CONSTITUTIONAL COURT OF TÜRKİYE

SELECTED JUDGMENTS

2022

60th year
1962-2022

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International Relations Department
Constitutional Court of the Republic of Türkiye

Translated by:
Enise YÜZÜAK
Özge ELİKALFA
Gizem TEZYÜREK
Gökçen Sena KUMCU
Tuğçe KILIÇ

Edited by:
Yücel ARSLAN
Fatih Çağrı OCAKLI

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

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FOREWORD

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

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

Despite the relatively short time period, the Constitutional Court has built considerable case-law since the individual application that started to operate in 2012. This volume of the book includes selected judgments rendered by the Constitutional Court in 2022 within the scope of individual application. These judgments, many of which attracted high public attention as well, bear significance with regards to the development of case-law. Sincerely wishing that this book will contribute to upholding the rule of law and protecting rights and liberties of individuals.

Prof. Dr. Zühtü ARSLAN
President of the Constitutional Court

INTRODUCTION

This book covers selected judgments which are capable of providing an insight into the case-law established in 2022 by the Plenary and Sections of the Turkish Constitutional Court through the individual application mechanism. In the selection of the judgments, several factors such as their contribution to the development of the Court's case-law, their capacity to serve as a precedent judgment in similar cases as well as the public interest that they attract are taken into consideration.

In the judgments included in the book, the Constitutional Court deals with the merits of the case following its examination on the admissibility. These judgments are primarily classified relying on the sequence of the Constitutional provisions where relevant fundamental rights and freedoms are enshrined. Subsequently, the judgments on each fundamental right or freedom are given chronologically.

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

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

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

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

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

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RIGHT TO LIFE (ARTICLE 17 § 1)

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

NECLA KARA AND OTHERS

(Application no. 2018/5075)

15 March 2022

On 15 March 2022, the First Section of the Constitutional Court found violations of both substantive and procedural aspects of the right to life, safeguarded by Article 17 of the Constitution, in the individual application lodged by *Necla Kara and Others* (no. 2018/5075).

THE FACTS

[8-63] As a result of the explosion that occurred on the third floor of a building used for the production and trade of explosives (firecrackers, torches) in İstanbul, 21 people, including the relatives of the applicants, were killed, 115 others were injured and extensive material damage was caused. It has been understood that the building where the explosion took place had a building permit (licence) issued by the municipality, while the occupancy permit and the fire brigade certificate were not available. The Bakırköy Chief Public Prosecutor's Office opened an investigation into the incident and sent the indictment to the 6th Chamber of the Bakırköy Assize Court ("the Assize Court").

The Assize Court acquitted three defendants, sentenced two defendants, who were building owners, to five years and six months of imprisonment each, and convicted five defendants, who were municipal officials, of involuntary manslaughter. On appeal, the Court of Cassation upheld the acquittal of the defendants and the conviction of two defendants, dismissed the case against one defendant, a municipal official, on the grounds of the statute of limitations, and quashed the verdict against the other municipal officials on the grounds of an error in the qualification of the offence.

The Assize Court found two officials guilty of negligence or delay in fulfilling the requirements of their duties and two other officials guilty of acting contrary to the requirements of their duties, and sentenced them to prison. It was decided to suspend the pronouncement of the judgment for four municipal officials as the conditions had been met.

V. EXAMINATION AND GROUNDS

64. The Constitutional Court ("the Court"), at its session of 15 March 2022, examined the application and decided as follows:

A. The Applicants' Allegations

65. The applicants claimed that the dangerous activity/explosion was foreseeable by the relevant public officials, but the necessary precautions were not taken by them and ultimately many people and their relatives lost their lives due to this negligence/fault and that the dismissal of the case against S.K., who was at fault for the occurrence of the explosion, due to the statute of limitations and the decision to suspend the pronouncement of the judgment against other public officials resulted in impunity for such a serious/grave incident and violated the right to life.

B. The Court's Assessment

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

"Everyone has the right to life…"

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

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

68. Since the applicants Ebru Çolak, Miyeser Kızılçam and Nebiye Kara died after the individual application was lodged, the application should be dismissed only in respect of Ebru Çolak, Miyeser Kızılçam and Nebiye Kara, since there are no longer any grounds justifying the continuation of the examination of the application in respect of those applicants under Article 80 of the Internal Regulations of the Court.

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

the context of the right to life as a whole, including its substantive and procedural aspects, taking into account the circumstances of the incident and the allegations made. The applicants' allegations are based on the negligence of public officials and the duty to protect. However, in the course of the proceedings, some public officials (e.g. the then Mayor of the İstanbul Metropolitan Municipality, officials of the Ministry of Labour and Social Security) were acquitted or dismissed from the investigation. The applicants have not made any allegations with regard to the decisions to acquit/not to investigate, etc., taken against these officials. Therefore, no further examination will be carried out with regard to the persons who are not public officials and the other public officials who are involved in the proceedings in some way by virtue of their responsibilities in the case but who are not the subject of the applicants' complaint.

1. Admissibility

70. In view of the natural character of the right to life, an application under this right can only be made by the relatives of a deceased person who claim to be victims as a result of the death of such a person (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, § 41). In the present case, since the applicants are relatives of the deceased, there is no lack of capacity to apply to the Court.

71. The applicants did not claim that the right to life had been intentionally violated and no element was found in the present case to suggest that the death of the applicants' relatives had been intentionally caused. As explained below in the *"General Principles"* section (see §§ 73-84), the obligation to establish an effective judicial system in all cases of death and injury caused by unintentional acts does not necessarily require the implementation of an effective criminal procedure. A different approach can be taken with regard to the obligation to investigate deaths caused by unintentional acts and do not involve the use of public force. In this context, in cases where the violation of the right to life or physical integrity is not intentional, it may be sufficient for the victims to have access to legal, administrative or even disciplinary remedies. However, even if the act is not intentional, an effective criminal investigation will be required if the death is the result of an error of judgment or a fault

beyond negligence on the part of the public authorities, i.e. the failure of those authorities to take the necessary and sufficient measures to avert the risks inherent in a dangerous activity within the powers vested in them, although they were aware of the possible consequences.

72. From this point of view, since it is not clear at first sight whether there is a situation in the present case which requires a departure from the established case-law on unintentional deaths, it will be examined, together with the examination of the merits, whether the procedural obligation of the State with regard to the right to life requires a criminal investigation. In the light of the foregoing, since it is considered that the application is not manifestly ill-founded in relation to the claim concerning the right to life, as regards the allegations that the deaths occurred as a result of negligence on the part of public officials and that no effective criminal investigation was carried out in this regard, and since there is no other ground -other than the exhaustion of remedies criterion- for deciding that it is inadmissible, it should be decided that it is admissible, the exhaustion of remedies criterion to be assessed at the merits stage.

2. Merits

a. General Principles

73. Article 17 of the Constitution, when read in conjunction with Article 5 thereof, imposes certain negative and positive obligations on the State (see *Serpil Kerimoğlu and Others*, § 50). The State has a duty to protect the corporeal and spiritual existence of the individual against any danger, threat or violence (see *Serpil Kerimoğlu and Others*, § 51; the Court's judgments, no. E.2005/151, K.2008/37, 3 January 2008; no. 2010/58, K.2011/8, 6 January 2011). When human lives are lost in circumstances that may involve State responsibility, Article 17 of the Constitution imposes on the State the obligation to take effective administrative and judicial measures, using all the means at its disposal, to ensure that the legislative and administrative framework established to protect the right to life is properly implemented and that any violation of this right is eliminated and punished. This obligation applies to any activity, whether public or not, in which the right to life may be at stake (see *Serpil Kerimoğlu and Others*, § 52).

74. First and foremost, the State must take legislative measures to deter and protect against threats and risks to the right to life, as well as the necessary administrative measures. This duty includes the obligation to protect the lives of individuals against any danger, threat or violence (see *Serpil Kerimoğlu and Others*, § 51). The State's duty to protect under the positive obligations requires both legal and practical measures. The measures required should provide effective protection to vulnerable persons and should include reasonable steps to prevent acts of which the authorities had, or should have had, knowledge (see *R.K.*, no. 2013/6950, 20 April 2016, § 75).

75. Where the public authorities knew or should have known of the existence of a real and imminent danger to human life, they must take reasonable measures to avoid that danger. However, taking into account the unpredictability of human behaviour and the operational choices which must be made in terms of priorities and resources, the positive obligation must be interpreted in such a way as not to impose an impossible or disproportionate burden on the authorities (see *Serpil Kerimoğlu and Others*, § 53).

76. It is for the administrative and judicial authorities to determine the measures to be taken in the context of the fulfilment of the positive obligations deriving from the right to life. A number of methods may be used to guarantee rights and freedoms. Even if one of the measures prescribed by law is not applied, the positive obligations may be fulfilled by applying another measure (see *Bilal Turan and Others*, no. 2013/2075, 4 December 2013, § 59).

77. The procedural aspect of the State's positive obligations under the right to life requires that there should be some form of effective official investigation capable of leading to the identification and, if necessary, punishment of those responsible for any kind of unnatural death. The essential purpose of such an investigation is to ensure the effective implementation of the law protecting the right to life and to ensure the accountability of the relevant persons for the deaths occurring as a result of the intervention of, or under the responsibility of, public officials or taking place as a result of the acts of other persons (see *Serpil Kerimoğlu and Others*, § 54).

78. This procedural obligation relating to the right to life may be fulfilled by criminal, civil or administrative investigations, depending on the nature of the case. In the case of deaths caused intentionally or as a result of ill-treatment, Article 17 of the Constitution obliges the State to conduct a criminal investigation capable of identifying and punishing those responsible. In such cases, the imposition of administrative sanctions or compensation as a result of administrative investigations and action for damages are not sufficient to remedy the violation and thus put an end to the person's victim status (see *Serpil Kerimoğlu and Others*, § 55). A different approach can be taken with regard to the obligation to investigate deaths caused by unintentional acts. In this context, the positive obligation does not necessarily require criminal proceedings in all cases where the violation of the right to life or physical integrity is not intentional. It may be sufficient for victims to have access to judicial, administrative or even disciplinary remedies (see *Serpil Kerimoğlu and Others*, § 59). However, in cases where the death is caused by unintentional acts, when the public authorities, within the limits of the powers conferred on them, have failed to take the necessary measures to eliminate the risks arising from a dangerous activity, although they were aware of its probable consequences, or when they have acted with a misjudgment or fault going beyond mere negligence, a criminal investigation must be opened against those who endanger the lives of individuals, even if the victims have had recourse to other remedies (see *Serpil Kerimoğlu and Others*, § 60).

79. For a criminal investigation to be effective, the investigating authorities must act *ex officio* to gather all evidence that may shed light on the circumstances of the death and identify those responsible. A shortcoming in the investigation which weakens the possibility of establishing the cause of death or the persons responsible may constitute a breach of the obligation to conduct an effective investigation (see *Serpil Kerimoğlu and Others*, § 57). In order to ensure that the criminal investigation is truly accountable, the investigation must be open to public scrutiny and, in all cases, the relatives of the deceased must be allowed to participate in the proceedings to the extent necessary to safeguard their legitimate interests (see *Serpil Kerimoğlu and Others*, § 58). Criminal investigations must be conducted with due diligence and promptness in order to ensure respect

for the rule of law and to avoid any appearance of collusion in or tolerance of unlawful acts (see *Salih Akkuş*, no. 2012/1017, 18 September 2013, § 30).

80. Where, as in the present case, the investigation phase has led to the initiation of criminal proceedings to establish criminal responsibility for an unnatural death, the proceedings as a whole, including the trial phase before the court of first instance, must comply with the requirements of Article 17 of the Constitution. Accordingly, the inferior courts may ensure that the interference with the victims' right to life and the attacks on their corporeal and spiritual existence do not go unpunished under any circumstances (see *Sadık Koçak and Others*, no. 2013/841, 23 January 2014, § 77).

81. Article 17 of the Constitution does not grant the applicants the right to ensure the prosecution or punishment of third parties for a criminal offence, nor does it impose an obligation on the State to conclude all proceedings with a conviction. This is not an obligation of result, but of appropriate means (see *Serpil Kerimoğlu and Others*, § 56). The fact that the obligation to investigate is not an obligation to reach a result, but an obligation to use the appropriate means, does not mean that every investigation must necessarily reach a conclusion that is consistent with the victim's account of events; however, it must in principle be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible (see *Doğan Demirhan*, no. 2013/3908, 6 January 2016, § 66). Although this is the primary view, inferior courts should not allow acts against the right to life to go unpunished by making an individual assessment in the specific circumstances of each case (see *Filiz Aka*, no. 2013/8365, 10 June 2015, § 32).

82. In this context, another important issue to be addressed by the Court is to review whether and to what extent the inferior courts, in reaching their conclusions in the proceedings conducted in such cases, can be considered to have examined the case thoroughly and diligently, as required by Article 17 of the Constitution. Indeed, the sensitivity to be shown by the inferior courts in this regard will ensure that the important role of the existing judicial system in preventing similar violations of the right to life is not undermined (see *Filiz Aka*, § 32). This is essential to

ensure respect for the rule of law and to avoid any appearance of collusion in or tolerance of unlawful acts (see *Fahriye Erkek and Others*, no. 2013/4668, 16 September 2015, § 91).

83. Moreover, it is the duty of the administrative and judicial authorities to assess the evidence concerning the occurrence of the incident (see *Rıfat Bakır and Others*, no. 2013/2782, 11 March 2015, § 68). It should be noted that the Court cannot directly substitute itself for the competent investigating and trial authorities in assessing the evidence and determining the necessary investigative procedures. In other words, it is not the Court's role to substitute its own assessment of the facts for that of the relevant authorities (see *Hıdır Öztürk and Dilif Öztürk*, no. 2013/7832, 21 April 2016, § 185). The Court's duty and competence in this respect is limited to examining whether the judicial procedure in question meets the requirements of the guarantees of the right to life guaranteed by Article 17 of the Constitution.

