly explained among Kurds as a metaphor to illustrate Turkey's stance on its foreign policy. In consideration of the impugned article as a whole, it appears to be in the nature of a political criticism. In this sense, it should be borne in mind that political expressions enjoy the widest possible protection afforded with respect to the freedom of expression. It could not be proven that the impugned anecdote went beyond a metaphor but was explained for the purpose of encouraging and inciting people to adopt terrorist methods, as well as to violence, hatred, revenge and armed resistance. The article in question was published in Germany in a German newspaper with publications in German, which undoubtedly lessens, to a great extent, the effect of the impugned article on the public order.

79. It was asserted in the third place in the detention order, in the applicant's another article of 17 February 2017, accompanied by a portrait of the President Mr. Recep Tayyip Erdoğan together with the caption "coup-plotter", it was further stated *"President Recep Tayyip Erdoğan is founding his own state, ignoring everyone; the state wrestling with protests is on the brink of disintegration ('Cumhurbaşkanı Recep Tayyip Erdoğan hiç kimseye aldırış etmeden kendi devletini kuruyor, protestolarla boğuşan ülke parçalanmaya gidiyor.')"*. The content of his article, other than the impugned caption, was not discussed in the detention order. As regards this allegation, the applicant maintained that it was not him but the editorial office that had formulated the caption. The relevant authorities could not put forth any fact that would prove otherwise. Besides, it is explicit that the sentence under the caption, which reads *"President Recep Tayyip Erdoğan is founding his own state, ignoring everyone; the state wrestling with protests is on the brink of disintegration"*, was in form of a political criticism and therefore under the protection of the freedom of expression.

80. It was indicated therein in the fourth place that the applicant's article dated 21 July 2016 (the date of article was 17 February 2017 in the detention order) was titled *"Value of an assurance given by a twister ('Bir Üç Kağıtçının Verdiği Teminatın Değeri')"* in which the applicant stated that it was not certain whether, or the extent, the FETÖ's leader had played a role in the coup attempt of 15 July. On the basis of another article of 18 July 2016, the applicant was alleged to have disseminated the propaganda of the said terrorist organisation. These articles were written a few days after the coup attempt. Regard being had to this conclusion reached a few days after the coup attempt when the investigations were pending, as well as to the news of similar contents, which were published within the country and abroad, the Court has not found it possible to consider these articles as a strong indication of criminal guilt on the applicant's part. As regards the title *"Value of an assurance given by a twister"*, the applicant noted that he had pointed to the equal probability between the President's assurance that citizens' freedoms would not be restricted during the state of emergency and the assurance of getting a substantial amount of money in the three-card trick (*'bul karayı al parayı'*). It appears that the metaphor *"assurance given by a twister"* was used by the applicant not to insult the President personally but to indicate that his assurance did not seem so convincing. As a matter of fact, the applicant was not accused of having insulted the President.

81. It was noted in the fifth place that in the applicant's article of 19 June 2016, Öcalan, leader of PKK (the Workers' Party of Kurdistan) was called as Abdullah Öcalan, the PKK's commander-in-chief. The applicant denied using the impugned expression, commander-in-chief, and maintained that it was an inaccurate translation. It appears from the translation text of the impugned article, which was submitted by the applicant, the expression is not indeed *"PKK's commander-in-chief"* but *"PKK's leader"*.

82. In the detention order, it was stated in the sixth place that in his article of 27 October 2016, titled *"Erdoğan uses the coup as a counter-coup ('Erdoğan Darbeyi Karşı Darbe Olarak Kullanıyor')*, the applicant allegedly noted that the President wished to dominate his dictatorial regime through referendum; that in this regime, the parliament and political

parties did not have any decision-making role within the framework of reconciliation; and that the single aim desired to be attained by the President was the same as the reign. It is clear that the cited part of the impugned article was in the form of a criticism similar to those directed by a certain section of the society and leaders of the opposition parties, which was thereby under the protection afforded by the freedom of expression.

83. Unlike the detention order, it was stated in the indictment that in his article of 19 June 2016, as regards the organisational activities whereby a graveyard was founded for the burial of terrorists who had died during the operations along with the organisational symbols -which was indeed an organisational martyrs' cemetery- the applicant implied that the administrative and military measures taken by the Turkish State destroyed the cemeteries, thereby intending to demonstrate the operations conducted against the organisation as unlawful. In the relevant part of his article which was cited in the indictment, the applicant stated that there were insults during the operations; and that the places with utmost hatred was the cemeteries. He accordingly maintained that during the solution process lasting for 2 years, the dead bodies of deceased PKK members buried in the mountains were transferred to the cemeteries, whereas during the security operations conducted into the ditch events, their gravestones were broken and graveyards were destroyed. He accordingly asserted that tire tracks of armoured vehicle driven over the graveyards could be still traced. The applicant tried to explain the events from his own perspective. An expression involving a subjective understanding and failing to reflect the apparent truth does not *per se* amount to an incitement. In consideration of the impugned article as a whole, the Court has observed that it did not encourage and incite people to violence, hatred, revenge or an armed resistance.

84. It was also maintained that in his article of 12 December 2016, the applicant alleged that H.A., a 19-year-old girl, had been burnt to death probably by the security officers in the basement of a building in Cizre, whereby he disseminated the terrorist propaganda and incited people to hatred and hostility. The applicant, however, stated that his article had been inaccurately translated; that this person had been allegedly burnt to

die; and that he merely mentioned this allegation in his impugned article and did not make any comment and express any conviction on the issue. In his article in question, the applicant told the stories of persons who had lost their lives at the age 19, based on the story of S.A., who had lost his life in a bomb attack in Beşiktaş. The reference to H.A. in the article was also made as she had lost his life at the age of 19. In consideration of the article as a whole, the Court has concluded that such a reference cannot be *per se* qualified as the praise of terrorist organisation, support for terrorism or incitement to violence.

85. In addition to those cited in the detention order, the applicant's article of 27 October 2016 was also relied on in the indictment. It was maintained that in the impugned article, the applicant used the expressions *"Genocide of Armenians"* as regards the social events taking place in the era of the Ottoman Empire between Armenian and Muslim citizens. In his article of 24 July 2016, he allegedly used *"ethnic cleansing"* as regards the operations conducted against the PKK/KCK armed illegal organisation. The applicant's expression *"Genocide of Armenians"* relates to a matter of serious debate not only in Turkey but also at the international level. The mere use of such expression must not be subject-matter of any accusation. It is further evident that the term, ethnic cleansing, did not *per se* incite violence, armed resistance or insurrection and amount to praise of terrorism.

86. In the indictment, it was further stated that there were HTS and communication records of 2014-2017 as to the communication between the applicant and 59 different persons with criminal records at the law-enforcement unit for their membership of, or relation with, the PKK/KCK armed terrorist organisation. It was thereby maintained that the suspect (applicant) was proven to have a relation with the FETÖ/PDY and PKK/KCK armed terrorist organisations. Journalists may possibly contact with various sources in order to report news. Being in contact with members of a terrorist organisation/those allegedly being a member thereof may be the subject-matter of a charge if pursing any aim other than journalistic purposes. In such case, there must be concrete facts to demonstrate that such a contact has been established for any purpose other than journalism. However, in the present case, the investigation authorities failed to do so.

87. Accordingly, the Court has concluded that in the present case, the applicant's right to personal liberty and security had been violated as there was no sufficiently *strong indication of criminal guilt* on his part.

88. Regard being had to this conclusion, the Court has not found it necessary to make a separate examination as to the applicant's other allegations that there were no reasons to justify the applicant's detention, that his detention was not proportionate, that his detention was ordered for any reason other than those specified in the Constitution and that his detention was unlawful.

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

iv. Article 15 of the Constitution

90. In its several judgments rendered so far, the Court has held that Article 15 of the Constitution regulating the suspension and restriction of the exercise of the fundamental rights and freedoms *in times of emergency* does not justify the detentions ordered in the absence of any indication of criminal guilt; and that detentions ordered in the absence of any indication of criminal guilt cannot be considered as a measure strictly proportionate to the exigency of the situation (see *Şahin Alpay*, §§ 105-110; *Mehmet Hasan Altan (2)* [Plenary], no. 2016/23672, 11 January 2018, §§ 152-157; *Turhan Günay* [Plenary], no. 2016/50972, 11 January 2018, §§ 83-89; and *Mustafa Baldır*, no. 2016/29354, 4 April 2018, §§ 83-88).

91. In the present case, there is no reason requiring the Court to depart from the conclusion reached in these judgments. Therefore, the Court has found a violation of the right to personal liberty and security under Article 19 § 3 of the Constitution, taken together in conjunction with Article 15 thereof.

Mr. Muammer TOPAL and Mr. Recai AKYEL did not agree with this conclusion.

3. Alleged Lack of Independence and Impartiality of Magistrate Judges

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

92. The applicant maintained that the magistrate judges ordering his detention lacked independency and impartiality.

93. In its observations, the Ministry did not provide any explanation as to the applicant's allegations under this heading.

b. The Court's Assessment

94. The applicant was detained on remand, *inter alia*, for having disseminated the propaganda of the FETÖ/PDY, considered to be the perpetrator of the coup attempt of 15 July, the main reason underlying the declaration of the state of emergency in Turkey, as well as to be an armed terrorist organisation. Therefore, the applicant's allegations that the judicial tribunal ordering his detention run counter to the natural judge principle and was not independent and impartial would be examined within the scope of Article 15 of the Constitution. During such examination, it would be primarily ascertained whether the tribunal ordering the applicant's detention fell foul of the safeguards inherent in various provisions of the Constitution, notably in Article 19 thereof.

ii. Admissibility

95. In several judgments, the Court has dealt with the allegations that the magistrate judges undermined the natural judge principle and lacked independence and impartiality; and that the conduct of judicial reviews of the challenges against detention by these judicial tribunals precluded the opportunity to raise an effective challenge against the deprival of liberty. It has accordingly concluded in consideration of the structural characteristics of magistrates judges that these allegations are manifestly ill-founded (see *Hikmet Kopar and Others*, §§ 101-115; and *Mehmet Baransu (2)*, no. 2015/7231, 17 May 2016, §§ 64-78 and 94-97).

96. In the present case, as regards the allegations of the same nature, there is no ground to require a departure from the conclusion reached by the Court in these judgments.

97. For the reasons explained above, this part of the application must be declared inadmissible *for being manifestly ill-founded* without any further examination as to the other admissibility criteria.

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

4. Alleged Restriction of Access to the Investigation File

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

99. The applicant claimed that he could not have access to the evidence underlying the charges against him and effectively challenge his detention due to the restriction imposed on the investigation file.

100. In its observations, the Ministry did not provide any explanation on the applicant's allegations under this heading.

b. The Court's Assessment

i. Applicability

101. The charges against the applicant, which were included in the investigation file where the restriction order complained of by the applicant had been issued, were related to the events leading to the declaration of a state of emergency in Turkey. Therefore, whether the impugned restriction had been lawful, in other words, its effects on the applicant's right to personal liberty and security will be reviewed within the scope of Article 15 of the Constitution. During this review, whether the impugned restriction was in breach of the guarantees set forth in Article 19 of the Constitution will be determined, and if there is any violation, it will be assessed whether the criteria set forth in Article 15 of the Constitution rendered such a violation lawful (see *Aydın Yavuz and Others*, §§ 193-195, 242).

ii. Admissibility

(1) General Principles

102. The general principles set by the Court on this matter are outlined in its judgment in the case of *Turhan Günay* [Plenary], no. 2016/50972, 11 January 2018, §§ 58-72.

(2) Application of Principles to the Present Case

103. Regard being had to the statements and interrogation reports, decisions on detention, the petitions submitted by the applicant or his defence counsels as regards his detention, as well as the information and documents in the investigation file, it has been observed that the applicant was aware of the information and documents underlying his detention, had sufficient knowledge of the contents thereof and was provided with sufficient opportunity to challenge his detention.

104. For the reasons explained above, this part of the application must be declared inadmissible *for being manifestly ill-founded* without any further examination as to the other admissibility criteria.

105. Accordingly, as it is seen that the interference with the applicant's right to personal liberty and security by the restriction order within the investigation file was not in breach of the safeguards provided in the Constitution, in particular, Article 19 § 8-, no further examination is required in accordance with the criteria specified in Article 15 of the Constitution.

5. Alleged Review of Detention without a Hearing

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

106. The applicant claimed that the judicial review of his detention and the challenges against his detention had been conducted without a hearing.

107. In its observations, the Ministry did not provide any explanation on the applicant's allegations under this heading.

b. The Court's Assessment

i. Applicability

108. The charges underlying the applicant's detention were related to the events giving rise to the declaration of the state of emergency. During the period when the applicant was detained on remand, the state of emergency was still in force. In this respect, the effect of the judicial review of the applicant's challenges against detention without a hearing on the right to personal liberty and security will be reviewed under Article 15 of the Constitution. During this review, it will be ascertained whether the impugned restriction was in breach of the guarantees set forth in Article 19 of the Constitution.

ii. Admissibility

109. Although the applicant maintained that the judicial reviews of his detention and the challenges against it had been conducted without a hearing, he indeed exhausted the available remedy to challenge -whereby he could effectively challenge the initial detention order- upon his initial detention order. He then lodged an individual application. Therefore, the Court would confine its examination to the decision of 13 March 2017 whereby the applicant's challenge against detention was dismissed.

110. Pursuant to Article 19 § 8 of the Constitution, persons whose liberties are restricted are entitled to apply to the competent judicial authority for speedy conclusion of proceedings regarding their situation and for their immediate release, if the restriction imposed upon them is not lawful (see *Mehmet Haberal*, no. 2012/849, 4 December 2013, § 122).

111. As it is requisite to have recourse to the competent judicial authority for release, the exercise of this right is contingent upon a request. Accordingly, the right to apply to the competent judicial authority is a guarantee for those deprived of their liberty due to a criminal charge, which must be afforded not only in terms of the request for release but also for the judicial reviews of challenges against detention, continued detention as well as against the decisions dismissing the request for release (see *Aydın Yavuz and Others*, § 328).

112. However, during an *ex officio* review of detention of the suspect or the accused without a request under Article 108 of Code no. 5271, no assessment shall be made within the scope of the suspect's/detainee's right to apply to the competent judicial authority. Therefore, such reviews do not fall into the scope of Article 19 § 8 of the Constitution (see *Firas Aslan and Hebat Aslan*, no. 2012/1158, 21 November 2013, § 32; and *Faik Özgür Erol and Others*, no. 2013/6160, 2 December 2015 § 24).

113. As it is set forth in Article 19 § 8 of the Constitution that the requests for release must be lodged with a judicial authority, it is, by its very nature, a judicial review. In this judicial review, the safeguards inherent in the right to a fair trial, which are applicable to the nature and conditions of detention must be afforded. In this respect, the principles of *equality of arms* and *adversarial proceedings* must be observed in reviewing the challenges against continued detention or the request to be released (see *Hikmet Yayğın*, no. 2013/1279, 30 December 2014, §§ 29 and 30).

114. The principle of equality of arms means that parties of the case must be subject to the same conditions in terms of procedural rights and requires that each party be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent. The principle of adversarial proceedings entails that the parties must be given the opportunity to have knowledge of, and to comment on, the case file, thereby ensuring the parties to actively participate in the proceedings (see *Bülent Karataş*, no. 2013/6428, 26 June 2014, §§ 70 and 71).

115. One of the fundamental safeguards deriving from Article 19 § 8 is the right to request for an effective review of detention before a judge. Indeed, this is the primary legal means for a person deprived of his liberty to effectively challenge his detention, to effectively submit his allegations as to the contents and classification of the evidence underlying his detention as well as his arguments against the opinions and assessments, favourable or unfavourable to him, in person before a judge or a court. Therefore, a detained person should be able to exercise this right by being heard before a judge at certain reasonable intervals (see *Firas Aslan and Hebat Aslan*, § 66; *Süleyman Bağrıyanık and others*, § 267; and *Aydın Yavuz and Others*, § 333).

116. As a reflection of this safeguard, Article 105 of Code no. 5271 sets out that while deciding on the suspect's or the accused's request for release at a hearing during the investigation or prosecution phases, the suspect, the accused or the defence counsel along with the public prosecutor shall be heard. Article 108 thereof also envisages that in deciding on the continued detention of the suspect at the investigation phase, the suspect or his defence counsel is to be heard. Moreover, decisions on detention that is rendered either *ex officio* or upon request within the scope of Article 101 § 5 or Article 267 of the Code no. 5271 may be challenged before a court (see *Süleyman Bağrıyanık and Others*, § 269). As regards the review of detention orders, Article 271 sets forth that the challenge shall be in principle concluded without a hearing; however, if deemed necessary, the public prosecutor and subsequently the defence counsel may be heard. Accordingly, in cases where judicial reviews of detention or challenge to detention are conducted through a hearing, the suspect, the accused or the defence counsel are to be heard (see *Aydın Yavuz and Others*, § 334).

117. However, holding a hearing for reviewing challenges to detention orders or assessing every request for release may lead to congestion of the criminal justice system. Therefore, the safeguards enshrined in the Constitution as to the review procedure do not necessitate a hearing for review of every single challenge to detention unless the special circumstances require otherwise (see *Firas Aslan and Hebat Aslan*, § 73).

118. In the present case, the applicant's detention was ordered by the İstanbul Magistrate Judge on 27 February 2017 in the presence of both the applicant and his defence counsel. The challenge to this detention order was dismissed by the İstanbul Magistrate Judge on 13 March 2017. As a result of the review conducted over the case-file, the applicant's continued detention was ordered on 22 March 2017. In that case, it cannot be considered strictly necessary to conduct the reviews of 13 March 2017 -14 days after the decision by the İstanbul Magistrate Judge (the date when the applicant's initial detention was ordered)- and 22 March 2017 -23 days thereafter- with a hearing.

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

120. Accordingly, as it is seen that the interference with the applicant's right to personal liberty and security due to the conduct of judicial review of challenge to the applicant's detention without a hearing was not in breach of the safeguards provided in the Constitution, in particular, Article 19 § 8, no further examination is required in accordance with the criteria specified in Article 15 of the Constitution.

B. Alleged Violation of the Prohibition of Ill-treatment

1. As regards the Custody Period

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

121. The applicant maintained that he had been placed, along with three other inmates, in a 3 or 4 square-meters cell fitted with two beds where there was no natural light but a fluorescent lamp constantly switched on; that he had found no opportunity to do physical exercise during his custody period; that he had been always provided with sandwich and canned goods, which were always the same and insufficient in the morning, at lunch and in the evening; and that his sleeping place lacked hygiene.

122. In its observations, the Ministry did not provide any explanation as to the applicant's allegations under this heading.

b. The Court's Assessment

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

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

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

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

125. Respect for fundamental rights and freedoms is a principle required to be complied with by all organs of the State, and in case of any incompliance with this principle, the alleged violation must be primarily brought before the competent administrative authorities and inferior courts. As required by the subsidiarity nature of the individual application mechanism, the ordinary legal remedies must be exhausted in order to lodge an application with the Constitutional Court. Pursuant to this principle, The applicant is to raise, primarily and in due course of time, his complaints –subject-matter of the individual application– before the competent administrative and judicial authorities, to present, in a timely manner, all relevant information and evidence at his hand to the authorities, as well as to pay due regard to pursue his case and application during this process. Only when it is not possible to redress the alleged violations through this ordinary review mechanism, an individual application may be lodged (see *İsmail Buğra İşlek*, no. 2013/1177, 26 March 2013, § 17; and *Bayram Gök*, no. 2012/946, 26 March 2013, § 18).

126. For the requirement of the exhaustion of domestic remedies, the legal system must primarily afford an administrative or judicial remedy to which an individual alleging that any of his rights has been violated may have recourse. Besides, this legal remedy must be effective and capable of providing redress in respect of the complaints, be reasonably accessible to the applicant, as well as must be available not only in theory but also in practice (see *Fatma Yıldırım*, no. 2014/6577, 16 February 2017, § 39). However, any doubt to the effect that any remedy which is capable of offering a reasonable prospect of success in theory would not accomplish in practice does not justify the failure to exhaust that remedy (see *Sait Orçan*, no. 2016/29085, 19 July 2017, § 36). Furthermore, the failure to actually resort to or use any legal remedy, which has been introduced through a legal arrangement and which arouses no hesitation as to its existence given the objective meaning of the law, will not suffice to reach a conclusion that this remedy is not effective or does not exist.

127. The question as to whether the applicant can be considered to have done everything which could be reasonably expected of him must be examined in the light of the particular circumstances of each case (see

S.S.A., no. 2013/2355, 7 November 2013, §§ 27 and 28). However, in cases where it appears that the exhaustion of available remedies would not serve the purpose or is not effective under the particular circumstances of a given case, an application lodged without these remedies being exhausted may be examined (see *Şehap Korkmaz*, no. 2013/8975, 23 July 2014, § 33).

128. Given the absolute nature of the prohibition of treatment incompatible with human dignity, which is safeguarded by Article 17 of the Constitution, a legal remedy may be said to be effective only when it is capable of preventing the alleged violation -and in certain circumstances must be punitive as well- and, if necessary, of providing reasonable redress for any violation that has already occurred as a complementary element. Otherwise, merely providing a redress for such kind of violations would (partially/implicitly) justify what these persons subjected to such treatments have experienced, as well as diminish, to an unacceptable degree, the State's liability to ensure that the detention conditions correspond to the standards enshrined by the Constitution. Therefore, as in the present case where what is complained of is *detention under conditions incompatible with human dignity*, a remedy which is capable of ensuring improvement/enhancement of detention conditions as well as offering redress for damage resulting therefrom may be said to be effective. Besides, in addition to a compensatory legal remedy, the State must also establish an effective mechanism which would promptly halt such treatment (see *K.A.* [Plenary], no. 2014/13044, 11 November 2015, §§ 72 and 73).

129. However, in cases where the person concerned is no longer held in the place giving rise to the alleged violation, his placement had been already discontinued. Therefore, the violation resulting from such placement can be said to no longer exist. The detention in custody is discontinued when the person's detention is ordered or when he is released at the end of the custody period. His placement in detention upon the expiry of the custody period does not demonstrate that the placement giving rise to the alleged violation is still pending. That is why after the person is detained on remand, he is transferred to a penitentiary institution, and his conditions of detention thereby change.

Besides, in case of placement in a penitentiary institution, the person concerned becomes entitled to apply to magistrate judges with respect to his detention conditions. In this sense, it is unreasonable -for those whose custody period has expired- to resort to legal remedies capable of preventing the violation or ensuring proactive improvement of placement conditions, in which case it is reasonable and sufficient to provide mechanisms capable of redressing the damage sustained. It may be accordingly concluded that with respect to the complaints raised by those whose custody period has expired about the detention conditions they are subjected to until they leave the custody room, the effective legal remedy is the compensatory remedy (see *B.T.* [Plenary], 2014/15769, 30 November 2017, § 49).

130. In the present case, the applicant was taken into custody on 14 February 2017 and placed in a custody room. On 27 February 2017, he was detained on remand and transferred to the Bakırköy Metris T-type Closed Penitentiary Institution no. 1. He did not maintain that he had been subjected to ill-treatment by the public officers –due to personal fault/aim, motive, or intentionally– during his custody but complained of the conditions of his detention in custody. Therefore, unlike the previous judgments rendered by the Court (*Alparslan Altan* [Plenary], no. 2016/15586, 11 January 2018, §§ 183-185), the legal remedy required to be exhausted -as regards the complaints merely resulting from detention conditions- is not to file an application with the judicial authorities to trigger the initiation of a judicial and/or administrative investigation into the intent and/or omission of public officers. Therefore, it must be examined whether a mechanism capable of offering redress for the pecuniary and non-pecuniary damage sustained by the applicant due to the conditions of his detention in custody –the period prior to the decision ordering his detention– is available in the Turkish law before the individual application process.

131. Pursuant to Article 125 of the Constitution and Article 2 of Law no. 2577 on Administrative Jurisdiction Procedure, absence of a decision indicating an award of compensation must not be *per se* decisive in concluding that there is no effective remedy whereby the damage sustained on account of unfavourable detention conditions could be

redressed. As a matter of fact, it may be erroneous to consider that there is no effective compensatory remedy without discussing whether such a remedy exists in theory but by merely relying on the absence of any court decision demonstrating that no such action has been so far brought and no compensation has been awarded. In this respect, in order to conclude that there is no available remedy, the domestic legal system must be primarily examined so that it would be ascertained whether a compensatory remedy to which a person whose custody period has expired may resort is available in theory. In addition, the failure to operate a remedy -which appears to exist in theory- in practice merely due to lack of information must not be construed to the effect that it is ineffective. In this case, what is indeed important is the existence of a decision indicating that no compensation could be awarded rather than a decision indicating an award of compensation. The conclusion that a remedy which is in theory capable of offering redress is nevertheless ineffective in practice may be reached only when the courts reject the claim, considering that the remedy is incapable of offering redress for the damage sustained due to the detention conditions (see, *mutatis mutandis*, *B.T.*, § 52).

132. The placement in custody is based on a decision of judicial nature. However, the custody rooms where those under custody are placed are run, inspected and operated by the relevant administration as a public service. Therefore, it is incumbent on the administration to ensure compliance of the conditions of custody rooms with the standards specified in the national and international law.

133. Article 2 of Law no. 2577 provides for that those whose individual rights have been infringed directly on account of an administrative act or action are entitled to bring an action for compensation before administrative tribunals. Accordingly, an administrative action for compensation may be brought in case of any damage resulting from the administration's acts and actions. As the said provision does not make any distinction as to the kinds of administrative acts or actions, it is possible to seek compensation, through such an action for compensation, for damage resulting from any kind of acts or actions in the form of an administrative function. It accordingly appears that Article 2 of Law no.

2577 forms a sufficient legal ground for litigating, before administrative tribunals, any kind of damage resulting from an administrative act. It has been therefore concluded that it is possible to bring an action for compensation, before administrative tribunals pursuant to Article 2 of Law no. 2577, due to the damages resulting from the alleged unlawfulness of the detention conditions at custody rooms (see, *mutatis mutandis*, *B.T.*, § 54).

134. In this regard, there is no doubt that the administrative court is, through an action for compensation to be brought in administrative jurisdiction, entitled to examine whether the detention conditions are compatible with the relevant national and international law as well as to award compensation if detention conditions are found to be unlawful, provided that this has caused damage and there is a casual link between the damage and such conditions (see *B.T.*, § 55).

135. In addition, the authorities exercising administrative jurisdiction are in a better position than the Constitutional Court to make an assessment as to physical conditions of custody rooms. In assessing the compatibility of physical conditions of custody rooms with national and international standards, the Constitutional Court makes an assessment over the case file whereas the inferior courts have several opportunities such as conducting an on-site examination, obtaining an expert report and etc.. It is therefore undisputed that making an assessment as to the physical conditions of custody rooms primarily by authorities exercising administrative jurisdiction is not only an approach compatible with the subsidiarity principle but also would be advantageous to the applicant (see, *mutatis mutandis*, *B.T.*, § 56).

136. In the light of Article 2 of Law no. 2577, it has been concluded that it would be incompatible with the "subsidiarity nature" of the individual application mechanism to examine this application lodged without the exhaustion of the remedy of *action for compensation*, which appears to be accessible as well as capable of having a prospect of success and offering sufficient redress for pecuniary and non-pecuniary damage arising from the incompatible conditions of detention.

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

138. However, the Court has found it necessary to clarify an issue as to the duration of administrative actions likely to be brought, following this judgment, in terms of the incidents like in the present application as well as those which are of the same nature with the present one and pending before the Court. It must be primarily stressed that it is within the discretion of the administrative tribunals to assess the conditions as to the duration of the proceedings and to determine whether the administrative actions have been brought in due time. However, in respect of persons who have had recourse to administrative jurisdiction following *the inadmissibility decisions rendered due to non-exhaustion of available* remedies, as in the present case and pending before the Court, terms of litigation must be considered in a way that would not lead to a violation of their right of access to court.

(2) As Regards the Detention Process

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

139. The applicant maintained that the prohibition of ill-treatment had been infringed, stating that he had been placed in solitary confinement in the penitentiary institution by the date his detention had been ordered; that his use of the sports hall in the penitentiary had been contingent upon the permission of the public prosecutor; that he had not been allowed to receive books outside and to send/receive letters; and that he had been thereby held in isolation.

140. In its observations, the Ministry did not provide any explanation as to the applicant's allegations under this heading.

b. The Court's Assessment

141. As required by the subsidiary nature of the individual application mechanism, for an individual application to be lodged with the Constitutional Court, the ordinary legal remedies must be primarily exhausted. The applicant is to raise, primarily and in due course of time,

his complaints –subject-matter of the individual application– before the competent administrative and judicial authorities, to submit the relevant information and evidence to these authorities, as well as to pay due regard to pursue his case and application during this process (see *İsmail Buğra İşlek*, no. 2013/1177, 26 March 2013, § 17).

142. In the present case, pursuant to Articles 4 and 5 of Law no. 4675, there were administrative and judicial authorities before which the applicant could raise his complaints and request that the alleged ill-treatment that he had been subjected to be immediately ceased. Although the applicant was able to apply to these competent administrative and judicial authorities before which he could allege that he had been subjected to ill-treatment due to the place and conditions of his detention as well as to request the improvement of his detention conditions within the shortest time and/or the stay or suspension of the execution of the action allegedly amounting to ill-treatment, he only submitted a petition in this respect to the Bakırköy Chief Public Prosecutor's Office. Accordingly, he failed to have recourse to these remedies.

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

C. Alleged Violations of the Right to Respect for Private Life and the Inviolability of Domicile due to the Unlawfulness of the Search Warrant

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

144. The applicant maintained that the right to respect for private life and the inviolability of domicile had been violated due to the conduct of a search at his home without giving notice to his lawyers.

145. In its observations, the Ministry did not provide any explanation as to the applicant's allegations under this heading.

2. The Court's Assessment

146. In its judgment in the case of *Hülya Kar* ([Plenary], no. 2015/20360, 27 February 2019), the Court has set the limits of the review to be

conducted through individual application mechanism with respect to the alleged violations of the respective rights due to the preventive measures. It has been acknowledged that the authorities applying the preventive measures are in a better position to assess and decide on the necessity of the application of such measure and thus have a wide margin of appreciation in this sense. Accordingly, a further assessment needs to be made on the merits if it is apparent at first sight that the preventive measure has led to consequences -which were more severe than the inevitable one- or was applied arbitrarily (for the relevant principles, see *Hülya Kar*, §§ 21-46).

147. In the present case, within the scope of the investigation conducted against the applicant, a search was carried out at the applicant's vehicle, home and workplace. He claimed that his right to respect for private and family life had been violated due to this practice. It has been however observed that the impugned practice was performed, within the scope of an investigation, in order to reveal the material truth.

148. As regards the complaints concerning any preventive measure, the Court takes into consideration the conditions prevailing at the time when the relevant order was issued. In the present case, the impugned preventive measure was applied to ensure the establishment of the material truth and in case of a criminal suspicion. This measure was based on a foreseeable and precise statutory arrangement, and the applicant was provided with the opportunity to effectively raise his challenges before the incumbent authorities. Besides, the impugned measure was not applied in a continuous manner.

149. Given the type and duration of the impugned preventive measure, way of its application and its effects on the given person's life as a whole, the Court has considered that the damage sustained by the applicant was not more severe than that which was inevitable or that the preventive measure was not applied arbitrarily. Nor did the applicant provide, in the application form, any explanation to prove the otherwise.

150. For these reasons, the Court has declared this part of the application inadmissible for *being manifestly ill-founded* as there was

no violation of the applicant's right to respect for private life and inviolability of domicile.

D. Alleged Violations of the Freedoms of Expression and the Press

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

151. The applicant claimed that the evidence against him within the scope of the investigation and underlying his detention on remand consisted of only his articles and news falling into the scope of his journalistic activities, and that his detention on remand due to these articles and news was in breach of the freedoms of expression and the press.

152. The Ministry, in its observations, asserted that as regards the alleged violations of the freedoms of expression and the press, the impugned cases against the applicant were still pending; and that therefore, these complaints were to be declared inadmissible for non-exhaustion of available remedies. In its observations on the merits, the Ministry indicated that the interference with the applicant's freedom of expression had a legal basis and pursued a legitimate aim as well as was proportionate and necessary in a democratic society. As regards the requirement of being necessary in a democratic society, the Ministry noted that the applicant's acts did not fall within the ambit of journalistic activities; that members of every profession might perform acts and actions in favour of a terrorist organisation as it had a complex structure; that despite being proven to have acted in favour of an organisation, certain persons were granted impunity due to their identities, which would hamper the fight against crime; and that the investigation conducted against the applicant must be considered within this framework.

153. In his counter-statements against the Ministry's observations, the applicant stated that the issues leading to the restriction of his freedom were indeed related to the exercise of his freedom of expression; that the impugned articles did not contain any criminal element; that he did not praise violence and adopt the activities of the illegal organisations in any of his articles; and that nor did he incite people to hatred and hostility.

2. The Court's Assessment

154. Article 26 of the Constitution, titled *"Freedom of expression and dissemination of thought"*, in so far as relevant, reads as follows:

> *"Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities…*
>
> *The exercise of these freedoms may be restricted for the purposes of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.*
>
> *(…)*
>
> *The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law."*

155. Article 28 of the Constitution, titled *"Freedom of the press"*, in so far as relevant, reads as follows:

> *"The press is free, and shall not be censored…*
>
> *(…)*
>
> *The State shall take the necessary measures to ensure freedom of the press and information.*
>
> *In the limitation of freedom of the press, the provisions of articles 26 and 27 of the Constitution shall apply.*
>
> *Anyone who writes any news or articles which threaten the internal or external security of the State or the indivisible integrity of the*

State with its territory and nation, which tend to incite offence, riot or insurrection, or which refer to classified state secrets or has them printed, and anyone who prints or transmits such news or articles to others for the purposes above, shall be held responsible under the law relevant to these offences. Distribution may be prevented as a precautionary measure by the decision of a judge, or in case delay is deemed prejudicial, by the competent authority explicitly designated by law. The authority preventing the distribution shall notify a competent judge of its decision within twenty-four hours at the latest. The order preventing distribution shall become null and void unless upheld by a competent judge within forty-eight hours at the latest.

(…)".

a. Applicability

156. The charge resulting in the applicant's detention on remand was related to his dissemination, generally through his articles, of the propaganda of the organisation that was the perpetrator of the coup attempt, the main incident leading to the declaration of a state of emergency in Turkey. Therefore, the effect of the applicant's detention on remand on his freedoms of expression and the press will be reviewed within the scope of Article 15 of the Constitution. During this review, whether the impugned interference was in breach of the guarantees set forth in the Constitution, especially in Articles 13, 26 and 28 of the Constitution, will be determined, and if there is any violation, it will be assessed whether the criteria set forth in Article 15 of the Constitution rendered such a violation lawful (see *Aydın Yavuz and Others*, §§ 193-195, 242).

b. Admissibility

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

(i) General Principles

158. The Court comprehensively sets forth the general principles that it will take into consideration in the examination of the individual

applications involving the alleged interferences with the freedoms of expression and the press, safeguarded by Articles 26 and 28 of the Constitution, due to the detention of a journalist in its judgment of *Şahin Alpay* (§§ 118-133) as follows:

> *"118. The Court has stressed on many occasions that the freedom of expression enshrined in Article 26 of the Constitution and the freedom of press, another form of the freedom of expression which is subject to special safeguards enshrined in Article 28 of the Constitution, constitutes one of the main pillars of a democratic society and conditions sine qua non for the progress of the society and the improvement of individuals (see Mehmet Ali Aydın [Plenary], no. 2013/9343, 4 June 2015, § 69; and Bekir Coşkun [Plenary], no. 2014/12151, 4 June 2015, §§ 34-36).*
>
> *119. In spite of their significance in a democratic society, the freedoms of expression and press are not absolute and may be subject to certain restrictions, provided that the safeguards set out in Article 13 of the Constitution are complied with. Unless it complies with the requirements of Article 13 of the Constitution concerning the restriction of fundamental rights and freedoms, an interference with the freedoms of expression and the press would be in breach of Articles 26 and 28 of the Constitution. Therefore, it must be determined whether the interference complies with the requirements of being prescribed by law, relying on one or more justified grounds specified in the relevant provisions of the Constitution, and not being contrary to the requirements of a democratic society, as well as the principle of proportionality, which are enshrined in Article 13 of the Constitution.*
>
> *120. The grounds for the restriction of the freedoms of expression and the press are set out in Article 26 § 2 of the Constitution. In restricting the freedom of the press, Articles 26 and 27 of the Constitution will in principle be applicable pursuant to Article 28 § 4 thereof. Besides, exceptional circumstances whereby the freedom of the press may be restricted are indicated in Article 28 §§ 5, 7 and 9 of the Constitution (see Bekir Coşkun, § 37).*

121. Accordingly, the freedoms of expression and the press may be restricted for the purposes of "maintaining national security", "preventing offences", "punishing offenders" and "safeguarding the indivisible integrity of the State with its territory and nation", pursuant to Articles 26 § 2 and 28 § 5 of the Constitution. To that end, it is possible to criminalize, and impose punishment for, the act of disclosing to the press the news or articles that threaten the internal and external security of the State and its indivisible integrity with its territory and nation. Nor is there a constitutional obstacle before applying detention measure, during the investigation and prosecution to be carried out, in respect of press members alleged to have performed such acts (for the Court's assessment in the same vein, see Erdem Gül and Can Dündar, § 89).

122. In order for an interference with the freedoms of expression and the press to be constitutional, it is not sufficient for it to be prescribed by law and made on the grounds specified in the Constitution. The interference must comply with the requirements of the order of a democratic society as well as being proportionate.

123. Pluralism, tolerance and open-mindedness are sine qua non in a democratic social order. A social order lacking these features cannot be regarded as "democratic" (for the Court's judgments in the same vein, see Emin Aydın, no. 2013/2602, 23 January 2014, § 41; Fatih Taş [Plenary], no. 2013/1461, 12 November 2014, § 94; and Erdem Gül and Can Dündar, § 90). Pluralism, tolerance, and open-mindedness –above all– must manifest themselves in the free expression of any peaceful opinion. As emphasized –with reference to the judgments of the ECHR– in many judgments of the Constitutional Court, this freedom should apply not only to information or opinions that are considered favourable or regarded as harmless or trivial, but also to those which are against the State or a part of the society and disturbing for them (see Emin Aydın, § 42; and Fatih Taş, § 94).

124. Another requirement of a democratic social order is to provide a suitable environment for individuals to develop their unique personalities. Individuals can realize their unique personalities only in

an environment where they can freely express and discuss their thoughts (see Emin Aydın, § 41; and Bekir Coşkun, § 35).

125. In addition, it is indispensable for a democratic society to ensure the participation of the people, especially in debates concerning the public. In this regard, all kinds of ideas and information regarding the debates concerning the public should be able to be disseminated and the public should have access to them. In this context, freedom of the press, which is a special aspect of freedom of expression, has a special importance in a democratic society. As a matter of fact, the aforementioned freedom not only allows the press to disseminate ideas and information, but also enables the public to reach them (see İlhan Cihaner (2), no. 2013/5574, 30 June 2014, §§ 56-58, 82; Kadir Sağdıç [Plenary], no. 2013/6617, 8 April 2015, §§ 49-51, 61-63; Nihat Özdemir [Plenary], no. 2013/1997, 8 April 2015, §§ 45-47, 57-58; and Erdem Gül and Can Dündar, § 87).

126. Transparency as well as accountability are also requirements of a democratic society (see İlhan Cihaner (2), §§ 56-58, 82; Kadir Sağdıç, §§ 49-51, 61-63; Nihat Özdemir, §§ 45-47, 57-58; and Erdem Gül and Can Dündar, § 87). A sound democracy requires that the public institutions be supervised not only by the legislative or judicial authorities, but also by other actors such as political parties, non-governmental organizations and the press that are the indispensable elements of a democratic society (see Ali Rıza Üçer (2) [Plenary], no. 2013/8598, 2 July 2015, § 55). In this context, the press imparts news and ideas by fulfilling its tasks as "a public watchdog" and also contributes to ensuring transparency and accountability in a democratic society (see İlhan Cihaner (2), §§ 56-58, 82; Kadir Sağdıç, §§ 49-51, 61-63; Nihat Özdemir, §§ 45-47, 57-58; and Erdem Gül and Can Dündar, § 87). Thus, by virtue of the freedom of the press, the public, reaching information and ideas from different sources, can form a healthier opinion on the works and actions of those holding public authority.

127. However, Article 12 § 2 of the Constitution, which provides "The fundamental rights and freedoms also comprise the duties and responsibilities of the individual to the society, his family, and other individuals.", refers to the fact that people have duties and

responsibilities while exercising their fundamental rights and freedoms. Accordingly, there are also some "duties and responsibilities" that apply to the press in the enjoyment of the freedoms of expression and the press. (For the duties and responsibilities of the press, see Orhan Pala, no. 2014/2983, 15 February 2017, § 46; Erdem Gül and Can Dündar, § 89; R.V.Y. A.Ş., no. 2013/1429, 14 October 2015, § 35; Fatih Taş, § 67; and Önder Balıkçı, no. 2014/6009,15 February 2017, § 43). As a matter of fact, in consideration of this issue, the freedoms of expression and the press are not envisaged as an absolute right – despite its significance as mentioned above, and they may be accordingly subject to certain restrictions merely for the reasons specified in the relevant provisions of the Constitution.

128. Any measure interfering with the freedoms of expression and the press must meet a pressing social need and be the last resort. Any measure failing to meet these conditions cannot be considered as a measure compatible with the requirements of the democratic social order (see Bekir Coşkun, § 51; Mehmet Ali Aydın, § 68; and Tansel Çölaşan, no. 2014/6128, 7 July 2015, § 51).

129. In this scope, in the assessment of necessity in a democratic society, it should not be ignored in which context the impugned expressions, resulting in the interference, had been used, and they should not be taken out of the context and considered separately (see Nilgün Halloran, no. 2012/1184, 16 July 2014, § 52; Fatih Taş, § 99; Bekir Coşkun, § 62; Mehmet Ali Aydın, § 76; Ali Rıza Üçer (2), § 49; and Ergün Poyraz (2) [Plenary], no.2013/8503, 27 October 2015, § 63).

130. In addition, while establishing the responsibility of the individual concerned, the impugned expression should not be assigned meanings beyond the meaning that an objective observer can comprehend (see Bekir Coşkun, § 63). In this context, the predictions and assumptions lacking a factual basis should be avoided.

131. Lastly, the potential "deterrent effect" of the interferences with the freedoms of expression and the press on the applicant and in general the press must be taken into account (see Ergün Poyraz (2), § 79; and Erdem Gül and Can Dündar, § 99).

132. The principle of proportionality reflects the relationship between the aim of interference and the means employed to achieve this aim. In the assessment of the proportionality of any interference with the fundamental rights and freedoms, it must be assessed whether the means chosen to achieve the aim sought is "appropriate", "necessary" and "proportionate" (see Fatih Taş, §§ 90, 92, 96; and Erdem Gül and Can Dündar, § 90).

133. It is obvious that public authorities have a margin of appreciation in respect of the requirement of being compatible with the requirements of a democratic society and the principle of proportionality. However, in interfering with the freedoms of expression and the press as a result of the exercise of this discretionary power, the public authorities must show "relevant and sufficient" grounds (see Fatih Taş, § 99; and Mehmet Ali Aydın, § 76). It is for the Constitutional Court to make the final assessment as to whether an interference within this scope complies with the safeguards enshrined in the Constitution. The Constitutional Court makes such an assessment on the basis of the grounds given by the public authorities and especially by the inferior courts (see Erdem Gül and Can Dündar, § 91)."

ii. Application of Principles to the Present Case

159. Regard being had to the questions directed to the applicant by the investigation authorities and the grounds of his detention order, it appears that the applicant was charged principally on account of his articles. Accordingly, it has been revealed that, irrespective of the content of the impugned articles, the applicant's detention also constituted a breach of the freedoms of expression and the press, along with the right to personal liberty and security (for the Court's assessment in the same vein, see *Erdem Gül and Can Dündar*, § 92).

160. In the assessment of the alleged unlawfulness of detention in relation to the right to personal liberty and security, it has been concluded that the impugned interference satisfied the requirement of being prescribed by law. There is no situation that would require the Court to depart from this conclusion in terms of the alleged violations of the freedoms of expression and the press.

161. In addition, the applicant was detained on remand for allegedly writing articles in line with the aims of the FETÖ/PDY, which carried out activities against the national security and was the organization behind the coup attempt. Therefore, it has been concluded that the interference with applicant's freedoms of expression and the press pursued a legitimate aim in accordance with the grounds specified in the Constitution.

162. Having a legal basis and achieving a legitimate aim, however, do not suffice for an interference to be in conformity with the Constitution. For an assessment as to whether the applicant's detention constituted a breach of the freedoms of expression and press, the present case must be examined also in terms of the requirement of being necessary in a democratic society and the principle of proportionality. The Constitutional Court will make this examination on the basis of the detention process and the reasoning of the detention order.

163. Regard being had to the above-mentioned findings with respect to the alleged unlawfulness of the detention and the fact that the main basis for the accusations against the applicant was his articles, a severe measure such as detention failing to satisfy the lawfulness requirement cannot be regarded as a necessary and proportionate interference in a democratic society in terms of the freedoms of expression and the press.

164. Moreover, it cannot be comprehended, from the circumstances of the present case and reasoning of the detention order, for which *pressing social need* the applicant's freedoms of expression and the press were interfered -due to his detention for having expressed, in his articles, some ideas that were embraced by certain section of the public and the leaders of political parties at the relevant time- and why it was necessary in a democratic society.

165. In addition, in making an assessment as to the requirement of being necessary in a democratic society and proportionality, possible "deterring effect" of the interferences with the freedoms of expression and the press on the applicants and generally on the media must also be taken into consideration (see *Ergün Poyraz* (2), § 79; and *Erdem Gül and Can Dündar*, § 99). In the present case, it is explicit that the applicant's

being detained on remand in the absence of any concrete fact, other than the articles published, may also have a deterrent effect on the freedoms of expression and the press.

166. For these reasons, it has been concluded that resorting to detention measure in respect of the applicant mainly on the basis of his articles and without establishing strong indications of guilt was contrary –in the ordinary period– to the safeguards with respect to the freedoms of expression and the press, which are set out in Articles 26 and 28 of the Constitution.

167. Besides, it must also be examined whether the impugned measure was legitimate and proportionate pursuant to Article 15 of the Constitution, which envisages the suspension and restriction of fundamental rights and freedoms in time of a state of emergency.

iii. Article 15 of the Constitution

168. In its previous judgments, the Court has concluded that Article 15 of the Constitution, which envisages the suspension and restriction of fundamental rights and freedoms in time of a state of emergency, does not justify the impugned interference with the freedoms of expression and the press due to detention on remand ordered in the absence of any indication of a criminal guilt (see *Şahin Alpay*¸§§ 143-146; and *Mehmet Hasan Altan (2)* [Plenary], no. 2016/23672, 11 January 2018, §§ 238-241).

169. In the present case, there is no reason that would require the Court to depart from these conclusions. Therefore, it has been concluded that, taken in conjunction with Article 15 of the Constitution, the applicant's freedoms of expression and the press under Articles 26 and 28 of the Constitution were violated.

Mr. Muammer TOPAL and Mr. Recai AKYEL did not agree with this conclusion.

E. Application of Article 50 of Code no. 6216

170. Article 50 §§ 1 and 2 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."

171. The applicant claimed 1,000 Euro for every day of his detention in respect of non-pecuniary compensation.

172. In the present case, the Court found violations of Article 19 § 3 as well as Articles 26 and 28 of the Constitution due to the unlawfulness of the applicant's detention giving rise also to the breach of the freedoms of expression and the press. The applicant was released on 16 February 2018 within the scope of the criminal proceedings conducted in respect of him. In this sense, it appears that there is no available remedy other than affording compensation with a view to redressing the violations and their consequences.

173. The applicant must be awarded a net amount of 25,000 Turkish liras ("TRY") in respect of the non-pecuniary damage resulting from the interference with his right to personal liberty and security, which could not be redressed by merely the finding of a violation.

174. The total court expense of TRY 2,732.50 including the court fee of TRY 257.50 and counsel fee of TRY 2,475, which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For the reasons explained above, the Constitutional Court held on 28 May 2019:

A. 1. UNANIMOUSLY that the alleged violation of the right to personal liberty and security due to the unlawfulness of the applicant's police custody be DECLARED INADMISSIBLE for *the non-exhaustion of legal remedies*;

2. UNANIMOUSLY that the alleged violation of the right to personal liberty and security due to the unlawfulness of the applicant's detention be DECLARED ADMISSIBLE;

3. UNANIMOUSLY that the alleged violation of the personal liberty and security due to the magistrate judges' being in breach of the principles of an independent and impartial judge be DECLARED INADMISSIBLE for *being manifestly ill-founded*;

4. UNANIMOUSLY that the alleged violation of the personal liberty and security due to the restriction on access to the investigation file be DECLARED INADMISSIBLE for *being manifestly ill-founded*;

5. UNANIMOUSLY that the alleged violation of the personal liberty and security due to the judicial review of the challenge against his detention without a hearing be DECLARED INADMISSIBLE for *being manifestly ill-founded*;

6. UNANIMOUSLY that the alleged violation of the prohibition of ill-treatment be DECLARED INADMISSIBLE for *the non-exhaustion of legal remedies*;

7. UNANIMOUSLY that the alleged violations of the right to respect for private life and inviolability of domicile due to the unlawfulness of the search warrant be DECLARED INADMISSIBLE for *being manifestly ill-founded*;

8. UNANIMOUSLY that the alleged violations of the freedoms of expression and the press for being detained on remand be DECLARED ADMISSIBLE;

B. 1. By MAJORITY and by dissenting opinion of Mr. Muammer Topal and Mr. Recai AKYEL, that the right to personal liberty and security safeguarded by Article 19 of the Constitution was VIOLATED;

2. By MAJORITY and dissenting opinion of Mr. Muammer Topal and Mr. Recai AKYEL, that the freedoms of expression and the press safeguarded respectively by Articles 26 and 28 of the Constitution were VIOLATED;

C. That a net amount of TRY 25,000 be PAID to the applicant in respect of non-pecuniary damage, and other compensation claims be REJECTED;

D. That the total court expense of TRY 2,732.50, including the court fee of TRY 257.50 and the counsel fee of TRY 2,475, be REIMBURSED to the applicant;

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

F. That a copy of the judgment be SENT to the 32nd Chamber of the İstanbul Assize Court for information (E.2018/24); and

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

DISSENTING OPINION OF JUSTICES MUAMMER TOPAL AND RECAİ AKYEL

A. Alleged Unlawfulness of the Applicant's Detention

In the present case, it must be primarily ascertained whether the applicant's detention had a legal basis. The applicant was detained on remand on 27 February 2016 by the İstanbul 9th Magistrate Judge, pursuant to Article 100 of the Code of Criminal Procedure no. 5271, for having disseminated the propaganda of an armed terrorist organisation and incited people to hatred and hostility. Accordingly, it appears that his detention had a legal basis.

Before proceeding with an examination as to whether the applicant's detention -found to have a legal basis- was in pursuance of a legitimate aim and proportionate, it must be primarily determined whether there existed a strong indication of guilt, the pre-requisite of detention.

In the detention order and the indictment issued with respect to the applicant, the accusations were mainly based on the contents of his articles and his interview with Cemil Bayık, the head of the PKK terrorist organisation.

In this context, the investigation authorities referred to the articles written by the applicant on various dates: in his article of 6 November 2016, the caption "coup-plotter", accompanied by a portrait of the President and with a Turkish flag in the background, was used, and it was asserted that the President had founded his own State and the FETÖ/PDY's discourses were tried to be legitimised; in his article 17 February 2017, titled *"Value of an assurance given by a twister ('Bir Üç Kağıtçının Verdiği Teminatın Değeri')"*, it was stated that the explanations and assessments to the effect that the perpetrator of the coup-attempt of 15 July was the FETÖ/PDY were not plausible; in his article of 26 October 2016, he stressed that the Turks would not wish the Kurds' welfare by making a reference to an anecdote concerning the relation between the Turks and the Kurds and thereby made assessments targeting the foreign policy adopted by Turkey; in his article of 19 June 2016, he called Abdullah Öcalan, the leader of the PKK terrorist organisation, as the

"chief-commander of the PKK" ; in his article of 27 October 2016, he made an assessment concerning the political stance taken by the President following the coup attempt of 15 July; in his article of 12 December 2016, he referred to the security operations conducted in Cizre within the scope of the ditch events and indicated that a 19-year-old girl was burnt to death probably by the security forces in the basement of a building; in his article of 24 July 2016, he used the phrase of "ethnical cleansing" with respect to the operations conducted by the Turkish State against the PKK terrorist organisation; and in the interview made with Cemil Bayık, one of the heads of the PKK, in Kandil which was titled *"When his dream to become a President failed, he set to revenge ('Başkanlık Hayali Suya Düşünce İntikama Sarıldı')"*, the PKK terrorist organisation was reflected as a legitimate structure. It was accordingly asserted that the applicant had incited people to hatred and hostility and disseminated the propaganda of the PKK through the impugned articles and interviews.

The investigation authorities concluded that there was strong indication of guilt necessitating the applicant's detention, stating that through his articles in question, the applicant intended to glorify the so-called ideology, leader and symbols of the PKK by using expressions praising the leader and members of the armed terrorist organisation, namely the PKK, as well as to demonstrate that the operations conducted against the PKK were indeed unlawful; that notably in the interview made with Cemil Bayık, one of the heads of the PKK, in Kandil, which was titled *"When his dream to become a President failed, he set to revenge"*, and released in a newspaper published in Germany during a period when the ditch events were taking place in Turkey, the applicant provided the opportunity for the high-level member of the PKK to disseminate his expressions, which were in the nature of the propaganda of the said organisation and which involved threats against Turkey, to masses in different countries; and that he tried to give the impression that the PKK terrorist organisation was a legitimate and political structure.

It is an unequivocal fact that the scope of the freedom of expression exercised by journalists are wider, and that in charging them on account of the articles they have written, a rigorous scrutiny must be conducted. However, it is of great importance that journalists should not disregard

the concerns of the large masses they address and the effects of their articles (publications) on the communities; and that they should not deviate from objectiveness. In the light of these findings, it was neither arbitrary nor unfounded for the investigation authorities to conclude that there was strong indication of guilt necessitating the applicant's detention as in the impugned interview and articles published by the applicant notably in relation to the PKK, -given the language used by him, the contexts thereof, the dates of publications as well as their possible effects on the society- the applicant had gone beyond the purpose of making news and ensured the dissemination of the PKK's ideological discourses to masses, tried to show the terrorist organisation innocent while the State's struggle against the organisation unlawful, thereby disseminating the propaganda of the terrorist organisation PKK and inciting people to hatred and hostility.

It must be then ascertained whether the applicant's detention, which satisfied the pre-requisite that there must exist strong indication of guilt, pursued a legitimate aim. In such an assessment, particular circumstances of the present case including the general conditions prevailing at the time when the detention order was issued must be all taken into consideration.

It has been observed that in ordering the applicant's detention, the magistrate judge relied on the gravity of the corresponding penalty prescribed in the law, the evidence collection process, which had not been completed yet, and the risk of fleeing.

Due to the conditions prevailing in the aftermath of the coup attempt, the preventive measures other than detention may not be sufficient for ensuring the proper collection of evidence and for conducting the investigations in a secure and effective manner. The risk of escape as well as the possibility of tampering with evidence by taking advantage of the turmoil in the aftermath of the coup attempt are more likely when compared to the crimes committed during the ordinary times (see, in the same vein, *Aydın Yavuz and Others*, §§ 271 and 272; and *Selçuk Özdemir* [Plenary], no. 2016/49158, 26 July 2017, §§ 78 and 79).

Therefore, regard being had to the general circumstances prevailing at the time when the applicant's detention was ordered, the above-

mentioned particular circumstances of the present case and the content of the detention order issued by the incumbent magistrate judge, it cannot be said that the grounds underlying the applicant's detention, notably based on the risk of his fleeing, lacked a factual basis.

Lastly, it must be also determined whether the applicant's detention was proportionate. In determining whether a given detention is proportionate under Articles 13 and 19 of the Constitution, all circumstances of the given case must be taken into consideration (see *Gülser Yıldırım (2)* [Plenary], no. 2016/40170, 16 November 2017, § 151).

It should be primarily noted that conducting an investigation into terrorist offences leads public authorities to confront with significant difficulties. Therefore, the right to personal liberty and security must not be constructed in a way that would seriously hamper the judicial authorities' and security forces' effective struggle against offences -particularly organised crimes- and criminality (see, in the same vein, *Süleyman Bağrıyanık and Others*, no. 2015/9756, 16 November 2016, § 214; and *Devran Duran* [Plenary], no. 2014/10405, 25 May 2017, § 64).

Regard being had to the above-mentioned circumstances of the present case, the conclusion, reached by the incumbent magistrate judge, to the effect that the detention measure was proportionate and any measure of conditional bail would remain insufficient given the severity of punishment prescribed for the imputed offence and the gravity of the acts committed by the applicant cannot be regarded as unfounded or arbitrary.

Accordingly, since it has been concluded that the interference with the applicant's right to personal liberty and security through detention was not in breach of the relevant guarantees enshrined in the Constitution (Articles 13 and 19), no further examination is required with respect to the criteria laid down in Article 15 of the Constitution.

For these reasons, we disagree with the majority as we consider that as regards the alleged unlawfulness of the applicant's detention, there was no violation of the right to personal liberty and security safeguarded by Article 19 § 3 of the Constitution.

B. Alleged Violations of the Freedoms of Expression and the Press

The criminal charge underlying the applicant's detention mainly relates to the alleged connection between the applicant's news and articles published in a newspaper and the structure that was behind the coup attempt, the main incident giving rise to the declaration of state of emergency in Turkey. In this regard, the examination as to the effect of the applicant's detention on his freedoms of expression and the press will be made under Article 15 of the Constitution. During this examination, it will be ascertained whether the impugned interference was contrary to the safeguards inherent in notably Articles 26 and 28 of the Constitution.

In examining the effects of detention measure upon the fundamental rights and freedoms such as the freedoms of expression and the press, the freedom of association as well as the rights to stand for election and engage in political activities, the Court firstly assesses whether the detention was lawful and/or whether it exceeded a reasonable time. The Court then ascertains whether there has been a violation of any other fundamental rights and freedoms by also taking into account its conclusion as to the lawfulness of detention and reasonableness of the detention period (see *Hidayet Karaca* [Plenary], no. 2015/144, 14 July 2015, §§ 111-117; *Günay Dağ and Others* [Plenary], no. 2013/1631, 17 December 2015, §§ 191-203; *Mehmet Haberal,* no. 2012/849, 4 December 2013, §§ 105-116; *Mustafa Ali Balbay*, no. 2012/1272, 4 December 2013, §§ 120-134; *Kemal Aktaş and Selma Irmak*, no. 2014/85, 3 January 2014, §§ 61-75; *Faysal Sarıyıldız*, no. 2014/9, 3 January 2014, §§ 61-75; *İbrahim Ayhan,* no. 2013/9895, 2 January 2014, §§ 60-74; and *Gülser Yıldırım,* no. 2013/9894, 2 January 2014, §§ 60-74).

In the present case, as regards the alleged unlawfulness of the applicant's detention, it has been concluded that there was convincing evidence giving rise to suspicion that the applicant might have committed an offence; and that there were also grounds requiring his detention which was proportionate. Regard being had to the assessments made in this regard, there is no circumstance which would compel the Court to reach a different conclusion as regards the allegation that the applicant had been under investigation and subsequently detained on remand

merely on account of his acts falling within the scope of the freedoms of expression and the press.

Accordingly, as it has been observed that the interference with the applicant's freedoms of expression and the press due to his detention has not been in breach of the relevant safeguards inherent in the Constitution (Articles 26 and 28), no further examination is required with respect to the criteria laid down in Article 15 of the Constitution.

For these reasons, we disagree with the majority as we consider that there was no violations of the freedoms of expression and the press safeguarded respectively by Articles 26 and 28 of the Constitution.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

SEMRA OMAK

(Application no. 2015/19167)

17 July 2019

On 17 July 2019, the Second Section 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 *Semra Omak* (no. 2015/19167).

THE FACTS

[7-27] The applicant is the mother of E.N., a 15 year-old minor who was detained on remand for having committed a theft.

E.N., who had taken two money-boxes including coins from a tea house, was brought before the magistrate judge that ultimately ordered his detention on remand. The challenge against his detention was dismissed.

A criminal case was brought against E.N.. The incumbent juvenile court ordered his continued detention. Shortly after this decision, E.N. committed suicide at the juvenile wing of the prison. The incumbent court then discontinued the proceedings on account of E.N.'s death.

The applicant lodged an individual application with the Court on 7 December 2015.

V. EXAMINATION AND GROUNDS

28. The Constitutional Court, at its session of 17 July 2019, examined the application and decided as follows:

A. The Applicant's Allegations

29. The applicant maintained that her son's detention had been ordered despite being a minor, which had been neither taken into consideration and nor discussed; that there were no reasons justifying his detention; that the authorities fell foul of the principle to the effect that detention must be used as a measure of last resort; that the social study report, which demonstrated the psychological problems suffered by her son, had not been taken into consideration; and that despite her son's psychological problems, his continued detention had been ordered for stereotyped reasons. She accordingly alleged that the right to personal liberty and security had been violated.

30. In its observations, the Ministry indicated that the present application was unlike the cases which were filed by the applicants themselves but pursued by their next-of-kin upon their death; that according to the application form, the applicant did not claim any personal damage due to the alleged violations; that the complaints under Article 5 had been raised on behalf of her deceased son E.N.; and that there was no evidence in the case-file which would lead to the conclusion that the applicant had suffered a damage as a result of E.N.'s detention or the other actions performed. The Ministry accordingly noted that the application must be declared inadmissible.

B. The Court's Assessment

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

> *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution 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."*

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

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

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

has been observed that the applicant's allegations are in essence related to the unlawfulness of the impugned detention, her complaints must be examined from the standpoint of Article 19 § 3 of the Constitution. The Court did not find it necessary to make a separate examination as to the applicant's allegation that the decision ordering continued detention had been notified in the absence of a lawyer and an expert caseworker.

1. Admissibility

34. By the very nature of the right to life, an application under this right with respect to a person who has lost his life can only be made by the relatives of the deceased, who have the victim status (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, § 41).

35. While the individuals who are able to operate the individual application remedy are essentially those who directly have the victim status, the individuals who have a personal or special relationship directly with the victim, and accordingly have been affected by the alleged violation of the Constitution and the Convention or have a legitimate and personal interest in the elimination of the said violation may also lodge an individual application in their capacity as "indirect victims", by the particular circumstances of every concrete case and the nature of the violated right (see *Engin Gök and Others*, no. 2013/3955, 14 April 2016, § 53).

36. However, the question whether the "*indirect victim status*" arises may vary according to the particular circumstances of the case and to the nature of the violated right. As a matter of fact, in certain cases where the victim cannot lodge an application in person and there is a close relationship –especially in cases involving an alleged violation of the right to life-, the Constitutional Court has held that the applicants who are not directly affected by the alleged violation may lodge an application on their own behalf for having been indirectly affected by the alleged violation in question (see *Sadık Koçak and Others*, no. 2013/841 , 23 January 2014; and *Rıfat Bakır and Others*, no. 2013/2782, 11 March 2015).

