
# Annual Report 2019

# Annual Report

# 2019

Constitutional Court Publications

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Annual Report 2019



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

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# PREFACE BY THE PRESIDENT

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

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

The first chapter of the 2019 Report, prepared to serve such function, provides brief information on the formation of the Plenary, Sections and Commissions of the Constitutional Court.

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

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

The fourth chapter includes the Opening Speeches delivered on the occasion of the 57th Anniversary of the Constitutional Court and on the Closing Conference of the Project on Supporting the Individual Application to the Constitutional Court.

The fifth chapter of the report includes brief summaries of the Court's leading decisions and judgments rendered in 2019 in the context of both individual application and constitutionality review with a view to giving an insight into the case-law of the Court on various subjects. This chapter is intended for presenting the paradigm of the Court on fundamental rights and freedoms and contributing to all those showing interest in the Court's case-law, notably academicians and legal practitioners. The chapter constitutes the backbone of the report, given that the main output of the Court is its decisions and judgments.

The final chapter contains a year-by-year comparison of the Court's performance in 2019 by providing various statistical data together with graphics.

I hope that the 2019 Report prepared by the Constitutional Court will be useful for those concerned.

Prof. Dr.
Zühtü ARSLAN

President of the Turkish Constitutional Court

# YEAR

## JANUARY

25 January — Re-election of Mr. Zühtü ARSLAN as the President of the Turkish Constitutional Court

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

## FEBRUARY

18 February — Putting into operation of the new institutional website of the Constitutional Court

20 February — Oath-taking ceremony held for the recently-appointed Constitutional Court Justice Mr. Yıldız Seferinoğlu

22 February — Appointment of the Chief Rapporteur-Judge Mr. Murat Şen as the Secretary General of the Constitutional Court

## MAY

3 May — Retirement of Constitutional Court Justice Mr. Serruh Kaleli

14-18 May — Attendance by the delegation of the Turkish Constitutional Court at the IX St. Petersburg International Legal Forum

## JUNE

9-15 June — Attendance by President Mr. Zühtü Arslan and the accompanying delegation at the 5th Congress of the Conference of Constitutional Jurisdictions of Africa held in Angola and the visit to the Constitutional Court of South Africa

17 June — Visit by the President of the Constitutional Council of Djibouti and the accompanying delegation to the Turkish Constitutional Court and signing of a bilateral memorandum of cooperation

17-20 June — Attendance by the delegation of the Turkish Constitutional Court at the symposium held in South Korea by the Association of Asian Constitutional Courts and Equivalent Institutions (AACC)

## SEPTEMBER

8-14 September — Organization of the 7th International Summer School event by the Turkish Constitutional Court under the auspices of the Permanent Secretariat of the AACC

12-13 September — Attendance by the delegation of the Turkish Constitutional Court at the Conference of the Heads of the Supreme Courts of the Council of Europe member states held in Paris

16 September — Ceremony held on the occasion of the promotion of the Court's assistant rapporteur-judges to the office of rapporteur-judge and opening of the Court library following the restoration process

## OCTOBER

8 October — Election of Mr. Recep Kömürcü as the Vice-President of the Constitutional Court

23-24 October — Attendance by the delegation of the Turkish Constitutional Court at the ceremony held on the occasion of 10th Anniversary of the Constitutional Court of the Republic of Kosovo

25 October — Visit by the President of the President of the Constitutional Court of Indonesia and the accompanying delegation to the Turkish Constitutional Court

26 October — Appointment of Vice-President Mr. Recep Kömürcü as the Presiding Judge of the Second Section

# 2019

## MARCH

4-5 March Visit by President Mr. Zühtü Arslan and the accompanying delegation to the ECHR

19 March Visit by the by the Supreme Judicial Council of Iraq and the accompanying delegation to the Turkish Constitutional Court

26 March Election of Mr. Hasan Tahsin Gökcan as the Vice-President of the Constitutional Court

## APRIL

3-4 April Attendance by the delegation of the Turkish Constitutional Court at the 30th Anniversary Celebration of the Superior Court of Justice of Brazil

15 April Appointment of Vice-President Mr. Hasan Tahsin Gökcan as the Presiding Judge of the First Section

24-25 April 57th Anniversary of the Turkish Constitutional Court

## JULY

3 July Attendance by President Mr. Zühtü Arslan and the accompanying delegation at the oath-taking ceremony held for Ms. Saadet Yüksek to represent Turkey at the ECHR

25 July Oath-taking ceremony held for the recently-appointed Constitutional Court Justice Mr. Selahaddin Menteş

## AUGUST

15 August Publication of the Journal of Constitutional Jurisdiction no. 36/1 compiled by the Constitutional Jurisdiction Research Centre (AYAM)

## NOVEMBER

2-7 November Attendance by the delegation of the Turkish Constitutional Court at the symposium held by AACC in Indonesia

12 November Visit by the President of the Supreme Tribunal of Justice of Venezuela and the accompanying delegation to the Turkish Constitutional Court

21-22 November Attendance by the delegation of the Turkish Constitutional Court at the international conference on Criminal Law held in Warsaw

## DECEMBER

5 December Attendance by the delegation of the Turkish Constitutional Court at the International Conference on Constitutional Jurisprudence in the Western Balkans held by the Council of Europe

# CHAPTER 01

## FORMATION OF THE COURT


T.C.
ANAYASA MAHKEMESİ

# Formation of the Court

## I. OVERVIEW

The Constitutional Court is comprised of fifteen members.[1]

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

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

In the elections to be held in the respective general assemblies of the High Court of Appeals, Council of State, the Court of Accounts and the Council of Higher Education for nominating candidates for membership of the Constitutional Court, three persons obtaining the greatest number of votes shall be considered to be nominated for

1 Number of justices taking office at the Constitutional Court was reduced from 17 to 15 by Article 16 of the Law Amending the Constitution of the Republic Turkey, which is numbered 6771 and dated 21/1/2017. However, as per the provisional Article 21 (D) incorporated into the Constitution by Article 17 of the same law, which provides for "those who have been appointed as the members of the Constitutional Court from the Military Court of Cassation and the Supreme Administrative Military Court shall continue acting as the members of the Court until the termination of their offices for any reason", the Court has 16 members by 31.12.2019.

each vacant position. In the elections to be held for the three candidates nominated by the heads of bar associations from among self-employed lawyers, three persons obtaining the greatest number of votes shall be considered to be nominated.

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

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

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


## II. FORMATION OF THE PLENARY

The Plenary shall comprise of fifteen members including the President and two Vice-Presidents. The Plenary shall convene with the participation of minimum ten members and shall be chaired by the President or a Vice-President to be designated by the President. The Plenary shall render a decision by an absolute majority. However, a two-thirds majority shall be sought for decisions on annulment of Constitutional amendments, dissolution of political parties or deprivation of political parties of state aid. As of 31 December 2019, the Plenary is composed of the following members:

**Prof. Dr. Zühtü ARSLAN** | President

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

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

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

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

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

He is married with four children.

**Hasan Tahsin GÖKCAN** | Vice-President

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

**Recep KÖMÜRCÜ** | Vice-President

Mr. Kömürcü, holding offices as a judge in Birecik, Kargı, Kadirli and Ankara, then sat as a presiding judge at the Ankara Commercial Court. He was appointed as a member of the Court of Cassation on 16 March 2003. Holding office as a member of the 19th Civil Chamber of the Court of Cassation, he was then appointed as the Justice of the Constitutional Court by the President of the Republic of Turkey on 4 December 2008 from among three candidates nominated by the General Assembly of the Court of Cassation. He was elected as the Vice-President of the Constitutional Court by the Plenary of the Court on 8 October 2019. He has been holding office as the Vice-President and the Presiding Judge of the Second Section since 26 October 2019.

**Serdar ÖZGÜLDÜR** | Justice

Mr. Özgüldür held office as a military judge and prosecutor at various military courts. Serving as a prosecutor at the Supreme Military Administrative Court (SMAC), he was then appointed as a member of SMAC in 1995. He held offices as a member of the First Section from1995 to 2002 and as the secretary general of the SMAC from 2002 to 2004. He then served as a member of the Civil Chamber of the Court of Jurisdictional Disputes from 2000 to 2003. He was appointed as the Justice of the Constitutional Court on 21 June 2004. He then held office as the President of the Court of Jurisdictional Disputes from 22 March 2012 to 21 March 2016.

**Burhan ÜSTÜN** | Justice

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

**Prof. Dr. Engin YILDIRIM** | Justice

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

**Hicabi DURSUN** | Justice

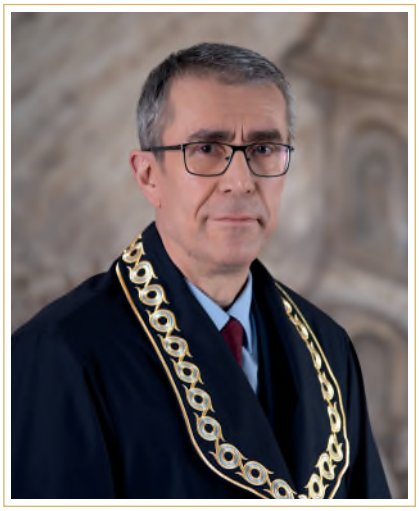
Mr. Dursun started public office as an assistant auditor candidate at the Court of Accounts in 1991. Qualified for the office in 1993, he then performed auditing activities as an auditor, chief auditor and senior auditor at the Court of Accounts from 1993 to 2008. He was appointed as a member of the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

**Celal Mümtaz AKINCI** | Justice

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

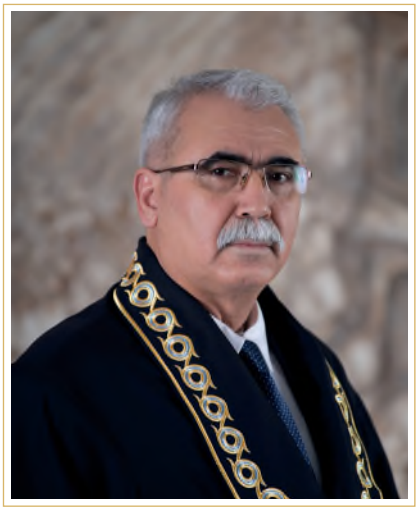
**Muammer TOPAL** | Justice

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



**M. Emin KUZ** | Justice

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



**Kadir ÖZKAYA** | Justice

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

**Rıdvan GÜLEÇ** | Justice

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

**Assoc. Prof. Dr. Recai AKYEL** | Justice

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

**Prof. Dr. Yusuf Şevki HAKYEMEZ** | Justice

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

**Yıldız SEFERİNOĞLU** | Justice

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

**Selahaddin MENTEŞ** | Justice

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

## III. FORMATION OF THE SECTIONS

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

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

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

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

As of 31 December 2019, pursuant to Article 29 of the Internal Regulations of the Constitutional Court, the list of the justices alternately attending the meetings of the Sections in 2019 is as follows:

### FIRST SECTION

| | |
|---|---|
| Hasan Tahsin GÖKCAN | Presiding Judge |
| Serdar ÖZGÜLDÜR | Member |
| Burhan ÜSTÜN | Member |
| Hicabi DURSUN | Member |
| Kadir ÖZKAYA | Member |
| Yusuf Şevki HAKYEMEZ | Member |
| Selahaddin MENTEŞ | Member |

### SECOND SECTION

| | |
|---|---|
| Recep KÖMÜRCÜ | Presiding Judge |
| Engin YILDIRIM | Member |
| Celal Mümtaz AKINCI | Member |
| Muammer TOPAL | Member |
| M. Emin KUZ | Member |
| Rıdvan GÜLEÇ | Member |
| Recai AKYEL | Member |
| Yıldız SEFERİNOĞLU | Member |

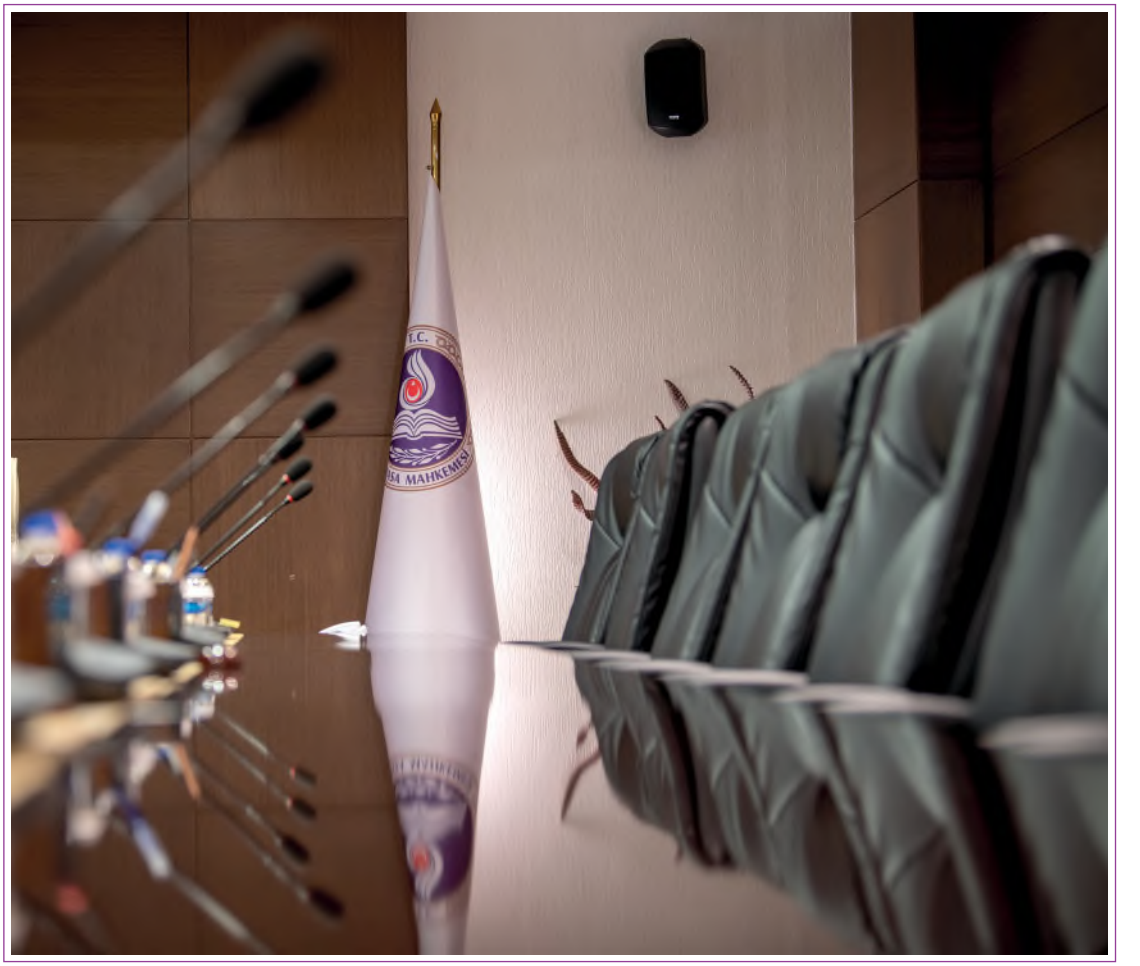
## IV. FORMATION OF THE COMMISSIONS

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

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

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

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



# CHAPTER 02

## DUTIES AND POWERS OF THE COURT

# Duties and Powers of the Court

## I. OVERVIEW

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

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

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

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

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

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

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

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

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

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

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

## II. DUTIES AND POWERS OF THE PLENARY

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

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

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

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

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

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

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

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

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

**j)** to examine objections; and

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

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

## III. DUTIES AND POWERS OF THE SECTIONS

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

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

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

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

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

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

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

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

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

## IV. DUTIES AND POWERS OF THE COMMISSIONS

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

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

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

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

# CHAPTER 03

## THE COURT IN 2019

# The Court in 2019

## I. DEVELOPMENTS AT THE COURT IN 2019

The Court has continued to apply its approach which broadens the scope of protection afforded to, and increases the standards in terms of, fundamental rights and freedoms in the decisions and judgments it has rendered in 2019.

By applying the list-based procedure in the individual application mechanism, the Court has achieved to conclude the applications found inadmissible in a more speedy fashion.

In alternately assigning the rapporteur-judges dealing with individual applications to the Sections and Commissions, it has been intended to ensure formulation of more qualified decisions and judgments which are in conformity with the established case-law.

In 2019, a total of 144 decisions/judgments rendered by the Court, 117 in individual application and 27 in constitutionality review, has been made available to the public through a press release.

The Court's new intranet updated with additional functions has been put into service. The social media accounts operated by the Court have been used more effectively with illustrations and statistics.

The Görünüm Journal, a bulletin whereby news and information on the Court and its decisions/judgments as well as statistical information are provided, continues to be published on digital platform.

An initiative to re-structure and institutionalize the Court's archive has been launched.

The Constitutional Jurisdiction Research Centre (AYAM), a unit within the Court formed to establish and develop the Court's relationship with the academic world, has organized training programmes, ensured formation of platforms for academic negotiations and coordinated the process during which the Court's publications were issued. The book titled Constitutional Justice, which has been published since 1984, is now formed into a peer-reviewed journal published every six months. Its first edition is offered to the utility of the academic circle.

The Court published and distributed, at national and international level, the 55th issue of the "Journal of Constitutional Court Decisions/Judgments" in 4 volumes and the 35th issue of the "Symposia Proceedings of Constitutional Justice", the Constitutional Justice Journal (Peer-reviewed Journal) no. 36/1, the "2018 Annual Report" both in Turkish and English, the "2018 Selected Judgments on Individual Applications", "Basic Texts of the Constitutional Court" and "Frequently Asked Questions on the Individual Application".

Besides, within the scope of the Joint Project of the Constitutional Court and the Council of Europe titled "Supporting the Individual Application to the Constitutional Court in Turkey" two handbooks regarding the individual application were published in 2019: "Law of Procedure in Individual Application" and "Right to Respect for Private and Family Life".

The library within the Court was restored. Accordingly, closed back shelf system was abandoned and instead open back shelves were installed. The space allocated for utilization was expanded, and thereby a study hall with twenty tables is also made available. Two separate units where the recent works and periodicals can be examined were also established within the Library. The Court has subscribed to several databases which enable the users to have access to rich and ample digital resources.

3439 new reference books were added to the Library's collection, thereby the total number of materials at the disposal of the Court Library has increased to nearly 25.000.

At the hall on the way of the Library, the gifts given by the Constitutional Courts from various countries to the President's Office are exhibited.

An assembly hall with a capacity of accommodating 150 persons is also made available.

Wired and wireless computer networks at the Court's premises were reinforced by recently-supplied equipment in 2019. Ensuring integration with the National Electronic Notification System, the Court has enabled the notification process to be conducted electronically.

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

# II- INTERNATIONAL ACTIVITIES OF THE COURT

## 1. OVERVIEW

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

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

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

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

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

## 2. COOPERATION WITH INTERNATIONAL ORGANIZATIONS

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

### A. World Conference on Constitutional Justice

The World Conference on Constitutional Justice unites 116 Constitutional Courts/Councils and Supreme Courts from five continents (Africa, the Americas, Asia, Australia/Oceania and Europe). It promotes constitutional justice –constitutional review including human rights adjudication– as a key element for democracy, the protection of human rights and the rule of law. The World Conference pursues its objectives through organization of regular congresses, by participating in regional conferences and seminars, by orchestrating the share of experiences and best practices, and by offering good services to its members on request.

The Turkish Constitutional Court became a member of the World Conference in 2013. The Court was elected to the Bureau of the Conference at the 3rd Congress in Seoul and served in the Bureau until the 4th Congress in Vilnius (2015-2017).

**B. Association of Asian Constitutional Courts and Equivalent Institutions**

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

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

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

The 7th Summer School was hosted by the Constitutional Court of the Republic of Turkey within the scope of the activities of the Permanent Secretariat of the AACC on 8-14 September 2019.

Among those who participated in the Summer School event with the theme of "Presumption of Innocence" are justices, rapporteur judges, researchers, speakers, legal experts and advisors from the constitutional courts or equivalent institutions of Azerbaijan, Bulgaria, Cameroon, Croatia, Georgia, Indonesia, Kazakhstan, Korea, Kosovo, Kyrgyzstan, Montenegro, Malaysia, Mongolia, Myanmar, Pakistan, Palestine, the Philippines, Thailand, Turkish Republic of Northern Cyprus, Ukraine and Uzbekistan. The 7th Summer School event started with the inaugural speech delivered by the President of the Turkish Constitutional Court, Mr. Zühtü Arslan. The participants then proceeded to their presentations on the "Presumption of Innocence" in their respective country. The Ankara part of the event was completed with the General Evaluation Session and Certificate Ceremony on 11 September.

The 7th Summer School event ended with a cultural visit to Eskişehir Province between 11 and 14 September.

Certificate Ceremony held for the Participants of the 7th Summer School Event of the AACC

The 2nd International Symposium on "Constitutional Review at the Association of Asian Constitutional Courts and Equivalent Institutions (AACC)" was held in South Korea. In representation of the Turkish Constitutional Court, Justice of the Court Mr. Kadir Özkaya and Rapporteur Mr. Hamit Yelken attended the Conference held by the AACC in Seul on 17-20 June 2019. In the Conference that was also attended by the representatives of the European Court of Human Rights and of the Venice Commission as well as the members of the Association, Mr. Kadir Özkaya delivered a presentation with the theme of "Principle of Proportionality in the Turkish Constitutional Justice".


Justice Mr. Kadir Özkaya and the accompanying delegation, attending the 2nd International Symposium on "Constitutional Review at the AACC" held in South Korea

Mr. Recep Kömürcü, Vice-President of the Turkish Constitutional Court, accompanied by Justice Mr. Engin Yıldırım and Secretary General Mr. Murat Şen, attended the 3rd International Symposium of the Constitutional Court of the Republic of Indonesia on "Constitutional Court and Protection of Social and Economic Rights" and the Board of Members Meeting as well as the Meeting of Secretary Generals of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) held in Bali, Indonesia between 2 and 7 November 2019.


Vice-President Mr. Recep Kömürcü and the accompanying delegation, attending the Board of Members Meeting of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) held in Bali, Indonesia

**C. Conference of European Constitutional Courts**

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

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

The term presidency of the Conference for the period between 2017 and 2020 has been undertaken by the Constitutional Court of the Czech Republic, and the 18th Congress will be held in Czech Republic in 2020.

**D. Preparatory Meeting of the 2nd Judicial Conference of the Constitutional/Supreme Courts/ Councils of the Organization of Islamic Cooperation (OIC) Member/Observer States.**

The 1st Judicial Conference of the Constitutional/Supreme Courts/Councils of the Organization of Islamic Cooperation (OIC) Member/Observer States, hosted by the Turkish Constitutional Court, was held in İstanbul between 14 and 15 December 2018. At the end of the Conference, it was held that the next Conference would be held in Indonesia in 2020 under the patronage of Indonesian Constitutional Court.

Secretary General Mr. Murat Şen, who visited Bali, Indonesia to attend the 3rd International Symposium of the Constitutional Court of the Republic of Indonesia and the Board of Members Meeting as well as the Meeting of Secretary Generals of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) between 2 and 7 November 2019, also attended the Joint Preparatory Meeting of the 2nd Judicial Conference of the Constitutional/Supreme Courts/ Councils of the Organization of Islamic Cooperation (OIC) Member/Observer States.

**E. Conference of Constitutional Jurisdictions of Africa**

On 7-8 May 2011, the Constitutional Courts/Councils and equivalent institutions in Africa held "the Constitutive Congress of the African Area of Constitutional Justice" in Algiers, Algeria. During the Constitutive Congress, the participants examined and adopted "the Statute of the Conference of Constitutional Jurisdictions of Africa" and proceeded to the election of the first Executive Bureau and the Secretary General. The Conference of Constitutional Jurisdictions of Africa (CCJA) was thereby established and the headquarters of the general secretariat was set in Algiers.

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

In order to promote constitutional justice in Africa and to promote the exchange of experiences, the CCJA holds an international seminar between two Congresses. The first seminar took place in Cotonou in 2013 on the theme: "the constitutional judge and the political power". The second seminar was held in Algiers in 2017 on the theme of "the access of individuals to constitutional justice".

The Constitutional Court of Turkey acquired the status of observer to the CCJA on 5 October 2017.

The 5th Congress of the CCJA was organized in Luanda, Angola on 9-13 June 2019. The President of the Turkish Constitutional Court Mr. Zühtü Arslan and the accompanying delegation participated in the Congress. Mr. Arslan delivered a speech titled "Role of the Turkish Constitutional Court in the Protection of Human Rights".

Also addressing to the participants at the closing session on behalf of the Association of Asian Constitutional Courts and Equivalent Institutions, President Mr. Arslan pointed out the significant role of the cooperation between regional institutions and constitutional courts.


Closing Conference of the Joint Project on Supporting the Individual Application to the Constitutional Court in Turkey held in İstanbul with a broad participation

**F. Council of Europe**

The Closing Conference of the Joint Project on Supporting the Individual Application to the Constitutional Court in Turkey (SIAC) themed "Review and Way Forward for the Individual Application System, Seven Years On" was held in İstanbul on 23-24 September 2019.

The Conference, which took place in presence of presidents and members of high courts from Turkey and various European countries – President of the Turkish Constitutional Court Mr. Zühtü Arslan and Justices, President of the Council of State Mrs. Zerrin Güngör and Justices, Vice-President of the European Court of Human Rights Mr. Robert Spano, President of the Venice Commission Mr. Giovanni Buquicchio, Director General for the Human Rights and Rule of Law of the Council of Europe Mr. Christos Giakoumopoulo, Deputy Head of the Delegation of the European Union to Turkey Mrs. Eleftheria Pertzinidou, Judges of the European Convention on Human Rights Mrs. Saadet Yüksel and Mr. Marko Bosnjak, and Deans and Faculty Members of the Faculty of Law– examined the current impact of the individual application system in Turkey. The road ahead for over 39,000 pending cases was also looked at and the ways of ensuring effectiveness of the national remedy were discussed. The themes of the sessions of the Conference were respectively "The Pivotal Role of the Individual Application in the System for the Protection of Fundamental Rights in Turkey", "The Individual Application in Other European Countries: A Comparative Outlook" and "The Execution of Individual Application Judgments: Challenges, Opportunities, and Way forward".

A delegation from the Congress of Local and Regional Authorities paid a visit to the Turkish Constitutional Court on 2 October 2019 within the scope of their visit to Turkey in order to draft a report, upon the request of the Committee of Ministers of the Council of Europe, on the state of local and regional democracy in the member states of the Council of Europe. The delegation was welcomed by the Secretary General of the Court Mr. Murat Şen along with the Deputy Secretary General of the Court Mr. Mücahit Aydın.

Deputy Head of Department for the Execution of Judgments of the European Court of Human Rights Mr. Clare Ovey and Legal Expert Mrs. Işık Batmaz paid a visit to the Turkish Constitutional Court on 2 May 2019 where they were welcomed by the Deputy Secretary General Mr. Mücahit Aydın and Chief Rapporteur-Judges Mr. Ayhan Kılıç and Mr. Murat Azaklı.

**G. European Court of Human Rights (ECHR)**

Chief Rapporteur-Judge of the Turkish Constitutional Court Mr. Ayhan Kılıç, the then Chief Rapporteur-Judge Mr. Murat Şen and Rapporteur-Judge Mr. Volkan Sevtekin attended the seminar on the topic "Strengthening Confidence in the Judiciary" held by the European Court of Human Rights in Strasburg, France on 25 January 2019.

President of the Turkish Constitutional Court Mr. Zühtü Arslan accompanied by a delegation – comprised of the then Vice-President Mr. Engin Yıldırım, Justices Mr. Muammer Topal, Mr. Hasan Tahsin Gökcan, Mr. Yusuf Şevki Hakyemez and Mr. Yıldız Seferinoğlu, Secretary General Mr. Murat Şen, Chief Rapporteur-Judges Mr. Ayhan Kılıç and Mr. Murat Azaklı, and Rapporteur-Judge Mr. Özgür Duman– rendered a visit to the ECHR on 4-5 March 2019. President Mr. Arslan had a bilateral meeting with the then President of the ECHR, Mr. Guido Raimondi. The delegation of the Constitutional Court also held meetings with the Judges of the 2nd Section of the ECHR and with Turkish Jurists.

Deputy Secretary General of the Constitutional Court Mr. Mücahit Aydın attended the 3rd Focal Points Forum of the Superior Courts Network (SCN), the European Court of Human Rights which was held in Strasbourg, France on 6-7 June 2019.


Meeting between President Mr. Zühtü Arslan and Secretary General of the Council of Europe Mr. Thorbjørn Jangland

President Mr. Zühtü Arslan, Justice Mr. Celal Mümtaz Akıncı as well as Secretary General Mr. Murat Şen attended the oath-taking ceremony held on 3 July 2019 for Assoc. Prof. Dr. Saadet Yüksel to represent Turkey at the ECHR. During his visits at Strasbourg, President Mr. Arslan also met with Mr. Thorbjørn Jangland, Secretary General of the Council of Europe.


President Mr. Zühtü Arslan, attending the oath-taking ceremony held for Ms. Saadet Yüksel, recently-appointed Turkish Justice of the ECHR

## 3. COOPERATION WITH NATIONAL CONSTITUTIONAL COURTS

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

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

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|---|---|
| **Indonesia** | |
| The Constitutional Court of Indonesia | 24 April 2007 |
| **North Macedonia** | |
| Constitutional Court of North Macedonia | 26 April 2007 |
| **Azerbaijan** | |
| Constitutional Court of Azerbaijan | 10 May 2007 |
| **Chile** | |
| Constitutional Court of Chile | 07 June 2007 |
| **Korea** | |
| Constitutional Court of the Republic of Korea | 24 April 2009 |

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| **Ukraine** | |
| Constitutional Court of Ukraine | 24 April 2009 |
| **Pakistan** | |
| Federal Supreme Court of Pakistan | 24 April 2009 |
| **Bosnia and Herzegovina** | |
| Constitutional Court of Bosnia and Herzegovina | 24 April 2009 |
| **Bulgaria** | |
| Constitutional Court of Bulgaria | 07 April 2011 |
| **Tajikistan** | |
| Constitutional Court of Tajikistan | 26 April 2012 |
| **Montenegro** | |
| Constitutional Court of Montenegro | 28 April 2012 |
| **Afghanistan** | |
| Independent Commission for Overseeing the Implementation of Constitution of the Islamic Republic of Afghanistan | 25 April 2013 |
| **Albania** | |
| Constitutional Court of Albania | 10 June 2013 |
| **Thailand** | |
| The Constitutional Court of the Kingdom of Thailand | 29 April 2014 |
| **Kyrgyzstan** | |
| The Constitutional Chamber of the Supreme Court of the Kyrgyz Republic | 28 September 2014 |
| **Romania** | |
| Constitutional Court of Romania | 17 October 2014 |
| **Algeria** | |
| Constitutional Council of Algeria | 26 February 2015 |
| **Turkish Republic of Northern Cyprus** | |
| Supreme Court of Northern Cyprus | 29 June 2015 |
| **Kosovo** | |
| Constitutional Court of Kosovo | 27 April 2016 |
| **Iraq** | |
| Federal Supreme Court of Iraq | 25 April 2017 |

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|---|---|
| **Kazakhstan** | |
| Constitutional Council of the Republic of Kazakhstan | 25 April 2017 |
| **Mongolia** | |
| Constitutional Court of Mongolia | 25 April 2017 |
| **Georgia** | |
| Constitutional Court of Georgia | 28 April 2017 |
| **Russia** | |
| Constitutional Court of the Russian Federation | 30 March 2018 |
| **Bolivarian Republic of Venezuela** | |
| The Supreme Tribunal of Justice of the Bolivarian Republic of Venezuela | 10 May 2018 |
| **Somalia** | |
| Supreme Court of Somalia | 19 December 2018 |
| **Djibouti** | |
| Constitutional Council of Djibouti | 17 June 2019 |

## 4. INTERNATIONAL ACTIVITIES OF THE COURT IN 2019

The Turkish Constitutional Court maintains its mutual contacts with both the superior courts of the foreign countries and international tribunals and institutions during 2019.

President of the Constitutional Court Mr. Zühtü Arslan hosted President of the Supreme Judicial Council, Mr. Faik Zıydan and the accompanying delegation consisting of the Members of the Court of Cassation and the Presidents of the Regional Courts of Appeal at his office on 19 March 2019.

The 30th Anniversary Celebration of the Superior Court of Justice of Brazil (STJ) and the international seminar on "The Judiciary in the International Relations", which were held in Brasília, Brazil on 3-4 April 2019, were attended by the then Vice-President of the Constitutional Court, Mr. Engin Yıldırım.

The Shariah Academy of Pakistan rendered a visit to the Turkish Constitutional Court on 8 April 2019 in order to gain insight into the Turkish legal system. The Pakistani delegation was received by the then Vice-President of the Court, Mr. Engin Yıldırım.

President of the Supreme Court of Djibouti Mr. Abdourahman Mohamed and the accompanying delegation rendered a visit to the Turkish Constitutional Court on 16 April 2019. President of the Court Mr. Zühtü Arslan welcomed Mr. Mohamed and the accompanying delegation at his office.

The National Youth Assembly of Pakistan paid a visit to the Turkish Constitutional Court on 19 April 2019. The delegation was received by Deputy Secretary General of the Court Mr. Mücahit Aydın.

The Organization for Islamic Cooperation's (OIC) Independent and Permanent Human Rights Commission President Prof. Dr. Akmal Saidov and the Secretary General of the Commission Mr. Margoob Butty, rendered a visit to the Turkish Constitutional Court on 30 April 2019. President of the Court Mr. Zühtü Arslan welcomed Mr. Saidov and Mr. Butt at his office.

Justice of the Turkish Constitutional Court Mr. Rıdvan Güleç and Rapporteur-Judge Mr. Umut Fırtına attended the 9th St. Petersburg International Legal Forum, which was held in St. Petersburg, Russia on 14-18 May 2019, upon the kind invitation of the Constitutional Court of the Russian Federation.

The international workshop organized by the Constitutional Council of Algeria in collaboration with the United Nations Development Programme in Algiers on 19-22 May 2019 was attended by the Deputy Secretary General of the Turkish Constitutional Court Mr. Mücahit Aydın.

President of the Turkish Constitutional Court Mr. Zühtü Arslan welcomed the Ombudsman of Portugal Mrs. Maria Lucia Amaral and the accompanying delegation at his office on 23 May 2019. The Ombudsman of Turkey Mr. Şeref Malkoç also accompanied the delegation.

President of the Inter-Parliamentary Union Ms. Gabriela Cuevas Barron and the accompanying delegation rendered a visit to the Turkish Constitutional Court on 10 June 2019. The delegation was received by the then Vice-President Mr. Engin Yıldırım.

The delegation of the Turkish Constitutional Court presided by President of the Constitutional Court Mr. Zühtü Arslan paid a visit to the Republic of South Africa. During his visit between 13 and 15 June 2019 upon the kind invitation of Chief Justice of the Constitutional Court of South Africa Mr. Mogoeng Mogoeng, President Mr. Arslan was also accompanied by President of the Court of Jurisdictional Disputes Mr. Hicabi Dursun and Chief Rapporteur-Judge of the Constitutional Court Mr. Ayhan Kılıç.