84. The purpose of Article 17 of the Constitution is to ensure that, in the event of death or injury to a person's corporeal or spiritual existence, the provisions of the law are effectively applied and those responsible are identified and held accountable. This is not an obligation of result, but of appropriate means. Therefore, it is not obligatory that all cases brought in this context result in a conviction or a specific criminal sentence (see *Cezmi Demir and Others*, no. 2013/293, 17 July 2014, § 127). However, as an element of the procedural obligation, those responsible must be punished in proportion to their actions and appropriate remedies must be provided to the victims (see *Şenol Gürkan*, no. 2013/2438, 9 September 2015, § 105).

b. Application of Principles to the Present Case

85. In the present case, in summary, it has been understood that the applicants' relatives lost their lives as a result of an explosion that occurred at 9.30 a.m. on 31 January 2008 at the workplace on the third floor of a building used for the production and trade of explosives (firecrackers, torches) within the borders of the Zeytinburnu district and at the end of the criminal proceedings, two public officials were found guilty of negligence or delay in fulfilling the requirements of their duties and two other public officials were found guilty of acting contrary to the requirements of

their duties and were sentenced to imprisonment, but it was decided to suspend the announcement of the judgment against these officials. It is also noted that the owners of the building, who were considered to be secondarily responsible, were sentenced separately to five years and six months' imprisonment, and that the sentences were not suspended or the decision to suspend the pronouncement of the judgment was not taken (regardless of whether it is possible to apply these practices according to the relevant law).

i. Substantive Aspect of the Right to Life (Obligation to Protect)

86. In assessing the alleged violation, the first step is to determine whether the competent public authorities knew or should have known (foreseeability) of the possibility of a risk such as fire or explosion that could endanger the lives of people (whether the unauthorised/unsupervised dangerous activity was known) at the workplace where explosives were being illegally manufactured and where there was no occupancy permit, and, if such a situation existed, to clarify whether the public officials took effective and practical measures that could reasonably be expected of them within the scope of their authority. In this respect, the first question to be assessed is whether the existence of a real and immediate risk to human life in the series of events which led to the explosion and the death of 21 people was known or should have been known to the authorities, in other words, whether there was foreseeability in the present case.

(1) Assessment of the Foreseeability of the Risk

87. Before proceeding with this assessment, it is appropriate to recall the legal status, importance and risk of workplaces where explosives (firecrackers, torches) are manufactured. As stated in the *"Relevant Legislation"* section, workplaces where explosives such as firecrackers and torches are manufactured, stored and traded are first class non-sanitary establishments. It is evident that these establishments are licensed and inspected by local authorities (municipalities). In the relevant Regulation, these establishments are defined as those that *are likely to cause harm to those around them*. The above-mentioned Regulation lists the conditions for the establishment of workplaces (taking the necessary safety measures, etc.); for the establishment and operation of non-sanitary establishments,

additional procedures are laid down, such as *the selection of the site* and *the authorisation of the establishment*. In addition, the provisions of the Regulation on the Procedures and Principles of the Manufacture, Import, Transport, Storage, Sale, Use, Disposal and Inspection of Explosives Excluded from the Monopoly, Hunting Materials and the Like, which applies to workplaces where fireworks and firecrackers are manufactured, sets out an establishment/approval process for the aforementioned workplaces, which involves many public institutions in the process, requires documents to be obtained from various institutions, and requires strict supervision. An analysis of the provisions of the above-mentioned Regulation shows that, in order to set up and operate workplaces where products such as fireworks and firecrackers are manufactured, many conditions must be met, ranging from lighting and alarm systems to distance from surrounding buildings, from special building conditions required for the place of production to zoning regulations. In this respect, it is evident that the workplaces in question are not ordinary workplaces, but establishments which pose a risk to their surroundings and therefore require special security measures, to which the public administration is sensitive and the establishment and operation of which are subject to strict conditions in accordance with detailed legal provisions.

88. The report prepared by the Faculty of Chemistry and Metallurgy of İstanbul Technical University also highlighted the risks associated with the manufacture of fireworks and firecrackers, stating that the materials used in the manufacture of such products are explosive and can be lethal even by inhalation and digestion, and that special precautions should be taken when transporting and using these substances.

89. There is no doubt as to the fact that the workplace where the explosion occurred was a workplace where firecrackers, torches and fireworks were illegally manufactured. This is clearly proven by the testimonies of the people who were working/present at the workplace at the time of the explosion, the investigation reports of the samples (more than one) taken from the site after the explosion, the reports of the fire brigade and the inspection carried out by the Zeytinburnu Municipality shortly before the incident. Furthermore, it is evident from the expert reports prepared during the court proceedings and from the documents submitted by the

Zeytinburnu Municipality to the judicial authorities that the building in which the workplace was located did not have an occupancy permit, although it had a building permit (licence), and that the quality of the construction was very poor, which increased the harmful effects of the explosion.

90. Consequently, in the present case, there is a situation of total lack of supervision and illegality with regard to the highly risky commercial activity being carried out without authorisation/illegally in a building that is not even suitable as a dwelling, not to mention the dangerous production activity.

91. With regard to the available data on this situation, i.e. whether the public authorities knew and/or should have known of the existence of a real and imminent danger to human life and whether there was foreseeability in the present case, first of all -as can be seen from the statements taken during the investigation and the fact that the application for a licence was made shortly before the incident- the municipal teams came to the relevant workplace shortly before the incident and warned against obtaining a licence. Moreover, in a written document submitted to the Public Prosecutor's Office by the Municipality itself, it was stated that the various companies operating in the same building had been inspected and sealed off by the Municipality on several occasions. It is therefore evident that the municipal teams had visited the building in question, and even the workplace where the explosion occurred, on several occasions before the explosion and found that the workplace was not licensed.

92. It is therefore evident beyond doubt that the municipal officials, who had previously carried out inspections in the building and sealed off the building where the explosion occurred, and who had even warned the workplace to obtain a licence shortly before the incident, and who were obliged to inspect the said workplace both in terms of the activity carried out and the zoning, and to take action if necessary, were aware of the existence of a real and imminent risk in relation to the activity of manufacturing explosives, which is regulated by detailed legal provisions, is subject to strict conditions, involves a high risk, but was being carried out illegally; in other words, it is crystal clear that this event, which would have had serious consequences for human life, was foreseeable.

(2) Analysis of Whether Reasonable Steps Were Taken Against the Foreseeable Risk

93. The point to be determined at this stage is whether the public authorities, aware of the existence of the risk, took reasonable steps to take the effective/practical measures expected of them under the obligation to protect the lives of individuals. In other words, it is necessary to determine whether the public authorities exercised due diligence to prevent the explosion and its fatal consequences by taking appropriate preventive measures.

94. As can be seen from the legal provisions cited in the *"Relevant Legislation"* section, it is evident that municipal officials have a duty to inspect dwellings for compliance with zoning laws and to take criminal action for any discrepancies they find.

95. In addition, municipalities have specific obligations, not only in terms of zoning legislation, but also in terms of licensing workplaces, monitoring that the necessary permits and licences have been obtained for the activity being carried out in the workplace, and taking action (stopping the activity if necessary) on the basis of any discrepancies they find.

96. As mentioned above, the building where the explosion occurred did not have an occupancy permit. In addition, the expert reports obtained in the course of the proceedings showed that an attic had been built in violation of the licence and that the building material was weak in a way that increased the impact and severity of the explosion. However, there was no licence for the production activity carried out in the workplace where the explosion occurred, which is subject to strict conditions due to the high risk involved. It was established that the building was put into use in 1992 and was used for a long time without an occupancy permit until 2008, when the explosion occurred, and that during this period no measures were taken in relation to the zoning legislation. In other words, for a period of 16 years, the building was freely used as a commercial space in violation of zoning legislation, including risky production activities.

97. In addition, it has been observed that the production activity that caused the explosion had been going on for about five years, according to

workers at the workplace, and that during this period municipal teams had visited the building several times to inspect and seal other businesses, and even in 2007 and shortly before the explosion, municipal teams came to the workplace when it was understood that the workplace was operating without a licence. Although the company that caused the explosion was found to be operating without a licence shortly before the explosion and in 2007, it has been understood that no action was taken as a result of this finding, such as stopping production or sealing off the workplace. Given that the activity carried out in the workplace was not a normal production activity, but the production of explosives, which involves a very high risk and is subject to a strict supervision and authorisation procedure, the continuation of production and the tacit authorisation of this activity through the absence of sanctions, despite the fact that the workplace was considered to be unlicensed, is a serious and decisive indication that adequate measures were not taken with regard to the obligation to protect life.

98. In the light of these data, although it was evident that a high-risk production activity had been carried out without a licence/permit in a building that could not even be used as a dwelling and that had been used for 16 years without an occupancy permit, it has been understood that the administration did not take reasonable steps in the context of the obligation to protect life and did not take measures to prevent the danger from materialising, since no measures were taken to stop the production activity. In conclusion, it cannot be considered that the public authorities have been able to effectively exercise the public power supported by the legal/institutional infrastructure in accordance with the obligation to protect life, and it is evident that *there is an insufficiency in the adoption and implementation of measures favourable to achieving results in terms of risk* related to the dangerous/illegal production activity, and that *the obligation to protect life has been violated*.

99. Following these findings on the obligation to protect life, it is necessary to assess whether there is effective judicial protection of the right to life, as this is directly linked to the *exhaustion of remedies*.

(3) Determination of the Effective Legal Remedy

100. In making this assessment, it should be recalled that, according to the case-law of the Court, the positive obligation to establish an effective judicial system may be satisfied in the case of a non-intentional violation of the right to life where the victims have civil, administrative or even disciplinary remedies available to them, but where the public authorities, fully aware of the likely consequences, have failed to take the necessary and sufficient measures, within the limits of the powers conferred on them, to avert the risks, the fact that those responsible for endangering life have not been charged or prosecuted may amount to a violation of the right to life (see *Kadri Ceyhan* [Plenary], no. 2014/1924, 17 May 2018, § 89). In a case involving a foreseeable risk in the context of a dangerous activity (mining, production of explosives, etc.) and there are measures to be taken to eliminate that risk, it cannot be said that there is no need for an effective criminal investigation in terms of the obligation to establish an effective judicial system (see *Naziker Onbaşı and Others*, no. 2014/18224, 9 May 2018, § 53). From this perspective, the question to be decided at this stage is what kind of remedy, in the context of the positive obligation of the State to establish an effective judicial system, would be the (appropriate) judicial response to those incidents where deaths were caused by the negligent failure to take reasonable precautions despite the existence of foreseeable dangers.

101. As stated above, in the present case there appears to be a complete lack of supervision and illegality in relation to the highly risky commercial activity being carried out without authorisation/illegally in a building that cannot even be used as a dwelling. The activity carried out at the workplace where the explosion occurred was not a normal production activity, but the production of explosives, which is a very high-risk activity and is subject to strict supervision and authorisation procedures. Despite this illegal production, the workplace was found to be unlicensed and its continued production was tacitly authorised by the absence of sanctions. In this context, the circumstances of the present case make it clear that the situation goes beyond simple error or negligence on the part of public officials.

102. In the context of a dangerous activity, the identification of those responsible for taking the necessary precautions to minimise the risks to life and physical integrity, and the legal response of the State in the face of the identified responsibilities, are also important in preventing similar incidents. In the present case, it is evident that the public authorities, although aware of the possible consequences within the scope of their powers, did not take the necessary and sufficient precautions to eliminate the risks that had arisen. Therefore, in this particular case, it is considered necessary for the State to conduct a criminal investigation in relation to the right to life, as part of its procedural obligations. In addition, the assessment of the European Court of Human Rights ("ECHR") that criminal proceedings are an effective remedy in the present case also supports the conclusion reached. It is therefore considered that the exhaustion of remedies and the requirements for effective judicial protection in the context of the claim for damages have no bearing on the present application.

(4) Assessment of the Damage

103. At this point, having established that inadequate measures were adopted and implemented in relation to the risks associated with the foreseeable dangerous/illegal production activity, and having also established the State's obligation to conduct an effective criminal investigation in response, it should be assessed whether the criminal proceedings in which the public officials were found guilty have provided an effective remedy for the breach of the obligation to protect life. However, in assessing whether an effective remedy has been provided, it should be stressed that the determination of the act and the nature of the offence is at the discretion of the Court.

104. It is evident that the mere existence of a legal remedy is not sufficient; the remedy must also be effective in practice. To be considered effective, the redress should be capable of preventing the violation of a right, of putting an end to a current violation if it exists, or of *providing an adequate redress for a past violation* once it has been established. In this context, in order to be able to say that the grievance arising from the violation of the right to life has been eliminated, it is essential that the

judicial authorities first clearly establish the violation of the right to life and determine legal liability, and then resolve the matter with an effective remedy (for considerations in the same vein, see *Şenol Gürkan*, no. 2013/2438, 9 September 2015; *Cezmi Demir and Others*, no. 2013/293, 17 July 2014). Fulfilment of these requirements is necessary in order to conclude that the violation/grievance relating to the right to life has been remedied.

105. An analysis of the proceedings shows that the Court clarified the circumstances of the incident, identified the public officials responsible for the incident, established the fault and offence of the public officials by finding a connection with the explosion, sentenced them to imprisonment, but decided to suspend the pronouncement of the judgment. In other words, in the incident leading to the death, the public authorities were found to have caused harm to persons by failing to fulfil the requirements arising from their duties, and thus the violation was substantively established in relation to the substantive aspect of the right to life. Although it is also the subject of the assessment to be made under the procedural aspect, it is necessary to examine whether the decision to suspend the pronouncement of the judgment provides the applicants with an adequate and effective remedy, in other words whether the outcome of the proceedings eliminates their status as victims. Although it is not within the competence of the Court to deal with issues of criminal liability or to decide on the guilt or innocence of individuals, the Court is obliged to carry out a constitutionality review in cases where there is a clear disproportion between the gravity of the offence or negligence and the punishment imposed in relation to the negligence or offences committed by public officials (in the same vein, see *Cezmi Demir and Others*, § 76).

106. First of all, it should be noted that the relevant legislation gives the courts of first instance the possibility to decide to suspend the pronouncement of the judgment. However, this is not an obligation and the judge has full discretion in this regard. At the discretion of the judge, if the accused (defendant) does not commit a new offence within the five-year trial period, it is possible that the decision will not be implemented and the case in question will be automatically dismissed in accordance with the relevant law.

107. Even if the act that leads to the prosecution of public officials is not related to the use of force (violence, coercion), or even if it is an offence committed through negligence/misconduct in office, these are the acts that have caused serious/severe consequences (inactions). It should be emphasised that the incident which formed the basis of the judgment that led to the decision to suspend the pronouncement of the judgment for public officials resulted in the death of 21 people, injured more than a hundred people and was a serious explosion in terms of its consequences affecting a wide area. In other words, the action/inaction of the officials is serious in terms of its consequences. Furthermore, the fact that the activity carried out in the workplace where the explosion occurred was not an ordinary commercial activity, that the building was not licensed, that the activity was subject to strict supervision and authorisation procedures because of the risk it posed, that the activity of the workplace was not stopped despite the fact that it had previously been found to be unlicensed by the municipal teams, and that the explosion occurred immediately afterwards, are important indications of the seriousness and gravity of the state of inaction.