37. However, it must be discussed whether the indirect victim status arises in the context of the right to personal liberty and security which is a personal and inalienable right. In principle, the next-of-kin or spouses

do not have victim status in case of alleged violations of the rights which are not closely related to the victim's death or disappearance. It must be nevertheless noted that in cases where the impugned measure allegedly giving rise to the violation of the right to personal liberty and security is closely associated with the complaint under the right to life -on condition of being independent from the essence of the complaint raised under the right to life-, the next-of-kin and spouses may lodge an individual application.

38. In the present case, the applicant is the legal representative of her son on behalf of whom the application has been lodged. The applicant's son committed suicide in a prison while being under the State supervision and control. In the application form included in the case-file concerning the right to life (no. 2016/78494), the applicant maintained that her son should have received psychological treatment as recommended in the social services report; that the witness' statements also confirmed the psychological problems suffered by her son; and that however, any preventive action had not been taken so as to prevent his suicide for which the prison administration was responsible. Regard being had to all these considerations as a whole, it has been concluded that irrespective of the conclusion to be reached with respect to the right to life, the applicant's complaint as to the unlawfulness of her son's detention was closely associated with the complaint concerning the right to life. In this sense, it must be accepted that the applicant had the capacity to lodge an application.

2. Merits

a. General Principles

39. In Article 19 § 1 of the Constitution, it is set out in principle that everyone has the right to personal liberty and security. In Article 19 §§ 2 and 3, certain circumstances under which individuals may be deprived of liberty are set forth, provided that the conditions of detention must be prescribed by law. (see *Murat Narman*, no. 2012/1137, 2 July 2013, § 42).

40. It is therefore necessary to determine whether an impugned detention, as an interference with the right to life and security, complies

with the requirements enshrined in Article 13 of the Constitution and applicable to the present case; i.e., the requirements of being prescribed by law, relying on one or more valid reasons specified in the relevant articles of the Constitution, and not being contrary to the principle of proportionality (see *Halas Aslan*, no. 2014/4994, 16 February 2017, §§ 53 and 54).

41. Accordingly, detention measure can be applied only for *individuals against whom there is a strong indication of guilt*. In other words, the prerequisite for detention is the existence of a strong indication that the individual has committed an offence. Therefore, the accusation needs to be supported with convincing evidence likely to be regarded as strong. (see *Mustafa Ali Balbay*, no. 2012/1272, 4 December 2013, § 72).

42. Besides, it is set forth in Article 19 § 3 of the Constitution that a detention order may be issued for the purposes of *preventing the risk of fleeing or destroying or altering the evidence*. Pursuant to Article 100 of Code of Criminal Procedure no. 5271 ("Code no. 5271"), a detention order may be issued if the suspect or accused flees, absconds, or there exists concrete evidence causing suspicion in this respect, and if his behaviours cause strong suspicion that he attempts to destroy, conceal or alter the evidence or to exercise pressure on the witnesses, victims or others. This Article also provides a list of offences for which there is a statutory presumption of the existence of grounds for detention. The same provision also embodies a list of the offences that are *ipso facto* presumed as a ground for detention, provided that there exists a strong suspicion of criminal guilt (see *Halas Aslan*, §§ 58 and 59).

43. It is also set out in Article 13 of the Constitution that the restrictions on fundamental rights and freedoms cannot be contrary to the "principle of proportionality". In this sense, detention must be proportionate to the gravity of the imputed offence and the severity of the sanction to be imposed (see *Halas Aslan*, § 72).

44. In every concrete case, it falls in the first place upon the judicial authorities ordering detention to determine whether the prerequisites for detention, i.e., the strong indication of guilt and other grounds exist, and whether detention is a proportionate measure. As a matter of fact, those

authorities which have direct access to the parties and evidence are in a better position than the Constitutional Court in making such determinations (see *Gülser Yıldırım (2)*, [Plenary], no. 2016/40170, 16 November 2017, § 123). However, it is the Constitutional Court's duty to review whether the judicial authorities have exceeded the discretion conferred upon them. The Constitutional Court's review must be conducted especially over the detention process and the grounds of detention order by having regard to the circumstances of the concrete case (see *Erdem Gül and Can Dündar* [Plenary], no. 2015/18567, 25 February 2016, § 79; and *Gülser Yıldırım (2)*, § 124).

45. Lastly, as regards the detention of minors, it must be taken into consideration in the light of the relevant international conventions and instruments (see *Furkan Omurtag*, §§ 30-40) that detention is a measure of last resort in respect of minors, and if it is inevitable to have recourse to this measure, it must be discontinued in the shortest time possible. Nevertheless, this principle cannot be construed to the effect that the minors can in no way be detained. As also underlined in a Recommendation adopted by the Committee of Ministers of the Council of Europe addressed to the member states, detention measure may be applied in exceptional cases where minors who are of relatively older age have committed very serious offences (see *Furkan Omurtag*, § 82).

b. Application of Principles to the Present Case

46. The applicant's son was detained on remand under Article 100 of Code no. 5271. In this sense, it appears that the impugned interference with the right to personal liberty and security had a legal basis.

47. In the impugned incident giving rise to the detention of the applicant's son, according to the findings of the investigation authorities, her son's fingerprints were found at the incident scene, and the suspects including her son stole money amounting to 250 Turkish liras ("TRY") from the complainant's workplace upon which they had trespassed at night by kicking the door. Her son confessed to committing the imputed offence both in his statement and questioning. It accordingly appears that in the present case, there is strong suspicion that the applicant's son committed the imputed offence.

48. In the present case, the court issuing the detention order referred to the nature of the criminal act of theft, the minimum and maximum lengths of sentence corresponding to this act, the inability of collecting the evidence yet, the risk of fleeing given the probable sentence to be imposed at the end of the proceedings and the nature of the imputed act as a catalogue offence as laid down in Article 100 § 3 of Code no. 5271. The criminal act of theft for which E.N.'s detention was ordered is among the offences corresponding to severe criminal sanctions in the Turkish legal system, and the severity of the penalty envisaged in the law for the imputed offence is one of the issues pointing to the risk of fleeing (in the same vein, see *Hüseyin Burçak*, no. 2014/474, 3 February 2016, § 61; and *Devran Duran* [Plenary], no. 2014/10405, 25 May 2017, § 66). Besides, the imputed offence is among the offences regarding which the *ground for detention may be deemed to exist ipso facto* under Article 100 § 3 of Code no. 5271. Therefore, it has been considered that the grounds for detention relied on in the case of the applicant's son had factual basis.

49. Lastly, it must be ascertained whether his detention was proportionate. In determining whether a given detention is proportionate within the scope of Articles 13 and 19 of the Constitution, the particular circumstances of every concrete case must be taken into consideration. In this sense, it must be also considered that the applicant's son was a minor.

50. As regards the detention of minors, it is specified in Law no. 5395 that this measure must be used only as a last resort. Notably pursuant to Article 20 of Law no. 5395, a minor's detention may be ordered only when the conditional bail measures have remained or appear to remain inconclusive or when these measures have not been complied with. It has been inferred from this provision that a measure of conditional bail should have been applied in the present case. As a matter of fact, in order to reach the conclusion that such measure has remained, or appear to remain, inconclusive or it has not been complied with, this measure must have been primarily applied.

51. In the present case, it has been observed that the detention order issued with respect to the applicant's son included no assessment to the effect that he was a minor. Therefore, it cannot be said that in ordering the

detention of the applicant's son, the principles laid down in the relevant international conventions and instruments were observed; and that the age of the applicant's son were taken into consideration while indicating that the preventive measures other than detention would have been insufficient. The grounds relied on by the magistrate judge in the detention order were not capable of demonstrating that the detention in the present case had been used as a last resort, notably as required in the domestic law, given the age of the applicant's son. Besides, it cannot be said that the judge ordering the detention of the applicant's son had indeed considered the measures other than detention. It cannot be therefore concluded that the impugned detention was proportionate.

52. For these reasons, the Court found a violation of Article 19 § 3 of the Constitution.

3. Application of Article 50 of Code no. 6216

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

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

54. The applicant claimed TRY 33,000 in respect of non-pecuniary compensation.

55. In the present case, the Court found a violation of the right to personal liberty and security.

56. The applicant must be awarded a net amount of TRY 27,500 in respect of the non-pecuniary damage which could not be redressed by merely the finding of a violation.

57. For the Constitutional 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 she did not submit any document on this matter.

58. The total court expense of TRY 2,701.90 including the court fee of TRY 226,90 and counsel fee of TRY 2,475, which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 17 July 2019 that

A. The alleged unlawfulness of the detention be DECLARED ADMISSIBLE;

B. The right to personal liberty and security safeguarded by Article 19 § 3 of the Constitution was VIOLATED due to the unlawfulness of the detention.

C. A net amount of TRY 27,500 be PAID to the applicant in compensation for non-pecuniary damage, and the other claims for compensation be DISMISSED;

D. The total expense of TRY 2.701.90 including the court fee of TRY 226.90 and the counsel fee of TRY 2,475 be REIMBURSED TO THE APPLICANT;

E. The payments be made within four months as from the date when the applicant applies to the Ministry of Finance following the notification of the judgment. In case of any default in payment, legal INTEREST

ACCRUE for the period elapsing from the expiry of four-month time-limit to the payment date;

F. A copy of the judgment be SENT to the Trabzon Juvenile Court (E.2015/278) for information; and

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

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

FATİH SARAMAN

(Application no. 2014/7256)

27 February 2019

On 27 February 2019, 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 *Fatih Saraman* (no. 2014/7256).

THE FACTS

[9-48] The applicant successfully passed the exam held by the Ministry of Justice for the position of guardian. Thereafter, the Presidency of the Justice Commission of the First Instance Court ("the Commission") initiated a security clearance investigation into the applicant intended to be placed in this position.

In the letter submitted by the relevant security directorate to the Commission, it was noted that as a result of the security clearance investigation and archive inquiry, the applicant had been previously subjected to a sanction for robbery. The applicant, who was under 18 years of age at the time of the offence, was sentenced to 5 months' imprisonment for his criminal act. His imprisonment sentence was then commuted to a heavy fine and subsequently suspended.

The Commission accordingly informed the Directorate General of Prisons and Detention Houses under the Ministry of Justice that the applicant did not satisfy the conditions sought for holding office as a civil servant and was not therefore fit for public office.

The applicant brought an action for annulment before the incumbent administrative court for his non-appointment. However, his action was dismissed. The applicant's appeal request was dismissed by the Council of State, and the decision ultimately became final.

The applicant then lodged an individual application on 21 May 2014.

The Constitutional Court, examining the individual application, asked the provincial security directorate how and from which authority they had obtained the court decision in respect of the applicant. In reply, it was informed that as a preliminary investigation had been conducted against him for robbery, the said court decision had been obtained

through the correspondence exchanged with the chief public prosecutor's office conducting the preliminary investigation.

V. EXAMINATION AND GROUNDS

49. The Constitutional Court, at its session of 27 February 2019, examined the application and decided as follows:

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

50. The applicant noted that it was prescribed by the law-maker that those below the age of 18 may commit some omissions for being a minor and therefore the arrangement laid down in Article 10 § 3 of Law no. 5352 on Criminal Records ("Law no. 5352") was introduced so as to preclude possible future effects of such omissions on their lives. He accordingly maintained that the relevant administration had access to the records of the offence he had committed when he had been under the age of 18, which was in breach of Article 10 § 3 of Law no. 5352; that his right to private life had been infringed; and that he had been thereby deprived of the right to hold a public office. Accordingly, he claimed that his rights to respect for private life as well as to work had been violated.

51. As noted by the Ministry of Justice in its observations, the examination on the merits of the applicant's case revealed that he had been subjected to a security clearance investigation and archive inquiry pursuant to Article 1 of Law no. 4045; that the principles and procedures as to how the security clearance investigation and archive inquiry processes would be conducted were laid down in the Regulation on Security Clearance Investigation and Archive Inquiry, which was issued based on Article 1 § 2 of Law no. 4045; and that in this regard, the interference in the present case satisfied the lawfulness requirement. The Ministry further indicated that given the qualifications sought for, and the delicate nature of, the position to which the applicant applied, the security clearance investigation conducted in respect of him had a legitimate aim and was in no respect incompatible with the requirements of a democratic society.

52. The applicant did not submit any counter-statements against the Ministry's observations.

B. The Court's Assessment

53. Article 20 of the Constitution, titled *"Privacy of private life"*, provides, insofar as relevant, as follows:

> *"Everyone has the right to demand respect for his/her private and family life. Privacy of private or family life shall not be violated.*
>
> *…*
>
> *Everyone has the right to request the protection of his/her personal data. This right includes being informed of, having access to and requesting the correction and deletion of his/her personal data, and to be informed whether these are used in consistency with envisaged objectives. Personal data can be processed only in cases envisaged by law or by the person's explicit consent. The principles and procedures regarding the protection of personal data shall be laid down in law."*

54. One of the legal interests safeguarded within the scope of the right to respect for private life is the right of privacy, which also covers the individual's legal interest of controlling the information about him. An individual has an interest in securing that any information concerning himself is not disclosed or disseminated without his consent, that such information is not accessible by others and is not used without his consent, in other words, that such information remains confidential. This points out the individual's right to determine the future of the information about him (see *Serap Tortuk*, no. 2013/9660, 21 January 2015, § 32).

55. In the third paragraph of Article 20 of the Constitution, which enshrines the right to respect for private life, it is set forth that everyone has the rights to request the protection of his personal data, to be informed of, have access to, and to request the correction and deletion of, such personal data, as well as to pursue whether they are used in line with the envisaged objectives. It is further set out that personal data may be processed only in cases envisaged by law or with the relevant person's explicit consent; and that the principles and procedures regarding the protection of personal data shall be regulated by law, thereby specifying the respective constitutional limits.

56. It is particularly stressed therein that individuals are entitled to pursue whether their personal data are used in line with the envisaged objectives.

57. The Court acknowledges that the notion of personal data covers any information relating to an identified or identifiable individual (see the Court's judgments no. E.2014/74 K.2014/201, 25 December 2014; E. 2013/122 K.2014/74, 9 April 2014; E.2014/149 K.2014/151, 2 October 2014; E.2013/84 K.2014/183, 4 December 2014; E.2014/180 K.2015/30, 19 March 2015; and *Bülent Kaya* [Plenary], no. 2013/2941, 11 May 2016, § 49). In this sense, the information on criminal conviction is undoubtedly in the form of personal data. Despite the applicant's claim that his right to work had also been violated as he was prevented from becoming a public officer, the main reason underlying the denial of his holding a public office was the submission of the criminal record -pertaining to the offence he had committed when he was below the age of 18- to the relevant public authorities, in other words, the disclosure of his personal data. The retention, storage or transfer of personal data must undoubtedly be examined from the standpoint of the right to respect for private life under Article 20 of the Constitution. Therefore, the present application would be examined under the right to respect for private life safeguarded by Article 20 of the Constitution.

1. Admissibility

58. 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.

2. Merits

a. General Principles

59. The collection, recording, retention, storage and use of any information related to an individual's private, professional and social life, including the asking of questions about private life by public authorities, constitute an interference with the right to respect for private life (see *Bülent Kaya* [Plenary], no. 2013/2941, 11 May 2016, § 51; and *Güzide Defne Samyeli*, no. 2014/4399, 21 September 2016, § 67).

60. In the present case, the criminal records of the offence committed by the applicant when he was under 18 years old were submitted to the relevant Commission by the Adana Security Directorate. The applicant's security clearance investigation yielded an unfavourable result due to this record, and he was not therefore appointed as a prison guard on a contractual basis.

61. The information on the criminal proceedings conducted against the applicant, which was retained and stored by the official authorities, is undoubtedly among personal data within the meaning of the right to respect for private life. It has been accordingly concluded that the disclosure of the applicant's personal information to public institutions and its use during his security clearance investigation constituted an interference with the right to respect for private life enshrined in Article 20 of the Constitution.

b. Whether the Interference Constituted a Violation

62. Article 13 of the Constitution reads as follows:

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

63. In determining whether the aforementioned interference constituted a violation, an examination must be conducted in terms of 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 and the proportionality principle. In this sense, it must be primarily ascertained in the present case whether the interference had a legal basis.

i. General Principles

64. As set forth in the Constitution, the restriction of fundamental rights and freedoms must be primarily prescribed by law. The requirement of being *"prescribed by law"* or the *lawfulness principle* is enshrined in Article 8 of the European Convention on Human Rights ("the Convention") as a criterion of restriction and protection. However, the notion of being *prescribed by law* as laid down in the Convention is not exactly the same with the *lawfulness principle* enshrined in the Constitution (see *Bülent Polat*, § 73).

65. The European Court of Human Rights ("the ECHR") interprets the requirements prescribed in law, in other words, the lawfulness in a broad manner and accordingly acknowledges that the principles set through the established case-law in judicial decisions may also meet the lawfulness requirement (see *Malone v. the United Kingdom*, no. 8691/79, 2 August 1984, §§ 66-68; and *Sunday Times v. the United Kingdom (no. 1)*, no. 6538/74, 26 April 1979, § 47), whereas the Constitution envisages that all restrictions may be imposed absolutely *by law*, thereby affording protection wider than that afforded by the Convention (see *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 31; and *Bülent Polat*, § 75).

66. However, the statutory arrangements concerning the restriction of fundamental rights and freedoms must not be available merely in theory. The lawfulness requirement also entails the existence of an effective content. At this point, what is of importance is the quality of the given law. The requirement of being restricted by law points to the accessible, foreseeable and precise nature of the restriction. It is thereby aimed at precluding any arbitrary acts of the practitioner and also enabling individuals to know the law, thereby ensuring legal security (see *Halime Sare Aysal* [Plenary], no. 2013/1789, 11 November 2015, § 62).

67. A given law may be considered to comply with these requirements only when it is sufficiently accessible; when the citizens have adequate knowledge of the existence of the provisions of law which are applicable to a given case; when the relevant law affords appropriate protection against arbitrariness; and when it precisely defines the extent of the

power afforded to the competent authorities and the way how such power may be exercised (see *Halime Sare Aysal*, § 63).

68. The law itself, except for any administrative practice it would involve, explicitly defines the scope of the discretionary power afforded to the competent authorities to protect the individuals against arbitrary interferences also in consideration of the legitimate aim pursued by the impugned act. The legal system should demonstrate the citizens, with sufficiently explicit expressions, that under which circumstances and within which limits the public authorities are empowered to interfere. In this sense, the legal system should enable the parties of an impugned interference to foresee the conditions underlying the interference and its possible outcomes (see *Halime Sare Aysal*, § 64).

69. However, the extent of protection afforded by the legislation, which could not offer solution for every opportunity, is mainly associated with its field and content, as well as the quality and quantity of its addressees. Therefore, the complex nature of a given provision of law, or its abstract nature to a certain degree, and thereby, its gaining clarity and precision through legal advice cannot be *per se* considered to fall foul of the principle of legal foreseeability. In this sense, the provision of law, allowing for an interference with any right or freedom, may of course grant discretionary power, to a certain degree, to the executive; however, it is necessary that the limits of such discretionary power be set in a sufficiently clear manner, and the provision of law ensure a sufficient degree of certainty (see *Halime Sare Aysal*, § 65).

70. In this context, whereas the relevant provision of law sets the basic framework of the restriction in question, the conditions of its implementation and the procedural details may be determined through regulatory acts. However, in this case, the regulatory acts must be accessible to the relevant parties, as well as clear and precise to the extent that the concerned parties could have a sufficient knowledge of the contents thereof (see *Halime Sare Aysal*, § 66).

ii. Application of Principles to the Present Case

71. The legal basis of the security clearance investigation and archive inquiry processes conducted in respect of the personnel to hold certain public offices is Law no. 4045.

72. In this Law, it is set forth that the security clearance investigation and archive inquiry shall be conducted in respect of the public officials to be employed at the units requiring high confidentiality and dealing with information and documents, which may cause damage or threat to the State's security, national existence and integrity, as well as to its internal and external interests if become known to unauthorised persons at the public institutions and organisations, those to be employed at the military organisations, security directorates and intelligence organisations, as well as in respect of those to serve at the penitentiary institutions and detention facilities.

73. However, the requirement that *"security clearance investigation and/or archive inquiry shall have been conducted"* was added to the general conditions sought for the recruitment of public officials, laid down in Article 48 of Law no. 657 on Civil Servants, by the Decree-Law no. 676 on Making Certain Arrangements under the State of Emergency, dated 3 October 2016, ("Decree-Law") and the Law no. 7070 on the Enactment of this Decree-Law. It accordingly appears that whereas the security clearance investigation was previously necessary merely in respect of certain offices specified in Law no. 4045, it is currently required by virtue of the amendment in question that security clearance investigation and archive inquiry be conducted in respect of all public offices.

74. However, it is required that the statutory arrangements that were in force at the time when the act complained of by the applicant, which constituted an interference in the present case, be taken as a basis in the examination to be made by the Court. Therefore, the Court cannot take into consideration the legal arrangement incorporated into Article 48 of Law no. 657, which was introduced on a date subsequent to the incident.

75. Law no. 4045 embodies a single provision on the security clearance investigation and archive inquiry where the public offices for which a

security clearance investigation is necessary are listed. It is also indicated therein that all arrangements other than this one shall be introduced by virtue of a regulation.

76. In this sense, the Regulation on Security Clearance Investigation and Archive Inquiry was issued. In Article 4 of this Regulation, the security clearance investigation is defined as *"the establishment and assessment whether the given person is wanted by the law-enforcement officers; whether he has any involvement and criminal record before the law-enforcement and intelligence units and whether there is any restriction imposed in respect of him; whether he has engaged in any destructive and separatist activities; as well as the establishment and assessment of his ethical status, his relation with foreigners and ability to keep secrets"*. Archive inquiry is defined as the establishment and assessment whether the given person is wanted by the law-enforcement officers; whether he has any involvement and criminal record before the law-enforcement and intelligence units and whether there is any restriction imposed in respect of him.

77. Pursuant to Article 7 of the Regulation, the authorities to conduct security clearance investigation and archive inquiry are the Undersecretary of the National Intelligence Organisation, the Security Directorates and local authorities.

78. In Article 11 of the Regulation, it is set forth that as a result of the security clearance investigation and archive inquiry, it is sought to reveal, in view of the environment where the person is, his identity, the authenticity of his identity records, his nationality, whether he has been ever a citizen of any foreign state, whether he has been ever wanted by the law enforcement officers, whether there is any information about him in the archives of the law enforcement and intelligence units, whether there is any criminal record and restriction in respect of him, whether he has engaged in destructive activities, whether he has acted in breach of Law no. 5816 on the Offences Committed Against Atatürk, dated 25 July 1951, as well as of the Atatürk's principles and reforms, whether he is keen on gambling, drugs, drinking, money and excessively on his personal interests to the extent that would infringe his honour and reputation and influence his profession, whether he has acted in breach

of ethics and code of conduct, the degree and reason of his relation, if any, with foreigners and notably with state agents and representatives who are opponent and likely to be opponent, and whether he has the ability to keep secrets.

79. In Article 12 of the Regulation, it is set out that the way how the security clearance investigations and archive inquiries shall be determined in line with the instructions of the authorities empowered to conduct such investigations and inquiries.

80. It is also laid down in the same provision that the information and documents demonstrating the result of such investigation and inquiry processes shall be kept in the relevant person's file at the security units with a higher degree of *"confidentiality"*; and that the information concerning those in respect of whom the results obtained at the end of these processes are unfavourable shall be conveyed by and between the Undersecretary of the National Intelligence Organisation and the Security Directorate.

81. Article 129 § 1 of the Constitution encompasses the obligation incumbent on the civil servants and public officials to carry out acts and activities, abiding by the Constitution and the relevant laws. Besides, Law no. 657 places on the public officials the obligations to be impartial and to be loyal to the State.

82. Much stricter qualifications may be naturally sought and certain restrictions may be naturally imposed in respect of the individuals to represent the State and to be appointed to certain critical positions in terms of national security, as required by the public officials' duty of commitment, impartiality and loyalty to the State. The qualifications sought in this sense and the restrictions specified in laws are intended for ensuring the effective and proper conduct of the public service. Therefore, the administration is, of course, entitled to introduce rules so as to set up the basic framework, by law, with regard to the security clearance investigation and archive inquiry to be conducted in respect of the individuals to be appointed to certain positions that are critical for the national security. Upon the determination of such framework through law, the conditions of its application and the procedural details

may be set forth through regulatory acts. Besides, it may be said that the foreseeability condition to be sought in the laws pertaining to the selection and supervision of the personnel to be recruited in the fields related to national security would be more flexible than that sought for the other fields. However, the relevant law and other subordinate legislation, which encompasses arrangements in this sense, must be formulated in a way that would explicitly, to a sufficient degree, demonstrate in which circumstances and limits the public authorities are empowered to take such kinds of confidential measures and to potentially interfere with private life, as well as that would afford sufficient protection against the possible abuses.

83. It appears that Law no. 4045 contains no provision as to the nature and scope of the information and documents to be subject-matter of the security clearance investigation and archive inquiry; from which resources such information shall be obtained and how and for how long these information and documents shall be preserved; whether those concerned shall be entitled to challenge such information; whether this information may be deleted after a certain period of time or the deletion procedure to be followed; the public officials and groups of profession involving confidentiality; the principles and procedures of security clearance investigation and archive inquiry, and as to the competent authorities to carry out these processes. It has been also observed that the relevant laws do not contain any provision making a reference to Law no. 5352 -the legal instrument required to be implemented in respect of the final criminal convictions- and protecting individuals from arbitrariness. Nor does the Regulation on Security Clearance Investigation and Archive Inquiry include any provision as to the periods during which the information obtained shall be preserved, whether it is possible to delete such information after a certain period of time or the procedure how it shall be deleted, whether the person concerned is entitled to challenge the obtained information, or any provision affording safeguards under the right to respect for private life.

84. Articles 10, 41, 58, 61 and 141 of the Constitution impose certain positive obligations on the State to take the necessary measures with a view to protecting children, ensuring their reintegration with the society

and applying special rules in case of their trials, as well as to establish necessary institutions and facilities in this respect.

85. It appears that the State has introduced certain legal arrangements within the scope of its positive obligations to protect children. One of these obligations is the principle that children cannot be permanently banned from public office due to any offence they have committed. In the Turkish Criminal Code no. 5237, it is set forth that an individual sentenced to imprisonment for having committed an intentional offence cannot be, on condition of being under 18 years of age at the time of offence, permanently deprived of holding a public office.

86. Likewise, it is set out in Article 10 of Law no. 5352 that criminal records and archive records of those who are under 18 may be requested by the chief public prosecutor's offices, judges or courts only when required for an investigation and prosecution. Accordingly, it is legally impossible to submit to the administrative authorities an individual's criminal record pertaining to an offence that he committed when he was under 18 years of age. As also noted herein under the heading *"Relevant Law"*, the opinion of the State Personnel Administration and the practice of the Ministry of Justice, Directorate General of Criminal Records and Statistics are also in the same direction.

87. However, with respect to the records of previous criminal convictions of the individuals, Law no. 4045 does not make any determination as to which offences pose an obstacle to holding a public office and whether the criminal records pertaining to offences committed before the age of 18 would lead to the security clearance investigation to result unfavourably. Nor does it make any distinction and classification as to the offences. In the same vein, it has been observed that it contains no arrangement as to whether the decisions to postpone the initiation of a criminal case and to suspend the pronouncement of the judgment, which are not considered as a finalised conviction pursuant to the Law no. 4616 on Conditional Release and Postponement of Court Cases and Punishments for Offences Committed until 23 April 1999, dated 21 December 2000, would also be a reason to cause the security clearance investigation to result unfavourably.

88. Law no. 4045 points merely to the public offices in terms of which a security clearance investigation is necessary and leaves the arrangement of any other issues to a regulation. Given the provisions of the relevant Regulation, it has been observed that nor does it contain any arrangement concerning the way how the security clearance investigation and archive inquiry would be conducted; and that this issue is left to the discretion of the authorities competent to conduct such investigations and inquiries, which would be indicated in their terms of reference. In view of the fact that the relevant terms are not made public through publication and may always be subject to a change by the administration, the individuals cannot be expected to know beforehand and foresee what the *sought terms of reference* are.

89. It further appears that the Regulation sets out that the information and documents showing the outcome of the security clearance investigation and archive inquiry shall be kept in the relevant person's file at the security units for an indefinite period; and that the information about those whose investigation or inquiry has resulted unfavourably shall be conveyed by and between the Undersecretary of the National Intelligence Organisation and the Security Directorates. It does not, however, provide those concerned with the opportunity to challenge such information and even to request its deletion after a certain period of time. In this sense, it has been observed that the security clearance investigation and archive inquiry processes are lacking objective, foreseeable and pre-determined safeguards and procedures and are conducted completely in accordance with the competent authorities' instructions, which leaves room for arbitrariness.

90. In the light of these findings, Law no. 4045 cannot be considered to establish the relevant basic rules, principles and framework of a given matter that entails a restriction on fundamental rights and freedoms. It has been accordingly found that the Law and the relevant Regulation do not contain clear and detailed provisions which regulate the scope and application of the measures as to the record, storage and use of personal data and which would afford sufficient safeguards, against the excess of power and arbitrariness, for those concerned with respect to the retention period, storage, use and access by third parties, the confidentiality,

integrity and destruction of these data. Accordingly, the Court has concluded that the statutory arrangement forming the legal basis of the impugned interference did not meet the lawfulness requirement.

91. In addition, regard being had to the applicant's having passed both the written and oral exams and the disclosure of the criminal record of the offence he committed when he was below the age of 18 to the administrative authorities in breach of Article 10 § 3 of Law no. 5352, it has been concluded that the impugned interference with the applicant's right to respect for private life lacked legal basis also in this respect.

92. As it has been determined that in line with the abovementioned findings, the present application did not satisfy the lawfulness requirement, the Court has found no reason to make a separate examination as to the other relevant criteria in terms of the impugned interference.

93. For these reasons, the Court has found a violation of the applicant's right to respect for private life safeguarded by Article 20 of the Constitution.

Mr. Emin KUZ expressed a concurring opinion.

3. Application of Article 50 of Code no. 6216

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

> *"(1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled...*
>
> *(2) If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favour of the applicant or the remedy of filing a case before*

the general courts may be shown. The court which is responsible for holding the retrial shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."

95. The applicant requested the Court to find a violation in his case and to award him 50,000 Turkish liras ("TRY") and TRY 50,000 in compensation for his pecuniary and non-pecuniary damages respectively.

96. In its judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court has indicated the general principles as to how a violation would be redressed.

97. Before indicating the steps to be taken for redressing the violation and its consequences, the reason giving rise to the violation must be identified. The violation may result from administrative acts and actions, judicial processes or the actions of the legislative body. Therefore, the identification of the underlying reason of the violation is of importance for determining the appropriate means of redress (see *Mehmet Doğan*, § 57).

98. In cases where the violation results from a court decision, the Court holds that a copy of the violation judgment be sent to the relevant inferior court for a retrial with a view to redressing the violation and its consequences, pursuant to Article 50 § 2 of Code no. 6216 and Article 79 § 1 (a) of the Internal Regulations of the Court (see *Mehmet Doğan*, § 58).

99. Accordingly, in cases where the Court finds a violation, it is not at the discretion of the inferior courts, but rather of the Court finding the violation, to decide on the necessity of a retrial. At this stage, the inferior court is obliged to take the necessary steps to redress the consequences of the violation, as indicated by the Constitutional Court in its violation judgment (see Mehmet Doğan, § 59).

100. In the present case, the Court has concluded that the right to respect for private life safeguarded by Article 20 of the Constitution was violated as the impugned interference resulting from the disclosure to the

administrative authorities of the information on the criminal proceedings conducted into the offence committed by the applicant when he was below 18 did not satisfy the lawfulness requirement.

101. It accordingly appears that the found violation stemmed from the act performed by the relevant administration. However, it has been also observed that the violation also stemmed from the court decision due to the dismissal of the action brought for the annulment of the said act and thus the failure to remedy the violation. In this case, there is a legal interest in conducting a retrial so as to redress the consequences of the violation of the right to respect for private life. A retrial to be conducted accordingly is for ensuring the redress of the violation and its consequences pursuant to Article 50 § 2 of Code no. 6216. In this sense, the step to be taken by inferior courts is to primarily revoke the initial decision leading to violation and to ultimately issue a fresh decision in line with the Court's violation judgment. Therefore, a copy of the judgment must be sent to the 4th Chamber of the Ankara Administrative Court for a retrial.

Mr. M. Emin KUZ disagreed with this conclusion.

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

103. The total court expense of TRY 2,681.10 including the court fee of TRY 206.10 and the counsel fee of TRY 2,475, which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 27 February 2019:

A. UNANIMOUSLY 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. By MAJORITY and by dissenting opinion of Mr. M. Emin KUZ, that a copy of the judgment be SENT to the 4th Chamber of the Ankara Administrative Court (E.2010/208, K.2010/2068, 14 December 2010) for a retrial in order to redress the consequences of the violation of the right to respect for private life;

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

E. That the total expense of TRY 2.681.10 including the court fee of TRY 206.10 and the counsel fee of TRY 2,475 be REIMBURSED TO THE APPLICANT;

F. 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

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

CONCURRING AND DISSENTING OPINIONS OF JUSTICE M. EMİN KUZ

In the present application involving the alleged violations of the rights to respect for private life and to work due to the act whereby the applicant was not appointed as a prison guard as his security clearance investigation had resulted unfavourably, the Court found a violation of the right to respect for private life and ordered a retrial for the redress of the violation.

I agree with the judgment finding a violation, which was issued by the Court unanimously, whereas I concur with the Court's view that the impugned interference did not satisfy the lawfulness requirement on a different ground. Besides, I do not agree with the Court's order for a retrial to redress the violation.

1. Concurring Opinion

In finding a violation, the Court primarily recalled the principles on the lawfulness requirements, which are established by the Court itself and the ECHR. It has however stated that Law no. 4045 embodies only one provision concerning the public offices for which security clearance investigation and archive inquiry are necessary; and that any other arrangement in this respect would be introduced through a regulation as indicated in the law. The Court has further noted that although the relevant regulation issued to that end includes arrangements in this sense, Law no. 4045 could not be said to set the basic rules, principles and framework as to the restriction of fundamental rights and freedoms; and that neither the said Law nor the relevant Regulation contains clear and detailed provisions as to the scope and application of the measures on the record, storage and use of personal data.

As is known, in cases where there is an interference with any fundamental right or freedom, it must be ascertained whether there is a provision of law that authorises such interference. An interference under Article 20 of the Constitution may be considered to satisfy the lawfulness requirements only when it has a legal basis.

In the abovementioned paragraphs under the heading of general

principles, it is stated that the requirement "being prescribed by law" set forth in the Convention is not same with the "lawfulness principle" enshrined in the Constitution; and that whereas the ECHR interprets the lawfulness in a broad manner and accordingly acknowledges that the legislation other than the legislative acts, as well as the principles based on the well-established judicial decisions may also meet the lawfulness requirement, the Constitution affords much more protection on this matter than the Convention (§§ 64-65).

It has been concluded in the Court's leading judgments cited above in the relevant paragraphs of this judgment that the principle of certainty amounts to not only the legal certainty but also the principle of judicial certainty in a broader sense; that the regulatory acts of the executive and judicial case-law –along with the existing laws– may also ensure judicial certainty provided that they satisfy the requirements of being accessible, precise and foreseeable; and that what is essential is the existence of a norm which would enable those concerned to foresee the legal consequences of a given act under particular circumstances of their cases. The Court has thereby concluded that given the provisions of law enumerating the duties of the administration in general terms along with the regulatory acts in the form of regulation and directive (even instruction) with more detailed arrangements, the statutory arrangements forming the basis of the interference with the applicant's right to respect for private life satisfied the "lawfulness" requirement (see *Bülent Polat* [Plenary], no. 2013/7666, 10 December 2015, §§ 82-98).

These general principles established with respect to lawfulness in the above-cited individual application where the Court found no violation of the right to respect for private life are reiterated in several individual applications where a violation of the right to respect for private life was found due to the disproportionate nature of the impugned interference despite the existence of no problem in terms of lawfulness (see, for instance, *Tevfik Türkmen* [Plenary], no. 2013/9704, 3 March 2016, §§ 62-64; and *Adem Yüksel* [Plenary], no. 2013/9045, 1 June 2016, §§ 67-70).

In the same vein, also in the individual applications involving the alleged violation of the right to respect for private life due to the record and storage of the information on the criminal proceedings conducted

against the applicants in the Criminal Record Check System (GBT), Article 13 of Law no. 3152 stipulating the duties of the relevant unit, Additional Article 7 of Law no. 2557 authorising the police to collect and evaluate information as well as to submit such information to the competent authorities for intelligence purposes, and the provisions of the Directive put into force based on Law no. 2557 were considered to constitute the legal basis of the impugned interference. The Court accordingly concluded that the interference satisfied the lawfulness requirement (see *Bülent Kaya* [Plenary], no. 2013/2941, 11 May 2016, §§ 71-78; and *E.Ç.A.* [Plenary], no. 2014/5671, 7 June 2018, § 48).

In the present case, the applicant, who had been declared to have successfully passed the exam held for the public office of prison guard on contractual basis, was not appointed to said position due to the unfavourable result of his security clearance investigation.

In Article 48 of Law no. 657 on Civil Servants, it is set forth as a general condition that those who would hold a public office must not have been convicted of theft even if being subsequently pardoned. It is further laid down therein as a specific condition that such individuals are to satisfy the conditions sought in any special law or legislation. In the relevant Regulation, the condition of "successfully passing the security clearance investigation process" is sought for becoming a prison guard, along with the general conditions and the other special conditions.

As regards the security clearance investigations to be conducted with a view to ascertaining whether the conditions prescribed in the said legislation have been satisfied, Article 1 of Law no. 4045 envisages that the prison guards are also among the public officials who shall be subjected to security clearance investigation process; and that the principles and procedures concerning the issues specified in the Law shall be put into force through the resolution of the Council of Ministers.

The abovementioned Regulation, entering into force upon being promulgated in the Official Gazette and undoubtedly fulfilling the requirements of being accessible to, precise and foreseeable for those concerned, comprehensively indicates the authorities competent to conduct security clearance investigations, the officials to be subjected to

such investigation process, the issues to be inquired during that process, as well as the other principles and procedures on the matter.

Therefore, Laws no. 657 and 4045 as well as the Regulations issued based on these Laws are unequivocally comprised of clear provisions to the extent that would eliminate the risk of any arbitrary implementation of law and are accessible to, and foreseeable for, the applicant. It is therefore clear that these statutory arrangements satisfy the "lawfulness" requirement.

Undoubtedly, the constitutional rights would be breached if such safeguards are not afforded in the legislation, or despite being afforded, if they are not applied or are rendered dysfunctional.

In the judgment, the majority of the Court has stated that Law no. 4045 does not establish the basic rules, principles and framework on the matter; that the Law and the relevant Regulation do not embody clear and detailed provisions; that the security clearance investigation process does not afford objective, foreseeable and precise safeguards and is completely conducted in line with the competent authorities' instructions, which may lead to arbitrariness. I do not agree with these conclusions. Although I consider that the applicant's right to respect for private life has been violated, the underlying reason is not the statutory arrangement, the legal basis of the impugned interference resulting from the "disclosure of the personal data –submission of which is forbidden by law– to the administrative authorities and the reliance on such data in the security clearance investigation process", but the interference itself, which did not satisfy the lawfulness requirement.

In other words, it is set forth in the last paragraph of Article 20 of the Constitution that personal data may be processed without the explicit consent of the relevant person only in circumstances prescribed by law; in Article 53 § 4 of Code no. 5237 that paragraph 1 thereof -where it is set out that any person sentenced to imprisonment for having committed an intentional offence cannot be appointed as a civil servant as a legal consequence of his conviction- cannot apply in respect of persons who were below the age of 18 on the date of offence; and in Article 10 § 3 of Law no. 5352 that "criminal and archive records of those below

the age of 18 may be submitted to courts, judges and prosecutor's office only for being assessed within the scope of an investigation and prosecution". However, in the present case, the applicant's personal data were submitted to the administration and taken as a basis in his security clearance investigation. I therefore consider that the impugned interference did not satisfy the lawfulness requirement and accordingly agree with the Court's view that the applicant's right to respect for private life was violated on a different ground.

2. Dissenting Opinion

For the reasons cited-above, whereas I agree with the conclusion that there was a violation of the applicant's right to respect for private life under Article 20 of the Constitution, I disagree with the majority's view that a retrial must be conducted in order to redress the violation in question.

Pursuant to the general principles set in the Court's judgment in the case of *Mehmet Doğan* and also referred herein, in cases where it is established through individual application examination that a fundamental right or freedom has been violated, the main rule, for redressing the violation and its consequences, is to ensure restitution as much as possible, that is to say, to ensure restoring to the former state existing before the violation. However, I consider that these general principles do not require a retrial to redress the violation found in the present case but rather the award of non-pecuniary compensation to the applicant.

As is known, the right to hold a public office is enshrined in Article 70 of the Constitution; however, it is not protected under the Convention. As the individual applications involving alleged violations of the rights that are not covered by the joint protection of the Constitution and Convention are outside the scope of the individual application, the Court declares inadmissible the individual applications involving the alleged violation of the right to hold a public office for lack of competence *ratione materiae* as they fall outside the joint protection realm of the Constitution and Convention.

In the present case, it was maintained that there had been violations of the applicant's rights to work and to respect for private life, and the Court examined his allegations from the standpoint of the right to respect for private life safeguarded by Article 20 of the Constitution and consequently found a violation thereof, which is well-founded also according to me. However, I consider that ordering a retrial falls foul of the abovementioned principles and constitutes an assessment which would lead to the recognition of the right to hold a public office, which is not covered by the joint protection realm and thus falls outside the scope of individual application.

In other words, although according to the principles established through the judgments rendered so far by the Court, the right to hold a public office falls outside the scope of individual application and only in cases where the Court finds a violation of a right falling under the scope of the individual application, it is to indicate the means for redress that would ensure restitution to the former state existing before the violation, the Court ordered a retrial which would lead to the possible recognition of the right to hold a public office which is indeed outside the scope of the individual application.

In the Court's judgments finding a violation which are referred to above under the heading of concurring opinion and where the applicants were dismissed from the Turkish Armed Forces, the Court found a violation of the right to respect for private life and accordingly ordered a retrial. However, in these cases, the applicants were dismissed from public office while they were serving as a public official, which was in breach of their right to respect for private life. Unlike the present case, the remedy of retrial indicated in these judgments did not lead to the recognition of the right to hold a public office falling outside the scope of the individual application.

For these reasons, I disagree with the majority as I consider that a retrial should not have been ordered due to the violation of the applicant's right to respect for private life, and instead non-pecuniary compensation should have been awarded as an appropriate way of redress.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

ŞÜKRAN İRGE

(Application no. 2016/8660)

7 November 2019

On 7 November 2019, the First Section of the Constitutional Court found a violation of the right to respect for family life safeguarded by Article 20 of the Constitution in the individual application lodged by *Şükran İrge* (no. 2016/8660).

THE FACTS

[7-23] The applicant, a convict serving her sentence in a penitentiary institution with her two children, submitted a petition to the incumbent chief public prosecutor's office for being granted a suspension of execution of her sentence in order to take care of her baby born on 12 February 2016. The chief public prosecutor's office dismissed her request. The applicant's challenge against the dismissal decision was also rejected by the relevant assize court.

Pending the examination by the Court of the applicant's request for an interim measure, the penitentiary institution issued a letter to the effect that the wards were not suitable for the children's life and development. By its interim decision of 28 June 2016, the Court indicated an interim measure in favour of the applicant and accordingly ordered necessary steps to be taken for the elimination of the threat to the physical and psychological integrity of both the applicant and her children.

Besides, the Administrative and Supervisory Board of the Penitentiary Institution decided, by virtue of the interim measure indicated by the Court, to transfer the applicant to another penitentiary institution fit for the applicant and her children. By the time when her individual application was under examination, she had been still placed in a women's closed penitentiary institution where she was transferred.

V. EXAMINATION AND GROUNDS

24. The Constitutional Court, at its session of 7 November 2019, examined the application and decided as follows:

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

25. The applicant maintained that due to the dismissal of her request for the suspension of her prison sentence which had been imposed on her

on account of offences committed on various dates, indeed her baby was punished; and that in its practices and decisions, the State should have taken into consideration primarily the best interests of children. She also noted that the State preferred to place the mother and her new-born baby suffering from a throat problem in prison instead of finding solutions so as to ensure the mother and the baby to live in a healthy environment; and that thereby, her baby was prevented from growing up in a healthy environment. She accordingly alleged that her right to respect for family life had been violated.

26. In its observations, the Ministry recalled the relevant legislation and the case-law of the European Court of Human Rights ("the ECHR") on this matter. It stated that the decision issued by the incumbent chief public prosecutor's office relied on the exception laid down in Article 16 § 5 of the Law no. 5275 on the Execution of Penalties and Security Measures ("Law no. 5275); and that the applicant had not surrendered herself for nearly 2 years by failing to comply with the decision suspending the imprisonment sentence previously imposed on her. In this sense, the Ministry stated that there was no violation in the applicant's case as she was considered, pursuant to the relevant legislation, to pose a threat due to her acts and conducts, which should be found reasonable.

B. The Court's Assessment

27. Article 20 § 1 of the Constitution, titled *"Privacy of private life"*, provides as follows:

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

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

> *"Family is the foundation of the Turkish society and based on the equality between the spouses.*
>
> *The State shall take the necessary measures and establish the necessary organisation to protect peace and welfare of the family,*

especially mother and children, and to ensure the instruction of family planning and its practice.

Every child has the right to protection and care and the right to have and maintain a personal and direct relation with his/her mother and father unless it is contrary to his/her high interests.

The State shall take measures for the protection of the children against all kinds of abuse and violence."

29. It is clear that placing the children with their mothers in penitentiary institutions is a result of the positive obligation incumbent on the State to ensure that children grow up with their parents and is in essence intended for ensuring the maintenance of family relationship. In this context, also given that the complaints raised in the present case were related to the conditions ensured for the maintenance of the family relationship also in pursuit of the child's best interest, the application was examined under the right to respect for private life.

1. Admissibility

30. The alleged violation of the right to respect for family life must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

a. General Principles

31. The obligation imposed on the State by virtue of the right to respect for family life is not limited only to the avoidance of arbitrary interference with the right. In addition to this negative obligation, which is of priority, the right also embodies positive obligations for ensuring an effective respect for private life. These positive obligations entail taking of measures for ensuring respect for private life even if in the realm of interpersonal relations (see *Murat Atılgan*, no. 2013/9047, 7 May 2015, § 26).

32. As regards the State's obligation to take positive measures, Articles 20 and 41 of the Constitution entail the right to request for the taking of

measures so as to ensure integration between the parent and his/her child as well as the obligation to take such measures that is incumbent on the public authorities. In Article 41 of the Constitution, it is explicitly laid down that unless being contrary to the child's best interest, he shall have the right to establish and maintain a personal and direct relation with his mother and father (see *Serpil Toros*, no. 2013/6382, 9 March 2016).

33. Moreover, *the child's interest*, as worded in the Convention on Children's Rights, and *the child's best interest*, as worded in Article 41 of the Constitution, are a principle that is to be observed in all acts and actions performed by the courts, the administrative authorities and the legislative organ, which are of concern to the children. In this sense, in cases where an action to have an effect on the child will be performed, making an assessment as to whether this action is in the child's best interest is of great importance for the fulfilment of the positive obligations inherent in the right to respect for family life.

34. Unless being contrary to the child's best interest, it is essential to ensure the right to establish and maintain a personal relationship with his mother and father. In this scope, as required by the principle of the child's best interest, the public authorities are obliged to ensure the maintenance of the family relationship between the parent and the child on the one hand, and to take the measures so as to ensure the child to live in an environment where he could maintain his mental and physical improvement on the other. The relevant administration has indeed a wide margin of appreciation with respect to the practices in a penitentiary institution. However, it cannot be said that the above-mentioned obligation is not applicable to the children who are placed in penitentiary institutions together with their convicted mothers.

35. On the other hand, what is in pursuit of the child's best interest varies depending on the particular circumstances of every concrete case. However, it must be always borne in mind that the State has obligations to provide sound conditions for the children who are temporarily placed in penitentiary institutions. However, this obligation is not absolute, and the nature and scope of the measures to be taken in consideration of the particular circumstances of every case may vary. Besides, it must

be taken into consideration that the person who is indeed convicted is the mother herself and therefore, the child's best interest must be taken into account in the rules and orders associated with the mother's penalty. Accordingly, it must be emphasised that the measures which would secure that the practices and conditions at the penitentiary institution would have the minimum effect on the child are to be taken.

36. Besides, the public authorities are expected to strike a balance between the public interest in the actions and orders with respect to the convicted mother, and the child's best interest, and to provide relevant and sufficient grounds to demonstrate that the child's best interests have been considered. Moreover, given the development process of the children, it is of importance that the measures to be taken by the public authorities be capable of meeting the child's needs in consideration of his age and that the relevant measures be applied swiftly so as to prevent any possible adverse effects of the conditions at the penitentiary institution on the child and his mother.

b. Application of Principles to the Present Case

37. In Article 16 § 4 of Law no. 5275 applied in the present case, it is set forth that *"imprisonment sentence of the women who are pregnant or who gave birth 6 months ago at the most shall be postponed"*, which clearly serves for the protection of both the woman and the child and aims at ensuring the child to be with his mother in a sound environment. Besides, this legal arrangement also envisages that the public interest pursued by placing a convicted mother in penitentiary institution be overridden, under certain circumstances, by the best interest of child.

38. In the present case, it has been observed that the applicant is being placed in the penitentiary institution with her baby born on 12 February 2016 and her child born on 2 January 2014; that she requested to be granted a suspension of her imprisonment sentence on account of the baby's need of care and unfit conditions of the penitentiary institution. Considering the term during which the applicant served her imprisonment sentence as well as her previous behaviours and conducts, the chief public prosecutor's office dismissed her request, noting that she was considered as a dangerous convict. However, in dismissing the

request, the chief public prosecutor's office failed to provide any sufficient ground so as to indicate why the applicant, convicted of aggravated theft, was categorized as a convict posing a threat. Moreover, her request was not assessed in consideration of the baby's living conditions and needs, and the provisions applicable merely to the convicted mother were relied on in the dismissal decision.

39. Besides, the public authorities found the ward's capacity as well as physical conditions of the penitentiary institution unfit for children's life and development. It has been therefore observed that the child of the applicant whose request for a suspension of execution had been nevertheless dismissed was deprived of a sound environment fit for his age and needs. It has been further concluded that in the decisions associated with the convict's sentence, the child's best interest was not taken into consideration within the scope of the right to respect for family life; that no balance was struck between the applicant's placement in a penitentiary institution and the child's best interest; and that nor was any measure such as providing an appropriate environment for the child or transferring them to another institution with better conditions taken.

40. For these reasons, the Court concluded that in the present case, the positive obligations inherent in the right to respect for family life were not fulfilled and accordingly found a violation of the right to respect for family life safeguarded by Article 20 of the Constitution.

3. Application of Article 50 of Code no. 6216

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

> *"1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled…*
>
> *2) If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the*

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

42. In its judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court has indicated the general principles as to how a violation found would be redressed.

43. The applicant requested the Court to award her 50,000 Turkish liras ("TRY").

44. It has been observed that the violation found by the Court in the present case resulted from the decision whereby the applicant's request for suspension of the execution of her imprisonment sentence was dismissed by the Diyarbakır Chief Public Prosecutor's Office.

45. In the present case, the Court found a violation of the right to respect for family life safeguarded by Article 20 of the Constitution.

46. Regard being had to the fact that upon the interim measure indicated by the Constitutional Court, the applicant was transferred to another penitentiary institution fit for the baby, it has been concluded that there is no legal interest in conducting a retrial to redress the consequences of the violation of the right to respect for family life. On the other hand, a net amount of TRY 5,500 must be awarded to the applicant in compensation for non-pecuniary damage suffered by her for not being provided with the safeguards inherent in the right to respect for family life, and her other claims for compensation must be rejected.

47. The total court expense of TRY 2,714.50 including the court fee of TRY 239,50 and counsel fee of TRY 2,475, which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 7 November 2019:

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

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

C. A net amount of TRY 5,500 be PAID to the applicant in compensation for non-pecuniary damage, and other claims for compensation be DISMISSED;

D. The total expense of TRY 2.714.50 including the court fee of TRY 239.50 and the counsel fee of TRY 2,475 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.

FREEDOM OF RELIGION
(ARTICLE 24)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

LEVON BERÇ KUZUKOĞLU AND OHANNES GARBİS BALMUMCİYAN

(Application no. 2014/17354)

22 May 2019

On 22 May 2019, the Plenary of the Constitutional Court found a violation of the freedom of religion safeguarded by Article 24 of the Constitution in the individual application lodged by *Levon Berç Kuzukoğlu and Ohannes Garbis Balmumciyan* (no. 2014/17354).

THE FACTS

[10-50] Two separate requests for election of a new patriarch were filed with the relevant Governor's Office as the Turkey's Armenian Patriarch was severely ill that he could no longer perform his duties.

The first request was filed by the Spiritual group whereas the second request was filed by the Civilian group including the applicants.

The Governor's Office tacitly rejected the Civilian group's request by leaving it unanswered and also refused the Spiritual group's proposal as the patriarchate's office was not vacant. It however notified that an election for a " patriarchal vicar-general" could be held. Thereafter, the Turkey's Armenian Spiritual Committee held an election of patriarchal vicar-general.

The applicants brought an action, for annulment of the decision whereby the Governor's Office dismissed the Civilians' requests, before the incumbent administrative court. They accordingly maintained that the conclusion finding it appropriate to hold an election for a patriarchal vicar-general had been reached as a result of the contacts made merely by the Spiritual Committee; and that the election should have not been held merely by the Spiritual Committee but by the Assembly of the Delegates mainly consisting of the Civilians.

The administrative court however dismissed the action, and following the appellate process, the Council of State ultimately rejected the applicants' request for appeal.

The applicants lodged two individual applications with the Constitutional Court on 30 October 2014 and 29 February 2016 respectively. These two applications were joined.

V. EXAMINATION AND GROUNDS

51. The Constitutional Court ("the Court"), at its session of 22 May 2019, examined the application and decided as follows:

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

52. The applicants asserted:

i. The incumbent Patriarch should be considered to have vacated his seat due to his illness and that a new patriarch should be elected as per Article 2 of the 1863 Regulation which stipulates that a new patriarch shall be elected when the Patriarch's seat became vacant for "various reasons" (*esbabı saire*).

ii. The Election Steering Committee (*Müteşebbis Heyet*), comprised of delegates from community foundations of the Armenian community, was entrusted with the authority to conduct any and every operational and legal procedures concerning the patriarchal election and, when necessary, to pursue judicial avenues against unlawful acts. In forming their opinion on the election of Patriarch of the Armenians of Turkey, the Istanbul Governor's Office had not obtained any information from the Election Steering Committee, which in itself was an independent, objective and impartial committee that only acted free from any influence with the purpose of implementing the patriarchal election procedure, under no circumstances, could act under the instructions of any institution or organisation of the community, including the Spiritual Council.

iii. It was at the Election Steering Committee where any objection or request likely to be raised by individuals, councils or institutions inside or outside the community during the election process would be resolved. The applicants contended that there was an interference with the community's internal affairs as a result of the administration's intervention in a matter which the community needed to handle with its own dynamics and its attempt to solve the question of the Patriarch by instituting a new post which did not exist in the community's traditions.

The patriarchal election was obstructed anti-democratically, the representative system was abolished, and the community's will was disregarded. In other words, the applicants argued that the administration's interference constituted a restriction imposed on the right and the freedom of the Armenian community in Turkey to democratically elect their patriarch.

iv. The Spiritual Assembly was not a council which decided to hold an election and formed the Election Steering Committee to implement it. Neither the customs and traditions of the Armenian community nor the long-established legal texts had ever envisaged to entrust the Spiritual Committee with such powers.

v. When the Council of Ministers permitted Archbishop Aram Ateşyan, who was appointed outside the will of the people, to wear religious garments outside places of worship, it terminated the patriarchal capacity of the elected incumbent Mesrop Mutafyan. Thus, having created the post of the patriarchal vicar-general by disregarding the community's will, the administration equipped the prospective occupant of that post with the powers of the Patriarch.

vi. The applicants complained of alleged violations of Article 24 on the freedom of religion and conscience; Articles 36 and 141 due to an unfairness of the trial and the lack of a reasoned judgment; Article 10 on the principle of equality before law due to discrimination against the Armenian community; and Article 5 of the Constitution due to the State's failure to fulfil its obligations to the Armenian community.

53. In its observations, the Ministry indicated:

i. The administrative authorities had a duty to uphold the application of existing rules with regard to the election of the Armenian patriarch. The election process had been fully conducted by community officials in compliance with the 1863 Regulation (*Nizamname*), the Directive (*Talimatname*) and customary practices, without any interference at all by the State organs.

ii. The two solutions sought about the issue arising as a result of the inability of Armenian Patriarch of İstanbul to fulfil his duties for a long time due to health problems, namely the spiritual clergy's proposal to elect a co-patriarch and the Civilians' proposal to elect a new patriarch, had been evaluated together. The Ministry indicated that the idea of election of a patriarchal vicar-general by the competent bodies of the Patriarchate came up as a conciliatory solution between the two different proposals. This new proposal brought up by the administrative authorities, in consideration of the demands of those concerned, served the purpose of helping the community to find their own solution to the issue. The impugned act was carried out within the framework of the State's positive obligation to *regulate* the religious sphere.

iii. The Ministry concluded that the patriarchal vicar post actually existed within the Armenian traditions and that the incumbent Patriarch, Mesrob Mutafyan, appointed the Chairperson of the Spiritual Council, Bishop Aram Ateşyan, as the patriarchal vicar-general on 27 August 2004 on the ground that the former would be away from his post for some time.

54. In their counter-statements against the Ministry's observations, the applicants argued:

i. The Ministry failed to discuss certain points of importance in its observations. In this sense, it failed to acknowledge that the 1863 Regulation did not provide for the post of a patriarchal vicar-general; and that the administration had created such a post in contravention of legislation. The Ministry also disregarded that the Spiritual General Assembly's duties were listed in Article 28 of the Regulation, which did not include the duty of electing a patriarchal vicar-general.

ii. Despite the administration's attempt to propose the post of patriarchal vicar-general as a conciliatory formula between the parties, the Armenian community was divided in two due to the administration's practices which were not based either on legislation or on tradition; and that the introduction of the post

of patriarchal vicar-general constituted a manifest interference by the State with the religious tradition.

iii. Lastly, the applicants recalled that the Spiritual General Assembly had decided on 26 October 2016 that the Patriarch should be considered to have retired.

B. The Court's Assessment

55. 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 essence of the applicants' complaints under Articles 5, 10, 36 and 141 of the Constitution concerns an alleged violation of the freedom of religion and conscience through the acts of the public power and rulings of the inferior courts. Thus, the Court has found it appropriate to examine the application from the standpoint of the freedom of religion.

56. Article 24 §§ 1, 2, 3 and 5 of the Constitution on the "*Freedom of religion and conscience*", which will be taken as basis of the assessment on the allegation, reads as follows:

"Everyone has the freedom of conscience, religious belief and conviction.

Acts of worship, religious rites and ceremonies shall be conducted freely, as long as they do not violate the provisions of Article 14.

No one shall be compelled to worship, or to participate in religious rites and ceremonies, or to reveal religious beliefs and convictions, or be blamed or accused because of his religious beliefs and convictions.

...

No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political interest or influence, or for even partially basing the fundamental, social, economic, political, and legal order of the State on religious tenets."

1. Admissibility

57. The Ministry contended that the applicants did not have the victim status. However, the applicants are both members of the Armenian community and the chairperson and the secretary, respectively, of the Election Steering Committee formed by the Civilians. It cannot be denied that the applicants are directly affected by the decisions of the administration and inferior courts with regard to the Election of the Patriarch of the Armenians of Turkey.

58. The Ministry further argued that the applicants did not pursue the remedy of requesting rectification of the decision, thereby failing to exhaust available legal remedies. The Court has held on many occasions that exhausting the remedy of rectification of the decision is not a mandatory condition to be able to lodge an individual application (see *Sema Öktem*, no. 2013/852, 6 March 2014, § 22).

59. In the circumstances of the present case, the Court does not find it necessary to make any further assessment on the applicants' victim status or the admissibility of the application. The alleged violation of the freedom of religion must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

a. **Existence of an Interference**

60. The applicants argued that the patriarchal seat became vacant as the incumbent Patriarch was unable to fulfil his duties; and that the prevention of the Armenian community from electing its religious leader constituted an interference with the freedom of religion. The Ministry indicated that the State acted impartially; there was no interference with the applicants' freedom of religion; since the Patriarch's illness had been discovered, the administration aimed to help resolve the disagreement between the Civilian and Spiritual groups and to remedy the grievances emerging between the groups.

61. At the outset, the Court will take note of the provisions of the Treaty of Lausanne in analysing the issue because the matter at hand

concerns non-Muslim minorities. Article 38 of the Treaty of Lausanne sets forth the freedom of the act of *practising* a belief in public or private. The rule in question provides that all inhabitants of Turkey shall be entitled to free exercise, whether in public or private, of any creed, religion or belief, the observance of which shall not be incompatible with public order and good morals.

62. Also, the case-law of the European Court of Human Rights ("the ECHR") will be borne in mind in ascertaining whether there has been an interference with the freedom of religion. According to the ECHR, the State's action favouring one leader of a divided religious community or undertaken with the purpose of forcing the community to come together under a single leadership against its own wishes would constitute an interference with freedom of religion (see *Serif v. Greece*, no. 38178/97, 14 December 1999, §§ 49, 52 and 53; *Hasan and Chaush v. Bulgaria*, § 78; and *Supreme Holy Council of the Muslim Community v. Bulgaria*, §§ 76, 85).

63. In the assessment of disputes concerning the leadership of a religious community, further note should be taken of the references made in international conventions, as well as Article 24 of the Constitution, in regard to the acts of manifesting [a religion or belief]. Indeed, pursuant to Article 18 of the International Covenant on Civil and Political Rights ("the ICCPR") and Article 9 of the European Convention on Human Rights ("the Convention"), the acts of manifesting are acknowledged, in general, as the "*practice, worship, teaching and observance*" of a "*religion or belief*".

64. In the case of *Tuğba Arslan* ([Plenary], no. 2014/256, 25 June 2014, § 66), the Court focused in a detailed manner on the determination of whether a certain behaviour constituted "*practice*" of a belief. As preventing an individual from acting in accordance with his religion or belief would result in weakening of the faith itself and a violation of the freedom of religion and faith, it becomes important to determine whether or not an act can be considered as "*practice*" of belief. Since the "*practice of belief*" is more comprehensive when compared to other forms of manifestation, it needs to be addressed in even more detail.