President of the Constitutional Council of Djibouti Mr. Abdi İbrahim ABSIEH and the accompanying delegation paid a visit to the Turkish Constitutional Court on 17 June 2019. President of the Turkish Constitutional Court Mr. Zühtü Arslan welcomed Mr. ABSIEH and the accompanying delegation at his office. After the meeting, a bilateral memorandum of cooperation was signed between the Turkish Constitutional Court and the Constitutional Council of Djibouti.

On the occasion of the 23rd Anniversary of the Constitution of Ukraine, an International Conference "Human Rights and National Security: Ensuring the Balance of Human Rights and the Interests of the State. The Role of the Constitutional Jurisdiction Body", was held on 26-28 June 2019 in Kyiv. The then Vice-President of the Turkish Constitutional Court Mr. Engin Yıldırım, representing Turkey in the conference, delivered a presentation titled "The Turkish Constitutional Court, Human Rights and National Security".

The then Vice-President of the Turkish Constitutional Court Mr. Engin Yıldırım and Justice Mr. Yusuf Şevki Hakyemez attended the Conference of the Heads of the Supreme Courts of the Council of Europe member states, held in Paris on 12-13 September 2019 upon the joint initiative of the Constitutional Council, Council of State and Court of Cassation of France.

Paying an official visit to Turkey with a view to gaining insight into current agenda of Turkey and discussing the steps to ensure progress on freedom of press and qualified journalism, the International Press Institute delegation was received by Secretary General of the Turkish Constitutional Court Mr. Murat Şen on 12 September 2019.

In its capacity as the Secretariat for Research and Development of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC SRD), the Constitutional Court of Korea represented by Deputy Director Mr. Miyoung CHUN and Contact Person Ms. Sora Kang paid a visit to the Turkish Constitutional Court, Directorate of International Relations on 20 September 2019. During the negotiations, the parties exchanged views on the Permanent Secretariats of the AACC.

Mongolian Ambassador to Ankara Mr. Bold Ravdan rendered a visit to the Turkish Constitutional Court on 24 October 2019. President Mr. Zühtü Arslan welcomed the ambassador Mr. Ravdan and the accompanying delegation at his office.

Bilateral meeting in South Africa between President Mr. Zühtü Arslan with Mr. Mogoeng Mogoeng, Chief Justice of the Constitutional Court of South Africa

Chief Justice of the Constitutional Court of the Republic of Indonesia Mr. Anwar Usman and the accompanying delegation paid a visit to the Turkish Constitutional Court on 25 October 2019. President Mr. Zühtü Arslan hosted Mr. Usman and the accompanying delegation at his office. During the negotiation, particular stress was put on the increasing strong relationship and collaboration between the courts of both countries.

Signing of a bilateral memorandum of cooperation between the Turkish Constitutional Court and the Djiboutian Constitutional Council

Justice of the Turkish Constitutional Court Mr. Selahaddin Menteş and Rapporteur-Judge Mr. Burak Fırat attended the 10th Judicial Year of the Constitutional Court of the Republic of Kosovo, which was held in Pristina on 22-26 October 2019.

President of the Supreme Tribunal of Justice of Venezuela Mr. Maikel Moreno and the accompanying delegation rendered a visit to the Turkish Constitutional Court on 12 November 2019. President Mr. Zühtü Arslan hosted Mr. Moreno and the accompanying delegation at his office. During the negotiation, Mr. Arslan expressed his satisfaction with the relationship between the courts of the two countries and stressed that this strong relationship would continue increasingly.

The Vice-President of the Turkish Constitutional Court Mr. Hasan Tahsin Gökcan and Rapporteur-Judge Mr. Hasan Saraç attended the International Conference on Criminal Law themed "Criminalization - Ideas and Restrictions", held by the Constitutional Court of Poland in Warsaw, Poland on 21-22 November 2019. Vice-President Mr. Gökcan delivered a presentation titled "Constitutional Restrictions on Criminalization".

Rapporteur-Judge of the Turkish Constitutional Court Ms. Fatma Gülbin Özcüre attended the International Conference "Freedom of Expression and Constitutional Jurisprudence in the Western Balkans", held by the Council of Europe in Pristina, Kosovo on 5 December 2019, and delivered a presentation.

President Mr. Zühtü Arslan, welcoming Chief Justice of the Constitutional Court of the Republic of Indonesia Mr. Anwar Usman and the accompanying delegation

President Mr. Zühtü Arslan, welcoming President of the Supreme Tribunal of Justice of Venezuela Mr. Maikel Moreno and the accompanying delegation

# CHAPTER 04

## PRESIDENT'S SPEECHES


VE ERDEMİDİR

# 25 April 2019 Welcoming Address, the 57th Anniversary of the Turkish Constitutional Court

His Excellency Mr. President,

Esteemed Guests,

I would like to welcome you to our ceremony held on the occasion of the 57th anniversary of the Constitutional Court, as well as extend you all my most sincere greetings.

The Constitutional Court may be said to have undergone three important phases in terms of its jurisdiction since it was founded. During the first phase that was until 2012, the Constitutional Court acted as a higher judicial body which mainly reviewed the constitutionality of laws.

The second phase of the Turkish constitutional jurisdiction started in 2012. With the constitutional amendment of 2010, the individual application mechanism has been introduced into our legal system, which has also modified the Constitutional Court's structure, as well as the number of its justices. Thus, the jurisdiction of the Court has been expanded to receive individual applications on human rights violations.

As a matter of fact, the individual application mechanism has not only extended the Court's jurisdiction but has also changed its judicial paradigm. With the introduction of this mechanism, the Court has turned into a higher judicial body based on the individual and fundamental rights and freedoms. Such a paradigm shift has also influenced the Court's approach in other areas of its jurisdiction. Indeed, the Court has reflected its rights-based approach, adopted in the individual application mechanism, in the constitutionality review as well.

One of the best examples of this interaction is the Court's annulment decision of 27 December 2018. In this decision, the Constitutional Court stroke down the relevant paragraph of Article 286 of the Code of Criminal Procedure no. 5271, which precluded recourse to appeal remedy against the initial conviction decisions rendered by district courts of appeal, for being in breach of Article 36 of the Constitution safeguarding the right to legal remedies. Thereby, the Court, previously adopting a cautious approach as regards the right to judicial review of decisions, has taken a significant step in conformity with the rights-based paradigm, which intended to prevent individuals from unjust treatment due to possible judicial errors.

This stance of the Constitutional Court has gone beyond the minimum safeguard provided by the European Convention on Human Rights as regards the same right. It is also satisfactory that shortly after the publication of the annulment decision in the Official Gazette, the legislator has made the necessary legislative amendments in order to eliminate the unconstitutionality.

His Excellency Mr. President,

The third phase of the Turkish constitutional jurisdiction has started with the constitutional amendment of 2017. With the constitutional amendment of 9 July 2018, the Constitutional Court has been empowered with the authority to review the constitutionality of the presidential decrees. Thus, the jurisdiction of the Constitutional Court has been extended to include, in addition to the legislative acts, the judicial review of the presidential decrees which are the first-hand regulatory acts of the executive.

The most important institution, the distinctive feature of the new system that has been adopted with the constitutional amendment of 2017, is the Presidential decrees. Therefore, the constitutionality review of the presidential decrees is of vital importance for the control and balance mechanism on which the system must be predicated upon.

In fact, since the introduction of the constitutional amendments, it has been a period of intensive work during which necessary preparations have been made by the Court in collaboration with the academicians who ponder and write on presidential decrees.

In this context, we have determined the theme of this year's symposium as "constitutional review and legal regime of presidential decrees". Taking this opportunity, I would like to extend my sincere thanks to the academicians who will contribute to the symposium with their participation and presentations, as well as to all participants.

Presidential decree is a new institution in our constitutional system. Basic principles, rules, and limits of the presidential decrees as well as their relation with the parliamentary laws have been laid out by the Constitution. In this respect, the task incumbent on the Constitutional Court is to carry out the constitutionality review of the contested presidential decrees brought before it.

Such decisions rendered by the Court will clarify the legal regime of the presidential decrees, on the one hand, and provide an insight into the nature of the relations among legislative, executive and judicial bodies in the new governmental system, on the other.

His Excellency Mr. President,

The above-mentioned three phases that the Turkish constitutional jurisdiction has undergone are also a part of the constitutionalism movements ongoing since the Ottoman Empire. Given our over two-century long history of constitutionalism dating back to the Charter of Alliance (Sened-i İttifak), it may be said that our constitutional identity has gone through a stable progress. Certain changes in

the governmental system as well as in the administration form took place but this has not changed the basic principles of our constitutional identity.

Our constitutional identity is best defined in Article 2 of the Constitution. Human rights, democracy, secularism, social state and state of law constitute the primary elements of the Turkish constitutional identity. Besides, indivisible integrity of the State has been a continuous part of the constitutional identity since the Ottoman Basic Law of 1876. Through its decisions, the Constitutional Court has been performing the tasks of interpreting and applying the principles set by the constitution-maker.

It must be emphasized at this point that supremacy of law or state of law serves as the most basic principle determining the constitutional identity as a whole. As a matter of fact, the Constitutional Court describes, in its many decisions, the state of law safeguarded by Article 2 of the Constitution as a principle required to be taken into consideration in interpretation and implementation of all provisions enshrined in the Constitution. Indeed, the aim of constitutionalism generally and of constitutional jurisdiction specifically is to ensure that the state be governed by law in order to secure fundamental rights and freedoms.

One of the principles making democracy "the regime of freedoms" is undoubtedly separation of powers. It is one of the most important principles contributing to the protection of fundamental rights and freedoms, through the control and balance mechanism, by avoiding a concentration of power.

The concept of separation of powers has been embraced by us since the final stage of the Ottoman Empire. In his work titled "Constitutional Law" (Hukuk-ı Esasiye) published in 1993, Babanzâde İsmail Hakkı, one of our first constitutional jurists, explains that separation of powers is indeed rooted in the very nature of human beings, and that a free person is empowered to enact and implement laws as well as to judicially resolve any disputes to arise. In the same vein, Ahmet Ağaoğlu, taking a role also in the preparatory period of the Constitution of 1924, considers that the step required to be taken in "establishing an independent and democratic State system" is to separate three powers –manifestation of national sovereignty– (the legislature, the executive and the judiciary) from one another and to ensure the harmonization of inter-relationship of these three powers.

The separation of powers, a paramount element of the Turkish constitutional system even today, as defined in the preamble of the Constitution, "refers solely to the exercising of certain state powers and discharging of duties and is limited to a civilized cooperation and division of functions." In this definition, 'division of functions' explicitly points out that each governmental branch shall fulfil, by exercising its constitutional powers, the duties entrusted to it. As a matter of fact, it is emphasized in the Court's decisions that in accordance with the principle of separation of powers, "no branch should exceed the limits of their powers set by the Constitution and interfere with one another's powers".

The State organs' working together to achieve their common goal of taking the Republic of Turkey beyond "the level of contemporary civilization" represents "cooperation". According to the Court, the principle of separation of powers requires the bodies to operate not individually but in cooperation by way of exercising their constitutional powers. In this sense, separation of powers is in no way a conflict of powers.

State of law and separation of powers, two basic elements of our constitutional identity, require the judiciary to be independent of the two other branches, namely the legislature and the executive. In this sense, judicial independence is a sine qua non for a democratic state governed by rule of law. Essentially, this fact prevails in all legal systems and in all times.

On the other hand, our recent experiences have shown that the judiciary is to be independent not only of the legislature and the executive but also of any kind of shadow structure and organization. Judge can, under no circumstances, entrust his mind and conscience to anyone else.

For the very reason, judges, who are independent and impartial in performing their duties by virtue of the Constitution, must deliver judgments based on their personal and conscious convictions. This constitutional provision also constitutes one of the universal rules of the judicial ethics. In fact, Article 2 of the Declaration of Turkish Judicial Ethics, which has recently been promulgated by the Council of Judges and Prosecutors and published in the Official Gazette, also regulates the independence of the judiciary, in compliance with Article 138 of the Constitution. Accordingly, judges and prosecutors "unconditionally reject any pressure and influence that may directly or indirectly affect their independence".

Lastly, it must be noted that the existence of principles and institutions, such as state of law, separation of powers, independence of the judiciary and judicial review, is necessary but not sufficient to guarantee the individual's fundamental rights and freedoms. At this point, we must give an ear to the late distinguished Prof. Dr. Mr. Ali Fuad Başgil, one of the pioneers of the constitutional jurisdiction, who expressed the necessity of a Constitutional Court far back in 1948. Mr. Başgil stated that the actual guarantee for safeguarding the fundamental rights and freedoms depends on the "culture of freedom and democracy" that could be achieved through education.

According to him, "The best constitution is the one that is applicable in the best and easiest manner". In this context, Ali Fuad Başgil emphasized that constitutional institutions and system alone would make no sense without applying and complying with the Constitution.

His Excellency Mr. President,

Esteemed Guests,

The expansion of the Court's jurisdiction has automatically led to an increase in its workload. We face an increasing workload in terms of both individual application and constitutionality review.

The number of individual applications pending before the Court as of today is nearly 42.000. 95% of the pending applications have been lodged since 2017.

As for constitutionality review, the number of pending cases is 104 in total; out of which 76 relates to abstract review and 28 to concrete review. The ratio of the cases to undergo abstract review is approximately 73%, while that of the ones to undergo concrete review is 27%. Considering the previous year's statistics, more than half of the total cases are subject to abstract review. However, in 2017, the ratio of the cases having undergone abstract review was approximately 11%, while that of the ones having undergone concrete review was 89%. In previous years, the ratio of the cases of concrete review had been generally higher than that of the cases of abstract review. This change points out the rapid increase in the number of the abstract review cases in the last two years.

In addition, nearly 70% of the pending cases of abstract review is comprised of decree-laws enacted under the state of emergency as well as the Presidential decrees. Currently, the Court has before it 21 Presidential decrees pending constitutionality review.

As shown by these statistics, in the forthcoming period, the decisions to be rendered through the constitutionality review will mainly be related to the decree-laws enacted under the state of emergency and to the Presidential decrees. It must be noted that in opposite of the cases of concrete review, the procedural and substantive review process as regards the cases of abstract review concerning the laws or decrees takes considerable time, as many rules are embodied in such laws and decrees.

Taking this opportunity, I extend my appreciation to all our members who work devotedly to deliver quality judgments by struggling to cope with the heavy workload, for their contributions.

On this occasion, I would like to commemorate our late retired justices and personnel. I also wish good health and prosperity to all members of the Court.

I wish that the symposium starting this afternoon be fruitful and successful. I would like to once again express my thanks to all distinguished academicians who will contribute to this symposium with their presentations and to all participants.

Once again, I would like to express my gratitude for your participation in our anniversary and for your attention. I extend my wishes of health and prosperity to all of you.


T.C.
ANAYASA MAHKEMESİ

## 23 September 2019 Welcoming Address, Closing Conference of the Joint Project on Supporting the Individual Application to the Constitutional Court in Turkey

Distinguished Guests,

Ladies and Gentlemen,

It is my pleasure to welcome you here today to the closing conference of the Joint Project on "Supporting the Individual Application to the Constitutional Court". I would like to extend you my most sincere greetings and express my gratitude for your participation.

Let me start my speech with a thought-provoking question: "How could we live together with those who are not like us, namely 'the others'?" In my opinion, this is the ever-present question as well as the hurdle of the civilization.

The simple answer to this question at the ideational level may be "to recognise the other's very existence and ontological status". As a matter of fact, recognizing the "other" as is also constitutes a guarantee for our own ontological existence. Likewise, as expressed by Lyotard, a French philosopher who was one of the pioneers of postmodernism, "every human being carries within him the figure of the other". So indeed, each of us is "the other" in the eyes of someone else. We are others for the other. For this very reason, we have certain rights in our capacity as "the other human being". In this sense, in Lyotard's view, human rights are at the same time "the other's rights".

At the social and political level, co-existence of differences entails a fair and pluralist order where fundamental rights and freedoms are safeguarded. Terrorism, xenophobia, racism and Islamophobia, which have been spreading rapidly nowadays, pose a serious threat to pluralism and thereby to the culture of living together.

On the other hand, another condition for living together with differences is the establishment of a fair legal order. In fact, the history of Europe of which we are a part is the history of struggles towards establishing such order. As all we know, the line of progress has not been straight in this respect, and there have been unfavourable occasions deflecting from democracy, rule of law and human rights.

As is known, the European Convention on Human Rights signed in 1950 ("Convention") has been one of the remedies intended to prevent re-occurrence of preceding massacres and systematic right violations in the European land.

The Convention as well as the European Court of Human Rights ("ECHR") entrusted with its interpretation were conceived as a safeguard mechanism that would serve to protect fundamental rights and freedoms against waves of deviation.

Esteemed guests,

We should hereby point to the crucial role undertaken by the Strasbourg bodies, notably the ECHR, in transformation of the legal orders of the Contracting Parties to the Convention. In this respect, the ECHR's case-law has had a determining impact on the progress of the constitutional and legal system of Turkey which has been a party to the Convention since 1954. Notably in the legislative intentions of the constitutional amendments of 1995, 2001, 2004 and 2010, a direct reference was made to both the Convention and the ECHR.

Undoubtedly, the constitutional amendment of 2010 through which the individual application mechanism was introduced was the most concrete and visible manifestation of the Convention's impact. The "European Convention on Human Rights" is mentioned not only in the legislative intention of Article 148 of the Constitution but also in its wording stating that individuals alleging a violation of their rights under joint protection of the Constitution and the Convention may lodge an individual application with the Constitutional Court.

Individual application that was put into practice on 23rd September 2012, exactly seven years ago today, has led to a revolutionary change in the Turkish legal order. In this respect, individual application is one of the greatest reforms introduced in the field of law in our country. We need not hours but days to thoroughly explain this reform and the change it has brought along. I will therefore confine my speech to the goals sought to be achieved by individual application mechanism and whether these goals have been achieved.

It should be noted at the outset that introduction of the individual application mechanism has two main goals, principal and practical. These goals may be found in the legislative intention of the constitutional amendment. Principal goal sought to be achieved by individual application is to ensure the advancement of fundamental rights standard in the country. As worded by the constitutional maker, through the jurisdiction to examine individual applications "the Constitutional Court is entrusted with the mission to protect and develop freedoms".

Practical goal of individual application is to ensure that the alleged right violations be examined at the domestic level, and if any, such violations be redressed without being brought before international judicial organs. Realisation of this goal would undoubtedly decrease the number of applications to be lodged from Turkey with international judicial organs. As a matter of fact, it is envisaged that -as worded by the constitutional maker- "through individual application mechanism, there will be a decrease in the number of cases to be brought before, and violation judgments to be rendered by, the ECHR against Turkey".

I am pleased to note that the seven-year functioning of individual application mechanism demonstrates that these two goals set by the constitutional maker have been achieved to a considerable extent. The Constitutional Court has adopted a right-oriented paradigm through this mechanism and rendered landmark decisions concerning fundamental rights and freedoms falling within the scope of individual application, ranging from the right to life to the freedom of expression.

These decisions have offered redress for damages resulting from right violations on one hand and contributed to the resolution of legal problems concerning the fundamental rights and freedoms on the other. In brief, the right-oriented decisions rendered through the individual application mechanism have made significant contributions to the improvement of standards of fundamental rights and freedoms in the country.

Besides, thanks to effective functioning of the individual application mechanism by the Constitutional Court, the allegations of right violations have been, to a significant extent, addressed at the domestic level. So indeed, effective functioning of this mechanism has also led to a significant decrease in the number of applications lodged against Turkey before the ECHR. In 2012 before the introduction of individual application system, number of pending cases before the ECHR against Turkey was 16.900. By 31 August 2019, this number is 8.800.

Moreover, putting aside the decisions whereby the Constitutional Court provided redress for thousands of individuals by way of finding a violation and awarding compensation, only a very small number of the applications found by the Constitutional Court inadmissible or no-violation was concluded differently by the ECHR. Therefore, the goal of resolving a significant part of the alleged right violations wit-

hin the Turkish legal system, which was aimed by the constitutional amendment on individual application mechanism, has been considerably achieved.

Esteemed guests,

We have experienced difficulties during the seven-year period of the individual application mechanism. From the beginning, the Constitutional Court has been facing with an intensive workload. I would like to provide you with statistical information on the seven-year past of individual application in order to give you a better insight of the workload-related difficulties faced or being faced by the Court.

Since 23 September 2012, the Court has received over 244.000 individual applications, approximately 197.000 of which have been concluded. It should be also noted that in the aftermath of the coup attempt of 15 July 2016, the Court has received additional applications which were over 100.000. During the state of emergency, the Court has dealt with such heavy workload on one hand and delivered higher number of violation judgments compared to ordinary times on the other.

Workload is still the most significant problem of the individual application mechanism. Currently there are nearly 47.000 pending applications on the Court's docket. In this sense, the fact that the ECHR has around 62.000 pending applications in total lodged by 47 countries provides a better understanding into the extent of our Court's workload.

The Constitutional Court has been so far taking necessary measures in order to overcome the increasing workload of individual application mechanism. However, functioning of this mechanism as an effective remedy depends on elimination of structural problems and ensuring improvement of our legal system in a way that would cause fewer violations.

The Constitutional Court is not in a position to examine and conclude, one by one, all alleged right violations raised throughout the country through individual application. Nor is it possible. Its mission is indeed to lay out main principles and procedures in a way to prevent new violations by means of identifying the problems underlying the violation. Notably, following the Court's violation judgments, inferior courts are to implement principles pointed out by the Court in cases of same or similar nature without awaiting for new applications to be lodged.

Besides, in cases where the violation has been resulted from a provision of law, the prompt step to be taken by the legislator to make necessary amendments in light of the stated grounds will prevent occurrence of new violations.

Distinguished guests,

Protection of fundamental rights and freedoms by executing decisions delivered through individual application mechanism in a more effective manner necessitates an effective and efficient cooperation among institutions. At this point, it appears that there are certain

ongoing debates concerning the nature of individual application, the first and foremost of which is the misperception that it is an appeal remedy. As we have previously stressed, the introduction of individual application has not vested the Constitutional Court with an appellate review authority in the civil, criminal and administrative jurisdiction.

The Court's examination through individual application mechanism is confined to determining whether the public authorities' impugned acts and actions have led to a violation of a right, precisely as is the case with the ECHR's examination on the basis of the Convention. This is indeed fulfilment of a constitutional duty by virtue of a power emanating from the Constitution. In this respect, the relation between the Constitutional Court and the other supreme courts, namely the Court of Cassation and the Council of State, is based on a constitutional division of function.

In addition, in order for an application to be lodged with the Constitutional Court, ordinary legal remedies including appeal with the Court of Cassation and the Council of State must be exhausted. Accordingly, within the scope of individual application, examination of the decisions that have become final after exhaustion of appeal remedy is a necessity stipulated by the Constitution.

However, Article 148 of the Constitution restricts the jurisdiction of the Constitutional Court with the provision "In the individual application, no examination shall be made on the issues to be considered in appellate review". It is specified in the reasoning of the legislative proposal regarding the constitutional amendment that the said provision has been introduced in order to "prevent any possible jurisdictional disputes between the Constitutional Court and the other high judicial bodies".

In this case, the examination to be made by the Constitutional Court within the scope of the individual application is limited to the determining "whether any fundamental right has been violated" and "how such a violation will be redressed". The Court does not carry out this examination in terms of "the compliance with the procedure and law" as is the case with the ordinary legal remedies, but in terms of the constitutional guarantees concerning fundamental rights and freedoms. In this sense, as stated in the Constitutional Court's decisions, "any examination as to whether fundamental rights and freedoms within the scope of individual application have been violated under the Constitutional guarantees cannot be regarded as 'the examination of an issue to be considered in appellate review'...".

It should be noted that debates on the jurisdiction of supreme courts through individual application are not peculiar to us. In all countries where the remedy of individual application to the constitutional courts has been introduced, the decisions rendered by these courts have been criticized by other supreme courts for interfering with their jurisdictions. Therefore, similar debates in our country should be considered normal.

However, we believe that strengthening of the communication and dialogue between supreme courts will contribute to reduce the discrepancy of views and hence to strengthen the Turkish legal system. As a matter of fact, I would like to express that the meetings, which have been held within the scope of the project that we are closing today and brought together the supreme courts, have contributed to the strengthening this communication.

Indeed, within the scope of this project, very efficient studies have been carried out in the case-law forums held with the participation of the Constitutional Court, the Court of Cassation and the Council of State with a view to contributing to the consistency in supreme courts' case-law.

Dear guests,

I would like to note that such projects, in the most general sense, promotes the activities that serve a world ideal where fundamental rights and freedoms are better protected. The responsibility to work for a better world is a responsibility we should undertake not only for ourselves but also for the future generations. As a Kashmiri saying goes, "We do not inherit the Earth from our ancestors—we borrow it from our children".

We must be in solidarity in order to fulfil this obligation as well as to protect the values such as democracy, rule of law, and human rights against undesired waves. The Council of Europe –of which we are a founding member– was built on that purpose. Indeed, a determined struggle against diseases such as terrorism, racism, xenophobia and Islamophobia which are the enemies of these common values requires national and international solidarity.

Sa'di of Shiraz was undoubtedly one of those who most briefly expressed the organic relationship and solidarity between people. In Gulistan which he wrote about eight centuries ago, Sa'di says "If you are indifferent to the misery of others, it is not fitting that they should call you a human being".

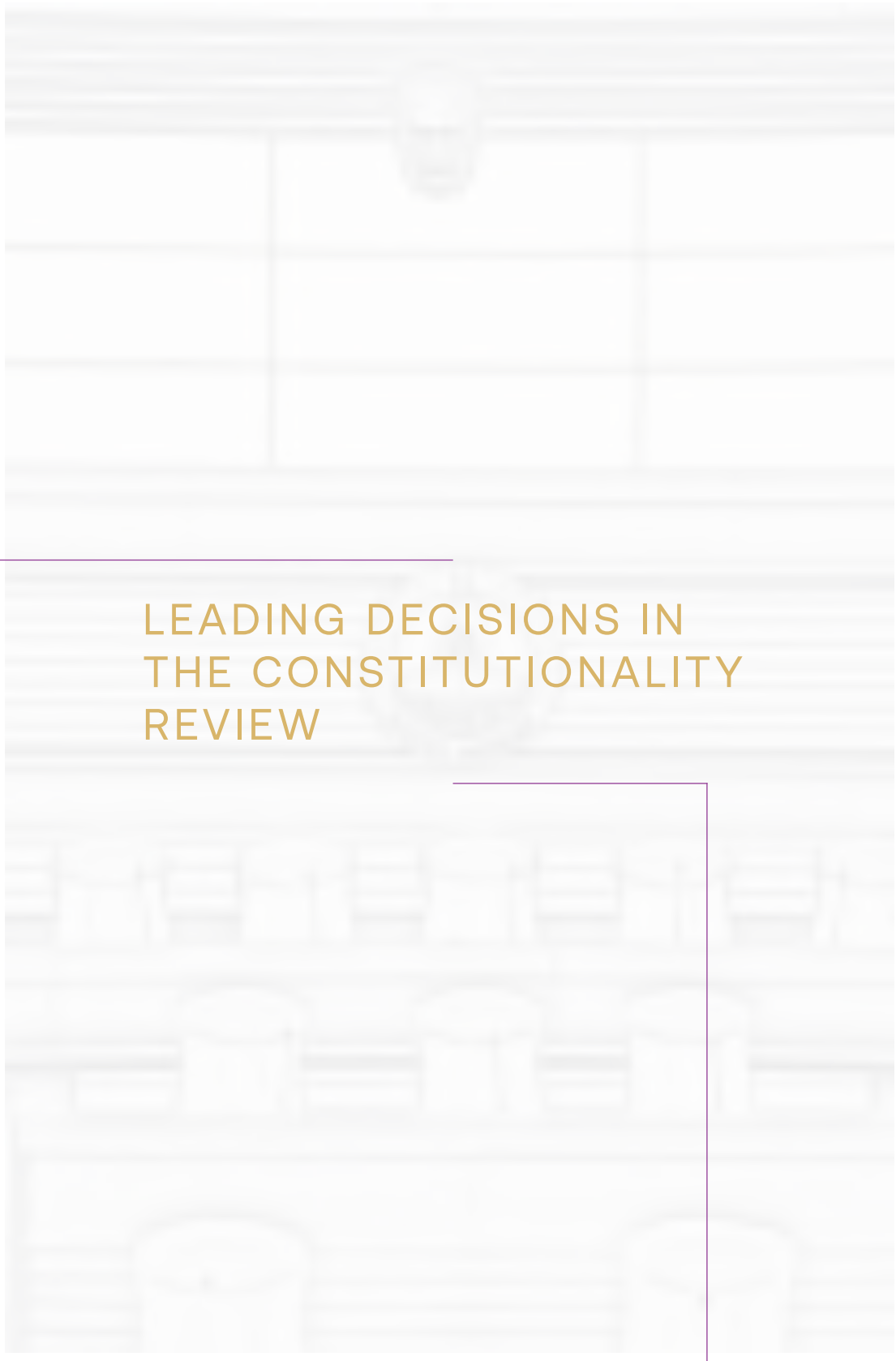
Unless we materialize this message given through the poem "Bani Adam", which is inscribed at the entrance of the United Nations building in New York, violations of fundamental rights and grief experienced in various regions of the world will continue. Nelson Mandela, one of those who internalized Sa'di's message, expressed the relationship with "the other" very well through freedom. According to Mandela, "To be free is not merely to cast off one's chains but to live in a way that respects and enhances the freedom of others".

With these feelings and thoughts, I would like to thank all those who have contributed at every stage from the beginning of this successful project until the closing conference, the stakeholders and all participants who will make presentations at the sessions.

I wish that the conference will be fruitful and I would like to once again extend my cordial greetings.

# CHAPTER 05

## LEADING DECISIONS IN THE CONSTITUTIONAL REVIEW



# LEADING DECISIONS IN THE CONSTITUTIONALITY REVIEW

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

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

## DECISION ANNULLING THE PROVISION PRECLUDING THE RETROACTIVE APPLICATION OF THE LAW MORE FAVOURABLE TO THE ACCUSED

(E.2019/9, K.2019/27, 11 April 2019)

### CONTESTED PROVISION

The contested provision stipulates that the Law shall not be applicable to the cases pending by the date of its entry into force.

### GROUND FOR THE REQUEST FOR ANNULMENT

It was maintained in brief that the contested provision precluded the retroactive application of new legal provisions that were more favourable to those accused of the offences committed when the abolished law had been in force. In this regard, it was claimed that the contested provision was in breach of Articles 2 and 38 of the Constitution.

### THE COURT'S ASSESSMENT

The provision laid down in Article 38 of the Constitution, which provides that *"... no one shall be given a heavier penalty for an offence other than the penalty applicable at the time when the offence was committed ..."* prohibits the application of a less favourable law retroactively by virtue of the principle of legal certainty and security. In cases where an act no longer constitutes an offence or carries a lighter penalty according to the law that entered into force after the date of offence, the principle of application of the more favourable law, another sub-principle, comes into question.

Unlike the prohibition on the application of a less favourable law retroactively, Article 38 of the Constitution does not include an explicit provision regarding the retroactive application of a more favourable law. Nor does it include a provision which stipulates that the punishment prescribed by the law that was in force at the time of offence must definitely be imposed for that offence.

The Constitution explicitly prohibits the retroactive application of the law aggravating the prescribed penalty to the offences committed prior to its entry into force. This prohibition, which is a consequence of the principle of legal certainty and security, also requires the application of the subsequent law that is more favourable than the former law in force at the time of offence. As a matter of fact, in cases where an act constituting an offence at the material time no longer constitutes an offence or it carries a lighter penalty in accordance with the subsequently enacted law, application of the less favourable provisions included in the abolished law will result in an unpredictable punishment for the individuals. This falls foul of the principle of legality of crimes and punishments which aims at ensuring the constitutional guarantee of the individuals' legal securities in the area of criminal law.

In addition, retroactive application of the more favourable criminal law is also a requirement of the principles of justice and fairness in conjunction with the rule of law. Imposition of a heavier penalty for an act, which no longer constitutes an offence or carries a lighter penalty in the face of developing social order and changing social needs, on the sole ground that it was previously committed does not comply with the principles of justice and fairness.

Considering the aforementioned issues together, it has been concluded that application of the more favourable law in the course of criminal proceedings is a constitutional obligation within the scope of the principle of legality of crimes and punishments which is enshrined in Article 38 of the Constitution.

As a matter of fact, the principle of application of the more favourable law is defined as "If there is a difference between the law in force at the time a criminal offence was committed and a provision subsequently brought into force, then the law which is more favourable to the offender is applied and enforced" in Article 7 of the Turkish Criminal Code, titled "Jurisdiction ratione temporis", which is regulated in accordance with the aforementioned constitutional principle.

In this context, the contested provision precludes the application of the Law to the cases pending as of the date of its entry into force without any distinction between civil and criminal norms. This situation leads to different results in terms of the application of criminal provisions.

The contested provision does not allow for the determination of the more favourable provisions between the former and current ones regarding the offences committed when the former law was in force and against which criminal proceedings were initiated. Nor does it allow for the retroactive application of the current provisions even if they are more favourable to the accused. This situation is contrary to the principle of application of the more favourable law within the scope of the principle of legality of crimes and punishments.

Consequently, the Court has found the contested provision unconstitutional and accordingly annulled it.

## DECISION ANNULLING THE PROVISION PROVIDING FOR REINSTATEMENT OF THE MANAGERS OF PROFESSIONAL ASSOCIATIONS WHO RESIGNED TO STAND FOR THE PARLIAMENTARY AND LOCAL ELECTIONS

(E.2019/6, K.2019/25, 11 April 2019)

### A. ADDITIONAL ARTICLE 1 OF LAW NO. 5174

#### CONTESTED PROVISION

As set forth by the contested provision, in the event that the President of the Turkish Union of Chamber and Commodity Exchanges ("the Union") and members of the Union's Administrative Board as well as the chairpersons and members of the administrative boards of the chambers and commodity exchanges, who resigned to be nominated as a candidate for the parliamentary and local elections, could not be nominated or elected, they would be reinstated in their previous positions. It was also set forth that during this period, no election shall be held for the replacement of the President of the Union as well as the chairpersons of the administrative boards of the chambers and commodity exchanges, and substitute members shall represent the members of the administrative board.

#### GROUNDS FOR THE REQUEST FOR ANNULMENT

It was maintained in brief that despite the constitutional arrangement making no distinction among the professional associations which are in the form of a public institution, the managers previously holding office in any of these associations are given the opportunity of reinstatement in their previous positions, by virtue of the contested provision, in the absence of any justified ground; and that the contested provision has also constituted a disproportionate interference with the autonomous nature of the professional associations that is safeguarded by the Constitution. It is accordingly asserted that the contested provision was in breach of Articles 10 and 67 of the Constitution.