108. In addition to certain objective conditions, there is also a subjective condition for the decision to suspend the pronouncement of the judgment following the decision of conviction by the courts of first instance. This subjective condition is defined in the law as *"the personal characteristics of the accused and his/her attitudes and behaviours during the trial"*, emphasising that the court must be convinced that the accused will not reoffend. Undoubtedly, the discretion in this situation belongs to the judges, but when evaluating *the personal characteristics of the accused*, this issue should be discussed in the reasoning of the decision, bearing in mind that the accused is a public official and has shown gross negligence with regard to its consequences, and it should be shown in the decision that a discretionary power was used accordingly. It is evident that in the judgment handed down as a result of the criminal proceedings relating to the present case, which occurred as a result of gross negligence and which is desperate in terms of its consequences, it cannot be said that there was any assessment dealing with the nature of the incident and the degree of negligence of the public officials, either for the decision to suspend the pronouncement of the judgment or for the discretionary mitigation.

109. Although the violation of the right to life was recognised by the courts of first instance, the decision to suspend the pronouncement of the judgment prevented the provision of an adequate and appropriate remedy. In this context, it has been concluded that, despite the fact that there is no legal obligation and that there is complete discretion for the offence, which was quite risky, which was embodied in the lack of supervision of the illegal production activity and which had serious consequences, the judges used their discretion to minimise the consequences of this act by deciding to suspend the pronouncement of the judgment, which is clearly stated in the law to have no legal consequences for the defendants, instead of demonstrating that an illegal act with serious consequences cannot be tolerated in any way, and it has also been concluded that there is no deterrent for the defendants and no effective remedy in terms of victimisation, that the applicants remain victims, and that it does not mean that the court of first instance has accepted that the obligation to protect under Article 17 of the Constitution has been violated by the decision to suspend the pronouncement of the judgment against public officials, which does not provide an appropriate and adequate redress for the violation.

110. In the light of the foregoing, it must be held that the substantive aspect of the right to life was violated.

Mr. Selahaddin MENTEŞ agreed with this conclusion by expressing a concurring opinion.

ii. Procedural Aspect of the Right to Life (Obligation to Conduct an Effective Investigation)

111. The procedural aspect of the State's positive obligations under the right to life requires that the circumstances of the death be established in all its aspects, that an effective investigation be conducted to determine responsibility, and that those responsible be punished in proportion to their actions. The ability to identify the persons responsible for minimising the risks to the life and physical integrity of persons and for taking the necessary measures in the context of a dangerous activity, as well as the judicial response of the State to the identified responsibilities, are also important in terms of preventing similar incidents.

112. The application alleged that there had been no effective investigation into the incident. The applicants conclude that no effective investigation was conducted on the basis of two main complaints. The first complaint concerns the decision to dismiss the case against S.K., one of the municipal officials, on the grounds of limitation, and the second complaint concerns the decision to suspend the pronouncement of the judgment in such a way as to create the impression of impunity for other public officials.

113. The applicants did not complain that the investigation was not opened *ex officio* and immediately, that the investigation was not conducted independently and expeditiously, that all evidence that could shed light on the incident and identify those responsible was not collected during the investigation. Furthermore, no information or findings were found in the present case that the above-mentioned principles concerning the obligation to conduct an effective investigation had been violated.

114. Since S.K., the former Director of Reconstruction of Zeytinburnu Municipality, resigned from his post on 27 August 2004, the date of the offence for S.K. was determined to be 27 August 2004 at the latest. In the court proceedings, it was established that the statute of limitations for the offence of negligent misconduct was seven years and six months according to the provisions of the repealed Law no. 765, which was in force at the time of S.K.'s resignation, and therefore the statute of limitations for this offence, which was caused by the explosion that occurred in 2008, expired before 2014 (approximately the beginning of 2012), which was the date of the first verdict against S.K., and a dismissal decision was made. It has been understood that the decision to dismiss the case was due to the fact that the date of the offence was long before the explosion due to the above-mentioned actual state -resignation from public service- and not due to the delay in the judicial process. Therefore, since the dismissal of the case against S.K. was not due to the discretion of the court or the delay in the judicial process, it has been concluded that the sentence against S.K. did not constitute a violation of the obligation to conduct an effective investigation.

115. However, in relation to the explosion that occurred in early 2008, the Chief Public Prosecutor's Office gathered evidence in 2008

and 2009, including an expert report, documents obtained from relevant organisations and testimonies, and a criminal case was filed in late 2009. The court delivered its first verdict in mid-2014, some six and a half years after the explosion. Due to the quashing decision on the legal qualification of the offence, the final verdict was handed down in March 2019. The convictions before and after the quashing decision were based on the same evidence, the difference being in the legal interpretation of the qualification of the offence. As a result, the criminal investigation spanned a period of approximately 11 years. In the present case, the fact that the manner and circumstances of the incident were revealed by the expert reports and testimonies given before a long period of time had elapsed after the explosion, despite the large number of participants in the judicial proceedings, the difficulty of resolving the legal issue in view of the prolongation of the proceedings with the quashing decision on the qualification of the offence, the nature of the material facts, the obstacles encountered in collecting evidence, it has been concluded that the present case does not appear to be sufficiently complex to make the 11-year period reasonable, and since has been observed that there is no element to show that the applicants have been negligent in exercising their attitudes and procedural rights, which would cause the prolongation of the proceedings, it has been concluded that the reasonable time has been exceeded in the judicial process.

116. Moreover, since the obligation to investigate is not an obligation as to the result but as to the appropriate means, it cannot be said that the process must ultimately lead to a particular type of punishment. However, although the possibility of using the institution of the suspension of the pronouncement of the judgment is at the discretion of the courts, it can be concluded that the effectiveness of the investigation cannot be guaranteed if it is found that the courts apply the law in such a way as to ensure that the accused remain *de facto* unpunished (see *Süleyman Deveci*, no. 2013/3017, 16 December 2015; *Yunus Kalkan*, no. 2013/4383, 18 February 2016; *Mehmet Şah Araş and Others*, no. 2014/798, 28 September 2016).

117. Impunity refers to absence of punishment for a crime. Impunity can take the form of a failure to bring those responsible to justice, a failure to punish them in a manner commensurate with the offence committed,

or a failure to ensure that sentences are carried out. Preventing impunity makes it possible to provide the necessary redress to victims and to create a deterrent effect to prevent further violations. If there is a disproportion between the offence committed and the punishment imposed, or if no punishment is imposed at all, it is far from having a deterrent effect capable of preventing such acts, resulting in a failure to fulfil the positive obligation to protect the right to life through administrative and legal legislation (for considerations in the same vein, see *Süleyman Deveci*, § 102).

118. The institution of the suspension of the pronouncement of the judgment is regulated by Article 231 of Law no. 5271. The suspension of the pronouncement of the judgment, which means that the conviction of the accused does not have any legal consequences and has a mixed character in terms of its consequences, is one of the grounds for dismissal that ends the criminal relationship between the accused and the State, as it leads to the dismissal of the criminal case in accordance with Article 223 of Law no. 5271 by abolishing the suspended judgment, if no new crime is committed intentionally during the period of supervision and if the obligations are fulfilled (see *Tahir Canan*, § 30). In this context, the decision to suspend the pronouncement of the judgment essentially leaves the person under the threat of punishment. As in the present case, the punishment of the person found guilty of the offence is made conditional on his intentionally committing a new offence during the period of supervision, so that the act for which he is held responsible by the court decision remains *de facto* unpunished unless he commits a new offence. In assessing whether this institution of impunity was introduced by the legislator in order to reintegrate the person into society as a result of the offence committed by that person, it is necessary to interpret the deterrent effect of the sanction in relation to the nature of the offence and the severity of the consequences within the framework of the specific circumstances of each case, without ignoring the issue of deterrence.

119. As stated in the assessment of the material liability, the acts (negligence) subject to prosecution had serious consequences and many people lost their lives. The negligence on the part of the officials, which gave rise to the offence of misconduct in office, relates to a workplace carrying out a high-risk production activity and located in a building

without an occupancy permit. This workplace was found to be operating without a licence by officials shortly before the incident, but the activity was not stopped and the explosion occurred shortly afterwards. As a result of the court's decision to suspend the pronouncement of the judgment, if the accused do not commit an offence during the trial period, the sentence will be deemed never to have been pronounced and will not be entered in the court records. This decision has a stronger effect than the suspension of the execution of the sentence and results in the exemption of the accused from punishment. Evaluating the process as a whole in the light of these findings, the court's decision gives the impression that it preferred to use its power to suspend the pronouncement of the judgment in order to mitigate or eliminate the consequences of the act that caused serious victimisation, rather than to use its power to show that the acts in question would not be tolerated in any way.

120. It is therefore evident that one of the conditions for ensuring the effectiveness of the investigation, namely that those responsible be punished in a manner commensurate with their actions, has not been met and that impunity has prevailed. This constitutes a manifest violation of the State's obligations to conduct a criminal investigation capable of ensuring that those responsible are punished with appropriate and proportionate penalties, in order to ensure deterrence and prevent similar violations. It is evident that this result gives the impression that such cases are treated with tolerance and may damage the confidence of individuals in the State and the justice mechanisms in this context.

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

Mr. Selahaddin MENTEŞ agreed with this conclusion by expressing a concurring opinion.

3. Application of Article 50 of Code no. 6216

122. Article 50 §§ 1 and 2 of the Code no. 6216 on the Establishment and the Rules of Procedure of the Constitutional Court of 30 March 2011 ("Code no. 6216"), read, insofar as relevant, as follows:

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

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

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

124. In its judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court set out the general principles on how to redress a violation found. In another judgment, the Court also referred to the consequences of failure to comply with a judgment finding a violation, stating that such a situation would constitute a continuing violation and would also lead to a second violation of the right in question (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

125. Accordingly, if a violation of a fundamental right is established in an individual application, the basic rule for redressing the violation and the consequences thereof is to ensure, as far as possible, restitution, that is to say, the restoration of the original situation prior to the violation. To this end, it is primarily necessary to identify the cause of the violation and then to put an end to the continuing violation, to revoke the decision or act which gave rise to the violation, to redress the consequences thereof, to compensate the pecuniary and non-pecuniary damages resulting from the violation and to take any other measures deemed appropriate in this context (see *Mehmet Doğan*, §§ 55, 57).

126. In cases where the violation results from a court decision or the [trial] court is unable to redress the violation; the Court decides, as a general

rule, to send a copy of the judgment to the competent court for retrial in order to redress the violation and the consequences thereof, pursuant to Article 50 § 2 of Code no. 6216 and Article 79 § 1 (a) of the Internal Regulations of the Court. This statutory regulation, unlike similar legal practices available in procedural law, provides for a remedy specific to the individual application mechanism and leads to a retrial for the purpose of redressing the violation. For this reason, when the Court orders a retrial in connection with a judgment finding a violation, the court concerned has no discretion to accept the existence of grounds for a retrial, which differs in this respect from the practice of reopening proceedings in procedural law. Therefore, the court receiving such a judgment is under a statutory obligation to issue a decision to hold a retrial on the basis of the Court's finding of a violation, without waiting for a request to that effect from the person concerned, and to conduct the necessary procedures to redress the continuing violation (see *Mehmet Doğan*, §§ 58, 59; *Aligül Alkaya and Others (2)*, §§ 57-59, 66, 67).

127. In the present case, it has been concluded that the substantive and procedural aspects of the right to life were violated. Therefore, it has been understood that the violation resulted from the actions of public officials and the procedures of the court in the context of the criminal proceedings related to this action.

128. In this case, in order to eliminate the consequences of the violation of the substantive and procedural aspects of the right to life, the necessary measures should be taken in accordance with Article 50 § 1 of Law no. 6216. For this reason, it is necessary to decide to send a copy of the decision to the Assize Court for retrial, in order to redress the deficiencies found during the proceedings that are the subject of the application.

129. Moreover, in the present case, one of the grounds for violation of the obligation to conduct an effective investigation (procedural aspect) is the failure to complete the investigation within a reasonable time. For this reason, it is evident that the finding of a violation will not be sufficient to compensate for the damage sustained by the applicant. Therefore, in order to redress the violation, with all its consequences, within the framework of the *restitution* rule, it is also necessary to compensate the applicants for

their non-pecuniary damage, which cannot be remedied by a finding of a violation due to the violation of the substantive and procedural aspects of the right to life alone. Therefore, for the violation of the obligation to conduct an effective investigation, the applicants should be awarded a total net amount of 1,200,000 Turkish liras ("TRY") in respect of non-pecuniary damage, as set out in the attached list, for the non-pecuniary damage that cannot be compensated by the finding of the violation.

130. In order for the Court to award compensation for pecuniary damage, there must be a causal link between the alleged pecuniary damage and the violation found. As the applicants have failed to provide any documents in this respect, their claims for compensation for pecuniary damage and the remaining claims for compensation should be rejected.

131. It must be held that the litigation costs, as determined on the basis of the documents in the case file, be paid to the applicants as set out in the attached list.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 15 March 2022 that

A. The applications be DISMISSED for Ebru Çolak, Miyeser Kızılçam and Nebiye Kara due to *death*;

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

C. The substantive and procedural aspects of the right to life, safeguarded in Article 17 of the Constitution, were VIOLATED;

D. A copy of the judgment be REMITTED to the 6th Chamber of the Bakırköy Assize Court (E.2017/523, K.2019/12) for retrial to redress the consequences of the violation of Article 17 of the Constitution;

E. A net amount of TRY 1,200,000 be REIMBURSED to the applicants for non-pecuniary damage as set out in the [Attached List] and the other claims for compensation be REJECTED;

F. The total litigation costs be REIMBURSED to the applicants as set out in the attached list;

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

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

CONCURRING OPINION OF JUSTICE SELAHADDİN MENTEŞ

In the present case, which is the subject of the application, it has been understood that some public officials were sentenced to prison terms ranging from 10 months to 1 year and 8 months for committing the offence of misconduct in public office by acting contrary to the requirements of duty, and that the pronouncement of these sentences were postponed.

Firstly, it should be noted that it is the duty of the administrative and judicial authorities to assess the evidence of the occurrence of the events and that it is not for the Court to substitute itself for the competent authorities in assessing the evidence or determining the necessary investigative procedures to be carried out (see § 83). Secondly, it should be emphasised that the Court does not directly intervene in the outcome of the investigations or prosecutions that are the subject of the application, nor in the degree of culpability or responsibility of those responsible. Consequently, it is not within the direct competence of the Court to resolve questions relating to the criminal liability of individuals.