65. As a consequence of this need, for example, the UN Human Rights Committee's General Comment No. 22 on Article 18 of the ICCPR lists various acts which give a broader range to the content of the terms "*teaching, practice, worship and observance*" and it considers the freedom to choose their religious leaders as a part of the practice of belief. According to the Committee,

> *"... the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, ..."*

66. The term "*practice of belief*" does not appear in the text of Article 24 of the Constitution. Nevertheless, Article 24 indicates that everyone has the freedom of *religious belief and conviction* and is free to conduct *acts of worship, religious rites and ceremonies*. The Court is of the opinion that the aforementioned concepts not only refer to rituals and ceremonial acts of worship in a narrow sense but can also be interpreted as encompassing, in a wider sense, various practices and acts of manifestation acknowledged as requirements of the religious life. Adopting only the narrowest meaning of the concepts "*worship*", "*religious rite*" and "*religious ceremony*" with an approach to the contrary would leave outside the protective radius of Article 24 of the Constitution any act of manifestation other than the acts of worship that are considered in international texts as part of the "*practice of belief*" and thus placed under the protection of the freedom of religion.

67. The Armenian patriarch is the spiritual leader of the Armenian community in Turkey, which is a religious community, and there is clearly a close relationship between the role played by the patriarch within the community and the body of meaning represented by the concept "*worship*". Therefore, it must be accepted that especially the election of a religious leader and a community life under a certain elected religious leader fall unequivocally within the protection of the right to manifest one's religion under Article 24 of the Constitution.

68. The development by the State of certain policies, including mediation, for resolution of a disagreement emerging within a particular group of faith will not constitute an interference with the believers' rights

enshrined in Article 24 of the Constitution. In the case giving rise to the present application, the administration did not favour one or another part of the divided Armenian community; however, upon the emergence of a difference of opinion between the Civilian group and the Spiritual group regarding the question of whether the patriarchal seat became vacant after the incapacitation of the incumbent Patriarch to fulfil his duties due to an illness, the administration forced, in a sense, the application of its own proposed solution by refusing the requests of both parties. The main question to discuss in this dispute is whether these events are the result of the State's pressure which was unconstitutional or a leadership change that has been freely determined by the community.

69. Lastly, there is no question as to the religious significance of the patriarchate for the Armenian community. Thus, regard being had to the legislation, in particular the Regulation, and the Armenian community's traditions, there is no reason to deny that the applicants' desire to elect a new patriarch stems from their religious belief. Therefore, the Court had concluded that the obstruction of the applicants' request to elect a new patriarch in the absence of a decision as to whether it was necessary to elect a new patriarch in the present case constituted a State interference with the Armenian community's internal organisation and, by extension, the applicants' freedom of religion and conscience guaranteed by Article 24 of the Constitution.

b. Whether the Interference Constituted a Violation

70. The above-mentioned interference shall constitute a violation of Article 24 of the Constitution unless it satisfies the requirements laid down in Article 13 of the Constitution. Article 13 of the Constitution provides as follows:

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

i. Whether the Interference was Prescribed by Law

71. In case of an interference with a right or freedom, the matter to be primarily determined is whether there is a provision of law that authorises the interference. In order to accept that an interference made within the scope of Article 24 of the Constitution meets the requirement of being prescribed by law (i.e. legality), it is compulsory that the intervention has a "*legal*" basis (see, for an extensive explanation on the requirement of legality in the context of the freedom of religion, *Tuğba Arslan*, §§ 81-99; see also, for further deliberations on the requirement of legality in other contexts, *Sevim Akat Eşki*, no. 2013/2187, 19 December 2013, § 36; *Hayriye Özdemir*, no. 2013/3434, 25 June 2015, §§ 56-61; and *Eğitim ve Bilim Emekçileri Sendikası and Others* [Plenary], no. 2014/920, 25 May 2017, §§ 53-69).

72. As regards the restrictions on fundamental rights and freedoms, the legality requirement primarily necessitates the formal existence of a law. Law, as a legislative act, is a product of the will of the Grand National Assembly of Turkey and is enacted by the Grand National Assembly of Turkey in compliance with the law-making procedures enshrined in the Constitution. Such an understanding affords a significant safeguard for fundamental rights and freedoms. Nevertheless, the legality 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 *Eğitim ve Bilim Emekçileri Sendikası and Others,* §§ 54, 55).

73.Certainty means that content of a provision must not give way to arbitrariness. Legal 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 could know their legal status. A provision of law must certainly indicate which acts or facts will entail which legal consequences and, by extension, what sort of a power to interfere will be afforded to the public authorities. Only then individuals may be able to foresee their rights and obligations and act accordingly. The legal certainty can thus be ensured, and bodies

exercising the public power can be prevented from performing arbitrary acts (see *Hayriye Özdemir*, §§ 56, 57; and *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 56).

74. It should be stressed that it is not easy to immediately ascertain the legal foundations of the interference with the applicants' freedom of religion and conscience. Article 2 titled "*Explanation as to the Election of the Armenian Patriarch of İstanbul*" of the Regulation provides that when the Patriarch's seat becomes vacant, the Spiritual and Material Assemblies shall convene and elect a *locum tenens* and request an approval from the Sublime Porte. Although there is not a material assembly at the moment, the practice of electing a *locum tenens* seems to be applied.

75. Furthermore, the Court has noted that the Directive which was in force in 1961, 1990 and 1998 came into force by a decision of the Council of Ministers and that Article 2 of the Directive gave the İstanbul Governor's Office and, by extension, the Ministry of Interior a regulatory role over the election affairs. Apart from the above, Article 29 of the Directive provides that the patriarchate's *locum tenens* shall submit the result of the election and request permission for the newly-elected patriarch to be able to wear religious garments outside the place of worship under the Law no. 2596 on Prohibition of the Wearing of Certain Garments, dated 3 December 1934.

76. The validity of the Regulation and the Directive should also be addressed. Neither the applicant nor the Ministry have contested the validity, in part or as a whole, of the rules contained in the above-mentioned documents. Further, the Regulation is clearly an important document for reference which demonstrates the customs and traditions of the Armenian community. In fact, this document stipulates the rules concerning the duties and obligations and the functioning of the patriarchate's Spiritual Assembly and other community bodies. In addition, the Ministry relied on the Regulation and the Directive to provide reasons for its observations and opinions. Moreover, the first-instance court, i.e. the 3rd Chamber of the İstanbul Administrative Court, dismissed the case by interpreting the first article of the Regulation.

77. Nevertheless, in its letter of reply dated 5 February 2018 to the Patriarchate of the Armenians of Turkey, the Ministry of Interior relied not on the provisions of the Regulation but rather on the "*practice*" as well as the 1961 Directive on Patriarchal Election. In the said letter, having indicated that "a*ccording to the practice employed in the elections and Patriarchal elections held after the 1961 Directive on Patriarchal Election, it would be possible to elect a new patriarch if the seat becomes vacant due to the patriarch's death or resignation or other reasons*", the Ministry of Interior added that "*there are judicial precedents in which health issues cannot be considered as one of the other reasons which would enable the Patriarch's seat to become vacant*".

78. The Court held detailed deliberations in the case of *Tuğba Arslan* as regards the question of whether court decisions and administrative practices could be regarded as "*law*" (*kanun*) within the meaning of Article 13 of the Constitution:

> *"Although the law created by the judge is accepted as a source of the law in some fields of Turkish law, it can never acquire a status of rule with the quality of 'law' in a field that is organised based on a completely formal principle of legality, such as restriction of human rights and freedoms. On the other hand, the fact that an interference with a fundamental right and freedom gains continuity and becomes accessible and foreseeable does not transform an act of public power, which is the basis of the interference, into a 'law'. Adopting an approach to the contrary would also mean accepting the fact that the rights violations arising out of an accessible and foreseeable act or action of the public power have 'legal' bases."* (see *Tuğba Arslan*, § 96; see also *ibid.* § 98).

79. When the procedures that have been employed in the elections since the 1863 Regulation are assessed together, it may be accepted that in the current situation the administration enjoys at least an authority in regulating the affairs related to patriarchal election.

80. That said, according to Article 13 of the Constitution, a law is absolutely necessary to be able to impose limitations on fundamental rights. The Court arrives at the conclusion that there exists no accessible, foreseeable and clearly precise provision of law within the meaning of

Article 13 of the Constitution -capable of preventing arbitrary acts of the bodies wielding the public power and allowing individuals to know the law- which could constitute the legal basis of the aforementioned authority that limits the applicants' freedom of religion and belief.

81. Despite finding that the interference did not have a legal basis, the Court considers it necessary to make a further assessment on whether the interference was compatible with the requirements of a democratic social order rather than concluding its examination on the application with a final ruling to the effect that, in the circumstances of the present case, the relevant norms of the Regulation and the Directive did not satisfy the requirement of "*restriction by law*".

M. Emin KUZ concurred with this opinion with a different reasoning.

ii. Whether the Interference Pursued a Legitimate Aim

82. The applicants complained that the authorities' objective was to prevent the Civilians from having a voice by means of leaving the Armenian community's administration in the hands of the Spiritual clergy. The Ministry argued that the State aimed to remedy the problems emerging as a result of the incumbent Patriarch's *de facto* absence from his function.

83. The second paragraph of Article 24 of the Constitution which reads "*Acts of worship, religious rites and ceremonies shall be conducted freely, as long as they do not violate the provisions of Article 14*" and the last paragraph thereof which reads "*No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political interest or influence, or for even partially basing the fundamental, social, economic, political, and legal order of the State on religious tenets*" constitute the foundation of the restriction regime prescribed by the Constitution with respect to the freedom of religion (see *Esra Nur Özbey*, no. 2013/7443, 20 May 015, § 69).

84. The freedom of religion guaranteed under Article 24 of the Constitution puts the State under not only negative obligations but also some positive obligations for the protection of the individuals' freedom of religion. Therefore, it is possible that certain measures taken by the

State for the protection of the freedom of religion of others might restrict another individual's freedom of religion.

85. Having regard to the process which started in the Ottoman era and continued through the Republican era, the Court has observed that the State has in general had the duty of maintaining order in the affairs related to Armenian community's patriarchal elections and protecting the rights and freedoms of the members of the community. Thus, it must be accepted that the public administration's general concern in the present case was to contribute to the establishment of a legitimate administration by eliminating the vacuum of religious and administrative authority, which had emerged due to the Patriarch's illness.

86. Accordingly, the Court has considered that the State pursued the aim of protecting the legal position of members of the community originating from Article 24 of the Constitution in interfering with the internal organisation of the Armenian community by rejecting both parties' demands and insisting on the application of its own proposed solution, i.e. election of a patriarchal vicar-general, to the problems created by the *status quo* due to the Patriarch's illness. Therefore, the Court has concluded that the interference in the form of prevention of the patriarchal elections pursued a constitutionally legitimate aim.

iii. Whether the Interference Complied with Requirements of the Democratic Order of the Society

(1) General Principles

(a) The Importance of the Freedom of Religion in a Democratic Society

87. The freedom of religion and conscience is one of the indispensable elements of the democratic state that are stipulated in Article 2 of the Constitution (see *Tuğba Arslan*, § 51; and *Esra Nur Özbey*, § 43).

88. That both the religion is one of the main sources that the individuals, who are devoted to a religion, refer to so as to understand and give meaning to the life and it has an important function for the shaping of the social life is present in the origin of the fact that the

freedom of religion and conscience is one of the foundations of the democratic society. Because of this function, it has been accepted at international level that the individuals have freedom of religion within certain limits independently from the positions of the religions vis-à-vis the freedoms. Like other freedoms, the freedom of religion was also enshrined with certain legal and constitutional guarantees as a result of a long and difficult process. As a matter of fact, the freedom of religion is a right that is protected in most of the international declarations and conventions on human rights at universal and regional level (see *Ahmet Sil*, no. 2017/24331, 9 May 2018, § 31; *Tuğba Arslan*, § 52; and *Esra Nur Özbey*, § 44).

(b) The Compliance of the Interference with Requirements of the Democratic Society

89. For an interference with fundamental rights and freedoms to be considered to be in compliance with the requirements of the democratic order of the society, it needs to meet a pressing social need and be proportionate. It is clear that an assessment under this head cannot be carried out independently from the principle of proportionality which is based on the relation between the aim of the restriction and the means employed to achieve that aim. Because Article 13 of the Constitution contains two distinct requirements, namely "*compliance with the requirements of the democratic order of the society*" and "*compliance with the principle of proportionality*", which are two pieces of a whole and have a strict connection in between (see, in the context of the freedom of expression, *Bekir Coşkun*, no. 2014/12151, 4 June 2015, §§ 53-55; *Mehmet Ali Aydın*, no. 2013/9343, 4 June 2015, §§ 70-72; see also the judgments no. E.2018/69, K.2018/47, 31 May 2018, § 15; and E.2017/130, K.2017/165, 29 November 2017, § 18).

90. The restriction of the freedom of religion must pursue the aim of meeting a pressing social need in a democratic society and it must be exceptional. In order to acknowledge that the measure constituting the interference met a pressing social need, it must be capable of achieving the relevant aim, be the last resort and the lightest measure available. An interference which does not help achieving the aim or is obviously more restrictive and heavier vis-à-vis the aim pursued cannot be said to meet

a pressing social need (see *Esra Nur Özbey*, § 79; see, in the context of the freedom of expression, *mutatis mutandis*, *Bekir Coşkun*, § 51; *Mehmet Ali Aydın*, § 68; and *Tansel Çölaşan*, no. 2014/6128, 7 July 2015, § 51).

91. Another duty of the Court is to check whether a fair balance has been struck between the individuals' freedom of religion and the legitimate aims prescribed by the relevant provisions of the Constitution for justifying the restriction of this freedom. It must be noted that the existence of legitimate aims in a particular case does not remove the right. What is important is to balance that legitimate aim against the right under the circumstances of the case (see, in the context of the freedom of expression, *Bekir Coşkun*, §§ 44, 47, 48; and *Hakan Yiğit*, no. 2015/3378, 5 July 2017, §§ 58, 61, 66).

92. Proportionality refers to the absence of an excessive imbalance between the aim pursued by the restriction and the restrictive measure employed. In other words, proportionality refers to establishing a fair balance between the rights of the individual and interests of the public or between the rights and interests of other individuals if the purpose of the interference is to protect the rights of others. A problem in terms of the principle of proportionality may be at issue in the event that a clearly disproportionate burden is imposed on the owner of the right, which was the subject of interference, when compared to public interest or the interests of others. The bodies wielding the public power must show on the basis of concrete facts the presence of an interest, which outweighs the interest arising from the exercise of the freedom of religion and which needs to be protected, as well as of the mechanisms that balance the burden placed on the individual (see, in the context of the freedom of expression, *mutatis mutandis*, *Bekir Coşkun*, § 57; *Tansel Çölaşan*, §§ 46, 49, 50; and *Hakan Yiğit*, §§ 59, 68).

93. Accordingly, if an interference with the freedom of religion fails to meet a pressing social need or is not proportionate despite meeting a pressing social need, it cannot be considered as an interference that complies with the requirements of the democratic order of the society.

94. The main axis of the assessments to be held in respect of the present case will be the question of whether the inferior courts were

able to convincingly demonstrate that the reasons they relied on in their decisions leading to the interference are *in compliance with the requirements of the democratic order of the society*. Interferences with the freedom of religion without any grounds or on such grounds that do not satisfy the criteria laid down by the Court shall be in breach of Article 24 of the Constitution.

(c) The Freedom of Association of Religious Communities

95. The present application concerns the leadership election and, by extension, the association of a religious community of a minority. The freedom of religion encompasses the religious communities' ability to organise its association away from arbitrary interferences of the State. Accordingly, the State must refrain from interfering with the internal affairs of religious communities unless it is absolutely necessary in a democratic society.

(d) The Relationship Between the State and Religious Communities in a Democratic Society

96. In the judgment in the case of *Tuğba Arslan*, the Court has recalled that the right protected by Article 24 of the Constitution is indispensable because the freedom of religion and conscience is of vital importance for laying the foundations of, and maintaining, an effective and meaningful democracy based on the rule of law. In the said judgment, the Court has indicated that the freedom of religion can only be protected in a democracy based on the understanding of recognition, pluralism and impartiality (see, for a detailed explanation on the concepts of recognition, pluralism and impartiality, *Tuğba Arslan*, §§ 53, 54; and see also *Esra Nur Özbey*, §§ 45, 46).

97. The Court has explained that in a pluralistic society, the State is under an obligation to take the measures necessary to ensure that individuals live as required by their own world views and beliefs. According to the Court, the State does not have the authority to accept one of the views or life styles present in the society as "*wrong*". In this context, unless the reasons for limitation stipulated in the Constitution are present, enabling differences to coexist is a requirement of the

pluralism even though the majority or the minority does not like it (see *Tuğba Arslan*, § 54).

98. In a democratic society, the State is obliged to take measures and initiatives in order to reconcile the interests of different religions and beliefs that coexist or the interests of different groups within the same religion or belief. There is always an opportunity in democratic societies to ensure the peaceful coexistence of people whose beliefs, views and lifestyles are in conflict with one another and to create a pluralistic environment within the society where all types of faiths can express themselves (see, for a similar approach, *Esra Nur Özbey*, § 57).

99. In this connection, it should be recalled that Article 24 of the Constitution places on the State not only negative obligations such as not violating the freedom of religion but at the same time positive obligations such as creating an environment where such freedom can be easily enjoyed (see *Esra Nur Özbey*, §§ 82-84).

100. In addition, the State must fulfil its obligations under Article 24 of the Constitution in an impartial manner. In order to achieve this impartiality and develop equitable policies with regard to different groups of religion and belief existing within the constitutional order, the dialogue among the belief groups themselves as well as between those groups and the State should be always maintained. The Court shares the ECtHR's view to the effect that, even in the presence of strong indications suggesting that the parties will not be changing their positions, the State has to keep the lines of dialogue open especially in a dispute related to the field of belief. Indeed, this is proof of a properly functioning democracy.

(e) The State's Course of Action in Disputes concerning the Election of Leaders of Religious Communities

101. The State enjoys a wide margin of appreciation in its relations with religious communities, which is a particularly sensitive area. However, in a democratic society, the State cannot, in principle, interfere with how religious communities elect their spiritual leaders or how they administer themselves in relation to their religious affairs. That said, in the disputes emerging with regard to a religious community's election

of their leaders, which is recognised as an act of religious practice, the first challenge faced by the bodies wielding the public power concerns the determination of whether the said act of practice actually exists and what its status is. The second challenge is to prove that the *act of practice* has taken place within the framework of the principles of the religion or belief in question; in other words, to determine what the rules of the religion or the traditional rules of that community are.

102. There is no doubt that the election of religious leaders and a community life under a certain elected religious leader fall within the scope of the "*practice*" of a belief. On the other hand, the crucial point for the resolution of the application at hand is concentrated on the circumstances in which a new religious leader can be elected and what the election procedure will be.

103. Except for cases of a pressing social need that must be met, it is for the members of the religion or belief in question to decide how a religion or belief may be manifested in the best way and whether a certain behaviour is a requirement of the religion or belief that the applicant puts forth (see *Tuğba Arslan*, § 67; and *Esra Nur Özbey*, § 59). Nevertheless, it needs to be kept in mind that the teachings of most of the religions or beliefs which have a certain hierarchical structure may be interpreted in various forms in most of these religions or beliefs. The differences within the same belief are frequently observed among the members of a certain faith and furthermore, the judicial bodies are not sufficiently equipped to resolve on their own this type of differences in terms of the provisions on the freedom of religion. Besides, in this sensitive area, investigating which members of a certain religion or belief understand the orders of their common faith more accurately cannot be considered within the judicial activity and the trial authority (see *Tuğba Arslan*, § 70).

104. Similarly, questioning the comments of individuals of a certain religion or faith as regards their own religions and what "*the common religious practices*" are, is outside the relevance of the judicial bodies. A contrary approach would mean that the courts or the bodies which exercise the public power will determine, by replacing the conscientious evaluation of the individuals with their own value judgments, what

the applicants believe in about the practices of the religion or belief is "*appropriate*" (see *Tuğba Arslan*, § 72; and *Esra Nur Özbey*, § 60).

105. For these reasons, attempting to evaluate whether a behaviour is a requirement of a religion or belief, such as in the main points of dispute concerned in the present case as to whether electing a new patriarch was necessary, whether electing a co-patriarch or a *locum tenens* was possible, or what is the procedure to be followed in patriarchal elections, gives rise to the risk of making a decision on what the members of a religion or belief can do without violating their own faith; in other words, on what an individual needs to believe in and how he needs to behave (see *Tuğba Arslan*, § 71). Therefore, against such a risk, the courts, the administration and other bodies exercising the public power are expected to be cautious in making their assessments in this area.

106. The State enjoys a certain margin of appreciation in the assessment of the existence of the necessity and proportionality of an interference with the acts of practice of a religion or belief carried out by religious communities or groups of religious minority, as is the case in the present application. Yet, as with all other freedoms, such margin of appreciation shall be subject to the review of the Court in a way to cover the legal circumstance and the decisions concerning the application of rules of law so that the freedom of religion go beyond some shiny rhetoric (see *Esra Nur Özbey*, § 76; *Ahmet Sil*, § 36).

107. In cases such as the present one which involves conflicting interests, imposing an interference which might prejudice the essence of the freedom of religion with a view to protecting one of the interests is not acceptable solution in a democratic society (see *Ahmet Sil*, § 37). Furthermore, it should be borne in mind that a disproportionate interference with a certain act of religious practice -in the name of reconciling religious groups- would mean undermining pluralism and tolerance by the hand of the State. For this reason, a democratic society must always adopt approaches that are focused on the protection of rights: in case of problems stemming from the exercise of a right, they must be resolved via measures oriented at ensuring the peaceful enjoyment of the right instead of rendering that right completely non-exercisable.

(2) Application of Principles to the Present Case

108. In the case giving rise to the present application, the incumbent Patriarch of the Armenian community became incapacitated to fulfil his duties due to his illness. The Civilians argued that the Regulation ordered the election of a new patriarch to replace the incumbent Patriarch who could no longer fulfil his duties due to a continuing/permanent illness. The Spiritual clergy, on the other hand, maintained that a patriarch was elected for life and a new one could not be elected until the incumbent's death. Thus, they agreed with the administration's view to elect a patriarchal vicar-general.

109. It should be stated before proceeding with the examination of the instant application that the non-Muslim Armenians are within the scope of the provisions under the heading "*Protection of Minorities*" in Part I, Section III of the Peace Treaty of Lausanne. The general conclusion drawn from the provisions of Articles 37 to 45 of the Treaty of Lausanne is the institution of equality between Muslims and non-Muslim minorities. There is no provision in the Treaty of Lausanne with respect to the internal functioning of non-Muslim minority groups or, in this connection, the election of their religious leaders.

110. The procedure for election of the patriarchs to fill the seat of the Patriarch located within the territory of the Ottoman Empire was enacted into statute law with the 1863 Regulation. Naturally, the existence and the legal status of the Armenian community date farther back, to the time under the rule of Sultan Mehmed II (the Conqueror). It is understood that the provisions of the Regulation in question with regard to the patriarchal elections of the Armenian community laid the basis of their practices ever since.

111. As a rule, it is not for the Court to determine whether the term "*various reasons*" (*esbab-ı saire*) contained in the relevant provision of the Regulation that concerns the cases in which a new patriarch will be elected, which provides "*In cases where the patriarchal seat becomes vacant due to the death or resignation of the Patriarch or various reasons...*" (*Patriğin vefatı ve istifası cihetiyle veyahut esbab-ı saireye mebni patriklik makamının halli vukuunda...*), applies to the cases where the patriarch is unable to fulfil

his duties due to continuing illness. In cases where the interpretations made by the bodies exercising the public power and by the courts on any rule interferes with fundamental rights and freedoms, on the other hand, it is the Court's duty to review whether those interpretations justify the interferences with the fundamental rights and freedoms and whether they are arbitrary; in other words, whether the decisions delivered by such public authorities and judicial bodies within their margins of appreciation are compatible with Article 24 of the Constitution.

112. In order to ascertain whether the impugned interference met a pressing social need, whether it was proportionate to the legitimate aim pursued, and whether the justifications given by the public authorities were seen as *relevant and sufficient*, the Court will deliberate on the interference at issue by considering the case as a whole.

113. In the instant case, the Election Steering Committee set up by the Civilians, among whom the applicants were also present, notified the İstanbul Governor's Office that a new patriarch would be elected as the incumbent Patriarch was gravely ill. Around the same time the Spiritual clergy also notified the İstanbul Governor's Office that an election would be held for a co-patriarch of the Armenians of Turkey. The İstanbul Governor's Office rejected both requests on the grounds that the Patriarch was still alive, that he was not able to resign, that his capacity as a patriarch was still standing, that the legislation on the patriarchal elections did not contain any provisions about a potential termination of the function of the patriarch due to health issues or about a co-patriarch election. In other words, the administration limited the conditions calling for the election of a new patriarch to simply *death* and *resignation*, thereby refusing to interpret the wording "*various reasons*" (*esbab-ı saire*) in Article 2 of the Regulation.

114. Similarly, although the 3rd Chamber of the İstanbul Administrative Court based its ruling on the 1863 Regulation, it held that Mesrop Mutafyan, who had been elected as patriarch, was still alive but he could not resign and there was thus no vacancy in the seat of the patriarch. Consequently, it dismissed the case on these grounds without attempting to interpret the meaning of "*various reasons*" indicated in the Regulation.

115. There is no dispute as to the fact that the Patriarch has been absent from his duty since 2007 because of having developed an incurable disease. Upon closer inspection of the rule in the Regulation concerning under which circumstances a new patriarch is to be elected, the Court has noted that it provides for the election of a new patriarch in cases where the patriarchal seat becomes vacant and mentions the situations of death and resignation as examples of when the seat of the Patriarch becomes vacant. Instead of giving an exhaustive list of all the circumstances in which the patriarchal seat would become vacant, the Regulation stipulates the need for electing a new patriarch in other similar situations if the seat of the Patriarch becomes vacant for "*various reasons*".

116. Indeed, according to the information presented to the Court, although in the last century the patriarchal seat has in general became vacant upon death of the patriarchs, one of the patriarchs who were elected into this function, Zaven Der Yeğyayan, left his post in 1922 without even resigning and went to Varna. Following the vacation of the patriarchal seat in such manner, Bishop Kevork Aslanyan was elected as *locum tenens* in December 1922 and subsequently Archbishop Mesrop Naroyan was elected as patriarch in 1927.

117. Therefore, seeing that the aforementioned norm does not list one by one every situation which would render the patriarchal seat vacant but in fact affords the public authorities a wider margin of interpretation in practice by simply stating "*various reasons*", the Court cannot regard the decisions of the administration and the inferior courts in the present case as relevant and sufficient due to their failure to evaluate whether or not the Patriarch's illness fell within the scope of the various reasons envisaged by the Regulation.

118. The preamble of the said Regulation contains the indication that this Regulation was drafted by a commission composed of trustworthy members of the *Armenian Millet* (ethno-religious community) in consideration of the requirements of the modern civilisation and the times. According to the Regulation, the patriarch shall be elected from the Bishop class via a two-tier electoral system by the delegates designated by members of the community. In addition, the Regulation also contains more detailed acknowledgements as to the administration of the

community and the status of the patriarch. The sixth subparagraph of the preamble puts a special emphasis on the will of the Armenian community by holding that "*the main principles of the communal administration founded on the system of Representative of the Community are the principle of justice based on necessity and law and the principle of legality based on making decisions with the majority's will*".

119. Thus, the election of the patriarch, who assumes powers and duties that are highly important for the Armenian community, has not been able to take place in accordance with the will of the Armenian community for over ten years.

120. Article 28 of the Regulation under the heading "*Explanation as to the Spiritual Assembly*" enumerates the duties of the Spiritual Assembly, some of which are, generally, to manage religious affairs; to protect, support and strengthen the principles of faith, customs and traditions of the Armenian Church; to maintain the order of the churches, community schools and religious education. Therefore, to lead the Armenian community, to represent it, to elect a Patriarch or a deputy/acting Patriarch under any name or form are listed among the duties of the Spiritual Assembly.

121. Article 57 of the Regulation prescribes that the General Assembly shall be comprised of 140 delegates, namely 20 from the Spiritual clergy and 120 from the Civilians. In other words, the Spiritual group is represented at a ratio of 1/7 in the patriarchal elections. On the other hand, the number of delegates were reduced through directives applied to the patriarchal elections held in the Republican era. In accordance with the Election Directive of 1998, a total of 89 delegates casted votes, of whom 79 were Civilian and 10 were Spiritual delegates. The Court has observed that the ratio of Spiritual and Civilian delegates has been preserved in the patriarchal elections held in the Republican era, where the Civilians have a majority. Therefore, the fact that the Spiritual General Assembly elected a patriarchal vicar-general to exercise the powers of the patriarch and that this vicar-general used the powers of the patriarch in religious and administrative fields for quite a long period of time has resulted in the prioritisation of the will of the Spiritual clergy and disregard for the will of the Civilians.

122. In the present case, the administration asked the Spiritual group to elect a patriarchal vicar-general and, by using an authority that does not exist either in the legislation or in the community's traditions, they indeed elected a patriarchal vicar-general to exercise the incapacitated Patriarch's powers. It has not been proven that the Spiritual General Assembly had the authority to elect a vicar that would represent the will of the Armenian community.

123. There is, however, evidence to indicate otherwise. Also, the Spiritual clergy seem to have acknowledged their lack of such authority. In fact, following the patriarch's placement under guardianship by a court order on 8 March 2016, the Spiritual General Assembly declared the incapacitated incumbent Patriarch as "*patriarch emeritus*" (retired patriarch) and the patriarch's seat as vacant at the meeting held on 26 October 2016. At the meeting where he was also present, the Spiritual General Assembly of the Patriarchate decided to terminate Archbishop Aram Ateşyan's capacity as the patriarchal vicar-general along with all the powers and duties it entailed and notified the Ministry of Interior of this decision. Having convened upon the call of the *locum tenens*, delegates from the Armenian community institutions designated and distributed the duties of the Election Steering Committee that would follow up with the process for the Election of the 85th Patriarch, Lastly, the Election Steering Committee scheduled and notified the Ministry of Interior of the election days of the Spiritual delegates and Civilian delegates. To put differently, the Spiritual General Assembly, by itself, acknowledged the fact that the on-going practice did not have a place in the legislation or the traditions.

124. In the present case, it was clearly the Ministry of Interior that decided in which circumstances the Armenian patriarch could be elected. Nevertheless, except for the purpose of meeting a pressing social need, the State cannot make a decision on under which conditions or through which procedure a new religious leader may be elected. Indeed, as it has been previously indicated by the Court, it is exclusively for the members of a religion or belief to decide what is required by that religion or belief.

125. The judicial bodies or the bodies wielding the public power are not sufficiently equipped, in terms of the freedom of religion, to resolve

their own this type of differences among members of the same faith. Therefore, the State's duty is to take measures and initiatives to reconcile the interests of different groups.

126. In the present application, on the other hand, the administration did not inquire the avenue of resolving the issue through dialogue. In a more general sense, the State did not develop policies towards resolution of the issue in accordance with the Armenian customs and traditions as well as religious requirements by means of bringing together the Armenian opinion leaders, clergymen, intellectuals and other community groups. Instead, by imposing its own proposed solution, the administration determined what would be the appropriate course of action in terms of the Armenian community's acts of practice of their belief.

127. As a result of the rejection of the proposals which the Civilian group presented on the basis of the legislation and the community traditions and the Spiritual group's adoption of the administration's proposal, the Civilians were excluded and thereby deprived of the opportunity to participate in the administration of community affairs and the management of its assets.

128. The events taking place after the present application was lodged has demonstrated the administration's continuing desire to determine the conditions under which elections for a religious leader might take place or to be decisive with regard to the procedure of elections for a religious leader, in the absence of a provision of law and without relying on a convincing reason. The Court has observed that, currently, there is no longer any dispute within the Armenian community as to whether a new patriarch can be elected to replace the incumbent Patriarch who is unable to fulfil his duties due to illness.

129. Besides, even though all the previously-contentious officials of the Armenian community put into operation all the procedures without any dispute, the Ministry of Interior considered all processes regarding the election of a new patriarch, including the election of Karekin Bekçiyan as the *Locum Tenens*, to be legally null and void with *absolute nullity* (*mutlak butlan*).

130. As a requirement of the democratic social order, if there is an interference with the election for the leader of a religious community and, by extension, the internal affairs of a religious community, it must be proven that the interference corresponded to a pressing social need in a democratic society. Whereas, in the present case, the administration failed to demonstrate a pressing social need that overrides the spirit of Armenian traditions and the will of the Armenian community, which seem to have been concretised in the Regulation, in obstructing the election of a new patriarch.

131. Therefore, the interference with the applicants' right to freedom of religion by way of refusing the request to hold elections for the seat of the Patriarch of the Armenians of Turkey cannot be considered to be compatible with the requirements of a democratic society.

132. For these reasons, it must be held that there has been a violation of the freedom of religion safeguarded by Article 24 of the Constitution.

Mr. Serdar ÖZGÜLDÜR, Mr. Rıdvan GÜLEÇ, Mr. Recai AKYEL and Mr. Yıldız SEFERİNOĞLU expressed dissenting opinions in this respect.

3. Application of Article 50 of Code no. 6216

133. Article 50 §§ 1 and 2 of the Law on the Establishment and Rules of Procedures of the Constitutional Court (Law no. 6216, 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."

134. The applicants only requested the Court to find a violation.

135. The Court has arrived at the conclusion that there has been a violation of the applicants' freedom of religion under Article 24 of the Constitution due to the rejection of their request to elect the Patriarch of the Armenians of Turkey.

136. The total court of expense of TRY 2,920.60 including the court fee of TRY 445.60 and counsel fee of 2,475.00, which is calculated over the documents in the case file, must be reimbursed jointly to the applicants.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 22 May 2019:

A. That the alleged violation of the freedom of religion be DECLARED ADMISSIBLE;

B. By MAJORITY and by dissenting opinions of Mr. Serdar ÖZGÜLDÜR, Mr. Rıdvan GÜLEÇ, Mr. Recai AKYEL and Mr. Yıldız SEFERİNOĞLU, that the freedom of religion safeguarded by Article 24 of the Constitution was VIOLATED;

C. That the total court expense of TRY 2,920.60 including the court fee of TRY 445.60 and counsel fee of TRY 2,475.00 be REIMBURSED JOINTLY TO THE APPLICANTS;

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

E. That a copy of the judgment be SENT to the Ministry of Interior; and

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

DISSENTING OPINION OF JUSTICES SERDAR ÖZGÜLDÜR AND RIDVAN GÜLEÇ

1. Articles 37-45 of the Peace Treaty of Lausanne dated 24 July 1923 contain comprehensive stipulations, under Section III regarding the "Protection of Minorities", on the status and rights of the non-Muslim minorities in the Republic of Turkey and the State's obligations thereto. In this scope, Article 42 provides "... The Turkish Government undertakes to grant full protection to the churches, synagogues, cemeteries, **and other religious establishments** of the above-mentioned minorities. **All facilities** and authorisation **will be granted** to the pious foundations, and **to the religious and charitable institutions** of the said minorities at present existing in Turkey, and the Turkish Government will not refuse, for the formation of new religious and charitable institutions, any of the necessary facilities which are guaranteed to other private institutions of that nature." (see, for the version of the text in contemporary Turkish, *Lozan Barış Konferansı, Tutanaklar-Belgeler*, Trans. Seha L. MERAY, Vol. 8, İstanbul 2001, p. 12).

2. During the rule of the Ottoman Empire, questions regarding the Armenian community's religious status, needs and election of the Armenian Patriarch were governed by the 1863 Regulation on the Armenian Community (*Nizamnâme-i Millet-i Ermeniyan*). Regard being had to the Compendium of the Republic of Turkey, the Regulation in question does not seem to be in effect or listed as one of the regulations in force.

3. From the explicit wording in the "1961 Directive on Election of the Patriarch" (composed of 30 articles in total) which is acknowledged to be appended to the Council of Ministers decision no. 5/1654 dated 18 September 1961, which read "... The election to be held for the vacant seat of the Armenian Patriarch of İstanbul, **until a new law and regulation is enacted and for one time only and without any legal effect to the future**, shall be carried out through the intermediary of the Election Committee comprised of the clergy and civilians, among candidates who are paternally Turkish ...", it is understood that this directive performed its one-time duty and is no longer in force, either.

4. In the present case, two separate requests were submitted with the administration on the ground that the incumbent Armenian Patriarch was no longer able to effectively fulfil his duties due to his medical condition: the first by the *Locum Tenens* and the Chairman of the Spiritual Assembly (the Spiritual group); and the second by some members of the Armenian community who described themselves as the "Election Steering Committee for the Election of the Patriarch of the Armenians of Turkey" (the Civilian group). While the drafters of the first petition indicated that the incumbent Patriarch would be recognised as the Patriarch until his last breath and thus requested to elect a "Co-patriarch", the second petition directly concerned a request for the election of a new Patriarch altogether. The administration (İstanbul Governor's Office) joined these two requests together, disapproved the Spiritual group's proposal to elect a Co-patriarch, and declared that only an election for a "Patriarchal Vicar-general" could be held. Upon this notification, the Spiritual General Assembly of the Armenians of Turkey informed the administration of the name of the Patriarchal Vicar-general whom they had designated via an election. With the decision dated 18 August 2010 of the Council of Ministers, the administration granted that person leave to wear religious garments outside the place of worship and religious rituals as long as he occupied this function. In the absence of a response to the Civilian group's request, the applicants filed an action for annulment of this implicit rejection before the administrative justice. The administrative court dismissed the case by finding no contravention of law in the administration's act which found "in favour of holding an election for a Patriarchal Vicar-general" on the grounds that the diseased Patriarch had not died or resigned, that the seat of the Patriarch had not become vacant, and that it would not be possible to elect a new Patriarch until his death. Consequently, this decision was found to be in line with the law and upheld by the Supreme Administrative Court.

5. As one can see, there is no applicable legislative provision concerning the Election of the Patriarch of the Armenians Community, nor is there any explicit stipulation in the Treaty of Lausanne in this respect. Nonetheless, Article 42 of the above-mentioned Treaty of Lausanne places the Turkish Government (the administration) under

an obligation to grant all facilities to the religious institutions of the Armenian community (which includes the Patriarchate) and to protect these religious institutions. Under these circumstances, being the highest norm concerning the Armenian minority, the provisions of this Treaty must be applied as a priority.

6. Even though Article 42 of the Treaty does not contain a specific provision with regard to the Election of the Patriarch, there have been no problems in patriarchal elections since the foundation of the Republic thanks to the mutually good relations between the Armenian Community and the Government of the Republic of Turkey and the Armenian Community has complied with the procedures set out under the Directives by the administration during various election processes held since 1961. Even when the 1863 Regulation and the 1961 Directive were not in force, the administration performed its obligation to "protect and facilitate" under Article 42 of the Treaty of Lausanne by means of resorting to both of those texts at times and introducing problem-solving arrangements. As a consequence of the ancient solidarity and cooperation between the State and the Armenian Community, the gap which resulted from the diseased Patriarch's inability to fulfil his duties was filled by the formula deemed appropriate by the administration involving the election of a "Patriarchal Vicar-general" (the administrative act), which was also established to be lawful via decisions of the inferior courts.

7. The formula set forth by the administration in accordance with Article 42 of the Treaty of Lausanne was not challenged by the "Spiritual group" composed of the *Locum Tenens* of the Armenian Community and the Chairman of the Spiritual Assembly. Thanks to this methodology based on the joint will of the parties, an election was held for a Patriarchal Vicar-general and the person elected was granted leave to wear religious garments outside the place of worship and religious rites. On the other hand, there is no legal basis for the applicants -comprised of certain individuals from the Armenian Community who call themselves the "Election Steering Committee for the Election of the Patriarch of the Armenians of Turkey" (the Civilian group)- to take it upon themselves to organise this process and to make requests of the

administration. In turn, the administration is not under an obligation to take them into account in terms of the act it decided to issue (i.e. the proposed formula). The Government of the Republic of Turkey (the administration), pursuant to the duty and obligation placed thereupon under Article 42 of the Treaty of Lausanne, enjoys full discretion in the determination of whom it will recognise as its addressee with regard to the Armenian Patriarchate and how it will achieve a constructive cooperation. Indeed, the exercise of this discretionary power was reviewed and found to be lawful by the inferior courts with relevant and sufficient reasons. It is not possible to qualify the impugned administrative act as an interference with the freedom of religion as it is, by nature, a continuation of the administration's approach towards the elections for the Armenian Patriarchate which has taken place in nearly the last century since the declaration of the Republic. The allegations raised under the individual application at hand are matters to be examined at the level of appellate legal remedies. Since there is no manifest error of discretion or arbitrariness, there is no contravention of law from the aspect of the right to a reasoned decision, either.

For these reasons, seeing no reason to find a violation of the freedom of religion, we disagree with the majority's view on the violation of Article 24 of the Constitution.

CONCURRING OPINION OF JUSTICE M. EMİN KUZ

The rejection of the applicants' request for holding a patriarchal election has been found to be in violation of the freedom of religion.

Though concurring with the finding of a violation, I agree with the view to the effect that the impugned interference was not prescribed by law for different reasons.

Under the examination of legality, the Court has held that in order to accept that an interference made within the scope of Article 24 of the Constitution meets the requirement of being prescribed by law, it is compulsory that the intervention has a legal basis; that this necessitates the formal existence of a law; that neither the applicant nor the Ministry contested the validity of the relevant Regulation and Directive; and that, even though the first-instance court dismissed the case by interpreting the relevant article of the Regulation, there was no accessible, foreseeable and clearly precise provision of law within the meaning of Article 13 of the Constitution. Consequently, the Court has concluded that the interference did not have a legal basis (§§ 71-81).

As indicated in the judgment, when there is an interference with a fundamental right or freedom, it should be ascertained whether there is a provision of law that authorises the interference. The same principle applies to an interference within the scope of Article 24 of the Constitution.

It is also known, on the other hand, that the legality 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 (§72).

Although the majority has indicated that neither the applicant nor the Ministry objected to the validity of the Regulation and that the first-instance court dismissed the case by interpreting the relevant article of the Regulation, it has been concluded that the piece of legislation in question was not an "accessible, foreseeable and clearly precise provision

of law within the meaning of Article 13 of the Constitution -capable of preventing arbitrary acts ... and allowing individuals to know the law-".

As it is well known, the laws and regulations from the Ottoman-era legislation which are still in force are included with the beginning of Volume I of the Compendium of Laws in Force -published by the Prime Ministry- and it is indicated that the validity thereof was established by the Project Management Board which had been founded by the decision no. 8/3468 dated 14 August 1981 of the Council of Ministers (*Yürürlükteki Kanunlar Külliyatı*, Vol. I, p. IX and pp. 1-126/3).

This Regulation is neither listed under the heading "The Laws and Regulations from the Ottoman Legislation which are Still in Force" in the beginning of the Compendium of Laws in Force, nor is there any information to indicate that this Regulation was repealed or annulled by a tribunal.

It is beyond doubt that the aforementioned acknowledgement by the Project Management Board is simply an administrative act and it is possible for the courts to recognise the Regulation, or certain provisions thereof, to be still in effect and take it as a basis for their decisions.

It is clear that the 1863 Regulation which contains certain provisions pertaining to patriarchal elections, the Patriarchate bodies and their functioning had the effect of law within the Ottoman regime at the time. It is also clear that, despite not being named in the Compendium as one of the regulations that are still in force and has the effect of law, certain provisions thereof referred to in the judgment (§§ 35-43) are still in force as long as they do not contradict the legal order of the Republic of Turkey and have not been repealed explicitly or implicitly. Indeed, as noted in the judgment, the inferior courts dismissed the applicants' case by relying on the applicable article of the Regulation.

In other words, the applicants argued that a patriarchal election had to be held when the seat of the Patriarch becomes vacant due to the Patriarch's death or resignation or other "various reasons" according to Article 2 of the Regulation and they requested the launch of the election procedure as the incumbent Patriarch's condition fell within the scope of

those "various reasons". In turn, when the applicants filed an action on the same grounds, the 3rd Chamber of the İstanbul Administrative Court dismissed the case by interpreting the same provision and finally the Supreme Administrative Court upheld this ruling.

It is thus understood that the interference has stemmed not from the absence of a provision of law which was accessible, foreseeable and clearly precise from the standpoint of the applicants but, in fact, from the interpretation of that provision by the administration and the inferior courts.

There is no doubt that, as well as a lack of the guarantees required for satisfaction of the "legality" criterion in the provisions which constitute the basis of the interference, not enforcing or rendering ineffective the legislation will also violate constitutional rights.

Despite the fact that many of the articles in the said Regulation are incompatible with the legal order of the Republic of Turkey and have been implicitly repealed, I am of the opinion that the second article thereof relating to the patriarchal elections -an undisputed requirement of the freedom of religion which is also guaranteed by the Treaty of Lausanne- has the effect of law and is still in force. Therefore, I agree with the eventual finding of a violation from the aspect of "legality" not because the aforementioned provisions constituting the basis of the interference were not accessible, foreseeable and clearly precise provisions of law within the meaning of Article 13 of the Constitution but because the administrative and judicial decisions causing the interference rendered the provision ineffective.

DISSENTING OPINION OF JUSTICES RECAİ AKYEL AND YILDIZ SEFERİNOĞLU

The application concerns an alleged violation of the freedom of religion due to the rejection of the applicant's request for holding an Election of the Patriarch of the Armenians of Turkey.

After the patriarchal seat became vacant upon the death of Patriarch of the Armenians of Turkey Karakin Kazancıyan on 10 March 1998, Archbishop Mesrop Mutafyan was elected on 4 October 1998 into the seat within the framework of the rules set out by the "Directive on Election of the Patriarch", which had been put into force via a decree of the Council of Ministers in 1961.

As from the summer of 2007 certain changes were observed in the behaviour of Patriarch Mesrop Mutafyan and, after medical examinations, various health care establishments expressed that Patriarch Mesrop Mutafyan was too ill to fulfil his duties.

In late 2009 two separate petitions were submitted with the İstanbul Governor's Office for holding elections for a new patriarch due to the incumbent Patriarch's inability to fulfil his duties.

The first petition, dated 3 December 2009, was signed by Archbishop Şahan Sıvacıyan, *Locum Tenens*, and Aram Ateşyan, Chairman of the Spiritual Assembly (the Spiritual group). The Spiritual group indicated that Patriarch Mesrop had been unable to fulfil his duties due to health issues and that he would be recognised as the Patriarch until his last breath as a manifestation of the respect for ancient customs and traditions. For this reason, they proposed to hold elections for a new spiritual leader under the name of "Co-patriarch of the Armenians of Turkey" to exercise full power the patriarch and, in case of the Patriarch's demise, to continue his service in the capacity of "Patriarch of the Armenians of Turkey".

On the other hand, another group, which included the applicants, formed the "Election Steering Committee for the Election of the Patriarch of the Armenians of Turkey" (the Civilian group) on 9 December 2009. On 14 January 2010 the Civilian group applied to the Ministry of Interior

through the channel of the İstanbul Governor's Office to request elections to be held for a new patriarch. This petition bore the signatures of applicants Levon Berç Kuzukoğlu and Ohannes Garbis Balmumciyan in their capacities as the chair and the secretary of the committee, respectively. The Civilians stated that Patriarch Mutafyan was too ill to fulfil his duties, which meant that the seat of the Patriarch had become *de facto* vacant. The Civilians argued that Article 2 of the 1863 Regulation (*Nizamname-i Milleti Ermeniyan*), which constituted the source of the procedures and principles followed in patriarchal elections, ordered the election of a new Patriarch under those circumstances. The names of members of the Election Steering Committee -formed by the Civilians- and the Directive on Patriarchal Election adopted by the Election Steering Committee were submitted with the İstanbul Governor's Office.

In its letter dated 29 June 2010, the İstanbul Governor's Office evaluated jointly the two petitions submitted by the Spiritual and Civilian groups. Despite the separate requests of the Civilian and Spiritual groups, the Governor's Office set forth a new proposal. Having examined the petitions submitted therewith and the existing legislation in this field, the Governor's Office saw no legal basis to either hold elections for a new Patriarch or form an election steering committee to elect a Co-patriarch because the seat of the Patriarch had not yet become vacant.

In conclusion, since new elections could not be held while the seat of the Patriarch was still occupied and the Co-patriarch position was not prescribed by the legislation, the İstanbul Governor's Office decided that the competent bodies of the Patriarchate could elect a "Patriarchal Vicar-general" to perform the religious and charitable affairs of the Patriarchate and the community. Thereupon, Archbishop Arem Ateşyan was elected the "patriarchal vicar-general" by the Spiritual General Assembly of the Armenians of Turkey on 6 July 2010. On 18 August 2010 the Council of Ministers granted Arem Ateşyan permission to wear religious garments outside the place of worship and religious rituals as long as he occupied this function.

Until this incident, there had been no other case of the Patriarch's inability to fulfil his duties due to illness. Therefore, it must be

acknowledged that the present case involves a particular problem. In view of the events as a whole, it is clear that the İstanbul Governor's Office pursued the aim of resolving an existing dispute within the Armenian Community of Turkey with regard to patriarchal elections and preventing a potential conflict. The compromise proposed by the İstanbul Governor's Office reflects the views of both parties.

There is no doubt as to the fact that the position of co-patriarch does not exist in the traditions of the Armenian community. On the other hand, it has not been established, either, whether there is a rule or practice which envisages the incumbent patriarch to be regarded as resigned from duty once he becomes unable to fulfil his patriarchal duties. In our view, there is no contravention of the existing directives or community traditions in the proposed solution of the İstanbul Governor's Office, which thought that it would be more appropriate for a "patriarchal vicar-general" to be assigned as a temporary solution until a new patriarch could be elected. It should also be kept in mind that the proposed solution at issue is a temporary practice. For these reasons, we cannot agree with the majority's finding of a violation.

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

AYŞE ÇELİK

(Application no. 2017/36722)

9 May 2019

On 9 May 2019, the Second Section of the Constitutional Court found a violation of the freedom of expression safeguarded by Article 26 of the Constitution in the individual application lodged by *Ayşe Çelik* (no. 2017/36722).

THE FACTS

[8-22] The applicant previously serving as a contract teacher joined a national-scale live TV show by phone and made certain explanations by primarily asking "Are you aware of the events taking place in the eastern and the south-eastern regions of Turkey?" during a period when the violent acts known to public as "trench events" were taking place.

A criminal case was brought against her for allegedly making terrorist propaganda on account of her expressions during the TV show. The incumbent assize court hearing the case sentenced her to 1 year and 3 months' imprisonment. She appealed against the conviction decision before the regional court of appeal, which ultimately dismissed the case on the merits with final effect.

V. EXAMINATION AND GROUNDS

23. The Constitutional Court, at its session of 9 May 2019, examined the application and decided as follows:

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

24. The applicant maintained that the impugned expressions underlying her conviction were not stirring up and justifying violence or hatred but were on the contrary of peaceful nature. She further noted that the first instance court drew inferences from the underlying motive of her expressing the impugned statements, whereas her real intent was to draw attention to unjust treatments in the region. In this sense, the applicant maintained that she had been convicted of disseminating terrorist propaganda for the grounds that were not relevant and sufficient and accordingly alleged that there had been violations of the freedom of expression, the right to a fair trial, as well as of the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*).

25. She further maintained that her requests for the hearing of B.Ö., TV show presenter, before the court as the most important witness of her case, and for the display of the impugned TV show in the presence of all parties had been rejected without any justified and legal ground, which was in breach of the right to adversarial proceedings.

26. The Ministry, in its observations, stated that the PKK, which was undoubtedly considered as a terrorist organisation both within the country and abroad, had been intensively performing armed terrorist activities since 1984; and that such activities were notably intensified by June, 2015. Given the circumstances prevailing in the country at the time when the impugned statements were expressed by the applicant, the release of these statements during a TV show broadcasted on a national TV channel, as well as also the extent of threat posed by the terrorist organisation, PKK, generally against the public security, the Ministry noted that the applicant's punishment corresponded to a pressing social need. According to the Ministry, the applicant's expressions caused a severe public disturbance, and her preference not to talk about the terrorist acts performed and trenches dug at the relevant cities during her statements was also taken into consideration in her conviction.

27. The Ministry also indicated that the decision on the applicant's conviction contained relevant and sufficient grounds; and that the applicant was imposed the lowest penalty prescribed in the relevant provision, and also the grounds of discretionary mitigation were applied in her case. It accordingly concluded that the interference with the applicant's freedom of expression had been proportionate.

28. The applicant, in her counter-statements, reiterated that she had not justified or incited violence or hatred through her impugned expressions; that she had merely wished to stress, as a citizen residing in the said region and being subjected to an unjust treatment, that the people in that region had been facing difficulties due to the clashes taking place and curfews declared in the region; and that she had not made mention of the State or any organisation as the cause of this unfavourable situation.

B. The Court's Assessment

29. The Constitutional Court is not bound by the legal qualification of the facts by the applicants and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). In this sense, it has been considered that the allegation that the applicant was convicted for disseminating terrorist propaganda through an unjust and unfounded decision must be examined from the standpoint of the freedom of expression.

30. Article 26 of the Constitution, titled "*Freedom of expression and dissemination of thought*", insofar as relevant, provides 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..."*

1. Admissibility

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

2. Merits

a. Existence of an Interference

32. The Court has considered that the applicant's conviction and being sentenced to imprisonment for disseminating terrorist propaganda through her expressions during a TV show constituted an interference with her freedom of expression.

b. Whether the Interference Constituted a Violation

33. 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 … the principle of proportionality."*

34. 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 Article 26 § 2 of the Constitution and not being contrary to the requirements of a democratic society as well as the proportionality principle.

i. Lawfulness

35. Article 7 § 2 of the Anti-Terror Law no. 3713 was found to satisfy the requirement of lawfulness.

ii. Legitimate Aim

36. It has been concluded that the decision whereby the applicant was sentenced was a part of the measures intended for maintaining public order within the scope of the fight against terrorist organisations and terrorism and thereby pursued a legitimate aim.

iii. Compliance with the Requirements of a Democratic Society

(1) General Principles

37. Any interference with the fundamental rights and freedoms may be considered to be *compatible* with the requirements of a democratic society only when it meets a pressing social need and is proportionate (see *Bekir Çoşkun* [Plenary], no. 2014/12151, 4 June 2015, §§ 53-55; *Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, §§ 70-72; and the Court's judgment no. E.2007/4 K.2007/81, 18 October 2007). Any measure constituting an interference may be considered to meet a pressing social need provided that it is suitable for achieving the pursued aim and appears to be the

last resort likely to be used as well as to be a less severe measure likely to be applied (see, *mutatis mutandis*, *Bekir Coşkun*, § 51; *Mehmet Ali Aydın*, § 68; and *Tansel Çölaşan*, no. 2014/6128, 7 July 2015, § 51). Proportionality means that a fair balance be struck between the rights and interests of the given person and the public interests or, if the interference is intended for protecting the others' rights, the rights and freedoms of other individuals (see, *mutatis mutandis*, *Bekir Coşkun*, § 57; *Tansel Çölaşan*, § 46, 49 and 50; and *Hakan Yiğit*, no. 2015/3378, 5 July 2017, §§ 59 and 68).

(2) Margin of Appreciation Afforded to the Authorities Wielding Public Power and Ground for Interference

38. The inferior courts should strike a fair balance between the individuals' right to express their opinions through freedom of expression and the legitimate aims set forth in Article 26 § 2 of the Constitution. It must be emphasised that the existence of legitimate aims in a given case does not set aside any right. What is important is to strike a balance between the legitimate aim and the relevant right by the circumstances of the case (see *Bekir Coşkun*, § 44, 47, 48; and *Hakan Yiğit*, §§ 58, 61, 66).

39. 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. However, this margin of appreciation is subject to the Constitutional Court's review. Therefore, the Court is the authority of last instance in adjudicating whether an impugned *interference* is compatible with the freedom of expression (see, among many other judgments, *Ali Kıdık*, no. 2014/5552, 26 October 2017, § 41; and *Kemal Kılıçdaroğlu*, no. 2014/1577, 25 October 2017, § 57).

40. In conducting this review, the Court does not substitute itself for the inferior courts but reviews 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. The Court will assess an impugned interference in consideration of the case as a whole with a view to ascertaining whether the interference was compatible with the requirements of a democratic society and whether the grounds relied on by public authorities to justify the interference were *relevant* and *sufficient*. Interferences with the freedom of expression without any justification or

with any justification failing to fulfil the criteria set by the Court would be in breach of Article 26 of the Constitution (see *Kemal Kılıçdaroğlu*, § 58; *Bekir Coşkun*, § 56; and *Tansel Çölaşan*, § 56).

(3) Application of Principles to the Present Case

41. The Court has taken into consideration the difficulties associated with the fight against terrorism, along with the particular circumstances of the present case.

42. The applicant, attending a famous TV show as an audience by phone at a time when extensive clashes with the terrorist organisation were taking place, made certain statements starting with the question *"Are you aware of the events taking place in the eastern and south-eastern regions of Turkey?"*. The question to be resolved by the Court is whether the opinions expressed by the applicant could be considered as an incitement to the commission of a terrorist offence.

43. Terrorist organisations 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. However, it should be primarily borne in mind that in the Turkish law, not expression of every kind of opinion associated with terrorism but merely the dissemination of terrorist propaganda in a way that would justify, praise or incite the terrorist organisations' methods involving coercion, violence or threat is considered to constitute an offence.

44. 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 they are associated with terrorism or a terrorist organisation– 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 social and political environment or socio-economic 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, as previously noted by the Constitutional Court (see *Abdullah Öcalan* [Plenary], no. 2013/409, 25 June 2014, § 95).

45. 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).

46. 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). 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 indicated:

> *"95. When drafting this provision, the CODEXTER bore in mind the opinions of the Parliamentary Assembly (Opinion No. 255 (2005), paragraph 3.vii and following), and of the Commissioner for Human Rights of the Council of Europe (document BcommDH (2005) 1, paragraph 30 in fine) which suggested that such a provision could cover "the dissemination of messages praising the perpetrator of an attack, the denigration of victims, calls for funding for terrorist organisations or other similar behaviour" which could constitute indirect provocation to terrorist violence.*

96. This provision uses a generic formula as opposed to a more casuisticone and requires Parties to criminalise the distributing or otherwise making available of a message to the public advocating terrorist offences. Whether this is done directly or indirectly is irrelevant for the application of this provision.

97. Direct provocation does not raise any particular problems in so far as it is already a criminal offence, in one form or another, in most legal systems. The aim of making indirect provocation a criminal offence is to remedy the existing lacunae in international law or action by adding provisions in this area.

98. The provision allows Parties a certain amount of discretion with respect to the definition of the offence and its implementation. For instance, presenting a terrorist offence as necessary and justified may constitute the offence of indirect incitement.

99. However, its application requires that two conditions be met: first, there has to be a specific intent to incite the commission of a terrorist offence, which is supplemented with the requirements in paragraph 2 (see below) that provocation be committed unlawfully and intentionally.

100. Second, the result of such an act must be to cause a danger that such an offence might be committed. When considering whether such danger is caused, the nature of the author and of the addressee of the message, as well as the context in which the offence is committed shall be taken into account in the sense established by the case-law of the European Court of Human Rights. The significance and the credible nature of the danger should be considered when applying this provision in accordance with the requirements of domestic law.

…

104. In order to make a message available to the public, a variety of means and techniques may be used. For instance, printed publications or speeches delivered at places accessible to others, the use of mass media or electronic facilities, in particular the Internet, which provides for the dissemination of messages by e-mail or for possibilities such as the exchange of materials in chat rooms, newsgroups or discussion fora."

47. The Court is of the opinion that there is a difference between the propaganda of terrorism *in abstracto* and the materialisation of provocation as a result of the propaganda. It is clear that in case of provocation at the end of a terrorist propaganda, the offender will be punished for acting as an accomplice or for any other corresponding act prescribed in the relevant law. On the other hand, considering the act of disseminating propaganda as an offence posing a danger *in abstracto* will probably have create 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 of disseminating 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.

48. In the present case, the first instance court acknowledged that the applicant had valued and justified the violence acts of a terrorist organisation, namely the PKK, led the people to sympathise for this terrorist organisation and gave the impression that the operations conducted by the security forces against terrorists had been indeed conducted against civilians and had given rise to the death of babies and children. Therefore, the first instance court considered that the applicant's expressions amounted to propaganda in favour of the terrorist organisation.

49. On the dates when the impugned statements were expressed, a large number of security forces were martyred and many terrorists were killed due to a long-standing conflict taking place between the security forces and PKK terrorists who attempted to declare self-governance in 11 cities and dug trenches in these cities to that end. Besides, it was also maintained that there were several civilian deaths due to the impugned incidents; however, these allegations were not confirmed by the public authorities. It has been also taken into consideration that hundreds of people were forced to emigrate from the region where the conflicts were taking place.

50. 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 amounts to an incitement to violence, the context of the impugned expressions, the identity of the person making the statement, the time and possible effects of the statement and all other expressions within the statement must be also taken into account (see, for a judgment concerning the seizure of a book allegedly disseminating terrorist propaganda, *Abdullah Öcalan*, §§ 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).

51. Regard being had to the context of the applicant's expressions and the background of the incidents taking place at the relevant time, the Court is not of the same opinion with the first instance court, which convicted the applicant. In the impugned statement, the applicant aimed at raising public awareness on the deaths occurring in the eastern and south-eastern parts of Turkey and requested the celebrities attending the TV show not to remain indifferent to those events. She further maintained that the events taking place in the regions with armed clashes had been conveyed to the public differently; and that there had been no public awareness as to the difficulties experienced by women and children affected by the clashes. She indeed made a call for raising public awareness in order for stopping the clashes whatever the reasons thereof. As a teacher, the applicant stated that it was unacceptable to see persons delighted by the deaths taking place due to the armed clashes; that the children in the region could not sleep due to the sounds of bullets and bombs, and the babies also suffered therefrom; and that they could not meet their basic needs.

52. Freedom of expression secures the right to freely express, explain, defend, convey to others, and disseminate thoughts and convictions without being condemned. Expressing the ideas including those opposed to the majority by any means, gaining stakeholders for the ideas expressed, materializing the ideas, and convincing others on this matter, as well as showing tolerance to these endeavours are amongst the pluralist democracy's requirements. Therefore, freedom of expression

is of vital importance for the functioning of democracy. Accordingly, ensuring social and political pluralism depends on the ability to freely and peacefully express every kind of thoughts and ideas (see *Bekir Coşkun*, §§ 33-35; *Mehmet Ali Aydın*, §§ 42, 43; and *Tansel Çölaşan*, §§ 35-38).

53. In this context, it should be borne in mind that freedom of expression is of vital importance for, and constitutes the core values of, a democratic society. Democracy is founded on the ability to solve the problems in a public debate (see *Ferhat Üstündağ*, no. 2014/15428, 17 July 2018, § 43). Interferences with the exercise of freedom of expression, other than those inciting violence or amounting to denial of democratic principles, undermine and imperil democracy. Even though some of the opinions and thoughts expressed are offending, disturbing and unacceptable for the bodies exercising public power, the thoughts opposing the established order and criticising the acts performed by bodies exercising public power should be freely expressed in a democratic society governed by rule of law (see *Mehmet Ali Aydın*, § 69).