#### THE COURT'S ASSESSMENT

The chambers and commodity exchanges as well as their umbrella organization, namely the Union, are professional associations in the form of a public institution, which are founded by Law no. 5174 within the framework set in Article 135 of the Constitution. The reason why those holding office in the administrative bodies of such professional associations are to resign in order to stand as a candidate in parliamentary and local elections is that these persons are among "those who are holding office in the administrative and supervisory boards of the professional associations in the form of a public institution" that are embodied in Article 18 of the Law on Parliamentary Elections.

The general framework of the right to stand for elections is set by Article 67 of the Constitution whereby the citizens are granted the right to stand for elections in accordance with the conditions prescribed in law and which sets forth that exercise of this right shall be governed by law. Article 76 of the Constitution where the right to stand for parliamentary elections is specifically set forth requires those holding certain public positions to resign from office so as to stand as a candidate in parliamentary elections.

The statutory arrangement allowing for the reinstatement of those who resigned to stand as a candidate in elections if they could not be nominated or elected is the Law on Basic Provisions of Elections and Voter Registers.

By vesting citizens with the right to stand for elections in accordance with the conditions indicated in law and by also noting that the exercise of this right shall be regulated by law, the Constitution gives discretionary power to the legislator in regulating the said right. In exercising the discretionary power in this respect, the legislator is to act in compliance with the principle of equality before the law.

In the constitutionality review to be made, under the principle of equality, in respect of the right to stand for elections, it must be primarily ascertained whether individuals in the same or similar positions have been treated differently within the meaning of Article 10 of the Constitution. In this sense, it must be determined whether there has been any distinction among the individuals in the same or similar positions as regards the interference with the right to stand for elections.

It is stipulated that those holding office in the administrative bodies of the professional associations covered by Law no. 5174 resign from office in order to stand as a candidate in parliamentary and local elections as these officers are among the ones who are holding office in the administrative and supervisory boards of the professional associations in the form of a public institution and who are enumerated in the Law on Parliamentary Elections.

Besides, it has been observed that as the contested provision allows for reinstatement in the previous position in the event that those concerned have failed to be nominated as a candidate or lost the election, it has led to a different treatment between the individuals holding office in the administrative bodies of the professional associations covered by Law no. 5174 and the ones holding office in the administrative bodies of the other professional associations that are in the form of a public institution.

As required by the principle of equality, a different arrangement introduced in favour of some of the individuals who are indeed in comparable situations may be considered not to afford a privilege only when it has an objective and reasonable basis and is proportionate. However, Additional Article 1 embodying the contested provision contains no explanation as to the objective and basis of the provision. Nor does the legislative intention of Law no. 7152 contain any explanation to this effect.

While the exercise of the right to stand for elections is conditioned upon the resignation from office, as a general restriction applicable to the managers of all professional associations in the form of a public institution, a different arrangement is introduced, by virtue of a special provision allowing for reinstatement, in respect of the managers of the professional associations that are covered by Law no. 5174. The arrangement in the contested

provision, which has led to a different treatment, is contrary to the principle of equality as regards the right to stand for elections.

Consequently, the Court has found the contested provision in breach of Articles 10 and 67 of the Constitution and therefore annulled it.

Besides, as Additional Article 1 § 1 of Law no. 5174 has been annulled, the second and third paragraphs thereof are no longer applicable. Therefore, these paragraphs have been also annulled pursuant to Article 43 of the Code no. 6216 on the Establishment and Rules of Procedures of the Constitutional Court.

### B. ADDITIONAL ARTICLE 1 OF LAW NO. 5362

CONTESTED PROVISION

In the contested provision, it is set forth that if the general president and chairpersons of the professional associations of merchants and craftsmen as well as the members of the administrative and supervisory boards of these associations, who resigned to be nominated as a candidate for the parliamentary and local elections, could not be nominated or elected, they shall be reinstated in their previous positions. It is also set forth that during that period, no election shall be held for the replacement of the president and chairpersons and these offices shall be held temporarily; and that substitute members shall represent the members of the administrative board.

GROUNDS FOR THE REQUEST FOR ANNULMENT

It was maintained that as the grounds asserted for the unconstitutionality of Additional Article 1 of Law no. 5174 were applicable also to Additional Article 1 of Law no. 5362, the said provision was in breach of Articles 10 and 67 of the Constitution.

THE COURT'S ASSESSMENT

The professional associations of merchants and craftsmen are professional associations in the form of a public institution, which are founded by Law no. 5174 within the framework set in Article 135 of the Constitution. Therefore, the above-cited assessments made under the heading "A. As regards Additional Article 1 of Law no. 5174" are also applicable to Additional Article 1 § 1, which is added to Law no. 5362 and embodies an arrangement, which is of the same nature with the annulled one, for another professional association.

Consequently, the Court has found the contested provision in breach of Articles 10 and 67 of the Constitution and therefore annulled it.

As Additional Article 1 § 1 of Law no. 5362 has been annulled, the second paragraph thereof is no longer applicable. Therefore, this paragraph has been also annulled pursuant to Article 43 of the Code no. 6216 on the Establishment and Rules of Procedures of the Constitutional Court.

## DECISION ANNULLING CERTAIN PROVISIONS OF THE LAW NO. 7070 ON MAKING CERTAIN ARRANGEMENTS UNDER THE STATE OF EMERGENCY

(E.2018/73, K.2019/65, 24 July 2019)

### A. PROVISIONS STIPULATING THAT THE LAWYERS UNDER CRIMINAL INVESTIGATION FOR THE OFFENCES LISTED IN ARTICLES 220 AND 314 OF THE TURKISH CRIMINAL CODE NO. 5237 AS WELL AS TERRORISM-RELATED OFFENCES SHALL BE BANNED FROM REPRESENTING THEIR CLIENTS FOR A CERTAIN PERIOD OF TIME

#### CONTESTED PROVISION

The contested provisions stipulate that in cases where the client is suspected, accused or convicted of organized crimes, such as establishing an organization for the purpose of committing offences and membership of a criminal organization, which are listed in Article 220 of Law no. 5237, and establishing an armed organization, commanding an armed organization and becoming a member of such an organization, which are listed in Article 314 thereof, as well as terrorism-related offences, the lawyer defending or representing the client shall be banned from defending or representing him where the lawyer is also under an investigation or prosecution on account of any of the same offences.

#### GROUND FOR THE REQUEST FOR ANNULMENT

It was maintained in brief that considering an investigation against a lawyer sufficient for banning him from representing his clients would eliminate the exceptional nature of the ban, make it easier to ban a lawyer from representing his clients and expand the limits of the ban. In this regard, it was argued that the impugned provisions were unconstitutional.

#### THE COURT'S ASSESSMENT

Banning such lawyers from representing their clients is not a type of punishment, but a judicial measure aiming at the proper conduct of the proceedings especially related to the organized crimes. Since the contested provisions envisage the lawyers to be banned from representing their clients for a certain period of time, they restrict the right to legal assistance enjoyed by the clients, as well as the right to work enjoyed by the lawyers who have been imposed the relevant measure.

It can be said that the impugned provisions aim at protecting the national security, public order and public security, and that therefore they restrict the rights enshrined in Article 36 and 49 of the Constitution for constitutionally legitimate reasons.

In order to impose the ban, it is not required that the client and the lawyer undergo an investigation or prosecution for the same offence. In this context, even if there is no relation between the respective investigations against the lawyer and the client, in the event that the conditions specified in the Law are fulfilled, the said ban may be imposed on the lawyer.

The impugned provisions set forth that in order to ban a lawyer from representing his clients, it is sufficient that an investigation has been

opened against him for the criminal or armed organization offences under Articles 220 and 314 of Law no. 5237.

The impugned provisions allow for banning a lawyer, who serves the effective exercise of the right of defence and reaching the material fact, from defending or representing his client due to a mere suspicion of crime, despite his having no relation with the offence allegedly committed by his client or despite the existence of no indication that he has abused his duty as a defence counsel. Thus, these provisions impose an extraordinary and excessive burden on the individuals in terms of both right to legal assistance and the right to work, thereby imposing a disproportionate restriction on the relevant rights.

Consequently, the Court has found the contested provisions in breach of Articles 2, 13, 36 and 49 of the Constitution and therefore annulled it.

### B. PROVISION STIPULATING THAT THE HEARING CAN BE CONTINUED IN THE ABSENCE OF THE DEFENCE COUNSEL

#### CONTESTED PROVISION

The contested provision stipulates that in cases where the defence counsel does not attend the hearing without an excuse or leaves the hearing, the hearing can be continued.

#### GROUND FOR THE REQUEST FOR ANNULMENT

It was maintained in brief that the impugned provision, which enables the continuation of the hearing in the absence of the defence counsel, did not comply with the elements of the right to a fair trial, namely the principles of adversarial hearing and equality of arms. In this regard, it was argued that the impugned provision was unconstitutional.

#### THE COURT'S ASSESSMENT

The contested provision enables the continuation of the hearing in the absence of the defence counsel. This is applicable only to the cases where the defence counsel does not attend the hearing without an excuse or leaves the hearing. The legislative intent of the provision is to prevent malicious attempts that will result in the procrastination of the proceedings.

It has been understood that the impugned provision has been adopted not to restrict the right to legal assistance at the hearing affecting the outcome of the proceedings, but to bring an exception to the provision which prevents any hearing where the defence counsel does not attend, even if there is no substantial action to be taken at the hearing affecting the outcome of the proceedings.

The guarantees included in the other provisions of the Law prevent the application of the impugned provision in respect of the hearings where substantial actions affecting the outcome of the proceedings are to be taken. Accordingly, a fair balance is struck between the obligation to appoint a defence counsel to the accused and ensure his use of the legal assistance in certain cases, with a view to ensuring the fairness of the proceedings, and the obligation to conclude the proceedings within a reasonable time.

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

## C. PROVISION RESTRICTING THE RIGHT TO CONFER WITH A LAWYER OF THOSE CONVICTED OF ESTABLISHING AN ORGANIZATION AND OF CRIMES AGAINST THE STATE AND THE NATION

### CONTESTED PROVISION

The contested provision stipulates that for a period of three months, during the interviews between the persons, who are convicted of establishing an organization and of crimes against the state and the nation, and their lawyers, interviews may be recorded by voice or video with a technical device; an officer may be present to monitor the interviews; the documents (or their copies) exchanged between the lawyer and his client, the relevant files and the records they keep about their interviews may be seized; and the days and hours of their interviews may be limited.

### GROUND FOR THE REQUEST FOR ANNULMENT

It was maintained in brief that in accordance with the impugned provision, imposition of restrictions, under subjective conditions, on the convicts' right to confer with their lawyers freely would result in arbitrary restrictions on their right and that the said restrictions impaired the essence of the relevant rights and were disproportionate. In this regard, it was argued that the impugned provision was unconstitutional.

### THE COURT'S ASSESSMENT

It has been understood that the impugned provision has been intended to ensure the security of penitentiary institutions and to prevent offences threatening the national security and public order, and that in this respect, it aimed at a constitutionally legitimate restriction.

While the State has an obligation to respect the private lives of convicts, it also has an obligation to ensure the security of penitentiary institutions as well as the security of the society in general. In this respect, the restriction imposed by the impugned provision is appropriate and necessary for ensuring the security of penitentiary institutions as well as preventing offences threatening the national security and public order.

In addition, the impugned provision has not introduced a categorical restriction with regard to all of those convicted of the offences specified therein. The impugned provision allows for the relevant restrictions in cases where there are information, findings and documents pointing to the fact that during the said interviews between the convicts and their lawyers, the security of the society and penitentiary institution is imperilled, a terrorist organization or another criminal organization is directed, orders and instructions are given to these organizations, and they give secret, open or encrypted messages though their comments. It is also specified in the impugned provision that a certain period of time is prescribed for the said restriction and that the authority for imposing a restriction in this respect is left to the judicial authorities.

Besides, the restriction orders given by the execution judge can be appealed in accordance with Law no. 5275. Those concerned have the right to appeal to the assize court located in the premises where the execution judge holds office. In this respect, it has been observed that the relevant

Law also includes legal safeguards to prevent the arbitrary use of the authority referred to therein.

Considering these safeguards, the reasonable balance is struck between the aim pursued by the impugned restriction and the individual interest under the right to respect for private life. Accordingly, the contested provision does not impose a disproportionate restriction on the right to respect for private life.

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

### D. PROVISION RESTRICTING THE RIGHT TO CONFER WITH A LAWYER OF THOSE ALREADY CONVICTED OF ESTABLISHING AN ORGANIZATION AND OF CRIMES AGAINST THE STATE AND THE NATION BUT SUSPECTED OR ACCUSED OF ANOTHER OFFENCE

#### CONTESTED PROVISION

The contested provision stipulates that Article 59, which prescribes restrictions for interviews with lawyer, is also applicable to those who are convicted of establishing an organization and of crimes against the state and the nation but confer with their lawyers in their capacity as suspect or accused for another offence.

#### GROUND FOR THE REQUEST FOR ANNULMENT

It was maintained in brief that in accordance with the impugned provision, imposition of restrictions, under subjective conditions, on the convicts' right to confer with their lawyers, in their capacity as suspect or accused for another offence, would result in arbitrary restrictions on their right. In this regard, it was argued that the impugned provision was unconstitutional.

#### THE COURT'S ASSESSMENT

The contested provision restricts the right to legal assistance during ongoing investigations and prosecutions. Legal assistance is especially important in order to facilitate the defence to make an effective defence in cases where they need special support. The prerequisite for ensuring the effective use of the legal assistance is the fact that the interviews with the lawyer are made in private. Privacy is of great importance for the suspect/accused and his lawyer to exchange information freely.

While restricting the right to confer with a lawyer for legitimate purposes, a balance must be established between the impugned restriction and the right of defence, and the relevant restriction must not prevent the effective exercise of the right of defence in any way. In order for a restriction not to impair the essence of a right, it should not hamper the exercise of fundamental rights thereby preventing them from attaining their purposes and should not be of a nature making them ineffective.

Although the limitation of the days and hours of the interviews between the convict and his lawyer imposes a restriction on the right to legal assistance, it is possible to apply this restriction without impairing the accused's right of defence. Besides, those concerned may appeal to the court, alleging that the relevant restriction order has rendered their right of defence ineffective, and thus may ensure that the said measure is implemented in a way not hindering their right to legal assistance.

In addition, restrictions such as the recording of the interviews between the suspect/accused and his lawyer, an officer's being present during the interview and the seizure of the information and documents, despite being subject to certain conditions, may directly eliminate the privacy between the lawyer and his client.

Since it is not possible for the suspect or accused to share secret information and exchange information with his lawyer under the specified circumstances, such a restriction on the right to confer with a lawyer may significantly reduce the possibility of an effective defence, especially in cases where the defence is in need of special support. In addition, while the contested provision eliminates the confidentiality of the lawyer-client interview, it appears that it provides no safeguards required for ensuring the suspect or accused to have access to an effective legal assistance as well as to exercise his right of defence effectively. Considering the importance of the right to legal assistance, it has been concluded that the impugned restriction imposes an excessive and disproportionate burden on individuals, and thus recording and monitoring of the interviews between the suspect/accused and his lawyer or seizure of the relevant information and documents imposes a disproportionate restriction on the right to legal assistance.

Consequently, the Constitutional Court has found the contested provision in so far as it is related to the following part of Article 59 § 5 of Law no. 5275, which provides "...interviews may be recorded by voice or video with a technical device; an officer may be present to monitor the interviews; the documents (or their copies) exchanged between the lawyer and his client, the relevant files and the records they keep about their interviews may be seized...", in breach of Articles 13 and 36 of the Constitution and therefore annulled it, while it has found the remaining part constitutional and accordingly dismissed the request for its annulment.

## E. PROVISION STIPULATING THAT SECURITY INVESTIGATION AND ARCHIVE RESEARCH PROCEDURES BE CONDUCTED TO ENTER INTO PUBLIC SERVICE

### CONTESTED PROVISION

The contested provision stipulates that security investigation and archive research procedures must be conducted to enter into public service.

### GROUND FOR THE REQUEST FOR ANNULMENT

It was maintained in brief that the conditions for the right to enter into public service must be defined by law, and that the legislature's leaving the practical issues related to a matter substantially affecting and restricting the fundamental rights and freedoms of the individuals, without making the basic arrangements, to the discretion of the administration resulted in the delegation of the legislative power. In this regard, it was argued that the impugned provision was unconstitutional.

### THE COURT'S ASSESSMENT

The principle of legal regulation refers to the introduction of the basic principles in the relevant area by law and to set their legal framework. Pursuant to this principle, it is stipulated in Article 128 of the Constitution that the rules regarding the qualifications and appointments of public officials should be prescribed by the law, and they should be explicit, clear and definite.

The right to demand protection of personal data, as a special aspect of the right to protection of human dignity and development of personality freely, aims to protect the individuals' rights and freedoms during the processing of personal data. In accordance with Article 20 of the Constitution, personal data can only be processed in cases prescribed by the law or with the express consent of the individual.

In order to materialize the constitutional guarantee related to the right to demand protection of personal data, the legal regulations regarding this right should be explicit, clear and suitable for the exercise of this right. It may be possible only with such an arrangement that the data, information and documents concerning the private lives of individuals are protected against the arbitrary interference of the authorities.

As specified in previous decisions of the Constitutional Court, the data obtained through security investigation and archive research procedures are of personal nature. The impugned provision allows for obtaining, recording and using of information about an individual's private, business and social lives, including the public authorities' asking questions about the individual's private life within the scope of the security investigation and archive research procedures, which imposes a restriction on the right to respect for private life.

Article 129 § 1 of the Constitution provides that civil servants and other public officials are obliged to carry out their duties with loyalty to the Constitution and the laws. In view of these, it is natural to introduce certain conditions with regard to the persons to be appointed to public services. Therefore, the provision stipulating that security investigation and archive research procedures must be conducted prior to entering into public service is at the discretion of the legislator. However, such provisions must clearly set forth the circumstances in which the public authorities shall be granted an authority to take measures and interfere with the right of privacy, as well as the limits of the authority to be granted, and they must also provide sufficient safeguards against any possible abuse of authority.

Although security investigation and/or archive research is specified among the general conditions in the appointment to the civil service, there is no regulation in the impugned provision regarding the information and documents to be subject to the security investigation and archive research, the manner in which the relevant information will be used and the authorities that will conduct the investigation and research in question. In other words, the basic principles – related to the conduct of the security investigation and archive research, as well as the use of the data to be obtained– are not set forth in the contested provision whereby it is only indicated that security investigation and archive research procedures are among the conditions required for the appointment of civil servants.

Allowing for the collection and use of the personal data, which will be obtained through security investigation and archive research procedures and will be based on in the appointment of civil servants – in the absence of the legal safeguards and basic principles regarding the collection, use and processing of such data– is in breach of the Constitution.

Consequently, the Constitutional Court has found the contested provision in breach of Articles 13, 20 and 128 of the Constitution and therefore annulled it.

## DECISION DISMISSING THE REQUEST FOR ANNULMENT OF THE ALLEGEDLY UNCONSTITUTIONAL PROVISION EXTENDING THE CUSTODY PERIOD UP TO 7 DAYS IN TIMES OF EMERGENCY AND ALLOWING FOR ITS PROLONGATION FOR A FURTHER 7 DAYS

(E.2018/92, K.2019/67, 25 July 2019)

### CONTESTED PROVISION

In the impugned provision, it is set forth that during the times of emergency, the custody period shall not exceed 7 days as from the time of arrest in terms of certain offences and that however, the public prosecutor shall be entitled to issue a written order for the prolongation of the custody period for a further 7 days given the difficulty in obtaining evidence or excessive number of suspects.

### GROUND FOR THE REQUESTS FOR ANNULMENT

In the petition, it is maintained that the custody period of 14 days in total, which is envisaged to be applied during the state of emergency by virtue of the contested provision, has constituted a disproportionate interference with the right to personal liberty and security safeguarded by the Constitution, thereby in breach of Articles 15, 19 and 119 thereof.

### THE COURT'S ASSESSMENT

Alleged unconstitutionality of the provisions enshrined in the decree-laws issued during the state of emergency may be brought before the Constitutional Court only after these decree-laws are enacted upon being ratified by the Grand National Assembly of Turkey.

The circumstances under which persons may be deprived of their liberties on condition that procedure and conditions of such deprivation are prescribed by law are listed in Article 19 of the Constitution securing the right to personal liberty and security. Accordingly, the periods prescribed in the Constitution may be extended during a state of emergency and in time of war. However, such arrangements cannot be in breach of the constitutional safeguards applicable during the state of emergency for the protection of fundamental rights and freedoms.

It is explicit that the provision, which allows for the prolongation of the custody period in comparison to the ordinary time, intends for the elimination of the threat or danger underlying the state of emergency; and its implementation is limited only to the duration of the state of emergency. Therefore, this provision must undergo a constitutionality review pursuant to Article 15 of the Constitution, which enshrines the safeguards against the restriction of fundamental rights and freedoms during the state of emergency.

Both in the course and aftermath of the coup attempt of 15 July, notably judicial organs and investigation authorities faced an unpredictably heavy workload. Moreover, just after the coup attempt,

a great number of judges and prosecutors were suspended from office and thousands of them were subsequently dismissed from office for being in liaison with the Fetullahist Terrorist Organization/ Parallel State Structure ("FETÖ/PDY").

Following the suppression of the coup attempt, several investigations were conducted against numerous persons allegedly engaged in the attacks and acts by other terrorist organizations as well as those who were considered to have link with the structure, the perpetrator of the coup attempt.

Judicial and administrative investigations into the incidents which trigger declaration of state of emergency such as coup attempt may lead the public authorities to encounter severe difficulties. Therefore, extension of powers conferred upon the executive branch, which is in need of taking urgent measures and decisions in the face of such incidents, may become necessary, and arrangements and strict measures, which cannot be in question during ordinary times, may be introduced in order to prevent reoccurrence of incidents underlying the state of emergency, as well.

Given the extent of the coup attempt, the structure of the FETÖ/ PDY, the number of investigations carried out and actions brought within the scope of the measures taken in the aftermath of the coup attempt and especially the fact that many police officers and judicial officers who had been assigned to carry out and supervise the investigations have been dismissed, extension of the custody period to a maximum of 14 days, which is only applicable during the state of emergency for the proper conduct of investigations, constitutes an appropriate and necessary measure.

While the impugned provision stipulates that the custody period shall be extended to a maximum of 14 days during the state of emergency, this period shall not be applied arbitrarily. The said provision defines the upper limit by prescribing that the custody period shall not exceed 7 days as from the time of arrest. Accordingly, as a rule, this period cannot exceed 7 days. However, in the present case, the custody period was allowed to be extended for a further 7 days given the difficulty in obtaining evidence or excessive number of suspects.

Undoubtedly, the custody period shall not be extended in cases where there is no difficulty in obtaining evidence or the number of suspects is not excessive. These are maximum periods, and therefore it is clear that in cases where the investigation process is completed within a shorter period given the specific circumstances of the case, then the custody period should be shorter.

Article 19 of the Constitution provides a constitutional guarantee in terms of custody-related objections. In this scope, Article 91 of Law no. 5271 provides that an individual may file an objection with the magistrate judge against the written order of the public prosecutor on his being taken into custody or extension of the custody period, in order to achieve an immediate release from custody. Thus, an effective remedy is available against custody and extension of custody.

Article 19 of the Constitution also provides that individuals arrested or detained shall be promptly notified, in all cases in writing, or orally when the former is not possible, of the grounds for their arrest or detention and the charges against them; in cases of offences committed collectively this notification shall be made, at the latest, before the individual is brought before a judge. Thus, it is stipulated that the individuals shall be informed of the offences imputed to them. It is also specified therein that the next of kin shall be notified immediately when a person has been arrested or detained.

Considering these provisions together, it appears that both the Constitution and Law no. 5271 provide adequate safeguards as to the lawfulness of the custody of an individual. In other words, while there are certain arrangements stipulating that the maximum custody periods prescribed in the Constitution in ordinary times may be exceeded during the state of emergency, certain guarantees have been provided in order to ensure that these periods are applied in a proper and proportionate manner. Thus, there are sufficient safeguards against arbitrariness that goes beyond the purpose of the measures required to be taken in order to eliminate the threat or danger leading to the state of emergency.

In this respect, the impugned provision which stipulates that the custody period shall not exceed 7 days in terms of certain offences and that it shall be prolonged, under necessary conditions specified in the law, for further 7 days in times of emergency cannot be said to restrict the right to personal liberty and security exceeding the extent required by the exigencies of the situation during the state of emergency.

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

## DECISION ANNULLING CERTAIN PROVISIONS OF THE LAW NO. 6749 ON THE ADOPTION, WITH CERTAIN AMENDMENTS, OF THE DECREE-LAW ON MEASURES TAKEN UNDER THE STATE OF EMERGENCY

(E.2016/205, K.2019/63, 24 July 2019)

### A. PROVISION STIPULATING THE CONTINUED PAYMENT OF THE TUITION FEES BY THE STUDENTS DESPITE BEING TRANSFERRED FROM THE CLOSED HIGHER EDUCATION INSTITUTIONS TO STATE/FOUNDATION UNIVERSITIES

#### CONTESTED PROVISION

The contested provision stipulates that the students transferred by the Council of Higher Education from the closed higher education institutions to the state universities or universities run by foundations continue to pay the tuition fees, which were indeed incurred before the closed higher education institutions run by foundations, to the relevant universities until graduation.

#### GROUND FOR THE REQUEST FOR ANNULMENT

It was maintained in brief that the contested provision constituted an inequality of treatment, which was in breach of Articles 10, 13 and 42 of the Constitution.

#### THE COURT'S ASSESSMENT

One of the measures taken under the state of emergency is to close the higher education institutions run by foundations that have been found to be in connection, relation or have link with the FETÖ/PDY, a terrorist organization proven to pose a threat to national security. The subsequent transfers of the students studying at such institutions are intended for eliminating the threats and dangers, as required by the state of emergency. However, as the application of the contested provision has not been limited only to the duration of the state of emergency, the examination as to the contested provision would be made according to the review regime of the ordinary period.

By virtue of the Decree-law no. 667, certain higher education institutions run by foundations were closed, and the students having enrolled in these institutions were transferred, by the Council of Higher Education, to state universities or the higher education institutions run by foundations.

It is stipulated in the contested provision that the transferred students would continue to pay until graduation the tuition fees, which were incurred before the closed higher education institutions, to the universities they have been transferred to. Accordingly, the students having enrolled in the closed higher education institutions would continue to pay tuition fees irrespective of whether the higher education institution they have been transferred to is a state university or foundation university. In this respect, it has been observed that the provision imposed a restriction on the right to education.

Pursuant to Article 13 of the Constitution, the right to education may be restricted to the extent that is necessary in a democratic society. Besides, such restrictions must not impair the very essence of the right and must not be also contrary to the wording and sprit of the Constitution, the

requirements of the democratic order of the society and to the principle of proportionality.

The provision might also allow the students studying at the closed higher education institutions to be transferred to the higher education institutions with students who obtained higher degrees than the transferred students in the same university admission exam. Therefore, the continued payment, by the transferred students, of the previously incurred tuition fees to the higher education institutions to which they have been transferred cannot be said to be incompatible with the principle of proportionality. However, the provision also covers the transfer to state universities where students -having obtained degrees equal to or lower than those of the transferred students in the same university admission exam- are studying. The students in this situation would continue to pay the tuition fees, which they paid to the closed higher education institutions, to the state universities where they have been transferred.

It cannot be understood on which compelling ground the impugned restriction with the right to education was based in respect of a democratic society. The stipulation, by virtue of the contested provision, that those who did not prefer state universities despite being entitled at the outset but enrolled in a higher education institution run by foundation -which was subsequently closed- and who were then transferred, due to the closure, to a state university not previously preferred would continue to pay the relevant tuition fee to the university to which they have been transferred constituted a disproportionate restriction with the right to education. Therefore, the contested provision is not compatible with the safeguards enshrined in Article 13 of the Constitution, which are to be observed in restricting the fundamental rights and freedoms.

As these students were already entitled to enrol in a state university given their degrees of success they obtained at the time when they enrolled in the higher education institutions, nor can it be said that the students transferred from the closed institutions and the ones already studying at the state universities are in a different legal situation. The provision has caused a difference in treatment as it requires some of the students, who have been all entitled to enrol in a state university according to the degree of their success, to pay tuition fee. This different treatment cannot be said to have a reasonable and objective basis.

In this respect, it also constitutes a contradiction with the principle of equality, within the meaning of the right to education, to stipulate that the students transferred to state universities admitting students who obtained equal or lower degrees in the university admission exam held in the year when the transferred students enrolled in the closed higher education institutions would continue to pay the previously incurred tuition fees.

Consequently, the contested provision has been found unconstitutional and therefore annulled in so far as it relates to the transfers to state universities where students with equal or lower degrees of success study.

## B. PROVISION STIPULATING "INDIVIDUALS WHO MAKE DECISIONS AND PERFORM DUTIES UNDER THE LAW SHALL NOT INCUR ANY LEGAL, ADMINISTRATIVE, FINANCIAL AND CRIMINAL LIABILITY DUE TO THESE DUTIES"

### CONTESTED PROVISION

The contested provision stipulates that individuals who make decisions and perform duties under the Law shall not incur any legal, administrative, financial and criminal liability due to these duties.

### GROUND FOR THE REQUEST FOR ANNULMENT

It was maintained in brief that the contested provision amounted to lack of liability in respect of individuals covered by this provision, which was therefore contrary to Articles 2 and 10 of the Constitution.

### THE COURT'S ASSESSMENT

The objective of Law no. 6749, as also indicated in the relevant article thereof, is to eliminate threats and dangers giving rise to the declaration of the state of emergency. It is therefore clear that the contested provision also serves for this purpose. However, while several provisions embodied in the Law are applicable only during the period of state of emergency, some of them are also applicable during the ordinary period. Therefore, as the application of the contested provision is not limited only to the duration of the state of emergency, it must be dealt with according to the review regime prescribed by the Constitution for the provisions of ordinary period.

According to the provision, individuals who make decisions and perform duties under the Law shall not incur any legal, administrative, financial and criminal liability due to these duties. In consideration of the decisions and duties specified in the Law, it has been observed that they are in the form of performance of the statutory powers granted with respect to the measures which have been intended for the elimination of the conditions giving rise to the declaration of the state of emergency.

In the legal system of the country, exercise of powers or performance of duties prescribed by laws or making decisions in this respect is considered to fulfil the lawfulness requirement. Accordingly, an individual performing a lawful act does not incur any liability due to this act. In other words, no legal, administrative, financial and criminal liability can be imposed on those who have performed a lawful act.

If performance of a duty or taking of a decision, which is a task entrusted to an individual by law, constitutes unlawfulness, it leads to a contradiction. Therefore, individuals who perform duties, or take such decisions, entrusted by laws in accordance with the statutory procedures and principles will not naturally incur any legal, administrative, financial and criminal liability.

As stressed by the Court in its several decisions, in democratic countries the administrative procedures of the state of emergency do not mean extrajudicial and arbitrary administration. The administrations during

state of emergency are regimes which originate from the Constitution, are brought into force pursuant to the constitutional provisions and continue to exist under the supervision of legislative and judicial bodies.

In this regard, the provision does not lead to an avoidance of proceedings. In examinations as to the acts allegedly resulting in an unfairness, it would be undoubtedly assessed, under the contested provision, whether the impugned act has been performed by virtue of or in relation to a duty entrusted by law. As it is clear that the individuals specified in the Law are not, and cannot be, vested with the task or power to perform an unlawful, wrongful or criminal act, the contested provision does not undoubtedly cover any wrongful or criminal act.

Besides, the reason why the contested provision does not hold individuals responsible for performing duties and making decisions falling under the scope of the Law, is not to provide legal and criminal immunity for the wrongful or criminal acts performed by them as well as not to grant special privilege and immunity to these individuals compared to those who are in the same status. The underlying reason is to ensure the performance of duties, which are intended for taking measures required to be limited to the duration of the state of emergency and to be taken under the state of emergency and which are accordingly quite different from the statutory arrangements of the ordinary period, without any concern and hesitation. Therefore, the contested provision does in no way infringe the principle of equality.

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

### C. PROVISION STIPULATING "IN CASES FILED DUE TO DECISIONS TAKEN AND ACTS PERFORMED UNDER THE LAW, A STAY OF EXECUTION CANNOT BE ORDERED"

**CONTESTED PROVISION**

The contested provision stipulates that in cases filed due to decisions taken and acts performed under the Law, a stay of execution cannot be ordered.

**GROUND FOR THE REQUEST FOR ANNULMENT**

It was maintained in brief that the impugned provision completely removed the possibility to order a stay of execution, which was contrary to Article 125 of the Constitution.

**THE COURT'S ASSESSMENT**

By its very nature, the contested provision is intended for the elimination of threats and dangers giving rise to the declaration of the state of emergency. However, it may be applied in a way that would exceed the duration of the state of emergency. In this sense, the examination as to the provision must be made according to the review regime prescribed by the Constitution for the ordinary period.

In Article 125 of the Constitution, it is set forth that should the implementation of an administrative act result in damages which are difficult or impossible to compensate for and should the act be clearly unlawful, stay of its execution may be ordered with justification; and that the law may restrict the issuance of an order for a stay of execution of an administrative act in cases of state of emergency, mobilization and state of war, or on the grounds of national security, public order and public health.

The contested provision nevertheless hinders, without making any distinction, the issuance of an order for a stay of execution, in cases filed with respect to the decisions taken and acts performed within the scope of the Law, in a way that would also be extended to the period following the end of the state of emergency. Therefore, the contested provision, which completely hinders the possibility to issue an order for a stay of execution, is manifestly inconsistent with Article 125 § 5 of the Constitution.

Consequently, the Court has found the contested provision in breach of Article 125 of the Constitution and therefore annulled it.

## DECISION DISMISSING THE REQUEST FOR ANNULMENT OF THE ALLEGEDLY UNCONSTITUTIONAL PROVISIONS PREVENTING INDIVIDUALS IN RELATION OR CONNECTION WITH TERRORIST ORGANIZATIONS FROM BECOMING A NOTARY PUBLIC, ARBITRATOR AND EXPERT

(E.2018/89, K.2019/84, 14 November 2019)

### CONTESTED PROVISIONS

In the contested provisions, it is stipulated that those who are in relation or connection with any terrorist organization cannot become a notary public, arbitrator and expert.

### GROUND FOR THE REQUEST FOR ANNULMENT

It was maintained in brief that the terms, relation and connection, were by their very nature uncertain and unpredictable; that the application of the contested provisions was not limited only to the duration of the state of emergency, but they were of permanent nature; and that they constituted an interference with the right to hold public office, which was incompatible with the criteria set for the restriction of the fundamental rights and freedoms. Therefore, the contested provisions were alleged to be unconstitutional.

### THE COURT'S ASSESSMENT

The contested provisions are undoubtedly statutory arrangements intended for elimination of the threats and dangers giving rise to the declaration of the state of emergency. However, as the application of the contested provisions is not limited only to the duration of the state of emergency, they were dealt with according to the review regime prescribed by the Constitution for the provisions of ordinary period.

In Article 70 of the Constitution, where the right to hold public office is enshrined, it is set forth that no criteria other than the qualifications for the office concerned shall be taken into consideration for recruitment into public service. The statutory arrangements restring this right must pursue the aims of restriction prescribed in the Constitution, must be introduced by law and be proportionate.