In addition, an examination of the prosecution that is the subject of the application shows that public officials are being held liable for the offence of "misconduct in public office", which has no relation to the offences of endangering human life in Law no. 5237 and, therefore, to the protection of the right to life in accordance with Article 17 of the Constitution. It follows that, although the competent authorities found that the officials in question had failed to fulfil the requirements of their duties, they did not assess whether they were responsible for the deaths of the applicants' relatives. This does not mean that the responsibility arising from the failure to protect the right to life is recognised, even indirectly. The judgment which is the subject of this application does not establish a breach of the obligation to protect life. The causal link between the failure of the public officials to fulfil their responsibilities and the deaths was not discussed or taken into account. This makes it impossible to believe that the competent authorities paid due attention to the extremely tragic and serious consequences of the accident. This deficiency has led to inadequate sanctions against those responsible for the incident.

Accordingly, it cannot be concluded that the judicial process which is the subject of the application has established the responsibility of the officials concerned and effectively implemented the deterrent function of the Turkish Criminal Code in order to protect the right to life by preventing similar incidents.

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

BİNALİ CAMGÖZ AND OTHERS

(Application no. 2019/36978)

26 May 2022

On 26 May 2022, the First Section of the Constitutional Court found a violation of the right to life, safeguarded by Article 17 of the Constitution, in the individual application lodged by *Binali Camgöz and Others* (no. 2019/36978).

THE FACTS

[7-42] On the day of the incident, three people called the Police Emergency Line 155 to report that Y.C.C., a relative of the applicants, was taking drugs in a park. Police officers S.P. and M.C. arrived at the scene and got into a fight with Y.C.C., who collapsed after being pepper-sprayed by the police officers and died in hospital the same day. The İzmir Chief Public Prosecutor's Office ("the Chief Public Prosecutor's Office") immediately launched an investigation into the incident. The Chief Public Prosecutor's Office stated that the actions of police officers S.P. and M.C. constituted the offence of causing death through negligence and requested that the İzmir Governor's Office ("the Governor's Office") authorise an investigation under the Law no. 4483 on the Prosecution of Civil Servants and Other Public Officials on the grounds that the suspected police officers were public officials and that the offence was committed in the exercise of and on account of their duties.

The Governor's Office requested the Ministry of Interior to appoint an inspector to conduct the investigation, and the Ministry appointed a chief civil inspector and a chief police inspector to conduct a preliminary inquiry. The chief inspectors in charge of the preliminary inquiry took statements from the police officers and other witnesses and collected the evidence they deemed necessary. In this context, they submitted the preliminary inquiry report, which concluded that no authorisation should be granted. On the basis of this report, the Bayramlı District Governor's Office ("the District Governor's Office") did not authorise an investigation against the police officers. The applicants appealed against this decision and the İzmir Regional Administrative Court ("the Regional Administrative Court"), which examined the appeal, rejected it. Subsequently, the Chief Public Prosecutor's Office decided that there was no need for an investigation as the appeal had been rejected and the case was closed.

V. EXAMINATION AND GROUNDS

43. The Constitutional Court ("the Court"), at its session of 26 May 2022, examined the application and decided as follows:

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

44. The applicants stated that their son, Y.C.C. had been lying on the ground and beaten by police officers when he had previously been sitting alone, that he had been sprayed with pepper spray when it was not necessary, which had caused his death, that a decision had been taken not to allow an investigation against the police officers who had exceeded the limit of intervention and that their objections had been rejected, and that there was a dissenting opinion in the said decision stating that there had been sufficient suspicion to justify an investigation, that the preliminary inquiry was carried out by the Ministry of Interior and the Directorate of Security, that the investigation was not impartial as the persons investigated were police officers, that the investigation was concluded with impunity and that they were not interrogated by those who had prepared the preliminary inquiry report, which were in breach of Articles 17, 36, 40 and 141 of the Constitution.

45. The Ministry stated that the Public Prosecutor acted *ex officio* as soon as he became aware of the report of the crime, collected the evidence by including witness statements, police reports, medical reports, autopsy reports, expert reports, forensic reports and all other evidence in the file, ensured that the applicants and their lawyers actively participated in the investigation, collected the necessary evidence by issuing writs to the relevant units in accordance with the applicants' requests, and requested permission for an investigation by concluding that an investigation should be conducted against the suspects.

46. In their counter-statements, the applicants put forward arguments similar to those contained in their individual application forms.

B. The Court's Assessment

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

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

…

The provision of the first paragraph shall not apply to acts of killing in self-defence, in the execution of arrest and detention warrants, in preventing the escape of lawfully arrested or convicted persons, in quelling riots or insurrections, or in carrying out the orders of authorised bodies during a state of emergency, when the use of arms is authorised by law as a coercive measure."

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

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

1. Scope of the Examination

49. The Court is not bound by the legal qualification of the facts by the applicant and it makes such an assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). It has been concluded that the alleged violations in the present case essentially concern allegations that a death occurred as a result of the disproportionate use of force when it was not necessary and that no effective criminal investigation was conducted in relation to this incident. The applicants' allegation was therefore examined in the context of the substantive aspect of the right to life, as regards the obligation not to kill, and the procedural aspect, as regards the obligation to conduct an effective investigation.

2. Admissibility

50. In view of the natural character of the right to life, an application under this right can only be made by the relatives of a deceased person

who claim to be victims as a result of the death of such a person (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, § 41). In the present case, the applicants are the mother, father and sibling of the deceased. There is therefore no defect in the application as regards the applicants' capacity to apply to the Court.

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

3. Merits

a. As regards the Substantive Aspect of the Right to Life

i. General Principles

52. Under the negative obligation of the State, public officials who use force in the exercise of public authority are obliged to refrain from the wilful and unlawful deprivation of life of any person within their jurisdiction (see *Serpil Kerimoğlu and Others*, § 51). This obligation applies not only to intentional killing, but also to the use of force which may have the unintended consequence of causing death (see *Cemil Danışman*, no. 2013/6319, 16 July 2014, § 44).

53. Deaths allegedly caused by the use of force by public officials should undoubtedly be examined in the context of the negative obligation of the State *not to take the life of any person*. This obligation covers both intentional killing and the use of force resulting in unintentional death. As stated in Article 16 of Law no. 2559, the use of force may take the form of physical force, other means of material force or the use of weapons (see *Cemil Danışman*, § 44).

54. According to the last paragraph of Article 17 of the Constitution, the use of weapons, which in a sense represents the most serious level of the use of force by public officials, may be permitted in the cases listed in the provision, such as *self-defence* and *the execution of arrest and detention warrants*. In these cases, however, the existence of *a compelling situation* making the use of force necessary is required in order to prevent the use of lethal force from violating the right to life (see *Cemil Danışman*, § 45).

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

"Fundamental rights and freedoms may be restricted only by law and on the grounds specified in the relevant articles of the Constitution without infringing upon their essence. Such restrictions shall not be contrary to the letter and spirit of the Constitution, to the requirements of a democratic social order and a secular republic, and to the principle of proportionality."

56. In accordance with the principle of proportionality set out in Article 13 of the Constitution, which regulates the conditions under which all fundamental rights and freedoms may be restricted, a fair balance must be struck between the public interest pursued by depriving individuals of their fundamental rights and the rights of the individual deprived of his/her fundamental right (see *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 37).

57. The principle of proportionality consists of three sub-principles: *suitability*, *necessity* and *commensurateness*. *Suitability* requires that the intended interference is suitable for achieving the objective (aim) pursued; *necessity* requires that the interference is indispensable for achieving the objective pursued, in other words that the objective pursued cannot be achieved by a less severe interference; and *commensurateness* requires that a reasonable balance be struck between the interference with the individual's right and the objective pursued by the interference (see *Mehmet Akdoğan and Others*, § 38).

58. When the constitutional provisions on the use of force to interfere with the right to life and the previous judgments of the Court on this issue are evaluated together, it can be said that police (law enforcement) officers may use force only to achieve the purposes set out in the Constitution, *in cases of absolute necessity* where there is no other remedy, and in a manner *proportionate* to the force faced in accordance with the objective pursued (see *Cemil Danışman*, § 50; *Nesrin Demir and Others*, no. 2014/5785, 29 September 2016, § 113).

59. The inviolability of the right to life and the obligation to use lethal force only in cases provided for in the Constitution and *as a last resort*

when no other means of intervention are available, require a very strict test of necessity and commensurateness in cases involving the use of such force that may result in death (see *İpek Deniz and Others*, no. 2013/1595, 21 April 2015, § 117).

60. In assessing the actions of officers in relation to the use of force, account must be taken not only of the actions of the officers exercising public authority, but also of all the surrounding circumstances, including matters such as the planning and control of the actions (see *Nesrin Demir and Others*, § 108). The circumstances and course of the incident must also be taken into account (see *Cemil Danışman*, § 57).

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

ii. Application of Principles to the Present Case

62. The applicants' allegation that the police officers used physical force against their relatives was accepted by the police officers and therefore not contested. The applicants challenged the assessments of the police officers and the competent authorities, who took the decision not to allow an investigation and rejected the subsequent appeal, as to whether the force used was necessary and proportionate.

63. S.P., a police officer who came to the park and saw Y.C.C. sniffing some gas, tried to talk to Y.C.C. and they got into an argument. When S.P. put his hand on Y.C.C.'s shoulder, Y.C.C. made a move to get rid of it and S.P. pulled his hand away. As Y.C.C. stood up, the parties began to push each other and then fell to the ground hugging each other. Police officer M.C. saw the scuffle and rushed to the scene. Meanwhile, S.P. got up from the ground and sprayed Y.C.C. with pepper spray as he continued to resist. Although the eyewitness, Y.B.K., claimed that both police officers had used pepper spray, the investigating authorities did not question the witness or the police officers to resolve this contradiction. In their coherent and consistent statements, the police officers stated that only police officer S.P. had used pepper spray. According to the report prepared by an expert

after decoding the CCTV footage of the scene of the incident, Y.C.C. kicked the police officers and resisted them, forcing the police officer S.P. to use force. In other words, it cannot be said that the police officer's use of force was not necessary. However, it is necessary to assess whether this force was proportionate or not.

64. It should be recognised that police officers have a degree of discretion in determining the degree of force used. However, the amount of force used must not exceed the objective of *breaking resistance* and must not be intended to cause the person resisting to suffer. In this sense, in cases where the physical force used to break resistance exceeds the necessary threshold, it can be concluded that it deviates from the intended purpose and is in fact intended to cause only physical pain. The use of force in such circumstances cannot be said to fall within the permissible limits of Article 17 § 3 of the Constitution. Furthermore, in assessing the commensurateness of the force used, the nature of the objective sought by the arrest warrant and the nature of the preferred means of breaking resistance are also taken into account (see *Deniz Karadeniz and Others*, no. 2014/18001, 6 February 2020, § 89).

65. In its previous judgments, the Court has addressed the procedures for the use of pepper spray/tear gas, which is considered a means used by police officers to intervene in social events and the use of which is not prohibited by national and international legislation, when assessing the commensurateness of the use of physical force under the right to life and the prohibition of ill-treatment. In so doing, the Court took account of the *information note on chemical weapons used at social events* issued by the Turkish Medical Association, which stated that the gas used in Türkiye could cause reactions such as shortness of breath, nausea, vomiting and irritation, and could even lead to death in children, the elderly, pregnant women and people with chronic illnesses (see *Ali Rıza Özer and Others*, no. 2013/3924, 6 January 2015, § 91).

66. In view of the possible effects mentioned above, the use of such types of gas can only be regarded as lawful if other available means suitable for breaking resistance have already been used but have not produced a result, or if it is clearly obvious in the particular circumstances of a given case that no result could be obtained (see *Deniz Karadeniz and Others*, § 92).

67. In the present case, the intervention of the police officers was not a pre-planned and prepared operation, but an intervention that lasted about two minutes and took place as a result of the radio announcement made by the officers of the Police Emergency Line 155 following the reports received, and two police officers were sent to the scene. Given the fact that there were two police officers, one of whom ran to the scene, that the deceased, who was resisting them, was lying on the ground at the time and, more importantly, that he was a 14-year-old child and that it was not alleged that he was suspected of carrying a weapon or weapon-like means of attack, it has been understood that it was possible for the police officers to take alternative measures to prevent the child from escaping or resisting. In other words, it is inconceivable that the danger posed by a 14-year-old child who had no weapon or similar means was so great that it could not be prevented by two police officers, each of whom had a physical advantage over the child, and that the intervention was insufficient. Therefore, it cannot be said that the police officer's use of physical force against the applicants' relative by means of pepper spray was proportionate.

68. It has therefore been concluded that the intervention in the form of the use of pepper spray by the police officer, which resulted in the death of the applicants' relative, was not proportionate.

69. In the light of the foregoing, it must be held that there was a violation of the substantive aspect of the right to life.

b. As regards the Substantive Aspect of the Right to Life

i. General Principles

70. The procedural aspect of the State's positive obligations under the right to life requires that there should be some form of effective official investigation capable of leading to the identification and, where appropriate, punishment of those responsible for any kind of unnatural death. The main purpose of this investigation is to ensure the effective implementation of the law protecting the right to life and to hold accountable those responsible for deaths caused by the intervention of public officials or under their responsibility, or by the acts of others (see *Serpil Kerimoğlu and Others*, § 54).

71. This procedural obligation relating to the right to life can be fulfilled by criminal, civil and administrative investigations, depending on the nature of the incident. In cases of intentional death or death resulting from assault or ill-treatment, Article 17 of the Constitution requires the State to carry out a criminal investigation capable of identifying and punishing those responsible. In such cases, the imposition of an administrative sanction or compensation as a result of administrative investigations and actions for damages is not sufficient to remedy the violation and therefore to eliminate the title of victim (see *Serpil Kerimoğlu and Others*, § 55).

72. Moreover, the obligation to conduct an effective investigation is not an obligation as to the outcome, but an obligation to use the appropriate means. Article 17 of the Constitution does not grant the applicants the right to ensure the prosecution or punishment of third parties for a criminal offence, nor does it impose on the State the obligation to conclude all proceedings with a conviction (see *Serpil Kerimoğlu and Others*, § 56).