54. Article 26 § 2 of the Constitution allows, to the minimum extent, for the restriction of freedom of expression in cases of public interest (see, among many other judgments, *Ali Kıdık*, §§ 53, 77; and *Abdullah Öcalan*, §§ 99, 108). In the present case, the applicant informed the public of the impugned events -called as trench events lasting for 10 months and leading to mass migration as well as to death and injury of many persons- from her own point of view. She accordingly criticised the long-standing conflicts. She indeed made a call for creating a public opinion to ensure the termination of the armed conflicts taking place for any reason whatsoever. There is no hesitation that the impugned expressions are concerning the matters of public interest. Besides, even if they are considered to be in the form of a criticism against the public authorities, it must be recalled that the acceptable level of criticism against the public authorities is much wider than that of an individual as they exercise public power. It must be always taken into consideration that in a democratic system, the acts or omissions of the public authorities are subject to strict scrutiny not only by legislative and judicial bodies but also by the public (see *Bekir Coşkun*, § 66; and *Ergün Poyraz (2)*, no. 2013/8503, 27 October 2015, § 69).

55. It appears that in convicting the applicant, the first instance court attached great importance to the consideration that she was able to reach masses through TV channel during the period when the armed clashes were still going on. However, it must be borne in mind that as previously emphasised on several occasions by the Court, Article 26 of the Constitution safeguards not only the contents of the expressed ideas and information, but also the way they are expressed (see, *mutatis mutandis*, *Fatih Taş* [Plenary], no. 2013/1461, 12 November 2014, § 105; and *İrfan Sancı*, no. 2014/20168, 26 October 2017, § 56).

56. As regards the expressions similar to those in the present case, the main issue to be taken into consideration is whether the impugned expressions contained hatred and hostility. Any explanation as to the social or personal problems faced during the legitimate struggle by the State against a terrorist organisation –even if they are completely subjective considerations– cannot be considered to amount to an expression of thoughts, which *per se* enable to raise awareness of, or encourage, those who are prone to commit terrorist offences and which increase the risk of commission of such offences.

57. The Court has not viewed the applicant's expressions as a praise of, or a support for, terrorism or as a direct or indirect incitement to violence, armed resistance or uprising. In the particular circumstances of the present case, the applicant was not considered, due to her expressions, to have praised the members of the terrorist organization clashing with the security forces during the trench events or the terrorist organisation itself, to have particularly inspired hatred against the security forces directly involved in the clashes, or to have encouraged recourse to violence (see, *mutatis mutandis*, *Abdullah Öcalan*, §§ 105-108; and *Mehmet Ali Aydın*, §§ 81-84).

58. In discussing the legitimacy of the impugned interference, the Court cannot disregard the sufferings of the victims of terrorist acts. Publicly defending or justifying terrorist organisations, terrorist offences or a person committing such offences also impairs the dignity of, despises, or insults, the victims of terrorist acts and their relatives. However, in the present case, the applicant's expressions were not found to have any aspect insulting the victims.

59. Consequently, it has been considered that through her speech, the applicant did not aim at increasing political or social efficiency of a terrorist organization, ensuring her voice to reach the masses, or fostering public opinion that the organization was an insuperable power that was capable of achieving its ultimate goal. Nor did she intend to eliminate or suppress individuals and institutions that were against the organizational struggle, to increase public sympathy, as well as to ensure active public support, for the organisation.

60. Accordingly, the impugned speech, which she spontaneously delivered on a live TV show at the time when the said events were still going on, should have been more tolerated. In consideration of the abovementioned information, it has been concluded that the applicant's conviction did not meet *a pressing social need*.

61. The Court has accordingly considered that the impugned interference with the applicant's freedom of expression was incompatible with the requirements of a democratic society. It has accordingly found a violation of Article 26 of the Constitution.

62. The Court has found it not necessary to make a separate examination as to the alleged violation of the principle of adversarial proceedings, for finding a violation of the freedom of expression.

3. Application of Article 50 of Code no. 6216

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

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

64. 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 (for further explanations, see *Mehmet Doğan*, §§ 57-60).

65. The applicant requested the Court to find a violation as well as to order a retrial. She also claimed 100,000 Turkish liras ("TRY") in compensation for non-pecuniary damage.

66. It has been concluded that the applicant's conviction did not meet *a pressing social need* and was therefore incompatible with the requirements of a democratic society; and that her freedom of expression was violated. Therefore, it has been observed that the said violation resulted from a court decision.

67. In this case, there is a legal interest in conducting a retrial in order to redress the consequences of the violation of the freedom of expression. The retrial to be conducted accordingly is intended for the redress of the established violation and its consequences pursuant to Article 50 § 2 of Code no. 6216. In this sense, the step to be taken by inferior courts is to revoke the court decision giving rise to the violation and to issue a fresh decision in line with the violation judgment. Therefore, a copy of this judgment must be sent to the 2nd Chamber of the Bakırköy Assize Court for a retrial.

68. A net amount of TRY 5,500 must be paid to the applicant in compensation for non-pecuniary damage which could not be redressed by merely the finding of a violation.

69. The total court expense of TRY 2,732.50 including the court fee of TRY 257,50 and counsel fee of TRY 2,475, which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 9 May 2019 that

A. The alleged violation of the freedom of expression be DECLARED ADMISSIBLE;

B. The freedom of expression safeguarded by Article 26 § 1 of the Constitution was VIOLATED;

C. A copy of the judgment be SENT to the 2nd Chamber of the Bakırköy Assize Court for a retrial with a view to redressing the consequences of the violation (E.2016/139, K.2017/150);

D. A net amount of TRY 5,500 be PAID to the applicant in compensation for non-pecuniary damage, and other claims for compensation be REJECTED;

E. The total expense of TRY 2,732.50 including the court fee of TRY 257.50 and the counsel fee of TRY 2,475 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;

G. A copy of the judgment be SENT to the 2nd Criminal Chamber of the İstanbul Regional Administration Court for information; and

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

MEHMET AKSOY

(Application no. 2014/5433)

11 July 2019

On 11 July 2019, the Plenary of the Constitutional Court found a violation of the freedom of expression safeguarded by Article 26 of the Constitution in the individual application lodged by *Mehmet Aksoy* (no. 2014/5433).

THE FACTS

[8-36] The applicant, a sculptor, constructed the impugned monument in Kars, upon the approval of the Regional Board of Conservation of Cultural Heritage ("Board"), on the basis of the contract he executed with the relevant Municipality.

Following the construction of the monument, the Board decided to have the structures -in the field where the monument was located- demolished for having obtained "new findings". Accordingly, the Municipal Council issued an order to demolish the said structures.

The applicant obtained a decision on the stay of execution of the order. However, after the decision had been lifted, the Municipality started the demolition work. The applicant's action for annulment of the impugned work was dismissed.

Upon the applicant's appeal, the Council of State ultimately upheld the dismissal decision.

V. EXAMINATION AND GROUNDS

37. The Constitutional Court, at its session of 11 July 2019, examined the application and decided as follows:

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

38. The applicant made the following allegations and requests:

i.The applicant argued that the statute of humanity symbolised peace with Armenia, that it was used in order to secure the right-wing votes in the parliamentary elections of June 2011, and, for this reason, it was demolished unlawfully.

ii. He maintained that works of art were a part of the freedom of expression and that the State could not interfere with works of art on the basis of certain subjective evaluations. According to the applicant, the State was under an obligation pursuant to Article 64 of the Constitution to protect artistic activities and artists and to take the measures necessary to that effect. The work of art at issue had been built in compliance with law and with the permission of the authorised boards. The applicant claimed that there had been a violation of the freedom of expression due to the demolition of the statute.

iii. He alleged that the Government applied pressure on both the administration and the judiciary during the demolition process. In the applicant's view, there had been a violation of the right to a fair trial due to the court rulings that had been rendered with prejudice to the principle of independence of courts.

iv. Relying on alleged violations of Articles 2, 26, 64 and 138 of the Constitution, the applicant requested a finding of violation and claimed non-pecuniary compensation.

39. The Ministry's observations as to the merits may be summarised as follows:

i. The Ministry contended that the decision to demolish the statue in question did not stem from the applicant's artist personality or the artistic character of the work but pursued the aim of protecting third parties' right to property and the immovable property containing cultural assets; thus, there had not been an interference with the applicant's freedom of expression.

ii. It added that there were competing interests in the present case, namely the applicant's freedom of expression on the one hand, and the Treasury's right to property as well as the public's right to conservation of cultural values. In view of the provisions of the Law no. 2863, the legislature preferred the conservation of cultural values. Therefore, a fair balance was struck in the present case between the applicant's interests and the interests of the Treasury and the public.

iii. The Ministry concluded that the impugned interference was proportionate and in line with the requirements of a democratic society because the demolition of the statue pursued the aims of protecting constitutional rights to property and to conservation of cultural values.

40. The applicant, in his counter-arguments to the Ministry's observations, stated that there was no truth to the impression that the statue had been erected unlawfully. The applicant indicated that the statue had been built in accordance with his contract with the Municipality and with the approval of the Regional Conservation Board (*Koruma Bölge Kurulu*).

B. The Court's Assessment

41. Relevant parts of Article 26 of the Constitution, which will be taken as basis of the assessment on the allegation, reads as follows:

> *"Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities...*
>
> *The exercise of these freedoms may be restricted for the purposes of ... public order, … protecting the ... 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.*

42. Article 27 § 1 of the Constitution, titled "*Freedom of science and arts*", provides as follows:

> *"Everyone has the right to study and teach, express, and disseminate science and the arts, and to carry out research in these fields freely."*

43. Article 64 of the Constitution, titled "*Protection of arts and artists*", reads as follows:

> *"The State shall protect artistic activities and artists. The State shall take the necessary measures to protect, promote and support works of art and artists, and encourage the spread of appreciation for the arts.*

44. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The Court has considered that the applicant's complaints concerning the alleged violations of Articles 2, 26, 64 and 138 of the Constitution should be examined within the scope of the freedom of expression (Article 26) in the light of the freedom of science and arts (Article 27) and the protection of arts and artists (Article 64).

Burhan ÜSTÜN and Kadir ÖZKAYA expressed dissenting opinions in this respect, indicating that the application should have been examined within the scope of the right to a fair trial.

1. Admissibility

45. In its observations, the Ministry argued that the fact that the applicant brought an action before an administrative court to challenge the lawfulness of the Municipal Council's decision to demolish the statue in question did not mean that he had exhausted all available remedies. According to the Ministry, where there is an interference with a work of art, the author (*eser sahibi*) will be entitled to bring an action pursuant to Law no. 5846 before civil courts for lifting of encroachment (*tecavüzün kaldırılması*), cessation of intervention (*müdahalenin meni*) and compensation of damages. In the Ministry's view, Law no. 5846 is a special law that regulates intellectual and artistic works. In that scope, this Law governs the determination and protection of material and non-material rights over the products of authors who create the intellectual and artistic works and artists who perform or interpret such works. It also regulates the conditions of use of these products and stipulates sanctions against their use in contravention of the prescribed principles and procedures. Therefore, where there is an alleged attack on the rights of the persons who create a work (of art or intellect), the persons concerned should initially pursue the legal remedies envisaged by this Law. Thus, the Ministry asserted that the applicant lodged an individual

application with the Court without exhausting the remedies provided for in Law no. 5846.

46. According to the established case-law of the Court, in cases where there is more than one effective remedy that can be resorted to in respect of an alleged violation, the applicant, as a rule, cannot be expected to exhaust all legal remedies serving the same purpose (see *S.S.A.*, no. 2013/2355, 7 November 2013, § 30. See also, for similar ECtHR judgments, *Kozacıoğlu v. Turkey*, no. 2334/03, 19 February 2009, § 40; and *Jasinskis v. Latvia*, no. 45744/08, 21 December 2010, §§ 50, 53-54). In deciding whether the available remedies have been exhausted, the Court has regard to the goal which the applicant wishes to achieve. In the case at hand, the applicant aims to prevent the demolition of the statue he had made. Although it was also possible for the applicant to achieve this goal through the other remedies mentioned in the observations of the Ministry of Justice, it was for the applicant to choose the legal remedy that was best suited to his case. For this reason, the fact that the applicant has exhausted one legal remedy but not another remedy which would have served the same goal does not mean that he has failed to exhaust the available remedies. Therefore, the Court has concluded that the applicant has exhausted the available legal remedies.

47. It is the Ministry's view that the applicant should have mainly brought an action before an administrative court against the decision dated 6 January 2011 of the Superior Conservation Board (*Koruma Yüksek Kurulu*) but he has not availed himself of this remedy, thereby failing to exhaust the available remedies. The Ministry indicates that the decision of the Kars Municipality was merely an implementation of the decision of the Superior Conservation Board and that the applicant should have actually brought an action against the decision of the Superior Conservation Board. It is not for the Court to deliberate upon what was the character, from an administrative law standpoint, of the Kars Municipality's decision to remove the statue or whether it could be litigated under an administrative action. It falls within the discretion and jurisdiction of the inferior courts to rule on this matter of procedural nature within the framework of administrative justice. In the present case, when the applicant brought an action against the decision of the Kars

Municipality, the first-instance court declared that the administrative act could be litigated under an administrative action. Having examined the merits of the case, it eventually dismissed the action on merits. This judgment was then upheld by the Supreme Administrative Court. Since the inferior courts did not dismiss the applicant's case by finding the Kars Municipality's decision simply executory and non-actionable, it would be incompatible with the purpose of the individual application for the Court to examine, of its own motion, a matter that is to be addressed by the administrative court during the first instance of examination.

48. For the reasons explained above, 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.

Burhan ÜSTÜN and Kadir ÖZKAYA expressed dissenting opinions in this respect, indicating that the application should have been declared inadmissible in so far as relevant to the freedom of expression due to non-exhaustion of legal remedies.

2. Merits

a. Existence of an Interference

49. According to Article 1/B § 1 (b) and Article 8 of the Law no. 5846, author (*eser sahibi*) is the person who creates the work. Being a sculptor, the applicant erected the monumental statue in question at the site designated by the Municipality on the basis of the contract he had signed with the Kars Municipality. Thus, there is no doubt as to the fact that the applicant is the author of the work. Moreover, as a principle, it is out of question for someone other than the creator of the work to have authorship over it. The link between the work and its author is a *natural* link. This natural relationship arises with the creation of the work and, as a rule, cannot be transferred to third parties.

50. The applicant enjoys material (economic) and non-material (moral) rights over the work of art, which originate from and are protected under the aforementioned Law, particularly Articles 13, 14, 15, 16 and 17 thereof. The author may accord to other persons certain economic rights

and interests over his work. Even if all of such rights were transferred, the relationship between the work and the person who created it would not be over. Persons who, despite not being the author, are authorised to use certain rights over the work on the basis of a contract they have executed with the author are named by the legislature as "the owner of the original" (*aslın sahibi*) or "the economic rightholder" (*mali hak sahibi*), whereas these persons are referred to as "rightholder" (*hak sahibi*) in the doctrine.

51. Moral right (*manevi hak*) is a legal term that is used to represent the non-material aspect of a work and the personal relationship of its creator with the work. The principal purpose of the moral right is the protection of the work from third parties. Since a work of art is an expression of the personality of its creator, the author enjoys an absolute right over his work. Even in cases where the work has been left to the discretion of third parties, the moral rights are such rights that may be enjoyed by its author for the rest of his life.

52. In the present case, the Kars Municipality, being a rightholder in respect of the work of art in question, commissioned the applicant to build the statue in return for a certain amount of money, which it paid to the applicant in full. Nevertheless, the applicant is the author of the work and, pursuant to Article 27 of the Law no. 5846, the applicant's rights over the work shall last for his lifetime plus 70 years after his death.

53. In conclusion, the work of art, namely the statue whose author is the applicant, was demolished as a result of a set of decisions taken by the organs wielding the public authority. Under these circumstances, there has been an inference with the applicant's freedom of expression.

b. Whether the Interference Amounted to a Violation

54. The above-mentioned interference shall constitute a violation of Article 26 of the Constitution unless it satisfies the requirements laid down in Article 13 of the Constitution. Article 13 of the Constitution 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 the principle of proportionality."

55. Therefore, it must be examined whether the interference in the present case was prescribed by law as required by Article 13 of the Constitution, relied on one or more than one of the legitimate aims set out in Article 26 § 2, and in compliance with the requirements of the democratic order of the society and the principle of proportionality.

i. Whether the Interference was Prescribed by Law

56. The Court has concluded that Articles 9 and 13 of the Law no. 2863 satisfied the requirement of restriction by law.

ii. Whether the Interference Pursued a Legitimate Aim

57. The Court has concluded that the decision to demolish the statue was part of a series of measures towards the maintenance of public order and that it pursued a legitimate aim.

iii. Whether the Interference Complied with Requirements of the Democratic Order of the Society and the Principle of Proportionality

(1) General Principles

(a) Concept

58. For an interference with fundamental rights and freedoms to be in compliance with the requirements of the democratic order of the society, it needs to meet a pressing social need and be proportionate (*Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, §§ 53-55; *Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, §§ 70-72; and the Court's judgment no. E.2007/4, K.2007/81, 18 October 2007).

(b) Freedom of Artistic Expression and its Limits

59. The freedom of artistic expression, a specific branch of the freedom of expression, guarantees that an artist can conduct his work freely or disseminate works of art and that this freedom is not to be interfered with by the State or any other party. Cultural rights, in connection

with the present application, guarantee that the artist or works of art are subsidised by the State, and they safeguard the right of the persons who wish to access the works of art to have this access. Thus, the State is under negative and positive obligations *vis-à-vis* the freedom of artistic expression.

60. The Court has not found it necessary to hold an evaluation as to whether the statue erected by the applicant qualifies as a work of art. Indeed, the bodies wielding the public power has not raised any objections to the artistic quality of the impugned statue. Therefore, the matter before the Court rather concerns whether there has been a breach of the freedom of expression enshrined in Article 26 of the Constitution due to the demolition of the statue in question, which was built by the applicant as per his contract with the Kars Municipality but was subsequently demolished as a result of a set of disputes among the Treasury, conservation boards and the municipality, as well as changing legal situations.

61. Article 26 § 1 of the Constitution does not envisage a limitation on the freedom of expression in regard to the content. The freedom of expression covers any kind of expression such as imparting political, artistic, academic or commercial thoughts and opinions (see *Ergün Poyraz (2)* [Plenary], no. 2013/8503, 27 October 2015, § 37; and *Önder Balıkçı*, no. 2014/6009, 15 February 2017, § 40).

62. Seeing the work concerned in the instant case is a statue, it should be recalled that Articles 26 and 27 of the Constitution offer protection not only for the content of the opinions and information that have been expressed, but also the form in which they have been expressed (see, *mutatis mutandis*, *Fatih Taş* [Plenary], no. 2013/1461, 12 November 2014, § 105).

63. In fact, as stated in the 2013 report submitted to the United Nations, entitled "The Right to Freedom of Artistic Expression and Creativity", all disciplines of art equally enjoy the protection of the freedom of expression. The report addressed "*forms of expression that carry an aesthetic and/or symbolic dimension, using different media including, but not limited to, painting and drawing, music, songs and dances, poetry and literature,*

theatre and circus, photography, cinema and video, architecture and sculpture, performances and public art interventions, etc., irrespective of whether their content is sacred or profane, political or apolitical, or whether it addresses social issues or not". The report continued "*artistic activity relies on a large number of actors not reducible to the artist per se, encompassing all those engaged in and contributing to the creation, production, distribution and dissemination of artistic expressions and creations*".

64. Artistic works usually make reference to multiple meanings; thus, it may not be easy to determine the message they propound. Moreover, the interpretation of artistic expression may vary according to each person. Therefore, it is possible for artistic expression to differ from other categories of the freedom of expression. Also, artistic expression can often be more "provocative" or "disturbing" than the said types of expression.

65. The Court drew attention in its previous judgments to the fact that segregating any expressed and disseminated thought as "valuable-valueless" or "useful-useless" for the society on the basis of its content would involve subjective elements; thus, it would create a risk of arbitrary limitations on the freedom in question. It should be borne in mind that the freedom of expression also encompasses, regardless of the subjective evaluations of individuals, the freedom to express and disseminate thoughts that may be regarded as "valueless", "useless", "provocative" or "disturbing" by others (see, for similar assessments, *Ali Gürbüz and Hasan Bayar*, no. 2013/568, 24 June 2015, § 42; and *Önder Balıkçı*, § 40).

66. On the other hand, Articles 26 and 27 of the Constitution do not guarantee an unlimited freedom of expression. The freedom of expression is subject to certain exceptions named under Article 26 § 2 of the Constitution. The exceptions in question must be convincingly established in every individual case.

67. Apart from the above, it should be recalled that Article 64 of the Constitution on the "*Protection of arts and artists*", which provides "*The State shall take the necessary measures to protect, promote and support works of art and artists, and encourage the spread of appreciation for the arts*", holds the State responsible for taking all measures necessary to protect the arts and the artists. In other words, it is the State's obligation to not only refrain

from violating human rights but also protect individuals from violations by others. This also applies to the freedom of artistic expression.

68. The freedom of science and arts is specifically safeguarded by Article 27 of the Constitution. In this connection, Article 26 and, especially, Article 27 of the Constitution include the freedom of artistic expression within the scope of obtaining information and ideas and imparting thoughts. These constitutional guarantees offer the possibility to take part in the expression, dissemination and exchange of any cultural, political or social knowledge or idea. Persons who create, publish or disseminate works of art such as the impugned statue in the present case, have a considerable input in the dissemination of ideas and such artistic works are of great importance for a democratic society. For this reason, the State has to act more sensibly regarding the obligation of not interfering unnecessarily with the freedom of expression exercised by the persons who have created a work of art (see, among other authorities, *Fatih Taş*, § 104).

(c) Principle of Holistic Approach in Cases Concerning the Freedom of Expression

69. Judicial bodies must examine expressions without taking them out of context in their assessments with regard to the freedom of expression. Acting to the contrary might lead to reaching erroneous results in the application of the principles set out in Articles 13 and 26 of the Constitution and in terms of making an acceptable assessment of the findings established. Especially when artistic expressions are at issue, the assessments to be made by judicial authorities must -as a requirement of this principle of holistic approach- take account of certain factors: the characteristics of the branch of art or the work; the context in which the work is expressed; the identity of the author; the purpose and the time of creation; the identities and the sense of aesthetics of the people it addresses/appeals to; and the potential effects of the work, all considered as a whole.

70. In this context, the Court must examine the interference giving rise to the present application within the entirety of the events and determine whether the interference with the freedom of expression was

"proportionate" and whether the grounds relied on by the inferior courts to justify the interference were convincing - in other words, "relevant and sufficient" (see *Nilgün Halloran*, no. 2012/1184, 16 July 2014, § 39; *Bekir Coşkun*, §§ 24 and 58; *Tansel Çölaşan*, § 52). In doing so, the Court must become convinced that the bodies exercising public power as well as the inferior courts applied the standards compatible with Article 26 of the Constitution and the principles set forth by the Court and that they also rendered their decisions through an acceptable appreciation of the material facts. Therefore, the Court will have regard to the assessments made by the inferior courts and the grounds established.

(2) Application of Principles to the Present Case

71. The statue in question was demolished after it was designated by the Conservation Board as an immovable cultural asset in need of conservation because the Treasury-owned immovable property on which the statue was erected was home to machine gun emplacements and vaulted structures made during the Second World War. On the other hand, the reasons for the decisions given by the Conservation Boards and the inferior courts over the course of the process leading to the demolition of the statue was not based on a disagreement over property between public institutions.

72. In the present case, the applicant signed a contract with the Kars Municipality, a public legal entity, by means of the Council decision dated 7 November 2005 whereas the Regional Conservation Board, by its decision dated 2 November 2006, registered certain immovable properties in the parcel where the statue was going to be built. By its decision dated 8 February 2007, the Regional Conservation Board approved the Municipality's environmental landscaping project and gave permission for construction of the statue. Nonetheless, on 10 September 2008, the Regional Conservation Board, in contradiction with its previous decisions, decided that, due to "new findings" discovered in the area of the statue, there could be no execution of the plan within this area and, therefore, the existing structures had to be demolished. On the basis of the Regional Conservation Board's decisions, the Kars Municipality decided on 1 February 2011 to demolish the statue.

73. As it may be understood from the above, the debates over the construction, legal status and demolition of the statue in question initially took place between public institutions. In other words, there has been an interference with an individual's fundamental right under the Constitution as a result of a disagreement between public institutions. Article 123 § 1 of the Constitution, which reads "*The administration is a whole with its formation and functions...*", provides for the principle of integrity of the administration, meaning that the bodies that make up the administration work as one whole in harmony. Because of the above-mentioned principle, the institutions which constitute the administration may not rely on disagreements between one another as grounds for interfering with the rights and freedoms of individuals. To put differently, the failure of the organs and institutions that make up the State to function in harmony cannot be raised as a justification for any interference with individual rights and freedoms.

74. It is true that the legal status of the immovable properties owned by different public institutions and organisations may vary. When read together with the foregoing explanations as to the integral structure of the administration, the Constitutional Court finds it neither necessary nor useful, in order for an examination to be held on the complaint giving rise to the application, to address the disagreement over property between the public institutions which make up the administration and wield the public power. For this reason, the application will be examined from the standpoint of whether the demolition of the statue in question, due to the designation of the immovable property it occupied as a cultural asset in need of conservation, has satisfied a social need and whether it was the last resort that could possibly be used.

75. The statue at issue in the present application, called the "*Statue of Humanity*", was reported to have been built "*as a gesture of goodwill*" at a period of time when messages were being expressed in favour of establishing warm relations between Turkey and Armenia. The Municipal Council's decision indicated that the statue was an expression of the wish for no more wars in our country and the world; further, the contract signed with the applicant described that the main purpose of the statue was to convey a call for peace to the people living in the region around

Kars. When taken together with the public debates that took place over the course of the construction and demolition processes of the statue, the latter can be regarded as a work of art that carried a heavy political weight.

76. Depending on the type of expression, certain expressions are afforded more protection than others. The highest degree of legal protection is to be afforded to political expressions (see *Fatih Taş*, § 98; and *Ergün Poyraz (2)*, § 58). The freedom of political debate is the basic principle of all democratic systems and governments are under an obligation to not only tolerate harsh criticisms but also ensure that the restrictive measures they put in place do not create a chilling effect on the exercise of the freedom of expression (see *Bekir Coşkun*, §§ 64, 67-69; and *Ergün Poyraz (2)*, §§ 68-70, 78-79). In cases where artistic expression is characterised as political expression, the extent of the protection afforded thereto should be wider. Therefore, the pieces of artistic expression involving political content are expected to have stronger protection compared to other types of expression.

77. In the light of these assessments, the focus should now be placed upon the question of whether the existence of certain cultural assets, which were registered and deemed to be in need of conservation, inside the same immovable property as the statue could be accepted as a relevant and sufficient reason for the demolition of the statue.

78. It had been claimed, prior to the beginning of construction of the statue, that there were cultural assets in need of conservation on the immovable property at issue. By its decision dated 2 November 2006, the Regional Conservation Board indicated that there were machine gun emplacements made during the Second World War in the northern part of the hill, which was located in the same parcel of land as the statue, and vaulted defensive structures in the western part of the hill; thus, the Board registered certain immovables on the hill as cultural assets on the basis of their cultural heritage characteristics.

79. The decision dated 14 November 2008 of the Regional Conservation Board indicated that the structures in question were described as assets from the Early Republic Era. The Mayor, on the other hand, stated that

there were certain military structures dating back to the 18th century in the parcel in question. The Court has noted that, during the more-than-two-year period elapsed between the Regional Conservation Board's decision of 10 September 2008 and the Kars Municipality's decision of 1 February 2011 on the demolition of the statue, no effort was made to produce a complete identification, classification and inventory of the structures deemed as cultural assets or to ascertain their number and the space they occupy. Secondly, it has not been possible to determine whether the registration made via the decision dated 2 November 2006 of the Regional Conservation Board covered the whole parcel or a portion of it, i.e. whether the area where the pedestal of the statue had been placed was one of the registered lands.

80. Although the Regional Conservation Board had decided on 2 November 2006 that the theme of the statue in question was compatible with the city and the castle from a landscaping standpoint and subsequently, on 8 February 2007, approved the Municipality's environmental landscaping project, the Regional Conservation Board's decision of 10 September 2008 for demolition of the statue did not provide any explanation as to what were the "new findings" that it relied on in this decision. There were highly contradicting statements made by the authorities as to what were the cultural assets in need of protection that had been discovered in the immovable property at issue. Even assuming that there actually were cultural assets in need of protection in that parcel of land, no explanation was provided as to how the statue being constructed at the time had caused damage to those assets.

81. By a decision dated 6 January 2011, the Superior Conservation Board annulled all of the earlier decisions of the regional conservation board. This decision indicated that after the property dispute regarding the parcel will have been resolved, the projects submitted by the Municipality would need to be evaluated by the Regional Conservation Board. Furthermore, it reminded that it was within the Municipality's discretion, within the framework of the Law no. 3194, to decide on the fate of the statue. The Kars Municipal Council, relying on the said decision of the Superior Conservation Board, decided on 1 February 2011 to remove the statue. Besides, in its ruling of 21 April 2011, the first-instance court

concluded that the aforementioned decision of the Superior Conservation Board was the reason for the decision to demolish the statue.

82. Considering these facts as a whole, the Court has observed that the bodies wielding the public power requested, permitted and paid the applicant to make the work of art without initially having resolved the property dispute over the immovable property in question or having fully identified the cultural assets on the immovable property; however, they have failed to protect the statue after completion of the artistic creation. As it may be understood from the decision dated 2 November 2006 of the Regional Conservation Board, the fact that certain immovable properties in a parcel of land are registered as cultural assets does not mean that no projects may be implemented on that parcel. Indeed, the Regional Conservation Board permitted the construction of the statue at issue despite the existence of registered cultural assets in the parcel; and the Ministry of Interior found "*no contravention of Board decisions*" in the monument and landscape construction being implemented within the scope of the project which had been submitted by the Municipality and approved by the Regional Conservation Board via its decision dated 8 February 2007.

83. It would be acceptable as a reasoning to deny permission for the statue prior to the beginning of its construction on the basis of the existence of cultural assets in need of conservation in the said region. In fact, the conservation of cultural assets is a duty placed upon the State by Article 63 of the Constitution. Nonetheless, as is the case in the present application, once the process of creation of a work of art starts or after it has been created, the work goes under the protection of the freedom of artistic expression. Thus, the bodies wielding the public power are under an obligation, in their acts and actions, to refrain from restricting the freedom of expression arbitrarily and to exert the utmost effort within the scope of their positive obligations to preserve a work of art.

84. Apart from the above, the Ministry's observations suggest that there were competing interests in the instant case, namely between the applicant's freedom of expression and the Treasury's right to property. However, neither the administrative decisions nor the court rulings were able to definitively establish who owned the immovable property.

Besides, in view of the report dated 10 June 2010 which was drawn up by experts upon request of the Superior Conservation Board, the uncertainty about the owner of the parcel of land had not yet been resolved.

85. Even if it were to be assumed that the immovable property in question was owned by the Treasury, both the decisions of administrative authorities and the court rulings failed to explain why a property disagreement between the Treasury and another public institution, the Municipality, was the reason for an interference with the rights of the author of a work of art; or why the public authorities' right to property superseded the author's freedoms of expression (Article 26) and the arts (Article 27), as well as the Constitution's imperative provision on the protection of arts and artists (Article 64). Lastly, in this connection, no effort was made to enquire whether it would have been possible to resolve the issue by means of having the value of the portion of the immovable property occupied by the statue's pedestal determined and securing its purchase by the Kars Municipality, which had commissioned the statue, pursuant to the relative provisions of the Turkish Civil Code.

86. Since the issue concerned in the present case is the demolition of the statue, it should have been assessed, at the minimum, how the statue had caused damage to the cultural assets found on the immovable property and if it those cultural assets could have been preserved without demolishing the statue. It could have been enquired whether it would have been possible to move the work of art to another location without destroying it; negotiations might have been conducted with the applicant -the author of the work of art- in order to reach a mutually agreeable solution; or an attempt might have been made to conciliate between the demands of the applicant and those of the administration. The failure to deliberate on these points either in the administrative decisions or in the court rulings delivered during the process leading to the demolition of the statue demonstrates that the State has failed to fulfil its positive obligations with regard to the protection of the work of art.

87. The questions of what were the cultural assets located on the immovable property at issue and whether the whole or a part of the immovable property was registered as a cultural asset in need of conservation have not been prominently answered. No examination has

been conducted, either, to establish if the statue had caused any damage at all to the cultural assets located therein. Thus, it has not been proven that the demolition of the statue satisfied a social need. Furthermore, no enquiry was made to ascertain whether the cultural assets could have been preserved without fully demolishing the statue; therefore, the demolition has not been proven to be the last resort available.

88. The bodies wielding the public power seem to have ignored the Constitution's provisions on the freedom of artistic expression throughout the process from the construction until the demolition of the statue. In the present case, it has not been proven that the bodies wielding the public power took the measures necessary for the protection of a work of art. Moreover, despite the fact that the statue in question had to be afforded a higher level of protection than other types of expression, it has not been proven that its demolition was necessary in a democratic society. For this reason, it has been concluded that the decisions of the administrative authorities and the courts did not provide relevant and sufficient reasons.

89. In conclusion, in the case giving rise to the present application, the bodies wielding the public power have failed to display the sensitivity required for the protection of a work of art, which had become a part of humanity's intellectual heritage that was open to everyone's access as it had become public, and by extension the constitutional right to freedom of artistic expression, which carries a great significance for a democratic society.

90. Consequently, the Constitutional Court has found a violation of the freedom of expression protected under Article 26 of the Constitution.

Serdar ÖZGÜLDÜR, Burhan ÜSTÜN, Muammer TOPAL, Kadir ÖZKAYA, Recai AKYEL and Yıldız SEFERİNOĞLU expressed dissenting opinions in this respect.

C. Application of Article 50 of Code no. 6216

91. Article 50 §§ 1 and 2 of the Code no. 6216 on the 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."

92. The applicant claimed 100,000 Turkish liras (TRY) as non-pecuniary compensation.

93. The Court has found a violation of the applicant's freedom of expression.

94. As regards the non-pecuniary damages sustained by the applicant due to the violation of his freedom of expression, which cannot be redressed by a mere finding of a violation, the Court awards TRY 20,000 (net) in favour of the applicant as non-pecuniary compensation.

95. The total court expense of TRY 2,681.10 including the court fee of TRY 206.10 and the counsel fee of TRY 2.475, which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 11 July 2019:

A. By MAJORITY and by dissenting opinion of Mr. Burhan ÜSTÜN and Mr. Kadir ÖZKAYA, that the alleged violation of the freedom of expression be DECLARED ADMISSIBLE;

B. By MAJORITY and by dissenting opinion of Mr. Serdar ÖZGÜLDÜR, Mr. Burhan ÜSTÜN, Mr. Muammer TOPAL, Mr. Kadir ÖZKAYA,

Mr. Recai AKYEL and Mr. Yıldız SEFERİNOĞLU, that the freedom of expression safeguarded by Article 26 of the Constitution was VIOLATED;

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

D. That the total court expense of TRY 2,681.10 including the court fee of TRY 206.10 and counsel fee of TRY 2,475 be REIMBURSED TO THE APPLICANT;

E. That the payment be made within four months as from the date when the applicant applies to the Ministry of 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

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

DISSENTING OPINION OF JUSTICES SERDAR ÖZGÜLDÜR AND MUAMMER TOPAL

1. The statue made by the applicant was constructed on an immovable property (owned by the Treasury) which was not under the ownership of or allocated to the Municipality but no permission was obtained from the officials of the Treasury (National Property: *Milli Emlâk*).

2. Although, the Conservation Board initially, being unaware of the fact that the Municipality concerned was not the owner of the immovable property, approved the Municipality's environmental landscaping project and allowed it to build the statue, a subsequent detailed inspection on the immovable property revealed that the existing structures (machine gun emplacements and a vaulted structure) on the land were in fact cultural assets in need of conservation; therefore, the same Conservation Board consequently decided that no project implementation would be allowed on this area, the existing structures had to be demolished, and that legal action would be taken against anyone who conducts or commissions a

project implementation in contravention of this decision. Likewise, the Superior Conservation Board also held that the construction and physical intervention (statue construction) in the parcel of land performed without the permission of the parcel's owner had to be assessed within the scope of the Zoning Act (Law no. 3194) (illegal construction) and be resolved by the Municipality concerned. Following this decision and a tender procedure held in accordance with the relevant Municipal Council's decision, the statue in question was cut into pieces and removed from the location and placed inside the Municipality warehouse. It is out of question for a violation of a right worthy of protection to happen, either in respect of the entity who commissioned or the applicant who built it, because of a statue which was built in contravention of the legislation on an immovable property that was registered in the said manner as a cultural asset in need of conservation and placed under an absolute prohibition of construction.

3. A local administration unit attempted of its own motion to build a statue without consulting any State units concerning a topic that is directly related to the State's foreign policy, albeit within the scope of the freedoms of expression and art. This activity was carried out, as explained above, in a manner that did not comply with the legislation, which resulted in the removal of the statue. The legal action brought against this act of removal was dismissed by the competent tribunals on the basis of relevant and sufficient reasons. As the sculptor who made the statue, the applicant received the royalty payment agreed under the contract for his labour and the work. In this sense, it is not sufficient to examine the matter simply from the standpoint of the freedom of expression because the examination should be held as a whole without taking it out of context. The principle of autonomy of local administrations cannot be interpreted as meaning that these units might act as they wish in such sensitive and national topics. The author of a work which came into being as a result of a production (statue construction) that was carried out in contravention of the legislation and has been found to have been against the law from the beginning cannot be considered separately from this discretion.

4. For these reasons, concluding that there are no grounds for finding a violation of the applicant's freedom of expression due to the removal

of a statue after it had been legally established to have been constructed in contravention of the law from the very beginning, we disagree with the majority's conclusion to the contrary as well as the decision to award non-pecuniary compensation to the applicant.

DISSENTING OPINION OF JUSTICES BURHAN ÜSTÜN AND KADİR ÖZKAYA

In the application lodged upon the dismissal of the action for annulment of the decision to remove the monument-statue, which the Kars Municipality had had the applicant build, our Court has found by a majority a violation of the applicant's freedom of expression. For the reasons to be explained below, we disagree with the majority's view.

On 7 November 2005, by its decision no. 153, the Kars Municipal Council decided to build a "Statue of Humanity" with environmental landscaping as well as a park of humanity on a Treasury-owned immovable property (hill) of 9090 square metres in surface area located at block. no. 790 parcel no. 1 in Üçler vicinity of Sukapı neighbourhood, Central district, Kars province. The immovable property was under the ownership of the Treasury on the date when this decision was taken and there is no information in the case file to suggest that it was allocated, transferred, or sold to the Kars Municipality, even after that date.

Following the tender procedure held on the basis of the Council decision, a contract was signed, in an attempt by the Kars Municipality to offer an arts and culture service, between the then-Mayor of Kars in his capacity as the "Employer" on behalf of the Kars Municipality, on the one side, and the applicant Mehmet AKSOY in his capacity as the "Contractor - Sculptor", on the other, on 4 July 2006 (or 5 June 2006 according to the Ministry's observations) for the construction of a monument-statue, which would be 30 metres in height from the surface including the pedestal, on a piece of flat area situated on top of the hill across the Kars Castle and overlooking the Kars River and Kaleiçi neighbourhood and also reported to have a panoramic view of the whole city of Kars.

After describing the parties to the contract, its subject, contents and purpose, the parties' obligations, financial conditions, the duration of the job and the sanctions to apply in case of termination of contract, the contract authorised the courts of Kars as competent to resolve any disputes arising from the contract, while reserving the sculptor's copyrights as well as his other rights under the Law on Intellectual and Artistic Works. According to the contract, the monument-statue would be completed within 18 months following the first payment. The Ministry's observations indicate that the first payment was made on 22 August 2006.

Although it cannot be understood from the case file when it had started, the production of the contracted monument-statue construction work had apparently started before the property dispute over the area in question was resolved or the procedure under the legislation on "Conservation of Cultural and Natural Assets" was completed. Relying on this ground, upon the petition letter dated 19 September 2006 of the provincial branch office of a political party and the letter no. 2149 dated 6 October 2006 of the Kars Provincial Directorate of Culture and Tourism, the Erzurum Regional Board for Conservation of Cultural and Natural Assets issued the decision no. 421 dated 2 November 2006, in which it decided that "*Located in block no. 790 parcel no. 1 of the Central district of Kars province, the machine gun emplacements made during the Second World War in the northern part of the hill and the vaulted structure in the western part of the hill near the bottom, on account of their cultural asset quality, be registered as immovable cultural assets in need of conservation within the scope of the Law no. 3386 and the Law no. 2863 as amended by the Law no. 5226; the execution of the project implementation being conducted on the highest point of the hill be stayed; and any execution of project implementation in the area be subject to the prior permission of the Conservation Board*". The Kars Municipality was informed of the situation.

Following the decision in question, without a resolution having been reached in terms of the property dispute over the immovable property, submitted a request via the letter no. 2078 dated 11 December 2006 to the Erzurum Regional Board for Conservation of Cultural and Natural Assets for building a monument on the said immovable property (i.e. for

the production which had already started without permission on a piece of land that was owned by another party).

The Erzurum Regional Board for Conservation of Cultural and Natural Assets, by its decision no. 501 dated 23 December 2006, decided that: "*Located at block no. 790 parcel no. 1 of Sukapı neighbourhood, Central district, Kars province, the immovable property owned by the Kars Municipality is not within any protected sites. By its letter no. 2078 dated 11 December 2006 the Kars Municipality submitted its request for building a monument on the parcel containing the machine gun emplacements that were registered by (our) Board's decision no. 421 dated 2 November 2006. … in conclusion, as regards the request for building a monument on the immovable property located at block no. 790 parcel no. 1 of Sukapı neighbourhood, Central district, Kars province, the theme of the monument is considered to be compatible with the city and the castle from a landscaping standpoint; thus, the implementation project containing the finalised recommendations on environmental landscaping other than the location and pedestal of the monument (e.g. in regard to illumination, groundwork, terracing, general spaces, historical texture etc.) should be sent to (our) board*". In the decision, the approved project was seemingly understood to be planned for construction on an immovable property owned by the Kars Municipality. However, the property was under the ownership of the Treasury.

After the above-mentioned decision, the environmental landscaping project prepared and submitted by the Municipality via its letter no. 178 dated 6 February 2007 was subsequently approved by way of rectification by the Conservation Board by its decision no. 523 dated 8 February 2007. Although the immovable property on which the approved project was going to be implemented was owned by the Treasury, this decision was also taken on the basis of the [mistaken] understanding that the property belonged to the Kars Municipality[1].

In the meantime, the Kars Municipality applied on 24 April 2008 to the Kars Directorate of National Property to request the allocation or sale

1 The statue, of which the production is understood from the decision no. 421 dated 2 November 2006 of the Erzurum Regional Board for Conservation of Cultural and Natural Assets to have started prior to the launch of the said correspondence and the process, was built as a 30 metres-tall iron-reinforced concrete structure. The completion date cannot be understood from the contents of the case file.

of the immovable property, where the statue construction was located, to the Municipality. On 29 April 2008 the Directorate of National Property requested the opinion of the Kars Provincial Directorate of Culture and Tourism on this request. Upon this request, the Directorate's experts conducted another inspection on the immovable property.

As a result, the Regional Conservation Board issued two separate decisions, nos. 1021 and 1022, on 10 September 2008. In the decision no. 1021, it held as regards the immovable property at issue that "*...in the light of the new findings unearthed during the excavation works on the immovable property that is owned by the Treasury, it must remain registered under the Law no. 2863; … no implementation [of projects] may be conducted within this area and the existing structures must be demolished; …*"; whereas in the decision no. 1022, it decided, by referring to the decision no. 1021, that the immovable property on which the statue in question was built might not be sold or allocated pursuant to the Law no. 2863 on Conservation of Cultural and Natural Assets[2].

Though it is unclear from the contents of the case-file upon which developments they were taken, the Regional Conservation Board issued two more decisions on 14 November 2008 and 25 September 2009. In the decision dated 14 November 2008, it confirmed that the decision no. 1021 dated 10 September 2008 was still valid. On the other hand, it the decision dated 25 September 2009, it confirmed the validity of both the decisions nos. 1021 and 1022 dated 10 September 2008 and the decision no. 1110 dated 14 November 2008 and it decided that an investigation should be launched against those who conducted or commissioned the project implementation in contravention of these decisions.

In the meantime the Directorate of National Property sent a letter on 2 February 2010 to the Kars Municipality, in which, after referring to its letter dated 2 June 2005 concerning the prohibition of taking any steps on the Treasury-owned immovable property, it recalled that the property could not be allocated or sold according to the decision no. 1022

2 It is understood that the production continued in the meantime for the construction of the monument-statue on the Treasury-owned immovable property as if it had been owned by the Kars Municipality.

dated 10 September 2008 of the Conservation Board and instructed the Municipality to return the immovable property in an empty state after demolishing the structures located thereat pursuant to Article 18 of the Law no. 775 on Squatter Houses.

In order to evaluate the situation concerning the immovable property in question and the "Statue of Humanity" being built on it, the Superior Board for Conservation of Cultural and Natural Assets of the Ministry of Culture and Tourism held a meeting on 19 January 2010. At the end of this meeting, it decided to have a panel inspect the situation surrounding the "Statue of Humanity" on site from the very beginning and submit a report on the matter.

On 6 January 2011 the Superior Board reconvened and adopted the decision no. 777, by which, after assessing the ownership issue of the immovable property, it decided, due to the disparity in between, that *all the decisions taken by the Conservation Board be annulled and the construction and physical intervention -outside the scope of the registration- being conducted on the parcel without the permission of the parcel's owner be assessed under the Zoning Act (Law no. 3194) and resolved by the Municipality concerned*.

Upon this decision of the Superior Board, the Kars Municipal Council adopted the decision no. 14 dated 1 February 2011. Through this decision, it decided to remove the monument on the immovable property by virtue of the Zoning Act (Law no. 3194).

In the action filed by the applicant for annulment of the said council decision, although initially the first-instance Administrative Court ordered a *stay of execution* on 7 March 2011 on the ground that it was the within the duty and authority of the municipal executive committee (*belediye encümeni*), not the municipal council (*belediye meclisi*), to issue an act to remove the disputed statue from its place, the Erzurum Regional Administrative Court subsequently lifted that order and dismissed the request for a stay of execution on 16 March 2011.

In its decision, the Regional Administrative Court found that there was no issue of authority in the impugned act and followed that the impugned act did not qualify as a decision to demolish taken by virtue of

Article 32 of the Zoning Act (Law no. 3194) but instead a decision taken in order to redesign the environmental landscaping project on the area in question in a harmony with the historical texture by means of removing the statue of humanity from there in a bid to implement the decision no. 777 dated 6 January 2011 of the Superior Board for Conservation of Cultural and Natural Assets of the Ministry of Culture and Tourism, which read "*all the decisions taken by the Conservation Board be annulled and the construction and physical intervention -outside the scope of the registration- being conducted on the parcel without the permission of the parcel's owner be assessed under the Zoning Act (Law no. 3194) and resolved by the Municipality concerned*". Moreover, the Regional Administrative Court noted that the decision had been taken due to the fact that the statue had been built without a licence on a Treasury-owned immovable property without the Treasury's approval and in non-compliance with Law no. 2863. In conclusion, it ruled that there was no contravention of law or legislation in the impugned act.

After these developments, on 21 April 2011 the Administrative Court dismissed the applicant's case. In this dismissal judgment, the Administrative Court concluded that there was no contravention of law or legislation in the impugned act on the ground that the impugned decision of the Municipal Council pursued the aim of executing the decision no. 777 dated 6 January 2011 of the Superior Board for Conservation of Cultural and Natural Assets of the Ministry of Culture and Tourism and, by extension, removing the monument-statue in question which had been built on a parcel of land -fully owned by the Treasury according to the existing title deed records and found to have the quality of a cultural asset in need of conservation- without any permission obtained from its owner (Treasury) and in non-compliance with the Law no. 2863. In sum, the impugned act was actually a *revocation* (*geri alınma*) of the decision no. 153 dated 7 November 2005 (i.e. the original decision of the Kars Municipal Committee to have a monument-statue built).

The request for appeal filed against this judgment was dismissed by the decision no. E.2011/9021, K.2013/161 dated 29 January 2013 of the 14th Chamber of the Supreme Administrative Court, which, thereby, upheld the judgment of the first-instance administrative court.

Upon the dismissal of the request for rectification of this last decision, an individual application was lodged with our Court[3].

Stating that works of art are part of the freedom of expression, the applicant claimed that the "Statue of Humanity" he had made was a symbol of piece with Armenia; that the decision to demolish a work of art symbolising the peace and the execution of the demolition had led to a violation of the freedom of expression enshrined in Article 10 of the European Convention on Human Rights ("the Convention"); that the State may not interfere with works of art on the basis of a set of subjective evaluations; that his work had been built in compliance with the law and with the permission of competent boards; and that the process that had been witnessed had also contravened the provisions of Articles 16 and 17 of the Law on Intellectual and Artistic Works.

In order to lodge an individual application with the Court, an applicant is required to exhaust all the administrative and judicial remedies available in respect of the act or action that has allegedly caused a violation. Since the individual application mechanism is a subsidiary remedy, what is essential is for the public authorities to respect rights and freedoms and, in case of a potential violation, secure its resolution through ordinary administrative and/or judicial avenues. For this reason, the remedy of individual application may only be pursued in cases where it has not been possible to eliminate the violation despite the exhaustion of all the ordinary remedies provided by law (no. 2012/338, 2 July 2013, § 28).

In the instant case, on 7 November 2005 the Kars Municipality issued an act (no. 153) pursuant to the rules of administrative law on a matter it considered to be within its sphere of duty and authority; accordingly, it decided to build a statue called "the Statue of Humanity" along with environmental landscaping as well as a park of humanity on an immovable property that was owned by the Treasury.

3 It is understood that, in the meantime, the statue in question was removed from its place by means of cutting into seventeen pieces and stored in the Municipality's warehouse after a tender process held by the Kars Municipality on 7 March 2011.

The relationship between the Kars Municipality and the applicant was established with a contract for the realisation of the said decision, which was drafted and signed fully within the framework of private law[4]. The signing of the contract was then followed by a set of legal issues over the course of the process. The contracted monument-statue had been produced before resolution of the issues arising from the ownership situation of the land it occupied and from the legislation on the conservation of cultural and natural heritage[5].

In the process that ensued, on the ground that the aforementioned legal issues had not yet been resolved and in accordance with a decision delivered by a Superior Board exercising the duty and authority it had in the resolution of some of those issues, the Kars Municipality issued another decision within the framework of its own duty and authority to dismantle and remove, pursuant to the Law no. 3194, the said monument-statue (which had been constructed on an immovable property owned by a third party and caused problems in terms of the legislation on the conservation of cultural and natural heritage).

This, as indicated in the judgment no. 2011/565 dated 21 April 2011 of the Erzurum 1st Administrative Court, was an act issued within the framework of the rules of administrative law with an aim to executing the requirements of the decision no. 777 dated 6 January 2011 of the Superior Board for Conservation of Cultural and Natural Assets of the Ministry of Culture and Tourism. It was also, in a sense, an administrative decision to realise a new project by abandoning the earlier project which had been launched by the Kars Municipal Council via its decision no. 153 on 7 November 2005 concerning the construction of a "Statue of Humanity" with environmental landscaping as well as a park of humanity on a Treasury-owned immovable property (hill) of 9090 square metres in surface area located at block. no. 790 parcel no. 1 in Üçler vicinity of Sukapı neighbourhood, Central district, Kars province.

4 It is not possible for the applicant to claim any rights against the Kars Municipality on the basis of a decision that had been taken completely within the sphere of administrative law prior to the contract.

5 Naturally, there is no liability attributable to the applicant in this regard.

Although this is an act that legally affected the applicant's legal position in his capacity as the author of the work, it cannot be construed as an act of demolition aimed at completely destroying the applicant's work[6]. This is an administrative act regarding the removal of a monument-statue, which had been built on the basis of another administrative decision, in accordance with the rules of administrative law.

It should be noted in this context that administrations may sometimes act as a private law entity and the rules of private law may be exceptionally applicable to some of their activities, principally they act within the sphere of the rules of administrative law in relation to the fulfilment of the duties they are given and execute their duties via administrative decisions and acts (Ali D. ULUSOY; *Yeni Türk İdare Hukuku*, Yetkin Yayınları, Ankara 2019, p. 34).

Administrative acts emerge as the administrative dispositions in which an administration, through its assigned and authorised organs, wield the public power in accordance with the rules of public law with regard to their administrative activities unilaterally and of their own will, thereby either entitling to a right or putting under an obligation the party or parties concerned.

The most important difference between administrative acts, except for administrative agreements/contracts, and acts of private law is that the former are such acts that take place with the administration's unilateral declaration of will, regardless of the will of the parties concerned and without asking them, and create consequences within the legal position of the parties concerned outside their will. Although there are views to the effect that it should not be regarded as an unquestionable and absolute rule due to administrative agreements/contracts and certain other exceptions, administrative acts emerge, as a rule, with the unilateral declaration of will by the administration. On the other hand, apart from certain exceptional cases in the sphere of private law, it is not possible, as

6 In fact, it is understood that the said monument-statue was not completely destroyed but, after the Kars Municipality's tender process dated 7 March 2011, was dismantled and removed by being cut into 17 pieces (possibly because it was physically and technically impossible to remove it as a single piece) and stored in the Municipality's warehouse.

a rule, to make any changes in the legal position of the adverse party (a person or a situation) with a unilateral declaration of will by either the administration or other persons (Ali D. ULUSOY; *Yeni Türk İdare Hukuku*, Yetkin Yayınları, Ankara 2019, p. 271).

In an action filed for annulment of an administrative act, the lawfulness of that act will be assessed by the tribunals of administrative justice on the basis of whether it was in line with the law in terms of the following factors (and in this order): authority, form, reason, subject and aim. The authority factor, in a very general sense, refers to whether the administrative act has been issued by an authority/organ or person that is competent (legally authorised) to do so. The form factor is whether the act has been issued in line with the form and method prescribed for that act by the relevant legislation. The reason factor concerns the legal and actual reasons that have led the administration to issue the act in question. The subject factor refers to the legal effect and consequence which has been/will be created by the act. The aim factor enquires whether the administrative act has been issued with the aim of achieving public interest. It should be particularly noted in this context that, because of its close relationship with the administration's discretionary power, the legal and actual factors that lead the administration to issue the administrative act must be in line with the law and the interests of the society. These factors might be explicitly specified by the legislation or, sometimes, be indicated in a very general manner or not indicated at all. If there is an indication therein, the tribunals of administrative justice will examine whether these reasons are present in their review. If there is no indication at all or there is one that is very general in nature, an examination will be held as to whether there are valid reasons to justify the act in terms of public interest and requirements of service (Ali D. ULUSOY; *Yeni Türk İdare Hukuku*, Yetkin Yayınları, Ankara 2019, p. 371 *et seq.*).

According to the rules of administrative law, the established case-law of the administrative justice and the situation explained above, due to the nature of things, just as administrations are not required to ask for the opinion of the owner of an immovable property when they decide to expropriate it, there is no requirement in the present case, either, to take

into account the will of the applicant, who has the capacity of "author" within the meaning of the Law on Intellectual and Artistic Works, in deciding whether or not to remove the monument-statue in question from its location. Furthermore, the tribunals of administrative justice that conduct the judicial review on the act concerning the removal of the monument-statue in question are not required to take into consideration the provisions of the Law on Intellectual and Artistic Works in this review.

In the instant case, the relationship between the applicant and the Kars Municipality was established, as indicated above, not by the decision no. 153 dated 7 November 2005 of the Kars Municipal Council but in fact by a contract that was signed between the Municipality and the applicant within the sphere of private law with a view to realising the aforementioned council decision. Therefore, the rights to which applicant became entitled to as a result of the execution of the said contract and the construction of the monument-statue, which may also be associated with the freedom of expression, are based not on the decision no. 153 dated 7 November 2005 but on the provisions of the Law on Intellectual and Artistic Works as well as other provisions of private law; they may thus be actionable under the Law on Intellectual and Artistic Works as well as other provisions of private law.

Note should be taken in this connection of the fact that the Law on Intellectual and Artistic Works is a special law that regulates intellectual and artistic works. In that scope, this Law governs the determination and protection of material and non-material rights over the products of authors who create the intellectual and artistic works and artists who perform or interpret such works. It also regulates the conditions of use of these products and stipulates sanctions against their use in contravention of the prescribed principles and procedures (Observations of the Ministry of Justice on the application).

Therefore, where there is an alleged attack on the rights of the persons who create a work (of art or intellect), the persons concerned should initially pursue the legal remedies envisaged by this Law. The Law on Intellectual and Artistic Works lays down certain protection mechanisms

in favour of the author of a work in case of any interference with works of art. Authors are entitled to apply for those mechanisms where there is an interference with their works. Filing actions before civil courts for lifting of encroachment (*tecavüzün ref'i*), cessation of intervention (*müdahalenin men'i*) and compensation of damages are some of those available legal remedies (Observations of the Ministry of Justice on the application).

In the application at hand, the outcome which the applicant intends to achieve is for the statue (which he built on an immovable property owned by a third party and caused problems in terms of the legislation on the conservation of cultural and natural heritage) to stay erect at its place (i.e. not be removed). In his pursuit of this outcome, the applicant relies on his rights arising from the Law on Intellectual and Artistic Works. Nonetheless, the act giving rise to the case is, as explained in detail above, an administrative act which was issued completely within the sphere of administrative law and with the aim of removing the applicant's work from its place in accordance with the rules of administrative law.

Even though the administrative act giving rise to the present application is such an act that affects the applicant's interest/right in his capacity as the author, this effect is not one that makes it necessary to take into account his rights arising from the Law on Intellectual and Artistic Works during the issuance or legal review of the act but rather it merely makes it possible for him to file an administrative action to secure a review of lawfulness of the act with regard to the factors of authority, form, reason, subject and aim.

What is to be examined in an action filed on the basis of this entitlement as a result of the aforementioned effect are: (i) whether the Kars Municipality has the authority to remove the monument-statue in question from its place; (ii) whether the removal decision complies with the form prescribed by the relevant legislation; (iii) whether there are reasons prescribed by law to be able to issue the removal decision; (iv) whether the effects and consequences of the removal are lawful; and (v) whether the decision pursues the aim of protecting the public interest. The subject matter of an individual application lodged with the Court after the completion of such proceedings will then be the question of compliance with the principles of fair trial.

Where this is the case, in order for an examination to be possible on an alleged violation of the freedom of expression claimed on with reference to the rights under the Law on Intellectual and Artistic Works, all the administrative and judicial remedies available in respect of the said rights must be exhausted prior to lodging an individual application. With this understanding, seeing that these remedies have not been exhausted in the present case, we conclude that, although the majority of our Court declared admissible the alleged violation of the freedom of expression, the application should have been rejected due to non-exhaustion of available remedies in so far as relevant to the freedom of expression and, instead, it should have been examined from the standpoint of the right to a fair trial.

That said, the following can be pointed out on the merits of the case:

The statue made by the applicant was constructed on an immovable property (owned by the Treasury) which was not under the ownership of or allocated to the Municipality but no permission was obtained from the officials of the Treasury (National Property).

As it is indicated in the dissenting opinion of Serdar ÖZGÜLDÜR and Muammer TOPAL, even though the Conservation Board concerned had initially, being unaware of the fact that the Municipality concerned was not the owner of the immovable property and actually by acknowledging the Municipality as the owner (see the decision no. 501 dated 23 December 2006 of the Erzurum Regional Board for Conservation of Cultural and Natural Assets; also the decision no. 523 dated 8 February 2007 of the Conservation Board), approved the Municipality's environmental landscaping project and allowed it to build the statue, a subsequent detailed inspection on the immovable property revealed that the existing structures (machine gun emplacements and a vaulted structure) on the land were in fact cultural assets in need of conservation; therefore, the same Conservation Board consequently decided that no project implementation would be allowed on this area, the existing structures had to be demolished, and that legal action would be taken against anyone who conducts or commissions a project implementation in contravention of this decision.

Subsequently, the Superior Conservation Board decided that the construction and physical intervention (statue construction) being

performed without the permission of the immovable property's owner had to be assessed within the scope of the Zoning Act (Law no. 3194) and be resolved by the Municipality concerned.

It should be recalled in at this juncture that administrations may issue a new act at any time, to the extent they are authorised with regard to matters within the scope of their duties, in line with the requirements of public service and public interest. They may also remove or revoke any of their previous decisions, if any, on the same matter. Otherwise, administrations would not be able to ever decide in any way to remove a statue they had placed at a certain location with certain legal issues without obtaining the "approval" (*olur*) of persons who enjoy the capacity of "authorship" within the meaning of the Law on Intellectual and Artistic Works.

In the case at issue, since the legal issues surrounding the parcel of land had not been resolved and the competent authorities had asked the Kars Municipality to take the necessary action, the Kars Municipality decided to remove the applicant's work from its place on the grounds that it was built in contravention of the legislation on an immovable property which was clearly designated as a cultural asset in need of conservation, owned by a third party, and protected under an absolute prohibition of construction.

This administrative act was issued at a stage where there is no requirement of upholding of the applicant's rights emerging from the Law on Intellectual and Artistic Works. At the end of a set of proceedings held by tribunals of administrative justice, which is understood to be in compliance of the criteria sought by the right for a fair trial, the act was found not to be unlawful in terms of the factors of authority, form, reason, subject and aim. Therefore, it is not possible to reach a finding of a violation of the freedom of expression in respect of the applicant, who is the "author" of the work within the meaning of the Law on Intellectual and Artistic Works, due to the dismissal of the action he filed for annulment of the administrative act.

For these reasons, we disagree with the majority's view on the finding of a violation of the applicant's freedom of expression.

DISSENTING OPINION OF JUSTICES RECAİ AKYEL AND YILDIZ SEFERİNOĞLU

We disagree with the majority's view on finding of a violation of the freedom of expression in the application that was lodged upon the removal of a monument/statue which had been commissioned to the applicant by the Kars Municipality.

To elaborate,

A) A contract was executed between the Kars Municipality and the applicant, according to which the applicant was duly paid and the statue was erected in line with its project. Then, it was discovered that there were remains of military structures and emplacements dating back to the 18th century in need of conservation on the immovable property where the statue was erected and that it was necessary to preserve the area due to its historical value.

On account of the need for conservation of the historical remains and the military emplacements that symbolised the fight for liberation put up against the Russian occupation, a choice was made to remove the statue in question which had been built very recently, did not have historical value, and could be re-erected somewhere else at a later date.

Regard being had to the facts and events as a whole, the administrative authorities and the courts opted for preserving the old artefacts that were part of the cultural heritage in a choice between protecting old historical artefacts whose destruction would be irreversible and protecting a new work which could be reproduced at any time. It is clear that this choice was made as a result of necessity.

B)The applicant, in his capacity as a "contractor", signed a "contract" with the Kars Municipality. The contents and the location of the statue were defined and the payment that would be made to the applicant/ contractor for this job was agreed upon under this contract.

Section 8 of the contract contained a clause that provided "In case of termination of the contract, in any event where the municipality no longer wishes to have the statue built, it may not claim a refund of the

payments that have been already paid and also agrees to pay 50% of the remainder".

The present case concerns an incident in which the Kars Municipality commissioned the applicant via the aforementioned contract to build a statue/monument on an immovable property which belonged to the Treasury. The immovable property where the statue was built neither belonged to the Kars Municipality, nor was it allocated by the Treasury to the Kars Municipality.