The contested provisions set the condition, inter alia, of having no connection or relation with any terrorist organization for becoming a notary public, arbitrator and expert.

Notary office is a public service whereby legal deeds are certified so as to ensure legal certainty and avoid conflicts. The importance attached to performance of this service by individuals who have no link with any terrorist organization for achieving legal certainty and public interest is undoubtedly clear. In this regard, the condition "having no connection or relation with any terrorist organization", which is sought for becoming a notary public, is one of the qualifications for the office itself. It has been accordingly concluded that the restriction imposed by the contested provision pursues the aim of restriction specified in Article 70 of the Constitution.

The term “connection” included in the provisions means cohesion, union and link while the term “relation” means related. These terms are of general nature but cannot be said to be uncertain and unpredictable. Legal nature and objective meaning of these terms may be ascertained through judicial case-law.

Pursuant to the contested provisions, any link with a sufficient factual basis, which would justify the impugned prohibition to hold these public offices, are to be considered as relation and connection. Undoubtedly, such assessment will be limited only to an inquiry as to whether an individual is qualified to be appointed to these public offices, irrespective of any criminal liability in this respect. This assessment will be conducted by the Ministry competent to make appointments to the notary office. In making such an assessment, the Ministry will freely take into consideration all facts, information and findings, not being bound by the reports made to it.

Besides, as having connection or relation with any terrorist organization, which is prescribed in the contested provisions, may arise in different terms in every individual case, such circumstances cannot be expected to be pre-determined by the legislator and specified individually in the law. As a matter of fact, laws are formulated in a general and abstract fashion so as to embody all possible types of solutions that may vary according to the particular circumstances of every concrete case. In this sense, the contested provisions are in no aspect contrary to the constitutional provision which stipulates that the fundamental rights and freedoms be restricted by law.

It is also possible to bring an action in case of any dispute resulting from the application of the contested provisions, which are clearly appropriate and necessary for achieving the aims of legal certainty and public interest. In this sense, they do not introduce any restriction with respect to the right to have recourse to judicial remedies. There is no obstacle before the individuals, who have recourse to judicial remedy for having no connection and relation with any terrorist organization and whose claim is found justified, to hold these offices. It has been observed that as the Law provides a legal safeguard to prevent the arbitrary application of the provisions, the reasonable balance between the public interest involved in the aims pursued by the provisions and the individual’s right to hold public office has not been upset. In this respect, it has been concluded that the contested provisions imposing restriction on the said right have not led to any incommensurate interference and do not therefore impose a disproportionate restriction on it.

Pursuant to the other contested provision, a restriction has been imposed on the right to work by stipulating that those who would be registered in the arbitration system, in other words who would perform arbitration services, must not have any connection or relation with terrorist organizations. This right may be restricted in order to achieve the aim of public interest by ensuring that all legal acts and actions be performed in an accurate, impartial and credible manner.

Arbitration is a procedure where the arbitrator is liable to equally and impartially perform the duty, where the letter signed by the parties if they reach a settlement at the end of the negotiations is considered as a verdict and recourse to which is prescribed as a cause of action in certain cases. Given these characteristics, the requirement that the arbitration procedure be conducted by those who have no link with terrorist organizations is clearly intended for attaining the public interest. In this sense, the provision cannot be considered neither inappropriate nor unnecessary. Besides, nor is it contrary to the proportionality requirement on the same grounds as those applied to the provision concerning notary office.

Expertise is a procedure where experts are asked by judges to provide information and assist the judges in reaching a decision in cases which require special and technical information to assess the facts and are entitled to put questions directly to the witnesses or the accused upon the judge's permission and to examine any kind of information and documents within the case-file. The experts entrusted these powers and undertaking important roles in performance of judicial services are entitled to take part in the trial, which is a public service, and contribute to the functioning of the judicial process.

In this respect, it has been understood that the contested provision requiring the expertise services to be performed by individuals who have no link with any terrorist organization is intended for achieving the public interest by ensuring that the public service be conducted in an accurate, impartial and credible manner. It has been accordingly concluded that the restriction imposed by the provision with respect to the experts is in no aspect contrary to the test of appropriateness, necessity or proportionality.

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

## DECISION ANNULLING CERTAIN PROVISIONS OF THE LAW NO. 7071 ON THE ADOPTION, WITH CERTAIN AMENDMENTS, OF THE DECREE LAW ON MAKING CERTAIN ARRANGEMENTS UNDER THE STATE OF EMERGENCY

(E.2018/90, K.2019/85, 14 November 2019)

The impugned Law no. 7071 entered into force after the approval by the Grand National Assembly of Turkey of the Decree no. 678 issued under the state of emergency. The applicability of the impugned provisions is not restricted to the state of emergency period. Thus, these provisions are of a nature allowing for general regulations going beyond the state of emergency period. For this reason, Article 15 of the Constitution, which regulates the restriction of fundamental rights and freedoms during the state of emergency, is not applicable in the constitutionality review of these provisions.

### A. PROVISION STIPULATING THAT THE REAL AND LEGAL PERSONS REPORTED TO HAVE CONNECTIONS AND RELATIONS WITH TERRORIST ORGANIZATIONS CANNOT PARTICIPATE IN PUBLIC TENDERS

#### CONTESTED PROVISION

The contested provision stipulates that the real and legal persons reported by the General Directorate of Security and the Undersecretariat of the National Intelligence Agency to have connections and relations with terrorist organizations cannot participate in public tenders.

#### GROUND FOR THE REQUEST FOR ANNULMENT

It was maintained in brief; that banning the real and legal persons from participating in public tenders constituted an interference with the freedom of contract; that the contents of the terms “connection and relation” were unclear and unpredictable; and that imposition of such a measure in the absence of a main legal arrangement, but relying on sub-arrangements, would amount to the delegation of the legislative prerogative. In this regard, it was argued that the impugned provision was unconstitutional.

#### THE COURT’S ASSESSMENT

The impugned provision restricts the freedom of labour and contract. This restriction is envisaged for national security reasons, by the nature of the process, in terms of the participation in public tenders, and therefore it pursues a legitimate aim.

In addition, as frequently emphasized by the Constitutional Court, it is not sufficient for a law restricting fundamental rights to exist in form; the legal provisions should also be precise, accessible and foreseeable, thereby preventing any arbitrariness.

The impugned provision stipulates that the real and legal persons having connections and relations with terrorist organizations cannot participate in public tenders. The phrases “connection” and “relation” are general concepts; however, they cannot be said to be categorically ambiguous and unpredictable, for the reasons specified in the Constitutional Court’s decision no. E.2018/89.

The provision prescribing the individuals' inability to participate in public tenders due to their acts and situations that may pose a threat to the national security is an administrative measure introduced by the legislator.

However, the ability for resorting to administrative measures does not necessarily mean having unlimited power in terms of these measures. The impugned provision relies on the notification to be made by the General Directorate of Security and the National Intelligence Agency; therefore, in the presence of such a notification, the individuals concerned shall automatically be banned from participating in public tenders or disqualified from tender. Such a decision is not limited to a certain period of time. In addition, it is understood that the impugned provision may limit the effectiveness of a judicial review on this matter. In other words, as regards the judicial review of the relevant administrative act, it provides an authority to review only whether there has been any notification by the relevant law-enforcement unit that the real and legal persons who will participate in the tender have connections and relations with terrorist organizations.

The notification to be made by the General Directorate of Security and the National Intelligence Agency are not necessarily required to be predicated upon the information and documents that may form a basis for the criminal investigation. In other words, it is highly probable that the facts taken as the basis for the assessment to be made in this respect are of intelligence value. Therefore, the judicial review of the actions to be taken by the administrations carrying out public tenders becomes much more important. As a result of the fact that the assessments to be made by the security institutions, which are not obliged to rely on information and documents that might be taken as a basis for criminal investigation, will have automatic results, the administrations and the courts that should in fact review the relevant administrative action will be denied to make an assessment as to whether the real and legal persons concerned have connections or relations with the terrorist organizations. Thus, the possibility of verifying such notifications and taking the proper administrative action is significantly restricted.

The impugned Law does not provide any legal safeguards ensuring the exercise of the relevant authority in compliance with its legislative intent and preventing any potential arbitrariness in this respect.

Considering the consequences of the impugned regulation, which is not limited to a certain period of time and which does not, as a rule, give the administrations carrying out public tenders and the courts that will review such actions the opportunity to make an assessment in this regard, it has been concluded that there has been a disproportionate restriction on the freedom of labour and contract.

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

Consequently, the Court has found the contested provision in breach of Articles 13 and 48 of the Constitution and therefore annulled it.

## B. PROVISION ALLOWING FOR THE POSTPONEMENT OF A LEGAL STRIKE OR LOCKOUT

### CONTESTED PROVISION

The contested provision stipulates that a legal strike or lockout in mass transportation and banking services, which has been decided or already started but is disrupting the economic and financial stability, may be postponed for a period of 60 days.

### GROUND FOR THE REQUEST FOR ANNULMENT

It was maintained in brief; that the contested provision imposed an excessive and disproportionate restriction on the right to strike, which was in breach of the order of the democratic society as well as the international instruments; that the executive organ was vested with an authority that could only been enjoyed by the judiciary; and that the right to strike could be restricted only in vital or essential public services, but that the services set forth in the relevant provision were not of that nature. In this regard, it was argued that the impugned provision was unconstitutional.

### THE COURT'S ASSESSMENT

The impugned provision restricts the right to strike by allowing for the postponement of a legal strike or lockout which has been decided or already started. Any restriction on the right to strike, which is an important right in terms of the functioning of democracy, must pursue a pressing social need.

Strike or lockout may be prohibited or postponed in cases where the safety of life or health of the whole or part of the population will get into danger if the relevant work or service is suspended, in other words, where the work subject of the strike or lockout is among the vital and essential services.

Mass transportation and banking services are not among the vital or essential public services classified by the International Labour Organization.

It is always possible that a strike in banking services may affect the economic and financial stability to a certain extent. In a sector that cannot be considered as an essential service in a democratic society, restriction of the right to strike, which is enshrined in the Constitution, due to financial concerns is unacceptable. In cases where the right to strike is not ensured, freedom of association as well as the right to collective bargaining will make no sense.

Therefore, the restriction prescribed in the impugned provision, stipulating that a legal strike or lockout in mass transportation and banking services that are not of vital nature for the society, which has been decided or already started, may be postponed, does not comply with the requirements of the order of the democratic society.

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

Consequently, the Court has found the contested provision in breach of Articles 13 and 54 of the Constitution and therefore annulled it.

# LEADING DECISIONS AND JUDGMENTS IN THE INDIVIDUAL APPLICATION

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# A. JUDGMENTS CONCERNING THE RIGHT TO LIFE

## JUDGMENT FINDING A VIOLATION OF THE RIGHT TO LIFE DUE TO FAILURE TO PROVE THE ABSOLUTE NECESSITY FOR THE USE OF FORCE

*Hüseyin Yıldız and İmiş Yıldız* (no. 2014/5791, 3 July 2019)

### THE FACTS

The applicants are the parents of T.Y. who was a prisoner injured (vision loss) during an operation known as "return to life" (hayata dönüş) in the penitentiary institution. After the operation where several people had died or been injured, investigations were conducted against the security forces and prisoners. The criminal cases brought subsequent to the relevant investigations were dismissed due to the statute of limitations. The proceedings initiated before the assize court after the investigation conducted into the operation have been pending since 14 March 2019.

T.Y. submitted a request for compensation before the Ministries of Justice and Interior, claiming that he suffered vision loss in one of his eyes. Upon dismissal of his request, he brought an action for compensation. Upon the applicant's death pending the proceedings, the applicants (his parents) became a party to the proceedings. At the end of the said proceedings, the administrative court awarded compensation to the applicants. Upon appeal, the Council of State quashed the judgment in so far as it was related to the awarding of compensation and upheld the judgment in so far as it was related to the dismissal of the case. The administrative court complied with the Council of State's judgment and thus dismissed the case. The applicants' subsequent appeal and request for rectification of the judgment were also dismissed. Hence, they lodged an individual application.

### THE APPLICANTS' ALLEGATIONS

The applicants claimed that their son (a prisoner) had suffered vision loss as a result of an operation carried out in the penitentiary institution, which was in breach of his right to life.

### THE COURT'S ASSESSMENT

It had become inevitable for the State to carry out an operation in the penitentiary institution where the applicants' son was being held, due to the acts of disorder and threat there. The State has a burden of explaining the course of the operation and the circumstances in which the applicant had been injured, as well as proving which conducts of the applicant had made it absolutely necessary to use force against him.

The applicants claimed that at the time of the operation, their son was on the 46th day of the death fast and accordingly, could not be in a state to resist the gendarmerie officers who carried out the operation. In addition, the criminal case initiated against T.Y. had been dismissed due to the statute of limitations. Therefore, the allegations against him could not be proven within the scope of the criminal case. At this point, the investigation conducted should be capable of determining whether the use of force had been justified, as well as leading to the identification and punishment of those responsible.

The criminal case opened for certain reasons -such as the failure to identify, within the scope of the investigation launched against the security officers taking part in the operation, the security officers who had actually carried out the operation as well as the failure to grant a leave for investigation- has been pending for more than nine years. With the lapse of time, it becomes difficult to collect evidence and to establish how the incident occurred.

Unreasonable length of investigations –especially in cases of abuse of power– may create the impression that such acts are tolerated and encouraged.

In the present case, regard being had to fact that during the criminal proceedings lasting so long, it was difficult to put forth clear information on the course of events as well as the circumstances in which the applicants' son had been injured, it was not reasonable to wait for the outcome of the criminal proceedings which were not conducted effectively to ensure the accountability of those responsible.

It has been concluded that the State failed to fulfil its obligation to provide a convincing explanation on the circumstances in which T.Y., who had been under its supervision at the material time, had been injured and accordingly also failed to prove that it had been absolutely necessary to use force against him. Therefore, it has been concluded that the use of force by the public officials against T.Y. had not been absolutely necessary.

In addition, it is not convincing that the administrative authorities, after a long time, concluded within the scope of the action for compensation that the applicants' son had actively participated in the events.

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

## JUDGMENT FINDING A VIOLATION OF THE RIGHT TO LIFE DUE TO A CHILD'S GETTING INJURED BY TOUCHING THE TRANSFORMER PANEL

*Selman Tumur and Others* (no. 2015/18754, 12 September 2019)

### THE FACTS

The applicants are Selman Tumur (S.T.), born in 2011, and his parents. When he was only three years old, S.T. touched the open door of a transformer panel near their house and was exposed to electric shock, as a result of which he got injured. According to the provisional report issued, the applicant had sustained life-threatening injuries that could not be treated by a simple medical intervention. At the end of the investigation into the incident, the chief public prosecutor's office issued a decision of non-prosecution. The applicant's objection to the decision was dismissed.

### THE APPLICANTS' ALLEGATIONS

The applicants claimed that their son's right to life had been violated due to his having got injured seriously after being exposed to electric shock by touching the transformer panel, as well as due to the authorities' failure to conduct an effective investigation into the incident.

### THE COURT'S ASSESSMENT

In the present case, the investigation file contained no documents or findings concerning the construction date of the transformer panel –operated by an electricity distribution company– that caused the applicant to get injured when he was only three years old.

As the electric power generation and distribution is a hazardous activity, all organizations and technical devices serving this purpose must be placed in a safe manner in accordance with the requirements concerning the protection of the individuals' life and physical integrity. Maintenance, repair and protection, as well as deactivation if necessary, of the buildings, technical equipment and other devices used in this scope fall within this obligation.

However, the public authorities must take into account children, mentally disabled persons and other persons in need of protection in their prediction of human conduct while carrying out hazardous activities and they must put into practice the appropriate administrative measures in due time.

The chief public prosecutor's office immediately launched an investigation into the incident, and an expert report was issued, as well as the statements of the complainants, witnesses and suspects were taken within the scope of the investigation. However, the decision was rendered without investigating whether the said transformer panel had been built in accordance with the legal regulations and technical requirements as well as whether it had been inspected periodically, and with a mere reference to the statements of the suspects and to the role of the social events specified in the expert report.

The responsible authorities should be aware of the fact that the transformer panel, which clearly poses a serious danger to the physical integrities of the individuals, was easily accessible by the third parties. However, at this stage, it cannot be said that the said incident where the applicant had been injured seriously had resulted from a simple error of judgment or carelessness.

In view of the foregoing, solely ordering compensation against those who are responsible for explicitly endangering the lives of vulnerable persons who do not have ability to discern like adults, such as minors, will not be sufficient in terms of the State's obligation to provide an effective judicial protection against such incidents. It should especially be emphasized that the judicial reaction of the State to the present incident is of importance in terms of the prevention of similar incidents.

It has accordingly been concluded that the action for compensation had no effect in the present application in terms of the exhaustion of legal remedies and the requirements for ensuring an effective judicial protection.

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

## JUDGMENT FINDING A VIOLATION OF THE RIGHT TO LIFE DUE TO THE SHORTCOMINGS IN THE INVESTIGATION INTO DEATH

*Mahin Parjani and Others* (no. 2015/19219, 10 October 2019)

### THE FACTS

The applicants, citizens of a neighbouring country, are relatives of S.K. who had been 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, for lack of 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' objection, the military court decided that the investigation be extended and certain shortcomings in the file be eliminated. Thereupon, the military prosecutor's office obtained the requested documents. Subsequently, the military court dismissed the applicants' objection with final effect, having regard, inter alia, to the outcome of the inquiries carried out within the scope the extended investigation.

### THE APPLICANTS' ALLEGATIONS

The applicants maintained that their relatives' right to life had been violated on the ground that he had died as a result of use of force by the security officers and that no effective investigation had been conducted into the incident.

### THE COURT'S ASSESSMENT

In the present case, the applicants claimed that their relative had been killed by the security forces. The soldiers intervening in the incident stated that the applicants' relative might have been killed by a gun fired from the village. At the end of the investigations conducted into the incident, the investigation authorities concluded that there had been no sufficient evidence to open a criminal case concerning the allegation that the incident had been caused the security forces.

In order for an investigation into a suspicious death to be effective, it is crucial that the investigation authorities that have been informed of the incident act ex officio and immediately. The reports pertaining to the incident contained no information concerning the time when the incident had been notified to the prosecutor's office as well as the Gendarmerie and when the Gendarmerie officers had arrived at the scene.

As the relevant reports did not contain any information on such issues, it has become almost impossible to find out whether the investigation authorities had been informed of the incident in a timely manner and if so, whether they had acted immediately to ensure that the evidence be secured. Accordingly, it will be discussed whether a rigorous investigation was conducted, as required by the procedural aspect of the right to life.

It appeared from the documents sent by the military authorities to the prosecutor's office that the number of bullets used in the incident had been higher than the one determined during the crime scene investigation. The investigation authorities failed to make a plausible explanation in this sense.

In the present incident where several guns had allegedly been fired repeatedly, the search that was carried out one day after the incident with metal detectors did not comply with the due diligence requirement within the scope of the procedural obligation under the right to life.

The Chief Public Prosecutor's Office started to take the statements of the relevant soldiers about fifty days after the incident. Such delays might create an impression on the victims and in general the society that the law enforcement officers act within an authority gap where they are not responsible to anyone for their own acts. This situation is incompatible with the requirement of due diligence within the scope of the procedural aspect of the right to life.

In addition, the information as to the existence of radio communication records as well as thermal camera footages could be included in the investigation file only after the inquiries that had been carried out in accordance with the decision on the extension of the investigation, namely 1 year and 8 months after the incident. It had been unreasonable in the circumstances of the present case that the inquiry that might have clarified the incident had been carried out so late.

In addition, there were substantial differences in the statements of the villagers, soldiers and S.M. a citizen of the neighbouring country, who had witnessed the incident. The investigation authorities reached a decision without questioning the authenticity of S.M.'s statement which was incompatible with the statements of both the villagers and the soldiers.

The military prosecutor's office emphasized that the civilians that might have been the perpetrators of the incident were investigated by the Chief Public Prosecutor's Office. However, the investigation concerning the probable civilian perpetrator(s) of the incident was not continued. It is clear that the failure to conduct an investigation into the incident where the applicants' relative had died did not meet the procedural requirements of the right to life.

All in all, it has been concluded that the investigation authorities had failed to carry out the initial procedures with due diligence; that they also failed to make a comprehensive analysis of the evidence collected at the end of the investigation; and that therefore the procedural aspect of the right to life had been violated for these shortcomings.

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

## JUDGMENT FINDING VIOLATIONS OF THE RIGHT TO LIFE AND PROHIBITION OF TORTURE DUE TO DEFICIENCIES IN THE JUDICIAL PROCEEDINGS INTO THE DEATH OF A SOLDIER

*Gülşen Polat and Kenan Polat* (no. 2015/4450, 10 October 2019)

### THE FACTS

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.

### THE APPLICANTS' ALLEGATIONS

In the present case, it was found established that M.P. had died as a result of the treatment he had been subject to in the military penitentiary institution. The inferior courts concluded that M.P. had died as a result intentional ill-treatment. Considering all these, it has been understood that M.P. had died under the control and protection of the State as a result of certain acts inflicted in the absence of reasonable explanations. Thus, the substantive aspect of the right to life had been violated.

### THE COURT'S ASSESSMENT

The fact that the military prosecutor's office took an action ten days after M.P. had been taken to hospital was a significant negligence. The failure of the military prosecutor's office to take an action immediately and ex officio caused the inability to take statement of M.P., who would later fall into a vegetative state and lose his life, by independent investigation authorities.

Failure to take M.P.'s statement may have resulted from the failure on the part of the military officers and hospital staff to report the incident to the incumbent prosecutor's office or from the failure of the incumbent prosecutor's office to take an immediate action into the incident. However, since there was a fault on the part of the public authorities in both cases, nothing will change as to the responsibility of the State. In addition, it has been understood that there was a camera system in the military penitentiary

institution at the material time; however, no footage could be obtained pertaining to the said period.

The indictment issued by the chief public prosecutor's office stated that similar incidents such as the ill-treatment inflicted on M.P. had frequently occurred in the military penitentiary institution and been continuing for a long period; it was concluded therein that the offence of aggrieved torture had occurred within the scope of the death of M.P. While the assize court had to make a comprehensive assessment on the issues set forth in the indictment as well as making a reasonable explanation as to why it disagreed the conclusions therein, it failed to make a comprehensive analysis in this regard. Moreover, the acts and reactions, regarding the incident, of all guardians in the dressing room where the incident had taken place were not evaluated separately.

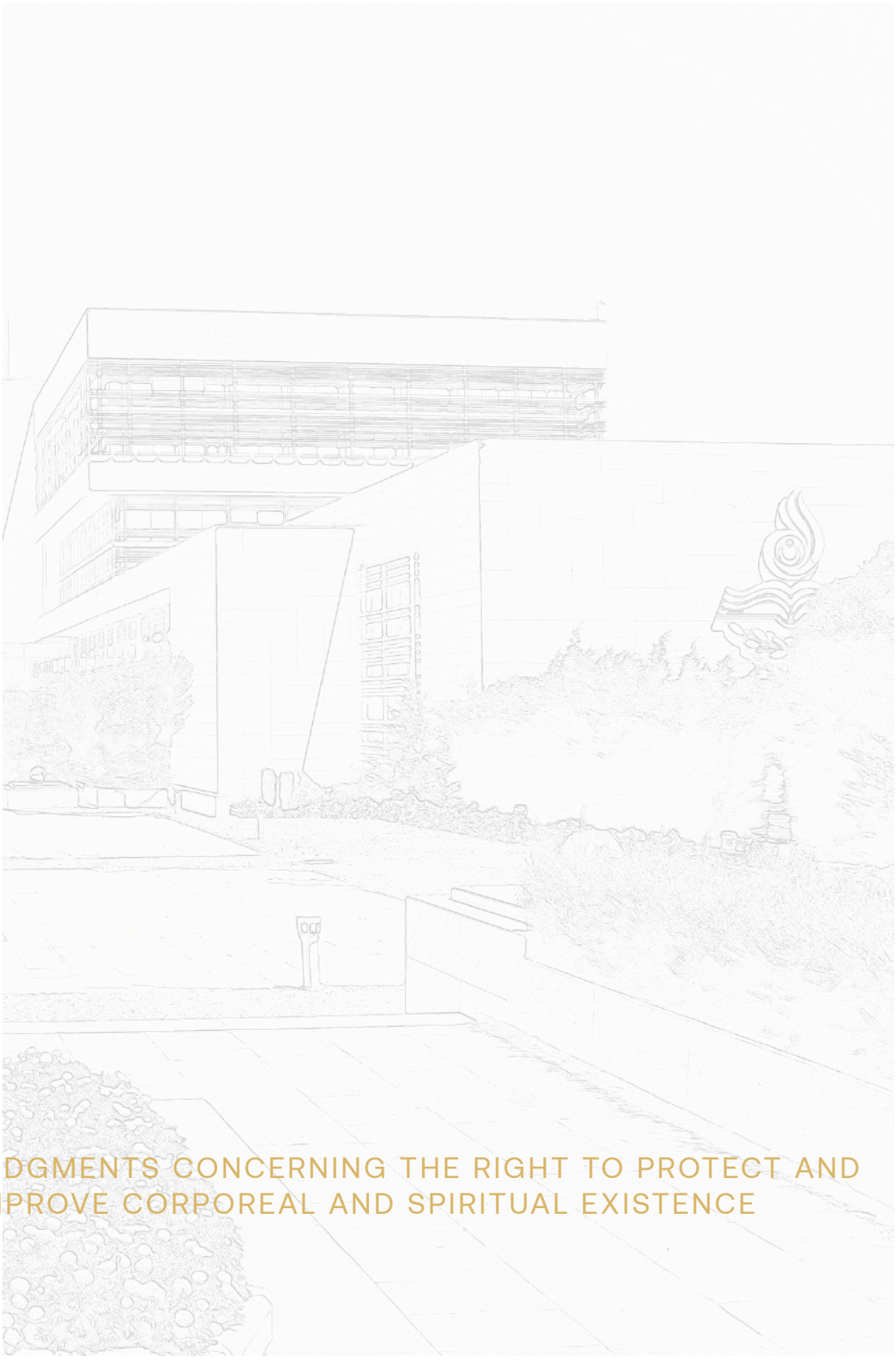
It is obvious that whether the military officers in the military penitentiary institution had been involved in the incident resulting in the death of M.P. should have been investigated rigorously by the inferior courts and that the findings obtained should have been evaluated. It was a significant deficiency that the arguments put forth in the indictment to prove that the authorities in the military penitentiary institution had acted in an effort to protect the guardians were not addressed to in the reasoned decision. In addition, the Court convicted a number of guardians of intentional injury in relation to some battering incidents that occurred in the said period. The inferior courts failed to provide sufficient justifications as to why the death of M.P. was examined independently of the other battering incidents.

Furthermore, given the importance of the subject matter of the case as well as the fact that applicants had no part in the prolongation of the proceedings, it has been concluded that the length of the proceedings that lasted 9 years and 7 months was not reasonable.

Considering all these together, it has been concluded that the failure on the part of the military prosecutor's office to take an action immediately and ex officio resulted in a certain negligence in terms of the collection and preservation of evidence; that the inferior courts failed to make a comprehensive analysis of the evidence obtained at the end of the investigation; that the investigation and prosecution into the incident had been conducted at a reasonable speed; and that thus, the procedural aspect of the right to life has been violated due to the deficiencies in question.

Considering the circumstances of the present case, it has been understood that alleged violations of the right to life and the prohibition of torture intertwined with each other. Therefore, it has been concluded that the procedural as well as substantive aspects of the prohibition of torture have also been violated.

Consequently, the Court has found violations of the right to life and prohibition of torture safeguarded by Article 17 of the Constitution.



# B. JUDGMENTS CONCERNING THE RIGHT TO PROTECT AND IMPROVE CORPOREAL AND SPIRITUAL EXISTENCE

## JUDGMENT FINDING A VIOLATION OF THE RIGHT TO PROTECT CORPOREAL AND SPIRITUAL EXISTENCE DUE TO DISMISSAL OF THE REQUEST FOR IMPOSITION OF A PREVENTIVE IMPRISONMENT

*Ö.T.* (no. 2015/16029, 19 February 2019)

### THE FACTS

The applicant had applied to the family court for having been subject to violence by her husband while divorce proceedings between them had been pending. On 24 June 2014, the court issued a protection order in favour of the applicant for a period of five months.

As the applicant was again subject to violence by her husband on 9 November 2014, while the divorce proceedings were still pending, a criminal case was initiated. The applicant applied to the family court, requesting the imposition of a preventive imprisonment on her husband. Upon the court's rejection of her request and the subsequent dismissal of her objection, the applicant lodged an individual application.

### THE APPLICANT'S ALLEGATIONS

The applicant maintained that her right to protect her corporeal and spiritual existence had been violated due to dismissal of her request for imposition of a preventive imprisonment on her husband.

### THE COURT'S ASSESSMENT

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

In the circumstances of the present case, an examination was made as to whether the State had fulfilled its positive obligation to establish an effective legal system, as well as whether reasonable practical measures required under the administrative and legal legislation had been taken.

In the present case, the applicant was again subject to violence within the five-month period when the protection order was in force. Although the applicant requested that a preventive imprisonment be imposed on his husband due to the violence she had been subject to, the decision of the incumbent court dismissing her request did not contain any assessment or reason as regards the said violence. It has therefore been concluded that the reasons stated in the decision were not relevant and sufficient within the scope of the applicant's right to protect her corporeal and spiritual existence.

Pursuant to Article 13 of the Law no. 6284 on Protection of Family and Prevention of Violence against Women, in case of a failure to comply with the requirements of a protection order granted by a judge, preventive imprisonment shall be imposed. The purpose of the preventive imprisonment is to prevent any perpetrator of violence from acting contrary to the protection order and to ensure deterrence. Given that the protection order applicable for five months in favour of the applicant had already terminated on the date of the judgment rendered by the Constitutional Court, there was no legal interest in conducting retrial for redress of the consequences of the violation.

Consequently, the Constitutional Court found a violation of the right to protect corporeal and spiritual existence safeguarded by Article 17 of the Constitution.

## JUDGMENT FINDING A VIOLATION OF THE RIGHT TO PROTECTION OF CORPOREAL AND SPIRITUAL EXISTENCE DUE TO UNLAWFUL INTERNAL BODY SEARCH

*B.P.O.* (no. 2015/19012, 27 March 2019)

### THE FACTS

The applicant, a Colombian woman, after arriving at Turkey, was taken to the police station by the police officers who became suspicious about her doubtful behaviours at the airport. During her body search, she was found to be carrying drugs. According 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 subject to an internal body search 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.

### THE APPLICANT'S ALLEGATIONS

The applicant maintained that her right to protection of her corporeal and spiritual existence had been violated due to the unlawful internal body search performed by a police officer, and that her right to a fair trial had also been violated due to her conviction on the basis of the evidence obtained unlawfully.

### THE COURT'S ASSESSMENT

#### Right to Protection of Corporeal and Spiritual Existence

In the present case, it was claimed that an unlawful internal body search had been conducted by a police officer within the scope of judicial search. The Court has examined the impugned search process not within the scope of the prohibition of ill-treatment safeguarded by Article 17 § 3 of the Constitution, as it did not attain the minimum level of severity to constitute an ill-treatment, but within the scope of the right to protection of one's corporeal and spiritual existence safeguarded by Article 17 § 1 of the Constitution.

Article 75 of the Criminal Procedure Code stipulates that internal body search shall be carried out by a judge or, in non-delayable cases, only by a medical officer upon the instruction of the public prosecutor. Since the relevant legal restrictions regulate certain exceptions ensuring the lawfulness of the interference with the constitutional right at stake, any process of internal body search that does not comply with these legal restrictions may result in a violation of the constitutional right.

In the present case, neither were these guarantees complied with nor did the public authorities provide a satisfactory explanation in this regard. As

a matter of fact, what should have been done by the police officers even in case of a justified and heavy suspicion that the applicant had been carrying drugs in her body cavity was to call the public prosecutor immediately with a view to preventing the loss of evidence and to act in accordance with the latter's instruction. The internal body search carried out by a police officer who was not authorized to carry out such a process without notifying the public prosecutor and thus in the absence of his instruction had no legal basis.

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

### Right to a Fair Trial

The applicant did not challenge as regards all of the drugs found on her body, but only the part found by the police officer through internal body search. However, it is seen that throughout the proceedings, no assessment was made as to whether the impugned drugs had been seized in an unlawful manner.

It cannot be fully understood from the reasoning of the judgment whether the drugs seized in an unlawful manner were among the evidence forming a basis for the judgment. Therefore, an assessment should be made by assuming that the unlawful evidence in question was taken as a basis for the judgment. In this respect, it should be considered whether the allegedly unlawful evidence was the only or decisive evidence on which the judgment was based, as well as whether it impaired the fairness of the proceedings as a whole.

According to the reasoning of the judgment, there were more than one evidence forming a basis for the applicant's conviction. It is beyond dispute that approximately three and a half times more of the impugned amount of drugs had been seized lawfully. Thus, the impugned evidence was not the only evidence, nor was it decisive.

The applicant was able to raise her claims and challenges both before the inferior courts and the Court of Cassation. Thus, the principles of equality of arms and the adversarial proceedings were respected. The inferior court examined that merits of the applicant's allegations and also provided sufficient justifications in its judgment. In view of all issues mentioned above, even if it is considered that the unlawfully seized drugs were relied on for the applicant's conviction, it has been concluded that this situation did not impair the fairness of the proceedings as a whole.

Consequently, the Court has found no violation of the right to a fair hearing within the scope of the right to a fair trial safeguarded by Article 36 of the Constitution.

## JUDGMENT FINDING A VIOLATION OF THE RIGHT TO PROTECT CORPOREAL AND SPIRITUAL EXISTENCE DUE TO UNAVAILABILITY OF MEDICAL RECORDS

*Eyüp Kurt* (no. 2015/6926, 4 April 2019)

### THE FACTS

On 21 September 2007 the applicant went to the health centre, as he was feeling unwell. He was injected with medication there. Afterwards, he felt numbness and pain in his left leg. As his pain increased, on 24 September 2007 the applicant first went to the same health centre from where he was referred to a state hospital.

Subsequently, the applicant underwent further examinations and treatments nine times in private and public medical institutions; however, his left leg became permanently disabled. The applicant applied to the Ministry of Health on 10 July 2008 and sought compensation for pecuniary and non-pecuniary damages he had sustained due to his disability. The Ministry implicitly rejected his request.

Thereafter, the applicant and his relatives brought an action for compensation before the administrative court on 29 September 2008. The court sent the file to the Forensic Medicine Institute. It was stated in the report issued by the Forensic Medicine Institute that the said intervention had been compatible with the medical rules and that as the medical records pertaining to the date of incident as regards the applicant were not available, no assessment could be made regarding the doctor's act.

The applicant requested a new expert report, claiming that the previously issued expert report had been erroneous as it included no assessment on the doctor's act due to the absence of medical records of the material time. The administrative court, finding the relevant expert report sufficient, dismissed the case. The decision was appealed by the applicant but upheld by the Council of State. The applicant's subsequent request for rectification of the decision was also dismissed.