73. For a criminal investigation in relation to the right to life to be effective, the investigating authorities must first act *ex officio* to identify all evidence that may shed light on the circumstances of the death and identify those responsible. Any shortcoming in the investigation that undermines its ability to establish the cause of death or the identity of those responsible will risk violating the obligation to conduct an effective investigation (see *Serpil Kerimoğlu and Others*, § 57). In this context, the authorities must take all possible measures required by the incident under investigation to obtain evidence of the events in question, such as taking statements from witnesses, conducting expert examinations and, where necessary, carrying out an autopsy, in order to enable a full and detailed report to be drawn up and an objective analysis of the cause of the incident to be made, the decision taken as a result of the investigation must be based on a comprehensive, objective and impartial analysis of all the evidence obtained during the investigation process, and the decision in question must also include an assessment of whether the interference, if it is an interference with the right to life, is a proportionate interference arising from a compelling circumstance required by the Constitution (see *Cemil Danışman*, § 99, *Turan Uytun and Kevzer Uytun*, no. 2013/9461, 15 December 2015, § 73).

74. In a state of law, it may be considered reasonable to require the authorisation of a specific authority to conduct a judicial investigation against public officials, since they perform their duties on behalf of the State and are subject to frequent complaints and investigations in relation to certain matters arising from the performance of their duties (see *Hidayet Enmek and Eyüpsabri Tinaş*, no. 2013/7907, 21 April 2016, § 106).

75. Indeed, Article 129 § 6 of the Constitution stipulates that the prosecution of civil servants and other public officials for alleged offences, except in the cases provided for by law, shall be subject to the authorisation of the administrative authority designated by law (see *Hidayet Enmek and Eyüpsabri Tinaş*, § 107).

76. Within the framework of the principle of the integrity of the Constitution, the rules laid down in the Constitution must necessarily be applied together in the light of the general principles of law. In this context, the body of rules imposing the obligation to conduct an effective investigation and the requirement to obtain authorisation for investigations against public officials must be interpreted in harmony with each other (see *Hidayet Enmek and Eyüpsabri Tinaş*, § 108).

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

- The investigating authorities conducting an investigation into deaths resulting from the use of force by public officials must be independent of those involved in the events (see *Cemil Danışman*, § 96);

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

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

- The investigation must be conducted with due diligence and promptness (see *Salih Akkuş*, no. 2012/1017, 18 September 2013, § 30).

ii. Application of Principles to the Present Case

78. The applicants complained that their statements had not been taken, that the investigation had not been conducted impartially and that the police officers had gone unpunished due to the failure to obtain a warrant (authorisation) for an investigation, despite the existence of sufficient reasonable suspicion to justify an investigation (see § 44).

79. In the present case, the İzmir Governor's Office requested the appointment of an inspector from the Ministry of Interior to conduct the investigation. Accordingly, the Ministry of Interior appointed a chief civil inspector and a chief police inspector to conduct a preliminary inquiry. The chief inspectors in charge of the preliminary inquiry took statements from the police officers and other witnesses and collected the evidence they deemed necessary. In this context, they submitted the preliminary inquiry report, which concluded that no authorisation should be granted. On the basis of this report, the District Governor's Office did not authorise an investigation against the police officers.

80. The applicants alleged that the investigation was not conducted in an impartial manner, as it was conducted by the Ministry of Interior and the Directorate of Security. The chief inspectors conducting the preliminary inquiry did not have the same hierarchical structure as the police officers under investigation, nor did the applicants allege that the police officers under investigation participated in or directed the procedures of the chief inspectors conducting the preliminary inquiry in collecting evidence and conducting examinations. In this case, it does not seem possible to say that the chief inspectors in charge of the preliminary inquiry have compromised the impartiality of the investigation simply because of the unit to which they were assigned.

81. Although the applicants claimed that their statements were not taken during the preliminary inquiry, it has been observed that the statement of the applicant Binali Camgöz was taken on 2 February 2018, and it has also been observed that another applicant was called by police officers to take his statement but did not come to testify, and an official report was prepared on this situation.

82. The purpose of the investigation authorisation procedure is to carry out a preliminary inquiry before proceeding with a criminal investigation into the alleged offences, in order to ensure that public officials are not unnecessarily accused of offences allegedly committed in the course of their duties, and to prevent disruption of public services by keeping them free from all manner of concerns. The preliminary inquiry is an administrative investigation carried out by the competent administrative authorities within the framework of the investigation of a criminal offence allegedly committed by civil servants and other public officials in the exercise of their duties, with the aim of determining whether it is necessary to open an investigation for administrative or judicial measures. In this inquiry, the reality of the alleged offence is examined in general terms, including its scope and nature, framework and evidence (see *Dilek Genç and Others*, no. 2014/3944, 1 February 2018, § 77).

83. Care must be taken to ensure that both the administrative preliminary inquiry and the examinations and assessments to be carried out by the administrative judicial bodies hearing appeals against the refusal to authorise an investigation are carried out in such a way that the investigation authorisation procedure is not used in such a way as to delay the functioning of the criminal proceedings and to prevent the effective conduct of the investigation or to create the impression that public officials are exempt from criminal investigation (see *Dilek Genç and Others*, § 78).

84. The decision of the Regional Administrative Court found that there was no sufficient and reasonable suspicion to require an investigation of the police officers, and the appeal against the decision not to grant permission for an investigation was rejected. In the aforementioned decision, it was noted that the reasons for the rejection of the appeal were not explained and that a conclusion was reached only in accordance with the opinion of the administration. It is understood that the decision of the Regional Administrative Court does not meet the requirement of being based on a comprehensive, objective and impartial analysis of all the findings of the investigation, does not include an assessment of the commensurateness of the interference with the right to life, and prevents an investigation and, if necessary, a prosecution in which these assessments can be taken into account.

85. In the light of the foregoing, it must be held that there was a violation of the procedural aspect of the right to life.

4. Application of Article 50 of Code no. 6216

86. Article 50 §§ 1 and 2 of the Code no. 6216 on the Establishment and the Rules of Procedure of the Constitutional Court of 30 March 2011 ("Code no. 6216"), read, insofar as relevant, as follows:

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

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

87. The applicants requested the Court to find a violation, order a retrial, and award them damages totalling 750,000 Turkish liras ("TRY") for non-pecuniary loss.

88. In its judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court set out the general principles on how to remedy a violation found. In another judgment, the Court also referred to the consequences of failure to comply with a judgment finding a violation, stating that such a situation would constitute a continuing violation and would also lead to a second violation of the right in question (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

89. Accordingly, if a violation of a fundamental right is established in an individual application, the basic rule for redressing the violation and the consequences thereof is to ensure, as far as possible, restitution, that is to say, the restoration of the original situation prior to the violation. To

this end, it is primarily necessary to identify the cause of the violation and then to put an end to the continuing violation, to revoke the decision or act which gave rise to the violation, to redress the consequences thereof, to compensate the pecuniary and non-pecuniary damages resulting from the violation and to take any other measures deemed appropriate in this context (see *Mehmet Doğan*, §§ 55, 57).

90. In the present application, it has been concluded that the substantive and procedural aspects of the right to life were violated. Therefore, it has been understood that the violation was a result of the decision of the Regional Administrative Court.

91. In the present case, there is a legal interest in conducting a retrial in order to remove the consequences of the violation of the right to life. A retrial to be conducted in this context is aimed at removing the violation and its consequences in accordance with Article 50 § 2 of Code no. 6216, which contains a provision specific to the individual application mechanism. In this regard, the procedure to be followed is to hold a retrial and to issue a new decision eliminating the reasons that led the Court to find a violation, in accordance with the principles set forth in the judgment finding a violation. For this reason, a copy of the judgment must be sent to the Regional Administrative Court so that the necessary action can be taken.

92. In addition, in order to remedy the violation and its consequences under the principle of *restitution*, it must be decided that the applicants be jointly awarded a net amount of TRY 225,000 for non-pecuniary damage which cannot be compensated by the mere finding of a violation.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 26 May 2022 that

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

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

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

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

C. A copy of the judgment be REMITTED to the 1st Administrative Chamber of the İzmir Regional Administrative Court (E.2019/580, K.2019/734) for the necessary actions to be taken to redress the consequences of the violation of the right to life;

D. A net amount of TRY 225,000 be JOINTLY REIMBURSED to the applicants for non-pecuniary damage and the other claims for compensation be REJECTED;

E. The total litigation costs of TRY 4,864.60, including the court fee of TRY 364.60 and the counsel fee of TRY 4,500, be JOINTLY REIMBURSED to the applicants;

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

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

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

HOOMAN HOSSEINPOUR

(Application no. 2021/47168)

29 September 2022

On 29 September 2022, the Plenary of the Constitutional Court found a violation of the right to life and the prohibition of ill-treatment, safeguarded by Article 17 of the Constitution, in the individual application lodged by *Hooman Hosseinpour* (no. 2021/47168).

THE FACTS

[6-46] According to an undated interview form for irregular migrants prepared by a police officer for the applicant, the applicant stated that he had entered Türkiye illegally, that there was unemployment in his country (Iran) and that he could go to a country outside his country if he was sent back. According to another undated interview form for irregular migrants, the applicant stated that his life was in danger in his country and that it did not matter to him which country he would go to after Türkiye.

Concluding that the applicant posed a threat to public order, public security or public health, as drugs were found in his home during the activities of the Counter Narcotics Division of the Yalova Provincial Directorate of Security against drug dealers and users on 16 August 2019, the Yalova Provincial Directorate of Migration Management ("the Migration Authority") decided on 19 August 2019 to deport the applicant to a third country to which he could go or to ensure his departure to his country of origin if he volunteered, on the grounds that deportation to his country of origin would be inconvenient, pursuant to Articles 4 and 55 § 1 (a) of the Law no. 6458 on Foreigners and International Protection of 4 April 2013. This decision was notified to the applicant in Farsi and Turkish on 20 August 2019. The applicant stated that he was illiterate but understood Turkish and that the seized substances did not belong to him.

On 4 June 2020, the applicant was handed over to the law enforcement officers of the Migration Authority. On the same day, the Migration Authority crossed out the date and number of the removal (deportation) order in the notification form of the removal order dated 19 August 2019 and wrote the date and number of the removal order as 4 June 2020 and 98, respectively, and notified the applicant of the order. On 10 June 2020, the applicant, through his lawyer, filed an action with the 1st Chamber of the Bursa Administrative Court for the annulment of the removal order of 4 June 2020.

The 1st Chamber of the Bursa Administrative Court dismissed the action on the grounds that the information and documents relating to the determination of the safe third country to which the applicant, who was the subject of a removal order, could be sent were not included in the file and that if the applicant was sent to any country, he would run the risk of being sent to countries where he would be subjected to the death penalty, torture, inhuman or degrading punishment or treatment or where his life or liberty would be threatened.

The applicant was involved in an incident on 7 April 2021 involving threats and injuries. Following notification of the incident by the police on 7 April 2021, the Migration Authority issued a new decision to change the applicant's entries on the grounds that he posed a threat to public order, public security or public health. On the other hand, in the form regarding the notification of the administrative detention decision taken against the applicant, the date of the removal order was stated as 19 August 2019 and the number of the order was not included. The applicant, through his lawyer, filed a new action with the 1st Chamber of the Bursa Administrative Court, requesting the annulment of the removal order dated 19 August 2019.

The 1st Chamber of the Bursa Administrative Court dismissed the case on 29 September 2021 on the grounds that the applicant had not explained what personal risk he faced in his country, that he had continued to live in Türkiye without applying to the official authorities despite the fact that he was at risk of being deported at any time, that there were doubts as to the credibility of his allegations that he would be subjected to ill-treatment in his country, that he had raised the risk of ill-treatment in his country for the first time in his appeal against the removal order and that he had therefore not established serious grounds for believing that he would be subjected to torture or inhuman or degrading treatment or punishment in the country of removal.

V. EXAMINATION AND GROUNDS

47. The Constitutional Court ("the Court"), at its session of 29 September 2022, examined the application and decided as follows:

A. Request for Legal Aid

48. The applicant stated that he could not afford to pay the litigation costs and therefore applied for legal aid.

49. The conditions required for the Court's acceptance of a request for legal aid are set out in the case of *Mehmet Şerif Ay* (no. 2012/1181, 17 September 2013, § 23) and the principles adopted by the Court for foreigners' (aliens') requests for legal aid are set out in the case of *Nadali Agheli Kohne Shari* (no. 2014/12633, 9 September 2015, §§ 17, 18). According to these principles, if the necessary conditions for legal aid are met, the foreigner's request for legal aid should be accepted even if the condition of reciprocity is not met.

50. In the present case, since it is apparent from the case file before the Court that the applicant, who is a foreign national, has no income or assets and is therefore not in a position to pay the litigation costs without making it significantly more difficult for him to earn a living, it must be decided to accept the request for legal aid, which is not manifestly ill-founded, and to grant him temporary exemption from the payment of the litigation costs.

B. Alleged Violations of the Right to Life and the Prohibition of Ill-Treatment

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

51. Referring to the reasoning of the decision of the 1st Chamber of the Bursa Administrative Court of 30 December 2020, the applicant argued that although he could not be removed (deported) because of the death sentence imposed on him in his country, the Migration Authority decided to remove him after the incident of 9 April 2021 (the date of the incident was actually 7 April 2021) and the complaint he lodged against this decision was rejected on 29 September 2021. The applicant made the following submissions:

i. He claimed that his right to a fair trial had been violated in that, from the moment of his arrest, he had been handed over to the Migration Authority for a decision on his removal without being able to have legal assistance from a defence counsel of his own choice, without even having

his statement taken and without knowing the charges against him, and that a removal order had been issued against him on the ground that he had acted contrary to public order and that a judgment had been passed against him without a trial (it is to be understood that by these statements the applicant meant that the Migration Authority had issued a removal order without knowing his statement and the charges against him, and that the removal order was regarded by the applicant as a judgment.), and that the 1st Chamber of the Bursa Administrative Court had not taken into account the fact that he had been sentenced to death in the country to which he was to be returned and had dismissed the case without holding a hearing, despite his request.

ii. He claimed that his rights to personal liberty and security, to life, to work, to respect for family life and to health, as well as the principle of equality had been violated on the grounds that he would be removed to Iran, where he would be executed and subjected to ill-treatment, and by the rejection of his application for annulment of the removal order, despite the fact that he was not one of the persons who could not be removed or returned because of the death sentence against him and despite the general human rights situation in Iran.

52. In its observations, the Ministry stated that there was a file on the applicant registered with the Office for Extradition and Transfer of Sentenced Persons under the Directorate General for Foreign Relations and the European Union of the Ministry of Justice. According to the documents attached to the Ministry's observations, the applicant is not wanted at international level.

2. The Court's Assessment

a. Legal Qualification of the Allegations

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

54. The applicant alleged that he had been denied the legal assistance of a defence counsel, but linked this to the removal order against him and consequently complained about the removal order. It has therefore been

concluded that the applicant raised the above-mentioned allegation of violation in order to express that the removal order did not have a valid legal basis.