At the end of certain stages, the Regional Conservation Board rendered a decision regarding the immovable property at issue, which read "in the light of the new findings unearthed during the excavation works on the immovable property that is owned by the Treasury, it must remain registered under the Law no. 2863; … no implementation [of projects] may be conducted within this area and the existing structures must be demolished; … the immovable property on which the statue in question is built may not be sold or allocated pursuant to the Law no. 2863 on Conservation of Cultural and Natural Assets".

As it may be understood from the foregoing,

Even though the immovable property where the statue was built was under the ownership of the Treasury, there was no approval or allocation given by the owner (Treasury) to this effect but an application was made by the owner/Treasury for the demolition of the structures built by the applicant.

Moreover, the immovable property where the statue was built was registered on grounds of its quality of a "cultural asset in need of conservation".

Seeing that the decision to demolish the statue in question, since it both lacked the approval of the owner of the immovable property (Treasury) and the property had a "cultural asset" quality, did not stem from the applicant's personality as an artist or the nature of the work of art but in fact pursued the aims of protection of the right to property of a third party (Treasury) and the preservation of the immovable property

carrying a cultural asset quality, we consider that there has not been any interference with the applicant's right to freedom of expression.

Article 35 of the Constitution sets out the right to property for "everyone" without drawing a distinction between natural persons and legal entities. Moreover, the reasoning of this Article clearly indicates that any natural person or legal entity who bears the owner status can enjoy this safeguard and claim that status. Thus, the protection and guarantees provided by the Constitution for private property are also applicable to public property. Indeed, it cannot be considered that the constituent legislature did not show the same diligence to the protection of public property as it did to the protection of private property or that the Constitution leaves the public property without protection (see the Court's judgment no. E.1994/49, K.1994/45-2, 7 July 1994).

Furthermore, it should be pointed out that the "Contract" which was signed between the applicant and the Kars Municipality for the construction of the statue in question is an agreement of private law and, therefore, any right emerging from this relationship would be a "relative right" (*nispi hak*). Accordingly, where there is an issue concerning the rights and receivables originating from this contract, they may only be claimed against the other party to the contract, namely the Kars Municipality. It should be noted that, *vis-à-vis* this "relative right", the right to property is an "absolute right" which may be claimed against and is to be respected by everyone.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

ZÜBEYDE FÜSUN ÜSTEL AND OTHERS

(Application no. 2018/17635)

26 July 2019

On 26 July 2019, the Plenary of the Constitutional Court found a violation of the freedom of expression safeguarded by Article 26 of the Constitution in the individual application lodged by *Zübeyde Füsun Üstel and Others* (no. 2018/17635).

THE FACTS

[8-59] A group of academics issued a declaration seeking to end the curfews and clashes during the operations carried out within the scope of the fight against terrorism in the East and Southeast of Turkey between 2015 and 2016. Applicants, who are academics at different universities also signed this declaration in order to support the other signatory academics.

After it had been issued, the declaration was criticized heavily. Criminal investigations were launched and subsequently criminal cases were initiated against the signatory academics, as well as some of them were dismissed from their offices. The applicants' challenges against the decisions on their conviction at the end of these proceedings were also dismissed.

V. EXAMINATION AND GROUNDS

60. The Constitutional Court, at its session of 26 July 2019, examined the application and decided as follows:

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

61. The applicants maintained:

i. The impugned declaration, titled *"Academics for Peace"*, was merely *a call for peace*; and the relevant courts had disregarded that what was indeed stressed by the declaration was *peace*;

ii. As a citizen, academics should have been able to express their opinions on political issues, and their being subject to a civil, administrative or criminal sanction was unacceptable. Besides, unlike the freedom of expression exercised by everyone, academic freedom was based on the qualified nature of thoughts and had

a potential contribution to public interest. Therefore, academic freedom should be afforded more protection than that afforded to the freedom of expression enjoyed by ordinary individuals.

iii. Reminding the legislative intention of the amendment made to Article 7 § 2 of the Anti-Terror Law no. 3713 ("Law no. 3713") and noting that the expressions which were not capable of inciting violence fell into the scope of the freedom of expression, punishment of individuals due to explanations containing no elements that encouraged the recourse to violence or were not capable of inciting people to an armed insurrection fell foul of the freedom of expression. Besides, by adding the phrase *"in a way that would legitimise or praise the [terrorist organisations'] methods involving coercion, violence or threat or encourage the use of these methods"* to Law no. 3713, the standards of the said offence were brought in compliance with the judgments of the European Court of Human Rights ("the ECHR").

iv. Although the criminal act of disseminating terrorist propaganda was laid down comprehensively in Law no. 3713, which expressions in the impugned declaration *"legitimised or praised the terrorist organisation's methods involving coercion, violence or threat or encouraged the use of these methods"* could not be demonstrated in the reasoned decision on conviction.

v. They used the words *"deliberate and planned slaughter"*, *"massacre"*, *"exiling policy"*, which might be considered to be *offending, shocking* or *disturbing* by the State or certain part of the population, for the purpose of shocking and disturbing the State authorities, who failed to question the proportionality of the force used during the incidents taking place in the region and convince certain section of the society as to the lawfulness and humanistic nature of the applied measures.

vi. The expressions likely to be regarded harsh were directed towards the State, the political actor which is entrusted with the obligation to tolerate the criticisms to the widest extent possible and which must therefore tolerate the most severe criticisms

against it. The impugned expressions were not intended for legitimising or praising the methods applied by the terrorist organisation or encouraging the use of such methods.

vii. For these reasons, their freedom of expression had been violated. They claimed various amounts in compensation for the pecuniary and non-pecuniary damage they had sustained.

62. In its observations, the Ministry noted:

i. By the time when the applicants made a statement, the events known as *"ditch events"* had been taking place in the country, as also stated in the first-instance decision. The first instance court explained the then incidents as follows: By the mid-2015, the terrorist and violent acts increased to the top level. The PKK terrorist organisation dug trenches, set up barricades and placed explosives in the streets in Cizre, İdil and Silopi districts of Şırnak; Yüksekova district of Hakkari; Silvan, Sur and Bağlar districts of Diyarbakır; Dargeçit, Nusaybin and Derik districts of Mardin; as well as in Varto district of Muş. Thereby, the terrorist organisation tried to exercise sovereignty -under the name of self-government- in certain part of these settlements. Upon the violent acts lasting for about 10 months and subsequently called as ditch events, the Turkish Armed Forces and the Security General Directorate conducted security operations against the PKK members in 11 cities, notably in the districts of Sur, Cizre and Nusaybin, with a view to wiping out the terrorist organisation members seeking to block people's entry and exit to the said places, and ultimately safeguarding the life and property of the citizens living there. Curfews were imposed in some of the regions where these operations were conducted, and some of them were declared as a military security zone. After the operations conducted by the security officers to arrest the terrorist organisation members and to safeguard the people's life and property had ended, the curfews were lifted. Therefore, the declaration undersigned by the applicants must be assessed in consideration of the circumstances prevailing in the country at the relevant time.

ii. The Ministry made a reference to the Convention on the Prevention of Terrorism and accordingly indicated that particular attention must be paid to the case-law of the European Court of Human Rights concerning the application of Article 10 of the European Convention on Human Rights ("the Convention") and to the experience of States in the implementation of their national provisions on *praising terrorism* and/or *incitement to terrorism*. Recalling that certain restrictions on messages that might constitute a direct or indirect incitement to violent terrorist offences were in keeping with the Convention, the Ministry noted that in determining the necessity of such restrictions, the way in which, and the extent to which, the expressions considered to constitute terrorist propaganda were disseminated and also the degree of the effects they caused must be also taken into consideration.

63. Each of the applicants submitted counter-statements against the Ministry's observations. They noted that the ECHR's judgments cited in the Ministry's observations were not a precedent for their case. They accordingly referred to several judgments rendered by the ECHR as well as by the Court. The applicants were of the opinion that the acknowledgment that the impugned declaration contained the elements of *legitimising, praising* or *incitement* -which are necessary to consider that the expression of opposite thoughts and ideas constitutes the offence of disseminating propaganda of a terrorist organisation- was in breach of the freedom of expression in terms of the lawfulness requirement. The applicants disagreed with the Ministry's conclusion that the impugned interference had a legitimate ground. They stated that they had signed the declaration to contribute to putting an end to the violent acts; and that the punishment of this act performed to that end could not pursue any legitimate aim.

64. Making a reference, to a significant extent, to the Court's judgment in the case of *Ayşe Çelik* (no. 2017/36722, 9 May 2019), the applicants pointed to the compliance of the principles laid down therein by the Court with the universal law, the case-law of the Court of Cassation and the ECHR and mainly reiterated their explanations in the application

forms. They also submitted the *"Scientific Opinion"* issued concerning the impugned declaration by the Turkish Criminal Law Association to the Court.

B. The Court's Assessment

65. The Constitutional Court is not bound by the legal qualification of the facts by the applicants and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). In this respect, the Court considered that the applicants' allegations that they had been convicted for disseminating terrorist propaganda by an unjust and unjustified decision must be examined from the standpoint of the freedom of expression. Article 26 of the Constitution, titled "*Freedom of expression and dissemination of thought*" in so far as relevant provides 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..."*

1. Admissibility

66. The Court declared the alleged violation of the freedom of expression admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

a. Existence of Interference

67. The Court has considered that the applicants' being subject to punishment depriving them of liberty for disseminating terrorist propaganda due to having signed a declaration constituted an interference with their freedom of expression.

b. Whether the Interference Constituted a Violation

68. 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 … the principle of proportionality."*

69. Therefore, it must be determined whether the restriction complied with the requirements set out in Article 13 of the Constitution and applicable to the present case, namely being prescribed by law, relying on one or several justified reasons specified in Article 26 § 2 of the Constitution and not being contrary to the requirements of a democratic society and the proportionality principle.

i. Lawfulness

70. The applicants asserted that in order to conclude that an interference satisfied the lawfulness requirement, merely the existence of a legal basis in the domestic law for the impugned measure was not sufficient; and that the interpretation and application of the relevant statutory provision were also important. According to the applicants, the amendment made to Article 7 of the Anti-Terror Law no. 3713 defined the offence of disseminating terrorist propaganda as the act of *legitimising* and *praising* the violent or threatening methods of terrorist organisations or *encouraging* the use of such methods and thereby designed to ensure legal certainty. They accordingly maintained that they had been convicted against the legislator's will and with the broad interpretation of the relevant provision; that therefore, Article 7 had not been interpreted in a way that could enable them to foresee the consequences of their acts and they were not unable to foresee that they would be punished for having signed the impugned declaration; and that their freedom of expression had been violated in respect of the *lawfulness* requirement.

71. The applicants' complaints as to the lawfulness of the impugned interference are closely related with the assessments on the question whether it complied with the requirements of a democratic society. Given the manner in which the present application was assessed, it has been concluded that it is necessary to make a final assessment, not as to whether the relevant norms satisfied the requirement of *being prescribed by law* in the particular circumstances of the present case, but as to whether the interference complied with the requirements of a democratic society.

ii. Legitimate Aim

72. The applicants maintained that the interference with their freedom of expression pursued a legitimate aim in accordance with Article 26 of the Constitution. However, the first instance courts concluded in their decisions that the applicants' punishment was a part of the measures taken to maintain the public order within the scope of the fight against terrorist organisation and terrorism, which was accordingly considered as a legitimate aim.

iii. Compliance with the Requirements of a Democratic Society

73. Any interference with the fundamental rights and freedoms may be considered to be *compatible* with the requirements of a democratic society only when it meets a pressing social need and is proportionate (see *Bekir Çoşkun* [Plenary], no. 2014/12151, 4 June 2015, §§ 53-55; *Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, §§ 70-72; and the Court's judgment no. E.2007/4 K.2007/81, 18 October 2007).

(1) Margin of Appreciation Afforded to the Authorities Wielding Public Power

74. The inferior courts should strike a fair balance between the individuals' right to express their opinions through freedom of expression and the legitimate aims set forth in Article 26 § 2 of the Constitution. It must be emphasised that the existence of legitimate aims in a given case does not set aside any right. What is important is to strike a balance between the legitimate aim and the relevant right in the particular circumstances of the case (see *Bekir Coşkun*, § 44, 47, 48; and *Hakan Yiğit*, §§ 58, 61, 66).

75. 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. Therefore, the Court is the authority of last instance (in the domestic law) in adjudicating whether an impugned interference is compatible with the freedom of expression (see, among many other judgments, *Ali Kıdık*, no. 2014/5552, 26 October 2017, § 41; and *Kemal Kılıçdaroğlu*, no. 2014/1577, 25 October 2017, § 57).

76. 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.

(2) Assessment of the Present Case

(a) Whether the Interference Met a Pressing Social Need

77. In order for the measure constituting an interference to be considered to meet a pressing social need, it must be suitable for attaining the pursued aim and appear to be the last resort likely to be used and to be a less severe measure likely to be applied (see, *mutatis mutandis*, *Bekir Coşkun*, § 51; *Mehmet Ali Aydın*, § 68; *Tansel Çölaşan*, no. 2014/6128, 7 July 2015, § 51).

78. At the material time when intensive armed conflicts with the terrorist organisation were taking place, the applicants undersigned a declaration introduced to the public as *"Academics' Declaration for Peace"*, which starts with the expression *"As the academics and researchers of this country, we will not act as an accomplice to this offence"*. The question to be clarified by the Court is whether the support given by the academics for

the impugned declaration would be considered as an incitement to the commission of terrorist offences.

(i) Whether There was an Incitement to Violence

79. Terrorist organisations 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 to the freedom of expression. Terrorism sets aside the fundamental rights and freedoms. Therefore, expressions which are capable of justifying, praising, or encouraging terrorism, terror and violence cannot be considered to fall within the scope of the freedom of expression.

80. However, it should be primarily borne in mind that in the Turkish law, not expressing every kind of opinion associated with terrorism but merely making terrorist propaganda in a way that would justify or praise the terrorist organisations' methods involving coercion, violence or threat or encourage the use of such methods is considered to constitute an offence (see *Ayşe Çelik*, § 43).

81. Expression of thoughts, which do not include any statements inciting violence, lead to the risk of commission of any terrorist offences, cannot be considered as a terrorist propaganda for merely being in parallel with a terrorist organisation's ideology, social or political aims as well as its opinions on political, economic and social matters. Despite being disturbing for the State's authorities or a significant part of the society as previously noted by the Constitutional Court (see *Abdullah Öcalan* [Plenary], no. 2013/409, 25 June 2014, § 95), the expression, dissemination, ensuring the adoption by others in an active, systematic and plausible manner, inspiration and promotion, of thoughts that are concerning social and political environment or socio-economic instabilities, ethnic problems, the different demographic structure of the country, the request for further freedom or that are in the form of criticism towards the governance of the country are under the protection of the freedom of expression (see *Ayşe Çelik*, § 44).

82. 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 entails a threat, 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 ECHR concerning the application of Article 10 of the European Convention on Human Rights and to the experience of States in the implementation of their national provisions on *praising of terrorism and/or incitement to terrorism* (see the explanatory report, § 88).

83. 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). 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 indicated:

> *"95. When drafting this provision, the CODEXTER bore in mind the opinions of the Parliamentary Assembly (Opinion No. 255 (2005), paragraph 3.vii and following), and of the Commissioner for Human Rights of the Council of Europe (document BcommDH (2005) 1, paragraph 30 in fine) which suggested that such a provision could cover "the dissemination of messages praising the perpetrator of an attack, the denigration of victims, calls for funding for terrorist organisations or other similar behaviour" which could constitute indirect provocation to terrorist violence.*
>
> *96. This provision uses a generic formula as opposed to a more casuistic one and requires Parties to criminalise the distributing or otherwise making available of a message to the public advocating terrorist offences. Whether this is done directly or indirectly is irrelevant for the application of this provision.*
>
> *97. Direct provocation does not raise any particular problems in so far as it is already a criminal offence, in one form or another, in most*

legal systems. The aim of making indirect provocation a criminal offence is to remedy the existing lacunae in international law or action by adding provisions in this area.

98. The provision allows Parties a certain amount of discretion with respect to the definition of the offence and its implementation. For instance, presenting a terrorist offence as necessary and justified may constitute the offence of indirect incitement.

99. However, its application requires that two conditions be met: first, there has to be a specific intent to incite the commission of a terrorist offence, which is supplemented with the requirements in paragraph 2 (see below) that provocation be committed unlawfully and intentionally.

100. Second, the result of such an act must be to cause a danger that such an offence might be committed. When considering whether such danger is caused, the nature of the author and of the addressee of the message, as well as the context in which the offence is committed shall be taken into account in the sense established by the case-law of the European Court of Human Rights. The significance and the credible nature of the danger should be considered when applying this provision in accordance with the requirements of domestic law.

…"

84. The Court is of the opinion that there is a difference between the propaganda of terrorism *in abstracto* and the *de facto* materialisation of provocation resulting from the propaganda. It is clear that in case of provocation at the end of a terrorist propaganda, the offender will be punished for acting as an accomplice or for any other corresponding act prescribed in the relevant law. Besides, considering the act of dissemination of propaganda as an offence posing a danger *in abstracto* will probably have create 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 of disseminating 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 *Ayşe Çelik*, § 47).

(ii) Acknowledgement of the First Instance Courts

85. According to the courts, the statements in the impugned declaration were capable of legitimising or praising the methods of the terrorist organisation involving coercion, violence and threat or encouraging the use of such methods; in other words, these statements amounted to propaganda of a terrorist organisation. The Court would mainly deal with the inferior courts' assessments in their decisions formulated in a repetitive manner, which are summarised as follows:

i. The inferior courts attached great importance to the conditions under which the declaration was published. Primarily reminding the ultimate aim pursued by the PKK, the inferior courts noted that this organisation had been long resorting to intensive violent acts to achieve this aim; that at the time when the declaration was published, it aimed at expanding its violent and terrorist acts from rural areas to city centres; that to that end, it had been conducting occupational activities under the name of self-governance in the relevant cities and engaged in long-standing clashes with the security forces by setting up barricades in the streets; and that it had not allowed people to leave the region with a view to using them as a shield.

ii. The courts also provided certain statistical information on the terrorist events, which lasted for about one year from the second half of 2015 to the second half of 2016. According to this information, during the clashes called as the ditch events, a minimum of 532 security forces were martyred and 228 civilians lost their lives. The imposed curfews directly affected 1.300.000 citizens, and 362.000 students were deprived of their right to education.

iii. According to the courts, the terrorist organisation sought to add an international dimension to the matter by escalating the violence. It aimed at humiliating the country at the international arena and even paving the way for an interference, by the external forces, with the country on the pretext of these events.

iv. The courts considered that the State was completely acting lawfully during the clashes taking place at the time when the impugned declaration was published. However, the terrorist organisation introduced, through all means it could use, the ongoing clashes as the acts of unjustified killing and destroying of civilians performed by the security forces. As a matter of fact, the impugned declaration tried to present the operations conducted by the security forces fighting -by virtue of the powers and responsibility granted through laws- against the terrorist organisation, which had set up barricades, dug trenches and placed bomb traps in the streets, carried out occupational activities under the name of self-governance, made the region uninhabitable for the civilians, took hostage and used as a human shield those who could not leave the region, as if they had been conducted against civilians.

v. Upon the call made by a high-level member of the terrorist organisation, the followers of the terrorist organisation acted so as to show the security forces as attackers and acquit the terrorists who were the real perpetrators of the violent acts, and in this sense, the impugned declaration was announced. In other words, the inferior courts considered that the declaration had been formulated and made public in line with the PKK's instruction.

vi. In the declaration, a call was made merely for the State, while there was no such call for the terrorist organisation. The lack of no assessment to the effect that the terrorist organisation had responsibility in the ongoing clashes and gave rise to these clashes and deaths indeed demonstrated that those signing the declaration had acted with the intent of protecting and defending the armed terrorist organisation.

vii. In the impugned declaration, the notions *"massacre"*, *"torture"*, *"exile"*, and *"deliberate and planned slaughter"* were used intentionally, thereby fostering the impression that it was the State responsible for these acts.

viii. It was impossible not to consider that the declaration would be used a means for the dissemination of the propaganda of the armed terrorist organisation.

(iii) The Context and Content of the Declaration

86. Given notably the difficulties faced while fighting against terrorism and the complex and vague nature of the expressions in the context of terrorism, it should be borne in mind that in ascertaining whether the expression of such kinds of thoughts amounted to an incitement to violence, the context of the impugned expressions, the identity of the person making the statement, the time and possible effects of the statement and all other expressions within the statement must be also taken into account (see, 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*, §§ 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 allegedly turning into propaganda of a terrorist organisation, *Mehmet Ali Aydın*, § 77).

87. On the dates when the impugned statements were expressed, several terrorists died and a large number of security forces were martyred due to a long-standing conflict taking place between the security forces and the PKK terrorists who attempted to declare self-governance in 11 cities and dug trenches in these cities to that end. Besides, according to the assessments included in the conviction decisions, there were also several civilian deaths resulting from the impugned incidents. Hundreds of people were forced to migrate from the region where conflicts were taking place, and a million of people were directly or indirectly affected by the armed clashes.

88. Regard being had to the context of the applicant's expressions and the background of the incidents taking place at the relevant time, it may be acknowledged that the applicants raised the following claims and requests in the impugned declaration:

i. The State should immediately abandon its policy of *"massacre"* and *"deliberate exile"* applied against those living in the region, notably the Kurds.

ii. The civilians have been exposed to *de facto* starvation and thirst due to the long-standing curfews. However, the use of weapons which may be used merely in times of war in the settlements leads to a violation of the rights and freedoms safeguarded by the Constitution and the relevant international conventions. For these reasons, the curfews should be immediately lifted, and the anti-terror method, which has been applied, should be abandoned.

iii. Those responsible for the violations of the human rights should be identified and punished.

iv. The pecuniary and non-pecuniary damages sustained by the citizens living in the region where the curfews were in place should be determined and compensated for, and to that end, national and international independent observers should be allowed to enter into the *destroyed areas*, to conduct inspections and to report.

v. The Government should set a roadmap, which takes into consideration the claims of the *"Kurdish political will"*, and lift all sanctions intended for supressing the opposition in order to *"satisfy the necessary conditions for negotiation"* and *"find solutions for securing permanent peace"*. Independent observers from the large groups of the society should attend the negotiations.

(iv) The Court's Evaluations

Call by the High-Level Member of the PKK

89. The first instance courts mainly relied their conviction decisions on the call *"Intellectual and democratic circles should protect the self-governments ('Aydın ve demokratik çevreler öz yönetimlere sahip çıksın')"*, which was allegedly made by a high-level member of the PKK about two months before the publication of the impugned declaration. According to the

courts, the said call was made as an instruction, and subsequent to this call, the impugned declaration was published. However, in the reasoning part of their conviction decisions, the first instance courts failed to demonstrate any evidence, *going beyond an assumption,* to the effect that those formulating and signing the declaration had acted in line with the PKK's instruction.

90. According to the documents submitted to the Court, the applicants requested the submission, to the Court, of the available evidence before the prosecutor's office as to the existence of such a call. However, there was no information as to the place where the impugned statements alleged to be in form of a call had been made, and the prosecutor's office did not append the relevant original text to the investigation file. Nor did the incumbent courts conduct any inquiry in this respect. The first instance courts found the arguments raised by the prosecutor's office adequate and left the applicant's relevant claims unanswered.

91. Besides, it has been inferred from the documents submitted the Court that the said high-level member of the PKK expressed certain statements on a TV channel on 22 December 2015, one week before the date specified in the indictment. These statements were subsequently broadcasted also by a news agency broadcasting in support of the PKK terrorist organisation. This statement was a call for both the Kurds and those of other ethnical origins to rebel and to attack the public buildings and other places throughout the country. It was further indicated that all powers clashing with the PKK, notably the ruling party -namely the Justice and Development Part-, were a legitimate target; that everything and everywhere were to be set on fire, thereby increasing the resistance, which was the Kurds' legitimate right of self-defence. However, any expression *"Intellectual and democratic circles should protect and defend the self-governments"* was not found in the statement, which was fully in the nature of a call for rebellion and armed violence.

92. It is disputed, however, whether the call relied on by the first instance courts in their conviction decisions and the call submitted by the applicants to the Court were the same. The high-level member of the PKK made a call for the Kurds and *"all democratic circles"* to rebel throughout

Turkey and to attack the buildings and places belonging to AK Party, whereas the declaration signed by the applicants, regardless of the words and style preferred therein, made a call for putting an end to the clashes and the respect for fundamental rights and freedoms, for resuming the solution process, stopping of the violence and establishing a dialogue and an environment without any clash.

93. As the alleged formulation of the impugned declaration in line with the PKK's instruction was the most significant evidence of the alleged propaganda of the terrorist organisation, the first instance courts should append the text of the impugned statement or security reports, if any, concerning this statement for ensuring the defendants to duly exercise their right of defence. They are also required to establish whether there were any similarity and parallelism between the contents of the impugned declaration and the statement made by the PKK's high-level member.

94. It is undoubted that the said evidence and assessments are of great importance to the extent that would directly have a bearing on the proceedings in essence. Regard being had to the several numbers of the courts by which the academics signing the declaration were tried, it cannot be understood why these courts all failed to conduct such an inquiry and assessment.

95. The criminal courts' and other public authorities' assumption, in the absence of any definite and plausible evidence capable of rebutting any kinds of disputes, to the effect that a given statement was expressed through any kind of cooperation with the terrorist organisation or in line with the organisation's instruction and the punishment of individuals on the basis of such assumption would exert a severe pressure on the freedom of expression.

Unilateral Call

96. Besides, the inferior courts stressed that the call for putting an end to the ongoing clashes was made merely to the State and in issuing their conviction decisions, they relied on the lack of a call of the same nature addressed to the terrorist organisation. According to the courts,

a lack of any assessment to the effect that the terrorist organisation was responsible for the occurrence of the violent acts demonstrated that the applicants had acted for protecting the armed terrorist organisation. Despite this conclusion reached by the inferior courts, it must be emphasised that it would not be reasonable to reach a legal conclusion due to the lack of any address to, or due to ignorance in the evaluations, of an armed and dangerous terrorist organisation, which acts unlawfully, aims at spreading fear and does not abstain from performing any act for intimidating the society.

97. As prescribed by laws, it is within the public authorities' discretion to decide whether to take into consideration the claims and proposals submitted by the civil society. However, it is undoubted that the punishment of those who have submitted certain proposals for the State concerning an incident that had a significant effect on the community life, for not having considered and treated the licit and illicit actors equally and having addressed their calls not to the terrorist organisation but merely to the State, would inevitably have a chilling effect on public discussion. Besides, the *unilateral* nature of information or convictions cannot be *per se* considered as a ground to interfere with the freedom of expression.

Aims Pursued by the Applicants

98. The applicants asserted that the sole aim underlying their signing of such a text was to draw the relevant authorities' attention and to ensure putting an end to violence and secure a peaceful environment. It must be borne in mind that such a text may pursue and embody aims other than those specified therein. However, it is unacceptable for the criminal courts to render conviction decisions merely based on assumptions and hypotheses. In these decisions, the courts failed to demonstrate any concrete evidence that the aim explained by those formulating and signing the declaration was not indeed valid. Therefore, it has been considered that the impugned declaration generally invited those wielding public power to act in accordance with law and to resolve the matters through methods denying violence, despite containing harsh expressions and severe imputations.

99. Freedom of expression secures the right to freely express, explain, defend, convey to others, and disseminate thoughts and convictions without being condemned. Expressing the ideas including those opposing to the majority by any means, gaining stakeholders for the ideas expressed, materializing the ideas, and convincing others on this matter, as well as tolerating these endeavours are amongst the pluralist democracy's requirements. (see *Bekir Coşkun*, §§ 33-35; *Mehmet Ali Aydın*, §§ 42, 43; *Abdullah* Öcalan, § 74; and *Tansel Çölaşan*, §§ 35-38).

100. To consider an expression as propaganda of terrorist organisation for merely aiming at *fostering an impression* cannot be considered as a legal assessment. In the impugned declaration, it was stated that certain practices of the security forces fighting against terrorism were unacceptable, and the public institutions were accused of certain acts. However, in its several judgments, the Court has made a reference to the conclusions in the ECHR's judgment (see *Handyside v. the United* Kingdom, no. 5493/72, 7 December 1976, § 49) that the freedom of expression is applicable not only to *information* or *ideas* that are favourably received or regarded as favourable, inoffensive or as a matter of indifference, but also to those that offend, shock or disturb, or that are unacceptable for, the State or any sector of the population. The Court has endorsed that these kinds of opinions are the demands of pluralism, tolerance and broadmindedness without which there was no democratic society (see *Education and Science Workers' Union and Others* [Plenary], no. 2014/920, 25 May 2017, § 78; *Fatih Taş* [Plenary], no. 2013/1461, 12 November 2014, § 94; *Bejdar Ro Amed*, no. 2013/7363, 16 April 2015, § 63; and *Abdullah Öcalan*, § 95).

Discussion of Matters of Public Interest

101. Article 26 § 2 of the Constitution allows, to the minimum extent, for the restriction of freedom of expression in cases of public interest (see, among many other judgments, *Ayşe* Çelik, § 54; Ali *Kıdık*, §§ 53, 77; and *Abdullah Öcalan*, §§ 99, 108). In the present case, the applicants signed a declaration involving certain assessments, from a certain point of view, concerning the impugned events called as ditch events, lasting for 10 months and leading to mass migration as well as death and injury

of many persons. There is no hesitation that the impugned declaration was concerning the matters of public interest. Therefore, it should have been demonstrated through meticulous assessments that the impugned interference with such kind of an expression of thought met a pressing social need.

Shocking Expressions

102. The declaration clearly criticises the public authorities for the methods they applied in fighting against terrorism and the severity of the violence they inflicted. According to the declaration, many people died and were forced to migrate due to the authorities' endeavour to resolve the ongoing matters by inflicting violence for a long period. The academics signing the declaration accused the authorities that had not preferred to use less severe methods of *slaughtering* as well as of *deliberately banishing* citizens and characterised the relevant cities as *destroyed regions* due to the pecuniary damages that had been caused. The inferior courts also criticised the use of expressions such as *"destruction"*, *"massacre"*, *"torture"*, *"exile"*, *and "deliberate and planned slaughter"* in the declaration. The language of the impugned declaration is clearly harsh, incriminating and offensive in respect of the public authorities. However, it must be recalled that freedom of expression applies not only to information and ideas that are accepted or considered harmless or irrelevant by the society, but also to those that offend, shock or disturb (see *Emin Aydın (2)*, no. 2013/3178, 25 June 2015, § 35). It must be stressed that freedom of expression be interpreted broadly to allow for exaggeration and even provocation to some extent (see *Ali Suat Ertosun*, no. 2013/1047, 15 April 2015, § 66).

103. It has been observed that the abovementioned notions are a part of the style used by those formulating the declaration, which was intended for causing polemics and triggering severe reactions. The use of a critical language in expressing an idea also pursues the aim of shocking the addressee. As a matter of fact, the applicants stated that they preferred *shocking* and *disturbing* expressions so as to voice their wish to put an end the long-standing violent acts and attract the authorities' attention.

Criticisms towards the Public Authorities

104. The Court has adopted certain principles with respect to the criticisms directed towards the public authorities or public policies. In the first place, even if certain opinions and thoughts expressed are found unacceptable by the bodies wielding public power, the thoughts opposed to the established order, policies and practices and criticising the acts performed by bodies wielding public power should be freely expressed in a democratic society governed by rule of law (see *Mehmet Ali Aydın*, § 69; and *Ayşe Çelik*, § 53).

105. In the second place, an effective fight against terrorism may be achieved by means of protecting the basic principles of a democratic state of law sought to be collapsed by way of terrorism. In this sense, individuals should not be imposed any sanction due to their opinions and thoughts criticising the State's anti-terror policies, regardless of how severe they are.

106. In the third place, it must be recalled that the acceptable level of criticism against the public authorities is much wider than that of an individual as they exercise public power. It must be always taken into consideration that in a democratic system, the acts or omissions of the public authorities are subject to strict scrutiny not only of legislative and judicial bodies but also of the public (see *Ayşe Çelik*, § 54; *Bekir Coşkun*, § 66; and *Ergün Poyraz (2)*, no. 2013/8503, 27 October 2015, § 69).

107. In the fourth place, the public authorities have the opportunity to answer and react the attacks and criticisms directed towards them by different means. However, the bodies wielding public power should abstain from initiating a criminal investigation and prosecution due to these unjust verbal attacks unless they incite violence.

108. In the fifth place, even if the expressions in the declaration are found to be excessively harsh, it should be taken into consideration that the declaration does not in its entirety target a person or public officer directly and contain expressions concerning a major social debate of great interest to the public. In this regard, the inferior courts' reliance in their conviction decisions on the aim of disgracing the country at the

international arena, pursued through the impugned declaration, cannot be regarded as a legitimate ground justifying the interference. The legitimate ground of the interference with the applicants' freedom of expression is to maintain public security. It is constitutionally forbidden to punish individuals for disseminating terrorist propaganda, merely based on presumptive assessments, for reasons such as the honour or reputation of public authorities, thereby restricting their freedom of expression.

109. In the sixth place, the declaration is, as a whole, a call for the authorities to put an end to the clashes and secure the principles and rules inherent in the right to life. In cases where an expression relates to the right to life safeguarded by Article 17 § 1 of the Constitution, the criticisms towards the acts of public authorities must be more tolerated.

Relation between the Impugned Declaration and Academic Freedoms

110. The impugned declaration directed towards the bodies wielding public power was signed by a minimum of 2.200 academics. It should be accepted that the declaration has a relation, to a certain extent, also with the academic freedoms. It is undoubted that any kind of development with respect to the state and the community is a concern to the academics both in Turkey and in the world; and that the share by academics of their convictions with the public is a part of the freedom of expression.

111. The aim of the universities are to conduct scientific researches, to contribute to the social development through these researches and to raise qualified human resource. It is not possible to achieve these aims by merely engaging in science and encouraging people to think and engage in science. In addition, it is also requisite to support the expression of thoughts. Therefore, the thoughts expressed by the academics are under the strict protection of the freedom of expression even though not being in relation with their own field of research, professional expertise and competence and being disputed or not being approved.

112. It cannot be undoubtedly said that all expressions uttered by the academics are absolutely true. It is nevertheless a compromised fact that alternative points of views, which are different from one another,

provide opportunity for a more accurate way of thinking. Therefore, the academics' ability to challenge the strongest opinions, like an ordinary citizen, in the most critical and delicate political matters even outside the scope of their own field of expertise may be much more effective than those of the other individuals and is therefore of critical importance for the society and the country.

113. It should be borne in mind that the expression of thoughts on the matters that are in dispute and are of particularly high public interest is of vital importance for the democratic society and constitutes the core values of a democracy. Democracy is based on the ability to solve the problems through open discussion (see *Ferhat Üstündağ*, no. 2014/15428, 17 July 2018, § 43). Interferences with the exercise of freedom of expression, other than those inciting violence or amounting to denial of democratic principles, undermines and imperils democracy.

Humiliation of the Victims

114. In discussing the legitimacy of the impugned interference, the Constitutional Court cannot ignore the sufferings of the victims of terrorist acts. Publicly defending or justifying terrorist organisations, terrorist offences or a person committing such offences also impairs the dignity of, despises, or insults, the victims of terrorist acts and their relatives (see *Ayşe Çelik*, § 58). However, in the present case, the expressions in the declaration signed by the applicants were not found to have any aspect insulting the victims.

Critical Explanations Cannot be Considered as a Propaganda

115. It has been considered that in the present case, Article 7 § 2 of the Anti-Terror Law no. 3713 is the legal basis of the interference with the applicants' freedom of expression. In this sense, it is extremely clear that the impugned interference had a legal basis and the relevant norm applied to the applicants' case was accessible. Before being amended, Article 7 of Law no. 3713 provided for *"Any person disseminating the propaganda of a terrorist organisation shall be sentenced to imprisonment for a term of one year to five years"*. By the amendment made thereto on 11 April 2013, it is set forth that a person disseminating the propaganda of

terrorist organisations in a way that would legitimise or praise their methods involving coercion, violence or threat or encourage the use of such methods shall be punished. In other words, it is accordingly 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*.

116. In the present case, the Court cannot disregard the amendments made to Article 7 § 2 of Law no. 3713, the will of the law-maker, as the master of the crime and punishment policy, which is explicitly set forth in the legislative intention of these amendments, the abovementioned case-law of the Court of Cassation and the relevant provisions of the European Convention on Prevention of Terrorism.

117. Also in consideration of the Court of Cassation's case-law in question, since 11 April 2013 the date when Law no. 6459 took effect, disseminating propaganda of *"terrorist organisations in a way that would legitimise or praise their methods involving coercion, violence or threat or encourage the use of such methods"* has constituted the material element of the offence. It should be considered that upon this amendment, the dissemination of propaganda of a terrorist organisation becomes a conduct crime. Accordingly, in order for the commission of this offence, the propaganda must have been separated in a way that would (a) legitimise the terrorist organisation's methods involving coercion, violence or threat, or (b) praise its such methods involving coercion, violence or threat, or (c) *encourage* the use of these methods involving coercion, violence or threat. Besides, in the assessment to be made in this respect, an objective and direct relation must be established between the elements of the imputed offence and the impugned act, with a view to concluding that the said act has amounted to a propaganda. In other words, the conclusion to be reached must not merely consist of a subjective interpretation that attributes indirect meanings to the expressions in the declaration by exceeding the scope of the relevant statutory provision.

118. The notion of praising literally means to glorify, laud or eulogise the value of a person or thing by mentioning his/its good sides and

advantages. In the context of propaganda of a terrorist organisation, praising means the act of presenting a terrorist organisation's methods involving coercion, violence or threat gorgeous, dignified or useful. As regards the act of encouraging the use of methods of a terrorist organisation involving coercion, violence or threat, the expressions are intended not for the accuracy and greatness of a certain offence but for showing the necessity of the commission of that offence. Incitement amounts to a triggering and special act intended for having a direct effect on the will of other individuals through a psychological energy. The act of legitimising means to justify the acts performed by a terrorist organisation. The dissemination of the propaganda of a terrorist organisation in a way that would legitimise its methods involving coercion, violence or threat such as killing, bombing, wounding, abducting and intimidating, which are performed by the organisation to achieve its purpose, is laid down as the element of this offence.

19. The main factors to be taken into consideration in cases of the expression of thoughts similar to those in the present case may be listed as follows:

(a) In case of the offence of disseminating propaganda of a terrorist organisation, it is aimed that the same act be performed by the others by defending and promoting, to a certain degree, the organisation's methods involving coercion, violence or threat.

(b) It should be ascertained whether the expression of thoughts contained hatred and hostility to the extent that would cause individuals to use the terrorist organisations' methods involving coercion, violence and threat. Any explanations as to the social or personal problems faced during the legitimate struggle by the State against a terrorist organisation –even if they are completely subjective considerations– cannot be considered to amount to an expression of thoughts, which *per se* enable to raise awareness or encourage those prone to commit terrorist offences and which increase the risk of commission of such offences (see *Ayşe Çelik*, § 56).

(c) The incitement to use terrorist organisations' methods involving coercion, violence or threat is dissemination of a message to the public

that entails the risk of commission of one or several offences for the purpose of provoking the commission of such offences. In this sense, expression of thoughts, which do not include any statements inciting violence and entail the risk of commission of any terrorist offences, cannot be considered to encourage the use of the method involving coercion, violence or threat and used by the terrorist organisation.

120. In its several judgments, the Court has stated that interferences with the freedom of expression without any justification or with any justification failing to fulfil the criteria set by the Court would be in breach of Article 26 of the Constitution. In order for an impugned interference with the freedom of expression to be found compatible with the requirements of a democratic society, the grounds relied on by the public authorities must be relevant and sufficient (see, among many other judgments, *Kemal Kılıçdaroğlu*, § 58; *Bekir Coşkun*, § 56; and *Tansel Çölaşan*, § 56).

121. Given the decisions issued by the inferior courts, it has been observed that the applicants were punished for having disseminated the propaganda of the said terrorist organisation as they had expressed their criticisms unilaterally, favoured the terrorist organisation and slandered the security forces.

122. However, in none of their decisions, the inferior courts made assessments as to how the impugned declaration *legitimised* or *praised* the methods of violence and threat adopted by the terrorist organisation or *encouraged* the use of these methods. In this sense, the grounds specified in the conviction decisions were not found to be *relevant* and *sufficient.*

Final Assessments

123. The Constitutional Court is aware of the concerns about the expressions and acts that might deteriorate the security situation in the region where the terrorist incidents leading to the loss of numerous lives and necessitating the declaration of a state of emergency in the large part of the country have been taking place for the last forty years.

124. The Court is also aware of the fact that the impugned declaration was formulated unilaterally and from a certain perspective; and that it

contained exaggerated comments, as well as some offensive and vicious expressions against the security forces. The Court's consideration that this declaration should fall under the protection of the freedom of expression enshrined in Article 26 of the Constitution does not mean that it shares and supports the thoughts and ideas stated in the declaration.

125. The declaration signed by the applicants is indeed unacceptable for the majority of the society. It is of course not possible to support a statement charging the State that has been fighting against terrorism with *"massacring"*, *"slaughtering"* and *"torturing"* the people. These expressions are so severe that they disturb the vast majority of the society perhaps except for a very small group.

126. However, the expressions that are in no way supported by the Court may also fall into the scope of the freedom of expression. In the assessment of whether an expression or statement falls under the freedom of expression, it shall not be decisive whether these expressions and statements are accurate or disturbing. At this point, it should be assessed not whether the expressions used are accurate or acceptable, but rather whether they have legitimised, praised or incited the violent and threatening methods of the terrorist organization.

127. Regard being had to the impugned declaration as a whole as well as its context, the Court has reached the following conclusions despite not agreeing with the content thereof:

(a) Given the objective meaning of the declaration signed by the applicants, the declaration cannot be, as a whole, qualified as a praise of the PKK terrorist organisation, a support for terrorism or a direct or indirect incitement to violence, armed resistance or insurrection. In other words, the Court has not considered that the declaration promoted the methods of the terrorist organisation that involved coercion, violence or threat for the purpose of encouraging others to commit the same offences.

(b) In case of an allegation that an expression of thought constitutes the propaganda of terrorism or a terrorist organisation, the most important element to be taken into consideration is whether the impugned expressions have the potential of inciting violence. In the particular circumstances of the present case, it cannot be demonstrated that the

publication of the impugned declaration via internet led to unfavourable consequences in terms of the State and the society and had a significant effect on the counter-terrorism activities conducted by the State.

(c) The declaration was not considered to have praised the members of the terrorist organization clashing with the security forces during the ditch events and the terrorist organisation itself, to have particularly inspired hatred against the security officers directly involved in the clashes or encouraged recourse to violence (see *Ayşe Çelik*, § 57; and *mutatis mutandis*, *Abdullah Öcalan*, §§ 105-108; and *Mehmet Ali Aydın*, §§ 81-84).

(d) Regardless of the other aims underlying the formulation or signing of the impugned declaration as well as the language and style used therein, it has been considered ultimately that the main issue in the declaration is the request for putting an end to the clashes taking place at the relevant time.

(e) Therefore, the Court has not reached the conclusion that the aim underlying the publication of the impugned declaration was to foster a public opinion that the said organisation could be in no way overcome and was able to attain its aims, as well as to deactivate and intimidate the individuals and institutions that were against the terrorist acts of that organisation and to receive active public support for the organisation.

128. Merely the sever nature of an expressed thought, the heavy criticisms it has directed towards the authorities, the accusatory and severe language used and even its being unilateral, contradictory and subjective do not necessarily mean that it incites violence, poses a threat to the society, the State and the democratic political order, thereby encouraging people to carry out unlawful acts.

129. Undoubtedly, the limits of permissible criticism towards the government, as a political actor, are wider than those with respect to the individuals. It should be considered normal that the operations conducted against a terrorist organisation in 11 cities for about 10 months and having a bearing on lives of millions of people have attracted public attention and undergone various assessments and comments.

130. It is evident that the thoughts reflected in the declaration signed by the applicants are explicitly different from those adopted by the majority of the society, which for this very reason entails the need to act with delicacy in affording protection to such kind of expressions. That is because the interferences with such expressions impose a severe restriction on the public's right to be informed of different perspectives on the particularly significant events taking place in the country, no matter how difficult it is for the majority of the society to embrace this point of view.

131. It must be prescribed that severe criticisms may be directed towards the public authority conducting the impugned operations, the issue on which the declaration was signed, and a higher degree of tolerance must be shown to such criticisms as a requirement of democratic pluralism. In the light of all this information, it has been concluded that the applicants' convictions did not meet a *pressing social need*.

(b) Proportionality

132. The proportionality points to the striking of a fair balance between an individual's right and the public interests or, if the aim pursued by a given interference is to protect the others' rights, between the individual's right and the other individuals' rights and interests (see, *mutatis mutandis*, *Bekir Coşkun*, § 57; *Tansel Çölaşan*, §§ 46, 49 and 50; and *Hakan Yiğit*, §§ 59 and 68).

133. The Court has previously held that even in cases when the applicant was subjected to conditional bail for a certain period of time (see *Fatih Taş*, § 108) and when the applicant was sentenced to a suspended punishment (see *Orhan Pala*, no. 2014/2983, 15 February 2017, § 54; and *Hakan Yiğit*, § 68), the applicants were nevertheless subjected to a criminal sanction; and that such practices would not in any case be sufficient *per se* to justify any interference with the applicants' freedom of expression.

134. The punishment imposed due to the expressions, even those disturbing in nature, in respect of the acts performed by those wielding public force may have a *deterrent effect*, thereby leading to the silencing of different voices in the public. The fear of being punished may pose

an obstacle to the maintenance of the pluralist society (see *Ergün Poyraz (2)*, § 79). As the punishment of academics would pose an obstacle, to a significant extent, to their contribution to the discussion of matters that are of public interest, they must not be punished in the absence of strong grounds (see, as regards the journalists, *Orhan Pala*, § 52; *Bekir Coşkun § 58*; and *Ali Rıza Üçer (2)* [Plenary], no. 2013/8598, 2 July 2015, § 46).

135. In the present case, the applicants were all sentenced to imprisonment. The pronouncement of the conviction decisions issued with respect to the applicants, save for the first applicant, was suspended, and these applicants were granted conditional bail. The sentence imposed on the first applicant was partially executed. The applicants maintain their lives by means of expressing thoughts, and to conduct researches, to attend conferences and seminars, to make comments and to raise arguments during discussions are a part of their profession. Therefore, the freedom of expression is of importance notably for academics. The fear of being sanctioned has had a suspensive effect on the applicants, and even if they may complete the probation period without being further convicted, such a suspensive effect may restrain the disclosure of their thoughts. As a result, it must be admitted that the risk of execution of their imprisonment sentences in future has caused them stress and fear of being punished (see *Orhan Pala*, § 54; and *Bekir Coşkun* § 70).

136. Consequently, the Court has concluded that in the particular circumstances of the present case, the impugned interference due to the applicants' being sentenced to imprisonment–even some of them were suspended-, which was found not to meet *a pressing social need*, could not be proven to be proportionate to the legitimate aim of maintaining public order within the scope of the fight against terrorist organisations and terrorism.

137. In a democratic society, being subjected to a punishment serving for the purpose of auto-censorship reflex renders unquestionable the decisions and acts of the bodies wielding public power. However, what is expected from the State in a democratic society is not to preclude a debate of high public interest through the threat of imposing criminal sanction, but rather to contribute to the public debate in question by effectively

responding to the criticisms directed against it by way of utilising the wide range of its opportunities to have access to source of information and communication means.

138. In any case, in responding to the criticisms, the bodies wielding public power have means and facilities more than anyone else within the country. Notably in cases where the State has the opportunity through different means to respond to the unjust attacks and criticisms directed by the opponents, even seeming to be nonsense and irrelevant, no criminal prosecution must be initiated.

139. The Court has concluded that the interference with the applicants' freedom of expression was incompatible with the requirements of a democratic society and thus found a violation of Article 26 of the Constitution.

Mr. Serdar ÖZGÜLDÜR, Mr. Burhan ÜSTÜN, Mr. Muammer TOPAL, Mr. Kadir ÖZKAYA, Mr. Rıdvan GÜLEÇ, Mr. Recai AKYEL, Mr. Yıldız SEFERİNOĞLU and Mr. Selahaddin MENTEŞ did not agree with this conclusion.

C. Alleged Violations of the Other Provisions of the Constitution

140. The applicants also complained that they had not been tried by an independent and impartial court; that their decisions were unreasoned; that they had not been provided with adequate time and facilities for the preparation of their defence; and that the principle of equality of arms had been violated. Although the applicants maintained that they had not been provided with certain procedural safeguards and that therefore their right to a fair trial had been violated, the Court did not find it necessary to deal with their complaints under the right to a fair trial as it has already found a violation of the applicants' freedom of expression.

141. They also claimed that their being sentenced to imprisonment was in breach of the prohibition on using the interference not for the intended purpose. According to the applicants, the grounds relied on by the courts were not relevant and sufficient and clearly went beyond the legal definition of the offence in question. They were of the opinion that given the other practices targeting all opponents in the country, the impugned

interference with their freedom of expression was based on *improper grounds*. The applicants' allegations that their conviction decisions were contrary to the principle that the restrictions of the fundamental rights and freedoms cannot be contrary to the letter and spirit of the Constitution as well as the prohibition of abuse of fundamental rights and freedoms, enshrined respectively in Articles 13 and 14 of the Constitution, were not separately examined, in consideration of the conclusion reached by the Court from the standpoint of the freedom of expression.

D. Application of Article 50 of Code no. 6216

142. Article 50 §§ 1 and 2 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."*

143. 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 (for further explanations, see *Mehmet Doğan*, §§ 57-60).

144. The applicants requested the Court to find a violation as well as to order a retrial. They also claimed various amounts for non-pecuniary damage they had sustained.

145. It has been concluded that the applicants' freedom of expression was violated as their convictions *did not meet a pressing social need, were not proportionate*, and were therefore *incompatible with the requirements of a democratic society*. It has been accordingly observed that the violation of the applicants' freedom of expressions resulted from the court decision.

146. In this case, there is a legal interest in conducting a retrial in order to redress the consequences of the violation of the freedom of expression. The retrial to be conducted accordingly is intended for the redress of the established violation and its consequences pursuant to Article 50 § 2 of Code no. 6216.

147. In this sense, the step to be taken by inferior courts is to revoke the court decision giving rise to the violation and to issue a new decision in line with the principles set forth by the Court in the violation judgment. Therefore, a copy of this judgment must be sent to the relevant courts for a retrial.

148. A net amount of TRY 9,150 must be paid to each of the applicants in compensation for non-pecuniary damages, which could not be redressed by merely the finding of a violation. Their other compensation claims must be rejected.

149. The total court expense of TRY 2,839.60 including the court fee of TRY 364.60 and counsel fee of TRY 2,475, which is calculated over the documents in the case file, must be reimbursed to the applicant Zübeyde Füsun Üstel; the total court expense of TRY 2,769.70 including the court fee of TRY 294.70 and counsel fee of TRY 2,475 must be reimbursed to each of the applicants Sharo İbrahim Garip, Yasemin Gülsüm Acar and Canan Özbey; the total court expense of TRY 3,359.10 including the court fee of TRY 884.10 and counsel fee of TRY 2,475 must be reimbursed jointly to the applicants Ayda Rona Aylin Altınay Cingöz, Melda Tunçay and İzzeddin Önder; and the total court expense of TRY 3,064.40 including the court fee of TRY 589.40 and counsel fee of TRY 2,475 must be reimbursed jointly to the applicants Nazlı Ökten Gülsoy and Zübeyde Gaye Çankaya Eksen.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 26 July 2019:

A. UNANIMOUSLY, that the alleged violation of the freedom of expression be DECLARED ADMISSIBLE;

B. By MAJORITY and by dissenting opinions of Mr. Serdar ÖZGÜLDÜR, Mr. Burhan ÜSTÜN, Mr. Muammmer TOPAL, Mr. Kadir ÖZKAYA, Mr. Rıdvan GÜLEÇ, Mr. Recai AKYEL, Mr. Yıldız SEFERİNOĞLU and Mr. Selahaddin MENTEŞ, that the freedom of expression safeguarded by Article 26 of the Constitution was VIOLATED;

C. That a copy of the judgment be SENT to the relevant courts issuing the conviction decisions against the applicants to conduct a retrial with a view to redressing the consequences of the found violation;

D. That a net amount of TRY 9,150 be PAID to each of the applicants in compensation for non-pecuniary damage;

E. 1. That the total court expense of TRY 2,839.60 including the court fee of TRY 364.60 and counsel fee of TRY 2,475 be REIMBURSED to the applicant Zübeyde Füsun Üstel;

2. That the total court expense of TRY 2,769.70 including the court fee of TRY 294.70 and counsel fee of TRY 2,475, must be REIMBURSED RESPECTIVELY to the applicants Sharo İbrahim Garip, Yasemin Gülsüm Acar and Canan Özbey;

3. That the total court expense of TRY 3,359.10 including the court fee of TRY 884.10 and counsel fee of TRY 2,475, must be REIMBURSED JOINTLY to the applicants Ayda Rona Aylin Altınay Cingöz, Melda Tunçay and İzzeddin Önder;

4. That the total court expense of TRY 3,064.40 including the court fee of TRY 589.40 and counsel fee of TRY 2,475 must be REIMBURSED JOINTLY to the applicants Nazlı Ökten Gülsoy and Zübeyde Gaye Çankaya Eksen;

F. 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;

G. That a copy of the judgment be SENT to the 3rd Criminal Chamber of the İstanbul Regional Court of Appeal for information; and

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

DISSENTING OPINION OF JUSTICES SERDAR ÖZGÜLDÜR, BURHAN ÜSTÜN, MUAMMER TOPAL AND RIDVAN GÜLEÇ

1. The declaration signed by the applicants must be undoubtedly assessed in consideration of the particular circumstances of the material time. A large number of security officers were martyred, and many civilian citizens lost their lives during the security operations conducted into the impugned terrorist incidents. Article 7 § 2 of Anti-Terror Law satisfied the lawfulness condition in the present case. The conviction decisions rendered by the inferior courts against the applicants pursued a legitimate aim of maintaining public order, as a measure taken within the scope of the fight against terrorism. It is set forth in Article 5 of the European Convention on Prevention of Terrorism that the public dissemination of a message which would lead to the risk of commission of terrorist offences by direct or indirect means (public incitement to commit terrorist offences) may be subject to a criminal sanction. It is also laid down in the "Explanatory Report" of this Convention that the restrictions to be imposed on messages, which may directly or indirectly incite terrorist offences involving violence, are in accordance with the Convention. In this sense, the expressions clearly stated in the impugned text (declaration) "… the Republic of Turkey has been exposing its citizens to *de facto* starvation and thirst, attacking the residential areas by heavy weapons which could be used in times of a war… and acting in breach of all fundamental rights and freedoms…"; "…This is a deliberate and planned slaughter…"; "…the State [should] immediately abandon the policy of massacring and intentional exile it has been implementing against all residents of the region…"; "…the State [should] immediately

put an end to the violence it has been inflicting on the citizens…"; "… As the academics and researchers of this country, we hereby declare that we would not remain silent and thereby act as an accomplice to this massacre…" were considered, by the inferior courts, to constitute a terrorist propaganda. The inferior courts' consideration was compatible with the requirements of a democratic society and corresponded to a pressing social need. We have accordingly concluded that the impugned interference with the freedom of expression in the present case constituted a proportionate interference; in other words, a fair balance was struck between the applicants' right to freely express their thoughts and the legitimate aims laid down in Article 26 § 2 of the Constitution; and that the conviction decisions issued by the inferior courts were therefore relevant and sufficient.

2. In the Preamble of the Constitution, the indivisible unity of the Turkish State (the indivisible integrity of the State with its territory) is notably stressed (paragraphs 1 and 5), and it is further laid down in Article 130 § 4 on the institutions of higher education "…Universities, members of the teaching staff and their assistants may freely engage in all kinds of scientific research and publication. However, this shall not include the liberty to engage in activities against the existence and independence of the State, and against the integrity and indivisibility of the nation and the country". These constitutional provisions are the hierarchically superior norms, which place the duty of "loyalty to the State" on the members of teaching staff. Along with these provisions, Articles 4/b and 5/b of the Higher Education Law no. 2547 embody provisions in parallel to the above-mentioned constitutional arrangements. As the constitutional provision prohibiting members of the teaching staff from engaging in "scientific researches and publications" against "the integrity and indivisibility of the nation and the country" cannot be said to afford "freedom of expression" in the same context, it appears that the freedom to express and disseminate thoughts, which everyone is entitled under Article 26 of the Constitution, is further restricted –other than the grounds of restriction prescribed in Article 26 § 2–, in respect of members of the teaching staff, insofar as it relates to the issue specified in Article 130 thereof. The acts and imputations, which do not comply with the duty of loyalty to the State, are not in essence covered by the scope of the

freedom of expression. It should be noted that in cases where employees and public officials generally act in breach of their duty of loyalty to their employers and the State, the European Court of Human Rights ("the ECHR") finds the interferences with the freedom of expression necessary and proportionate (see the ECHR's judgment in the case of *Langner v. Germany*, no. 14464/11).

3. For the reasons cited above, we disagree with the majority as we consider that there was no violation of the applicants' freedom of expression.

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

The applicants -who were punished for having disseminated the propaganda of a terrorist organisation, namely the PKK, as they had signed a declaration published in the course of the operations conducted by the security forces against the members of the PKK, the perpetrator of the terrorist and violent acts known to the public as the ditch events- lodged an individual application with the Court. The majority of the Court found a violation of the applicants' freedom of expression. We disagree with the majority for the following reasons.

1. During the armed clashes and operations conducted in the eastern and south-eastern regions of the country for about 10 months in 2015-2016, a declaration undersigned by 1.128 academics from various universities, also including the applicants, was published on 11 January 2016. Next week, the number of academics signing the declaration exceeded 2.200.

2. Following the publication of the impugned declaration, the applicants were subjected to investigations and criminal proceedings for having disseminated propaganda of a terrorist organisation.

3. Nine applicants whose individual applications were joined were each sentenced to imprisonment for a term of 1 year and 3 months. The pronouncement of the conviction decisions issued in respect of the applicants, save for that of the applicant Zübeyde Füsun Üstel, was

suspended. A decision to suspend the pronouncement of the conviction decision cannot be issued in the case of Zübeyde Füsun Üstel as she did not give consent. The courts relied on the same grounds in the decisions issued in respect of the applicants other than the applicant Melda Tunçay. In the decision rendered in respect of the applicant Melda Tunçay, the grounds similar to those in the other decisions were relied on.

4. The applicants lodged an individual application upon the finalisation of the decisions.

5. The Court's majority examined the grounds relied on by the inferior courts in their conviction decisions and found a violation of the freedom of expression safeguarded by Article 26 of the Constitution on the grounds that their convictions did not correspond to a pressing social need and that the impugned interference resulting from the applicants' being sentenced to imprisonment could not be proven to be proportionate to the legitimate aim of maintaining public order within the scope of the fight against terrorist organisations and terrorism.

6. In this sense, it should be primarily noted that the issue needed to be resolved by the Court in the present case is whether the signing by the applicants of a declaration -starting with the sentence "As the academics and researchers of this country, we would not act as an accomplice to this massacre" and known to public as the "Academics' Declaration for Peace"- at a time when extensive clashes were taking place between the security forces and the terrorist organisation constituted an offence of disseminating terrorist propaganda (incitement to the commission of terrorist offences).

7. Undoubtedly, the impugned interference with the applicants' freedom of expression in the present case can be considered to give rise to no violation; in other words, to be an interference compatible with Article 13 of the Constitution only when it was compatible with the requirements of a democratic society and proportionate to the aim pursued. It is found to be compatible with the requirements of a democratic society only when it met a pressing social need and was proportionate. In other words, the interference must appear to be appropriate for attaining the pursued aim as well as, to be a less severe measure of last resort likely to be used.

8. Besides, in case of interferences that fall within the scope of the fight against terrorism, the requirements of a democratic society make it necessary to assess the interplay between the impugned acts or expressions and violence and terrorism, as well as whether these acts and expressions have incited, praised and glorified violence and terrorism.

9. In making such an assessment, a fair balance is to be struck between the individuals' right to freely express their thoughts and the legitimate aims specified in Article 26 § 2 of the Constitution. As a matter of fact, the existence of legitimate aims does not *per se* set aside a right. Therefore, a balance is to be struck between the legitimate aim and a given right in the particular circumstances of a case.

10. In assessing whether a given interference with the freedom of expression corresponds to a pressing social need, the public authorities are afforded a certain margin of appreciation, on condition of taking into account the above-mentioned balance. Such margin of appreciation is exercised both by the legislative organ and notably by the judicial authorities empowered to interpret the relevant legislation and apply it to a given case.

11. It should be also stated that the margin of appreciation afforded to public authorities, in assessing whether an impugned interference with the freedom of expression is appropriate and convenient to meet an urgent and pressing social need and whether the grounds put forth to justify the interference are fit for the intended purpose and sufficient, are much wider with respect to the issues concerning terrorism.

12. As is known, terrorist organisations 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 to disseminate propaganda of terrorism or terrorist organisations is one of these means. Terrorism is inimical to all values of a democratic society, notably to the freedom of expression. Therefore, expressions which are capable of justifying, praising, or encouraging terrorism, terror and violence cannot be considered to fall within the scope of the freedom of expression.

13. In the Turkish law, the criminal act of disseminating terrorist propaganda is prescribed not as an offence of threat *in concreto* but *in abstracto*. However, not every kind of expression of terror-related thoughts but merely those disseminating terrorist propaganda in a way that would legitimise or praise the terrorist organisations' methods involving coercion, violence or threat or encourage the use of such methods are considered to constitute an offence. Accordingly, only in cases where a person has disseminated the propaganda of a terrorist organisation in a way that would legitimise or praise its methods involving coercion, violence or threat or encourage the use of such methods, his act would be considered to constitute an offence.

14. In the judgments rendered by the Court and European Court of Human Rights, the expression of thoughts, which do not include any statements inciting violence or do not involve the risk of commission of terrorist offences, is not qualified as a terrorist propaganda.

15. However, it should be notably stressed at this point that a clear and rigorous distinction must be made between the expressions of thoughts which praise, lead to, or may lead to spread of, violence (even if distributing for the society in general or arguing against the existing order) and those of peaceful nature that are promoted to be realised by peaceful ways. This is a necessity that is because the expression of thoughts, which adopt violence as a method or involves violence, puts the existence of a democratic society at risk and falls foul of the exercise of a democratic right. Therefore, such kinds of thoughts cannot be considered among the ones that should be tolerated in a democratic society.

16. Article 5 of the Convention on Prevention of Terrorism prescribes a punishment for the public dissemination of a message that directly or indirectly leads to the risk of commission of a terrorist offence. In the explanatory report of this Convention, it is recalled that certain restrictions with respect to the messages that would directly or indirectly incite terrorist offences involving violence are in accordance with the European Convention on Human Rights.

17. Various means and methods may be used to convey a message to the public. In assessing whether such restriction is necessary, the way

how the expression considered to constitute a terrorist propaganda has been disclosed, the extent it has been disseminated and therefore the degree of its impact is to be, *inter alia*, taken into consideration. Given notably the difficulties faced while fighting against 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 any thought amounted to incitement to violence, the context of the impugned expressions, the identity of the person making the statement, the time and possible effects of the statement and all other expressions in the statement must be also taken into account.