### THE APPLICANT'S ALLEGATIONS

The applicant maintained that his right to protect his corporeal and spiritual existence was violated as a result of the proceedings conducted into his having been permanently disabled allegedly due to medical negligence.

### THE COURT'S ASSESSMENT

In cases where any disability or other disorders occur in the body as a result of medical intervention, the question as to whether the intervention has been carried out in accordance with the current and generally accepted rules can be clarified, to a large extent, through the examination of the records kept during the diagnosis and treatment processes. The responsibility for recording and storing for a reasonable period the data pertaining to the diagnosis and treatment process is incumbent on the health institution carrying out the medical intervention.

In cases where information or documents required to be included in the patient registry file are not submitted to the judicial authorities, thus hindering the assessment of whether the medical institution has complied with its medical responsibilities, this situation should not be interpreted to the detriment of the applicant. Interpretation of the medical institution's failure to submit the relevant documents to the court, to the detriment of the applicant who was in a weaker position, would impose an excessive burden on the applicant, thereby leading to an unfair situation for him.

In the present case, the inferior court failed to conduct an inquiry as to whether the medical records which were clearly important in the determination of the responsibility of the doctor having examined the applicant upon his complaint of numbness had been kept. Nor did it evaluate how the unavailability of the necessary records would affect the responsibility on the parts of the doctor and the medical institution.

The inferior court, relying on the report issued by the Forensic Medicine Institute which stated, without observing that the responsibility for keeping patient records was incumbent on the medical institution, that no assessment could be made about the doctor in the absence of medical records, concluded that no responsibility attributable to the administration could be established. This conclusion put the applicant at a disadvantage in the face of the respondent administration. Accordingly, it cannot be said that the examination carried out by the inferior court was in compliance with its obligation to establish an effective judicial system.

As a result, it has been concluded; that the inferior court failed to provide an adequate justification on the basis of concrete evidence as to whether the said injection had been administered to the applicant improperly; that the applicant's allegations were not sufficiently examined; and that therefore the State failed to fulfil the requirements of its positive obligations within the scope of the right to protect corporeal and spiritual existence of individuals.

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

## JUDGMENT FINDING A VIOLATION OF THE RIGHT TO PROTECT THE APPLICANT'S CORPOREAL AND SPIRITUAL EXISTENCE DUE TO DISMISSAL OF HER REQUEST FOR CHANGE OF WORKPLACE

*K.Ş.* (no. 2016/14613, 17 July 2019)

### THE FACTS

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 before 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'S ALLEGATIONS

The applicant maintained that the right to protect her corporeal and spiritual existence had been violated due to the dismissal of the request for the change of her workplace although her life was endangered.

### THE COURT'S ASSESSMENT

The right to protect an individual's corporeal and spiritual existence, which is enshrined in the Constitution, imposes both positive and negative obligations on the State. These positive obligations necessitate taking measures for ensuring respect for rights.

In the present case, the Court made an examination as to the positive obligations incumbent on the public authorities within the scope of the right to protect the applicant's corporeal and spiritual existence as her request for change of workplace –one of the protection measures laid down in Law no. 6284– had been dismissed.

With a view to adopting an effective and swift procedure for the protection of family and prevention of violence against women as well as to taking any person exposed to violence or facing such a risk under protection without any delay, the legislator has introduced and enacted the provisions of Law no. 6284.

As set out in the Law, the judge may order a change of the victim's workplace as a preventive order, and such an interim measure indicated by the judge shall be applied by the competent authority or person by virtue of the relevant legislation provisions to which the victim is subject.

It is clear that immediately after the applicant's filing a complaint that she had been exposed to violence by her husband with whom she was on the verge of divorce, the incumbent family court ordered a protection measure; that these measures were prolonged by the orders issued on various dates; and that they were also in effect when the applicant requested change of her workplace as a preventive measure. This is because, it appears that by virtue of the decision –whereby the family court dismissed the applicant's impugned request–, prolongation of the interim measure previously indicated in her favour was ordered.

Moreover, the applicant demonstrated concrete indications of the existence of a real risk to her life safety.

On the other hand, the inferior court failed to provide any concrete explanation, assessment and ground as to the alleged serious risks to the applicant's life safety, despite the ex-husband's attitude towards her. It has been accordingly concluded that the grounds relied on by the court were neither sufficient nor relevant within the context of the right to protect the applicant's corporeal and spiritual existence.

It has been observed that the Ministry and the family court failed to act in accordance with their positive obligations to take protective measures for the applicant who was a victim of violence, despite the fact that she had brought her life-safety concerns based on concrete grounds primarily before her institution and subsequently before the incumbent judicial authorities. It cannot be therefore said that the positive obligations incumbent on the State under the right to protect the individual's corporeal and spiritual existence had been duly fulfilled.

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

# C. JUDGMENTS CONCERNING THE PROHIBITION OF TORTURE AND ILL-TREATMENT

## JUDGMENT FINDING A VIOLATION OF THE PROHIBITION OF TORTURE DUE TO INSUFFICIENT REDRESS AFFORDED TO THE BATTERED APPLICANT

*Doğukan Bilir* (no. 2014/15736, 29 May 2019)

### THE FACTS

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 respect 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.

### THE APPLICANT'S ALLEGATIONS

The applicant maintained that he had been battered during the Gezi Park events, in breach of the prohibition of torture.

### THE COURT'S ASSESSMENT

Article 17 of the Constitution guarantees everyone's right to protect and improve their corporeal and spiritual existence, as well as it provides that no one shall be subjected to torture or mal-treatment and that no one shall be subjected to penalties or treatment incompatible with human dignity.

In the present case, the criminal court convicted the accused of actual bodily harm. Thus, it was found established by the court that the applicant had been subject to ill-treatment by three persons two of which had been police officers. The Court therefore limited the scope of its review to whether the substantive and procedural

obligations under the prohibition of torture, depending on the sufficiency of the sanctions imposed on the perpetrators, were fulfilled.

Even though the injuries sustained by the applicant, except for those related to his teeth, could be treated with a simple medical intervention, it should not be disregarded that the incident had been committed by more than one person using sticks and truncheons in the middle of the street at night. Since the fractures and losses of teeth amounted to injuries that could not be treated with a simple medical intervention and this situation might further damage the applicant's dignity, the said act was considered within the scope of the prohibition of torture.

The trial court failed to provide any justification as to why the judicial fine at the minimum level was imposed on three of the accused while there had been another alternative sanction such as prison sentence. It has been concluded that the sanction imposed on the police officers for battering the applicant, who was found not to have violated the peaceful nature of the demonstration and thus against whom no investigation was conducted, was disproportionate to the prohibition of torture.

The sanction imposed on the police officers failed to create the impression that the acts of ill-treatment would not be tolerated in any way. Rather, a disproportionate judicial fine was imposed as well as the pronouncement of the judgment was suspended, which mitigated the consequences of the impugned act. Thus, the procedural obligation of conducting an effective investigation under the prohibition of the torture has been infringed.

Given the fact that the suspension of the pronouncement of the judgment with regard to two police officers as well as the judicial fine imposed on the relevant civil person did not provide sufficient redress for the applicant, the applicant did not lose his victim status. Hence, the substantive aspect of the prohibition of torture was also violated.

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

# D. JUDGMENTS CONCERNING THE RIGHT TO PERSONAL LIBERTY AND SECURITY

## JUDGMENT FINDING A VIOLATION OF THE RIGHT TO PERSONAL LIBERTY AND SECURITY DUE TO THE FAILURE TO CONDUCT A JUDICIAL REVIEW OF DETENTION BEFORE A JUDGE/COURT

*İbrahim Soylu* (no. 2015/14648, 23 Ocak 2019)

### THE FACTS

The applicant taken into custody within the scope of an investigation conducted by the relevant chief public prosecutor's office was detained on remand by the incumbent assize court.

He was charged with membership of an armed terrorist organization, causing damage to property, disseminating propaganda of a terrorist organization and contravening the Law no. 2911 on Meetings and Demonstrations Marches.

The proceedings against the applicant were initiated before the assize court which ordered his release at the first hearing. It is still pending before the first instance court.

Relying on Article 141 of the Code of Criminal Procedure no. 5271, the applicant brought a compensation action for his not having been brought before a judge within a reasonable time. The assize court dismissed his action on the ground that the impugned case was still pending. On the appeal by the applicant, the first instance decision was upheld by the Court of Cassation.

### THE APPLICANT'S ALLEGATIONS

The applicant maintained that his right to personal liberty and security had been violated, stating that he had been brought before the court thirteen months after his detention.

### THE COURT'S ASSESSMENT

One of the basic safeguards afforded by Article 19 of the Constitution is the right to an effective review of the challenge against detention at hearings conducted in the presence of a judge. Providing the individual, who has been deprived of his liberty, with the opportunity to orally present, before a judge/court, his complaints in connection therewith, his claims about the evidence forming a basis for his detention and his submissions and counter-statements will enable him to more effectively challenge his detention.

In an individual application where the applicant's detention was reviewed over a case-file without holding a hearing for seven months, the Court found a violation of Article 19 of the Constitution.

In the present case, the applicant was brought before a judge/court nearly one year after his detention. The compensation action brought by him for his not having been brought before a court/judge was dismissed by the first instance court. Besides, the Court of Cassation denied his allegation, noting that the high number of complainants in the impugned case would have a bearing on the prolongation of this period.

The grounds relied on by the Court of Cassation may be deemed sufficient for the excessive length of the applicant's detention. However, they cannot justify his continued detention for over one year without being brought before a court/judge. Neither complex nature of the case nor high number of the accused and complainants in his case may be regarded as a justified ground for the failure to bring him before a court/judge for such a long time.

Accordingly, the judicial review of the applicant's detention without a hearing and his deprivation of liberty for about thirteen months on the basis of such a procedure resulted in the failure to afford him sufficient safeguards.

Consequently, the Court found a violation of the right to personal liberty and security safeguarded by Article 19 of the Constitution.

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

*Abdulkadir Yapuquan* (no. 2016/35009, 2 May 2019)

### THE FACTS

The applicant, a citizen of the People's Republic of China ("China") of Uighur origin, stated that he fled from China in 1996 for having been subject to torture for 9 years while being imprisoned and ultimately arrived in Turkey in 2001.

The applicant receiving a refugee certificate from the United Nations Refugee Agency ("UNHCR") in 2007 was granted international protection. He maintained that he was classified as a terrorist in China as he was struggling to disclose the policies of pressure applied by China to the Uighur Turks, and the Chinese authorities exerted influence to ensure his extradition.

The incumbent chief public prosecutor's office issued an indictment against the applicant, seeking for his extradition to China. However, the assize court dismissed the extradition request. The dismissal decision appealed by the public prosecutor was quashed by the Court of Cassation. The applicant's case, which was referred to the assize court after the prosecutor's office had issued a decision of non-jurisdiction upon the quashing judgment, is still pending.

Having been released, the applicant was taken to the Foreigners' Removal Centre ("Removal Centre"). On 19 October 2016 the Governor's Office of the province -where the Removal Centre is located- issued a deportation order and an administrative detention order against him. The applicant's challenge against the administrative detention order was rejected by the magistrate judge, while the action brought by him for annulment of the deportation order was dismissed by the administrative court.

The applicant filed an application with the Court for an interim measure because of the risk of his being extradited to China. Accordingly, the Court indicated an interim measure in 2016 and allowed for his extradition neither to China nor to Kazakhstan.

The applicant lodged an application with the European Court of Human Rights ("ECHR"), alleging that Turkey would deport him to a third country other than China and Kazakhstan. Thereafter, the ECHR indicated an interim measure to ensure suspension of the applicant's deportation from Turkey.

### THE APPLICANT'S ALLEGATIONS

The applicant maintained that his right to personal liberty and security had been violated on the ground that administrative detention of foreigners at the Removal Centre for over 12 months was unlawful.

### THE COURT'S ASSESSMENT

Placing in administrative detention is an exceptional power introduced by Article 19 of the Constitution. It is accordingly possible to arrest or detain a foreigner pending his deportation or extradition. However, such deprivation of liberty cannot be considered legitimate unless the deportation or extradition process is conducted with due diligence.

The Law no. 6458 clearly points to the procedure whereby the extradition process should be conducted. In this respect, the Court examined whether the procedure prescribed in the said Law had been conducted with due diligence.

In the administrative detention order whereby the applicant was deprived of his liberty, the legal grounds relied on -such as maintaining public order and public safety- were reiterated in an abstract fashion and without providing any justification. It has been observed that the process of the extradition of criminals, which was conducted in respect of the applicant, had no bearing, either direct or indirect, on the administrative detention order which did not also contain any such finding.

It further appears that there is no act taken or finding made by judicial and administrative authorities that the applicant residing in Turkey from 2001 to 2016, the date when he was removed from the country, had involved in any incident causing disturbance of public order and safety. The administrative detention order lacked any explanation as to what particular circumstance of the applicant's case was considered as a threat to public safety and public order. Therefore, in its examination, the Court could not find an issue to discuss whether the applicant's administrative detention was lawful.

In spite of the necessity of making a regular review of administrative detention orders on monthly basis, such review in the applicant's case was performed 9 days after the expiry of the prescribed period, which was also incompatible with the lawfulness requirement.

On the other hand, the Directorate General of Migration Management submitted certain documents to the effect that the applicant continued staying in the Removal Centre of his own will following the twelfth month when the discontinuation of his administrative detention was ordered. The applicant abstained from signing the report that was issued by the Removal Centre, which led to the suspicion and uncertainties as to the veracity of its content. His application both to the Court and the ECHR for seeking his release indicates that he did no longer consent to his placement in the Removal Centre.

Besides, it is one of the positive obligations incumbent on the State to prevent an individual from giving consent to deprivation of his liberty. The passive attitude adopted by the State and the public authorities as a part of the State in taking an action to satisfy a legal requirement would not be compatible with this positive obligation.

Regard being had to the applicant's applications before the Court and the ECHR, it cannot be accepted that the applicant was placed in administrative detention of his own will. Any assumption to the contrary would be in breach of the legal norms setting the extent to which liberty may be exercised. Given the constitutional provisions concerned, no legal value could be attributed to the applicant's voluntary deprivation of his liberty.

Consequently, the Court has found a violation of the right to personal liberty and security safeguarded by Article 19 of the Constitution.

## JUDGMENT ON THE ALLEGED VIOLATIONS OF THE RIGHT TO PERSONAL LIBERTY AND SECURITY AND THE FREEDOMS OF EXPRESSION AND THE PRESS DUE TO DETENTION OF CERTAIN JOURNALISTS

*Ahmet Hüsrev Altan* (no. 2016/23668), *Ayşe Nazlı Ilıcak* (no. 2016/24616), *Mehmet Murat Sabuncu* (no. 2016/50969), *Akın Atalay* (no.2016/50970), *Önder Çelik and Others* (no. 2016/50971), *Ahmet Şık* (no. 2017/5375), *Murat Aksoy* (no. 2016/30112), *Ahmet Kadri Gürsel* (no. 2016/50978) *and Ali Bulaç* (no. 2017/6592, 2-3 May 2019)

### CASES OF AHMET HÜSREV ALTAN, AYŞE NAZLI ILICAK, MEHMET MURAT SABUNCU, AKIN ATALAY AND ÖNDER ÇELİK AND OTHERS

### THE APPLICANTS' ALLEGATIONS

The applicants maintained that their right to personal liberty and security had been violated due to unlawfulness of their detention, as well as their freedoms of expression and the press in that the charges for which they had been detained were indeed related to the acts falling within the ambit of these freedoms.

### THE COURT'S ASSESSMENT

**Case of Ahmet Hüsrev Altan**

It is indicated in the detention order issued by the Magistrate Judge that the applicant, former editor-in-chief of the Taraf newspaper, was consistently giving explanations through the media outlet of the Fetullahist Terrorist Organization (FETÖ) and/or Parallel State Structure (PDY) -the perpetrator of the coup attempt of 15 July 2016- in line with the aims of this organization, thereby fomenting the coup attempt; and that this fact was also plainly revealed by his speech during a TV programme.

Given the applicant's speeches on a TV programme the day before the coup attempt, his recent articles, his position at the newspaper and the statements of anonymous witnesses indicating the relation of his position with the organization, it is neither unfounded nor arbitrary to consider these facts as a strong indication of guilt in relation to the FETÖ/PDY.

The Magistrate Judge's conclusion that the applicant's detention was a proportionate measure and conditional bail would remain insufficient, taking into account the amount of the sentence prescribed for the imputed offence as well as the nature and significance of the offence, was neither arbitrary nor unfounded.

**Case of Ayşe Nazlı Ilıcak**

The applicant, who is 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. Therefore, the applicant's detention had a legal basis.

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.

Therefore, the conclusion by the investigation authorities that the applicant's expressions were a strong indication of her guilt in relation to the FETÖ/PDY, given the time, content and context of these expressions, cannot be said to be unfounded and arbitrary.

**Case of Mehmet Murat Sabuncu**

The applicant, who was the editor-in-chief of the Cumhuriyet newspaper in the aftermath of the coup attempt, was accused mainly for being responsible for the headlines, news and articles published in the newspaper. It was further alleged that he had argued against the operations conducted by security officers against the FETÖ/PDY's media outlets and tried to create the impression, through his social media posts, that members of this organization were a victim; and that he had also supported the media outlet making propaganda in favour of the PKK (Kurdistan Workers' Party) through the messages he had posted, thereby having aided the said terrorist organizations.

Regard being had to the facts that the news, articles and headlines published in the said newspaper within the period when the applicant was the editor-in-chief as well as his social media posts aimed at undermining persistently the State's struggle against the PKK and the FETÖ/PDY, which went beyond the purpose of criticism and reporting news; that the messages given through these materials was intended to disunite the society; and that an impression was tried to be created to the effect that these organizations were innocent and victim, it is neither unfounded nor arbitrary to consider these facts as a strong indication of the applicant's guilt.

**Case of Akın Atalay**

It is indicated in the detention order against the applicant that following the replacements in the Board of Directors of the Cumhuriyet Foundation, the newspaper targeted at the State and published many headlines, news and articles which may be regarded as a propaganda of the terrorist organizations and create an impression in favour of these organizations. It has been accordingly concluded that there was strong suspicion of guilt on the part of the suspects sitting in the Foundation's Board of Directors including the applicant, who was held responsible for these publications in his capacity as the chief executive officer of the newspaper.

The applicant was accused mainly for being responsible for the headlines, news and articles published in the newspaper in his capacity as an official in the management of the Foundation and the Company and as the chief executive officer. He was alleged to have aided the said terrorist organization by arguing against the operations conducted against the FETÖ/PDY's media outlets, trying to undermine these operations through his social media posts as well as creating the impression that members of this terrorist organization were indeed a victim.

It was neither arbitrary not unfounded for the investigation authorities to consider that there existed a strong indication of guilt, given the language used in the impugned articles, news and social media posts, the public impression that these impugned materials left at the time of their publication as well as their influences on public, when taken together with the context thereof.

**Case of Önder Çelik and Others**

In the detention order issued against the applicants, managers of the Cumhuriyet Foundation, it is indicated that following the replacements in the Board of Directors of the Cumhuriyet Foundation, the newspaper targeted at the State and published many headlines, news and articles which may be regarded as a propaganda of the terrorist organizations and create an impression in favour of these organizations.

It appears that given the applicants' positions and their long-term offices at the newspaper, they were found to exert an influence on the editorial policy of the newspaper and therefore held responsible for the news and articles published therein.

It was neither arbitrary not unfounded for the investigation authorities to consider that there existed a strong indication of guilt, given the language used in the impugned articles, news and social media posts, the public impression that these impugned materials left at the time of their publication and their influences on public, when taken together with the context thereof.

Regard being had to the severity of the punishment set forth in the law for the imputed offences, it may be concluded that the risk of fleeing exists on the part of all above-mentioned applicants.

Besides, in all of these cases, there is no circumstance which would compel the Court to depart from the inferior courts' conclusion in respect of the allegation that the applicants were investigated and subsequently detained on remand merely on account of their acts falling within the scope of the freedoms of expression and the press.

Consequently, in the above-mentioned cases, the Court has found no 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 respectively safeguarded by Articles 26 and 28 of the Constitution.

## CASE OF AHMET ŞIK

### THE APPLICANTS' ALLEGATIONS

Maintaining that the impugned news, articles and social media posts fell under the scope of the freedoms of expression and the press as well as involved no criminal element, the applicant alleged that his right to personal liberty and security as well as freedoms of expression and the press had been violated.

### THE COURT'S ASSESSMENT

The detention order stated that the applicant had gone beyond reporting news in his texts and articles as well as attempted to ensure that the statements of terrorist organizations reached out to the masses, and concluded that there was evidence indicating the existence of a strong suspicion of the applicant's guilt.

It was neither arbitrary not unfounded for the investigation authorities to consider that there existed a strong indication of guilt, given the newspaper interviews with the perpetrators and announcement of their message to the public at the very time when an activity was carried out by the organization to create an impression and keep its name on the agenda.

In view of the circumstances in the aftermath of the court attempt, the protective measures other than detention might have remained insufficient in order to ensure the proper collection of evidence as well as the safe conduct of the investigations. The risks of fleeing taking advantage of the turmoil during this period and tampering with evidence are much more when compared to the offences committed during an ordinary period. Therefore, the grounds for the applicant's detention on remand due to especially the risk of fleeing and tampering with evidence had factual basis, and the detention measure was proportionate.

In addition, there is no circumstance which would compel the Court to depart from the inferior court's conclusion in respect of the allegation that the applicant was investigated and subsequently detained on remand merely on account of his acts falling within the scope of the freedoms of expression and the press.

Consequently, the Court has found inadmissible the alleged violations of the right to personal liberty and security safeguarded by Article 19 of the Constitution, as well as the freedoms of expression and the press that are respectively safeguarded by Articles 26 and 28 of the Constitution, as being manifestly ill-founded.

## CASES OF MURAT AKSOY, AHMET KADRİ GÜRSEL AND ALİ BULAÇ

### THE APPLICANTS' ALLEGATIONS

The applicants maintained that their right to personal liberty and security had been violated, stating that the elements of the charges against them had not been proven; and that their freedoms of expression and the press had been violated due to their detention on remand for their social media posts and articles.

### THE COURT'S ASSESSMENT

**Case of Murat Aksoy**

The investigation authorities failed to prove that the applicant's articles and posts did not fall within the scope of the freedom of expression. The said articles and posts mainly criticized the Government, disparaged its policy and expressed ideas on political events. However, they, by virtue of their wording, did not incite to violence and terrorist acts.

The fact that the opinions put forth by the applicant in his articles showed parallelism with the discourse and ideas of the terrorist organization and coincided with them at some points cannot per se be regarded as a strong indication of guilt.

The applicant's detention, which was mainly based on his newspaper articles and social media posts, in the absence of strong indication of guilt, was in breach of his freedoms of expression and the press.

**Case of Ahmet Kadri Gürsel**

Although the investigation authorities maintained that the applicant in his capacity as the editorial consultant was responsible for the news and articles published in the Cumhuriyet newspaper, they failed to clarify how his office -only confined to editorial consultancy- had a bearing on the editorial policy of the newspaper.

Although it may be said that the wording of the applicant's article was harsh and critical, his expressions were not explicitly inciting to violence and terrorist acts.

Besides, a person's meeting with those who have undergone an investigation due to any offence related to a terrorist organization cannot per se be a reason for his accusation. In this respect, it must be proven that such meetings were held within the scope of an organizational activity. In the present case, the investigation authorities failed to demonstrate for which purposes the applicant had met with these persons.

In view of all these considerations, the Court has concluded that the inferior court failed to sufficiently demonstrate the existence of strong indication of the applicant's guilt. The applicant's detention on the basis of mainly his articles in the newspaper, in the absence of strong indication of guilt, was in breach of the guarantees inherent in the freedoms of expression and the press.

**Case of Ali Bulaç**

It is seen that the facts forming a basis for the applicant's detention on remand were mainly his articles in the newspaper. The investigation authorities maintained that the applicant had written these articles in accordance with the aims of the FETÖ/PDY.

The applicant's articles neither contained a call for violence and rebellion or hate speech, nor did they praise or legitimize terrorism. The articles, in general, criticized the Government and its policies and contained subjective ideas on political and social events, which were considered disturbing by some people.

The mere fact that the applicant was a member of the board of trustees of the foundation of journalists and authors does not imply that he had ties with the organization.

Detention, which is a severe measure if not satisfying the condition of lawfulness, cannot be regarded as a necessary and proportionate interference, in a democratic society, in terms of the freedoms of expression and the press.

Consequently, the Court has found violations of the right to personal liberty and security safeguarded by Article 19 of the Constitution, as well as the freedoms of expression and the press that are respectively safeguarded by Articles 26 and 28 of the Constitution.

## JUDGMENT FINDING A VIOLATION, INTER ALIA, OF THE RIGHT TO PERSONAL LIBERTY AND SECURITY DUE TO THE UNLAWFULNESS OF A JOURNALIST'S DETENTION

*İlker Deniz Yücel* (no. 2017/16589, 28 May 2019)

### THE FACTS

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.

### THE APPLICANT'S ALLEGATIONS

The applicant maintained that there had been violations of the right to personal liberty and security as he had been detained in the absence of a reasonable suspicion of his guilt as well as of the freedoms of expression and the press as his detention was solely based on news and articles which were indeed in the form of journalistic activities.

### THE COURT'S ASSESSMENT

**Alleged Unlawfulness of Detention**

In the detention order, it was indicated that the applicant had interviewed with Cemil Bayık, one of the heads of the said terrorist organization; that the PKK had been reflected as a legitimate organization through the impugned interview; and that the applicant had disseminated terrorist propaganda and incited the people to hatred and enmity also through his certain articles.

News reporting based on interviews constitutes one of the important means whereby the press is able to play its vital role of public watchdog. The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest.

As a result of its examinations, the Court cannot reach the conclusion that the applicant maintained an attitude affirming the interviewee's expressions and asked questions guiding the interviewee for the purpose of enabling him to disseminate the terrorist propaganda. The inferior court failed to demonstrate that the applicant's motivation in making the interview was to disseminate propaganda of the terrorist organization.

It has been further observed that the other articles relied on as a ground in ordering the applicant's detention were in the form of a political criticism, thereby being under the protection of the freedom of expression; and that they cannot be regarded as a strong indication of criminal guilt.

Journalists may hold interviews with various news sources as many as possible with a view to making news. To establish contacts with members of terrorist organization may constitute a criminal offence only when it is intended to serve any purpose other than journalism. In such a case, it must be demonstrated with concrete facts that the contact has been established for any purpose other than journalism. However, in the present case, the investigation authorities failed to demonstrate any such facts.

Consequently, the Court has found a violation of the right to personal liberty and security safeguarded by Article 19 of the Constitution.

**Alleged Violations of the Freedoms of Expression and the Press**

It appears that the grounds underlying the applicant's detention are mainly the newspaper articles written by him. Any detention which does not satisfy the lawfulness requirement, which amounts to a severe measure, cannot be considered as a necessary and proportionate interference in a democratic society within the meaning of the freedoms of expression and the press.

In the present case, it cannot be comprehended what pressing social need justified the interference imposed on the applicant's freedoms of expression and the press by ordering his detention as he had expressed, through his articles, views similar to those voiced by a certain section of the society and leaders of the opposition parties at the time when the impugned articles were published.

Besides, his detention in the absence of any concrete fact other than the articles published may undoubtedly have a deterrent effect on the freedoms of expression and the press.

Consequently, the Court has found violations of the freedoms of expression and the press safeguarded respectively by Articles 26 and 28 of the Constitution.

## JUDGMENT FINDING A VIOLATION OF THE RIGHT TO PERSONAL LIBERTY AND SECURITY DUE TO THE DISPROPORTIONATE NATURE OF A MINOR'S DETENTION

*Semra Omak* (no. 2015/19167, 17 July 2019)

### THE FACTS

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 who 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 penitentiary institution. The incumbent court then discontinued the proceedings on account of E.N.'s death.

### THE APPLICANT'S ALLEGATIONS

The applicant maintained that the right to personal security and safety had been violated due to the unlawfulness of her son's detention.

### THE COURT'S ASSESSMENT

In determining whether the detention measure is proportionate under the relevant provisions of the Constitution, all circumstances of the concrete case must be taken into consideration. In the present case, the minor status of the applicant must also be borne in mind.

Detention of a minor is a measure of last resort pursuant to the Child Protection Law no. 5395 which sets forth that a minor's detention may be ordered only when the measure of conditional bail has proven, or appears, to be inconclusive or such measures have not been complied with. Accordingly, in the present case, the measure of conditional bail should have been primarily applied. Nor was there any assessment demonstrating that in ordering E.N.'s detention, the incumbent judge took his being a minor into consideration.

The grounds relied on by the magistrate judge in the detention order do not give the impression that E.N.'s detention was a measure of last resort. Besides, it does not appear that the judge ordering detention had considered the alternative measures instead of detention. Therefore, the impugned detention was found disproportionate.

Consequently, the Court has found a violation of the right to personal liberty and security safeguarded by Article 19 of the Constitution.

## DECISION FINDING INADMISSIBLE THE ALLEGED VIOLATION OF THE RIGHT TO PERSONAL LIBERTY AND SECURITY DUE TO DETENTION OF A UN JUDGE

*Aydın Sefa Akay* (no. 2016/24562, 12 September 2019)

### THE FACTS

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 attempted coup of 15 July, for his alleged involvement in the FETÖ/PDY hierarchical structure. In this 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 appealed his detention order; but his appeal request was dismissed. Thereafter, he lodged an individual application with the Court.

On the other hand, a criminal case was opened against him before the incumbent assize court by 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.

### THE APPLICANT'S ALLEGATIONS

The applicant maintained that his right to personal liberty and security had been violated due to the unlawfulness of his arrest, custody and detention that were ordered within the scope of the investigation conducted in connection with the attempted coup.

### THE COURT'S ASSESSMENT

The applicant alleged that he had been detained in breach of the safeguards inherent in the diplomatic immunity to which he was entitled by virtue of his profession.

Those who are taking office as a judge at the UN IRMCT shall be afforded privileges, immunity, exemptions and opportunities which are enjoyed by diplomatic representatives pursuant to the international law. However, the exemptions and immunities laid down in the relevant statutory arrangements are applicable in the States where these officers are taking office. As they cannot rely on the specified exemptions and immunities before the bodies of the State of their origin which they represent, any investigation initiated against them will be conducted in accordance with general provisions, and their detention may be ordered, if deemed necessary, by the magistrate judges which are the judicial bodies exercising general jurisdiction.

Therefore, in the present case, the applicant's allegation that his detention was in breach of the safeguards that he should have enjoyed, pursuant to the international law, in his capacity as a judge at the IRMCT was groundless. In this sense, the applicant's detention had a legal basis.

Given the general circumstances prevailing at the time when his detention was ordered, the particular circumstances of the present case as well as the content of the order issued by the magistrate judge as a whole, it has been concluded that the grounds underlying the applicant's detention had factual basis.

Regard being had to all circumstances of the present case, the magistrate judge's conclusion that the applicant's detention was a proportionate measure and that the conditional bail would be insufficient cannot be said to be arbitrary or unfounded given the severity of the sanction prescribed for the imputed offence as well as nature and significance of the criminal act. For these reasons, it is clear that there was no violation in respect of the alleged unlawfulness of the applicant's detention.

Consequently, the Court has found inadmissible the alleged violation of the right to personal liberty and security safeguarded by Article 19 of the Constitution.

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

*Mustafa Özterzi* (no. 2016/14597, 31 October 2019)

### THE FACTS

The applicant holding office as a judge was taken into custody and subsequently detained within the scope of an investigation that was conducted into the offences related to the Fetullahist Terrorist Organization/ Parallel State Structure (FETÖ/PDY) following the coup attempt of 15 July. After the applicant's challenge against his detention order had been dismissed, he lodged an individual application. Meanwhile, a criminal case was filed against him, and at the end of the proceedings he was subsequently acquitted by the decision of the incumbent assize court. Thereupon, his acquittal decision was appealed before the regional court of appeal. By the date when his individual application was examined by the Court, the appeal proceedings had been still pending.

### THE APPLICANT'S ALLEGATIONS

The applicant maintained that his right to personal liberty and security had been violated due to the unlawfulness of his arrest, custody and detention.

### THE COURT'S ASSESSMENT

In the particular circumstances of the present case, the applicant's allegation that he had been detained unlawfully in the absence of the safeguards he should have been entitled in his capacity as a judge under the Constitution or the Law no. 2802 is not justified. Given the fact that the applicant was detained following the coup attempt for his alleged membership of the FETÖ/PDY, it has been observed that the investigation authorities' assessments as to his arrest in flagrante delicto for the imputed offence of membership of an armed terrorist organization had a factual and legal basis. Besides, the applicant's detention had a lawful basis.

In its detention order, the magistrate judge made a general reference to the concrete facts underlying the strong suspicion of his guilt and in this respect emphasized his suspension from office by the High Council of Judges and Prosecutors (HCJP). In the indictment issued in respect of the applicant, the allegations against him were based on the HCJP's decision ordering his dismissal from office, the HTS reports showing the phone conversations held between the applicant and certain individuals who were under investigation due to the FETÖ/PDY-related offences, his membership of the Association of Judges and Prosecutors ("Association") as well as on the information obtained through the analysis of the relevant digital materials.

As regards the lawfulness of the applicant's detention, the Court made its examination as to whether there was a strong suspicion of his guilt on the basis of these findings and facts.

One of the measures taken under the state of emergency, which was declared and prevailing throughout the country following the coup attempt of 15 July, is the Decree-Law no. 667. As indicated in Articles 3 and 4 of

the Decree-Law, having any relation or link with the structures, formations or groups that are designated by the National Security Council ("Council") will be deemed sufficient to order dismissal from public office or profession. However, any such conclusion to be reached in this respect is irrespective of the establishment of criminal liability. Therefore, the applicant's suspension from office and/or dismissal from public office cannot be considered per se as a strong indication of his criminal guilt.

Besides, his membership of the Association could be regarded as an organizational activity only when it is demonstrated that he did so in line with an instruction given by a terrorist organization. Otherwise, reaching a conclusion as to the existence of a strong indication of guilt will be based only on a presumption. As a matter of fact, the case-law of the Court of Cassation on this matter is also in the same vein. In this sense, no such assessment can be made in respect of the applicant, who has been a member of the Association since 2010.

The applicant was charged also on account of his phone conversations with individuals against whom an investigation was conducted due to the FETÖ/PDY-related offences. He maintained that these conversations had been made within the scope of his professional activities. The investigation authorities neither found established nor asserted that the phone conversations had been made within the framework of an organizational relation. Nor is there any information as to the contents of these conversations. Besides, it was not established that the applicant had held the phone conversations with the heads ("imam") of the FETÖ/PDY in the judicial arena. In this regard, the HTS records of these phone conversations cannot be considered as a criminal indication of the criminal guilt within the meaning of an organizational relation.

The witness statements against the applicant did not also contain any explanation that he was a member of the FETÖ/PDY or had an organizational relation with this structure.