55. Although the applicant claimed that his rights to personal liberty and security, to respect for family life, to work and to health, as well as the principle of equality had been violated, he did not explain how these violations had occurred. Moreover, all the allegations made in the application for annulment of the removal order, including those concerning the violation of the right to a fair trial, were based on the fact that the order to remove to a country where there was a risk of execution and ill-treatment had been issued and that the allegations concerning the possible consequences of the removal had not been subjected to a rigorous examination in the judicial proceedings for annulment of the order. It was therefore concluded that it was necessary to assess and examine the present application in the context of the right to life and the prohibition of ill-treatment.

56. Article 17 §§ 1 and 3, titled *"Personal inviolability, corporeal and spiritual existence of the individual"*, and Article 38, titled *"Principles relating to offences and penalties"*, of the Constitution, on which the assessment of the allegation is based, read, insofar as relevant, as follows:

"Article 17 - Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence.

…

No one shall be subjected to torture or ill-treatment; no one shall be subjected to penalties or treatment incompatible with human dignity.

…

Article 38 - …

Neither the death penalty … shall be imposed as punishment.

…"

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

"Article 5 – The fundamental aims and duties of the State are … to strive for the removal of political, economic and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and the social state governed by the rule of law, and to create the conditions necessary for the development of the material and spiritual existence of the individual."

b. Scope of Examination

58. It appears from the documents in the application file that the applicant was the subject of removal orders of 9 November 2017 and 19 August 2019, that certain entries in the removal order of 19 August 2019 were corrected by an administrative decision of 4 June 2020, that the applicant's complaint against the administrative decision of 4 June 2020 was rejected and that certain entries in the removal order of 9 November 2017 were corrected by an administrative decision of 9 April 2021. Although the applicant claimed that the Migration Authority had issued a removal order on 9 April 2021 and that his complaint against this order had been rejected on 29 September 2021, he had in fact filed the aforementioned complaint for annulment of the removal order of 19 August 2019. Therefore, the Court will examine the allegations of violation only in the framework of the removal order of 19 August 2019 and the complaint filed for the annulment of this order, taking into account that, due to the subsidiary nature of the individual application mechanism, it is mandatory to exhaust the ordinary legal remedies prior to the individual application, that no document has been submitted to the Court demonstrating that the legal remedies available in the legal system have been exhausted with regard to the removal order of 9 November 2017 and the decision of 9 April 2021 correcting some of the entries in that decision and, above all, that the impugned judicial proceedings relate to the annulment of the removal order of 19 August 2019. However, the applicant's claim that the lack of a hearing, despite his substantive request for one, resulted in his being unable to participate effectively in the proceedings and thus to challenge the removal order effectively has not been assessed, as no request for a hearing was made in the petition and no documentary evidence of a subsequent request for a hearing was submitted.

c. Admissibility

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

d. Merits

i. General Principles

(1) As regards the Death Penalty

60. In the first version of the last paragraph of Article 17 of the Constitution, *"the execution of death penalties handed down by the courts"* was included among the situations in which the right to life was lawfully violated; however, Article 3 of Law no. 5170 of 7 May 2004 removed this situation from the text of the article, and Article 5 of the same Law amended Article 38 § 10 of the Constitution, which stated that *"general confiscation shall not be imposed"*, to read *"neither the death penalty nor general confiscation shall be imposed as punishment"*. Furthermore, with the amendment made by Article 2 of Law no. 5170, the execution of the death penalty is no longer included in the exceptions listed in Article 15 of the Constitution, which allows for the partial or total suspension of the exercise of fundamental rights and freedoms to the extent required by the situation, or the adoption of measures contrary to the guarantees established by the Constitution in times of war, mobilisation or state of emergency, provided that obligations under international law are not violated. The relevant part of the general reasoning expressed in the text of the proposal for Law no. 5170 is as follows:

"…

On the one hand, the abolition of the death penalty in accordance with Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which emphasises that the right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings; on the other hand, the need to make changes to our laws in order to adapt to the new democratic initiatives developed in the world and to raise fundamental rights

and freedoms to the level of universally accepted standards and norms and the criteria of the European Union, in accordance with this initiative, has led to the need to make amendments to our fundamental law, the Constitution.

…"

61. On the basis of the aforementioned constitutional amendment, which aims to protect human dignity and the right to life, it must be accepted that the death penalty is a punishment incompatible with human dignity within the meaning of Article 17 § 3 of the Constitution, taking into account the state of mind of the prisoner in the period between the death sentence being passed and its execution, and the agony felt by the prisoner during the execution of the death penalty.

(2) **As regards Removal to a Country Where There Is a Risk of Execution and Ill-Treatment**

62. The judgment of *A.A. and A.A.* ([Plenary], no. 2015/3941, 1 March 2017, §§ 54-72) sets out the general principles for removal to a country where there is a risk of ill-treatment. In brief, these principles are as follows:

i. Article 17 of the Constitution, read in conjunction with Articles 5 and 16 of the Constitution, which provides that the fundamental rights and freedoms of aliens may be restricted by law in accordance with international law, also imposes a positive obligation on the State to protect aliens within its sovereign jurisdiction who may be subjected to ill-treatment in the country to which they will be removed, against risks to their corporeal and spiritual existence. In fact, Article 17 of the Constitution does not contain any exception to the (negative) obligation of the State not to ill-treat, and Article 15 of the Constitution, which allows for the suspension of the exercise of fundamental rights and freedoms in times of war, mobilisation or state of emergency, states that the integrity of corporeal and spiritual existence cannot be touched.

ii. In order to provide real protection to the deportee against the risks he/she may face in the country of origin under the aforementioned positive obligation, the deportee must be given an effective opportunity to challenge the removal order. Otherwise, it will not be possible to

claim that real protection can be offered to an alien who claims to be in danger of being ill-treated if removed, and who has more limited means of substantiating this claim than the State. It is therefore beyond doubt that the positive obligation to protect against ill-treatment -by the very nature of the rights protected by the prohibition- includes the procedural safeguards which enable an alien to be removed with the opportunity to have the allegations against him investigated and the removal order against him fairly examined. In this context, if the allegation that the prohibition of ill-treatment would be violated in the country to which the alien would be removed through the removal procedure is well-founded (verifiable/questionable/worthy of investigation/gives rise to reasonable suspicion) and of a certain degree of seriousness, and if information and documents are provided to support the allegation, the administrative and judicial authorities must investigate in detail whether there is a real risk of ill-treatment in the country concerned. In accordance with the above-mentioned procedural safeguards, removal orders issued by administrative authorities must be reviewed by an independent judicial body; they must not be enforced during this review period and the effective participation of the parties in the proceedings must be ensured.

iii. In order to establish that the prohibition of ill-treatment may be violated if the removal order is carried out, it must be shown that the risk in the country of return goes beyond a mere possibility to *a real risk*. Depending on the nature of the allegation, the burden of proof may lie with the authorities and/or the applicant.

iv. As a general rule, the circumstances at the time of the removal order should be taken into account when considering whether there are material facts relating to the existence of a real risk. However, in the case of significant developments that have a direct bearing on the outcome of the assessment to be made, the new situation should also be taken into account.

v. The primary role of the Court in individual applications for removal orders is to examine whether the procedural safeguards of the aforementioned prohibition are provided by the administrative and judicial authorities where there is a well-founded allegation of a risk of ill-treatment in the country of return. If the Court considers that procedural

safeguards have not been respected, it will necessarily, in accordance with the principle of subsidiarity, issue a judgment finding a violation for the purposes of a retrial. In cases where procedural safeguards are provided, the question of whether there is a real risk of ill-treatment in the country of return is assessed separately. Exceptionally, however, the Court may examine first-hand whether there is a real risk of ill-treatment in the country of return if it considers this necessary in the specific circumstances of the case. In such a case, the Court may assess whether the substantive aspect of the prohibition of ill-treatment would be violated in the event of deportation.

63. The State's positive obligation under the prohibition of ill-treatment requires the authorities, when issuing a removal order, to take into account the possibility that the alien may be indirectly returned to the country where he/she claims to be at risk of ill-treatment (see *A.D.*, no. 2014/19506, 3 April 2019, § 55).

64. The above principles also apply to the removal of an alien to a country where there is a risk of execution. Indeed, one of the positive obligations imposed on the State by Article 17 of the Constitution is to take measures, within reasonable limits and in such a way as to prevent this danger from materialising, in cases where the public authorities know or should know that there is a real and imminent danger to the life of a person (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, § 50). In this respect, it can be well argued that the constitutional norm prohibits the direct or indirect removal of an alien to the country where the risk exists, if there are substantial grounds for believing that the alien would be exposed to a real risk of being subjected to the death penalty or to the existing death penalty, which is a punishment incompatible with human dignity and is not listed in the last paragraph of Article 17 of the Constitution among the situations in which interference with the right to life is lawful. Therefore, deporting the alien directly or indirectly to the country where the risk exists, despite the risk in question, violates both the right to life and the prohibition of ill-treatment. For this reason, both the administrative authorities responsible for issuing the removal order and the judicial authorities reviewing the annulment of the removal order should carefully consider whether the alien should be removed to

a country where there is a real risk, even an indirect one, that the alien will be sentenced to the death penalty or that the death penalty will be executed.

ii. **Application of Principles to the Present Case**

65. In the Preliminary Assessment Form issued by a Migration Authority official, the applicant stated that he had been sentenced to death in his country of origin. Furthermore, in the action for annulment of the removal order, the applicant claimed, inter alia, that he could not be deported to his country because he had been sentenced to death in Iran and submitted a court decision and its Turkish translation to the 1st Chamber of the Bursa Administrative Court. For this purpose, the applicant's claim that his right to life and the prohibition of ill-treatment would be violated because of the risks he would face if deported to his country is admissible and it should be examined whether, in the present case, there are effective procedural safeguards to protect the applicant against direct or indirect removal to his country.

66. The Migration Authority concluded that the applicant posed a threat to public order, public security or public health because he had been charged with the offence of buying, receiving or possessing drugs or stimulants for the purpose of using or consuming drugs or stimulants, but considered that his removal to his country of origin would be inconvenient, in accordance with Articles 4 and 55 § 1 (a) of Law no. 6458, and decided to remove the applicant to a third country to which he could go or to ensure his exit to his country of origin if he did so voluntarily. However, the decision did not specify the country to which he was to be removed.

67. It may be considered that the decision to remove the applicant to a third country to which he could go did not make it possible to remove him to his country of origin without his consent, but that decision does not prevent the applicant from being removed indirectly to Iran. In fact, Law no. 6458 and the Regulation do not contain any provisions on how to determine the country to which an alien who is to be removed to a third country is to be removed, whether this country is to be communicated to the applicant, whether the applicant can lodge an appeal on the grounds that the country determined is not a safe country for him/her and/or that

the third country in question will remove or extradite him/her to his/her country, and, if he/she can lodge an appeal, whether this appeal will stop the removal procedure. However, the aforementioned problem does not arise from the existence of a legal gap. It is not possible to interpret Article 52 of Law no. 6458, which states that *"foreigners may be deported to their country of origin or transit or to a third country on the basis of a removal order"*, as meaning that a removal order may be issued without specifying the country to which the alien is to be deported. In fact, Article 4 of Law no. 6458 on non-refoulement and Article 55 on exemption from removal order do not mention the country of origin, but they do state that no one may be sent to a place where he/she would be subjected to torture, inhuman or degrading punishment or treatment, or where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion, and that a removal order may not be issued against an alien if there are serious indications for believing that he/she would be subjected to the death penalty, torture, inhuman or degrading punishment or treatment in the country to which he/she is to be returned. It is evident that if the removal order does not specify where the alien will be removed to, the judicial authorities cannot assess whether the alien will be subjected to the death penalty, torture, inhuman or degrading punishment or treatment in the country of removal, or whether the alien will be indirectly returned to the country of origin.

68. In short, the 1st Chamber of the Bursa Administrative Court dismissed the case on the grounds that the applicant had failed to explain what kind of personal risk he would face in his home country, that there were doubts as to the credibility of his allegations that he might be subjected to ill-treatment in his home country, and that the applicant had not shown any serious indication that he would be subjected to torture, inhuman or degrading punishment or treatment in the country of removal. However, the applicant submitted to the 1st Chamber of the Bursa Administrative Court a court judgment and its Turkish translation, which he claimed related to a death sentence imposed on him. In view of the content of these documents, the 1st Chamber of the Bursa Administrative Court should examine whether the decision, a photocopy of which was submitted to it

and which was allegedly related to the death penalty, actually exists and, if so, whether it has been finalised. Once again, Article 17 of the Constitution prohibits the direct or indirect removal of an alien to a country where there is a real risk that he/she will be subjected to the death penalty, which is a punishment incompatible with human dignity and which is not included in the last paragraph of Article 17 of the Constitution among the situations in which it is lawful to interfere with the right to life, if there are substantial grounds for believing that the alien will be subjected to the death penalty or that there is a real risk that an existing death penalty will be applied.

69. It should be noted that the decision of the 1st Chamber of the Bursa Administrative Court did not include any assessment of the fact that the removal order did not contain any information as to where the applicant would be deported. However, in the decision annulling the decision of 4 June 2000 on the correction of certain entries, a copy of which was submitted by the applicant to the 1st Chamber of the Bursa Administrative Court, and which was itself issued by the 1st Chamber of the Bursa Administrative Court and which contains assessments similar to the above-mentioned finding of the Court (see § 69), it was stated that no information or documents had been submitted to the file in order to determine the safe third country to which the applicant could be deported, that the applicant could be deported to any country on the basis of the decision in the case, and that in this case the applicant would run the risk of being sent to countries where he would be subjected to the death penalty, torture, inhuman or degrading punishment or treatment, where his life or corporeal and/or spiritual existence would be threatened. Therefore, the 1st Chamber of the Bursa Administrative Court should have assessed the applicant's claims in the light of the aforementioned annulment decision.

70. In the circumstances of the present case, it cannot be said that the applicant was provided with effective procedural safeguards to protect him against indirect removal to his home country and that the 1st Chamber of the Bursa Administrative Court rigorously examined the applicant's allegations of violation.

71. In the light of the foregoing, it must be held that the right to life and the prohibition of ill-treatment were violated.

e. Application of Article 50 of Code no. 6216

72. The applicant requested the Court to find a violation and to award him compensation.

73. There is a legal interest in conducting a retrial in order to redress the consequences of the violations identified in the application. In this respect, the procedure to be followed by the judicial authorities to whom the judgment is remitted is to initiate the retrial procedures and to issue a new decision eliminating the reasons that led the Court to find a violation, in accordance with the principles set forth in the judgment finding a violation (see *Mehmet Doğan* [Plenary], no. 2014/8875, 7 June 2018, §§ 54-60; *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019, §§ 53-60, 66; *Kadri Enis Berberoğlu (3)* [Plenary], no. 2020/32949, 21 January 2021, §§ 93-100 for the details of the retrial procedure in relation to the individual application set out in of Code no. 6216).