18. As also stated in the Court of Cassation's case-law, an expression may be considered to constitute the offence of disseminating propaganda of a terrorist organisation only when it legitimises or praises the methods adopted by the terrorist organisation, which involve coercion, violence or threat, or encourages the use of such methods; in other words, it creates an atmosphere that triggers violence by leading to an unreasonable hatred as an incitement or encouragement to violence or to armed resistance and rebellion or in a way that would arouse aggressive feelings. In case of a direct or indirect call for violence, an assessment must be conducted by also taking into consideration the identity and position of the person expressing the impugned statement as well as the place and time where and when the impugned statement is materialised.

19. According to the inferior courts' conviction decisions, the statements included in the declaration signed by the applicants were of the nature that legitimised or praised the methods adopted by the said terrorist organisation, which involved coercion, violence or threat, or encouraged the use of such methods, that is to say, constituted the propaganda of the terrorist organisation.

According to the inferior courts:

- The circumstances of the relevant time when the impugned declaration was published are of great importance. The PKK/KCK terrorist organisation, which aims at carrying out activities to disunite a certain part of the territories under the control of the State, as well as at overthrowing the constitutional order and unitary structure of

the Republic of Turkey, has caused the death of thousands of civilians and security forces through its armed terrorist activities it has been continuously performed to that end and has been still performing several acts of severe nature, intended to extent violence and its terrorist acts in rural areas to urban centres at the publication date of the impugned declaration. It carried out invasions under the name of self-governance in the cities, engaged in long-standing clashes with the security forces by setting up barricades in the streets, used the civilians as shield and did not allow them to leave the region where clashes were taking place.

- The terrorist organisation sought to add an international dimension to the impugned issue by increasing the violence. It tried to degrade the country at the international arena and even paved the way for an intervention with the country by external powers under the pretext of these events.

- During the clashes ongoing at the publication time of the impugned declaration, while the State was acting lawfully in all aspects, the terrorist organisation presented, through every means they could use, the acts and actions performed by the security forces as the killing of civilians without a cause, as well as destruction. In the impugned declaration, the operations -conducted by the security forces in line with the authority conferred by laws and in a responsible manner against the terrorist organisation, which set up barricades, dug ditches and placed booby traps in the streets; carried out invasions under the name of self-governance; made the region unliveable for the civilians; took hostage and used as a human shield those refusing to leave the region- were intended to be shown as if conducted against civilians. Therefore, the counter-terrorism activities performed by the State's security forces on a legitimate and lawful basis were introduced, by those signing the declaration, in the same way as did the terrorists.

- The declaration was published upon the call of a high-level head of the said terrorist organisation so as to present the security forces as assailants and vindicate the terrorists who were the real perpetrators of the incidents.

- In the impugned declaration, the phrases such as "massacre", "violence", "exile", "deliberate and planned slaughter" were used consciously and the impression to the effect that the party responsible for these incidents was the State was given. Therefore, it was impossible for those signing the declaration not to consider that the declaration would be used a means for the propaganda of the terrorist organisation.

20. As also emphasised by the Court in its several judgments, the freedom of expression safeguarded by Article 26 of the Constitution applies not only to information and thoughts that are considered to be in favour or harmless or indifferent, but also to those that are offensive, shocking or disturbing.

21. It should be noted in this context that academics may also express an opinion on political issues like all other citizens; and that they cannot be subjected to a legal, administrative or criminal sanction, even at the lowest level, for merely having expressed an opinion on a political issue.

22. On the other hand, academics are obliged to be bound by the scientific realities by the very nature of their profession, to produce qualified thoughts for the society, as well as to potentially make contributions in favour of the public. This plays a decisive role in the determination of the scope of the freedom of expression afforded to them (it may vary by the particular circumstances of each case).

23. As noted in the judgments of the European Court of Human Rights ("the ECHR"), "expressions" which are found not to have consequently incited violence, armed resistance or rebellion or to constitute a hate speech -even if certain parts of these expressions are offensive in tone or depict the State in an unfavourable manner- cannot be subject to any sanction. However, the punishment of expressions, which incite people to grudge, hatred, hostility and armed resistance, involve a call for violence, armed resistance or rebellion, intensify armed struggle, or praise war, is legitimate and founded. According to the ECHR, it is a matter which must be assessed under the particular circumstances of each case. In this sense, whether "a given expression" convinces or guides its audiences or readers, or influences them to or not to display a conduct varies by the context and motive of the impugned "expression", the positions of those

materialising this expression, as well as its style. These factors indicate the pragmatic power of the expression.

24. According to the declaration signed by several academics including the applicants and made public:

- The State of the Turkish Republic has been exposing its citizens to *de facto* starvation and thirst on account of the curfews that were in force in many regions for weeks.

- It has attacked the residential areas by heavy weapons which might be used only in times of war.

- It has performed a deliberate and planned slaughter.

- It has massacred the citizens residing in the relevant region, notably the Kurds.

- It has adopted an intentional exile policy with respect to the citizens residing in the relevant region, notably the Kurds.

- It has acted in breach of almost all rights and freedoms that are safeguarded under both the Constitution and the international conventions to which it is a party, including but not limited to the right to life, the right to personal liberty and security and the prohibition of torture and ill-treatment.

25. By the mid-2015, the terrorist and violent acts of the PKK started to be performed extensively also in the cities. Within the second half of 2015, the PKK terrorist organisation infiltrating to the certain provinces and districts of the eastern and south-eastern regions of the country dug ditches, set up barricades and placed explosive materials in the streets in Cizre, İdil and Silopi districts of Şırnak; Yüksekova district of Hakkari; Silvan, Sur and Bağlar districts of Diyarbakır; Dargeçit, Nusaybin and Derik districts of Mardin; and Varto distict of Muş. It was thereby intended to rule over certain parts of these settlements under the name of self-governance as well as to deprive the citizens of their opportunity to maintain their daily lives and to preclude the performance of public services. The students were prevented from attending the schools. An impression that the "State" did no longer hold the control in these regions

and it was now the terrorist organisation dominating over the regions was tried to be created, and this information was also made available to the public.

26. The security forces conducted operations against the members of the PKK terrorist organisation that performed the terrorist and violent acts lasting for about 10 months, laid siege to the citizen of the relevant regions and seeking to prevent the residents' entry and exit to the region and students' attendance to the schools. During these operations, some women, children and the elders were used as a human shield by the terrorist organisation against the security forces, and even some citizens were taken hostage. The violent acts lasting for about 10 months were subsequently named as the ditch events.

27. The ditch operations were conducted by the security forces against the members of the PKK in 11 cities. These operations were carried out in order to preclude the terrorist organisation members seeking to prevent the citizens' entry and exit to the said regions as well as to secure the life and properties of the citizens. Curfews were declared in some of these regions where the security operations were conducted, with a view to securing the life and property of the citizens. Some of these regions were also declared as a military security zone for a temporary period. The curfews imposed in some of the said provinces and districts were lifted after the operations conducted by the security forces had been ended.

28. The impugned declaration was published on 11 January 2016 during these clashes and operations. Therefore, the context and scope of the declaration must be assessed in consideration of the particular circumstances prevailing throughout the country at the relevant time.

29. It is a well-established fact both in the literature and the judgments of the ECHR and the Court that it is highly difficult for the democratic state of law to struggle against the separatist and destructive terrorist organisations without disturbing the legal order and infringing the individuals' rights and freedoms. As a matter of fact, the States inevitably face the dilemma and the necessity to strike a balance between "security and rights as well as freedoms" in the fight against terrorism, which has become a global problem. By the very nature of this situation,

there is a state of emergency caused by the terrorist activities posing a threat to peace, human rights and national and international statutory arrangements on the one hand and, on the other, the need to impose a restriction on the human rights and freedoms for the elimination of this state of emergency. In this sense, in the present case, a balance must be struck between the need to fight against terrorism and human rights/ freedoms.

30. Besides, it is acknowledged that the State authorities enjoy a wider margin of appreciation, as noted above, in the punishment of the propaganda of terrorist organisations -notably in cases where this propaganda involves violence- due to the unfavourable and fatal effect of terrorism on peace and human rights. In case of severe acts involving violence, it is considered that it would cause no problem notably within the meaning of "legitimate aim" if the public authorities act in a more delicate manner so as to maintain public security and public order.

31. In cases where the expressions amounting to the propaganda of a terrorist organisation are included in an academic study on the issue or any related issue (variable by the incidents), it is in principle acknowledged that the public authorities' interference with freedom of expression is interpreted more narrowly and the boundaries of its margin of appreciation are narrowed. However, it should be considered that in the context of terrorist propaganda, the position held by the person uttering an impugned expression or performing an impugned act, the place where, the time when and the circumstances under which the expressions or acts have been uttered/performed and the effects they have caused would, in some cases, necessitate the interpretation of the scope of freedom of expression exercised by these persons to be much narrower than that of other individuals as these expressions and acts may lead to increase in violent acts or difficulty as regards its control. It is therefore considered that on condition of being limited to this scope, punishment of a given person due to expression of any thought may in some cases become an exigency in terms of public order and security.

32. In this sense, it must be said that there is an intrinsic link between the rights and freedoms enjoyed by individuals and the duties as well

as responsibilities imposed on them. Article 12 of the Constitution, which provides for *"The fundamental rights and freedoms also comprise the duties and responsibilities of the individual to the society, his/her family, and other individuals"*, also stresses such relation. Therefore, the individuals' freedom of expression cannot be considered to be independent of the rights and responsibility they bear in exercising this freedom, which points out that the individuals' impugned acts and expressions may be classified depending on their time and place and that the nature of these acts and expressions when they finally reach to the addressees may vary depending on time and place.

33. A brief research in this respect reveals that the notions of massacre and slaughter mean carnage, mass homicide or the acts performed to destroy human communities and to kill living creatures other than humans or cause severe corporeal damage to them for either a reason or no reason.

34. It cannot be of course said that the expressions in the impugned declaration whereby it was requested that the curfews be lifted, the pecuniary and non-pecuniary damage sustained by the citizens living in these regions be determined and compensated for, and those responsible for the human rights violations be identified and punished fall outside the scope of the freedom of expression.

35. However, it is not possible to consider the impugned declaration as a text which was formulated merely for criticising the State and the ongoing clashes, for fostering a public opinion so as to put an end to these clashes taking place for any reason whatsoever, which informed the public of the incidents from the applicants' own perspectives, drew a negative picture in respect of the Turkish State likely to fall into the scope of the freedom of expression and invited the State to act in a more delicate manner to abide by law. That is because the anti-terror activities conducted by the State on a legitimate basis are depicted as "massacre", "exile", "deliberate and planned slaughter" and "offence" in the declaration. Given the above-cited meanings of these expressions, as well as the nature of the relevant incidents and the way how they developed, the impugned declaration cannot be qualified as explanations, which

do not involve any feelings of hatred and hostility and merely point to the social or personal problems that occur during the State's legitimate struggle against the terrorist organisation. Nor can they be considered as expression of thoughts which has not aroused the feelings of hatred and violence in the terrorist organisation members and sympathisers against the State and the security forces or increased or encouraged such feelings; which has not raised the awareness of, and encouraged, those ready to commit terrorist offences; and which has not increased the risk of commission of such offences. It is therefore considered that the declaration signed by the applicants is a text capable of arousing the feelings of "hatred and hostility" in the members of sympathisers of the terrorist organisation against the security forces and of inciting them to perform terrorist acts.

36. In this regard, although the impugned declaration did not intend to directly and explicitly legitimise or praise the methods used by the terrorist organisation or to encourage the use of these methods and was titled "Academics for Peace" and included the notion of "peace", it cannot be said to have no potential adverse effect on the national security and public order. Nor can it be said that within the meaning of the State's struggle against the terrorism on legitimate basis, the impugned declaration has not or would not lead the members and sympathisers of the terrorist organisation to perform acts and actions against the State and security forces or incite them to violence.

37. Besides, the expressions used in the impugned declaration manipulated the fact that during the State's fight against terrorism, there might occur certain unavoidable situations due to the very nature of these operations, depending on several conditions such as time, place and etc. and also directed some accusations, accuracy of which was not verified, towards the State and security forces. It should be therefore borne in mind that this situation may encourage members and sympathisers of the terrorist organisation to take a severe action against the State and security forces and also cause hatred against both the State and security forces.

38. Moreover, the impugned declaration was made public in the course of an anti-terror operation, which was of high public importance

and multi-dimensional, conducted by the security forces against the PKK terrorist organisation under highly severe conditions and at a time with high tension when the declaration may, by its content and possible consequences, cause a positive effect on the terrorist organisation members and sympathisers. It was not a product of academic research but was capable of deteriorating the situation both in the region where the incidents were taking place and in the other regions of the country as the anti-terror operation conducted by the State on a legitimate basis was depicted as "massacre", "exile", "deliberate and planned slaughter" and "offence".

39. As a result, we therefore conclude that the impugned text promoted the PKK in connection with its terrorist acts, prioritised the PKK over the State, fostered public opinion in its favour and thereby disseminated its propaganda.

40. Therefore, the impugned act of signing the declaration and making it public must be considered, in the context of the pressing social needs, to amount to the propaganda of the said terrorist organisation in a way that incited violence.

41. Moreover, the applicants were each sentenced to imprisonment for a term of 1 year and 3 months; however, the pronouncement of the judgment was suspended in respect of 8 applicants. Therefore, their imprisonment sentences were not executed. One applicant was not entitled to this procedure as she did not consent thereto.

42. Also given the limits of the margin of appreciation enjoyed by the relevant public authorities in consideration of the incident as a whole and nature of the issue in question, we consider that the interference with the applicants' freedom of expression was compatible with the requirements of a democratic society, met a pressing social need and was proportionate. In other words, a fair balance was struck between the applicants' right to freely express their thoughts and opinions and the legitimate aims laid down in Article 26 § 2 of the Constitution, and the grounds relied on by the inferior courts in their decisions were relevant and sufficient.

43. For these reasons, we do not agree with the majority's conclusion finding a violation.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

SIRRI SÜREYYA ÖNDER

(Application no. 2018/38143)

3 October 2019

On 3 October 2019, the Plenary of the Constitutional Court found a violation of the freedom of expression safeguarded by Article 26 of the Constitution in the individual application lodged by *Sırrı Süreyya Önder* (no. 2018/38143).

THE FACTS

[8-39] The applicant was a member of parliament at the time of the events giving rise to his application when the Government had been conducting a long-standing democratic initiative process in the country in order to cease the terrorist acts. The applicant played an active role during this process in his capacity as a spokesman of a political party delegation. He delivered a speech, addressing a crowd of people who attended the Newroz celebrations while the democratic initiative process was pending. Upon the criminal complaint filed against him for disseminating propaganda in favour of a terrorist organisation during the gathering, the incumbent chief public prosecutor's office issued a motion requesting that the applicant's parliamentary immunity be lifted. The motion was submitted to the Grand National Assembly of Turkey (GNAT). In the meantime, the terrorist organisation performed increased acts of violence by June 2015, thereby nullifying the endeavours to maintain the democratic initiative process.

Provisional Article 20 was added to the Constitution by Article 1 of Law no. 6718, which was adopted by the General Assembly of the GNAT. Accordingly, the motions referred to the authorities specified in the provisional article were exempted from the scope of parliamentary immunity set forth in Article 83 of the Constitution. Therefore, in June 2016 the investigation file underlying the motion against the applicant was sent to the chief public prosecutor's office which indicted the applicant for having disseminated terrorist propaganda on account of his certain remarks.

At the end of the proceedings before the assize court, the applicant was sentenced to 3 years and 6 months' imprisonment for disseminating terrorist propaganda on 7 September 2018. He then appealed his

conviction before the Regional Court of Appeal which dismissed, with final effect, his appeal on the merits.

The applicant then lodged an individual application with the Court on 31 December 2018.

V. EXAMINATION AND GROUNDS

40. The Constitutional Court, at its session of 3 October 2019, examined the application and decided as follows:

A. Alleged Violation of the Freedom of Expression

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

41. The applicant maintained that the first instance court had assessed his impugned expressions by extracting them from the context of his speech and cutting the former and subsequent expressions; that in convicting him, the first instance court had failed to take into consideration his political stance during the solution process and his capacity as a member of a political party, as well as to consider on which matter and how these expressions had been uttered. He considered that the expressions underlying his conviction did not justify or incite violence or hatred; and that he had indeed called for peace in his speech as a whole. He maintained that as his conviction decision lacked justification and the lower limit set for the corresponding penalty in the law had not been taken into consideration, his freedom of expression, right to a fair trial and presumption of innocence had been violated.

42. The Ministry, in its observations, noted that:

> i. The applicant delivered his speech during a *Newroz* festival organised in the form of a meeting where banners praising the PKK terrorist organisation and its leader were unfurled and slogans in their favour were chanted on a stage with the photo of Abdullah Öcalan (A.Ö.) and the remark *"Liberty for Abdullah Öcalan – Statute for the Kurds"*.
>
> ii. It should be emphasised that the applicant was a member of parliament at the relevant time. In his capacity, the applicant,

who should have behaved in a uniting and unifying manner, made a statement praising and glorifying the leader of the PKK, qualified as a terrorist organisation at national and international level, which was as follows: *"I bring you compliments of the Kurdish people's leader, Mr. Öcalan"*. He also said with respect to the terrorists resorting to violence against the State officers *"We are honoured by Mr. Öcalan's dignified children"*. These expressions could not be considered to fall under the protection afforded by the freedom of expression.

iii. The Ministry made a reference to the Convention on the Prevention of Terrorism aiming to punish the act of directly or indirectly disseminating a message which would cause a threat that a terrorist offence might 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 of the European Convention on Human Rights ("the Convention") and to the experience of States in the implementation of their national provisions on the praise of, and/or incitement to, terrorism. Besides, 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.

iv. The Ministry primarily noted that political parties might criticise the governments in order to fulfil their role of political opposition and even use harsh language while doing so. It further stated that it was also a requisite of the international standards reflected in the ECHR's case-law for the representatives of the political parties to condemn terrorism, terrorist organisations and terrorist acts performed by these organisations, which are the greatest threats against democracy and human rights, as well as to keep their distance from terrorism and terrorist organisations. It was further noted that the applicant's expressions, which were unlawful and intended for destroying the unity and integrity

of the State could in no way be afforded protection within the meaning of the freedom of expression.

v. Lastly, the Ministry asserted that the first-instance decision contained relevant and sufficient justification; and that the impugned interference was necessary in a democratic society for maintaining public order and preventing the commission of offences.

43. The applicant, in his counter-statements, provided explanations similar to those which he mentioned in the application form.

2. The Court's Assessment

44. The Constitutional Court is not bound by the legal qualification of the facts by the applicants and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). In this respect, the Court considered that the applicant's allegation that he had been convicted for disseminating terrorist propaganda by virtue of an unjust and unjustified decision must be examined, as a whole, from the standpoint of the freedom of expression.

45. Article 26 of the Constitution, titled "*Freedom of expression and dissemination of thought*", insofar as relevant provides 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

46. The Court declared the alleged violation of the freedom of expression admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

i. Existence of an Interference

47. The Court has considered that the applicant's conviction and being sentenced to imprisonment for disseminating terrorist propaganda due to his expressions constituted an interference with his freedom of expression.

48. Freedom of expression secures the right to freely express, explain, defend, convey to others, and disseminate thoughts and convictions without being condemned. Expressing the ideas including those opposing to the majority by any means, gaining stakeholders for the ideas expressed, materialising the ideas, and convincing others on this matter, as well as showing tolerance to these endeavours are amongst the pluralist democracy's requirements. Accordingly, ensuring social and political pluralism depends on the ability to freely and peacefully express every kind of thoughts and ideas (see *Bekir Coşkun*, §§ 33-35; *Mehmet Ali Aydın*, §§ 42, 43; and *Tansel Çölaşan*, §§ 35-38).

49. In this context, it should be borne in mind that freedom of expression is of vital importance for the democratic society and constitutes the core values of a democratic society. Democracy is founded on the ability to solve the problems in a public debate (see *Ferhat Üstündağ*, no. 2014/15428, 17 July 2018, § 43). Interferences with the exercise of freedom of expression, other than those inciting violence or amounting to denial of democratic principles, undermine and imperil democracy. Even though some of the opinions and thoughts expressed are offending, disturbing and unacceptable for the bodies wielding public power, the thoughts opposing the established order and criticising the acts performed by bodies wielding public power should be freely expressed in a democratic society governed by rule of law (see *Mehmet Ali Aydın*, § 69).

ii. Whether the Interference Constituted a Violation

50. 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. Article 13 of the Constitution insofar as relevant reads as follows:

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

51. Therefore, it must be determined whether the restriction complied with the requirements set out in Article 13 of the Constitution and applicable to the present case, namely being prescribed by law, relying on one or several justified reasons specified in Article 26 § 2 of the Constitution, not being contrary to the requirements of a democratic society and the proportionality principle.

(1) Lawfulness

52. It has been considered that the first sentence of Article 7 § 2 of the Anti-Terror Law no. 3713 is the legal basis of the impugned interference.

(2) Legitimate Aim

53. It has been concluded that the decision whereby the applicant was punished was a part of the measures intended for maintaining public order within the scope of the fight against terrorist organisations and terrorism and therefore pursued a legitimate aim.

(3) Compliance with the Requirements of a Democratic Society

54. Any interference with the freedom of expression may be considered to be *compatible* with the requirements of a democratic society only when it meets a pressing social need and is proportionate (see *Bekir Çoşkun* [Plenary], no. 2014/12151, 4 June 2015, §§ 53-55; *Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, §§ 70-72; and the Court's judgment no. E.2007/4 K.2007/81, 18 October 2007).

55. The inferior courts should strike a fair balance between the individuals' right to express their opinions through freedom of expression and the legitimate aims set forth in Article 26 § 2 of the Constitution (see *Bekir Coşkun*, § 44, 47, 48; and *Hakan Yiğit*, no. 2015/3378, 5 July 2017, §§ 58, 61, 66).

56. 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 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).

57. 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* [Plenary], no. 2018/17635, 26 July 2019, § 76).

Whether the interference met a pressing social need

58. In order for any measure constituting an interference to be considered to meet a pressing social need, it must be suitable for achieving the pursued aim and appear to be the last resort likely to be used as well as to be a less severe measure likely to be applied (see, *mutatis mutandis*, *Bekir Coşkun*, § 51; *Mehmet Ali Aydın*, § 68; *Tansel Çölaşan*, no. 2014/6128, 7 July 2015, § 51).

59. In the present case, the interference with the applicant's freedom of expression may be considered to meet a pressing social need if his expressions are proven to have incited persons to commit terrorist offences. In that case, the question to be clarified is whether the inferior courts plausibly demonstrated that the applicant had incited persons to commit terrorist offences due to expressions he had uttered.

60. In its several judgments, the Court has stated that interferences with the freedom of expression without any justification or with any justification failing to fulfil the criteria set by the Court would be in

breach of Article 26 of the Constitution. In order for an impugned interference with the freedom of expression to be found compatible with the requirements of a democratic society, the grounds relied on by the public authorities must be relevant and sufficient (see, among many other judgments, *Kemal Kılıçdaroğlu*, § 58; *Bekir Coşkun*, § 56; *Tansel Çölaşan*, § 56; and *Zübeyde Füsun Üstel and Others*, § 120).

Incitement to Violence

61. Terrorist organisations 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 to the freedom of expression. Therefore, expressions which are capable of justifying, praising or encouraging terrorism, terror and violence cannot be considered to fall within the scope of the freedom of expression (see *Zübeyde Füsun Üstel and Others*, § 79).

62. In the judgment of *Zübeyde Füsun Üstel and Others*, the Court has already made certain assessments as to the classification of the criminal act of disseminating propaganda of a terrorist organisation in the Turkish law (see *ibidem*, §§ 115-118). Accordingly, the amendment made to Article 7 of the Anti-Terror Law no. 3713 is designated 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 the offence as the act of legitimising and praising the violent or threatening methods of terrorist organisations or encouraging the use of such methods. In the same vein, the Court of Cassation has on many occasions stated that in the Turkish law, not every kind of expression of thoughts in association with terrorism but merely the acts of disseminating propaganda of terrorist offences, which would legitimise and praise the terrorist organisations' methods involving coercion, violence or threat or encourage the use of such methods are considered to constitute an offence.

63. The incitement to use terrorist organisations' methods involving coercion, violence or threat is dissemination of a message to the public

that causes 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. 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).

64. In the same judgment, it is further stated 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 *Zübeyde Füsun Üstel and Others*, § 84; and *Ayşe Çelik*, § 47).

65. 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 cannot be considered as a terrorist propaganda even though they are associated with terrorism or a terrorist organisation. The expression, dissemination, ensuring the adoption by others in an active, systematic and plausible manner, inspiration and promotion, of thoughts which are related to social and political environment or socio-economic 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 -as previously noted by the Constitutional Court (see *Abdullah Öcalan* [Plenary], no. 2013/409, 25 June 2014, § 95)- being disturbing for the State's authorities or a significant part of the society (see *Zübeyde Füsun Üstel and Others*, § 80; and *Ayşe Çelik*, § 44).

Acknowledgement of the First Instance Courts

66. The applicant was convicted by the first instance court due to his expressions *"I bring you compliments of the Kurdish people's leader, Mr.*

Öcalan. We are honoured in Kurdistan by Mr. Öcalan's dignified children." The first instance court considered that through his impugned expressions, the applicant qualified a person -who had inspired the Kurdish people for a long period- as their leader and thereby tried to legitimise the terrorist organisation PKK. Secondly, the first instance court also found inappropriate the applicant's use of the word "Kurdistan". The court recalled, in the first place, the ECHR's case-law that an interference with an expression which designated a certain region of Turkey as *"Kurdistan"* would not *per se* considered to be a justified interference; however, concluded that the term *Kurdistan* was used, in the separatist ideology of the terrorist organisation, to point to a certain region within the country, which amounted to disseminating and legitimising the ideology of terrorist organisation. In the view of the court, the applicant also tried, through his impugned expressions, to foster an unfavourable impression with respect to the legitimate and rightful anti-terror operations conducted by the security forces of the Turkish State. As a result, the first instance court acknowledged that the applicant's expressions legitimised, promoted and praised the violence perpetrated by the PKK terrorist organisation; and that these expressions accordingly constituted the propaganda of a terrorist organisation.

Context and Content of the Applicant's Speech

67. 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 concerning the allegation that a statement signed by a group of academicians constituted the offence of disseminating propaganda of a terrorist organisation, *Zübeyde Füsun Üstel and Others*, §§ 77-139; 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*, §§ 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).

68. In the individual applications concerning the freedom of expression, the examination of the impugned expressions by extracting them from the context may lead to erroneous conclusions in the application of principles enshrined in Articles 13 and 26 of the Constitution and in the reasonable assessment of the findings obtained (see *Mehmet Ali Aydın*, § 76).

Final Assessments

69. At the relevant time when the impugned expressions were uttered, the State had already initiated an administrative and political initiative process with a view to ending violent and terrorist acts. During this period also called as the *solution process*, the violent and terrorist acts were reduced to a significant extent.

70. The impugned expression *"I bring you compliments of the Kurdish people's leader, Mr. Öcalan"* on account of which the applicant was convicted was uttered during the speeches delivered by the politicians -who had a face-to-face meeting with A.Ö. on solution process a short time ago- at a meeting organised by the Peace and Democracy Party ("BDP").

71. As also stated in the explanatory report to the Convention on the Prevention of Terrorism, in assessing whether a given expression has posed a threat of commission of a terrorist offence, the context of the impugned expression, as well as the nature of the addressees of the impugned expression must be taken into consideration, and the significance and plausibility of the threat must be assessed in accordance with the requirements of domestic law. In its several judgments, the ECHR has concluded that calling A.Ö. as *"the leader of the Kurds"* did not *per se* incite violence. The Court of Cassation has also adopted a method as to the assessment of similar expressions. In cases where the accused has chanted slogans in favour of the founder of the terrorist organisation,

the Court of Cassation has held that the place where the impugned event took place, the particular circumstances and those addressed, the audience and the question whether these expressions had the potential to motivate the relevant audience must be taken into account.

72. The question to be ascertained is whether the disputed expressions such as those calling A.Ö. as a leader and praising him have incited violence within the historical context and in view of the speech as a whole. It should be once again underlined that the explanations, which do not contain any explanations leading individuals to use violence and pose the threat of commission of terrorist offences, cannot be considered to constitute an incitement to the use of methods involving coercion, violence or threat, which are employed by terrorist organisations.

73. It must be taken into consideration that the applicant's impugned speech was delivered within a context which was called as democratisation process and aimed at disarming the terrorist groups, ending the violent acts taking place in the country and increasing the possibilities to resolve the social problems by operating democratic negotiation processes. In this regard, the historical context of the impugned speech demonstrates that a meeting was held with A.Ö., who has been convicted since 15 February 1999, during the democratic initiative process. Accordingly, the applicant's expressions concerning A.Ö. cannot be considered as an incitement to violence in the particular circumstances of the present case.

74. The second reason underlying the applicant's conviction is his use of *"Kurdistan"*. The meaning of *"Kurdistan"* may be determined by taking into consideration the other expressions in the same speech, as well as the particular circumstances of the relevant time when the speech was delivered (see *Abdullah Öcalan*, § 102).

75. During the impugned speech, the applicant informed the crowd about the ongoing solution process which he qualified as the peace process. He explained that they, as the People's Democratic Congress, would call for peace also in future and seek for reconstructing Turkey with the participation of all society and through a full democracy. He further stated that until having an opportunity to live in a fully democratic country, they would be eager and determined to call for peace. Therefore,

it has been considered that the impugned speech generally called for the maintenance of policies already initiated to solve the problems through methods denying violence.

76. The first instance court issuing the decision in the applicant's case concluded that *"he has been trying to foster an unfavourable impression about the legitimate and rightful anti-terror operations conducted by the security forces of the Turkish State"*. To consider an expression as a propaganda of terrorist organisation without demonstrating how it incited violence but merely stating *in abstracto* that it was *intended to foster an impression* cannot be considered as a legal assessment. The first instance court did not provide any explanation as to which expression uttered by the applicant led it to reach this conclusion.

77. In his speech, the applicant called A.Ö. as *"leader"* and a certain part of Turkey as *"Kurdistan"*. It is a fact that calling a person, who has acted as the founder and long-standing head of a terrorist organisation, as a *leader* as well as a certain part of the country in a way that would imply the partition in any way are unacceptable for a great majority of the society.

78. However, in its several judgments, the Court has made a reference to the conclusions in the ECHR's judgment (see *Handyside v. the United* Kingdom, no. 5493/72, 7 December 1976, § 49) that the freedom of expression is applicable not only to *information* or *ideas* that are favourably received or regarded as favourable, inoffensive or as a matter of indifference, but also to those that offend, shock or disturb, or that are unacceptable for the State or any sector of the population. In the assessment whether a given expression or explanation falls into the scope of the freedom of expression, the disturbing nature of this expression or explanation is not decisive. Besides, the question to be assessed is not whether the uttered expressions are true or acceptable, but whether they are capable of legitimising, praising or inciting the methods adopted by the terrorist organisation, which involve coercion, violence or threat.

79. Given the historical context of the impugned speech, objective meaning of the expressions used by the applicant and the speech as a whole, the applicant's expressions cannot be considered as a praise of,

or a support for, terrorism or as a direct or indirect incitement to violence, armed resistance or uprising. In other words, the Court has not considered that the applicant promoted the methods of terrorist organisations involving coercion, violence or threat in order to provoke the commission of the same offences (in the same vein, see *Ayşe Çelik*, § 57).

80. In cases where an expression of opinion allegedly constitutes propaganda of terrorism or a terrorist organisation, the most important issue to be assessed is whether the impugned expression had the potential to incite violence. In the particular circumstances of the present case, it could not be demonstrated that the applicant's delivery of the impugned speech at a broadly-attended meeting held in İstanbul, its appearance on media and continued availability through video sites had an unfavourable bearing on the State and social life and had a significant effect on the State's anti-terror activities.

81. Besides, nor was the applicant considered to have praised the members of the terrorist organisation clashing with the security officers and the terrorist organisation itself, to have particularly inspired hatred against the security officers directly involved in the clashes or encouraged recourse to violence (see *Ayşe Çelik*, § 57).

82. Regardless of the language and style used, it has been considered that the impugned speech was mainly intended for the successful maintenance and termination of the solution process conducted at the relevant time. Therefore, it has been regarded that through his speech, the applicant did not aim at increasing political or social efficiency of a terrorist organisation, ensuring his voice to reach the masses, or fostering public conviction that the organisation was an insuperable power that was capable of achieving its ultimate goal. Nor did he intend to increase public sympathy, as well as to ensure active public support for the organisation (see *Ayşe Çelik*, § 59).

83. In addition, it is clear that the freedom of expression is notably of great value for the elected members who represent the voters, voice the voters' demands, concerns and opinions in the political arena and defend their interests. As a matter of fact, elected persons such as the members of parliament may represent their voters and duly perform their legislative

and supervisory functions to the extent they freely express their ideas and opinions (see the Court's judgment no. E.2017/162 K. 2018/100, 17 October 2018).

84. It is clear that the public authorities should have enjoyed a very narrow margin of appreciation in interfering with the expressions of the applicant, who was an elected member of parliament and an important actor of the solution process conducted at that time; and that they should have made particularly meticulous assessments (see, for the same assessment in the context of a mayor's expressions, *Mehmet Ali Aydın*, § 85).

85. It is inferred from the first instance decision that the court convicted the applicant for having disseminating propaganda of the terrorist organisation, namely PKK, as his expressions were found to be capable of legitimising the organisation in question and its leader. However, the first instance court failed to demonstrate how the applicant's expressions *legitimised or praised* the terrorist organisation's methods involving violence and threat or *encouraged the use of these methods*.

86. In consideration of the aforementioned information, it has been concluded that the first instance court failed to provide *relevant* and *sufficient* reasons to prove that the applicant's conviction met *a pressing social need*.

87. The Court has held that the interference with the applicant's freedom of expression was not compatible with the requirements of a democratic society and accordingly found a violation of Article 26 of the Constitution.

B. Other Alleged Violations

88. The applicant maintained that his requests for the conduct of a constitutionality review as to his case by the Constitutional Court as well as for the consideration of his act to fall into the scope of his legislative immunity had been dismissed on erroneous grounds; and that his defence submissions had not been taken duly as prescribed in the relevant law. He further maintained that the right to a fair trial had been violated as the opinion of the prosecutor had not been served on him and he had

been tried for an offence which was not stated in the summary report (*"fezleke"*).

89. In addition to these allegations, the applicant also maintained that given the length of his imprisonment sentence and the appellate-review duration of his case, he had been subjected to these judicial processes for political motives, and there had been violations of the right to a fair trial as well as of Article 18 of the Convention; and that he had been also deprived of the right to elect and stand for elections as a result of his conviction decision which was unlawful and of a political nature.

90. Having already found a violation of the freedom of expression in the present case, the Court has found it not necessary to make a separate examination with respect to all these complaints.

C. Application of Article 50 of Code no. 6216

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

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

92. In its judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court sets forth the general principles as

to how a violation of any fundamental right, which has been found established by the Constitutional Court, and its consequences would be redressed (for further explanations, see *Mehmet Doğan*, §§ 57-60).

93. The applicant requested the Court to find a violation as well as to order a retrial. He further claimed both pecuniary and non-pecuniary compensation without specifying any amount.

94. It has been observed that there was a violation of the applicant's freedom of expression and it resulted from the relevant court's decision. In this case, there is a legal interest in conducting a retrial in order to redress the consequences of the violation of the freedom of expression. The retrial to be conducted accordingly is intended for affording redress for the established violation and its consequences pursuant to Article 50 § 2 of Code no. 6216. In this sense, the step to be taken by inferior courts is to revoke its initial decision giving rise to the violation and to issue a new decision in line with the violation judgment. Therefore, a copy of this judgment must be sent to the 26th Chamber of the İstanbul Assize Court for a retrial.

95. A net amount of TRY 9,150 must be paid to the applicant in compensation for non-pecuniary damage that could not be redressed by merely the finding of a violation.

96. The total court expense of TRY 2,769.70 including the court fee of TRY 294.70 and counsel fee of TRY 2,475, which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 3 October 2019 that

A. The alleged violation of the freedom of expression be DECLARED ADMISSIBLE;

B. The freedom of expression safeguarded by Article 26 § 1 of the Constitution was VIOLATED;

C. A copy of the judgment be SENT to the 26th Chamber of the İstanbul Assize Court to conduct a retrial with a view to redressing the consequences of the found violation (E.2017/173, K.2018/152);

D. A net amount of TRY 9,150 be PAID to the applicant in compensation for non-pecuniary damage, and other claims for compensation be REJECTED;

E. The total court expense of TRY 2,769.70 including the court fee of TRY 294.70 and the counsel fee of TRY 2,475 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;

G. A copy of the judgment be SENT to the 2nd Criminal Chamber of the İstanbul Regional Court of Appeal for information; and

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

WIKIMEDIA FOUNDATION INC. AND OTHERS

(Application no. 2017/22355)

26 December 2019

On 26 December 2019, the Plenary of the Constitutional Court found a violation of the freedom of expression safeguarded by Article 26 of the Constitution in the individual application lodged by *Wikimedia Foundation Inc. and Others* (no. 2017/22355).

THE FACTS

[10-35] The Prime Ministry, Directorate General for Security Affairs requested the Information and Communication Technologies Authority ("the Authority") to remove two contents available on the website, namely Wikipedia, which were considered to fall within the scope of cases where delay was deemed prejudicial; to block access to these contents, if not removed; and to block access to the entire website, if the latter option was not also available.

The Authority, approving the said request, decided to block access to the entire website as the contents were not removed and it was not technically possible to block URL-based (content) access. The magistrate judge approved the decision issued by the Authority and dismissed the subsequent challenges in this regard. Thereupon, Wikimedia Foundation Inc., owner of the relevant website, and some of the users lodged an individual application. The applicant Wikimedia Foundation Inc. claimed that the voluntary Wikipedia editors made extensive changes on the impugned texts and thus the order for the blocking of access was no longer justified.

V. EXAMINATION AND GROUNDS

36. The Constitutional Court, at its session of 26 December 2019, examined the application and decided as follows:

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

37. The first applicant maintained that:

- Wikipedia was a source of information composed of rich, impartial and educational information formulated by numerous voluntary users throughout the world in a hundred language,

and its contents must be considered to fall into the scope of the freedoms of expression and the press. The blanket ban on access to the website in its entirety was contrary to the requirements of a democratic society and amounted to a disproportionate interference. Thus, its freedoms of expression and the press had been violated.

- Two articles, subject-matter of the magistrate judge's decision on approving the order to block access to the website, contained over 10.000 words and hundreds of citations. In the reasoned decision, there was no explanation as to which parts of these articles led to unlawfulness, as well as the reasons thereof. This decision lacked a sufficient reasoning that would justify a blanket ban on access to the website consisting of several information. The challenge raised against the decision approving the blanket ban on access to the website was dismissed on the basis of the circumstances of the state of emergency declared in the country. The state of emergency regime prescribed in Article 15 of the Constitution could not be construed to the effect that every decision taken, and every act performed, by the State bodies be subject to the state of emergency regime. Besides, as the impugned ban on access to the website was not related to the grounds that had led to the declaration of the state of emergency, it could not be considered as a measure necessary under the state of emergency. Accordingly, there had been a violation of the right to a reasoned decision.

38. The second applicant stated that it was a non-governmental organisation, which was in pursuance of the freedom of expression as well as the right to impart and receive information and which was conducting lawful activities to that end; and that the denial of access to Wikipedia had set aside the millions of readers' freedom of expression and right to receive information. It accordingly maintained that there had been a violation of the freedom of expression.

39. Along with their complaints similar to those raised by the first applicant, the third and fourth applicants maintained that their freedom

of expression had been violated, noting that they lodged an individual application in their capacity as the users of the website; that they were academics studying in the field of internet and human rights and using Wikipedia for several years within the scope of their scientific studies and training activities; that it was sometimes very difficult to reach information alternative to that available on Wikipedia; and that there had been an interference with their right to receive news and opinions.

40. In its observations, the Ministry stated that the notice-takedown procedure had been first applied for the enforcement of the decision on blocking of access to the website; that the first applicant had been notified of the necessity to remove the contents available on the said URL addresses, but the said process had not yielded any result, and besides, the relevant URL addresses had been also encrypted; and that as it had been therefore technically impossible to impose a ban merely on these addresses, a blanket ban on access to the website in its entirety had been imposed. The Ministry further indicated that the contents available on the URL addresses in question had been in the form of an unjust attack and included misleading information; that the website where these contents had been published was a platform that could be easily accessed by everyone; and that given the effect of these contents on large masses, the impugned measure was found to be necessary in a democratic society. It also noted that as the incumbent magistrate judge ordered the lifting of the blanket ban on access to the said website on condition of the removal of the contents available on the URL addresses, the impugned interference was proportionate. The Ministry further considered that the applications lodged by the applicants in their capacity as the users of the website must be declared inadmissible for lack of competence *ratione personae* as the applicants did not have victim status.

41. In its counter-statements against the Ministry's observations, the first applicant mainly reiterated its allegations stated in the application form. The first applicant maintained that

> - The notion *"maintenance of national security and public order"*, the ground underlying the blanket ban on access to the website, was interpreted so widely by the administrative and judicial authorities. According to the decision issued by the magistrate

judge, the reason for the order blocking access to the website was the impugned contents in the form of an unjust attack, which tarnished the State's prestige; however, no link was established therein between the reason and the purposes of *"maintaining national security and public order"*.

- States could not be afforded protection to the same degree with individuals in terms of the right to honour and reputation. Information and allegations, which were a matter of public interest, could be made public without any concerns as to the impairment of the State's prestige.

- Wikipedia was an online platform accessible by everyone. The articles and information on Wikipedia were formulated and consistently improved by the independent and voluntary editors. This platform could contain different opinions and ideas as its users across the world were able to add information to the website. Therefore, there were also inconsistent and disputed issues. No information available on Wikipedia was permanent and definite. As a matter of fact, the impugned articles were also subject to comprehensive amendments by the editors following the order on blocking of access to the website.

42. In their counter-statements against the Ministry, the third and fourth applicants mainly reiterated their allegations stated in the application form. They further noted:

- The Ministry had formulated its observations without making any reference to the case-law of the European Court of Human Rights ("the ECHR") and the Court on the blocking of access and by disregarding notably the Court's judgment in the case of *Birgün İletişim ve Yayıncılık A.Ş.* ([Plenary], no. 2015/18936, 22 May 2019) where the principles to be observed by the administrative and judicial authorities in issuing an order on blocking of access under Article 8/A of Law no. 5651 were outlined in detail.

- It was difficult to understand which threat could be avoided immediately by blocking access in Turkey to the impugned contents while they were still accessible all across the world. The

State itself also acknowledged that the application of Law no. 5651 was problematic. In the Judicial Reform Strategy Document announced by the President on 30 May 2019, the primary purpose was designated as *"the Protection and Improvement of Fundamental Rights and Freedoms"*. Besides, in the subparagraph (e) of Aim 11 laid down therein, it was stated that the procedures as to the blocking of access envisaged in Law no. 5651 shall be re-considered within the framework of the freedom of expression, and the necessary amendments shall be introduced. However, the Ministry did not make any assessment to elucidate the concerns with respect to Law no. 5651.

2. The Court's Assessment

43. The Constitutional Court is not bound by the legal qualification of the facts by the applicants and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). In this respect, all complaints raised by the applicants were examined from the standpoint of the freedom of expression.

44. Article 26 of the Constitution, titled *"Freedom of expression and dissemination of thought"* insofar as relevant provides as follows:

"Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities…

The exercise of these freedoms may be restricted for the purposes of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime…

…

The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law."

1. Admissibility

45. The Court has noted that in examining the individual applications against measures taken during the period when emergency administration procedures were in force, it would take into account the protection regime set out in Article 15 of the Constitution with respect to fundamental rights and freedoms (see *Aydın Yavuz and Others*, §§ 187-191). In the present case, although the appellate authority stated in its decision that the impugned measure whereby access to the said website was denied had been taken under the state of emergency, neither the order issued by the Information and Communication Technologies Authority ("the Authority") nor the first-instance decision issued by the Ankara 1st Magistrate Judge provided any explanation to the effect that the impugned measure had been among the ones taken under the state of emergency.

46. The emergency administration procedures are the regimes, which are applied in cases where a severe threat or danger, or a current threat, to the existence of the State cannot be avoided through ordinary measures and with a view to ensuring the restoration of the State to its ordinary order. In this sense, it is unequivocal that the measures to be taken under the state of emergency must be intended to avert such threat or danger leading to the declaration of the state of emergency. Therefore, the fact that the impugned measure of blocking access was taken under the state of emergency does not *per se* mean that the interference with the freedom of expression due to this measure could be examined under Article 15 of the Constitution titled *"Suspension of the exercise of fundamental rights and freedoms"*.

47. On 15 July 2016, a military coup attempt was staged in Turkey, and therefore, a state of emergency was declared throughout the country on 21 July 2016. Based on factual grounds, the public and investigation authorities have considered that the plotter/perpetrator of this coup attempt is a structure called as the Fetullahist Terrorist Organization/ Parallel State Structure ("the FETÖ/PDY"), which has been performing activities within the country for long years (see *Aydın Yavuz and Others* [Plenary], no. 2016/22169, 20 June 2017, §§ 12-25).

48. The impugned blocking order was not related to any reason necessitating the declaration of the state of emergency; nor was it intended for averting the reasons underlying the state of emergency. Therefore, in the present case, no separate examination will be made under Article 15 of the Constitution.

2. Admissibility

a. As Regards the Application Lodged by the Second Applicant

49. The Court has on many occasions stressed that the applications, which are for protecting the general interest of the society and are called as *"actio popularis"*, are not considered to fall into the scope of individual application (see *Tezcan Karakuş Candan and Others*, no. 2013/1977, 9 January 2014, § 21; *Mahmut Tanal*, no. 2014/11368, 23 July 2014, § 20; and *Liberal Democrat Party*, no. 2014/11268, 23 July 2014, § 18). Pursuant to Article 46 § 1 of Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, a person may be deemed to have a victim status within the meaning of individual application only when one of his current and personal rights has been directly affected by an act, action or negligence of the public authority which is subject-matter of the application and has allegedly constituted a violation. In order for an individual application to be declared admissible, it is not sufficient for the applicant to merely claim that he has victim status, he must also prove that he has been directly or indirectly affected by the alleged violation, in other words he is a victim, or must provide plausible explanations to demonstrate that he is a victim (see *Mahmut* Tanal, § 34; *Ayşe Hülya Potur*, no. 2013/8479, 6 February 2014, § 24; and *Kerem Altıparmak and Yaman Akdeniz (2)*, no. 2015/15977, 12 June 2019, § 36).

50. In the present case, the applicant introducing itself as a non-governmental organisation in pursuance of freedom of expression and conducting legal activities in this respect merely asserted that the impugned blocking order constituted a violation of the freedom of expression of all Wikipedia users but did not provide any plausible explanations to prove that it was directly and personally affected therefrom.

51. For these reasons, the application lodged by the second applicant, Punto 24 Independent Journalist Platform, must be declared inadmissible for *lack of competence ratione personae* without any further examination as to the other admissibility criteria.

b. As Regards the Applications Lodged by the First, Third and Fourth Applicants

52. The third and fourth applicants lodged an individual application with the Court, alleging that the blanket ban imposed on access to the Wikipedia website had violated their rights to receive information and ideas. In its judgment in the case of *Kerem Altıparmak and Yaman Akdeniz (2)*, the Court has stated that as regards the individual applications involving the alleged violation of freedom of expression, which are lodged by third persons who are entitled to the right to receive information and ideas, due to alleged interferences with the means of expression, the question whether the applicants have victim status must be examined under the particular circumstances of every given case. The Court has accordingly set certain criteria that must be satisfied in a given case in order to accept that the applicants have victim status. It is indicated therein that in assessing whether any applicant has a victim status, the followings should be taken into consideration insofar as compatible with the circumstances of the present case (see *Kerem Altıparmak and Yaman Akdeniz (2)*, § 37):

> i. The way how the applicant has used the means of expression (website, social media platform, book, newspaper, journal and etc.) (whether he has created any content; is an active user or passive user);
>
> ii. Gravity of the effects -likely to be caused by the measure imposed with respect to the expression- on the applicant who enjoys the right to receive information;
>
> iii. Whether there is any opportunity to have access to the information through any other means;
>
> iv. Characteristics of the means of expression (in the present case, websites and social media accounts to which access was

denied) (number of users/visitors/followers, its function, its popularity on national/international platforms, whether it has any alternative);

v. Whether those concerned have been deprived of a significant source of communication due to the impugned interference with the means of expression;

vi. Whether the measure taken has precluded the applicant from involving in a public debate;

vii. Whether the applicant has been deprived of a concretely identifiable interest due to the measure taken;

53. In the judgment *Kerem Altıparmak and Yaman Akdeniz (2)*, the complaint concerning the blocking of access to 615 addresses, out of which 350 were personal accounts at social media websites, namely Twitter, Youtube, Dailymotion and Facebook, and which were also consisted of certain news website and other websites with unknown intended purposes, was examined in consideration of the abovementioned criteria. It was accordingly observed that the applicants failed to demonstrate that they were active users of the said addresses; and that nor could they demonstrate that they had been deprived of a certain interest. It was further considered that the applicants failed to prove that they had not had any opportunity, other than the blocked web addresses, to have access to information; and that they could not demonstrate that they had been deprived of a significant means of communication due to the measure blocking access to the websites, which mainly contained various posts and media that incited revenge and violence through photos and videos of military officers, police and village guards; and that they had been precluded from participating in public debate. Accordingly, the Court has concluded in that judgment that the applicants failed to establish a direct and personal link between the impugned measure of blocking access and their rights to receive information and ideas, as well as to prove on reasonable and plausible grounds going beyond abstract allegations that they had victim status (see *Kerem Altıparmak and Yaman Akdeniz (2)*, §§ 39-46).

54. In the judgment in the case of *Kerem Altıparmak and Yaman Akdeniz (3)* involving an alleged violation of the freedom of expression due to the blocking of access to a column available on a website of a national newspaper, the application lodged by two academics was examined. In the impugned incident giving rise to the application, neither the executives of the national newspaper nor the authors of the column applied to a judicial authority. Applying the abovementioned criteria (§ 52) to the case, the Court has concluded that the applicants failed to establish a direct and personal link between the impugned measure of blocking access and their rights to receive information and ideas, as well as to prove on reasonable and plausible grounds going beyond abstract allegations that they had victim status (see *Kerem Altıparmak and Yaman Akdeniz (3)*, no. 2015/17387, 20 November 2019, § 25).

55. In the present case, the Court has concluded that the applicants, with their capacity as the users visiting Wikipedia for years within the scope of their scientific studies and educational activities, had victim status on the ground that Wikipedia –given its function, number of users, its popularity on national and international platforms and the absence of any alternative– is an important source of information and the applicants were deprived of such source (for a similar judgment where the applicants were found to have victim status, see *Youtube Llc Corporation Service Company and Others* [Plenary], no. 2014/4705, 29 May 2014, §§ 27-28).

56. The alleged violation of the freedom of expression must be declared admissible with respect to the first, third and fourth applicants for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

3. Merits

a. Existence of an Interference

57. It was ordered that a blanket ban be imposed on access to Wikipedia. It appears that the relevant order and court decisions constituted an interference with the freedom of expression of the first applicant in its capacity as the service provider, as well as of the third and fourth applicants in their capacity as the users of the said website.

b. Whether the Interference Constituted a Violation

58. The abovementioned interference will lead to a violation of Article 26 of the Constitution, unless it fulfils the conditions set forth in Article 13 thereof. Article 13 of the Constitution insofar as relevant provides as follows:

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

59. Therefore, it must be determined whether the interference complied with the requirements laid down in Article 13 of the Constitution and applicable to the present case, namely being prescribed by law, being justified by one or more of the grounds stipulated in the relevant provision of the Constitution and not being contrary to the requirements of the democratic order of the society.

i. Lawfulness

60. In the present case, the Directorate General for Security under the Prime Ministry in the first place sent a letter to the Authority, seeking for the removal of two impugned articles available on Wikipedia; or if not possible, for the blocking of access to these articles; or otherwise, for imposing of a blanket ban on access to the website, in its entirety, on the basis of the domain name, pursuant to Article 8/A of Law no. 5651, for the purposes of *"protecting the right to life as well as the lives and property of individuals, maintaining national security and public order, and the prevention of commission of offence"*. The Authority accordingly ordered the blocking of access to the website in its entirety *"for the reasons laid down in Article 8/A (1) of Law no. 5651"* but did not provide any explanation as to the specific reason it had relied on. The Ankara 1st Magistrate Judge approved the order on blocking of access for the purposes of *"preventing the performance of any acts and actions praising, inciting violence and commission of offence, threatening public order and national security; protecting the right to life as well as the lives and property of individuals; and preventing the commission*

of offence". The magistrate judge also dismissed the challenges raised against the impugned order on the grounds that *"the impugned articles constituted an unjust attack to the extent that would give the impression that the Turkish State was supporting terrorism, which was tarnishing its reputation and prestige both on international and national platforms…"*.

61. In the present case, the legal basis for the impugned interference with the applicants' freedom of expression is Article 8/A of Law no. 5651. However, it was not clearly stated which reason laid down in the subparagraph 1 thereof and allowing for an interference was exactly relied on. Besides, *"the State's reputation"*, which is not specified as a ground in the provision forming a legal basis for the impugned interference, was shown as a ground justifying the interference. Therefore, it has been observed that the relevant provision was interpreted so broadly as to give the impression that there was arbitrariness.

62. However, there is no strong interplay between the assessments as to the lawfulness of the interference with the applicants' freedom of expression and the assessments as to whether the interference was compatible with the requirements of a democratic society. Given the manner in which the present case was examined, the Court has reached the conclusion that what is necessary in the present case is not a final assessment as to whether the relevant norms satisfied the requirement of *being restricted by law* in the particular circumstances, but rather an assessment as to whether the impugned interference was compatible with the requirements of a democratic society.

ii. Legitimate Aim

63. An interference with the freedom of expression may be legitimate only when the interference has been intended for the purposes of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary, which are all specified in Article 26 § 2 of the Constitution.

64. It appears extremely difficult to determine the aim underlying the order blocking of access to the website. In the present case, it cannot be said that there is no question as to the legitimate ground of the impugned interference. However, this matter, which is in connection with the issue determined through the assessment as to the lawfulness, would be dealt with during the assessment to be made under the requirement of being necessary in a democratic society with which it is closely associated.

iii. Compliance with the Requirements of a Democratic Society

(1) Notion of Requirements of a Democratic Society

65. *The notion "requirements of a democratic society"* entails that the restrictions with respect to freedom of expression must be compulsory or exceptional measures and appear to be the last resort or the last measure to be taken. In order for a restriction to be considered as one of the requirements of a democratic society, it must serve a pressing social need in a democratic society. Accordingly, a restrictive measure cannot be considered to comply with the requirements of a democratic social order, unless it fulfils a social need or it is applied as a last resort (see *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).

(2) Freedom of Expression and Role of Internet

66. 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 demonstrate 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). In this sense, internet having a significant function in imparting and receiving news and ideas is under the protection of the freedom of expression enshrined in Article

26 of the Constitution (see *Medya Gündem Dijital Yayıncılık Ticaret A.Ş.* [Plenary], no. 2013/2623, 11 November 2015, §§ 30, 33).

67. 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 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; and *C.K.* [Plenary], no. 2014/19685, 15 March 2018, § 27).

68. 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.

69. Social media undeniably plays an important role in making internet a significant value for the exercise of the fundamental rights and freedoms, notably freedom of expression, in modern democracies. It is a medium as a transparent platform with the opportunity of mutual communication, which enables personal participation in the form of creating, publishing and interpreting the contents. As a matter of fact, Wikipedia, as a social media, is also an online network where its users publish and share the contents they have produced. The Court, which has previously pointed to the indispensable nature of social media platforms providing service through internet for the individuals in disclosing, exchanging and disseminating their information and ideas, notes that both the State and administrative authorities must act in a particularly delicate manner while introducing and implementing regulations in terms of social media platforms, which have been nowadays the most effective and common means in terms of not only expression of thought but also obtaining information (see *Youtube Llc Corporation Service Company and Others*, § 52).

70. It is obvious that despite the significance of internet in terms of the freedom of expression, some of the contents available on internet entail serious risks to individuals, the nation and the State; and that due to its peculiar characteristics, it has been exploited to a significant extent. Internet, which enriches social life, facilitates processes of obtaining information and creating new job opportunities, may however turn into a platform where severe attacks are directed against individuals' fundamental rights, notably against the personal rights, and which leads to real security risks and damages against the society and the State such as the spread of inaccurate information and increased cyberbullying, online fraud, pornography, child abuse, prostitution, gambling, violence, hatred and racism, support for and proliferation of terrorism.

71. It is undoubtedly impossible to successfully struggle against these risks merely by imposing restrictions on internet. The unlimited nature of internet and its being under the monopoly of no country reduce the State's prospect of success to interfere with this platform. In order for the methods of blocking access, employed as a means for interfering with a given content available on internet, to be effective, access must be blocked at every outlet of internet flow throughout the country. Therefore, nowadays, in fighting any contents constituting offences against the democratic order of the society such as sexual abuse of the child, hate speech and terrorism and in preventing such kinds of contents from being circulated via internet, States introduce various statutory arrangements and engage in international cooperation.

72. It is evident that such an international cooperation may be achieved when the bodies wielding public power are able to sufficiently demonstrate that their interferences have been justified and the rights of the public and individuals have been balanced, as well as that there is a legal framework whereby fundamental rights are respected and rigorously exercised.

(3) Certain findings as to the order for blocking access issued pursuant to Article 8/A of Law no. 5651

73. The Constitutional Court, in its judgment in the case of *Birgün İletişim and Yayıncılık Ticaret A.Ş.*, examined in detail the procedure

whereby the decisions ordering the removal of a given content from the publication and the blocking of access to the given publication were issued pursuant to Article 8/A of Law no. 5651 (see *Birgün İletişim ve Yayıncılık Ticaret A.Ş.*, §§ 63-72). Accordingly, it has been observed that the law-maker has introduced a special measure procedure through which swift results may be obtained, with a view to more effectively fighting the offences committed via internet (see *Birgün İletişim ve Yayıncılık Ticaret A.Ş.*, §§ 63).

74. The order for the removal of a given content from online publications and/or the blocking of access to such publications, which is issued by the Head of the Authority under Article 8/A of Law no. 5651, is an exceptional avenue that must be resorted only in cases where delay is deemed prejudicial, thereby necessitating an immediate interference. Therefore, the competent authorities are expected to delicately make a decision by considering that it is an exceptional revenue, which is to be resorted only in cases where delay is deemed prejudicial (see *Birgün İletişim ve Yayıncılık Ticaret A.Ş.*, § 71).

75. If it is *prima facie* perceivable without the need for any further examination that publications available on internet, which pose a threat to the democratic order, such as the ones praising violence, as well as inciting and encouraging persons to adopt the methods employed by a terrorist organisation, to use violence, to hatred, revenge or armed resistance, the abovementioned exceptional procedure -prescribed in Article 8/A of Law no. 5651 and involving the order issued by the Head of the Authority- may be applied (see *Birgün İletişim ve Yayıncılık Ticaret A.Ş.*, § 72).

76. In such cases, the measure whereby access to the impugned internet publication has been blocked may be found justified in appearance or as *prima facie*. Limiting the interferences -by the relevant administration with the publications available on internet- to the cases where delay is deemed prejudicial and such interferences are found *prima facie* justified would strike a fair balance between the need to rapidly protect public interests and the freedom of expression (see *Birgün İletişim ve Yayıncılık Ticaret A.Ş.*, §§ 71-72; and *Ali Kıdık*, no. 2014/5552, 26 October 2017, §§ 62-63).

77. If it requires a further examination to determine whether a given internet publication imperils the democratic order of the society and the interference cannot be found *prima facie* justified, it is not for the administration to order the blocking of access to the impugned publications (the abovementioned exceptional procedure), but for the "incumbent court" to take the necessary steps as prescribed in Article 8/A of Law no. 5651.

(4) Issues to be taken into consideration by administrative and judicial authorities with respect to the interferences in the form of blocking of access under Article 8/A of Law no. 5651

78. In its judgment in the case of *Birgün İletişim ve Yayıncılık Ticaret A.Ş.*, the Court has also pointed to the issues that are to be taken into consideration by the administrative and judicial authorities in order for the grounds underlying the interferences -whereby the removal of certain part of the given publications available on internet and/or the blocking of access to such publications has been ordered by the administration under Article 8/A of Law no. 5651- to be compatible with the requirements of a democratic society in terms of the restriction imposed on the freedom of expression (see *Birgün İletişim ve Yayıncılık Ticaret A.Ş.*, §§ 73-75).

79. It may be deemed sufficient to consider that such an order is justified, if the incumbent magistrate judge to which the order (blocking of access) is submitted for approval and the appellate authority reach the same conclusion, on the basis of the same ground or making the same reference, with that of the administrative authorities requesting the imposition, and/or issuing, of such an order. However, in cases where the incumbent magistrate judge just reiterates, or refers to, the grounds relied on by the Authority in issuing the order to block access to the impugned publication, the Court would examine the grounds relied on by the Authority in its orders. Any interference with the freedom of expression without any justification or with any justification failing to satisfy the criteria set by the Court would constitute a breach of Article 26 of the Constitution (see *Birgün İletişim ve Yayıncılık Ticaret A.Ş.*, §§ 73).

80. In the judgment *Birgün İletişim ve Yayıncılık Ticaret A.Ş.* (§ 74), the elements which are required to be included in the decisions for

rendering the grounds -relied on by the inferior courts and the bodies wielding public power- relevant and sufficient and which may vary by the particular circumstances of similar applications are listed as follows:

i. In order for the Head of the Authority to order the blocking of access to any internet content, the existence of a case where delay is deemed prejudicial must be demonstrated by administrative and/or judicial authorities.

ii. If the cases where delay is deemed prejudicial may occur in relation to one or more of the purposes of protecting the right to life as well as the lives and property of individuals, maintaining national security and public order, preventing the commission of offences or maintaining public health, the interplay between the impugned publication and these purposes must be fully demonstrated.

iii. For making such an analysis, a fair balance must be struck between the freedom of expression and a democratic society's legitimate right to protect itself against the activities of terrorist organisations if the impugned publication has any link with terrorist organisations or intended for legitimising the terrorist activities.

81. The considerations required to be examined for striking such a balance are also stated in the Court's judgment in the case of *Birgün İletişim ve Yayıncılık Ticaret A.Ş.*. For such a balance, the followings should be examined along with the content of the impugned publication:

- Whether the impugned publication, taken as a whole, has designated a private person, public officers, a certain section of the society or the State as a target, and incited violence against any of them;

- Whether it has led individuals to face the risk of physical violence, and whether it has incited hatred towards individuals;

- Whether the message conveyed by the impugned publication has shown the use of violence as a necessary and justified measure;

- Whether the publication has praised violence and incited individuals to hatred, revenge or armed resistance;

- Whether it has caused further violence in a certain part of, or throughout, the country by putting forth charges or arousing hatred;

- Whether it has contained untruths and false information that might cause panic among individuals or institutions, or threats and insults;

- Whether the extensity of clashes taking place in a certain part, or throughout, the country and the high tension within the country at the date of the publication have had any impact on the decision on the blocking of access thereto;

- Whether the impugned restrictive measure has corresponded to a pressing social need in a democratic society and whether it was the last resort to be applied; and

- Lastly, whether the impugned measure was a proportionate restriction constituting the minimum interference with the freedom of expression so as to achieve the public interest pursued.