Besides, the analysis report of the digital data obtained during the searches conducted by the investigation authorities revealed that the applicant's e-mail account contained no record or finding concerning the Bylock application. Any finding or information with respect to ByLock application may be regarded as a strong indication only when it is proven that it has been actively in use or already downloaded to the mobile phone for use. In the present case, the investigation authorities did not maintain that the applicant had used or downloaded the application in question. As a matter of fact, nor did the first instance court consider the signs sufficient to prove the applicant's use of ByLock application.

The applicant followed certain social media accounts and websites which were disseminating propaganda of the FETÖ/PDY. In this sense, unless the organizational aim and link are demonstrated with concrete facts by the public authorities, merely accessing or following websites and social media

accounts disseminating terrorist propaganda cannot be considered as a strong indication of criminal guilt. In the present case, the investigation and prosecution authorities failed to demonstrate that the applicant followed these sites and social media accounts on the basis of an organizational motive.

It has been concluded that the applicant's detention in the absence of any strong indication of his criminal guilt was in breach of the right to personal liberty and security.

As the existence of a strong indication of criminal guilt is a pre-condition for ordering detention, any consideration to the contrary will render dysfunctional all safeguards inherent in the right to personal liberty and security. Even in the administrative procedures during the state of emergency, detention of individuals in the absence of any indication of their criminal guilt cannot be regarded as a measure strictly required by the exigencies of the situation.

In the present case, the investigation authorities ordered the applicant's detention without demonstrating the existence of concrete facts in support of his criminal guilt. It has been accordingly considered that the impugned interference contrary to the safeguards inherent in the right to personal liberty and security was not justified by Article 15 of the Constitution whereby the exercise of fundamental rights and freedoms may be suspended and restricted during the state of emergency.

Consequently, the Court has found a violation of the right to personal liberty and security safeguarded by Article 19 of the Constitution.

# E. JUDGMENTS CONCERNING THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

## JUDGMENT FINDING A VIOLATION OF THE RIGHT TO RESPECT FOR PRIVATE LIFE DUE TO UNLAWFUL DISCLOSURE OF THE CERTAIN PERSONAL DATA TO THE ADMINISTRATIVE AUTHORITIES

*Fatih Saraman* (no. 2014/7256, 27 Ferbuary 2019)

### THE FACTS

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 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 investigation and archive research, the applicant had been previously subject 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 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 required to take 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 Court 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.

### THE APPLICANT'S ALLEGATIONS

The applicant maintained that his right to respect for private life had been violated, indicating that the administration had unlawfully had access to the records of the offence he had committed under 18 years.

### THE COURT'S ASSESSMENT

One of the legal interests safeguarded within the scope of the right to respect for private life, which is enshrined in Article 20 of the Constitution, is the right to privacy afforded to individuals.

It is surely possible for the administration to introduce rules forming the basic framework with respect to security investigation and archive research to be conducted in respect of those who will be appointed to positions of great importance for national security. However, the legislation embodying provisions in this field must be formulated in an adequately explicit manner

whereby individuals will know under which conditions and within which limits the public authorities are entitled to take certain confidential measures and to potentially interfere with the privacy of the private life.

Law no. 4045 forming a basis for the security investigation and archive research procedures to be conducted in respect of officers to hold certain public positions does not contain any information as to the types of information and documents to be subject to such investigation and research, the authority from which such information may be obtained, as well as the manner and period how and how long such information and documents will be reserved. It cannot be therefore said that the Law embodies basic rules, principles and framework with respect to the issue imposing a restriction on fundamental rights and freedoms. It has been accordingly concluded that the provision of law forming a basis for the impugned interference does not satisfy the lawfulness requirement.

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 Investigation and Archive Research include any provision affording safeguards inherent in the right to respect for private life.

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 Law no. 5237, it is set forth that an individual who was 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.

Likewise, it is set out in Law no. 5352 that criminal records and archive records of those who are under 18 may be sought by the chief public prosecutor's offices, judge's offices or courts only if 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.

Besides, regard being had to the facts that the applicant's success both in the written and oral exams was announced and that the criminal record pertaining to the offence he committed when he was under 18 was notified to the administrative authorities, which was a manifest breach of the relevant provision in Law no. 5352, it has been concluded that, also in this respect, the interference with the applicant's right to respect for private life was devoid of a legal basis.

Consequently, the Court found a violation of the right to respect for private life safeguarded by Article 20 of the Constitution.

## JUDGMENT FINDING A VIOLATION OF THE RIGHT TO RESPECT FOR FAMILY LIFE DUE TO DISMISSAL OF THE REQUEST FOR A SUSPENSION OF EXECUTION FOR TAKING CARE OF A BABY

*Şükran İrge* (no. 2016/8660, 7 November 2019)

### THE FACTS

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 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. She has been still placed in a women's closed prison where she was transferred.

### THE APPLICANT'S ALLEGATIONS

The applicant maintained that her right to respect for family life had been violated due to dismissal of her request for a suspension of execution of her sentence for having a baby.

### THE COURT'S ASSESSMENT

It is evident that Article 16 § 4 –setting forth that "the execution of the prison sentence against a woman who is pregnant or who gave birth less than six months ago shall be postponed" – of the Law no. 5275 on the Execution of Penalties and Security Measures, which applied in the present case, serves for protecting both the woman and the child and is intended for ensuring the baby to be with the mother in a sound environment. Besides, this legal arrangement also ensures that the public interest pursued by placing a convicted mother in penitentiary institution be overridden, under certain circumstances, by the best interest of child.

In the present case, the applicant requested to be granted a suspension of execution 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 sentence as well as her previous behaviours and conducts, the chief public prosecutor's office dismissed her request noting that she was to be 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,

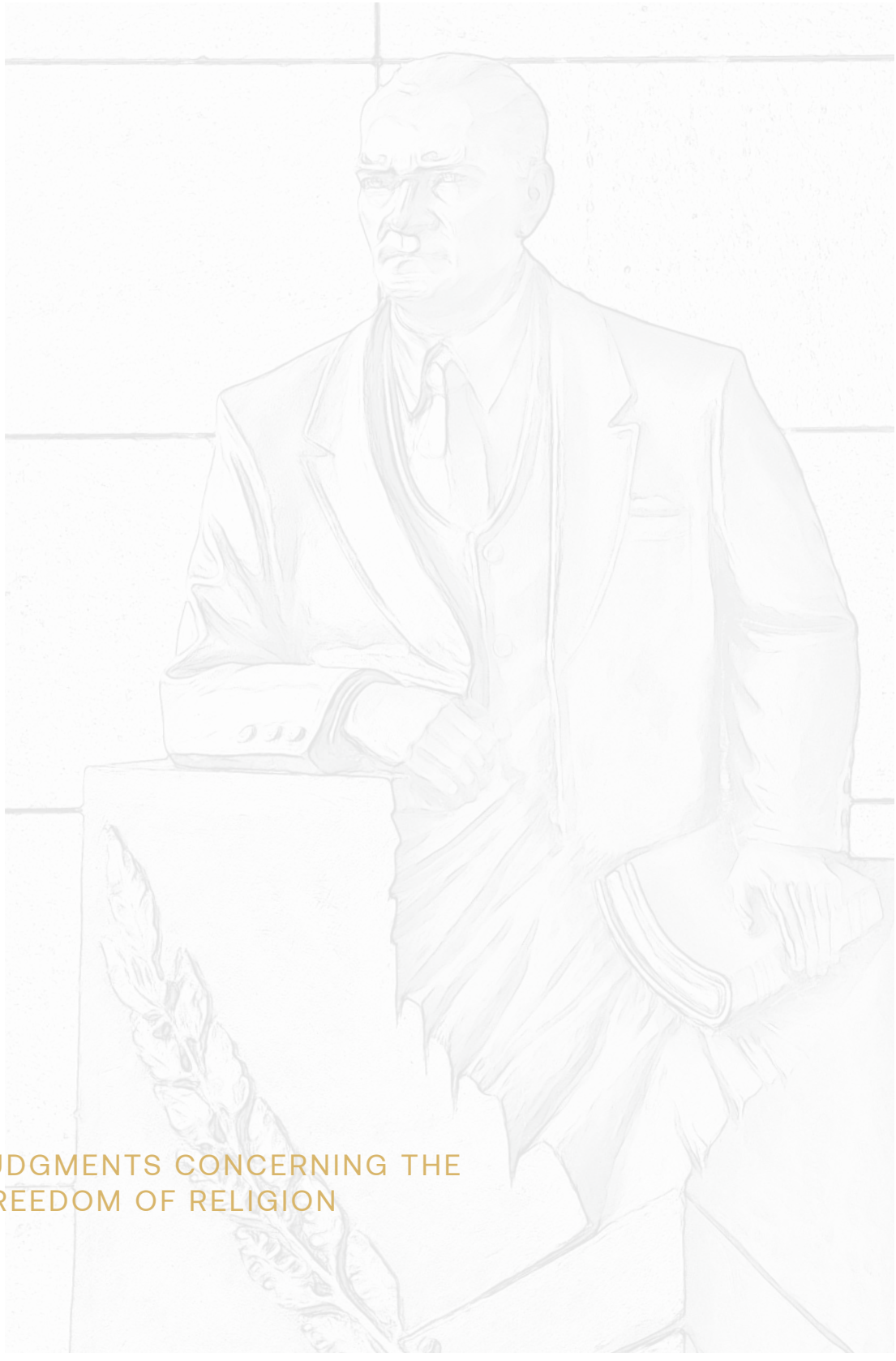
was categorized as a convict posing a threat. Moreover, her request was not assessed in consideration of the baby's living conditions and needs, and the provisions applicable merely to the convicted mother were relied on in the dismissal decision.

Besides, the public authorities found the ward's capacity as well as physical condition of the penitentiary institution unfit for children's lives and development. Therefore, 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.

In addition, no balance was struck between the applicant's placement in a penitentiary institution and the child's best interest. Nor was any measure such as providing an appropriate environment for the child or transferring them to another institution with better conditions taken. In the present case, the positive obligations inherent in the right to respect for family life were not fulfilled.

Consequently, the Court has found a violation of the right to respect for family life safeguarded by Article 20 of the Constitution as well as awarded compensation to the applicant.

There is no legal interest in conducting a retrial in order to eliminate the consequences of the violation in question as the applicant was transferred, upon the interim measure indicated by the Court, to another penitentiary institution which is fit for the baby. The applicant has been awarded compensation as she was not afforded the safeguards inherent in the right to respect for family life.



# F. JUDGMENTS CONCERNING THE FREEDOM OF RELIGION

## JUDGMENT FINDING A VIOLATION OF THE FREEDOM OF RELIGION DUE TO DISMISSAL OF THE REQUEST FOR HOLDING AN ELECTION OF TURKEY'S ARMENIAN PATRIARCH

*Levon Berç Kuzukoğlu and Ohannes Garbis Balmumciyan* (no. 2014/17354, 22 May 2019)

### THE FACTS

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 Clericals whereas the second request was filed by the Civilians including the applicants.

The Governor's Office tacitly rejected the Civilians' request by leaving it unanswered and also refused the Clericals' proposal as the patriarchate's office was not vacant. It however notified that an election for a "general acting patriarch" could be held. Thereafter, the Turkey's Armenian Clerical Committee held an election of general acting patriarch.

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 general acting patriarch had been reached as a result of the contacts made merely by the Clerical Committee; and that the election should have not been held merely by the Clerical 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' ALLEGATIONS

The applicants alleged that their freedom of religion had been violated, maintaining that the administration had interfered with an issue which should have been settled by the community itself and had tried to solve the patriarchal problem by way of creating an institution that did not actually exist in the community's customs and practices, which amounted to an interference with the internal affairs of the community; and that the patriarchal election had been anti-democratically precluded.

### THE COURT'S ASSESSMENT

The election procedure of the patriarchs to hold the Patriarchate's office located within the country started to be governed by statute law by virtue of the Code of Regulations ("Nizamname") dated 1863. The provisions included therein and related to the election of the Armenian patriarch constitute the basis for practices that have been carried out so far.

In the Code of Regulations, all circumstances when the patriarchate's office shall be deemed vacant are not listed exhaustively; but instead the phrase "for various reasons" (esbab-ı saire) is stated therein, which means that also in similar circumstances when the patriarchate's office becomes vacant, a new patriarch is to be elected.

In dismissing the request for election by restricting the circumstances when a new patriarch may be elected to cases of death and resignation, the administration did not interpret the phrase of "for various reasons" stated in the Code of Regulations. In the same vein, the administrative court dismissed the applicants' action and failed to consider the meaning of this phrase, in spite of relying on the Code of Regulations in rendering its decision.

Although the patriarchate's office generally becomes vacant upon the death of patriarchs, it appears that an elected patriarch previously abandoned his seat without even resigning, and a new patriarchal election was held to replace him. Given the fact that the said provision -where the circumstances when patriarchate's office shall be deemed vacant are not listed on an individual basis but instead the phrase "for various reasons" is stated- leaves a wider margin of interpretation to the public authorities in practice, the decisions rendered by both the administration and the inferior courts could not be considered as relevant and sufficient.

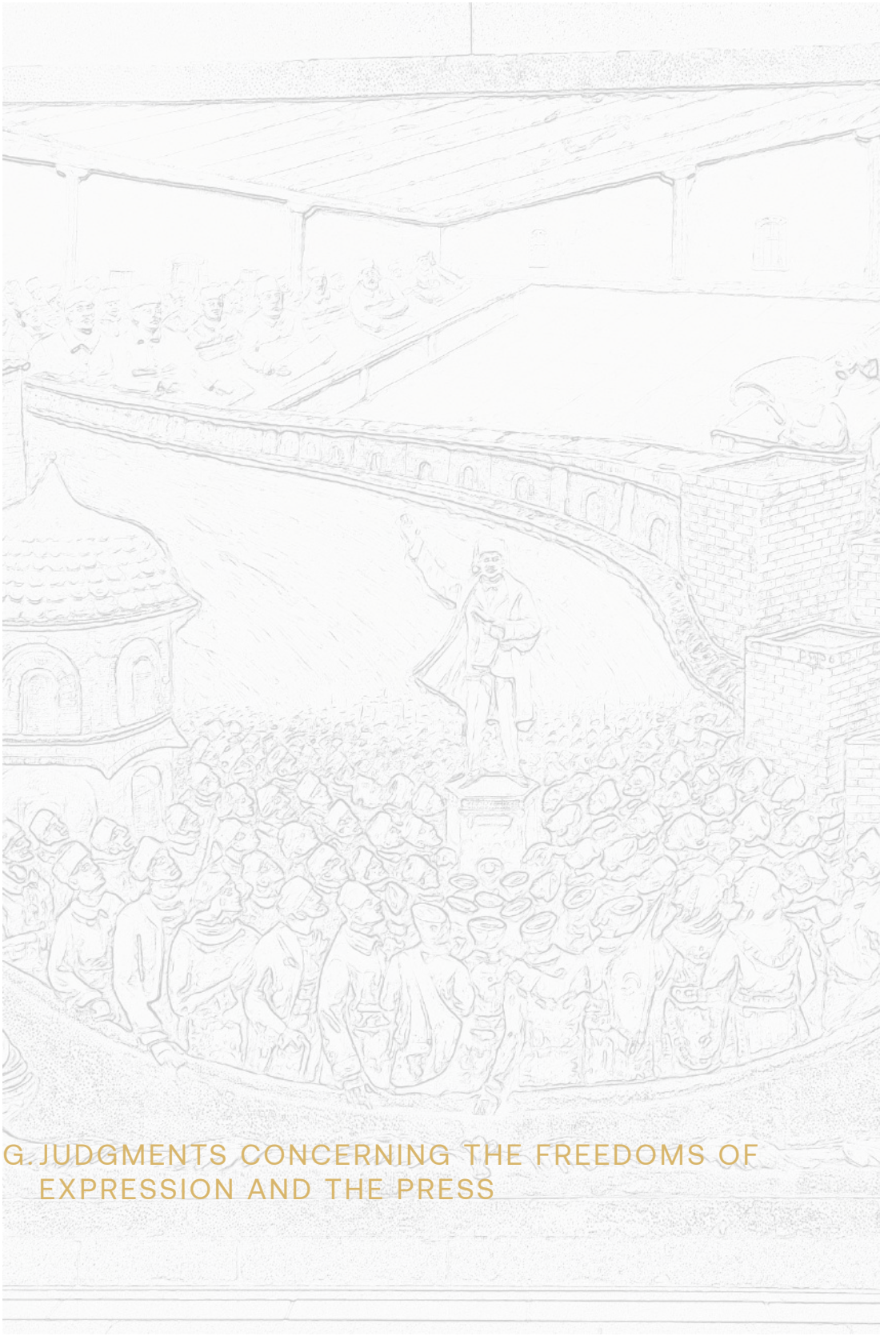
It has been observed that will of the Armenian community has not played a role, for a period of over ten years, in the election of patriarch who assumes powers and duties of great importance for the community.

Besides, it appears that the civilians had a say in the patriarchal elections held during the Republican era. Therefore, election by the Clerical Committee of a general acting patriarch who would enjoy the religious and executive powers entrusted to the patriarch for a very long period has led to the prioritisation of the Clericals' will and thus to the ignorance of the Civilians' will.

In the present case, the Ministry explicitly decided under which circumstances the Armenian Patriarch would be elected. However, the State can in no way decide on the circumstances under which a new religious leader would be elected or on the election procedure, save for the case of meeting a pressing social need. As a matter of fact, as previously stressed by the Court, requirements of a religion or faith may be designated merely by the members of this religion or faith.

The administration failed to consider the probability of solving the matter through dialogue; nor did it develop policies in order to conclude the matter in compliance with the Armenian customs and traditions as well as its religious practices. In hindering the patriarchal election, the administration also failed to demonstrate the pressing social need outweighing the spirit of Armenian customs set forth in the Code of Regulations and the Armenian community's will. It has been accordingly concluded that the interference with the applicants' freedom of religion due to dismissal of the request for election of Turkey's Armenian Patriarch cannot be considered to comply with the requirements of a democratic society.

Consequently, the Court has found a violation of the freedom of religion safeguarded by Article 24 of the Constitution.



# G. JUDGMENTS CONCERNING THE FREEDOMS OF EXPRESSION AND THE PRESS

## JUDGMENT FINDING A VIOLATION OF THE FREEDOM OF EXPRESSION FOR BEING SENTENCED TO IMPRISONMENT DUE TO THE EXPRESSIONS ON A TV SHOW

*Ayşe Çelik* (no. 2017/36722, 9 May 2019)

### THE FACTS

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 east and the south-east of Turkey?" during a period when the violent acts known to public as "ditch 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 application on its merits with final effect.

### THE APPLICANT'S ALLEGATIONS

She maintained that her freedom of expression had been violated, stating that she had not used any expression justifying or inciting violence or hatred but, to the contrary, used peaceful expressions.

### THE COURT'S ASSESSMENT

With the intent of disseminating their thoughts and deepening their ideas within the society, terrorist organizations may use every means to realize their objectives. Propaganda of terrorism or terrorist organizations is undoubtedly one of these means.

However, the Turkish law considers as an offence not any expressions of thoughts in relation to terrorism but merely the act of disseminating propaganda of terrorist organizations in a way to justify, praise, or incite recourse to, their methods involving force, violence or threat.

Expression of thoughts even those related to terrorism or terrorist organization or those in parallel to terrorist organization's ideology, social or political goals as well as its opinions on political, economic and social issues cannot be considered as a terrorist propaganda as long as they do not involve statements encouraging recourse to violence and lead to the risk of committing terrorist offences.

Expression and dissemination of thoughts as to social and political environments or socio-economic imbalances, ethnic problems, discrepancies in the country's population, demand of more freedoms or criticism about the regime as well as instilment and inspiration of such thoughts to others in an active, systematic and convincing manner fall under the protection of freedom of expression, even if they disturb the State or any sector of the population.

In the present case, according to the first instance court, the applicant had idealized and justified the violent acts performed by the terrorist organization,

had called for people to sympathise with the terrorist organization as well as had created the impression that the operations conducted by the security officers against terrorists had been targeting civilians and had led to the deaths of infants and children. Therefore, the first instance court considered that her expressions amounted to dissemination of propaganda in favour of the terrorist organization.

Given the context of the applicant's opinions and background of the events taking place at the material time, the Court disagrees with the first instance court having convicted her. In her speech, 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 zones of 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. It is undoubted that the impugned speech concerned a matter of public interest.

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 circumstances of the instant case, the applicant was not considered, due to her expressions, to have praised the members of the terrorist organization clashing with the security officers during the ditch events, to have particularly inspired hatred against the security officers directly involved in the clashes or encouraged recourse to violence.

It has been regarded 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 conviction 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 organization. It has therefore been concluded that the impugned interference was incompatible with the requirements of a democratic society.

Consequently, the Court has found a violation of the freedom of expression safeguarded by Article 26 of the Constitution.

## JUDGMENT FINDING A VIOLATION OF THE FREEDOM OF EXPRESSION DUE TO THE REFUSAL TO HAND OVER CERTAIN PERIODICALS TO PRISONERS

*Recep Bekik and Others* (no. 2016/12936, 27 March 2019)

### THE FACTS

The applicants held in high-security prisons were denied access to certain issues of the periodicals such as journals and newspapers, which they had purchased, by virtue of the decisions taken by the educational boards of the prisons. Nevertheless, there is no decision issued to recall or seize these periodicals.

In the decisions taken by the educational board of the relevant prisons, it was indicated that these periodicals contained expressions praising a terrorist organization and its leaders as well as amounting to dissemination of terrorist propaganda.

The incumbent magistrate judges dismissed the applicants' challenges against the decisions issued by the educational board. Their appeals against the dismissal decisions were also rejected by the relevant assize courts.

### THE APPLICANT'S ALLEGATIONS

The applicants complained of the violation of their constitutional rights as they had been arbitrarily denied access to the periodicals, which they had subscribed to or purchased, without any justification.

### THE COURT'S ASSESSMENT

By its previous judgments, the Court has established its case-law on access to publications in prisons and admission of publications to prisons and also underlined the principles concerning the publications of which prisoners may avail themselves.

It has been found out that some of the decisions issued by the prison administrations and the inferior courts whereby the applicants were denied access to the relevant periodicals included assessments failing to satisfy the criteria set by the Court. It has been further observed that in these decisions, the parts of the periodicals, which had been found inconvenient, were not pointed, and assessments were made not on the basis of concrete elements but instead worded in abstract terms.

In some of these decisions, the prison administrations and the inferior courts specified the pages where the inconvenient parts were included but failed to provide any ground compatible with the principles laid down in the Court's established case-law. Besides, in these decisions, it was not discussed whether it was possible to hand over the publications to the applicants after the parts found inconvenient had been extracted.

Regard being had to the decisions issued by the relevant administrations and incumbent courts as a whole, it appears that not the applicants' personal situations but categorical reasons such as their conviction of terrorist offences and their placement in high-security prisons were taken as a basis in denying their access to the impugned periodicals.

In addition, it has been observed that the considerations as to whether a publication should be handed over to all prisoners of the same status in all prisons throughout the country are extremely variable.

It has been accordingly concluded that there is no mechanism capable of precluding arbitrariness in delivery of periodicals to detainees and convicts in prisons, ensuring equal treatment among those who are of the same legal status as well as of securing clear, guiding and stable administrative practices.

Consequently, it has been observed that as for the impugned practice whereby the prisoners are allowed to access to periodicals, no uniform assessments satisfying the criteria set out by the Court could be made.

Besides, in spite of its several judgments finding a violation in respect of the same issue, the Court still receives individual applications lodged against such kind of interferences, which apparently results from a structural problem concerning the current practice on allowing access to periodicals in prisons.

It is clear that if an effective mechanism whereby the prisoners are ensured to receive periodicals in a uniform and fair manner which satisfies the criteria set by the Court is not operated, the said structural problem will continue to exist, which would undoubtedly amount to a continued violation of the freedom of expression safeguarded by Article 26 of the Constitution.

Consequently, the Court has found a violation of the freedom of expression safeguarded by Article 26 of the Constitution.

## JUDGMENT FINDING A VIOLATION OF THE FREEDOM OF EXPRESSION DUE TO CONVICTION OF AN MP FOR DISSEMINATING TERRORIST PROPAGANDA

*Sırrı Süreyya Önder* (no. 2018/38143, 3 October 2019)

### THE FACTS

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 organization 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 organization 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'S ALLEGATIONS

The applicant maintained that his freedom of expression had been violated due to his conviction of disseminating terrorist propaganda on account of his remarks during a gathering.

### THE COURT'S ASSESSMENT

The freedom of expression means an individual's not being condemned on account of his views and convictions as well as his ability to freely express, explain, defend, convey to others and disseminate them.

In the present case, the applicant's conviction and imprisonment for disseminating terrorist propaganda on account of expressing his thoughts has explicitly constituted an interference with his freedom of expression. The impugned interference will be in breach of the freedom of expression, unless it complies with the conditions set out in Article 13 of the Constitution.

In this regard, it must be assessed whether the impugned restriction complied with the requirements of being prescribed by law, being justified by one or more of the justified grounds and not being contrary to the requirements of the democratic order of the society and the principle of proportionality, which are stipulated in the Constitution and applicable to the present case.

As noted in the Explanatory Note of the Council of Europe Convention on the Prevention of Terrorism, when considering whether any expression posed the danger that a terrorist offence might be committed, the nature of the addressee of the message, as well as the context in which the offence is committed shall be taken into account, and the significance and the credible nature of the danger should be considered in accordance with the requirements of domestic law.

In the same vein, the European Court of Human Rights has in its several judgments concluded that description of the terrorist organization's head as the "Kurdish leader" did not per se incite to violence. In its examination as to the remarks of similar nature, the Court of Cassation also considered that in cases where the accused chanted slogans in favour of the founder of the terrorist organization, place where the impugned act was performed, conditions and those addressees, the audiences and the question whether the impugned act had the potential of activating the audiences must be taken into consideration.

The issue needed to be ascertained is whether the controversial explanations -such as remarks describing the terrorist organization's head as a leader and praising him- incited to violence within the historical context as well as the context of the impugned speech as a whole. It must be borne in mind that the impugned speech was delivered within a context serving the purpose of increasing and improving the possibilities of ceasing violent acts in the country and resolving social problems through democratic negotiation processes. Accordingly, the applicant's remarks cannot be regarded as an incitement to violence.

Another ground for the applicant's conviction was the fact that he used the word "Kurdistan" in his speech. The meaning of the word "Kurdistan" can only be ascertained by considering it together with the expressions used throughout the speech as well as the specific circumstances in which the speech was delivered. Taken as a whole, in his speech, the applicant informed the crowd of the ongoing resolution process. Regard being had to the whole speech, it has been observed that in general a call was made for the continuation of the policies initiated with a view to resolving the problems through non-violent methods.

The first instance court that rendered the impugned decision concluded that the applicant "had attempted to create a negative perception about the legitimate and justified counter-terrorism operations carried out by the

Turkish security forces". Regarding an expression as a terrorist propaganda without demonstrating that it had incited to violence, with an abstract reference to the fact that a perception had been tried to be created, cannot be accepted as a legal assessment. The first instance court made no explanation as to which remark of the applicant had led it to this conclusion.

Considering the historical context of the applicant's speech, the objective meaning of the words used by him and the entire speech as a whole, it has not been concluded that the applicant had supported the violent and threatening methods of the terrorist organization with a view to inciting others to commit the same offences.

In the circumstances of the present case, the relevant authorities failed to demonstrate that the fact that the impugned speech was delivered at a mass meeting, it appeared on the media and continued to be published on the internet had negative consequences for the State and the society as well as had a significant effect on the State's anti-terrorism activities.

It has been considered that regardless of the language and style used, the impugned speech mainly concerned the demand for the successful conduct and termination of the ongoing resolution process at the material time. Accordingly, it is not acceptable that the applicant had delivered the relevant speech in order to enhance the political and social effectiveness of a terrorist organization, to make his voice heard to the masses, to establish the conviction that it was impossible to overcome the organization and that it could achieve its aim as well as to increase the sympathy of the people for the organization thereby seeking to provide the active support of the people.

It is obvious that the public authorities interfering with the remarks of the applicant who was an elected Member of the Parliament and an important actor of the ongoing resolution process at the material time had a very narrow margin of appreciation and that much more rigorous assessments were needed to be made.

The first instance court failed to provide relevant and sufficient reasons to justify that the applicant's conviction served a pressing social need.

Consequently, the Court has found a violation of the freedom of expression safeguarded by Article 26 of the Constitution.

## JUDGMENT FINDING A VIOLATION OF THE FREEDOM OF EXPRESSION DUE TO DEMOLITION OF A MONUMENT

*Mehmet Aksoy* (no. 2014/5433, 11 July 2019)

### THE FACTS

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. On the applicant's appeal, the Council of State ultimately upheld the dismissal decision.

### THE APPLICANT'S ALLEGATIONS

The applicant maintained that his freedom of expression had been violated due to demolition of the monument he had constructed.

### THE COURT'S ASSESSMENT

The applicant's freedom of expression was interfered with due to the demolition of his work of art by virtue of a series of decisions issued by the bodies exercising public authority. The impugned interference will be in breach of the freedom of expression, unless it complies with the conditions set out in Article 13 of the Constitution.

Disputes as to the construction, legal status and demolition of the impugned monument primarily took place among the public institutions. The failure of the bodies and institutions forming the State to function in harmony with one another cannot be relied on as a ground for justifying an interference with the individuals' rights and freedoms. Considering that the immovable where the impugned monument was located was declared as a cultural heritage required to be preserved, the Court dealt with the questions as to whether its demolition met a social need and whether it was applied as a measure of last resort.

In the present case, it should have been assessed whether it was possible to preserve the cultural assets on the immovable without having the monument demolished. Besides, it should have been discussed whether the work of art could be transferred to another place without being destroyed, and the applicant in his capacity as the sculptor of the monument should have been consulted to find a common solution. These considerations were included neither in the administrative decisions nor in the judicial decisions issued during the demolition process, which indicates that the State failed to fulfil its positive obligations on the preservation of works of art.

The bodies exercising public authority ignored the freedom of artistic expression enshrined in the Constitution during the period from construction to demolition of the monument. Nor was it demonstrated that the demolition of the impugned monument, which would indeed require more protection than other types of expression, had been necessary in a democratic society and applied as a measure of last resort. It has been therefore concluded that the decisions taken by the administrative bodies and the courts included no relevant and sufficient reasons.

Therefore, it has been concluded that the bodies exercising public power failed to show due diligence in protecting a work of art and thus the freedom of artistic expression which is safeguarded by the Constitution.

Consequently, the Court has found a violation of the freedom of expression safeguarded by Article 26 of the Constitution.

## JUDGMENT FINDING A VIOLATION OF THE FREEDOM OF EXPRESSION DUE TO CONVICTION OF THE ACADEMICS SIGNING A DECLARATION

*Zübeyde Füsun Üstel and Others* (no. 2018/17635, 26 July 2019)

### THE FACTS

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.

### THE APPLICANTS' ALLEGATIONS

The applicants maintained that their freedom of expression was violated on account of their conviction of spreading terrorist propaganda as they had signed a declaration issued by a group of academics.

### THE COURT'S ASSESSMENT

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 lives have occurred and required the declaration of a state of emergency in the large part of the country, for the last forty years.

The Constitutional Court is also aware of the fact that the impugned declaration had been prepared unilaterally and from a certain perspective and that it included exaggerated comments, as well as some offensive and vicious expressions against the security forces. The Constitutional Court's consideration that this declaration should fall under the protection of the freedom of expression set out in Article 26 of the Constitution does not mean that it shares and supports the thoughts and ideas stated in the declaration.

The content of 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 fights against terrorism with "massacring", "slaughtering" and "torturing" the people.

However, the expressions that are in no way supported by the Constitutional Court may also fall within the scope of the freedom of expression. In the assessment of whether an expression or statement fall 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 whether the used expressions legitimize, praise or incite the violent and threatening methods of the terrorist organization.

The fact that an expressed thought heavily criticizes the authorities, that it has been written in an accusatory and severe language and even that it is unilateral, contradictory and subjective does 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.

Undoubtedly, the limits of permissible criticism are wider with regard to the government than in relation to an individual. It is normal that the operations conducted against a terrorist organization within 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.

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 showing judicial reaction to such kind of expressions. That is because such interferences impose a severe restriction on the public's right to be informed of a different perspective 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.

It must be prescribed that severe criticisms may be directed towards the public authority conducting the impugned operations, as a result of 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' conviction was not necessary in a democratic society on the basis of a pressing social need.

Besides, the applicants were sentenced to imprisonment. However, the pronouncement of the conviction decisions rendered in respect of the applicants, except for one of them, was suspended, and the applicants were accordingly released on conditional bail.

Given the particular circumstances of the present case, it has been concluded that the interference imposed on the applicants –despite the suspension of the interference as regards certain applicants– could not be proven to be proportionate to the aim of maintaining public order inherent in the fight against the terrorist organization in question and terrorism.

Authorities exercising public power are afforded more opportunity, in responding to the criticisms against state policies, than anyone else in the country. Particularly in cases where it is possible to address unjust attacks and criticisms of the opponents through different means even if they appear to be highly unreasonable and irrelevant, criminal proceedings must not be resorted to.

Consequently, the Court has found a violation of the freedom of expression safeguarded by Article 26 of the Constitution.

## JUDGMENT FINDING A VIOLATION OF THE FREEDOM OF EXPRESSION DUE TO BLOCKING OF ACCESS TO WIKIPEDIA

*Wikimedia Foundation Inc. and Others* (no. 2017/22355, 26 December 2019)

### THE FACTS

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 is 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.

### THE APPLICANTS' ALLEGATIONS

The applicants maintained that there had been a breach of the freedom of expression, stating that blocking of access to the entire website had constituted an interference not complying with the requirements of the democratic order of the society.

### THE COURT'S ASSESSMENT

It should be demonstrated with relevant and sufficient grounds that the interference through the blocking of access to Wikipedia, which is considered to be an online encyclopaedia and provides a considerable amount of information in every field, has been necessary in a democratic society in order to ensure that the freedom to impart and receive information is not infringed.

In the present case, access to Wikipedia in its entirety was blocked due to the contents available on two URL addresses. In both contents, Turkey was described as one of the major external actors of the civil war in Syria. It was also claimed therein that Turkey supported the opposition forces in Syria, including terrorist organizations, against the current regime.

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 denial of access to the impugned contents, almost all of the resources referenced by the contents are still available on the internet.

It should be primarily noted that the order, issued 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 case of urgent necessity. Access to Wikipedia has been blocked by resorting to this exceptional means; 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 the above-cited 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 is deemed prejudicial.

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. In this respect, 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. 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 order for the blocking of access to the website was dismissed on the ground that the impugned contents "tarnished the State's reputation", in the absence of reasonable explanation as to why the contents were considered within this scope. 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.

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.