74. Furthermore, since it is evident that the retrial will provide an adequate redress in view of the nature of the violation, the applicant's claim for compensation must be dismissed.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 29 September 2022 that

A. The request for legal aid be GRANTED;

B. The alleged violations of the right to life and the prohibition of ill-treatment be DECLARED ADMISSIBLE;

C. The right to life and the prohibition of ill-treatment, safeguarded by Article 17 of the Constitution, were VIOLATED;

D. A copy of the judgment be REMITTED to the 1st Chamber of the Bursa Administrative Court (E.2021/464, K.2021/783) for retrial to redress the consequences of the violations of the right to life and the prohibition of ill-treatment;

E. The applicant's claims for compensation be REJECTED;

F. The counsel fee of 9,900 Turkish liras ("TRY") be REIMBURSED to the applicant;

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

H. The applicant not to be DEPORTED until the conclusion of the removal order proceedings on 19 August 2019; and

I. A copy of the judgment be SENT to the Directorate General of Migration Management of the Ministry of Interior and to the Ministry of Justice for information.

RIGHT TO PERSONAL LIBERTY AND SECURITY (ARTICLE 19)

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

SAMIRA ALAKBAROVA

(Application no. 2018/19302)

22 February 2022

On 22 February 2022, the First Section of the Constitutional Court found a violation of the right to personal liberty and security, safeguarded by Article 19 of the Constitution, in the individual application lodged by *Samira Alakbarova* (no. 2018/19302).

THE FACTS

[8-44] A red notice for the extradition of the applicant, a citizen of Azerbaijan, was issued by the Azerbaijani authorities on 21 March 2017. The applicant was arrested by the relevant teams of the Turkish National Police on 27 December 2017. The Bakırköy 3rd Magistrate Judge (in Criminal Matters) ("the Magistrate Judge in Criminal Matters") decided to remand the applicant in custody for 40 days pending extradition to Azerbaijan, and the appeal against this decision was rejected. In accordance with the Law no. 6706 on International Judicial Cooperation in Criminal Matters and the European Convention on the Extradition, the 2nd Chamber of the Bakırköy Assize Court rejected the applicant's challenge to her continued detention on the grounds that the maximum detention period of 40 days had expired.

At the hearing held on 1 February 2018, it was decided that the applicant was extraditable and that her detention would continue until the end of the extradition procedures. The applicant's appeal against the interlocutory decision on her continued detention after conviction was dismissed on the grounds that the decision was in accordance with procedure and law. The applicant then lodged her first individual application. After the Court of Cassation, which had examined the appeal against the decision on the admissibility of the extradition request, had upheld that decision, the applicant lodged her second individual application. The applicant's appeal against her continued detention was also rejected. As the Ministries of Interior and Foreign Affairs, whose opinions were consulted in accordance with the relevant legislation, did not express a negative opinion, the applicant's extradition to Azerbaijan was approved by presidential decision of 20 December 2018. The applicant was handed over to the Azerbaijani authorities on 16 February 2019.

V. EXAMINATION AND GROUNDS

45. The Constitutional Court ("the Court"), at its session of 22 February 2022, examined the application and decided as follows:

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

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

46. The applicant claimed that her right to personal liberty and security had been violated, stating that she had been detained in the absence of any evidence of the offence she had committed in Azerbaijan, in violation of Articles 16 and 24 of Law no. 6706 and the extradition treaty signed between Azerbaijan and Türkiye, and that her detention, which was supposed to be temporary, had exceeded the 40-day period provided for by the European Convention on Extradition and the reasonable period provided for by law.

47. In its observations, the Ministry stated that the intensity and nature of the extradition correspondence between the Azerbaijani authorities during the relevant period should be taken into account with regard to the complaint that the duration of the applicant's detention was unreasonable.

48. In her counter-statements against the Ministry's observations, the applicant claimed that the document drawn up by the complainant and submitted by the Azerbaijani authorities as evidence of the alleged offence did not bear her signature and that no evidence had been provided to prove that she had committed the offence attributed to her. The applicant also stated that, following her extradition, she was tried for offences other than the extradition request, in violation of Law no. 6706, and that she was subjected to an unfair trial because the complainant was an influential person in Azerbaijan.

2. The Court's Assessment

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

"Fundamental rights and freedoms may be restricted only by law and on the grounds specified in the relevant articles of the Constitution without infringing

upon their essence. Such restrictions shall not be contrary to the letter and spirit of the Constitution, to the requirements of a democratic social order and a secular republic, and to the principle of proportionality."

50. Article 19 §§ 1 and 2 of the Constitution, titled *"Personal liberty and security"*, provide, insofar as relevant, as follows:

"Everyone has the right to personal liberty and security.

No one shall be deprived of his/her liberty except in the following cases, in accordance with the procedure and conditions prescribed by law:

… the arrest or detention of a person who enters or attempts to enter the country illegally or for whom a deportation or extradition order has been issued.

…"

a. Admissibility

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

b. Merits

i. General Principles

52. See the judgment *S.K.*, §§ 55-56 for general principles.

ii. Application of Principles to the Present Case

53. In the present case, it is primarily necessary to determine whether there was a legal basis for the applicant's detention.

54. It can be seen that the measures to be taken for the purpose of extradition are regulated in two stages, before and after the extradition request is sent. The long duration of diplomatic procedures in extradition cases requires certain measures to be taken during this period. This is because the person subject to the extradition request may flee. Provisional arrest is regulated in bilateral agreements, in the European Convention on Extradition and in Article 14 of Law no. 6706, during the period until

the extradition documents are delivered to the competent authority of the extradition requesting country. The conditions for provisional arrest are laid down in Article 14 of Law no. 6706. For this purpose, it is necessary that the Ministry has not received the extradition document, that there is a strong suspicion that an offence that may be the subject of an extradition request has been committed, that there is a request from the State concerned in accordance with the provisions of the relevant international treaty or the principle of reciprocity, that the Ministry, as the central authority, approves the request from the State concerned, that the public prosecutor makes a request and that the magistrate judge (in criminal matters) makes a decision.

55. In the present case, the applicant was brought before a magistrate judge (in criminal matters) under this provision. The Bakırköy 3rd Magistrate Judge (in Criminal Matters) noted that the Azerbaijani judicial authorities had requested her extradition for the offence of fraud and ordered the applicant's detention for 40 days in accordance with Article 16 of the European Convention on Extradition. It is noted that the arrest warrant issued by the Azerbaijani court, to which both the extradition request and the red notice decision refer, sufficiently demonstrates the strong suspicion of a criminal offence. It is therefore concluded that the provisional arrest satisfies the requirement of strong suspicion of a criminal offence as laid down in Law no. 6706.

56. The applicant also argued that the duration of her detention exceeded the 40-day period provided for in the European Convention on Extradition and Law no. 6706.

57. Article 14 of Law no. 6706 stipulates that the duration of provisional arrest shall be determined in accordance with the provisions of the relevant international treaty, and if the arrest request is made within the framework of the principle of reciprocity, the maximum duration shall be 40 days. In the present case, there is an extradition request in accordance with the provisions of the international treaty. Since Türkiye and Azerbaijan are parties to the European Convention on Extradition, which provides for the repeal of extradition provisions in bilateral treaties, the European Convention on Extradition must be taken into account in the present case.

58. According to Article 16 § 4 of the European Convention on Extradition, the period of provisional arrest is normally 18 days and may in no case exceed 40 days. Therefore, the maximum period of provisional arrest in the present case is 40 days. However, this period applies until the extradition request is received. In fact, Article 14 § 6 of Law no. 6706 and Article 16 § 5 of the European Convention on Extradition provide that if the State concerned does not send the extradition documents within the prescribed time limit, the provisional arrest measure shall be lifted, but this does not prevent the implementation of protective measures for the purpose of extradition once the extradition request has been received. In the present case, the 40-day period had not yet expired on 5 February 2018, when the extradition document was sent. The applicant's detention following receipt of the extradition request is not in the nature of provisional arrest. In this respect, it has been concluded that the applicant's detention at this stage is in accordance with the law.

59. The rules governing the protective measures that may be taken following receipt of the extradition document are set out in Article 16 of Law no. 6706, titled *"Application of protective measures for the purposes of extradition"*, and in the provisions of the Criminal Procedure Code no. 5271 of 4 December 2004, referred to in Article 16, on protective measures. Accordingly, the assize court may decide on protective measures for the person whose extradition is requested at any stage of the extradition procedure, in accordance with the provisions of Law no. 5271. It follows from this provision that protective measures may be taken from the time of receipt of the extradition document until the person is handed over to the foreign authorities. In accordance with the relevant statutory provisions, it is evident that the provisions of Law no. 5271 will be applied with regard to the protective measures to be applied at this stage following receipt of the extradition document. In order to determine whether the applicant's detention is lawful, it is necessary to assess whether the substantive and procedural provisions of the regulation (Article 100 of Law no. 5271) on which the detention is based have been complied with.

60. In the present case, the applicant was not arrested in the course of a criminal investigation or criminal proceedings on suspicion of having committed a criminal offence. The applicant's detention is a measure

taken in the course of proceedings to decide whether or not to order her extradition at the request of another State in respect of an offence which she is alleged to have committed in another State. The aim is to ensure that the extradition procedure is conducted properly. There are therefore significant differences in purpose and nature between arrest on the basis of a criminal charge and arrest as a measure applied in the context of an extradition procedure. This is because the examination of the extradition request by the court does not have the characteristics of a judgment, which focuses on the evaluation of evidence and the establishment of the offence.

61. On the other hand, the difficulties in determining and assessing the existence of a strong suspicion of a criminal offence, especially in relation to an offence committed abroad, are obvious, and it should therefore be accepted that the discretion of the inferior courts in this respect is considerably wider than the discretion in relation to a criminal charge. In this respect, the Court may review this area of discretion when examining individual applications only if there are exceptional circumstances requiring an assessment of the conditions of detention different from that made by the judicial authorities. At this stage, the requirement of strong suspicion of a criminal offence and the grounds for detention can be assessed in the context of the extradition document submitted.

62. In the present case, there are no circumstances which would require a departure from the finding in the decision on provisional arrest that there was a strong suspicion of a criminal offence. The decision on the applicant's continued detention was based on the nature and type of the offence, the evidence and the severity of the sanction foreseen for the offence. In this respect, it must be accepted that the applicant was detained in accordance with the conditions of detention laid down by law. In this respect, it can be said that the applicant's detention had a legal basis and that she was detained in accordance with the procedure laid down by law.

63. On the other hand, it is necessary to determine whether there is a legitimate aim for the applicant's detention. Article 19 of the Constitution provides that the detention of a person against whom an extradition order has been issued constitutes a legitimate reason for restricting the right to personal liberty and security. The applicant was detained in order to

ensure the proper conduct of the extradition proceedings. It is therefore concluded that the applicant's detention pursued a legitimate aim.

64. It is also necessary to determine whether the measure of detention taken against the applicant was proportionate and, in this context, whether the extradition proceedings were conducted diligently. It will also be examined whether the period of detention, irrespective of the duration of the proceedings, exceeds the reasonable time necessary to achieve the objective pursued. In this respect, the assessment of the reasonableness of the duration of the extradition proceedings on which the detention is based will take into account whether the authorities failed to act with due diligence and whether the applicant's attitude and conduct caused the proceedings to be prolonged. In determining the degree of diligence to be exercised, the importance of the form of extradition should not be overlooked. Unlike extradition for the purpose of executing a sentence, extradition for the purpose of bringing the suspect to trial in the requesting State, as in the present case, presupposes the innocence of the person arrested during the criminal proceedings. More precisely, at this stage, the possibility of exercising the right of defence during the criminal proceedings in order to prove the person's innocence is very limited. It is not possible for the extraditing State to examine the merits of the case. For these reasons, the requesting State must exercise due diligence to protect the rights of the person concerned, to ensure that the extradition proceedings are conducted properly and to ensure that the person is tried within a reasonable time.

65. In the present case, the period of detention pending extradition is one year, one month and 20 days (from 27 December 2017 to 16 February 2019). The extradition proceedings lasted two months at first instance and three months at the Court of Cassation. It should be noted that during the first instance proceedings a hearing was held for the applicant to present her defence. After a single hearing, it was decided that the applicant would be extradited. The Court of Cassation ruled on the appeal against this decision within three months, as required by law. In this respect, it has not been established that there was any delay or negligence in the extradition procedure.

66. However, it cannot be said that the seven-month period between 3 July 2018, when the information on the finalisation of the decision was submitted to the Ministry, and 16 February 2019, when the applicant was extradited, was carried out diligently. Once the assize court has established that there are no obstacles to extradition and has decided that the extradition request is admissible, the execution of this decision is subject to the approval of the President of the Republic. In addition, Article 19 of Law no. 6706 requires the opinion of the Ministries of Foreign Affairs and of the Interior, as well as a proposal from the Minister of Justice. Although it is expected that the process will be carried out with the diligence required by the right to liberty, there is no doubt that these bureaucratic procedures will take some time. However, it is not clear from the case file why it took five months to decide whether the applicant should be extradited to the requesting State after the 3rd Chamber of the Bakırköy Assize Court had found that there was no legal obstacle to extradition and decided that the extradition request was admissible. No explanation was provided by the Ministry.

67. On the other hand, Article 16 § 2 of Law no. 6706 provides that the status of detention must be reviewed by the assize court within a maximum of thirty days. In the present case, this provision was not complied with and the applicant's detention was not treated with due diligence. While it can be accepted that there were some formalities in the period between the approval of the extradition and the handover (transfer) in order to determine the appropriate place, date, delivery and receiving officials for the handover, it has been concluded that the period of two months from the approval stage to the handover was not reasonable, given that the applicant continued to be detained during this period. Although the applicant requested a postponement of the transfer during this period, it has been noted that this request had no effect on the prolongation of the transfer.