(5) Application of General Principles to the Present Case

82. Wikipedia is an online platform, which has millions of users all over the world and where the contents available on the platform are formulated by the users. The changes such as adding new information to Wikipedia or enriching the available contents, updating certain information included in the contents and deleting some of them are made by the users registered in the system and called as editors. Wikipedia, which is considered to be an online encyclopaedia and provides a considerable amount of information in every field, is visited by millions of people every day. The contents searched through a search field available on the website can be reached in the shortest time, and further related information can be viewed through internal ports. Accordingly, the contribution made by such a platform to the availability and accessibility of information for everyone is undisputed. Therefore,

it should be demonstrated with relevant and sufficient grounds that the impugned interference due to the blocking of access to Wikipedia has been necessary in a democratic society in order to prevent the infringement of the freedom to impart and receive information.

83. In the present case, access to Wikipedia in its entirety was blocked due to the contents available on two URL addresses. The first one of these URL addresses is titled *"State-Sponsored Terrorism"*. Under this heading, 16 countries are listed. The links ensuring access to these countries provide explanations as to the supports allegedly provided by each of these countries for terrorism. The impugned content underlying the measure of the blocking of access is the content under the heading of *"Turkey"*. The other URL address is titled *"Foreign involvement in the Syrian Civil War"*. The countries considered to have relation with the civil war in Syria are classified under the headings *"Support for the Syrian Ba'athist government"* and *"Support for Syrian opposition"*. The impugned content underlying the measure of the blocking of access is the content available under *"Turkey"* under the heading of *"Support for Syrian opposition"*.

84. In both contents, Turkey is depicted as one of the major external actors of the civil war in Syria. It is asserted therein that Turkey has supported the opposition forces in Syria, including terrorist organizations, against the current regime. It is further maintained that Turkey has been providing military and logistic support, along with the financial aid, for the terrorist organisations such as DAESH and engaged in trading of oil and petroleum with them.

85. Given the texts made available via URL addresses, it appears that the allegations specified therein are mainly based on the news in national and international press. In spite of the blocking of Wikipedia in order to ensure the denial of access to the impugned contents, almost all of the resources referenced by the contents are still available on the internet. The impugned contents also include the explanations provided by persons known at national and international levels, notably the statements of the actors of the ruling party and main opposition party of Turkey. It has been further observed that some of the allegations lack any ground, or the reliability of the source of information underlying these allegations is controversial.

86. As it was technically impossible to make a URL-based blocking and the first applicant did not remove the impugned contents from the website, a blanket ban on access to the website was imposed. Both the administrative authorities and the incumbent magistrate judge relied, as the ground justifying the blocking of access to the website, on the consideration that the impugned contents were among the cases where delay was deemed prejudicial in terms of *"the protection of the right to life, the lives and properties of the individuals, the maintenance of national security and public order and the prevention of the commission of an offence"* under Article 8/A of Law no. 5651. In dismissing the first applicant's request for the lifting of the impugned measure, the magistrate judge noted that the impugned contents constituted an unjust attack to the extent that would tarnish the reputation and prestige of Turkey on international and national platforms and would give the impression that Turkey was supporting terrorism.

87. It should be primarily noted that the order, issued by the Head of the Authority under Article 8/A of Law no. 5651, which allows for removing, and/or blocking of access to, a certain online content is an exceptional means to be applied only in cases where delay is deemed prejudicial; in other words, in cases of an urgent necessity (see *Birgün İletişim ve Yayıncılık Ticaret A.Ş.*, § 72). In the present case, access to Wikipedia was blocked under Article 8/A of Law no. 5651; however, neither the administrative authorities nor the inferior courts considered the issues to be taken into account in cases of the interferences under the relevant provision of this Law. The relevant authorities also failed to prove the causal link between the impugned contents and the reason underlying the impugned restriction, as well as to demonstrate the existence of any case where delay was deemed prejudicial.

88. The law-maker cannot be expected to define, in every detail, the content and scope of statutory phrases, namely *"maintaining national security and public order and prevention of offences"*, which point to unforeseeable circumstances that cannot be formulated, by their very nature, in a comprehensive and concrete fashion. These phrases are attributed meanings in time through practice and judicial decisions, and the general framework of these phrases are thereby set and their scopes

are made concrete (see the Court's decision no. E.2014/149, K.2014/151, 2 October 2014). In this respect, the interpretation of the above-cited phrases in a broader sense that would lead to arbitrary practices may be in breach of the freedom of expression (see *Birgün İletişim ve Yayıncılık Ticaret A.Ş.*, § 68). In the present case, the inferior courts failed to demonstrate any concrete grounds so as to justify the interference with the impugned contents on the ground of *"maintaining national security and public order"*. Besides, the challenge against the decision on denial of access to the website was dismissed on the ground that the impugned contents "*tarnished the State's reputation*", in the absence of any reasonable explanation as to why the contents were considered within this scope, which implies that these phrases have been interpreted broadly.

89. As in the present case, the broad interpretation of the grounds for interference prescribed by law without establishing concrete links, which would lead to an impression of arbitrariness, leaves the individuals in a state of uncertainty and makes the relevant provision unforeseeable. The deterring effect caused thereby exerts an extensive and severe pressure not only on the applicants but also on large masses wishing to exercise their freedom of expression.

90. Wikipedia declares that it may contain subjective information and that as everyone may put an entry on the platform, it may be even subject to malicious attempts. Thereby, it explicitly makes a warning to the effect that information provided by its contributors may not refer to undisputed or true facts. Wikipedia also states that the issues it has made available may become an objective content only through long-standing discussions and in time, which may take months and even years.

91. In the present case, following the decision on blocking of access to the website, the volunteer and impartial editors on Wikipedia have made comprehensive changes in the impugned texts, tried to reformulate their contents in a more objective and careful manner, as well as removed certain contents -which were found neither reliable nor verifiable- and the resources referenced by these contents. Thereby, a significant part of the allegations that Turkey has been providing support to radical formations has been also removed. Besides, the paragraphs concerning

the Al-Nusra Front and the DAESH were revised to a significant extent, and sources of information which were relatively much known and reflected different points of view were also referenced. Lastly, as regards the news concerning petroleum-trafficking from Syria to Turkey, a sentence whereby the allegation that Turkey and Iraq's Kurdish Regional Authority had been engaged in petroleum-trafficking was denied and a paragraph whereby John R. Bass, US Ambassador to Turkey, explained that these allegations were unfounded and which contained the CIA's excuse for the allegations it raised in 2014 were added on the website.

92. The blocking of access to Wikipedia in Turkey has constituted an interference not only with the freedom to disseminate information and thoughts enjoyed by the first applicant in its capacity as the content provider, but also with the Turkish users' right to receive information and thoughts. Besides, the blocking of access has precluded discussion and consideration of the impugned contents by the Wikipedia users in Turkey, and the active Wikipedia editors have been also deprived of the opportunity to make adjustments and changes in, and to make contributions to, the contents.

93. Wikipedia authors and editors updated, and rendered more objective, the contents shown as a ground for the impugned interference in the present case. The impugned contents are still being updated. However, in their decisions, the administration and the inferior courts failed to take into consideration the nature of the website as an ever-evolving encyclopaedia.

94. Finally, it should be also noted that in the present case, no subsequent criminal investigation and prosecution were launched owing to the impugned contents. Even if it seems meaningless to initiate an investigation into the incident as it is difficult to identify the persons loading the impugned articles, the preference not to initiate a criminal investigation also against the persons, authors of the mainly controversial statements included in the impugned articles, although their identities are known demonstrates that the impugned articles indeed contain no grave issues that could justify the blocking of access to Wikipedia in its entirety.

95. Regard being had to all these considerations, it has been concluded that the administrative and/or judicial authorities failed to provide relevant and sufficient grounds to demonstrate that the impugned restriction in the form of blocking access was justified by a pressing need.

96. In the current situation, the measure of blocking access became permanent. Such restrictions imposed for an indefinite period of time – also in consideration of the blanket ban on access to the entire website– would clearly constitute a disproportionate interference with the freedom of expression.

97. For these reasons, the Court has concluded that the impugned interference with the freedom of expression of the first, third and fourth applicants was not compatible with the requirements of a democratic society. The Court has accordingly held that there was a violation of Article 26 of the Constitution.

Mr. Muammer TOPAL, Mr. Kadir ÖZKAYA, Mr. Rıdvan GÜLEÇ, Mr. Recai AKYEL, Mr. Yıldız SEFERİNOĞLU and Mr. Selahaddin MENTEŞ did not agree with this conclusion.

4. Application of Article 50 of Code no. 6216

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

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

way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."

99. The applicants requested the Court to find a violation.

100. In its judgment in the case of *Mehmet Doğan*, the Court sets forth the general principles as to how a violation of any fundamental right, which has been found by the Constitutional Court, and its consequences would be redressed (see *Mehmet Doğan*, no. 2014/8875, 7 June 2018, §§ 57-60). In another judgment, the Court also mentions the consequences of the failure to comply with a violation judgment and the principles set in the abovementioned judgment and accordingly notes that this situation would constitute a continuing violation and also lead to the violation of the respective right for the second time (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

101. 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 violation, to put an end to the continuing violation, to eliminate the decision or the act giving rise to the violation or their consequences, to compensate for the pecuniary and non-pecuniary damages resulting from the violation, as well as to take the other measures deemed necessary in this respect (see *Mehmet Doğan*, §§ 55, 57).

102. In cases where the violation resulted from a court decision, the Court orders the communication of a copy of its judgment to the relevant court to conduct a retrial, with a view to redressing the violation and its consequences, pursuant to Article 50 § 2 of Code no. 6216 and Article 79 § 1 (a) of the Internal Regulations of the Court. This statutory provision prescribes a compensatory remedy, which is specific to the individual application mechanism and requires a retrial for the redress of the violation, as distinct from the similar legal institutions available in the procedural law. Therefore, in cases where the Court orders a retrial 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 retrial available in the procedural law. Accordingly, the court receiving such a judgment is legally obliged to conduct a retrial owing to the violation judgment rendered by the Court, without awaiting for any such request by the person concerned, and to take the necessary actions to redress the consequences of the continuing violation (see *Mehmet Doğan* [Plenary], §§ 58-59; and *Aligül Alkaya and Others (2)*, §§ 57-59, 66-67).

103. It has been concluded that the blocking of access to the website, namely Wikipedia, was not compatible with the requirements of a democratic society and therefore constituted a violation of the freedom of expression of the first, third and fourth applicants. It has been accordingly observed that in the present case, the violation resulted primarily from the impugned act of the administration as well as from a court decision as the inferior courts failed to redress the violation.

104. In that case, there is a legal interest in conducting a retrial in order to redress the consequences of the violation of the freedom of expression. The retrial to be conducted is for the elimination and redressing of the violation and its consequences pursuant to Article 50 § 2 of Code no. 6216, which embodies a regulation specific to the individual application mechanism. In this sense, the step required to be taken is to conduct a retrial and to issue a new decision which eliminates the reasons requiring the Court to find a violation and which is in pursuance of the principles set by the Court in its violation judgment. Accordingly, a copy of the judgment must be sent to the relevant court to conduct a retrial.

105. The total court expense of TRY 2,732.50 including the court fee of TRY 257.50 and counsel fee of TRY 2,475, which is calculated over the documents in the case file, must be reimbursed to the first applicant, and the total court expense of TRY 2,732.50 including the court fee of TRY 257.50 and counsel fee of TRY 2,475 must be reimbursed jointly to the third and fourth applicants, whereas the court expenses incurred by the second applicant must be covered by it.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 26 December 2019:

A. 1. UNANIMOUSLY that the alleged violation of the freedom of expression be declared INADMISSIBLE insofar as it concerns the second applicant for *lack of competence ratione materiae*;

2. UNANIMOUSLY that the alleged violation of the freedom of expression be declared ADMISSIBLE insofar as it concerns the first, third and fourth applicants;

B. BY MAJORITY and by dissenting opinion of Mr. Muammer TOPAL, Mr. Kadir ÖZKAYA, Mr. Rıdvan GÜLEÇ, Mr. Recai AKYEL, Mr. Yıldız SEFERİNOĞLU and Mr. Selahaddin MENTEŞ, that the freedom of expression safeguarded by Article 26 of the Constitution be VIOLATED insofar as it concerns the first, third and fourth applicants;

C. That a copy of the judgment be SENT to the Ankara 1st Magistrate Judge (no. 2017/2956) to conduct a retrial for the redress of the violation of the freedom of expression and its consequences;

D. 1. That the total court expense of TRY 2,732.50 including the court fee of TRY 257.50 and the counsel fee of TRY 2,475 be REIMBURSED to the FIRST APPLICANT; and the total court expense of TRY 2,732.50 including the court fee of TRY 257.50 and the counsel fee of TRY 2,475 be JOINTLY REIMBURSED to the THIRD and FOURTH APPLICANTS;

2. That the court expense incurred by the second applicant be COVERED by it;

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

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

DISSENTING OPINION OF JUSTICES MUAMMER TOPAL, KADİR ÖZKAYA, RIDVAN GÜLEÇ, RECAİ AKYEL, YILDIZ SEFERİNOĞLU AND SELAHADDİN MENTEŞ

1. The majority of the Court held that there had been a violation of the freedom of expression, safeguarded by Article 26 of the Constitution, as regards the first, third and fourth applicants due to the blocking of access to the website, www.wikipedia.org, on account of the impugned articles available on two different URL addresses. We disagree with the majority's finding a violation for the following reasons.

2. In the present case, the impugned order on blocking of access was issued on the ground that the said website had included certain articles posing a threat to the internal and external security of the country and disturbing public order.

3. On 28 April 2017, the Directorate General for Security of the Prime Ministry sent a letter to the Authority, *seeking for the removal of two impugned articles available on Wikipedia; or if not possible, for the blocking of access to these articles; or otherwise, for imposing a blanket ban blocking access to the website, in its entirety, on the basis of the domain name pursuant to Article 8/A of Law no. 5651, for the purposes of "protecting the right to life as well as the lives and property of individuals, maintaining national security and public order, and the prevention of commission of offence" as these articles were found to praise terrorism, incite persons to violence and offence and pose a threat to their lives and property…"*.

4. Upon the request, which was assessed by the Authority pursuant to the procedure set forth in Law no. 5651, it was held with respect to the impugned articles published on the said website that *"the impugned contents would be removed; and in case of any failure to remove, and deny access to, the impugned articles within 24 hours at the latest, a blanket ban on access to the website in its entirety would be imposed"*.

5. The order -whereby notice and takedown procedure was applied and it was sought that the necessary action be taken within 24 hours at the latest- was notified on 28 April 2017 by 4.37 p.m. to Wikimedia Foundation via the e-mail addresses that had been provided to the

Authority for official notifications, as well as to the lawyer appointed by the Foundation in Turkey.

6. As it has been observed that the order was not enforced despite 14 hours having elapsed following the notification and that it had not been technically possible to block access to the impugned articles specifically, access to the website, https://www.wikipedia.org, was blocked in its entirety pursuant to the provision of the relevant Law. The order was then submitted for the approval of the incumbent judge.

7. The judge approved the order blocking access to the website in its entirety on 29 April 2017 but held that if the website itself blocked access merely to the impugned articles, which were sought to be removed, the blanket ban on access to the website be lifted.

8. The challenge against the decision was dismissed by the relevant magistrate judge on the grounds that the impugned articles *"constituted unjust and ill-founded attacks to the effect that the Turkish State is among those that has triggered the civil war in Syria, has been supporting terrorist organisations and provided financial aid and firearms to these organisations, which would tarnish the Turkish State's reputation and prestige both on international and national platforms and give the impression that it has been supporting terrorism"*.

9. Upon the dismissal of the challenge, an individual application was lodged with the Court.

10. In the context of the above-cited explanations, internet that is now a basic source of information and reference with numerous information –which nevertheless needs to be verified– available on it, that has provided individuals with the opportunity to make a free choice among several contents, that has ensured active participation in public debates, that has been thus widely used as a means for mass communication and increasingly preferred to the conventional methods, as well as the acts of imparting/receiving information and ideas through internet provided that they do not constitute an offence, are undoubtedly within the scope of the freedom of expression and are of great importance for the exercise of fundamental rights and freedoms, notably the freedoms of communication and expression.

11. Accordingly, in legal, administrative and judicial rules, decisions and practices, due regard must be paid to the determination of interference which would adversely affect the flow of information over the internet, and Articles 13 and 26 of the Constitution (Articles 8, 10 and 11 of the Convention) must be observed in the determination and implementation of the rules concerning the contents to be classified as unlawful or concerning the blocking of access thereto, as well as in the taking of decisions in this respect.

12. However, it is a well-known fact that as mentioned above, some of the documents/information produced/available via internet may entail serious risks to the nation and the State and that internet, which enriches social life, facilitates the processes of obtaining information and creates new job opportunities, may also entail grave attacks towards certain fundamental rights of individuals, notably their personal rights, lead to the dissemination of inaccurate information, increased cyberbullying, online fraud, pornography, child abuse, prostitution, gambling, violence, hatred and racism, as well as to promotion and proliferation of terrorism, and turn into a platform which entails real security risks and damages against the community and the State.

13. Therefore, it may sometimes become a necessity to remove from internet the contents of criminal nature which are made public via internet and are thereby accessible from all across the world within a short period of time or to preclude their accessibility.

14. Nevertheless, due to the unlimited nature of internet, its being under the monopoly of no country and the willingness of the respective countries or real or legal persons to make cooperation in this field at each time and under all conditions, it cannot be always possible to interfere with such contents in a flexible manner, and therefore, taking of certain measures which are more inclusive may be deemed necessary.

15. Besides, the different nature and characteristics of the internet, which is different from the other mass media such as the ability of internet traffic to flow over different countries within seconds, the ability of a problem occurring at a certain point within a complex structure to adversely affect the internet traffic at any other remote point of the world,

the spread network of the servers including the websites all over the world and the necessity to ensure control and maintenance of general and regional internet points, its multi-dimensional, dynamic and dispersed structure with several actors, its technique, way of functioning, infrastructure and "national infinity/international nature" brings along certain difficulties. These characteristics require the arrangement of internet platform and imposition of certain restrictions specific to this field.

16. As also noted above, in the present case, the order blocking access to the website, www.wikipedia.org, was issued as two separate URL addresses on this website had contained certain information constituting a threat to the internal and external security of the country and leading to the impairment of public order.

17. The impugned restriction, which was in the form of a blanket ban on access to Wikipedia for denial of access to the impugned contents, constituted an interference with the freedom of expression (the right to impart and receive information) of the first applicant in its capacity as the content provider as well as of the third and fourth applicants in their capacities as the users of the website. The said interference with the applicants' freedom of expression may be found not to cause a violation; in other words, may be classified as an interference compatible with Article 13 of the Constitution only when it was compatible with the requirements of a democratic society and proportionate to the aim sought to be attained. In order for the interference to be considered as compatible with requirements of a democratic society, it must both correspond to a pressing social need and be proportionate.

18. On the other hand, a fair balance must be struck between the individuals' right to express their ideas through freedom of expression and the legitimate grounds laid down in Article 26 § 2 of the Constitution. As a matter of fact, the existence of legitimate grounds in a given case does not *per se* set aside a right. It is therefore necessary to strike a fair balance between the legitimate grounds and the relevant right in the particular circumstances of the case.

19. Besides, it should be noted that the public authorities enjoy a certain margin of appreciation in deciding whether the interference with

the freedom of expression was appropriate and sufficient for satisfying an urgent and pressing social need and whether the grounds relied on to justify the impugned interference were expedient and sufficient.

20. In the present case, the interference with the applicants' freedom of expression pursued the aim of *"… maintaining national security and public order…"* under Article 8/A of Law no. 5651.

21. In the articles giving rise to the blocking of access to the website, Turkey is depicted as one of the significant external actors of the civil war taking place in Syria, and it is asserted that Turkey was providing support for the opposition forces in Syria, including terrorist organisations, against the current regime. It is further maintained that Turkey has been providing military and logistic support, along with financial aid, to the terrorist organisations like al-Nusra and DAESH and engaged in trading of petroleum with DAESH.

22. The question whether a given expression is punishable must be assessed in the particular circumstances of every individual case. Accordingly, whether "an expression" has convinced or guided its addressees (audiences/readers) or has affected them to display or not to display a behaviour varies by the context and intent for which the "expression" is uttered, positions of those uttering the "expression", as well as the way how it is uttered. These factors determine the pragmatic potency of the expression.

23. Accordingly, in the present case, the impugned articles must be assessed in conjunction with the issues whether they posed a threat to the national security of Turkey, which would impair the public order, as well as with the internal and external security conditions prevailing at the country which would potentially have several impacts on the national security and public order.

24. Some of the organisations, which were -as alleged in the impugned articles- supported by Turkey, were in cooperation with Turkey, provided with aids including weapon and also engaged in trading of petroleum, are organisations which carry out activities in the neighbour countries of Turkey and against which many countries are globally struggling for being considered as a global threat for the whole world. Some of the

incidents taking place at the relevant time in the countries, used as a base by these organisations, were also directly related with the national security and public order of these countries.

25. Therefore, we consider that given the circumstances as to the internal and external security of Turkey at the relevant time, it cannot be said that the impugned articles -in which the Turkish State was shown among the countries triggering the civil war in Syria and was accused of giving various aids including firearms to the organisations (against which there was a global cooperation by several countries for posing a threat to the security of the world), providing military and logistic support for them, as well as of trading petroleum with them- were not constituting a threat to the national security and public order, did not fall into the scope of the cases where delay was deemed prejudicial, and were not therefore considered as a ground justifying the impugned blocking of access in terms of public needs.

26. However, it is undoubted that the blanket ban blocking access to the website in its entirety caused a clash between the freedom of communication and other relevant rights of those using the website and the public interests such as national security of the country and public order.

27. In the present case, for the purpose of protecting the freedom of communication and the other related rights of the individuals using the website, a "notice and take-down" mechanism was applied to ensure the removal of merely the impugned articles, and it was requested that the necessary step be taken within at the latest 24 hours, which was notified to the Wikimedia Foundation through its e-mail addresses informed by the Foundation, as well as to its lawyers in Turkey.

28. In this notification, it was stated that in case of the denial of the request for removal of the impugned articles, a measure blocking access not only to the impugned articles but also to the website in its entirety due to technical reasons would be imposed. However, neither the Foundation nor the lawyers took a step in this respect. Thereafter, an order involving a blanket ban on access to the website, https://www.wikipedia.org, was issued and submitted for the approval of the incumbent judge.

29. In its decision, the incumbent judge approved the order blocking access to the website in its entirety but also noted that if the website itself blocked access to the impugned articles sought to be removed, the blanket ban on access to the website would be lifted.

30. Given all circumstances surrounding the present case and the margin of appreciation afforded to the public authorities in this regard, we have concluded that the blocking of access to the articles available through two separate URL addresses on www.wikipedia.org was necessary for public needs; and that therefore, the interference with the applicants' freedom of expression was compatible with the requirements of a democratic society and met a pressing social need. Taking into consideration that primarily the conduct of the website owner and subsequently the relevant technical barriers necessitated the imposition of blanket ban on access to the website due to merely two impugned articles, we have also concluded that the impugned interference was proportionate; in other words, a fair balance was struck between the applicants' freedom of expression and the legitimate aims laid down in Article 26 § 2 of the Constitution; and that the grounds stated in the inferior courts' decisions were relevant and sufficient.

31. Besides, although it was asserted by the first applicant through a petition submitted to the Court on 28 May 2018 that upon the decision on blocking of access to the website, which was issued by the Ankara 1st Magistrate Judge, the independent and voluntary Wikipedia editors made comprehensive changes in the impugned articles and that the judge's decision thereby became devoid of justification, this was not considered as a factor to have a bearing on the outcome of the proceedings before the Court as it did not, at that very stage, fall within the Court's jurisdiction to determine whether the impugned articles had been really amended, and if amended, whether such amendments were sufficient to meet the requirements so as to lift the measure imposing a blanket ban on access to the said website. Besides, there is no obstacle, *de jure* or *de facto*, before the applicants to ensure the lifting of the measure that they are complaining of by informing the relevant administrative authorities and inferior courts of the assertion specified in the first applicant's petition.

32. Moreover, it should be noted that the opportunity -developed also by the contribution of the first applicant- to get access to the website through several methods despite the blanket ban on access to the impugned articles, which thereby rendered the blocking order dysfunctional, was not among the issues needed to be taken into consideration by the Court during its examination.

33. For these reasons, we do not agree with the Court's majority finding a violation.

RIGHT TO PROPERTY
(ARTICLE 35)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

İOANİS MADİTİNOS

(Application no. 2015/9880)

8 May 2019

On 8 May 2019, 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 *İoanis Maditinos* (no. 2015/9880).

THE FACTS

[8-38] The applicant, who was a Turkish national, was deprived of Turkish citizenship by virtue of a Cabinet Decree for voluntarily acquiring citizenship of a foreign state without any permission. The applicant, a Greek who is still residing in Athens, became the only heir of an immovable located in İstanbul. However, the incumbent civil court assigned the whole inheritance to the State Treasury as the applicant was no longer a Turkish nation.

He then filed an application with the incumbent civil court to obtain a certificate of inheritance, and the civil court accepted his application. Thereafter, the Treasury filed an action against the applicant for the revocation of his certificate of inheritance, which was subsequently revoked by virtue of a court decision. On the other hand, the action brought by the applicant before the civil court for the revocation of the Treasury's certificate of inheritance was dismissed. He appealed the dismissal decision before the Court of Cassation; however, the decision was ultimately upheld.

V. EXAMINATION AND GROUNDS

39. The Constitutional Court ("the Court"), at its session of 8 May 2019, examined the application and decided as follows:

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

40. The applicant asserted that the disputed immovable property was registered to Frenike and Tanaş Maditinos in the land registry and that since the registered owner Tanaş Maditinos had died in 1996, he had a right to the inheritance as the heir of the said person. The applicant complained that, despite this fact, his claim for a certificate of inheritance was rejected and the Treasury was granted a certificate of inheritance

over the immovable property at issue. Referring to relevant judgments of the European Court of Human Rights ("the ECtHR") on the subject, the applicant alleged that there had been a violation of his right to property.

41. In its observations, the Ministry cited the rulings of the European Court of Human Rights in similar applications and relevant pieces from the case-law of the Court of Cassation, consequently affirming the Court's discretion on the matter.

B. The Court's Assessment

42. Article 35, titled "Right to property", of the Constitution, which will be taken as basis of the assessment on the allegation, 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."*

1. Admissibility

43. According to the Constitution and Provisional Article 1 § 8 of the Law on the Establishment and Rules of Procedures of the Constitutional Court (Law no. 6216, dated 30 March 2011), the Court's temporal jurisdiction runs from 23 September 2012, which means that it is authorised to examine only the individual applications lodged against the acts and decisions that became final after the said date. In view of this clear provision, it is not possible to extend the coverage of the temporal jurisdiction in a way that will also cover the actions and decisions that had become final before the aforementioned date. These rules on the temporal jurisdiction of the Court must be taken into consideration *ex officio* at every stage of the individual application procedure as they pertain to the maintenance of public order (see *Ahmet Melih Acar*, no. 2012/329, 12 February 2013, § 15; and *G.S.*, no. 2012/832, 12 February 2013, § 14).

44. The Court has further indicated that, as a rule, an interference with the right to property -in the form of deprivation of property- is a momentary act and does not constitute a continuing interference (see

Agavni Mari Hazaryan and Others, no. 2014/4715, 15 June 2016, § 114). On the other hand, the Court will make its assessment by taking note of whether, on the condition that it became final within the jurisdiction *ratione temporis*, the public authorities examined and issued a decision on the substantial aspect (merits) of the interference or whether there was any compensation or a similar remedy accorded in respect of the interference (see *Varvara Arnavut*, no. 2014/7538, 13 September 2017, § 48; and *Agavni Mari Hazaryan and Others*, §§ 111-120).

45. In the present case, the applicant's claim for a certificate of inheritance was granted on 9 June 1997 by a court but, following an action filed on 27 October 1997 by the Treasury, the relevant court revoked the certificate of inheritance on 28 December 2001. This judgment was upheld by the Court of Cassation and the subsequent request for rectification of the decision was dismissed, thereby becoming final on 14 November 2002. However, the applicant filed a new action on 12 April 2013 for revocation of the Treasury's certificate of inheritance. Having examined it on the merits, the trial court dismissed the case by relying on grounds of the inter-state reciprocity principle. Though the applicant appealed the dismissal, the Court of Cassation upheld it on 9 March 2016. Thus, in view of the nature of the relevant sets of proceedings and the decisions rendered as a result thereof, as well as the reasons given in the judgments of the inferior courts, the Court observes that the dispute process giving rise to the present application was finally concluded within the period of time covered by the Court's temporal jurisdiction.

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

2. Merits

a. Existence of Property

47. A person complaining that his/her right to property was violated must prove that such a right existed in the first place (see *Mustafa Ateşoğlu and Others*, no. 2013/1178, 5 November 2015, §§ 49-54). For this reason, it is primarily necessary to evaluate the legal status of the applicant on the

point of whether or not he has an interest in relation to property which requires protection under Article 35 of the Constitution (see *Cemile Ünlü*, no. 2013/382, 16 April 2013, § 26; and *İhsan Vurucuoğlu*, no. 2013/539, 16 May 2013, § 31). 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 judgment no. E.2015/39, K.2015/62, 1 July 2015, § 20).

48. It is clear in the present case that the immovable property at issue represented an asset value which fell under the scope of the right to property. Frenike and Tanaş Maditinos each held a share of 1/12 over this immovable property according to the land registry. Frenike Maditinos died on 31 July 1978 and Tanaş Maditinos died on 21 October 1996. The Beyoğlu 1st Magistrates' Court in Civil Matters decided on 17 March 1998 that Frenike Maditinos's inheritance was passed on to the Treasury. The same court dismissed the applicant's objection on 14 June 2000. The Beyoğlu 4th Magistrates' Court in Civil Matters conditionally granted the applicant's inheritance claim over the immovable properties; however, this certificate of inheritance was revoked on 28 December 2001 following the Treasury's request. Prior to lodging an individual application, the applicant filed an action with the İstanbul 8th Civil Court of General Jurisdiction, requesting the revocation of the certificate of inheritance granted to the Treasury by this judgment dated 28 December 2001. After the dismissal of his case became final, the applicant complained of an alleged violation of his right to property.

49. Therefore, this individual application concerns the issuance of a certificate of inheritance to the Treasury through revocation of the certificate of inheritance which was previously granted to the applicant in respect of the 1/12 share registered to Tanaş Maditinos due to the latter's death. Since the application pertains to the succession of the testator's inheritance, there is no dispute as to the fact that it has to be examined from the standpoint of the right to property.

50. It cannot be said in the present case that the inheritance would pass directly onto the applicant upon the testator's death pursuant to Article 705 of the Turkish Civil Code (Law no. 4721, dated 22 November 2001).

In fact, according to Article 35 of Law no. 2644, which was in force at the time of the testator's death, the reciprocity requirement also needed to be satisfied. However, it should be borne in mind that the applicant had been granted a certificate of inheritance regarding the aforementioned registered owner's inheritance until it was revoked in respect of the immovable properties.

51. On the other hand, a deliberation should be held on the question of whether the applicant had a legitimate expectation to acquire ownership of the immovable property in question. Being the son of the brother of one of the shareholders of the immovable property (Tanaş Maditinos) who died in 1996, the applicant clearly has an ancestral link that enables him to be recognised as an heir according to the provisions of inheritance law. Nonetheless, the inferior courts revoked the applicant's certificate of inheritance due to the absence of reciprocity between the two countries and issued a certificate of inheritance to the Treasury. In other words, it is understood that the applicant could be recognised as the sole heir of the testator if there was a reciprocal relationship between the countries. Therefore, setting aside the deliberation on the existence of reciprocity to be held under the head of the justifiability of the interference, in the presence of a clear relationship of ancestral link between the testator and the applicant, which calls for his recognition as an heir, the Court must acknowledge that the applicant had a legitimate expectation to acquire ownership rights over the disputed immovable property. Besides, having regard to the fact that the applicant had been granted a certificate of inheritance which had been valid until its revocation, the Court has concluded that the applicant had an interest worthy of protection under the right to property within the meaning of Article 35 of the Constitution.

b. Existence of an Interference and its Type

52. The right to property safeguarded as a fundamental right under Article 35 of the Constitution is such a right that enables an individual to use the thing he/she owns, benefit from its fruits, and dispose of that thing provided that he/she does not prejudice the rights of others and respects the restrictions imposed by law (see *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 32). Therefore, restricting any

of the owner's powers to use his/her property, benefit from its fruits, and dispose of the property constitutes an interference with the right to property (see *Recep Tarhan and Afife Tarhan*, no. 2014/1546, 2 February 2017, § 53).

53. 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).

54. In the case giving rise to the present application, the fact that the Treasury was declared as the heir of testator Tanaş Maditinos through revocation of the certificate of inheritance granted to the applicant in respect of the disputed inheritance has resulted in the registration of the inherited immovable property in the name of the Treasury. Therefore, it is beyond doubt that there has been an interference with the applicant's right to property. In view of its nature and purpose, the Court has found it appropriate to examine the interference within the framework of the general rule concerning *peaceful enjoyment of possessions*.

c. Whether the Interference Amounted to a Violation

55. 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."*

56. Article 35 of the Constitution does not envisage the right to property as an unlimited right; accordingly, this right may be limited by law and in the interest of the public. In interfering with the right to property, Article 13 of the Constitution must also be taken into consideration as it governs the general principles concerning the restriction of fundamental rights and freedoms. In order for the interference with the right to property to be in compliance with the Constitution, the interference must have a legal basis, pursue the aim of public interest, and be carried out in accordance with the principle of proportionality (see *Recep Tarhan and Afife Tarhan*, § 62).

i. General Principles

57. Article 35 § 2 of the Constitution stipulates that any interference with the right to property must be prescribed by law as it provides that the right to property may be limited by law and in the interest of the public. Similarly, governing the general principles surrounding the restriction of fundamental rights and freedoms, Article 13 of the Constitution adopts the basic principle that *rights and freedoms may only be restricted by law*. Accordingly, the primary criterion to be taken into account in interferences with the right to property is whether the interference is based on the law. Where it is established that this criterion was not met, the Court will arrive at the conclusion that there has been a breach of the right to property, without holding any examination under the remaining criteria (see *Ford Motor Company*, no. 2014/13518, 26 October 2017, § 49).

58. The regulation by law of rights and freedoms, as well as the interferences and restrictions to be imposed thereon, is one of the most important elements of a democratic state governed by rule of law that prevent arbitrary interference with these rights and freedoms and ensure legal security (*Tahsin Erdoğan*, no. 2012/1246, 6 February 2014, § 60).

Equally important as the existence of the law is the necessity that the text and application of the law has legal certainty to a degree that individuals may foresee the consequences of their actions. In other words, the quality of the law plays an important role in the determination of whether the requirement of legality has been satisfied (see *Necmiye Çiftçi and Others*, no. 2013/1301, 30 December 2014, § 55). For an interference to be prescribed by law, there must be sufficiently accessible and foreseeable rules regarding the interference (see *Türkiye İş Bankası A.Ş.* [Plenary], no. 2014/6192, 12 November 2014, § 44).

59. The principles of legal security and certainty are prerequisites for a state governed by rule of law. Aimed at ensuring the legal safety of persons, the principle of legal security requires that legal norms are foreseeable, that individuals can trust the state in all of their acts and actions, and that the state avoids using any methods which would undermine this trust in their legislative acts (see the judgments nos. E.2013/39, K.2013/65, 22 May 2013; E.2014/183, K.2015/122, 30 December 2015, § 5). The certainty principle means that legislative acts must be sufficiently clear, non-ambiguous, understandable and applicable not to allow any hesitation or doubt on the part of both the administration and individuals and they must include safeguards against arbitrary practices of public authorities (see the Court's judgments nos. E.2013/39, K.2013/65, 22 May 2013; and E.2010/80, K.2011/178, 29 December 2011).

ii. Application of Principles to the Present Case

60. Although Greek citizens' transfer rights over their immovable properties within Turkey were initially suspended in accordance with the principle of reciprocity via the Decree dated 2 November 1964, issued on the basis of the Law no. 1062, this Decree was abolished on 3 February 1988 by the Council of Ministers. As indicated in the rulings of the Court of Cassation, this Decree was issued as a reciprocal act in response to all the measures and treatments adopted by the Government of Greece. It pursued the aim of simply suspending temporarily the transfer rights of persons of Greek nationality over their immovable properties located within Turkey rather than confiscating them. Accordingly, it is clear that the said Decree, which imposed a temporary restriction on Greek citizens'

transfer rights in respect of immovable properties within Turkey, was not in force when the testator in the present case died on 21 October 1996. Besides, the Plenary Session of the Court of Cassation in Civil Matters acknowledged that it was not the aim of the said Decree to substantially nullify all legal transactions other than transfer rights and that even the court judgment delivered on the basis of this Decree was of an interim nature; thus, it was not a definitive ruling which either established the existence/absence of a right or granted/removed a right.

61. Nonetheless, the inferior courts in the instant case decided that the applicant could not be the heir of the testator in respect of the latter's immovable property on account of the absence of reciprocity with Greece. In reaching this conclusion, the inferior courts relied on the letters of the Directorate General [for International Law and Foreign Relations of the Ministry of Justice] concerning the issue of reciprocity between the two countries. However, upon examination of these letters, the Court clearly observes that, at the time of the testator's death or during the proceedings, there was no finding to indicate that Turkish citizens were not able to acquire property by inheritance in Greece, even in the regions where various restrictions applied. Although these letters mention the introduction of a requirement for obtaining authorisation to perform legal transactions such as purchase and sale of property in certain regions of Greece, which make up 55% of its territory, there is no concrete information indicating that such an authorisation procedure also applies to acquisition of property by inheritance. In fact, in the cases of *Nacaryan and Deryan v. Turkey* and *Apostolidi and Others v. Turkey*, the European Court of Human Rights pointed at the lack of such information in the letters of the Ministry [of Justice] and the Ministry of Foreign Affairs. It held, on the contrary, that there were documents indicating that Turkish citizens in Greece had been able to acquire by inheritance the immovable properties located within the regions which were subject to the restriction imposed via Law of 1990.

62. It must also be emphasised that the principle of reciprocity has become no longer a requirement for acquisition of property by inheritance thanks to the legislative amendments of 29 December 2005 and 3 May 2012 to Article 35 of Law no. 2644. Accordingly, in cases where it is

discovered that the immovable properties and limited real rights have not been acquired in compliance with the conditions set out in the first paragraph of this article, the owner shall be given up to one year's time to liquidate the property. If the owner fails to do so by the end of that time, the Ministry of Treasury and Finance shall liquidate the property and pay the sales price to the rightholder.

63. As a result, the Court observes that the inferior courts failed to show the legal basis, with a reasonable and sufficient justification, for the revocation of the applicant's certificate of inheritance in the absence of any explicit finding, as a requirement of the principle of reciprocity, that Turkish citizens were not allowed to acquire properties by inheritance in Greece within the framework of the provisions of law which were in force at the material time. Therefore, in view of the fact that Article 35 of Law no. 2644 was not applied in a sufficiently foreseeable manner in the present case, the Court concludes that the interference with the applicant's right to property in the form of non-recognition of his capacity as an heir was devoid of any foreseeable legal basis. In the light of this conclusion, the Court finds no need to further examine whether the interference pursued a legitimate aim or if was proportionate.

64. For these reasons, it must be held that there has been a violation of the right to property protected under Article 35 of the Constitution.

3. Application of Article 50 of Code no. 6216

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

> *"(1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the resolution of the violation and the consequences thereof shall be ruled...*
>
> *(2) If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. In cases where*

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

66. If the Court finds a violation of a fundamental right or freedom within the scope of an individual application, the main requirement which needs to be satisfied to 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, 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* [Plenary], no. 2014/8875, 7 June 2018, § 55).

67. Before ruling on what needs to be done to remove the violation and its consequences, the source of the violation must first be ascertained. In this respect, a violation may stem from administrative acts and actions, judicial acts, or legislative acts. Determining the source of the violation plays a significant role in the determination of the appropriate way of redress (see *Mehmet Doğan*, § 57).

68. In cases where the violation originates from a court ruling, the Court decides, as a rule, 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 (see *Mehmet Doğan*, § 58).

69. Accordingly, the discretion to decide whether it is necessary to conduct a retrial in case of a finding of a violation by the Court is vested not in the inferior courts but in the Court itself. In turn, the inferior courts are under an obligation to take the steps necessary in order to redress the consequences of the violation in accordance with the direction set by the Court in its judgment (see *Mehmet Doğan*, § 59).

70. The applicant requested the violation to be ceased and claimed pecuniary compensation.

71. The Court has found a violation of the right to property due to the judicial authorities' denial of recognising the applicant's right to inheritance in respect of the disputed immovable property. It has thus been understood that the violation in the present case stemmed from a court ruling.

72. In such cases, there is legal interest in holding a retrial in order to redress the consequences of the violation of the right to property. A retrial to be conducted in this scope aims to redress the violation and its consequences according to Article 50 § 2 of Code no. 6216. In this regard, what is to be done by the inferior courts consists of annulling in the first place the court ruling giving rise to the violation and finally rendering a new ruling in accordance with the violation judgment. For this reason, a copy of the judgment must be remitted to the İstanbul 8th Magistrates' Court in Civil Matters for retrial.

73. The only document submitted by the applicant in support of his claim for pecuniary compensation for the damages incurred over the period of time he was deprived of the property is a report drafted by a real estate firm, which shows approximately the current amount of rent on the immovable property, without relying on any reasoning or scientific data. Thus, the applicant failed to produce any documents or reports demonstrating the concrete and real damage, which would be sufficient for an award of pecuniary compensation under this head. As regards the claim for payment of the property's sales price as pecuniary compensation, this claim must also be rejected as the ruling in favour of a retrial offers sufficient redress in this regard.

74. The total court of expense of TRY 2,701.90 including the court fee of TRY 226.90 and counsel fee of TRY 2,475, which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court unanimously held on 8 May 2019 that

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

B. The right to property safeguarded by Article 35 of the Constitution was VIOLATED;

C. A copy of the judgment be REMITTED to the İstanbul 8th Civil Court of General Jurisdiction (no. E.2013/297, K.2014/488) for a retrial to redress the consequences of the violation of the right to property;

D. The applicant's claims for compensation be REJECTED;

E. The total court expense of TRY 2,701.90 including the court fee of TRY 226.90 and counsel fee of TRY 2,475 be REIMBURSED TO THE APPLICANT;

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

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

EROL KESGİN

(Application no. 2015/11192)

30 May 2019

On 30 May 2019, the Plenary of the Constitutional Court found no violation of the right to property safeguarded by Article 35 of the Constitution in the individual application lodged by *Erol Kesgin* (no. 2015/11192).

THE FACTS

[8-36] The applicant received the payment order issued by the Provincial Directorate of the Social Security Institution for the social security contributions of the company where he was a shareholder and a Board member as well as for the incurred default interest. The applicant filed an action with the labour court for annulment of the payment order. Having an expert report obtained on the issue, the labour court dismissed the action relying on the expert report as a ground. On the applicant's appeal, the first instance decision was upheld by the Court of Cassation.

V. EXAMINATION AND GROUNDS

37. The Constitutional Court ("the Court"), at its session of 30 May 2019, examined the application and decided as follows:

A. The Applicant's Allegations

38. Indicating that the Executive Board had decided on 24 September 2009 to exclusively authorise E.S., the Chair of the Executive Board, to represent and bind the Company on all matters for a term of three years, the applicant asserted that he did not have any representative authority and that he could not be held liable for the insurance premium and default interest debts concerned by the payment order. The applicant stressed that, according to the established case-law of the Supreme Administrative Court and the Court of Cassation, simply having the capacity of a member of the Executive Board is not sufficient to have several liability for the [Social Security] Institution's receivables; in fact, the person concerned had to be either a senior executive or legal representative (agent) with the authority to represent and bind during the time period in which the premium debt accrued and became due in order to have such liability. The applicant also expressed that his allegations and objections were not

sufficiently assessed by the inferior courts in their rulings. Stating that an attachment was imposed on his house, pension and vehicle and that deductions were made from his pension due to the premium debt, the applicant complained of an alleged violation of his rights to property and a fair trial enshrined in Articles 35 and 36 of the Constitution, respectively.

B. The Court's Assessment

39. Article 35 of the Constitution provides as follows:

> *"Everyone has the right to own and inherit property.*
>
> *These rights may be limited by law only in view of public interest.*
>
> *The exercise of the right to property shall not contravene public interest."*

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 addition to an alleged violation of his right to property, the applicant also complained that he had not had a fair and equitable hearing within the scope of the right to a fair trial. However, considering that the applicant's complaint concerning the fact that he had to pay the social security premium debt despite his alleged lack of liability therefor pertains to the right to property, the Court is of the opinion that these allegations must also be examined from the standpoint of the right to property.

1. Admissibility

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

2. Merits

a. Existence of Property

42. In the present case, a payment order was issued with a view to collecting from the applicant, in his capacity as a member of the executive board, the 8,841 Turkish liras (TRY) of social security premium and

default interest debt for the period between December 2009 and August 2010. Accordingly, there is no doubt as to the fact that the amount of money which the he had to pay constituted property/possession from the applicant's standpoint within the meaning of Article 35 of the Constitution (see, in the same vein, *Ahmet Uğur Balkaner* [Plenary], no. 2014/15237, 25 July 2017, § 46).

b. Existence of an Interference and its Type

43. There is no doubt that there has been an interference with the right to property due to the fact that the applicant was held liable for the social security and default interest debt of the debtor Company. In previous cases, the Court has established that, on account of the purposes they carry, any interference aimed at determining, amending and securing the payment of taxes and similar liabilities as well as social security premiums and contributions must be examined within the scope of the State's authority to control or regulate the use of property for the sake of public interest (see *Arif Sarıgül*, no. 2013/8324, 23 February 2016, § 50; and *Narsan Plastik San. ve Tic. Ltd. Şti.*, no. 2013/6842, 20 April 2016, § 71). In the present case, as well, the interference in the form of holding the applicant liable for the Company's unpaid social security premiums and default interest on account of his capacity as a member of the executive board must be examined within the framework of the third rule which concerns the control or regulation of the use of the property.

c. Whether the Interference Amounted to a Violation

44. 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."*

45. 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*, no. 2014/1546, 2 February 2017, § 62).

i. Whether the Interference was Prescribed by Law

46. The first criterion required to be examined in case of an interference with the right to property is whether the interference had a legal basis. Where it is established that this criterion was not met, the Court will arrive at the conclusion that there has been a breach of the right to property, without holding any examination under the remaining criteria. For an interference to be prescribed by law, there must be sufficiently accessible, certain and foreseeable rules regarding the interference (see *Türkiye İş Bankası A.Ş.* [Plenary], no. 2014/6192, 12 November 2014, § 44; *Ford Motor Company*, no. 2014/13518, 26 October2017, § 49; and *Necmiye Çiftçi and Others*, no. 2013/1301, 30 December 2014, § 55).

47. The inferior courts cited Article 88 of Law no. 5510, which had repealed Law no. 506 that was in force at the material time, as the legal basis of the social security premium and default interest debts. This article stipulates that, if the [Social Security] Institution's insurance premiums and other receivables are not paid within the indicated time-limits without a valid reason, the senior executives and officials of the company concerned, including members of the executive board, as well as the representatives of the institutions concerned shall be jointly and severally liable. Furthermore, Article 35-*bis* of the Law no. 6183 provides that the public receivables which cannot be collected, or are understood to be impossible to collect, from legal entities shall be collected from the personal assets of their legal representatives.

48. The Court of Cassation has held that, since Article 88 of Law no. 5510 governing the liability for insurance debts is a more specific provision than the provisions of Law no. 6183, the personal liability of a company's representatives could directly be pursued in respect of

such debts without seeking fulfilment of the prior condition of inability to collect from the company. Therefore, in view of the fact that the said provision of law is accessible, certain and foreseeable, the Court concludes that the interference had a legal basis.

ii. Whether the Interference Pursued a Legitimate Aim

49. According to Articles 13 and 35 of the Constitution, the right to property may only be restricted in the interest of the public. The notion of public interest serves as both a restrictive instrument, which allows for imposition of restrictions on the right to property where the public interest requires it, and an effective protection mechanism, which sets out limits to restrictions by preventing the imposition of any restrictions on the right to property outside public interest aims. The concept of public interest is the one that brings with it the margin of appreciation of the State bodies and it should be evaluated separately on the basis of each particular case as it does not fit a singular objective definition (see *Nusrat Külah*, no. 2013/6151, 21 April 2016, §§ 53, 56; and *Yunis Ağlar*, no. 2013/1239, 20 March 2014, §§ 28, 29).

50. The legislature enjoys a wide margin of appreciation in taking necessary measures in order to ensure payment of taxes and social security premiums and in selecting the required and appropriate means in this regard. In the present case, a payment order was issued in order to collect the Company's debt to a public body from the applicant, as he was a member of its Executive Board. It may be said that the aim pursued by this interference was to improve the chances of successfully collecting public receivables. It is beyond dispute that there is public interest in securing the payment and improving the chances of collecting public receivables (see, in the same vein, the Court's judgments no. E.2014/177, K.2015/49, 14 May 2015; no. E.2012/87, K.2014/41, 27 February 2014; no. E.2014/144, K.2015/29, 19 March 2015; no. E.2011/42, K.2013/60, 9 May 2013; and no. E.1992/29, K.1993/23, 24 June 1993). Thus, the Court concludes that there is a public interest-oriented legitimate aim in pursing the applicant's personal liability, in his capacity as one of the Company's shareholders and executives, with a view to collecting public receivables.

iii.Proportionality

(1) General Principles

51. Lastly, the Court should examine whether there was a reasonable balance of proportionality between the objective sought by the interference with the applicant's right to property and the means used for achieving this objective.

52. The principle of proportionality (*ölçülülük*) comprises of three subprinciples, which are "appropriateness" (*elverişlilik*), "necessity" (*gereklilik*) and "proportionality" (*orantılılık*). "Appropriateness" means that the prescribed interference is capable of achieving the objective aspired for; "necessity" shall mean that the interference is absolutely necessary for that objective, that is when achieving such objective with a lighter intervention is not possible; and "proportionality" shall refer to the need for striking a reasonable balance between the interference with the individual's right and the objective sought (see the Court's judgments no. E.2011/111, K.2012/56, 11 April 2012; no. E.2014/176, K.2015/53, 27 May 2015; and no. E.2016/13, K.2016/127, 22 June 2016, § 18; and *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 38).

53. In order for an interference with the right to property to be proportionate pursuant to Articles 13 and 35 of the Constitution, it must above all be capable of achieving the public interest aim pursued by this measure. Moreover, in the performance of the interference, the instrument that is best suited to achieve the relevant public interest aim must be chosen. In this respect, it is primarily for the relevant public authorities to decide which instruments to use since they are in a better position to make the appropriate decision. For this reason, the administrations enjoy discretionary powers to a certain extent with respect to the instruments to be preferred. Nonetheless, this discretion enjoyed by the administrations in regard to the necessity of the instrument chosen is not an unlimited power. Where the instrument chosen has aggravated the interference distinctly in comparison with the aim it sought to achieve, the Court may conclude that the interference was not exigent or necessary. However, the Court's supervisory role in this context is not directed towards the degree of appropriateness of the instrument chosen but the gravity of

its interference with rights and freedoms (see, *mutatis mutandis*, *Hamdi Akın İpek*, no. 2015/17763, 24 May 2018, § 108; and *Hanife Ensaroğlu*, no. 2014/14195, 20 September 2017, § 67).

54. Pursuant to the principle of proportionality, a fair balance must be struck between the public interest sought in restricting the right to property and the individual's rights. This fair balance will have been upset where it is found out that the applicant has personally borne an excessive burden. In the assessment of proportionality of the interference, the Court will take account of the burden imposed on the applicant from two perspectives: on the one hand, it will examine the importance of the legitimate aim sought to be achieved; and, on the other, it will have regard to the nature of the interference along with the behaviour of the applicant and the public authorities (see *Arif Güven*, no. 2014/13966, 15 February 2017, §§ 58, 60; and *Osman Ukav*, no. 2014/12501, 6 July 2017, § 71).

55. In order to secure public receivables and improve the chances of collection, the legislature may either choose to distribute liability or prescribe several liability (see the Court's judgment no. E.2014/144, K.2015/29, 19 March 2015).

56. The legal acts and transactions of the commercial companies, which do not have a material presence and are recognised as legal entities by virtue of the legal order, are carried out on their behalf by natural persons responsible for their management. These natural persons have the opportunity and power to carry out the legal acts and transactions of the legal entity they represent, to manage its personnel and assets, to determine the direction of its investments and activities and to take the measures required by its economic and financial situation. Therefore, it can be possible to hold those persons, who manage commercial companies and carry out acts and transactions on behalf of the company, severally liable to pay social security receivables, of which the immediate payment is deemed to be overwhelmingly in the interest of the public and imperative for the continuation of the social security system. In view of these powers and duties assigned thereto, it is understood that holding such persons severally liable for the unpaid public receivables does not, as a rule, place an excessive and extraordinary burden on them (see, with regard to tax debts, *Ahmet Uğur Balkaner*, § 58).

57. On the other hand, no liability beyond the powers and opportunities entrusted to the company executives should be imposed on them. Holding an executive liable for the payment of public receivables arising from certain acts and transactions carried out during a period when he had no chance to intervene in or prevent them or especially have control over the company's activities may result in a disproportionate burden placed on that executive in the circumstances of the case at hand (see, in the same vein, *Ahmet Uğur Balkaner*, § 59).

58. Note must be taken in this connection of the fact that, pursuant to Article 375 § 1 (e) of Law no. 6102, the executive board is responsible for the supervision of the company's executive managers. Indeed, one of the executive board's duties is to give the necessary instructions to executive managers. Accordingly, it is within the unalienable duties and powers of the executive board to supervise whether the persons in charge of the management comply with, in particular, laws, articles of incorporation, internal directives, and the written instructions of the executive board (see the Court's judgment no. E.2016/191, K.2017/131, 26 July 2017). Thus, the law explicitly prescribes that the executive board has the overall supervisory authority in cases where the executive management power is assigned/transferred to others.

(2) Application of Principles to the Present Case

59. The applicant became a shareholder of the Company by buying one share on 21 August 2009 and he was elected to Executive Board membership. Accordingly, it is beyond doubt that the Company owed an insurance premium debt and that the applicant was a Company executive at the time when this debt emerged and became due. Nevertheless, the applicant indicated that he was not the Company's legal representative and he thus had no fault with regard to the payment of this debt as it was the legal representative who should be liable for the debt.

60. Both Article 80 of the now-repealed Law no. 506 and Article 88 of Law no. 5510 (coming into effect as of 1 July 2008) aim at ensuring the timely and regular collection of premiums. The Turkish social security system relies predominantly on a premium-based regime. In turn, the provision of social insurance benefits by the Social Security Institution depends on

the timely and full payment of insurance premiums, which make up its most important source of income (see the decision of the Plenary Session of the Court of Cassation in Criminal Matters no. E.2014/21-2323, K.2017/152, 25 January 2017). In this context, it is clear that holding all members of the executive board, even if they were not authorised to represent and bind, jointly and severally liable for the premium debts which had not been duly paid in time was, in its manner of practice in the present case, *capable* of and *exigent* for achieving the aim of securing the full and timely collection of premium payments. Thus, the objective is to secure the collection of premiums and encourage the fulfilment of the duty of paying premiums in laying down the rule to the effect that the senior executives or officials, including executive board members, and the legal representatives of the private legal entities described in Article 88 of Law no. 5510 shall be held jointly and severally liable, as well as their employer, for the employer's premium debts to the institution (see the decision of the Plenary Session of the Court of Cassation in Criminal Matters no. E.2014/21-2323, K.2017/152, 25 January 2017).

61. Having undoubtedly established the *capability* and *exigence* of the collection of public receivables directly from the applicant with regard to the achievement of the public interest aim pursued thereby, the Court must ascertain whether the interference was *proportionate*.

62. Accordingly, the Court must examine in the first place whether the applicant was afforded an opportunity to effectively put forward his allegations and defence submissions against the payment order he had been issued in his capacity as an Executive Board member for the social security premium and default interest debts. The applicant challenged the Social Security Institution's enforcement order by filing an action before the Bolu Labour Court, where he denied any liability for the said social security premium debts. When his case was dismissed, he submitted a request for appeal. The applicant also requested an interim measure to stay the execution of the debt enforcement procedure until completion of this set of proceedings because the continuation of the procedure would cause irreparable harm. The Court observes that the applicant has had the opportunity of presenting all of his allegations and defence submissions in an effective manner over the course of the proceedings.

63. Nonetheless, even though the applicant indicated that, according to the established case-laws of the Supreme Administrative Court and the Court of Cassation, simply having the capacity of a member of the Executive Board is not sufficient to have several liability for the institution's receivables and that the person concerned had to be either a senior executive or legal representative (agent) with the authority to represent and bind during the time period in which the premium debt accrued and became due to carry such liability, the Court notes that this case-law concerns the premium debts that pertained to the period preceding the entry into force of Law no. 5510.

64. In the present case, being a member of the Executive Board, the applicant had the chance to intervene in and prevent default, within the framework of the powers prescribed by law, in order to ensure the payment of the premium debts emerging at the time of his membership.

65. Moreover, since the applicant paid the enforced debt due to the enforcement proceedings pursued against him as a member of the Executive Board of the Company who was jointly and severally liable along with the employer for the premium payments, he can have recourse against the other shareholders of the Company in proportion to their shares within its internal operations by means of substituting himself for the administration by virtue of the principle of universal succession. The applicant can also have recourse against the legal entity of the Company for the portion of the payment he made corresponding to his share. Indeed, the applicant stated in his petition for action that, in addition to equipment pools and a factory, the Company owned immovable properties valued at TRY 35,000 according to the land registry records.

66. In sum, the Court has arrived at the conclusion that the applicant was not personally subjected to an excessive and extraordinary burden due to the fact that the applicant was held liable in his capacity as a member of the Executive Board for the public receivable arising as a result of non-payment of the Company's social security premium debts and the default interest accrued thereon at a period of time when the Company had a legal representative. Therefore, the interference carried out in this way has not upset to the detriment of the applicant the fair balance which

must be struck between the public interest sought by the interference and the owner's right to property.

67. For these reasons, it must be held that there has been no violation of the right to property protected under Article 35 of the Constitution.

Mr. Zühtü ARSLAN, Mr. Engin YILDIRIM and Mr. Celal Mümtaz AKINCI expressed dissenting opinions in this respect.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 30 May 2019:

A. UNANIMOUSLY that the alleged violation of the right to property be DECLARED ADMISSIBLE;

B. By MAJORITY and by dissenting opinions of Mr. Zühtü ARSLAN, Mr. Engin YILDIRIM and Mr. Celal Mümtaz AKINCI, that the right to property safeguarded by Article 35 of the Constitution was NOT VIOLATED;

C. That the court expenses be COVERED by the applicant; and

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

DISSENTING OPINION OF PRESIDENT ZÜHTÜ ARSLAN

1. The applicant complained of the alleged violation of his right to property due to the fact that he was held liable for the debts owed by the company, of which he was an executive board member, to a public body despite his lack of authority to represent that company. The majority of our Court decided that the applicant's right to property was not violated.

2. In 2009 the applicant purchased one of the 100 shares, each valued at TRY 500, of the company and shortly afterwards he was elected to be a member of the executive board by the General Assembly of the Company. The Social Security Institution issued to the applicant a payment order for a debt in the amount of TRY 8,841 concerning the said Company's social security premium and default interest debts pertaining to a period of time when the applicant was a member of the executive board. The action filed by the applicant for annulment of the payment order was dismissed.

3. It should be noted at the outset that the amount of money which the applicant had to pay in accordance with the payment order, which caused a reduction in his personal wealth, constituted property/possession within the meaning of Article 35 of the Constitution; therefore, it is beyond doubt that the payment order in question interfered with the applicant's right to property (see *Ahmet Uğur Balkaner* [Plenary], no. 2014/15237, 25 July 2017, §§ 46-47). According to Article 13 of the Constitution, this interference would violate the right to property unless it had a legal basis, pursued a legitimate aim and was proportionate. Though the interference clearly had a legal basis and pursued a legitimate aim in the interest of the public, it cannot be considered to be proportionate.

4. The Court has explained it its previous rulings that the principle of proportionality consists of three sub-principles: appropriateness, necessity and proportionality. Appropriateness means that the envisaged interference must be capable of achieving the intended purpose; necessity describes that an interference must be absolutely necessary in order to achieve the intended purpose, in other words, that it is not possible to achieve the intended purpose by a lighter interference; and proportionality requires that a reasonable balance that must be struck between the rights of the individual and the intended purpose (see the Court's judgment no.

E.2018/142, K.2019/38, 15 May 2019, § 33; and *Yaşar Çoban* [Plenary], no. 2014/6673, 25 July 2017, § 64).

5. There is no doubt that the legislature enjoys a wide margin of appreciation in choosing the instruments which are necessary and appropriate for collection of the tax and premium receivables. In this scope, a provision oriented at ensuring collection of public receivables from the persons concerned through joint and several liability cannot be said to be *incapable* of achieving the public interest sought as a legitimate aim.

6. Still, the exigence and proportionality of the interference carried out in the present case need to be examined. Exigence principle prohibits resorting to a more restrictive interference which places a burden on individuals if it is possible to achieve the same purpose via a lighter interference. As a rule, the Company debt needs to be collected out of the assets of its legal entity. Certainly, in cases such as when this situation is abused or when it is impossible to collect the public receivable from the company's legal entity, it may become necessary to lift the corporate veil. In such cases, a decision may be made to collect the debt, which cannot be collected from the corporate legal entity, from the company's legal representative or shareholders in proportion to their shares.

7. In fact, the main road to be taken in the collection regime of public receivables is to primarily collect the debt from the company's legal entity. According to Article 35-*bis* of the Law no. 6183 on Procedures for Recovery of Public Receivables, the public receivables which cannot be collected, or are understood to be impossible to collect, out of the corporate assets of legal entities shall be collected as per this Law from the personal assets of their legal representatives. Indeed, the Court has held in the past that the executives and legal representatives of companies could be held severally liable for the debts owed by companies to public bodies; however, this method could only be resorted to when there is no longer a chance to collect the debt from the legal entity of the company (see *Ahmet Uğur Balkaner*, § 58; and *Arslan Gedik*, no. 2014/17217, 14 September 2017, § 44).

8. On the other hand, Article 88 of the Law no. 5510 on Social Security and General Health Insurance, which was cited as the legal basis of the

impugned interference, provides that the senior executives or officials, including executive board members, and the legal representatives of the private legal entities shall be held jointly and severally liable, as well as their employer, for insurance premiums and other receivables. It is understood that the legislature aimed to distribute the several liability with this provision. However, it is also clear that this provision may be interpreted in conjunction with Article 35-*bis* of Law no. 6183, in line with the guarantees set out by Articles 13 and 35 of the Constitution. In this context, it can be said that the provision in Article 88 of Law no. 5510 does not extinguish the *subsidiarity* of the liability stipulated by Article 35-*bis* of Law no. 6183, which regulates the collection of public receivables in general and also relies on a basis of several liability.