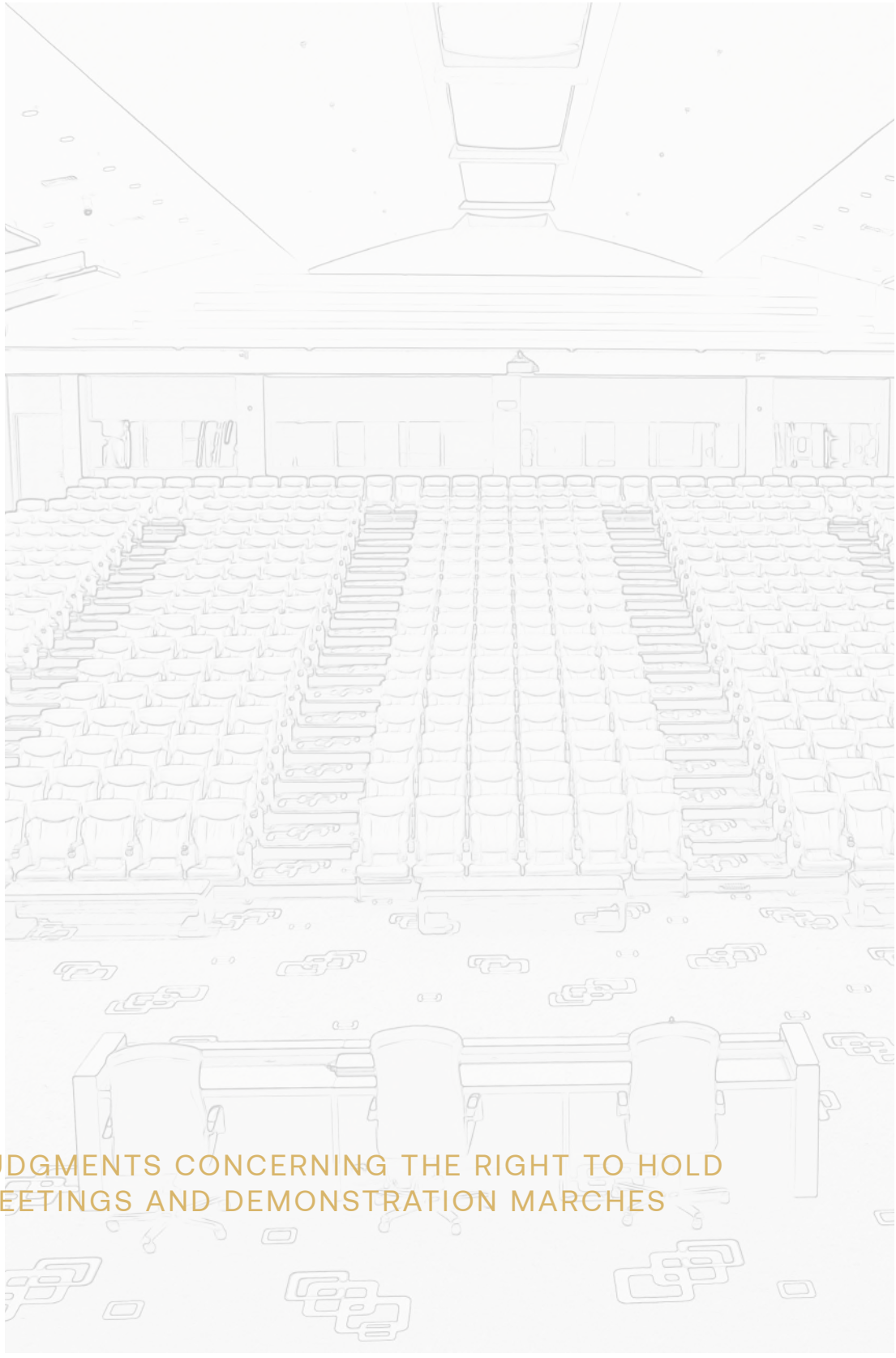
In the present case, following the order for the blocking of access to the website, the volunteer and impartial editors on Wikipedia have made comprehensive changes in the impugned texts, tried to reformulate their contents in a more objective and careful manner as well as removed certain contents -which were found neither reliable nor verifiable- and the resources referenced by these contents. Thereby, a significant part of the allegations that Turkey had been providing support to radical formations has been also removed.

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 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 also the active Wikipedia editors have been denied the opportunity to make adjustments and changes in, and to make contributions to, the contents.

Regard being had to all these considerations, it has been concluded that the inferior courts 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.

In the current situation, the measure of blocking access has become 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. It has been concluded that the impugned interference with the freedom of expression was not compatible with the requirements of a democratic society.

Consequently, the Constitutional Court has found a violation of the freedom of expression safeguarded by Article 26 of the Constitution.



# H. JUDGMENTS CONCERNING THE RIGHT TO HOLD MEETINGS AND DEMONSTRATION MARCHES

## JUDGMENT FINDING NO VIOLATION OF THE RIGHT TO HOLD MEETINGS AND DEMONSTRATION MARCHES DUE TO THE APPLICANT'S CONVICTION FOR MEMBERSHIP OF A TERRORIST ORGANIZATION

*Metin Birdal* (no. 2014/15440, 22 May 2019)

### THE FACTS

The applicant was taken into custody and subsequently detained on remand for his alleged membership to a terrorist organization, disseminating terrorist propaganda, causing damage to public property and resisting the police officers so as to prevent them from performing their duties. The incumbent assize court convicted the applicant for his membership of a terrorist organization. Thereafter, pursuant to the Law no. 6352 on the Amendment to Certain Laws for Increasing the Efficiency of Judicial Services and the Suspension of Prosecution and Penalties Regarding Offences Committed through Press, the incumbent court ordered suspension of the prosecution against the applicant. On the applicant's appeal, the first instance decision was upheld by the Court of Cassation.

### THE APPLICANT'S ALLEGATIONS

The applicant maintained that his right to hold meetings and demonstration marches had been violated as his participation in certain demonstrations had been relied on as a ground in his conviction of membership of a terrorist organization.

### THE COURT'S ASSESSMENT

In the present case, the applicant's participation in certain demonstrations was used as evidence during the criminal proceedings conducted with respect to his alleged membership of a terrorist organization. Accordingly, the applicant's right to hold meetings and demonstration marches was undoubtedly interfered with. The impugned interference will be in breach of Article 34 of the Constitution, unless it complies with the conditions set out in Article 13 of the Constitution.

The first instance court punished the applicant not on account of his activities at these demonstrations but of his membership of a terrorist organization. However, the court referred to his participation in the demonstrations, where violent acts took place and terrorist propaganda was disseminated, so as to indicate his membership of the said organization and to point to the persistent nature of his activities.

In one of its recent judgment, the Court has underlined that the disclosure of support in favour of a terrorist organization, namely the PKK, at meetings and demonstrations that turned into a propaganda event constitutes a severe threat against the democratic society.

Also given the principle of circumstantial evidence applicable in the law on criminal procedure, it is possible for the first instance court to

consider the applicant's participation in the meetings and demonstrations, which were held upon the terrorist organization call and served the purpose of disseminating terrorist propaganda, as evidence in convicting him.

Besides, it was not the sole ground relied on by the first instance court in reaching the conclusion that the applicant was a member of the terrorist organization. The first instance court took into account the phone records, intelligence information, police reports, denunciations, the applicant's conducts and roles during certain demonstrations as well as other available evidence as a whole.

The Court considers that given the way in which the first instance court assessed the available evidence in respect of the applicant, there is no inconsistency between his participation in certain demonstrations and the other evidence which could be qualified as a terrorist propaganda or which is an indicator of his sympathy towards the organization.

In the present case, the first instance court concluded that the applicant posed a severe threat to the democratic life for inciting to violence and leading to spread of undemocratic methods on account of his acts and behaviours. Therefore, the applicant's punishment met a pressing social need. It has been observed that the first instance court struck a fair balance between the society's right to live in an environment free of terror and the applicant's right to hold meetings and demonstration marches. Accordingly, the impugned interference with the said right could not be considered to be incompatible with the requirements of a democratic society.

Consequently, the Court has found no violation of the right to hold meetings and demonstration marches safeguarded by Article 34 of the Constitution.

# I. JUDGMENTS CONCERNING THE RIGHT TO PROPERTY

## JUDGMENT FINDING A VIOLATION OF THE RIGHT TO PROPERTY DUE TO COLLECTION OF THE EXPERT FEE FROM THE APPLICANT

*A.D.* (no. 2015/10393, 9 January 2019)

### THE FACTS

The governor's office imposed an administrative fine on the applicant, an association carrying out human rights-related activities, for illegal collection of donations. It also ordered the freeze of the applicant's bank and postal checking accounts.

The applicant brought an action before the administrative court seeking the annulment of the administrative fine. The court unblocked the applicant's bank accounts.

The decision was appealed. The Council of State quashed the decision on the ground that the dispute fell within the jurisdiction of the magistrates' court. The court abided by the Council of State's decision and dismissed the case for lack of jurisdiction.

After the finalization of the decision, the applicant appealed before the magistrate judge's office. The magistrate judge, having ordered an expert report on the case, rejected the applicant's appeal, finding no unlawfulness in the administrative sanction. The judge also decided that the expert fee of 350 Turkish liras (TRY) would be collected from the applicant and appropriated by the Treasury.

The applicant's appeal against the rejection of its objection to the administrative fine, as well as against the collection of the expert fee was dismissed by the magistrate judge.

### THE APPLICANT'S ALLEGATIONS

The applicant maintained that its right to property had been violated due to the court decision ordering it to pay the expert fee that had incurred during the proceedings.

### THE COURT'S ASSESSMENT

The judicial authorities enjoy a wide discretion in seeking expert opinion during the proceedings. However, although it is clearly understood at a glance that the dispute can be resolved by the judge's legal knowledge, seeking an expert opinion and collecting the expert fee from the relevant party will constitute a disproportionate interference with its right to property.

The applicant did not deny the fact that it had not obtained a prior permission before collecting donations. It raised an objection by arguing that it collected donations, which was an ordinary activity. Although the grounds relied on by the applicant were not related to material facts, but only to legal matters, the magistrate judge ordered an expert report without any justification.

As a matter of fact, in the expert report, the topic had been formulated as "whether the administrative fine was justified". The report also stated that "there was no unlawfulness in the administrative sanction" and that "the objection was not justified".

Accordingly, the material facts of the present case were not required to be discussed. It is therefore seen that all of the issues included in the expert report could have been enlightened by the judge's legal knowledge. It is very clear that the issues such as whether the administrative fine was justified, whether the administrative sanction was lawful, what the legal basis of the administrative sanction was, and whether the objection was justified can only be adjudicated by the judge within the scope of its jurisdiction. Therefore, no expert opinion is required on such matters.

Collection of the expenses that incurred as a result of obtaining evidence, which would clearly not facilitate the resolution of the dispute, from the relevant party will unnecessarily prolong the proceedings, as well as it will result in an unnecessary expense for the relevant party, constituting a disproportionate interference with its right to property.

Although the amount of the expert fee was relatively low, it was approximately half of the administrative fine subject to the applicant's objection. Accordingly, it has been concluded that the fair balance between the public interest and the applicant's right to property was disturbed to the detriment of the applicant and that the said interference was disproportionate.

Consequently, the Constitutional Court found a violation of the right to property safeguarded by Article 35 of the Constitution.

## JUDGMENT FINDING A VIOLATION OF THE RIGHT TO PROPERTY DUE TO THE FAILURE TO COMPENSATE THE DAMAGE SUSTAINED IN THE EXPROPRIATION PROCESS

*İbrahim Sözer and Others* (no. 2016/10425, 4 April 2019)

### THE FACTS

The immovable owned by the applicants was allocated, through the implementary development plan, as an area of public service where a school would be built. The applicants sought the expropriation of their immovable before the Special Provincial Administration but could not attain any result.

They then brought an action for compensation before the incumbent civil court against the administration and requested to be paid the current market value of the immovable. The civil court awarded compensation in favour of the applicants; however, on appeal, the first instance decision was quashed by the Court of Cassation. The first instance court, complying with the quashing judgment, dismissed the applicants' action for lack of jurisdiction.

On the other hand, the administration filed an action before the civil court, seeking the determination of the expropriation price and registration of the impugned immovable. Accordingly, the administration was granted time to pay the relevant amount, which was designated as the expropriation price by the expert reports, to the applicants. Finding that the administration failed to pay the relevant price within the prescribed period, the civil court dismissed the action.

Thereafter, the applicants brought an action for compensation for pecuniary damage against the administration before the administrative court. However, it was dismissed. The applicant's appeals as well as their request for rectification of the judgment were also dismissed by the Regional Administrative Court.

### THE APPLICANT'S ALLEGATIONS

The applicants maintained that their right to property had been violated as their immovable allocated as an area of public service had not been expropriated for nearly 30 years and the damages they sustained had not been compensated.

### THE COURT'S ASSESSMENT

It is undoubted that the immovables allocated for public use in the zoning plans are to be expropriated within a certain period of time; and that extension of this period leads to uncertainty in the exercise of the rights inherent in the right to property.

In the present case, the applicants' immovable was allocated as an area of public service by the implementary development plan of 1986. It accordingly appears that the restriction imposed on the immovable has been in force for 33 years.

Although the administration stated that it had waived the expropriation of the impugned immovable, it appears that the restrictions resulting from its

allocation for public use are still effective. It is clear that such restrictions would be lifted only when the immovable is removed from the scope of the area allocated for public use by an amendment to the zoning plan. However, it has been observed that in spite of the applicants' request, the public authorities have not made an amendment to the zoning plan yet.

The applicants have been subject to restrictions, such as a ban on construction, for 33 years. They could not take legal steps that they wished in respect of the immovable and were also subject to an unfavourable effect in terms of the value of the immovable. As a matter of fact, the applicants clearly indicated that they had sustained damage due to the lengthy annotation procedure during the proceedings. It accordingly appears that their claims for compensation are not limited only to the expropriation price. In other words, although the applicants claimed compensation for the damage they had sustained on account of the impugned restriction, their action was dismissed by the inferior courts on the ground that the expropriation price was not payable. However, in order for rendering the impugned interference proportionate, the damages caused by the restrictions to the applicants should have been compensated.

Therefore, it has been concluded that the public authorities' failure to pay compensation placed an excessive and extraordinary burden on the applicants, which upset, to their detriment, the fair balance that had to be struck between the protection of the right to property and the public interest.

Consequently, the Court has found a violation of the right to property safeguarded by Article 35 of the Constitution.

## JUDGMENT FINDING A VIOLATION OF THE RIGHT TO PROPERTY FOR NON-RECOGNITION OF HEIRSHIP DUE TO LACK OF INTER-STATE RECIPROCITY

*Ioanis Maditinos* (no. 2015/9880, 8 May 2019)

### THE FACTS

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.

### THE APPLICANT'S ALLEGATIONS

The applicant maintained that there had been a violation of his right to property as he had a right to inheritance in terms of the immovable under dispute.

### THE COURT'S ASSESSMENT

By a Decree-law issued in 1964, Greek citizens' right to transfer ownership of their immovable in Turkey was suspended; however, this Decree-law was ultimately annulled by the Council of Ministers in 1988.

In the present case, it is explicit that the Decree-law which imposed a temporary restriction on the Greek citizens' right to transfer ownership of their immovable in Turkey was not in force by the date when the testator died.

The inferior courts refused to recognize the applicant's capacity as the heir of the testator's immovable for the lack of reciprocity between Turkey and Greece.

In reaching this conclusion, the inferior courts relied on the instruments related to inter-state reciprocity, which were issued by the Ministry of Justice, Directorate General for International Law and Foreign Relations. However, regard being had to these instruments, it has been explicitly observed that there is no finding as to the fact that individuals of Turkish nationality were not allowed, by the date of testator's death or date of the relevant proceedings, to acquire property by inheritance in Greece, even in the regions where certain restrictions were in question.

According to these instruments, although a requirement for obtaining authorization to perform legal acts such as purchase and sale of any

immovable has been introduced in certain regions of Greece, there is no concrete information indicating that such authorization also covers the process of acquisition of property by inheritance. As a matter of fact, the European Court of Human Rights also notes that, as indicated in certain instruments, Turkish citizens in Greece are allowed to acquire, by inheritance, immovable properties located in areas under such restriction.

However, it must be highlighted that the principle of reciprocity in acquisition of property by inheritance was rescinded through the legal arrangements of 2005 and 2012. It is accordingly set forth that in cases where the immovable acquired by inheritance has not been sold off by its owner, it will be sold off and the relevant sale price will be paid to the beneficiary.

As a result, it has been observed 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 that time. It has been therefore considered that the interference with the applicant's right to property due to non-recognition of his capacity as an heir was devoid of any foreseeable legal basis.

Consequently, the Court has found a violation of the right to property safeguarded by Article 35 of the Constitution.

## JUDGMENT FINDING NO VIOLATION OF THE RIGHT TO PROPERTY FOR HOLDING THE APPLICANT RESPONSIBLE FOR HIS COMPANY'S DEBTS TO THE PUBLIC

*Erol Kesgin* (no. 2015/11192, 30 May 2019)

### THE FACTS

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 is 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.

### THE APPLICANT'S ALLEGATIONS

The applicant maintained that his right to property had been violated as he had been held responsible for the debts to the public incurred by the company where he was a Board member but had no authority to represent.

### THE COURT'S ASSESSMENT

The applicant's being held responsible for the social security contributions and default interest incurred by the debtor company undoubtedly constituted an interference with his right to property. Such an interference may be found compatible with the provisions of the Constitution only when it was based on a law, served the aim of public interest and complied with the proportionality principle.

Both the abolished Law no. 506 and the Law no. 5510, which took effect on 1 July 2008, are intended for ensuring timely and regular collection of the contributions. The Social Security Institution's ability to provide social security benefits is also contingent on the timely and full payment of insurance contributions which are the primary source of income.

In this sense, the practice whereby all members of the Board of Directors -even if they have no authority to represent and bind- are held responsible in order to secure effective, full and timely collection of contribution liabilities, as in the present case, is undoubtedly appropriate and necessary. This statutory arrangement is designated to secure the collection of contributions and to promote timely payments.

It is undoubted that collection of the public receivables directly from the applicant was appropriate and necessary to attain the aim of public interest pursued. Besides, the applicant, bringing an action before the labour court and subsequently lodging an appeal, had the opportunity to effectively put forth all his claims and submissions.

The applicant could also demand the return of the amount he paid from the other shareholders in proportion to the shares they possess. As for the amount corresponding to his own share, the applicant has the opportunity to recourse to the company's legal entity.

As a result, it has been considered that no personal excessive and extraordinary burden was placed on the applicant for being held responsible for the public debts incurred due to the non-payment of the company's social security contributions and the default interest. It has been therefore 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.

Consequently, the Court has found no violation of the right to property safeguarded by Article 35 of the Constitution.

## JUDGMENT FINDING A VIOLATION OF THE RIGHT TO PROPERTY DUE TO EXCESSIVELY HIGH ADMINISTRATIVE FINES

*Mohamed Kashet and Others* (no. 2015/17659, 20 June 2019)

### THE FACTS

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.

### THE APPLICANT'S ALLEGATIONS

The applicants argued that export and import of currency was allowed in accordance with a decision of the Council of Ministers and that the administrative fine imposed on them was not proportionate to the amount of money subject of the alleged misdemeanour. In this regard, they claimed that their right to property had been violated.

### THE COURT'S ASSESSMENT

In order to strike a fair balance between the public interest pursued by the interference with the right to property and the protection of the individual's right to property, the property owner must first be provided with the opportunity to effectively make his defence and raise his objections against the measures taken, and then, the relevant allegations and defence submissions must be considered effectively.

In the present case, the public authorities established that the impugned foreign currency had been seized while the applicants had been trying to import it into the country.

The applicants claimed that the administrative fines imposed on them had been unlawful, stating that it was not forbidden to import foreign currency into the country. However, given the fact that at the material time, importing and exporting currency was subject to permission with prior notice and that the applicants failed to comply with this permission procedure, the decisions against them were neither arbitrary nor unforeseeable. However, the applicants were imposed administrative fines amounting to 5,006,183 Turkish liras (TRY) in total for the money amounting to 630,000 USD that

had not been notified to the customs authorities. It is observed that a fine of approximately 3.5 times more of the seized money was imposed.

As a result, even though the interference had been caused by the applicants' own faults and the results of their act had been foreseeable, the total amount of the administrative fines imposed on them was excessively higher than the amount of the seized money and thus caused an excessive burden on them. Accordingly, the fair balance to be struck between the applicants' right to property and the public interest pursued by the interference had been impaired to the detriment of the applicants.

Consequently, the Court has found a violation of the right to property safeguarded by Article 35 of the Constitution.

# J. JUDGMENTS CONCERNING THE RIGHT TO A FAIR TRIAL

## JUDGMENT FINDING NO VIOLATION OF THE PRINCIPLE OF NOT TO BE TRIED OR PUNISHED TWICE FOR THE SAME OFFENCE DUE TO THE SANCTIONS IMPOSED AT THE END OF BOTH ADMINISTRATIVE AND CRIMINAL PROCESSES

*Ünal Gökpınar* (no. 2018/9115, 27 March 2019)

### THE FACTS

The transactions performed by the applicant, who has been engaging in trade, between 2007 and 2011 were made subject to tax inspection. In accordance with the report issued as a result of the said inspection, various taxes and penalties were imposed on the applicant.

The applicant challenged the impugned decision before the tax court. The latter found unlawful the relevant tax/penalty procedures. The administration, appealing against the court's decision, again issued tax/penalty notices and sent them to the applicant. The Council of State, finding the appeal request irrelevant, found no ground for a decision.

The applicant, pending the cases he had brought against the tax and penalty notices issued by the tax administration for the second time, had his debt restructured in accordance with the Law on the Restructuring of Certain Receivables and eventually paid it. He also withdrew the cases he had filed with the tax courts.

On the other hand, the chief public prosecutor's office filed a criminal complaint against the applicant for "issuing and using false invoice". The criminal court found the applicant guilty as charged and sentenced him five times for each offence. The applicant unsuccessfully appealed against the decision of the criminal court. Hence, the regional court of appeal upheld the criminal court's decision.

### THE APPLICANT'S ALLEGATIONS

The applicant maintained that the principle of not to be tried or punished twice for the same offence had been violated as a result of a tax inspection.

### THE COURT'S ASSESSMENT

The right to a fair trial requires that the principle of rule of law be respected in the resolution of disputes. The principle of rule of law that is enshrined in Article 2 of the Constitution as among the characteristics of the Republic should be taken into account in the interpretation and implementation of any constitutional provision.

Another requirement of the rule of law is the principle of legal certainty. The principle of legal certainty also necessitates the preservation of favourable consequences, for the individuals, of the relationships between the private persons as well as between the private persons and the State. In this context, disregard and renewal of the criminal processes, which are concluded in favour

of the individuals in accordance with the applicable legal rules and having the characteristics of final judgment, impair the principle of legal certainty.

In addition, punishment of the acts violating the legal order is one of the most basic powers of the State. However, in a democratic legal order, the State's reaction to unfair acts through punishment must be proportionate and not attain a level impairing the legal certainty. Trial or punishment of an individual who have already been tried or punished before for the same unlawful act impairs the fair balance between the public interest pursued by the sanction and the individual's interests, thereby placing an excessive burden on the individual.

The principle of not to be tried or punished twice for the same offence ensures that individuals are not tried or punished again while there are pending criminal proceedings against them. Thus, it is aimed to ensure legal certainty as a requirement of the principle of the rule of law in terms of the criminal processes within the scope of the right to a fair trial. Accordingly, the principle of not to be tried or punished twice for the same offence, which is inherent in the principle of rule of law, is an element of the right to a fair trial safeguarded by Article 36 of the Constitution.

In accordance with the principle of not to be tried or punished twice for the same offence, an individual cannot be tried or punished more than once for the same offence. However, this principle is not absolute, and the same offence may be subject to different assessments in different legal disciplines. Since this principle is applicable solely to criminal cases, it does not constitute an obstacle to bringing a civil action or launching a disciplinary investigation, alongside the criminal investigation, for the same offence. Therefore, imposition of different sanctions for the same offence within the scope of such legal disciplines is not in breach of the said principle.

In the present case, both of the impugned proceedings were carried out against the same person and in relation to the same taxation periods. As a result of the administrative proceedings carried out upon the finding of the tax office that false invoices had been issued, tax penalties were imposed for the relevant act. In addition, criminal proceedings were carried out for the same act impairing the taxation procedure. Accordingly, the applicant's acts leading to certain criminal processes are integrated and should be regarded as the same offence in legal sense.

Considering all these, imposition of tax penalty at the end of the administrative proceedings as well as a sentence at the end of the criminal proceedings, with a view to achieving different aims and legal interests, does not fall foul of the principle of not to be tried or punished twice for the same offence.

Consequently, the Court has found no violation of the principle of not to be tried or punished twice for the same offence within the scope of the right to a fair trial safeguarded by Article 36 of the Constitution.

## JUDGMENT FINDING A CONTINUED VIOLATION DUE TO NON-ENFORCEMENT OF THE CONSTITUTIONAL COURT'S JUDGMENT

*Aligül Alkaya and Others (2)* (no. 2016/12506, 7 November 2019)

### THE FACTS

By the decision of the incumbent assize court dated 4 May 2011, the applicants were sentenced to life imprisonment for attempting to overthrow the constitutional order by force. Following the finalization of the conviction decision upheld by the Court of Cassation, the applicants lodged an individual application with the Court. Finding a violation of the right to a fair hearing in respect of all applicants as well as a violation of the right to legal assistance solely in respect of the applicant Aligül Alkaya, the Court sent a copy of its judgment to the incumbent court to conduct a retrial in order to redress the consequences of the violation.

In that judgment, it is indicated that the applicants other than Aligül Alkaya were convicted based on the latter's [police] custody statements taken in the absence of a lawyer; and that in spite of the request by the applicants other than Aligül Alkaya for examination of a witness, the assize court failed to consider this request. It is further stated that conviction of some of the applicants was mainly based on the statements of the witnesses heard by various courts; however, the applicants were not provided with the opportunity to examine these witnesses during the hearing, which fell foul of the right to examine a witness; and that there was therefore a violation of the right to a fair hearing as a whole.

Invoking the Court's judgment finding a violation in their cases, the applicants requested a retrial. By the additional decision of 30 March 2016, the assize court dismissed the request for a retrial without holding a hearing.

### THE APPLICANTS' ALLEGATIONS

The applicants maintained that their right to a fair hearing had been violated due to the dismissal of the retrial request filed on the basis of the Court's violation judgment.

### THE COURT'S ASSESSMENT

Enforcement of the judgment whereby the Constitutional Court finds a violation of any fundamental rights and freedoms is a mandatory consequence of the power and task of concluding individual applications entrusted to the Constitutional Court. Non-enforcement of a violation judgment rendered by the Court amounts to the continuation of the previously-found violation.

In cases where the Constitutional Court orders a retrial in conjunction with its violation judgment, the relevant inferior court has no discretionary power in assessing whether a ground requiring

a retrial exists, which differs from the process of a retrial in procedural law. Therefore, the legal obligation of the relevant court, upon such a violation judgement, is to take the necessary steps indicated in the Court's judgment with a view to redressing the consequences of the violation found.

Besides, in cases where the Court orders a retrial, there is no need to file a request, by those in favour of whom the violation judgment is or by any other person or persons concerned, with the inferior court to conduct the retrial. Unlike the process of retrial laid down in the relevant procedural laws, the inferior court is obliged, immediately upon receiving the Court's judgment, to conduct a retrial without awaiting an application by those concerned. Accordingly, in cases where a retrial is to be conducted by virtue of the violation judgment rendered by the Court, the inferior court does not make an assessment as to the admissibility of retrial order unlike the process in the procedural law / an assessment as to the admissibility is not made unlike the process in the procedural law .

In this sense, the first step needed to be taken by the inferior court is to decide to conduct a retrial by virtue of the Court's judgment finding a violation. As a matter of fact, after the inferior court takes such a decision, its previous decision which has been found by the Court to be in breach of any fundamental rights and freedoms will automatically become null and void. The liability incumbent on the inferior court at the subsequent stage is to take necessary steps in order to redress consequences of the violation found by the Court.

Within this framework, if the violation results from any procedural negligence, failure or other omission during the trial, such negligence, failure or omission is to be remedied/eliminated in a way that would not lead to a violation. Nevertheless, this liability cannot be construed to the effect that the inferior courts cannot satisfy the requirements indicated in some of the violation judgments by way of reaching a conclusion opposite to the former one over the case-file -without holding a hearing- or varying its decision so as to eliminate the causes resulting in violation. If it is possible to redress the violation found by the Court in its judgment without holding a hearing, consequences of the violation may be redressed in this way. In determining the method by which consequences of the violation will be redressed, nature of the violation must be taken into consideration.

In the present case, the Court found, in the first application lodged by the applicants, a violation of the right to a fair hearing in its entirety due to the inferior court's failure to fulfil the requirements inherent in the rights to examine and cross-examine witnesses as well as to legal assistance.

In its various judgments, the Court has laid down the principles with respect to the rights to examine and cross-examine witnesses and to legal assistance falling under the right to a fair hearing.

Accordingly, for a fair hearing, an accused should be able to examine the witnesses and confront them during the criminal proceedings as well as be afforded with the opportunity to test the veracity of witness statements.

However, it is not an absolute right and may be subject to restrictions based on reasonable grounds. On the other hand, if the conviction is based on statements given by a witness whom the accused could neither examine nor cross-examine, it would constitute a restriction on the accused's rights to the extent in defiance of the constitutional safeguards.

Reliance, in a conviction decision, on a confession by an accused who was not provided with legal assistance causes irreparable damage to the right to legal assistance. In cases where the accused person denies his confession obtained at the investigation stage under ill-treatment and torture but the court relies on this confession without conducting an inquiry, it will constitute a significant lack of due diligence.

In the circumstances where, as in the present case, the Court finds a violation and orders redress of the violation and its consequences, the relevant judicial authorities are to take necessary steps to redress the violation and its consequences, considering the nature of the violation judgment.

In the present case, the first instance court dismissed the request for a retrial, which is contrary to its statutory obligation. The step to be taken is to eliminate the causes giving rise to a violation of the procedural safeguards by conducting a re-trial, to make assessments based on the available evidence and to reach a new conclusion accordingly.

It is not possible to examine, without holding a hearing, the witnesses who provided testimony against the applicants and whose statements were decisively relied on in their conviction. The applicants can be afforded with the opportunity to confront the witnesses against them as well as to test the veracity of the latter's statements only when the incumbent court decides to conduct a retrial and to hold a hearing.

Besides, the questions as to whether the pre-trial investigation confession of the applicant Aligül Alkaya was obtained under ill-treatment and torture and whether his confession could be relied on as evidence in conviction may be clarified after the deficiencies concerning the witnesses' examination are eliminated. It has been observed that the interpretation of the incumbent assize court in refusing the request for a retrial did not comply with the Court's violation judgment, and that therefore, the violation found by the Court in its judgment with respect to the applicants and the consequences thereof were not redressed by the inferior courts.

Consequently, the Court has found a violation of the right to a fair hearing safeguarded by Article 36 of the Constitution.

Regard being had to the fact that it is the second time that the Court finds a violation in the same case due to non-enforcement of its previous judgment finding a violation of the right to a fair trial, the Court has considered that merely finding a violation and ordering a retrial will not provide a sufficient redress to the applicants and thus awarded them compensation.

# K. JUDGMENTS CONCERNING THE RIGHT TO AN EFFECTIVE REMEDY

## JUDGMENT FINDING A VIOLATION OF THE RIGHT TO AN EFFECTIVE REMEDY TO CHALLENGE THE DEPORTATION ORDER - ADOPTION OF THE PİLOT JUDGMENT PROCEDURE

*Y. T.* (no. 2016/22418, 30 May 2019)

### THE FACTS

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.

### THE APPLICANT'S ALLEGATIONS

The applicant maintained that his right to an effective remedy had been violated for lack of an effective legal remedy to challenge the decision ordering his deportation to a country where he would face the risk of ill-treatment.

### THE COURT'S ASSESSMENT

Article 40 of the Constitution safeguards the right to request prompt access to the competent authorities (right to an effective remedy) for everyone whose constitutional rights have been violated.

In the present case, the applicant raised his allegations before the administrative judicial authorities to the effect that he would face the risk of ill-treatment in his country and he filed an individual application at the same time. The Constitutional Court has considered that the applicant's allegations are of serious nature and therefore accepted his request for interim measure and suspended the deportation process. However, following a procedural examination, the administrative court dismissed the case as being time barred. The applicant's allegations on the merits were not examined by the administrative court.

The applicant maintained that he could not wait the outcome of the proceedings before the administrative court as he was under a constant risk of deportation at any stage of the proceedings. The applicant's allegations that the proceedings pending before the administrative court had ceased to be an effective remedy as it had had no prospect of success were not unfounded. The applicant was not provided with an opportunity to pursue his case pending before the administrative court without facing any risk of deportation. This situation clearly pointed out the fact that the guarantees would not be able to be met in the proceedings before the administrative court.

However, the impugned situation did not stem from the practice of the administrative court or its misinterpretation of the legislation, but from the amendment made to Law no. 6458. It has been understood that the said amendment has not been compatible with the right to life, prohibition of ill-treatment and right to an effective remedy, which are safeguarded by the Constitution, as well as the relevant established case-law of the Constitutional Court.

Accordingly, it has been concluded that the applicant's right to an effective remedy was violated since he was not provided with a legal guarantee which would eliminate the risk of deportation while awaiting the outcome of the proceedings before the administrative court and that the violation stemmed from the new situation arising from the legislative amendment in question.

Consequently, the Constitutional Court has found a violation of the right to an effective remedy safeguarded by Article 40 of the Constitution in conjunction with Article 17 thereof. In addition, it decided on the application of the pilot judgment procedure and held that the applicant would not be deported until the conclusion of the retrial.

In addition, it has been the first application lodged with the Constitutional Court following the amendment made to Law no. 6458. After this application, 1,545 applications of the same nature have been filed by 8 April 2019.

As these applications stemmed from a structural problem related to the legislative amendment, it was decided on 12 June 2018 that the pilot judgment procedure would be initiated in accordance with the Internal Regulations of the Constitutional Court. Hence, the present case has been determined as a pilot case.

The foremost objective in the adoption of the pilot judgment procedure is to ensure that the similar applications are resolved by the administrative authorities instead of finding a violation and therefore the source of the violation is eliminated, thus fixing the main structural problem.

In case of a failure on the part of the relevant authorities to fix the structural problem and to settle the applications in this scope within the period set by the Constitutional Court, it will be possible to adjudicate the similar applications collectively.