9. It is observed in the present case that a payment order was directly issued to the applicant, a member of the company's executive board, without having initially attempted to collect the company's debt out of its corporate assets. Whereas, in the petition for action he submitted with the Bolu Labour Court, the applicant contended that the Company actually owned TRY 35,000's worth of registered immovable properties, equipment pools and a factory and, thus, the debt could have been collected out of the Company's assets. Nonetheless, no weight was given to this point over the course of the proceedings. Therefore, the decision to initiate collection of the said premium debt and default interest directly from the applicant simply because of his position as a member of the executive board without having established the existence of any obstructions to collecting the debt from the legal entity of the Company cannot be considered to be *necessary*. In other words, it is incompatible with the *necessity* principle for the public authorities to try to achieve public interest with a heavier and more restrictive interference while it would be actually possible to attempt to collect the receivable out of the Company's corporate assets, which would be a lighter interference.

10. What is more, the Company, of which the applicant was a shareholder, is a joint stock company whose liability is limited by law. Holding the applicant liable to pay the social security premium debt in the amount of TRY 8,841 owed by the Company, despite the fact that the applicant held only one share valued at TRY 500 and did not have the capacity of

legal representative, constitutes a disproportionate interference with the right to property. The proportionality principle requires a fair balance to be struck between the public interest pursued by the public authorities in collecting public receivables and the individual's right to property. In the instant case, there is no finding to suggest that the relevant authorities had not been able to collect, or had understood that it would have been impossible to collect, out of the Company's assets the disputed debt which was directly collected from the applicant.

11. For the reasons set out above, I disagree with the majority's view of finding no violation as I am of the opinion that there was a disproportionate interference with the right to property due to the fact that the public receivable had directly been collected from the applicant without having attempted to collect it out of the Company's assets first.

DISSENTING OPINION OF VICE-PRESIDENT ENGİN YILDIRIM AND JUSTICE CELAL MÜMTAZ AKINCI

1. The applicant complains that his right to property has been violated due to the fact that he was held liable for the debts owed to the public bodies by a company, of which he was an executive board member but did not have the capacity of legal representative.

2. It is clear that the liability imposed on the applicant for the debtor Company's social security premium and default interest debts by considering him as its legal representative constitutes an interference with the right to property. In interfering with the right to property, which is not an unlimited right, 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.

3. In the present case, there is a legal basis for the interference with the right to property. Also, there is a legitimate aim in the interest of the public pursued by the interference in seeking the applicant's liability with a view to ensure collection of the public receivable on account of his position as one of the company's shareholders and executives.

4. An assessment should be held as to whether there was a reasonable balance of proportionality between the objective sought by the interference with the applicant's right to property and the means used for achieving this objective.

5. The principle of proportionality consists of three sub-principles: appropriateness, necessity and proportionality. "Appropriateness" means that the prescribed interference is capable of achieving the objective aspired for; "necessity" shall mean that the interference is absolutely necessary for that objective, that is when achieving such objective with a lighter intervention is not possible; and "proportionality" shall refer to the need for striking a reasonable balance between the interference with the individual's right and the objective sought (see the Court's judgments no. E.2011/111, K.2012/56, 11 April 2012; no. E.2014/176, K.2015/53, 27 May 2015; and no. E.2016/13, K.2016/127, 22 June 2016, § 18; and *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 38).

6. In order for an interference with the right to property to be proportionate pursuant to Articles 13 and 35 of the Constitution, it must above all be capable of achieving the public interest aim pursued by this measure. Moreover, in the performance of the interference, the instrument that is best suited to achieve the relevant public interest aim must be chosen. In this connection, though the public authorities enjoy a margin of appreciation in the choice of instruments to that end, an assessment needs to be made as to whether or not the chosen instrument serves to achieve the aim pursued.

7. Pursuant to the principle of proportionality, a fair balance must be struck between the public interest sought in restricting the right to property and the individual's rights. In the assessment of proportionality of the interference, the Court will take account of the burden imposed on the applicant from two perspectives: on the one hand, it will examine the importance of the legitimate aim sought to be achieved; and, on the other, it will have regard to the nature of the interference along with the behaviour of the applicant and the public authorities (see *Arif Güven*, no. 2014/13966, 15 February 2017, §§ 58, 60; and *Osman Ukav*, no. 2014/12501, 6 July 2017, § 71).

8. When the liability of the legal representative is being evaluated, it should be borne in mind that the company has a separate legal entity and, as a rule, the company's legal entity itself has to be held liable for the debts owed by the company. Thus, an effort should be made to collect the company's debts primarily out of the corporate assets of the company's legal entity. Personal liability of the legal representative for the company's debts should only be sought in exceptional circumstances and as a last resort. It should be emphasised that, in cases where it is possible to cover the company's debts with the assets owned by the company's legal entity, i.e. if the company's assets are deemed to be sufficient to pay the debt, the public authorities' margin of appreciation will become narrower and that only unavoidable circumstances might justify collection from the legal representative directly of a debt owed by a company with insufficient assets. The public authorities carry the burden of proof in establishing the existence of those unavoidable circumstances.

9. In the present case, there is no doubt that the decision to collect the public receivable directly from the applicant was capable of achieving the public interest aim pursued. That being said, the exigence and proportionality of the interference need to be determined, as well. In this framework, it must be ascertained whether the interference in the form of attempting to collect the public receivable directly from the company's shareholders or executives instead of the debtor company itself was the most appropriate instrument with regard to the protection of the applicant's right to property.

10. It should be noted at the outset in this scope that the Company, of which the applicant was a shareholder, is a joint stock company which is recognised by law to have a limited liability. Accordingly, the liability of the legal entity of the joint stock company for its debts is, as a rule, limited to its capital. To put differently, creditors of the Company are to primarily seek to collect their receivables from the relevant legal entity itself. However, in some exceptional cases, such as when company shareholders or executives abuse their rights or are involved fraudulent conduct, it may be deemed necessary to lift the corporate veil of the legal entity. Accordingly, in certain circumstances, a decision might be made to collect public receivables directly out of the shareholders' personal assets

instead of the debtor Company that is liable with its capital. Nevertheless, there must be a compelling circumstance which makes it absolutely necessary to collect the public receivable at issue in this manner. In order to be able to also hold personally liable the shareholders or executives of a legal entity, of which the liability is recognised to be limited, there needs to be certain concrete circumstances to justify this measure and certain reasonable safeguards must be afforded.

11. In the case giving rise to the present application, the applicant was held liable to pay out of his personal assets the social security premium debt in the amount of TRY 8,841 owed by the Company whereas he held only one share valued at TRY 500 and did not have the capacity of legal representative of the Company. In return, the applicant claimed that the debt could be collected from the Company itself, as it owned immovable properties registered to its name, as well as equipment pools and a factory. Nevertheless, the Social Security Institution did not primarily attempt to approach the Company for collection of the debt but instead chose to directly hold the applicant personally liable along with the other shareholders. On the other hand, there is no finding to suggest that the public authorities had not been able to collect, or had understood that it would have been impossible to collect, the disputed debt from the Company.

12. Thus, what happened in this case is that the applicant's personal liability was enforced without having initially attempted to initiate a debt enforcement procedure against the debtor Company. Accordingly, as it has been observed in the present case, holding the applicant directly liable with his personal wealth despite the alleged existence of assets owned by the Company was clearly not the lightest instrument available for the achievement of the aim pursued by the interference. Besides, the public authorities did not rely on any concrete facts that would indicate that it was absolutely necessary to directly pursue the applicant's personal liability. As a result of this course of events, despite holding only one share of the company and not having the capacity of legal representative, the applicant was held liable with his personal assets. Thus, an excessive burden was placed on the applicant.

13. In conclusion, seeking the collection of the public receivable directly from the applicant without attempting to collect it from the debtor company caused an unnecessary interference with the applicant's right to property. Therefore, the balance which had to be struck between the public interest pursued by the interference and the applicant's right to property was upset to the detriment of the applicant. For this reason, concluding that there has been a violation of the right to property enshrined in Article 35 of the Constitution, we disagree with the majority's view.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

MOHAMED KASHET AND OTHERS

(Application no. 2015/17659)

20 June 2019

On 20 June 2019, the Plenary of the Constitutional Court found a violation of the right to property safeguarded by Article 35 of the Constitution in the individual application lodged by *Mohamed Kashet and Others* (no. 2015/17659).

THE FACTS

[9-35] During the exit controls carried out by the officials at the Free Zone Customs Office, a sum of cash money was found in the car which the applicants were in.

Upon an instruction received from the chief public prosecutor's office, the customs officers seized the money. The applicants successfully filed an objection with the magistrate judge to lift the seizure order. Upon approval of their objection, the seized money was returned to the applicants.

The chief public prosecutor's office imposed administrative fines on the applicants separately, on the ground that they committed misdemeanour. The applicants challenged the prosecutor's decision before the magistrate judge. The latter ordered that an expert examination be carried out on the matter.

The expert report stated that the impugned cash money had been found to have been taken into the country in a bag, while it had been possible to send it through a bank, and that therefore the decision against them was not erroneous. Hence, the magistrate judge dismissed the applicants' challenge. The applicants' subsequent appeal was also rejected.

V. EXAMINATION AND GROUNDS

36. The Constitutional Court, at its session of 20 June 2019, examined the application and decided as follows:

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

37. The applicants asserted that there was no reason in the present case for the imposition of an administrative fine, since importing and

exporting foreign exchange to and from the country was permitted according to the decision of the Council of Ministers, dated 11 June 2015. They claimed that the administrative fines imposed on them were in contravention of the law. The applicants added that no grounds had been found to prosecute (i.e. a decision of non-prosecution had been issued) in similar cases.

38. The applicants further complained that administrative fines had been imposed on them despite the fact that the commercial source of the money was clear as the money in question had been transported due to the transfer of company shares only three days after this transfer. The applicants indicated that the total sum of the administrative fine imposed in this scope was 4,291,014 Turkish liras (TRY) whereas the amount of money found was TRY 1,426,200; thus, when compared to the amount of undeclared money at issue, the fine was disproportionate.

39. For these reasons, the applicants alleged that the right to property, the right to a fair trial, the right to an effective remedy, the prohibition of discrimination, and the principle of a state governed by rule of law had been violated.

B. The Court's Assessment

40. 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."*

41. 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).

42. Although the applicants, through their complaints within the scope of the right to property, claimed that there had also been a violation of the prohibition of discrimination, they failed to concretely substantiate this

allegation. Moreover, seeing that the objections raised by the applicants against the administrative fine were examined at two separate instances, a violation of the right to an effective remedy is also out of question. It is also beyond doubt that the principle of a state governed by rule of law within the meaning of Article 2 of the Constitution is one of the general principles which has to be considered within the framework of the protection of all rights and freedoms giving rise to individual applications under the shared protective umbrella of the Convention and the Constitution. In the present case, given that the disputed administrative fine was prescribed by law, there is no issue to note as regards the alleged violation of the principle of legality of crimes and punishment (*nullum crimen, nulla poena sine lege*). Thus, the Court finds it unnecessary to hold separate examinations with respect to the above-mentioned complaints raised via the hereby individual application.

43. The essence of the applicants' complaints concerns the alleged violation of the right to property as a result of the imposition of an administrative fine for the misdemeanour of attempting to bring foreign exchange into the country without declaration. Therefore, all of the alleged violations raised by the applicants have been considered within the scope of the right to property.

1. Admissibility

44. Alleged violation of the right to property must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

a. Existence of Property

45. In the present case, the Public Prosecutor's Office decided to impose an administrative fine of TRY 715,169 on each applicant for the misdemeanour of attempting to bring foreign exchange into the country without making a declaration and obtaining a permission. Since there is no doubt that the money collected from the applicants as a result of the imposition of an administrative fine was part of the applicants' assets

and that the imposition of an administrative fine caused a decrease in the applicants' assets, this money clearly constituted a *possession* for the applicants (for the Court's assessments in the same vein, see *Orhan Gürel*, no. 2015/15358, 24 May 2018, § 43).

b. Existence of an Interference and its Type

46. An administrative fine was imposed on the applicants due to their failure to comply with the obligations to make a declaration and obtain permission for importing foreign exchange into the country. Thus, the aim pursued with this interference was to regulate and control the entry and exit of cash foreign exchange into and from the country. Therefore, taking note of the consequences and particularly the aim of the interference performed in the present case through the imposition of an administrative fine on the applicants, the Court has considered that the application must be examined from the standpoint of the rule concerning the control of the use of the possession/property in line with the public interest (for the Court's assessments in the same vein, see *Orhan Gürel*, § 46).

c. Whether the Interference Amounted to a Violation

47. 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."*

48. 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*, no. 2014/1546, 2 February 2017, § 62).

i. Whether the Interference was Prescribed by Law

49. The administrative fine giving rise to the present application was imposed by virtue of Article 3 §§ 2 and 7 of Law no. 1567 on Protection of the Value of Turkish Currency (Law no. 1567). Seeing that the provisions of this Law are clear, accessible and foreseeable, there is no doubt that the interference with the applicant's right to property was prescribed by law (see *Orhan Gürel*, §§ 50-51).

ii. Whether the Interference Pursued a Legitimate Aim

50. In the present case, considering that large amounts of money in cash can might be used for money laundering, drug trafficking, financing of terrorism or organised crime, tax evasion or other serious financial crimes, the State is authorised to monitor and supervise the exchange of money into or from the country and, by extension, the transport of foreign exchange over the border. Besides, the above-mentioned monitoring and supervision is also a requirement of international conventions which put obligations on the State in this regard, such as the United Nations Convention against Transnational Organized Crime. The obligation of customs declaration and permission placed on individuals, as observed in the present case, allows the authorities to know and detect the foreign exchange in an amount exceeding a certain threshold which will be taken out of or brought into the country. Therefore, there is a public interest in penalising the applicant due to non-compliance with the obligation of declaration and permission, which was considered as a misdemeanour, and it is beyond doubt that the interference pursued a legitimate aim (see *Orhan Gürel*, § 53).

iii. Proportionality

(1) General Principles

51. Finally, it should be examined whether the public authorities' interference with the applicants' right to property was proportionate.

52. The principle of proportionality (*ölçülülük*) comprises of three subprinciples, which are "appropriateness" (*elverişlilik*), "necessity" (*gereklilik*) and "proportionality" (*orantılılık*). "Appropriateness" means that the prescribed interference is capable of achieving the objective aspired for; "necessity" shall mean that the interference is absolutely necessary for that objective, that is achieving such an objective with a lighter intervention is not possible; and "proportionality" shall refer to the need for striking a reasonable balance between the interference with the individual's right and the objective sought (see the Court's judgments no. E.2011/111, K.2012/56, 11 April 2012; no. E.2014/176, K.2015/53, 27 May 2015; no. E.2016/13, K.2016/127, 22 June 2016, § 18; and *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 38).

53. Pursuant to the principle of proportionality, a fair balance must be struck between the public interest sought to be achieved by restricting the right to property and the individual's rights. This fair balance will have been upset where it is found out that the applicant has personally borne an excessive burden. In the assessment of proportionality of the interference, the Court will take account of the burden imposed on the applicant from two perspectives: on the one hand, it will examine the importance of the legitimate aim sought to be achieved; and, on the other, it will have regard to the nature of the interference along with the behaviour of the applicant and the public authorities (see *Arif Güven*, no. 2014/13966, 15 February 2017, §§ 58 and 60).

54. In order for a fair balance to be struck between the aim of public interest sought to be achieved by the interference with the right to property and the protection of the individual's right to property, the property owner must firstly be given a chance to effectively put forth his defence and objections against the measures put in place and the allegations and defence submissions in question must be reasonably responded to (see, for cases where the interference was found proportionate thanks to the fact that the applicant was afforded, *inter alia*, an effective right of defence, *Eyyüp Baran*, no. 2014/8060, 29 September 2016, §§ 75-95; and *Fatma Çavuşoğlu and Bilal Çavuşoğlu*, no. 2014/5167, 28 September 2016, §§ 74-89. See in contrast, for cases where the interference was found disproportionate due to the denial of the same guarantee

during the proceedings, *Mahmut Üçüncü*, no. 2014/1017, 13 July 2016, §§ 79-102; and *Arif Güven*, §§ 57-72).

(2) Application of Principles to the Present Case

55. The Court has already examined a similar complaint from the standpoint of proportionality in the case of *Orhan Gürel*, in which it laid down the principles regarding the matter (see *Orhan Gürel*, §§ 54-65).

56. In the cited case, the Court stressed that the interference could not be said to have been unnecessary in view of the fact that the interference was capable of achieving the public interest sought and that only an administrative fine had been imposed on the applicant since his act was categorised as a misdemeanour. As regards the question whether the interference was proportionate, the Court held that the applicant had been afforded the opportunity of effectively putting forth his allegations and defence submissions against the imposition of the administrative fine and that the inferior courts had not ruled arbitrarily or unforeseeably. Lastly, having acknowledged that the legal interest pursued by the categorisation of the act as a misdemeanour and the prescription of an administrative sanction for it was simply to enforce compliance with the obligation of making a declaration to customs authorities and obtaining a permission, the Court particularly emphasised that no sanction had been applied other than the imposition of an administrative fine in the amount that corresponded, as of the incident date, to half the value of the foreign exchange being carried by the applicant. Under these circumstances, the Court concluded that the interference with the right to property did not place an excessive burden on the applicant and that it was proportionate *vis-à-vis* the public interest it pursued (see *Orhan Gürel*, §§ 54-65).

57. The same principles must be applied to the present case as it concerns a similar complaint. The public authorities have established that the foreign exchange giving rise to the alleged violation of the right to property was seized as the applicants were trying to bring it into the country in cash. Indeed, the applicants have not contested this fact. Accordingly, the applicants wished to bring cash foreign exchange in the amount of 630,000 United States dollars (USD) into the country but they neither made a declaration to the customs authorities in this

regard nor obtained a permission in advance. For this reason, separate administrative fines were imposed on each applicant under Article 3 § § 2 and 7 of Law no. 1567.

58. The Court notes at the outset that the applicants have not raised any complaints to the effect that they were unable to present a defence or effectively put forth their objections against the interference with their right to property. By indicating that it was not forbidden to bring foreign exchange into the country, the applicants contended that the administrative fines imposed on them were in contravention of law. Nonetheless, as a rule, the Court's duty within the scope of an individual application is limited with regard to the interpretation of legal rules and it may not intervene in this area unless there is obvious arbitrariness or manifest error of discretion. In this context, since the inferior courts acknowledged that exchange of foreign currency into or from the country was possible at the material time on the condition of declaration and permission and that this permission procedure had not been complied with in the present case on the basis of an interpretation of the Decree no. 32 of the Council of Ministers and Articles 1 and 3 of the Law no. 1567, these decisions cannot be considered as arbitrary or unforeseeable.

59. On the other hand, the applicants were respectively fined TRY 715,169 in the present case. It is understood that, as was the case in the incident giving rise to the application of *Orhan Gürel*, these fines corresponded to half of the then-current market value of the cash foreign exchange detected by the authorities. However, the fines at issue were imposed due to a single incident. Thus, a total of TRY 5,006,183 in administrative fines were imposed on the applicants for USD 630,000 (TRY 1,426,200) of undeclared money.

60. In the instant case, there is neither any criminal charges imputed to the applicants by public authorities nor any allegations suggesting that the foreign exchange found on the applicants had been used for money laundering, financing of terrorism, drug trafficking or any other criminal activity or that it was a fruit of crime. In this context, the legal interest pursued by the imposition of administrative fines was simply to ensure compliance with the obligation of making a declaration to

customs authorities and obtaining a permission. In fact, the Chief Public Prosecutor's Office issued a decision of non-prosecution in respect of the applicants for the act in question. The applicants also submitted documents to prove that the money had been acquired through legitimate means, against which the public authorities did not make any finding or accusation to the contrary. It is also possible to say that, in the incident involving bringing foreign exchange into the country, the applicants' failure to declare the foreign exchange they were carrying to the customs authorities did not cause any damage in terms of the protection of the Turkish currency.

61. The Court has acknowledged that the control of undeclared and unpermitted flow of cash is especially important with respect to prevention of crime as a requirement of international conventions and that the State enjoys a wide margin of appreciation in the regulation and application of administrative fines (see *Orhan Gürel*, § 63). However, the exercise of this margin of appreciation also has a limit, which is respecting the requirements of protection of the right to property. Accordingly, as indicated above, an interference must not lead to an excessive personal burden on the part of the property owners.

62. In the instant case, the Court observes that the administrative fine imposed amounted to 3.5 times the sum of seized money. Although the misdemeanour stemmed from the same incident and act, each of the applicants was imposed a separate administrative fine as per Article 14 of the Law no. 5326 on the ground that multiple persons had been involved in the commission of the misdemeanour.

63. Consequently, when examined in the light of the principles established in the case of *Orhan Gürel*, the present complaint brings the Court to a different conclusion due to its particular circumstances. That is, even though the applicants caused the interference as a result of their own fault and the consequences of the act were foreseeable, the total amount of the administrative fines imposed on the applicants in the present case was much higher than the sum of money that could have been declared. However, the legal interest sought by this rule is merely limited to ensuring compliance with the obligation of declaration

and permission. Thus, when taken together with the legal and material interest safeguarded with the prescribed sanction, the administrative fine in question has, under the circumstances of the present case, caused an excessive personal burden on the part of the applicants.

64. As a result, the Court has reached the conclusion that the interference with the applicants' right to property, namely the imposition of administrative fines for having attempted to bring foreign exchange into the country without permission, has placed an excessive and extraordinary burden on the applicants despite the intrinsic public interest it pursued and the wide margin of appreciation accorded to the public authorities in this respect. Therefore, the fair balance which needed to be struck between the applicants' right to property and the public interest sought by the interference was upset to the detriment of the applicants and the interference was not proportionate.

65. For these reasons, it must be held that there has been a violation of the right to property protected under Article 35 of the Constitution.

Serdar ÖZGÜLDÜR expressed a dissenting opinion in this respect.

3. Application of Article 50 of Code no. 6216

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

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

way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."

67. If the Court finds a violation of a fundamental right or freedom within the scope of an individual application, the main requirement which needs to be satisfied in order to consider that the violation and its consequences have been redressed is to ensure restitution to the extent possible, that is to restore the situation to the state it was in prior to the violation. For this to happen, the continuing violation needs to be ceased, the decision or act giving rise to the violation as well as the consequences thereof need to be 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).

68. Before ruling on what needs to be done to remove 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 determination of the appropriate way of redress (see *Mehmet Doğan*, § 57).

69. In cases where the violation originates from a court ruling, the Court decides, as a rule, 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 (see *Mehmet Doğan*, § 58).

70. Accordingly, the discretion to decide whether it is necessary to conduct a retrial in case of a finding of a violation by the Court is vested not in the inferior courts but in the Court itself. In turn, the inferior courts are under an obligation to take the steps necessary in order to redress the consequences of the violation in accordance with the direction set by the Court in its judgment.

71. The applicants requested finding of violations and a retrial, as well as claiming respectively TRY 20,000 as pecuniary compensation.

72. The Court has concluded that there has been a violation of the right to property under the circumstances of the present case due to the interference in the form of administrative fines imposed on the applicants. Accordingly, the Court understands that the violation originated from a disproportionate interpretation by the judicial authorities of the provision under Article 3 of Law no. 1567 together with Article 14 of Law no. 5326. In other words, the Court has found that the fact that judicial authorities interpreted the rule provided by Article 3 of Law no. 1567 together with Article 14 of Law no. 5326 in this way caused an excessive personal burden on the part of the applicants.

73. In such cases, there is legal interest in holding a retrial in order to remove the consequences of the violation of the right to property. A retrial to be conducted in this scope aims to remdress the violation and its consequences according to Article 50 § 2 of Code no. 6216. In this regard, what is to be done by the inferior courts consists of removing in the first place the court ruling giving rise to the violation and finally rendering a new ruling in accordance with the violation judgment. In this framework, the relevant trial court should bear in mind that the applicants, who were merely found to have committed the misdemeanour of attempting to bring foreign exchange into the country without permission, may only be fined on the basis of the amounts of foreign exchange for which they are personally at fault. For this reason, a copy of the judgment must be remitted to the Mersin 2nd Magistrate Judge (Miscellaneous File no. 2015/3839) for retrial.

74. Since the ruling in favour of a retrial offers sufficient redress in terms of the consequences of the violation, the applicants' claims for compensation must be rejected.

Mr. Zühtü ARSLAN, Mr. Engin YILDIRIM and Mr. Yusuf Şevki HAKYEMEZ expressed dissenting opinions in this respect.

75. According to the calculations over the document in the case file, the court fee of TRY 226.90 must be reimbursed to applicant Moslem Alhabbal separately whereas the court fee of TRY 226.90 must be reimbursed to the rest of the applicants jointly. Also, the counsel fee of TRY 2,475 must be reimbursed to all the applicants jointly.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 20 June 2019:

A. UNANIMOUSLY that the alleged violation of the right to property be DECLARED ADMISSIBLE;

B. BY MAJORITY and by dissenting opinion of Mr. Serdar ÖZGÜLDÜR, that the right to property safeguarded by Article 35 of the Constitution was VIOLATED;

C. BY MAJORITY and by dissenting opinions of Mr. Zühtü ARSLAN, Mr. Engin YILDIRIM and Mr. Yusuf Şevki HAKYEMEZ, that one copy of the judgment be REMITTED to the Mersin 2nd Magistrate Judge (Miscellaneous File no. 2015/3839) for a retrial to redress the consequences of the violation of the right to property;

D. BY MAJORITY and by dissenting opinions of Mr. Zühtü ARSLAN, Mr. Engin YILDIRIM and Mr. Yusuf Şevki HAKYEMEZ, the applicants' compensation claims be REJECTED;

E. That the court fee of TRY 226.90 be REIMBURSED to applicant Moslem Alhabbal separately whereas the court fee of TRY 226.90 be JOINTLY REIMBURSED TO THE REST OF THE APPLICANTS; also, the counsel fee of TRY 2,475 be JOINTLY REIMBURSED TO THE APPLICANTS;

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

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

DISSENTING OPINION OF PRESIDENT ZÜHTÜ ARSLAN

1. The applicants complained about the violation of their right to property due to the imposition of an administrative fine for the misdemeanour of attempting to bring foreign exchange into the country without making a declaration. The majority of our Court have found a violation, thereby ordering a retrial and rejecting the applicants' claims for compensation. While agreeing with the conclusion that there has been a violation of the right to property, I disagree with the majority's view in regard to the source of the violation and the way of redress.

2. The majority has decided that the violation stemmed from a misinterpretation of the legal rules during their application to the case at issue and that the violation needs to be redressed through conducting a retrial by bearing in mind that the applicants "may only be fined on the basis of the amounts of foreign exchange for which they are personally at fault".

3. In the present case, the Chief Public Prosecutor's Office decided, pursuant to Article 3 of the Law no. 1567 on Protection of the Value of Turkish Currency, to impose an administrative fine equivalent to half (TRY 715,169) of the seized sum of money on each applicant for having attempted to bring foreign exchange into the country without declaration. The objections raised against this decision were dismissed by the relevant magistrate courts.

4. In addition, Article 14 § 1 of the Law of Misdemeanours (Law no. 5326) was also considered in determination of the administrative fine. According to this provision, "Where multiple persons are involved in the commission of a misdemeanour, an administrative fine shall be imposed on *each* of these persons as perpetrators."

5. The disproportionality of the interference with the applicants' right to property and, by extension, the violation originated from the legislative provisions. To be precise, the violation has emerged from Article 3 of Law no. 1567, which has to be applied in conjunction with Article 14 of Law no. 5326. Therefore, the source of the violation is not how the rule was interpreted but it is the rule itself. It is out of the question for the

judicial authorities that are entrusted with applying the law to disregard explicit provisions of law through interpretation. Interpretation is applicable when rules are open and likely to be understood differently. As it was also indicated in Article 14 of the Ottoman Civil Code (*Mecelle*), there is no place for interpretation and jurisprudence where there is a clear and precise provision ("*Mevrid-i nasda içtihada mesağ yoktur*").

6. Therefore, the violation found in the present case stemmed from the fact that the judicial authorities applied a clear provision of law, i.e. directly from the law, which is a legislative act. The action to be taken in this situation is not conducting a retrial but instead amending the provision of law which gave rise to the violation so that all consequences of the violation can be remedied and similar new violations can be prevented. Thus, a copy of the judgment should have been communicated to the legislative branch.

7. On the other hand, since communicating a copy of the judgment would be insufficient for redressing the applicants' suffering stemming from the violation in the present case, the applicants' claims for compensation should have been satisfied, as well. In fact, even though the applicants each paid TRY 715,169 in administrative fines, they claimed TRY 20,000 as pecuniary compensation. In this case, the applicants should have indeed been awarded TRY 20,000 separately.

8. For these reasons, I disagree with the majority's decision to order a retrial and deny the applicants any payment of compensation whereas a copy of the judgment should have been communicated to the legislative branch and the applicants should have been awarded compensation in order to redress the violation along with all of its consequences.

DISSENTING OPINION OF VICE-PRESIDENT ENGİN YILDIRIM

I agree with the views in the dissenting opinion written by Zühtü ARSLAN with regard to the need for communicating a copy of the judgment to the legislative branch and awarding the applicants compensation in order to redress the violation along with all of its consequences.

DISSENTING OPINION OF JUSTICE SERDAR ÖZGÜLDÜR

The administrative fine envisaged by Article 3 of Law no. 1567 is to be imposed in an amount equivalent to the market value of the items and securities/valuables in question if any of the securities/valuables listed in Article 1 of that Law have been brought into or taken out of the country without permission; or in an amount equivalent to half of that value if such an act has only been attempted (as is the case in the present application). Taking account of the amount of foreign exchange (valuable) seized, the majority has found that the administrative fines imposed on the applicants reached up to nearly 3.5 times the seized amount of money and that this caused an excessive and extraordinary burden. Finally, the majority concluded that the fair balance which needed to be struck between the applicants' right to property and the public interest was upset to the detriment of the applicants and the interference was not proportionate. Nevertheless, it is clear that various procedures and methods are prescribed for determination of administrative fines by many different provisions in the legislation. In this respect, certain acts which can be regarded as minor infractions are punishable by administrative fines in arguably high amounts. At this point, the gravity of the disrupted public order is the determining factor and this matter essentially falls within the legislature's margin of appreciation.

The legislative provision concerning the administrative fine which gave rise to the present application was put in place in pursuit of public interest, i.e. with the aim of protecting the value of Turkish currency, and prescribed a proportionate sanction. Thus, it is inappropriate to make an assessment based simply on the amount of seized valuables

(foreign exchange) and the administrative fine imposed. In view of the fact that there are several other provisions such as this one in the legislation (e.g. sales of alcoholic products outside the designated hours, certain infractions at petrol stations etc.), there is no balance -upset to the detriment of the applicants- to speak of in the case at hand.

For these reasons, having personally reached the conclusion that there has not been a violation with the applicants' right to property, I disagree with the majority's decision to the contrary.

DISSENTING OPINION OF JUSTICE YUSUF ŞEVKİ HAKYEMEZ

1. In the application concerning the alleged violation of the right to property due to imposition of an administrative fine for the misdemeanour of attempting to bring foreign exchange into the country without permission, the Court, while recognising the aim of public interest pursued and the public authorities' wide margin of appreciation in this regard, found that the interference with the right to property in the form of imposition of administrative fines on the applicants placed an excessive and extraordinary burden on the part of the applicants. Having concluded that the interference was not proportionate because it upset, to the detriment of the applicants, the fair balance that had to be struck between the applicants' right to property and the public interest pursued by the interference, the Court held that there has been a violation of the applicants' right to property enshrined in Article 35 of the Constitution.

2. For having attempted to bring cash foreign exchange into the country without permission, each of the seven applicants was separately fined TRY 715,169, which corresponded to half of the then-current market value of the total amount of undeclared foreign currency (USD 630,000). The USD 630,000 which was not declared to the customs authorities was equivalent to TRY 1,426,200 at its market value at the material time; however, the administrative fines imposed amounted to a total sum of TRY 5,006,183.

3. While agreeing with the majority of the Court in finding a violation of the applicants' right to property due to the imposition of a

disproportionate administrative fine, I disagree with the decision to remit the case file to the Mersin 2nd Magistrate Court for retrial because I am of the opinion that the source of this violation stems from the Law itself.

4. The relevant provision of law in this respect is Article 3 § 2 of the Law no. 1567 on Protection of the Value of Turkish Currency. According to this provision, "*If the act consists of bringing into or taking out of the country the securities/valuables listed in Article 1 without permission, an administrative fine shall be imposed on the person, unless the act constitutes a criminal offence or misdemeanour under the Anti-smuggling Law (no. 5607), in an amount equivalent to the market value of the items and securities/valuables in question; or in an amount equivalent to half of that value if the act has only been attempted.*"

5. Thus, by virtue this mandatory provision of the Law, each of the individuals who committed such an act have to be penalised with an administrative fine in an amount to be calculated on the basis of the market value of the items and securities/valuables, about which the courts have no margin of appreciation. For this reason, even though the cause of the violation in the instant case is the disproportionality of the administrative fine imposed, this disproportionate fine stemmed not from the relevant court's interpretation of the provision but from the very fact that the Law provides as such in a way which does not allow for any other interpretation.

6. Indeed, regard being had to Article 14 § 1 under the head of "Complicity" of the Law of Misdemeanours (Law no. 5326) which reads "*Where multiple persons are involved in the commission of the misdemeanour, an administrative fine shall be imposed on each of these persons as perpetrators*" as well as other relevant paragraphs therein, the courts have no choice but to impose an administrative fine on each person, who were complicit in attempting to bring foreign currency into the country without permission, which is calculated in accordance with Article 3 § 2 of Law no. 1567.

7. Therefore, seeing that the violation in the present case stems from the provision of Article 3 § 2 of Law no. 1567, which cannot be applied in any other way, there is no need for remitting the case file to the Mersin 2nd Magistrate Court for a retrial to be conducted in order to redress the consequences of the violation of the right to property.

8. To redress the violation, first of all the applicants should have instead been awarded pecuniary compensations separately. As the applicants respectively claimed TRY 20,000 as pecuniary compensation, this claim should have been respected and each of them should have been awarded TRY 20,000 as pecuniary compensation as the material redress of the violation.

9. Secondly, in view of the fact that it is for the legislative branch to review the legal provision giving rise to the violation with a view to preventing similar violations, the situation should have been communicated to the Grand National Assembly of Turkey.

10. With this dissenting opinion as to the way of redress, I agree with the finding of a violation reached by the majority of the Court.

RIGHT TO AN EFFECTIVE REMEDY (ARTICLE 40)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

Y.T.

(Application no. 2016/22418)

30 May 2019

On 30 May 2019, the Plenary of the Constitutional Court found a violation of the right to an effective remedy safeguarded by Article 40 of the Constitution in the individual application lodged by *Y.T.* (no. 2016/22418).

THE FACTS

[10-35] The applicant, having entered Turkey legally, married to a Turkish woman and had four children.

In the course of the routine control carried out by the law enforcement officers, it was understood that an exclusion order had been issued in respect of the applicant. The Provincial Immigration Authority ordered on 30 September 2016 that the applicant would be placed in administrative detention for deportation. The Law no. 6458 on Foreigners and International Protection that was in force at the material time provided that in case of judicial appeal, the deportation order shall not be executed until the finalization of the appeal proceedings.

Meanwhile, amendments were made to Law no. 6458 with the Decree Law no. 676 that was published in the Official Gazette dated 29 October 2016 and additional provisions were included in the Law. Accordingly, it is stipulated –unlike the previous version of the provision– that the deportation process shall not be suspended in respect of the foreigners ordered to be deported, during the period prescribed for appeal or during the appeal stage.

In accordance with the said amendment, the applicant's deportation was ordered. The applicant brought an action for annulment also requesting the stay of execution before the administrative court, stating that he was a Turkish national and came to Turkey for having been subjected to torture. The applicant's request was rejected and the case was dismissed as being time barred, without any assessment as regards the alleged ill-treatment.

The applicant claimed that the deportation order against him was enforceable at any time and that therefore the administrative court was

no longer an effective remedy in practice. Thus, the applicant lodged an individual application with a request for interim measure on the same day when he brought an action before the administrative court.

V. EXAMINATION AND GROUNDS

36. The Constitutional Court, at its session of 30 May 2019, examined the application and decided as follows:

A. Request for Legal Aid

37. It has been understood that the applicant has been 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 has not been manifestly ill-founded and should be accepted.

B. As Regards the Right to an Effective Remedy in Conjunction with the Prohibition of Ill-treatment

1. The Applicant's Allegations

38. The applicant submitted that he was a national of the Russian Federation, that he had been forced to flee his country due to his religion and political views, that he had entered Turkey legally and married a Turkish national, and that his physical and moral integrity would be under risk if he were to be repatriated. He followed that since the actions brought before administrative courts did not offer a prospect by itself of staying the execution of a deportation procedure, it was no longer an effective remedy in practice and that there was no other effective legal remedy than an individual application in this respect.

39. The applicant's requests consisted of an interim measure on the deportation procedure, pecuniary and non-pecuniary compensation, anonymity in publicly available documents, and legal aid.

2. The Court's Assessment

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

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

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

41. 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."

42. 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."

43. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The applicant's allegations concerning the potential deprivation of his life or liberty in case of deportation are considered under Article 17 § 3 of the Constitution, whereas his complaints concerning the alleged inability of the action for annulment of the deportation order to offer an effective remedy are

considered from the standpoint of Article 40 in conjunction with Article 17 of the Constitution. Since the application is regarded as a pilot case, the Court will not hold at this point a separate examination in respect of the prohibition of ill-treatment according to the conclusion of the examination to be held on the right to an effective remedy.

a. Admissibility

44. The applicant complains of an alleged lack of an effective judicial remedy that he can use to challenge the order for his deportation to a country where he will face the risk of ill-treatment. He alleges that there has been a violation of the right to an effective remedy, which he claims to be caused by a legislative amendment. Given that the allegations in question directly concern the merits of the case, the question of admissibility must be assessed together with the merits.

b. Merits

i. General Principles

45. In the cases of *Yusuf Ahmed Abdelazim Elsayad* (no. 2016/5604, 24 May 2018) and *A.A. and A.A.* ([Plenary], no. 2015/3941, 1 March 2017), the Court laid down the basic principles regarding the imposition of orders for deportation to a country where the person concerned faces the risk of ill-treatment and, in this connection, the right to an effective remedy. The above-mentioned judgments read, in so far as relevant, as follows:

> *"The Constitution does not entail any provisions concerning the aliens' entry into the country, their residence in the country or removal from the country. As is also acknowledged in the international law, this issue falls within the scope of the State's sovereignty. It is therefore undoubted that the State has a margin of appreciation in accepting aliens into the country or in deporting them. However, it is possible to lodge an individual application in the event that such procedures constitute an interference with the fundamental rights and freedoms guaranteed in the Constitution (see A.A. and A.A., § 54).*
>
> *Article 17 § 1 of the Constitution also safeguards the right to protect and improve one's corporeal and spiritual existence, as well as*

the right to life. Article 17 § 3 provides that no one shall be subjected to "torture or maltreatment" and that no one shall be subjected to penalties or treatment "incompatible with human dignity". As can also be understood from the systematic structure of the relevant article, the corporeal and spiritual existence of the individual that is generally safeguarded by the first paragraph is specifically protected against ill-treatment in the third paragraph (see A.A. and A.A., § 55).

However, in order to consider that the rights protected by this prohibition are actually guaranteed, it is not sufficient that the State does not administer ill-treatment. The State is also expected to protect individuals against any ill-treatment by its own officials or third parties (see A.A. and A.A., § 57).

As a matter of fact, pursuant to Article 5 of the Constitution, it is among the aims and duties of the State "to provide the conditions required for the development of the individual's material and spiritual existence". When Articles 17 and 5 of the Constitution are read together, it is understood that the State also has an obligation (positive) to protect individuals against any breaches of the prohibition of ill-treatment (see A.A. and A.A., § 58).

When Articles 5, 16 and 17 of the Constitution are interpreted in conjunction with the relevant provisions of the international law and especially the Geneva Convention to which Turkey is a party, the State is under a positive obligation to protect aliens, who are under the State's sovereign jurisdiction and likely to be subject to ill-treatment in the destination country, against the risks directed towards their physical and spiritual integrity (see A.A. and A.A., § 59).

Within the scope of this positive obligation, the person to be deported must be provided with the "opportunity to challenge" the deportation order, for offering a real protection against the risks he may face in his own country. Otherwise, it will not be possible to say that a real protection has been provided to an alien who has claimed to be at risk of ill-treatment if deported and who has more limited opportunities than the State to prove his claim (see A.A. and A.A., § 60).

Accordingly, the positive obligation to protect against ill-treatment –by the very nature of the rights protected by the said prohibition– undoubtedly includes the procedural guarantees providing an alien to be deported with the opportunity to "have his allegations investigated" and "have the deportation order against him examined fairly" (see A.A. and A.A., § 61).

In this scope, if it is claimed that the prohibition of ill-treatment would be breached in the country to which the alien would be sent through deportation, the administrative and judicial authorities must inquire in detail whether there is a real risk of ill-treatment in that country. As required by the above-mentioned procedural safeguards, the deportation orders taken by the administrative authorities must be reviewed by an independent judicial organ; during this review period, the deportation orders must not be enforced, and the parties' effective participation in the proceedings must be ensured (see A.A. and A.A., § 62).

Article 40 of the Constitution guarantees the right to request prompt access to the competent authorities (the right to an effective remedy) for everyone whose constitutional rights and freedoms have been violated (see Yusuf Ahmed Abdelazim Elsayad, § 59).

Accordingly, 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 taking place 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 Yusuf Ahmed Abdelazim Elsayad, § 60).

It is not sufficient, in itself, that the legislation provides for a remedy through which alleged violations of fundamental rights and freedoms may be raised. The remedy in question must at the same time be effective in practice (i.e. offer a prospect of success). Nonetheless, the fact that a remedy is both legally and practically effective in general does not preclude an assessment as to whether there has been any interference

with the right to an effective remedy in the present case (see Yusuf Ahmed Abdelazim Elsayad, § 61).

As per the foregoing principles, an alien whose deportation has been ordered must be provided access to an effective "opportunity to challenge" this order by virtue of the obligation to protect against breaches of the prohibition of ill-treatment. At first sight, it is understood that the procedural guarantees acknowledged to be inherently included with the said prohibition are of a similar nature as the guarantees under the right to an effective remedy (see Yusuf Ahmed Abdelazim Elsayad, § 62).

The right to an effective remedy contains, other than the guarantees oriented at the protection of the substance of the prohibition of ill-treatment, such guarantees that enable communication of alleged violations of the material right to the competent authorities. Indeed, according to the Court's case-law, while the existence of an arguable claim equipped with strict criteria of proof is sought for an examination within the scope of the prohibition of ill-treatment (see A.A. and A.A., §§ 63, 71-74), a reasonable explanation on an alleged violation of the right to an effective remedy in conjunction with the said prohibition may be considered sufficient for an examination. Thus, violation of the right to an effective remedy is not dependent on the absolute violation of the prohibition of ill-treatment at the same time (see Yusuf Ahmed Abdelazim Elsayad, § 63)."

46. As it may be understood from the foregoing principles, in order to offer a real protection to a person subjected to a deportation order against the risks he might face in his country, the person concerned must be given an effective opportunity to challenge that order. This opportunity can only be provided through affording an effective remedy.

47. 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 taking place 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.

48. In the case of *A.A. and A.A.*, the Plenary of the Constitutional Court indicated that the following procedural guarantees must be accorded in deportation procedures in respect of persons who claim that their right to life will be breached or that they will be subject to ill-treatment (*ibid.* § 62):

> i. Review of deportation orders by an independent judicial organ;
>
> ii. Non-execution of the deportation orders until the end of this review;
>
> iii. Ensured participation of the parties in the proceedings.

49. The right to effectively enjoy a judicial remedy prescribed within the legal order must be afforded without discrimination to everyone who claims to face the risk of a breach of the right to life or the prohibition of ill-treatment. It is not sufficient for such a remedy to be simply provided for in the legislation but it also needs to offer a prospect of success in practice. Moreover, everyone who pursues such a remedy must be afforded not only a reasonable amount of time to allow for exercising the right to apply but also a statutory guarantee (which is outside the margin of appreciation enjoyed by administrative or judicial authorities) that will prevent a deportation in the process after the application until the application is concluded. In other words, where the right to life and the prohibition of ill-treatment are at stake, the relevant legislation has to automatically block the deportation procedure throughout the prescribed time-limit for filing an action on these allegations, as well as during the period until the relevant proceedings are concluded.

50. It would not constitute, by itself, a sufficient safeguard in terms of ensuring an effective judicial protection for the administrative and judicial authorities to have the capacity to cancel deportation procedures which do not stop automatically by virtue of the legislation.

51. The fact that judicial authorities have the power and capacity to stay the execution or the mechanisms for delivering decisions speedily is not sufficient, either, for ensuring the guarantees under the right to an effective remedy. Because, it does not seem possible to speak of an effective protection in this regard without laying down the legislative right of a system capable of guaranteeing these persons the ability to remain in the country during the prescribed time-limit for filing an action (before they have accessed to a court) and the ability to pursue their cases.

ii. Application of Principles to the Present Case

52. In brief, the application concerns the alleged lack of an effective remedy in practice through which the applicant could raise his allegations about the potential risk of ill-treatment he would face due to his political views and religious beliefs if he was deported to his country. To put differently, the applicant complained of the alleged inefficiency of the existing judicial system.

53. Law no. 6458 was published in the Official Gazette on 11 April 2013. Article 53 thereof came into force one year after its publication. The provision in the first version of Article 53 § 3 which read "*... the alien concerned may not be deported throughout the prescribed time-limit for filing an action or, where an application has been made for a judicial remedy, until the proceedings are concluded*" was originally envisaged to be applied in respect of all aliens regardless of the grounds for their deportation.

54. The *automatic stay of execution rule* under Article 53 § 3 of Law no. 6458 remained in force for over two years until it was amended by the Decree-law no. 676. In fact, during that period of time, the Court dismissed a number of requests for interim measure on grounds of non-execution of judicial remedies and the impossibility of execution of a deportation order during that process (see *G.B.* [Interim Decision], no. 2015/508, 16 January 2015).

55. The above-mentioned amendment, on the other hand, introduced certain exceptions to the rule that stayed the deportation procedures in respect of aliens throughout the prescribed time-limit for filing an action against the deportation order or until the end of the proceedings.

56. In the new system, the rule of staying the deportation procedure throughout the prescribed time-limit for filing an action against the deportation order or until the end of the proceedings is no longer applicable to cases where a deportation order has been issued in respect of leaders, members or supporters of terrorist or interest-seeking criminal organisations; persons who pose a threat to the public order, public safety or public health; and those who are deemed to be associated with the terrorist organisations as described by international institutions and organisations.

57. Consequently, even if the aliens who claim that they will face a breach of their right to life or be subjected to ill-treatment in their country file an action with the judicial authorities, some of them can no longer enjoy the opportunity to pursue their cases to the end or, at best, this question has been left to the discretion of the administration and the judiciary.

58. In the present case, an order was issued for the applicant's deportation as he was reported to be of those who posed a threat to the public order, public safety or public health. The applicant raised his allegations concerning a risk of ill-treatment he would face in his country, which have been considered to be arguable claims, before the authorities of administrative justice and, at the same time, lodged an individual application with the Court. The Court found the applicant's allegations arguable; thus, it stayed the execution of the deportation procedure by accepting his request for an interim measure. On the other hand, the administrative court dismissed the case as being time-barred as a result of a formalistic examination, without holding an assessment on the substance of the applicant's allegations or paying regard to the date on which, according to the attorney, the deportation order had been notified. Therefore, the Court notes that the applicant's allegations on the merits of his case have not been deliberated upon before the administrative court.

59. In the present case, the applicant expressed that he did not have the possibility of waiting for the outcome of the proceedings to be held before the administrative court as he faced the risk of deportation at any stage of the proceedings. The applicant's allegations are not unsubstantiated in the sense that the proceedings before the administrative court have no

longer been an effective remedy because they did not offer a prospect of success in practice. The applicant was not able to pursue his case before the administrative court without facing the risk of being deported. This clearly demonstrates that the guarantees indicated above under the head of "*General Principles*" could not be satisfied within the scope of the proceedings before the administrative court.

60. Nevertheless, the issue arising in the present case stems not from the administrative court's practice or misinterpretation of the legislation but rather from the amendment made to Article 53 § 3 of Law no. 6458. The Court has understood that this amendment was incompatible with the right to life and the prohibition of ill-treatment under Article 17 §§ 1 and 3 of the Constitution and, in conjunction therewith, the right to an effective remedy under Article 40, as well as the well-established case-law of the Court on this matter.

61. Therefore, the Court has arrived at the conclusion that the applicant's right to an effective remedy had been violated due to a lack of statutory guarantee which would eliminate the risk of deportation while he was waiting for the outcome of his case before the administrative court. The Court has found that this violation stemmed from the new situation created by the legislative amendment.

62. For these reasons, it must be held that there has been a violation of the right to an effective remedy protected under Article 40 of the Constitution, in conjunction with Article 17.

c. Application of Article 50 of Code no. 6216

i. General Principles

63. Article 50 §§ 1 and 2 of the Code no. 6216 on the 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 redressed. 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 redress the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."

64. According to Article 49 § 6 of Code no. 6216, the examination on the merits determines whether there has been a violation of a fundamental right and, if so, how it can be redressed. Further, as per Article 50 § 1 of the same Code and Article 79 § 2 of the Internal Regulations, where a violation is found, the Court rules on what needs to be done to redress the violation and its consequences. Accordingly, in case of a violation, the Court will not only find that the fundamental right or freedom concerned has been violated but also determine the matter of *how to redress the violation*, in other words *decide on what needs to be done so that the violation and its consequences can be resolved* (see *Mehmet Doğan* [Plenary], no. 2014/8875, 7 June 2018, § 54).

65. If the Court finds a violation of a fundamental right or freedom within the scope of an individual application, the main requirement which needs to be satisfied to consider that the violation and its consequences have been redressed is to ensure restitution to the extent possible, that is to restore the situation to the state it was in prior to the violation. For this to happen, the continuing violation needs to be ceased, the decision or act giving rise to the violation as well as the consequences thereof need to be redressed, where applicable the pecuniary and non-pecuniary damages caused by the violation need to be indemnified, and any other measures deemed appropriate in that scope need to be taken (see *Mehmet Doğan*, § 55).

66. On the other hand, Article 50 § 1 of Code no. 6216 precludes the Court from rendering decisions or judgments in the nature of an administrative act or action when determining the way to redress the

violation and its consequences. Accordingly, in determining the way to redress the violation and its consequences, the Court may not issue an act by substituting itself for the administration, the judicial authorities or the legislative branch. The Court adjudicates the way by which the violation and its consequences would be redressed and remits its judgment to the relevant authorities for the necessary action to be taken (see *Şahin Alpay (2)* [Plenary], no. 2018/3007, 15 March 2018, § 57).

67. Before ruling on what needs to be done to redress the violation and its consequences, the source of the violation must first be ascertained. In this respect, a violation may stem from administrative acts and actions, judicial acts, or legislative acts. Determining the source of the violation plays a significant role in the determination of the appropriate way of redress (*Mehmet Doğan*, § 57).

68. 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 to be able to say that the violation has been redressed with all of its consequences. Moreover, in certain circumstances the repealment 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.

69. 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.

70. 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.

71. 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.

72. 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.

ii. Application of Principles to the Present Case

73. The application at hand constitutes the first application lodged with the Court following the amendment made to Article 53 of the Law no. 6458. After this application, there have been 1,545 new applications of the same nature lodged with the Court as of 8 April 2019 and the number of new applications continues to rise every day. As its reasons are explained above, there is no doubt that these applications stem from a structural problem related to a legislative amendment. Indeed for this reason, the Court decided on 12 June 2018 to initiate the pilot judgment procedure by virtue of Article 75 of the Internal Regulations and the present case was designated as a pilot case since it is the very first application lodged on this matter (see § 8).

74. In the present case, the Court has found a violation of the right to an effective remedy safeguarded by Article 40 of the Constitution in conjunction with the right to life and the prohibition of ill-treatment guaranteed by Article 17 of the Constitution. It is understood that the

violation stems from the legislative amendment which was introduced to Article 53 of the Law no. 6458 and entered into force on 29 October 2016. In other words, where a deportation order has been issued in respect of a certain individual, the amended provision allows for the removal of the individual from the country without giving them the chance to apply to a court. This provision is applied to all persons who are ordered for deportation with reference to the subparagraphs (b), (d) and (k) of Article 54 § 1 of the Law in question. Accordingly, the Court understands that the violation stems from a provision of law, which is a legislative act.

75. Seeing that the law in question is still in force, it will not be possible to redress the violation via a retrial to be held by administrative courts. Moreover, even if the deportation orders were lifted in the present case as well as other pending cases through finding of a violation by the Court, this would neither prevent further similar applications in the future, nor would it stop the unconstitutional deportation of persons in similar circumstances. Therefore, the Court concludes that the provision of law giving rise to the violation needs to be reviewed so that the violation and its consequences can be eliminated, other applications of similar nature can be resolved in this manner by the administrative authorities, and similar violations which might arise in the future can be prevented.

76. If the legislative branch reinstates the version of Article 53 § 3 of the Law no. 6458 that was in effect until the amendment or enacts a new arrangement capable of automatically ensuring that a person in respect of whom a deportation order has been issued can stay in the country until the end of the prescribed time-limit for filing an action against the order and, where an action has been filed, throughout the course of the proceedings, it will eliminate the structural problem at issue and prevent new applications of a similar nature to be lodged in the future. Thus, a copy of the judgment must be communicated to the legislative branch.

M. Emin KUZ concurred with this opinion with an additional reasoning.

77. That said, although the arrangement to be made by the legislative authority will prevent new applications, it will not be sufficient for the settlement of 1,545 applications which are pending before the Court,

the number of which has been increasing by day. On this point, either a transitory provision needs to be introduced in order to resolve the pending applications or the administration needs to lift/revoke/review the previously-issued deportation orders or find a different solution. Thus, a copy of the judgment, along with a list of the pending applications, must be sent to the Ministry of Justice and the Directorate General of Migration Management of the Ministry of Interior for their information and appreciation.

78. In this scope, pursuant to Article 75 § 5 of the Internal Regulations, the Court must postpone the examination of the 1,545 applications, which were lodged between 29 October 2016 and 8 April 2019, as well as any new applications in the same vein coming after that date and it must inform the persons concerned of this postponement.

79. Nevertheless, the postponement of examination of the applications does not extinguish the Court's power and obligation under Article 49 of Code no. 6216 and Article 73 of the Internal Regulations to take the measures necessary for protection of the fundamental rights and freedoms and to receive applications in this framework.

80. Lastly, sending a copy of the judgment to the legislative branch falls short of fully redressing the applicant's victimisation due to the violation in the present case. Accordingly, the case file must be remitted to the Bursa 1st Administrative Court for a retrial to be held with a view to removing the consequences of the violation and ensuring an inquiry and assessment on the alleged risk of ill-treatment the applicant could face in his country.

81. In the present case, there is nothing to prevent the applicants from being deported during the course of the retrials to be held before administrative courts (*Y.T.* [Interim Decision], no. 2016/22418, 1 November 2016). If the applicant was deported during the process while it was still being inquired whether he would face a real risk of ill-treatment in the destination country, it might lead to the emergence of a serious threat in terms of his physical and moral integrity.

82. It is thus understood that ruling in favour of a retrial in this case will not be sufficient for eliminating the consequences of the violation.

The Court must also rule that the applicant not be deported until the completion of the proceedings in the retrial to be held.

83. As regards the non-pecuniary damages sustained by the applicant, which cannot be redressed by a mere finding of a violation, the Court awards 10,000 Turkish liras (TRY) (net) in favour of the applicant as non-pecuniary compensation.

84. For the Court to be able to award pecuniary compensation, there has to be a causal link between the alleged violation and the pecuniary damage allegedly suffered by the applicant. In the absence of any documents submitted by the applicant to that effect, the Court must reject the claims for pecuniary compensation.

85. The court expense consisting of a counsel fee of TRY 2,475 must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court held UNANIMOUSLY on 30 May 2019 that

A. The request for legal aid be GRANTED;

B. The applicant's request for anonymity in public documents be GRANTED;

C. The alleged violation of the right to an effective remedy in conjunction with the prohibition of ill-treatment be DECLARED ADMISSIBLE;

D. The right to an effective remedy safeguarded by Article 40 of the Constitution was VIOLATED;

E. Seeing that the violation has stemmed from a structural problem, the PILOT JUDGMENT PROCEDURE BE APPLIED;

F. The situation concerning an amendment to Article 53 § 3 of Law no. 6458 for elimination of the structural problem be COMMUNICATED to the legislative branch;

G. The examination on the applications lodged after 29 October 2016 and the applications to be lodged after the delivery of the hereby judgment be POSTPONED FOR 1 YEAR from the publication of the judgment in the Official Gazette;

H. The persons concerned whose applications fall within the scope of the pilot judgment be INFORMED of the situation via announcement of their application numbers on the Court's website;

I. The list of applications on which the examination has been postponed be SENT to the Directorate General of Laws and the Human Rights Department of the Ministry of Justice and the Directorate General of Migration Management of the Ministry of Interior;

J. A copy of the judgment be REMITTED to the 1st Chamber of the Bursa Administrative Court (no. E.2016/1456, K.2016/1568) for a retrial to redress the consequences of the violation;

K. The applicant NOT BE DEPORTED until the completion of the retrial;

L. A net amount of TRY 10,000 be PAID to the applicant in respect of non-pecuniary damage, and other compensation claims be REJECTED;

M. The court expense consisting of a counsel fee of TRY 2,475 be REIMBURSED TO THE APPLICANT;

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

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

ADDITIONAL OPINION OF JUSTICE M. EMİN KUZ

In the present case concerning the alleged violation of the right to an effective remedy due to the lack of an effective judicial remedy which could be availed of in order to challenge an order for deportation to a country where the applicant might face the risk of ill-treatment, the Court has found a violation of the right to an effective remedy. Concluding that the violation stems from a structural problem, the Court has decided to apply the pilot judgment procedure and to send a communication to the legislative branch to notify them of the situation calling for an amendment to be made to Article 53 § 3 of Law no. 6458 for elimination of the structural problem.

While concurring with the unanimous conclusion, I find it necessary to point out the following:

As explained in the judgment, the original version of Article 53 § 3 of Law no. 6458 used to provide that where a deportation order was issued in respect of an alien, the latter or his/her legal representative or attorney could challenge the deportation order within 15 days before an administrative court and the alien concerned could not be deported, unless he wished otherwise of his own will, during that 15-day time-limit or, if the judicial remedy was availed of within this time, until the end of the proceedings. However, the clause added to the paragraph in question by the Decree-law no. 676 has made it possible to execute deportation orders immediately, without waiting for the 15-day time-limit prescribed for filing an action or for the proceedings to be concluded if they filed an action, in respect of persons who are "leaders, members or supporters of terrorist or interest-seeking criminal organisations", "a threat to the public order, public safety or public health", and "deemed to be associated with the terrorist organisations as described by international institutions and organisations".

It is thus noted that the amendment introduced by the Decree-law no. 676, which was subsequently enacted via Law no. 7070 and became law, redressed the possibility of staying the deportation, unless the Court delivers an interim measure, during the prescribed time-limit for filing an action and, if an action is filed, until the end of the proceedings in respect

of persons described in the amended provision of law, even if they claim to be under a risk of a violation of the right to life or prohibition of ill-treatment in their country.

As the Court has already acknowledged, "there is no doubt that acts of terrorism are one of the most serious dangers threatening societies" and "in modern democracies, states are under a positive obligation to protect individuals within their jurisdictions against activities of terrorist organisations" (see *Metin Birdal* [Plenary], no. 2014/15440, 22 May 2019, §§ 64-65). Thus, criminalising membership to a terrorist organisation has become a part of the policies for an effective fight against terrorism in our country as well as in many of the developed democracies (see *Metin Birdal*, § 64). Other legal provisions that concern the leaders, members and supporters of terrorist or interest-seeking criminal organisations or those who are deemed to be associated with terrorist organisations also fall within this scope.

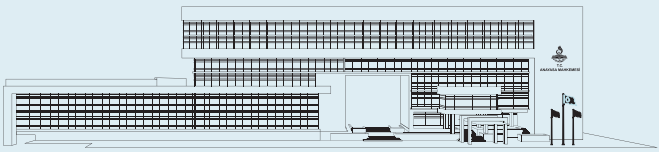
It is understood from its general reasoning that the amendment pursued the aim of protecting the fundamental rights and freedoms and the public order as a necessity of these policies against threats posed by terrorist organisations. It accordingly makes a distinction between the aliens to be deported under Article 54 of Law no. 6458 and expedites the deportation procedures in respect of some of those aliens. Though it is understandable that the necessity in question calls for a new legal arrangement, the amendment at issue seems to be resulting in the complete removal of the opportunity under Article 53 § 3 in respect of these persons and it could make it meaningless even if the proceedings filed by persons deemed to fall within this scope eventually resulted in their favour.

To put differently, despite existence of a legitimate aim in introducing a different stipulation in respect of the aliens described in subparagraphs (b), (d) and (k) of Article 54 § 1 of Law no. 6458, it is understood that this amendment -giving rise to the violation- redress the right to an effective remedy of the persons concerned.

In view of the fact that Article 53 § 3 of Law no. 6458 prescribes the time-limit for filing an action and the time-limit for concluding the

proceedings as 15 days each and that the rulings of the administrative courts in this regard are indicated to be final, the disproportionate removal of the right to an effective remedy can be prevented by means of introducing an arrangement which stays the execution of the deportation orders in respect of the persons in the aforementioned situation during the prescribed time-limit for filing an action and, where an application is made to the administrative court, for a period of time which will allow for an assessment to be held on the applicants' claims.

For these reasons, it should be clarified that the call made to the legislative branch for amending Article 53 § 3 of Law no. 6458 in order to eliminate the structural problem at issue, namely the call for reverting the provision to the version that was in force before the amendment by the Decree-law no. 676, in other words "reinstating the version ... that was in effect until the amendment or enacting a new arrangement capable of automatically ensuring that a person in respect of whom a deportation order has been issued can stay in the country until the end of the prescribed time-limit for filing an action against the order and, where an action has been filed, throughout the course of the proceedings", falls completely within the margin of appreciation of the legislative branch. This should not be construed as a call for an amendment that has to be made absolutely in this manner. It would also be possible to introduce other provisions capable of protecting the right to an effective remedy of the persons concerned when introducing a different arrangement in respect of the persons concerned with the amendment to be made.



İncek Şehit Savcı Mehmet Selim Kiraz Bulvarı No: 4
06805 Çankaya / Ankara / TURKEY
Phone: +90 312 463 73 00 • Fax: +90 312 463 74 00
E-mail: tcc@anayasa.gov.tr
twitter.com/aymconstcourt

www.anayasa.gov.tr/en

9 786052 378656