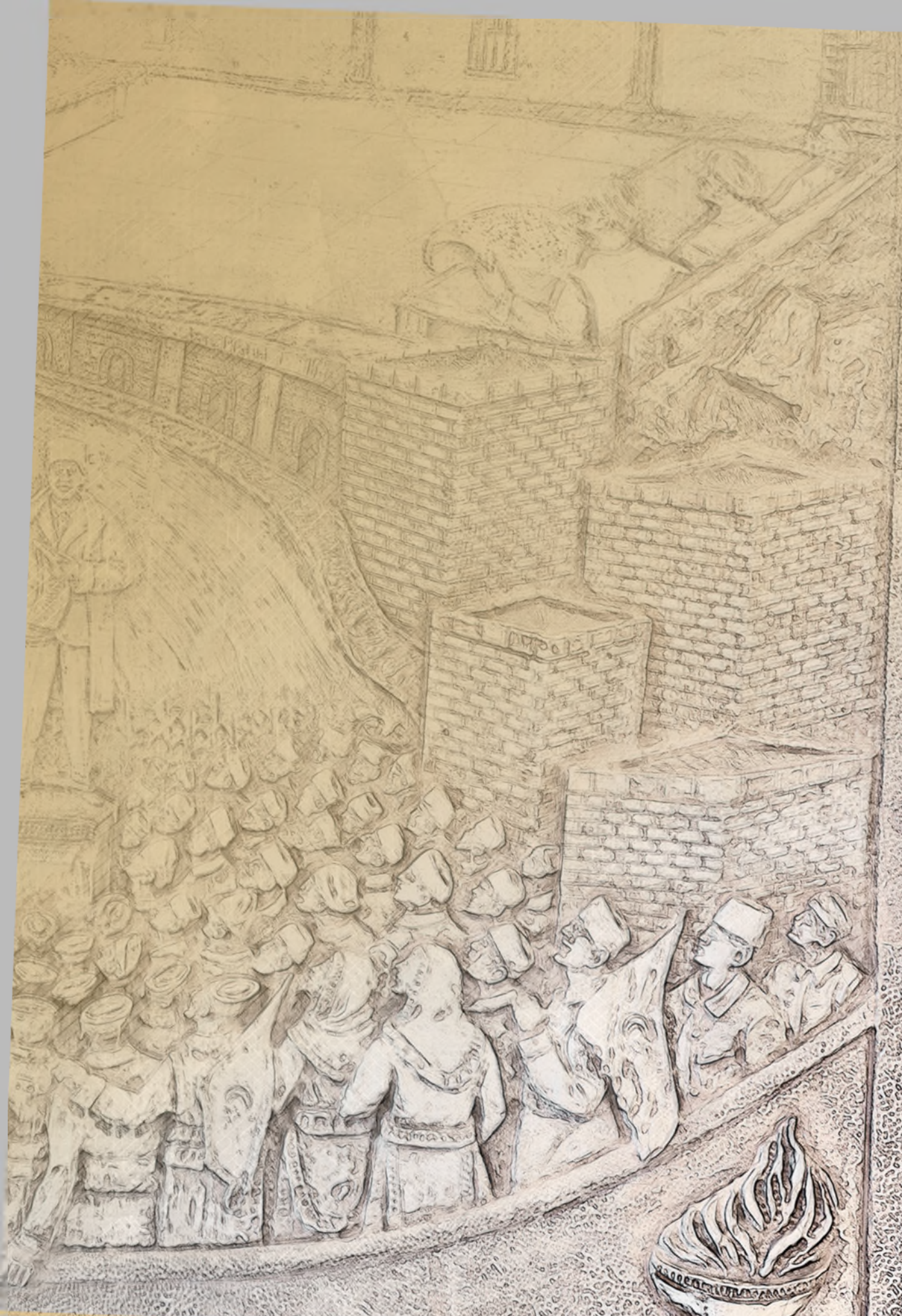
During the period when the relevant provision has been in force, it will not be possible to remedy the violation by way of a retrial by the administrative courts. Accordingly, while it is at the discretion of the legislative authority to ensure the redress of the violation and its consequences as well as the prevention of similar violations, it has been understood that the legal provision leading to the violation should be reviewed.

Arrangement to be made by the legislative authority will eliminate the structural problem in question, thereby preventing new applications of similar nature. It has therefore been decided that a copy of the judgment be sent to the legislative authority.

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 Constitutional Court and the number of which has been increasing day by day. Therefore, solutions must be found in respect of the pending applications. In this regard, it has been decided that the list of the pending applications be sent to the Directorate General for Laws and the Human Rights Department of the Ministry of Justice as well as to the Directorate General of Migration Management of the Ministry of Interior for their resolution by the administrative authorities.

# CHAPTER 06

## STATISTICS

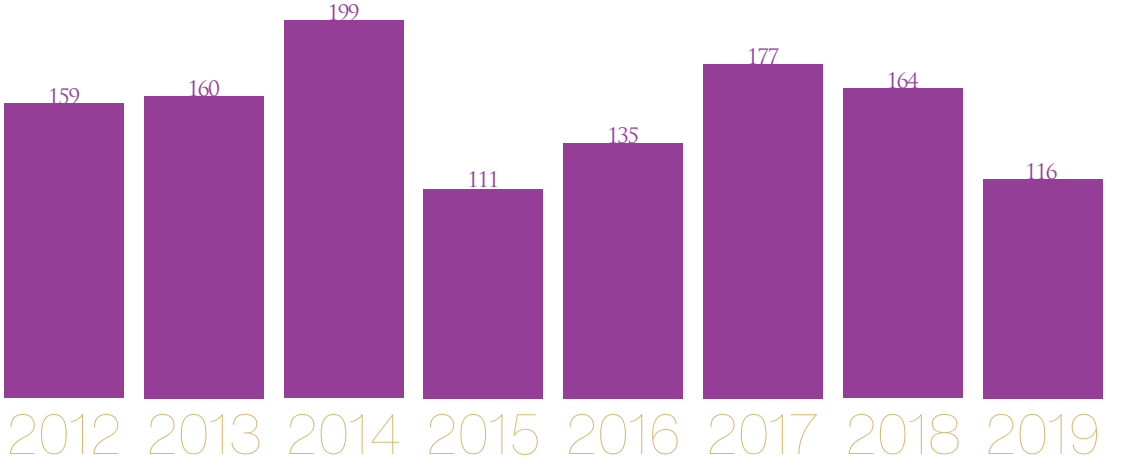


# STATISTICS ON CONSTITUTIONALITY REVIEW

# Table 1

Number of Abstract and Concrete Review Applications Per Years

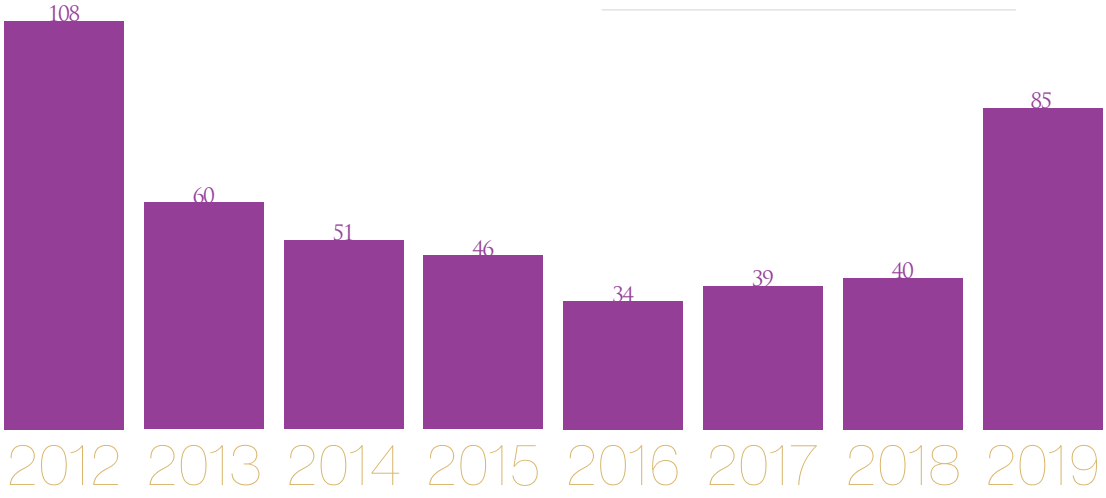
| | NUMBER OF ABSTRACT & CONCRETE REVIEW APPLICATIONS |
|---|---|
| 2012 | 159 |
| 2013 | 160 |
| 2014 | 199 |
| 2015 | 111 |
| 2016 | 135 |
| 2017 | 177 |
| 2018 | 164 |
| 2019 | 116 |



# Table 2

Number of Abstract & Concrete Review Applications from Previous Years

| | NUMBER OF PENDING ABSTRACT & CONCRETE REVIEW APPLICATIONS |
|---|---|
| 2012 | 108 |
| 2013 | 60 |
| 2014 | 51 |
| 2015 | 46 |
| 2016 | 34 |
| 2017 | 39 |
| 2018 | 40 |
| 2019 | 85 |



# Table 3

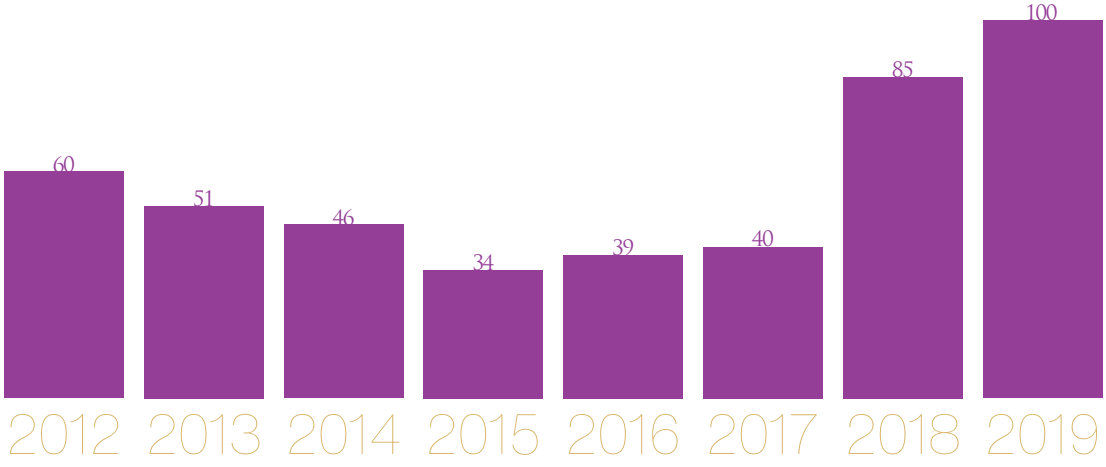
Number of Total Abstract & Concrete Review Applications Received and Decided in 2019

| | ABSTRACT & CONCRETE REVIEW APPLICATIONS |
|---|---|
| TOTAL RECEIVED / PENDING FROM PREVIOUS YEAR | 201 |
| DECIDED | 101 |
| PENDING FOR THE NEXT YEAR | 100 |

# Table 4

Number of Abstract & Concrete Review Applications Pending for the Next Year

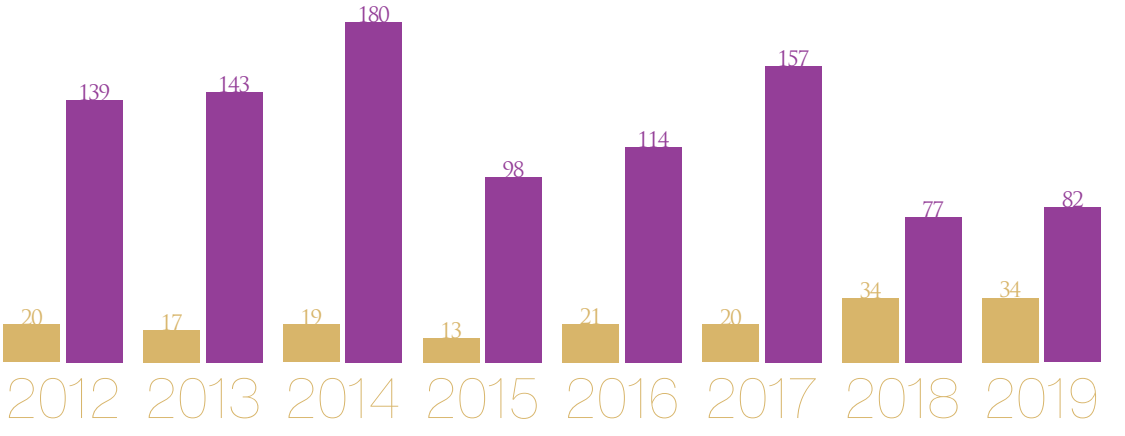
| | NUMBER OF ABSTRACT & CONCRETE REVIEW APPLICATIONS PENDING FOR THE NEXT YEAR |
|---|---|
| 2012 | 60 |
| 2013 | 51 |
| 2014 | 46 |
| 2015 | 34 |
| 2016 | 39 |
| 2017 | 40 |
| 2018 | 85 |
| 2019 | 100 |



# Table 5

Abstract & Concrete Review Applications Received per Years

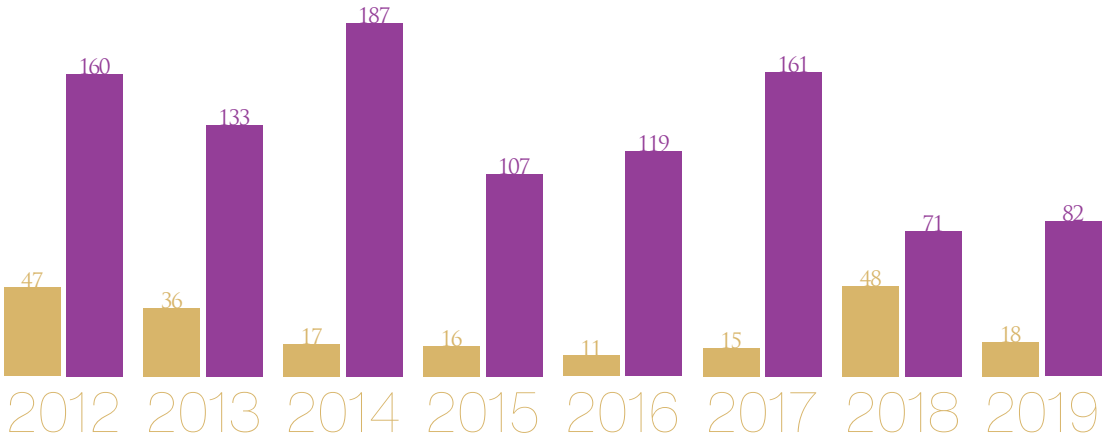
| | ABSTRACT REVIEW APPLICATIONS RECEIVED | CONCRETE REVIEW APPLICATIONS RECEIVED |
|---|---|---|
| 2012 | 20 | 139 |
| 2013 | 17 | 143 |
| 2014 | 19 | 180 |
| 2015 | 13 | 98 |
| 2016 | 21 | 114 |
| 2017 | 20 | 157 |
| 2018 | 87 | 77 |
| 2019 | 34 | 82 |



# Table 6

Abstract & Concrete Review Applications Adjudicated per Years

| | ABSTRACT REVIEW APPLICATIONS ADJUDICATED | CONCRETE REVIEW APPLICATIONS ADJUDICATED |
|---|---|---|
| 2012 | 47 | 160 |
| 2013 | 36 | 133 |
| 2014 | 17 | 187 |
| 2015 | 16 | 107 |
| 2016 | 11 | 119 |
| 2017 | 15 | 161 |
| 2018 | 48 | 71 |
| 2019 | 18 | 83 |



# Table 7

Decisions in Abstract Review Cases in 2019

| | DECISIONS |
|---|---|
| ANNULMENT | 10 |
| REJECTION | 7 |
| JOINDER | 1 |

# Table 8

Decisions in Concrete Review Cases in 2019

| | DECISIONS |
|---|---|
| ANNULMENT | 12 |
| REJECTION | 59 |
| JOINDER | 12 |

# Table 9

Statistics on Constitutionality Review (2012-2019) Overview

| | | | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | TOPLAM |
|---|---|---|---|---|---|---|---|---|---|---|---|
| RECENTLY-RECEIVED AND PENDING ABSTRACT AND CONCRETE REVIEW APPLICATIONS | RECENTLY-RECEIVED ABSTRACT AND CONCRETE REVIEW APPLICATIONS | ABSTRACT REVIEW APPLICATIONS RECEIVED | 20 | 17 | 19 | 13 | 21 | 20 | 87 | 34 | 231 |
| | | CONCRETE REVIEW APPLICATIONS RECEIVED | 139 | 143 | 180 | 98 | 114 | 157 | 77 | 82 | 990 |
| | | TOTAL | 159 | 160 | 199 | 111 | 135 | 177 | 164 | 116 | 1.221 |
| | ABSTRACT AND CONCRETE REVIEW APPLICATIONS PENDING FROM PREVIOUS YEAR | ABSTRACT REVIEW APPLICATIONS PENDING FROM PREVIOUS YEAR | | | | | 9 | 19 | 24 | 63 | |
| | | CONCRETE REVIEW APPLICATIONS PENDING FROM PREVIOUS YEAR | | | | | 25 | 20 | 16 | 22 | |
| | | TOTAL | 108 | 60 | 51 | 46 | 34 | 39 | 40 | 85 | 463 |
| | FINAL TOTAL | | 267 | 220 | 250 | 157 | 169 | 216 | 204 | 201 | 1.684 |
| ABSTRACT AND CONCRETE REVIEW APPLICATIONS ADJUDICATED | ABTSRACT REVIEW APPLICATIONS | ANNULMENT | | | | 9 | 3 | 4 | 7 | 10 | |
| | | REJECTION | | | | 5 | 8 | 10 | 40 | 7 | |
| | | JOINDER | | | | 2 | 0 | 1 | 1 | 1 | |
| | | TOTAL | 47 | 36 | 17 | 16 | 11 | 15 | 48 | 18 | 208 |
| | CONCRETE REVIEW APPLICATIONS | ANNULMENT | | | | 21 | 15 | 11 | 11 | 12 | |
| | | REJECTION | | | | 79 | 89 | 115 | 54 | 59 | |
| | | JOINDER | | | | 7 | 15 | 35 | 6 | 12 | |
| | | TOTAL | 160 | 133 | 187 | 107 | 119 | 161 | 71 | 83 | 1.021 |
| | FINAL TOTAL | | 207 | 169 | 204 | 123 | 130 | 176 | 119 | 101 | 1.229 |
| ABSTRACT AND CONCRETE REVIEW APPLICATIONS PENDING FOR THE NEXT YEAR (PER YEARS) | | ABSTRACT REVIEW APPLICATIONS | | | | 9 | 19 | 24 | 63 | 79 | 194 |
| | | CONCRETE REVIEW APPLICATIONS | | | | 25 | 20 | 16 | 22 | 21 | 104 |
| | FINAL TOTAL | | 60 | 51 | 46 | 34 | 39 | 40 | 85 | 100 | 455 |

# STATISTICS ON INDIVIDUAL APPLICATION

## I. GENERAL STATISTICS

# Table 1

Number of Individual Applications Filed and Adjudicated by Years

| | RECEIVED APPLICATIONS | ADJUDICATED APPLICATIONS | RATIO OF ADJUDICATION |
|---|---|---|---|
| 2012 | 1342<br>0.5% OUT OF THE TOTAL | 4<br>0% OUT OF THE TOTAL | 0% |
| 2013 | 9.897<br>3.9% OUT OF THE TOTAL | 4.924<br>2.3% OUT OF THE TOTAL | 50% |
| 2014 | 20.578<br>8.1% OUT OF THE TOTAL | 10.926<br>5.2% OUT OF THE TOTAL | 53% |
| 2015 | 20.376<br>8% OUT OF THE TOTAL | 15.369<br>7.3% OUT OF THE TOTAL | 75% |
| 2016 | 80.756<br>31.7% OUT OF THE TOTAL | 16.089<br>7.6% OUT OF THE TOTAL | 20% |
| 2017 | 40.530<br>15.9% OUT OF THE TOTAL | 89.650<br>42.3% OUT OF THE TOTAL | 221% |
| 2018 | 38.186<br>15% OUT OF THE TOTAL | 35.370<br>16.7% OUT OF THE TOTAL | 93% |
| 2019 | 42.971<br>16.9% OUT OF THE TOTAL | 39.469<br>18.6% OUT OF THE TOTAL | 92% |

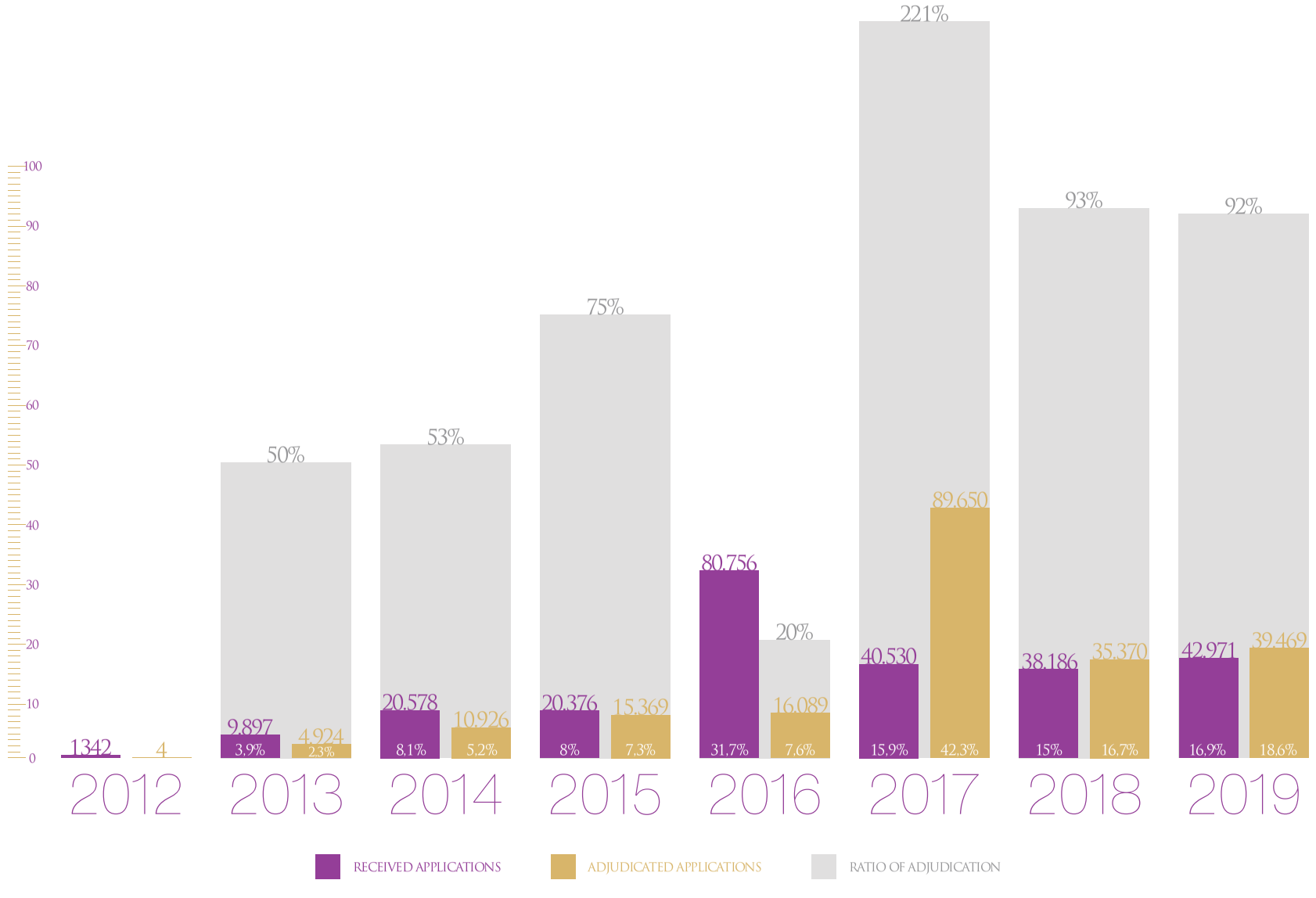
TOTAL

| 254.636 | 211.801 | 83,2% |
|---|---|---|
| RECEIVED APPLICATIONS | ADJUDICATED APPLICATIONS | RATIO |

* There may be a little change, compared to the previous statistics, in the number of the adjudicated applications as the file is closed in case of an inadmissibility decision on administrative grounds and reopened if the challenge against the inadmissibility decision is accepted.

** The ratio of adjudication of the applications filed in 2016, save for those lodged under the state of emergency, is 85%.

*** The ratio of adjudication of the applications filed in 2017, save for 72.134 applications that were declared inadmissible for non-exhaustion of available remedies due to the establishment of the Commission for the Examination of the Proceedings under the State of Emergency, is 90%.


100
90
80
70
60
50
40
30
20
10
0
1342
4
50%
9.897
3,9%
4.924
2,3%
53%
20.578
8.1%
10.926
5.2%
75%
20.376
8%
15.369
7.3%
80.756
31.7%
20%
16.089
7.6%
221%
40.530
15.9%
89.650
42.3%
93%
38.186
15%
35.370
16.7%
92%
42.971
16.9%
39.469
18.6%
2012
2013
2014
2015
2016
2017
2018
2019
RECEIVED APPLICATIONS
ADJUDICATED APPLICATIONS
RATIO OF ADJUDICATION

# Table 2

Number of Pending Individual Applications

| | PENDING INDIVIDUAL APPLICATIONS | RATIO TO THE TOTAL NUMBER OF APPLICATIONS |
|---|---|---|
| 2013 | 6 | 0% |
| 2014 | 61 | 0,1% |
| 2015 | 168 | 0,4% |
| 2016 | 752 | 1,8% |
| 2017 | 2.540 | 5,9% |
| 2018 | 7.911 | 18,5% |
| 2019 | 31.397 | 73,3% |

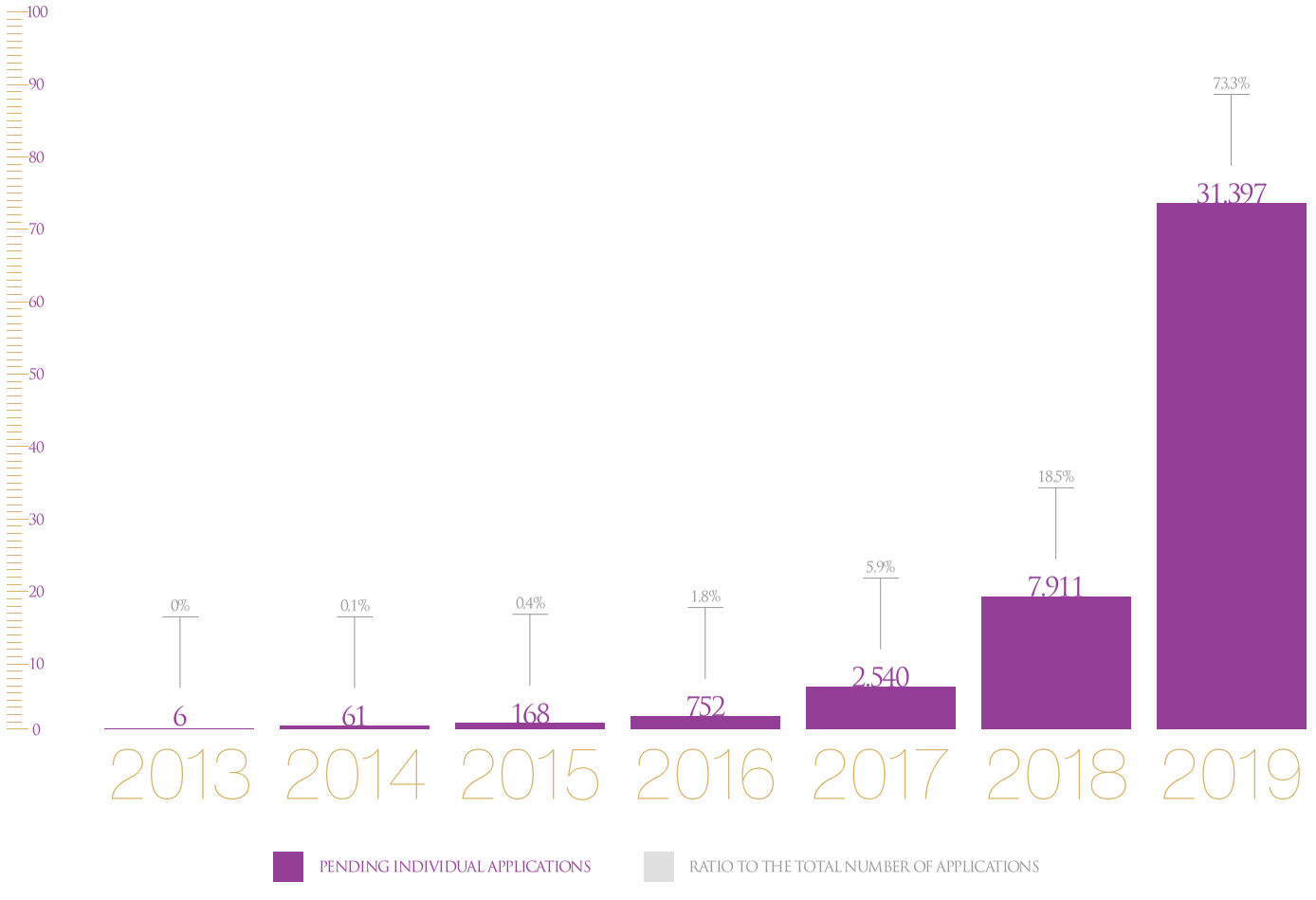
TOTAL

254.636 APPLICATIONS

42.835 TOTAL PENDING APPLICATIONS

16,8% RATIO TO THE TOTAL NUMBER OF APPLICATIONS

* Shows the number of pending applications by years as of 31 December 2019.


100
90
80
70
60
50
40
30
20
10
0
0%
0.1%
0.4%
1.8%
5.9%
18.5%
73.3%
6
61
168
752
2,540
7,911
31,397
2013
2014
2015
2016
2017
2018
2019
PENDING INDIVIDUAL APPLICATIONS
RATIO TO THE TOTAL NUMBER OF APPLICATIONS

# Table 3

Adjudicated Applications
by Judgment Types

| | TOTAL | RATIO |
|---|---|---|
| REJECTION ON ADMINISTRATIVE GROUNDS* | 12.038 | 5,7% |
| INADMISSIBILITY | 189.627 | 89,5% |
| VIOLATION OF AT LEAST ONE RIGHT | 8.369 | 4% |
| NON-VIOLATION | 596 | 0,3% |
| OTHER** | 1.171 | 0,6% |

TOTAL
211.801
DECISION

100%
TOTAL RATIO

* There may be a little change, compared to the previous statistics, in the number of the adjudicated applications as the file is closed in case of an inadmissibility decision on administrative grounds and reopened if the challenge against the inadmissibility decision is accepted.

** Strike-out, closing of applications, rejection.

## II. STATISTICS ON THE APPLICATIONS EXAMINED ON THE MERITS
### A. STATISTICS ON THE MERITS BY NUMBER OF ADJUDICATED APPLICATIONS

# Table 4

Ratio of Violation Judgments

### BASED ON THE CONCLUDED APPLICATIONS

| | DECIDED | CONCLUDED* | RATIO |
|---|---|---|---|
| NUMBER OF FILES INVOLVING A VIOLATION | 8.369 | 211.801 | 4% |

### BASED ON THE FILES EXAMINED ON THE MERITS

| | DECIDED | FILES EXAMINED ON THE MERITS | RATIO |
|---|---|---|---|
| NUMBER OF FILES INVOLVING A VIOLATION | 8.369 | 8.965 | 93,4% |

* Number of files decided is 3.445, and the number of joinder of applications is 4.924.

# Table 5

Number of Individual Applications in which at least One Right was Decided to Have Been Violated
(Including the Right to a Trial Within a Reasonable Time and Joinder of Applications)

| | TOTAL | RATIO |
|---|---|---|
| 2013 | 75 | 0,9% |
| 2014 | 768 | 9,2% |
| 2015 | 1.827 | 21,8% |
| 2016 | 1.282 | 15,3% |
| 2017 | 1.025 | 12,2% |
| 2018 | 2.167 | 25,9% |
| 2019 | 1.225 | 14,6% |

TOTAL
8.369

## B. STATISTICS ON THE APPLICATIONS EXAMINED ON THE MERITS BY RIGHTS AND FREEDOMS

### 1. INCLUDING JOINDER OF APPLICATIONS

# Table 6

Violation Judgments by Rights and Freedoms (Including the Right to a Trial within a Reasonable Time and Joinder of Applications)*

| | TOTAL | RATIO |
|---|---|---|
| Right to life | 103 | 1,2 % |
| Prohibition of ill-treatment | 181 | 2,1 % |
| Right to personal liberty and security | 172 | 2,0 % |
| Right to a fair trial* | 4.357 | 50,8 % |
| Freedom of expression | 570 | 6,6 % |
| Right to education | 3 | 0,0 % |
| Prohibition of discrimination | 107 | 1,2 % |
| Freedom of religion and conscience | 8 | 0,1 % |
| Right to protect one's material and spiritual existence | 44 | 0,5 % |
| Right to respect for private and family life | 224 | 2,6 % |
| Right to property | 2.650 | 30,9 % |
| Right to elect, stand for elections and engage in political activities | 6 | 0,1 % |
| Right to assembly and demonstration | 53 | 0,6 % |
| Freedom of association | 59 | 0,7 % |
| Principle of legality in crimes and punishment | 11 | 0,1 % |
| Presumption of innocence | 22 | 0,3 % |
| Right to an effective remedy | 12 | 0,1 % |
| Prohibition of slavery and forced labour | 0 | 0 % |
| Right to an individual application | 1 | 0 % |
| Right to appellate review | 0 | 0 % |
| Other rights | 0 | 0 % |

TOTAL
8.583

* Number of individual applications involving a violation only of the right to a trial within a reasonable time is 2.379.

# Table 7

Violation Judgments by Years
(Based on Rights and Freedoms) (Including the Right to a Trial within a Reasonable Time and Joinder of Applications)*

| | TOTAL | RATIO |
|---|---|---|
| 2013 | 78 | 0,9 % |
| 2014 | 782 | 9,1 % |
| 2015 | 1.854 | 21,6 % |
| 2016 | 1.315 | 15,3 % |
| 2017 | 1.083 | 12,6 % |
| 2018 | 2.221 | 25,9 % |
| 2019 | 1.250 | 14,6 % |

TOTAL
8.583

* More than one right may be decided to have been violation in one application.

# Table 8

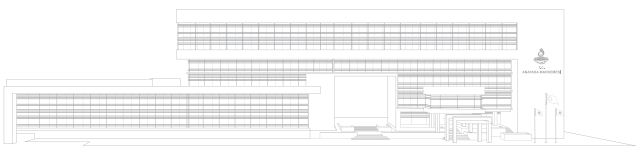
Violations of the Right to a Fair Trial by Inherent Safeguards
(Including the Right to a Trial within a Reasonable Time and Joinder of Applications)*

| | TOTAL | RATIO |
|---|---|---|
| Right to a trial within a reasonable time | 3.006 | 56,6 % |
| Right of access to a court | 276 | 5,2 % |
| Right to a reasoned decision | 608 | 11,5 % |
| Right to a fair hearing | 542 | 10,2 % |
| Principle of equality of arms / principle of adversarial proceedings | 833 | 15,7 % |
| Right to call and examine witnesses | 16 | 0,3 % |
| Right to legal assistance | 12 | 0,2 % |
| Other** | 16 | 0,3 % |
| Judgments only finding a violation of the right to a trial within a reasonable time | 2.379 | 44,8 % |

TOTAL
5.309

* More than one safeuard may be decided to have been violated within the scope of the right to a fair trial in one application.

** Other: Right to defence, right of effective participation in trial, manifest error of assessment, right not to be tried or punished twice for the same offence and right to obtain enforcement of decision and etc.



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