68. Finally, Article 16 of Law no. 6706 refers to Law no. 5271 with regard to the protective measures that may be applied in the extradition procedure. It is therefore possible to grant conditional bail instead of issuing an arrest warrant. The legislative intent of this article is as follows: *"One of the problems that may arise in practice is that, despite the court's decision*

that the extradition request is admissible, the court releases the person whose extradition is requested on conditional bail, the person escapes from Türkiye during the ongoing extradition proceedings and, therefore, the extradition request remains unfounded. However, by taking into account the strong social and economic ties of the person, such as the fact that the person has been living in Türkiye for a long time and has a certain job, it will be at the discretion of the court to apply other measures than arrest". Although it may be necessary to order an arrest measure at the first stage in order to prevent the person whose extradition is requested from absconding during the extradition procedure in progress, it is essential to consider conditional bail measures at a later stage, taking into account the personal situation of the applicant in accordance with the principle of proportionality. In the present case, although the applicant repeatedly stated in her applications for release and challenges to her detention that she had been in Türkiye since 2001, that she worked in Türkiye as a registered employee of the Social Security Institution, that she had no previous criminal record and that she lived lawfully at a fixed address with her 11-year-old daughter who was studying in Türkiye, it has been found that the conditional bail measures were not sufficiently taken into account by the courts of first instance and that the reasons for the inadequacy of these measures were not justified.

69. Therefore, given the nature of the extradition proceedings initiated for the purpose of prosecuting the applicant in a third State and the fact that the delays were not justified by the Turkish authorities, the applicant's detention for approximately one year and two months was not lawful.

70. In the light of the foregoing, it must be held that there was a violation of Article 19 § 2 of the Constitution.

B. Alleged Violation of the Right to Fair Trial

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

71. The applicant claimed that her right to a fair trial had been violated because, although Law no. 6706 and the Agreement signed between Azerbaijan and Türkiye stipulated that the evidence relating to the charges should be presented and requested and that she had made a request to that effect, her extradition had been ordered without requesting the evidence

relating to the charges and the Public Prosecutor's Office had quashed the decision on this ground.

72. Referring to the case-law of the European Court of Human Rights ("ECHR"), the Ministry argued that the complaints concerning the extradition procedure could be declared inadmissible for lack of jurisdiction *ratione materiae*.

2. The Court's Assessment

73. Pursuant to Article 148 § 3 of the Constitution and Article 45 § 1 of the Code no. 6216 on the Establishment and the Rules of Procedure of the Constitutional Court of 30 March 2011 ("Code no. 6216"), in order for an individual application to be examined, the right allegedly violated by the public authority must be guaranteed by the Constitution and must also fall within the scope of the European Convention on Human Rights ("the Convention") and the additional protocols to the Convention to which Türkiye is a party. The applications concerning an alleged violation of rights outside the joint protection of the Constitution and the Convention do not fall within the scope of the individual application mechanism (see *Onurhan Solmaz*, no. 2012/1049, 26 March 2013, § 18).

74. Article 36 § 1 of the Constitution stipulates that everyone has the right to claim and defend himself or herself, as plaintiff or defendant, before the judicial authorities, using legitimate means and channels, and the right to a fair trial, but does not specify the scope of this right. The legislative intent of Article 14 of Law no. 4709 of 3 October 2001, which added the term *"fair trial"* to Article 36 § 1 of the Constitution, states that *"the right to a fair trial, which is also guaranteed by international conventions to which the Republic of Türkiye is a party, has been included in this provision"*. It is understood that the purpose of adding this term to Article 36 of the Constitution is to safeguard the right to a fair trial as enshrined in the Convention (see *Yaşar Çoban* [Plenary], no. 2014/6673, 25 July 2017, § 53). In this respect, Article 6 of the Convention, titled *"Right to a fair trial"*, and the relevant case-law of the ECHR must be taken into account when determining the scope and context of the right to a fair trial guaranteed by the Constitution (see *Onurhan Solmaz*, § 22).

75. The Convention does not guarantee the right to a fair trial in respect of all rights and obligations that a person may claim. Article 6 of the Convention, which governs the right to a fair trial, provides that the rights and principles relating to the right to a fair trial shall apply to the determination of the merits of *disputes concerning civil rights and obligations* or *criminal charges*. The scope of this right is thus limited to these matters. Accordingly, an applicant is titled to submit an individual application concerning an alleged violation of the right to legal remedies as long as he/she is a party to a dispute concerning his/her civil rights and obligations or is the subject of a decision on the merits of a criminal charge against him/her. Therefore, applications concerning alleged violations of the right to a fair trial, with the exception of the above-mentioned issues, cannot be examined through the individual application mechanism because they fall outside the joint protection of the Constitution and the Convention (see *Onurhan Solmaz*, § 23).

76. The right to a fair trial guaranteed by Article 36 of the Constitution applies not only to proceedings relating to a criminal charge but also to the determination of one's *civil rights and obligations*. In order for Article 36 § 1 of the Constitution to apply in *civil* matters, a *right* must be at stake which is granted to a person by the legal system or which at least has an arguable basis. Such a right does not necessarily have to be related to a right directly or indirectly specified and guaranteed in the Constitution. In this sense, the rights and privileges granted to individuals by law and having an arguable basis also fall within the scope of a right within the meaning of Article 36 of the Constitution, provided that they can be invoked before the courts (see, *mutatis mutandis*, *Mehmet Güçlü and Ramazan Erdem*, no. 2015/7942, 28 May 2019, § 28; *M.B.* [Plenary], no. 2018/37392, 23 July 2020, § 67).

77. In several judgments, the Court has held that the right to a fair trial does not apply to disputes relating to removal proceedings (see *Z.M. and I.M.*, no. 2015/2037, 6 January 2016, § 63). According to the ECHR, judicial proceedings concerning disputes relating to extradition procedures fall outside the scope of the protection of the right to a fair trial. In the above-mentioned judgments of the Court and the ECHR, it has been recognised that the procedures and proceedings relating to the entry, residence,

removal and extradition of aliens are not related to the adjudication of the merits of a *civil right and obligation* or of a *criminal charge* within the scope of the right to a fair trial, and it has been held that the right to a fair trial does not apply in relation to the above procedures.

78. In the light of all these assessments, it is concluded that the dispute, which does not fall within the scope of civil rights and obligations or criminal charges, does not fall within the joint protection of the Constitution and the Convention.

79. For these reasons, this part of the application must be declared inadmissible for *lack of jurisdiction ratione materiae*.

C. Application of Article 50 of Code no. 6216

80. Article 50 §§ 1 and 2 of Code no. 6216 read, insofar as relevant, as follows:

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

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

81. The applicant claimed 150,000 Turkish liras ("TRY") as compensation for non-pecuniary damage.

82. In its judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court set out the general principles on how to remedy a violation found. In another judgment, the Court also referred to the consequences of failure to comply with a judgment finding a violation,

stating that such a situation would constitute a continuing violation and would also lead to a second violation of the right in question (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

83. Accordingly, if a violation of a fundamental right is established in an individual application, the basic rule for redressing the violation and the consequences thereof is to ensure, as far as possible, restitution, that is to say, the restoration of the original situation prior to the violation. To this end, it is primarily necessary to identify the cause of the violation and then to put an end to the continuing violation, to revoke the decision or act which gave rise to the violation, to redress the consequences thereof, to compensate the pecuniary and non-pecuniary damages resulting from the violation and to take any other measures deemed appropriate in this context (see *Mehmet Doğan*, §§ 55, 57).

84. In the present case, it has been concluded that Article 19 § 2 of the Constitution was violated by the unlawfulness of the detention. As the extradition proceedings and the related detention of the applicant ended with the handover of the applicant to the Azerbaijani authorities on 16 February 2019, it has been observed that there is no remedy other than the payment of compensation to eliminate the consequences of the violation.

85. On the other hand, it is evident that a finding of a violation in the present case would not be sufficient to compensate for the damage suffered by the applicant. In order to remedy the violation of the applicant's right to personal liberty and security, it must be held that the applicant must be paid a net amount of TRY 40,000 in respect of non-pecuniary damage, which cannot be remedied by the mere finding of a violation.

86. The total litigation costs of TRY 5,089.40, including the court fee of TRY 589.40 and the counsel fee of TRY 4,500, as determined on the basis of the documents in the file, are to be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 22 February 2022 that

A. 1. The alleged violation of the right to personal liberty and security be DECLARED ADMISSIBLE due to the unlawfulness of the extradition detention;

2. The alleged violation of the right to a fair trial be DECLARED INADMISSIBLE for lack of jurisdiction *ratione materiae*;

B. The right to personal liberty and security, safeguarded by Article 19 of the Constitution, was VIOLATED by reason of the extradition detention;

C. A net amount of TRY 40,000 be REIMBURSED to the applicant as compensation for non-pecuniary damage and the remaining claims for compensation be REJECTED;

D. The total litigation costs of TRY 5,089.40, including the court fee of TRY 589.40 and the counsel fee of TRY 4,500, be REIMBURSED to the applicant;

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

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

SULTAN KAYA

(Application no. 2020/29355)

15 March 2022

On 15 March 2022, the First Section of the Constitutional Court found a violation of the right to personal liberty and security, safeguarded by Article 19 of the Constitution, in the individual application lodged by *Sultan Kaya* (no. 2020/29355).

THE FACTS

[5-20] The applicant and a person named H.B.Y. were arrested and detained by law enforcement officers on the grounds that they had unfurled a banner and chanted slogans in favour of E.T. and A.Ü., who were being investigated/prosecuted in connection with a terrorist organisation, at the exit of a metro station near the presidential residence in İstanbul, and that they had continued to protest despite warnings.

The İstanbul Chief Public Prosecutor's Office ("the Chief Public Prosecutor's Office") referred the applicant to the 11th Magistrate Judge ("the Magistrate Judge") for detention on remand for alleged membership of an armed terrorist organisation and violation of the Law no. 2911 on Meetings and Demonstrations. The Magistrate Judge ordered the applicant's detention on remand for the alleged offences.

The applicant appealed against the detention order before the 12th Magistrate Judge, which rejected her appeal with no further right of appeal. The applicant's request for release was also rejected by the 2nd Magistrate Judge. Her appeal against this decision was dismissed with no further right of appeal by the 3rd Magistrate Judge.

A criminal case was brought against the applicant before the 29th Chamber of the İstanbul Assize Court ("the Assize Court") for membership of an armed terrorist organisation, dissemination of propaganda in favour of a terrorist organisation and violation of Law no. 2911. At the end of the trial, the Assize Court ordered her release on conditional bail, the condition being that she could not travel abroad. At the end of the trial, the Assize Court acquitted her of the imputed offences and ordered the discontinuation of the conditional bail. The Chief Public Prosecutor's Office appealed against the decision insofar as it related to the acquittal of the applicant for the offence of violating Law no. 2911, while the applicant appealed against the decision insofar as it related to the lawyer's fee.

V. EXAMINATION AND GROUNDS

21. The Constitutional Court ("the Court"), at its session of 15 March 2022, examined the application and decided as follows:

A. Request for Legal Aid

22. The applicant applied for legal aid on the ground that she could not afford to pay the costs of the individual application. In accordance with the principles set out by the Court in the case of *Mehmet Şerif Ay* (no. 2012/1181, 17 September 2013), the Court should accept the applicant's request for legal aid, on the ground that it is not manifestly ill-founded, since it has been established that the applicant is unable to afford the litigation costs without suffering a significant burden.

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

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

23. The applicant claimed that her rights to personal liberty and security, to respect for private life and family life, and to a fair trial had been violated, arguing that the detention order had been issued in the absence of any suspicion of a criminal offence and of any evidence to justify it, that there was no risk of the evidence being tampered with and no suspicion of absconding, and that the detention order and the decision ordering her continued detention, which had been issued following an appeal against that decision, contained no statement of reasons.

24. In addition, the applicant claimed that her actions, which fell within the scope of freedom of expression and the right to hold meetings and demonstration marches, were relied on as a basis for her detention. For these reasons, the applicant claimed that her freedom of expression and right to hold meetings and demonstration marches had also been violated.

25. In its observations, the Ministry noted that the remedy of compensation provided for in Articles 141 and 142 of the Code of Criminal Procedure no. 5271 of 4 December 2004 ("CCP") was not resorted to as regards the above-mentioned complaint and that in this case an individual application was made without exhausting the ordinary legal remedies in relation to the allegation in question.

26. The Ministry's assessment of the merits of the above allegation found that there was a legal basis for the applicant's detention, that the evidence referred to in the detention order constituted a strong suspicion that the offence had been committed, that the detention measure applied to the applicant had a legitimate purpose and that the detention was proportionate.

27. In her counter-statement against the Ministry's observations, the applicant argued that the action for compensation offered no prospect of success in respect of the alleged unlawfulness of her detention. On the merits, the applicant reiterated her statements in the individual application form.

2. The Court's Assessment

28. The Court is not bound by the legal qualification of the facts by the applicant and it makes such an assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The Court has considered that the essence of the applicant's allegations relates to the unlawfulness of her detention. It has accordingly considered it appropriate to examine the applicant's complaints under Article 19 § 3 of the Constitution.

a. Admissibility

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

Mr. Selahaddin MENTEŞ dissented from this conclusion.

b. Merits

i. General Principles

30. The general principles set by the Court on this matter are outlined in its judgments in the cases of *Gülser Yıldırım (2)* [Plenary], no. 2016/40170, 16 November 2017, §§ 110-124; *Zafer Özer*, no. 2016/65239, 9 January 2020, §§ 38-45.

ii. Application of Principles to the Present Case

31. In the present case, it is primarily necessary to determine whether there was a legal basis for the applicant's detention. The applicant was detained pursuant to Article 100 of the CCP no. 5271 of 4 December 2004 for her alleged membership of the armed terrorist organisation, namely the DHKP/C. There was therefore a legal basis for the applicant's detention.

32. Before examining whether the detention, which has been found to have a legal basis, pursued a legitimate aim and was proportionate, it should be ascertained whether there are facts giving rise to *a strong suspicion that the offence has been committed*, which is a prerequisite for pre-trial detention.

33. Examination of the investigation documents with respect to the applicant reveals that the charges on which the detention measure was based were the applicant's actions of unfurling a banner and shouting slogans on 28 May 2020 and 29 June 2020. The investigation authorities claimed that these actions were carried out in accordance with the orders and instructions of the DHKP/C terrorist organisation for the purpose of serving the organisation's aims and making propaganda for it. In this context, the investigation authorities referred to the activities of formations linked to the DHKP/C, stating that the hunger strike carried out by E.T. and A.Ü., who were cited on the banner carried by the applicant, had no longer been a way of seeking rights and had become an activity serving the aims of the terrorist organisation, and that the applicant's actions in support of these individuals had been taken up by statements made on a social media account considered to be linked to the DHKP/C terrorist organisation.

34. It is evident that a sit-in or a hunger strike protest, which under certain conditions can be considered an aspect of freedom of expression, or actions such as shouting slogans, making press statements, unfurling banners, etc., carried out by third parties in support of these actions, cannot in themselves be considered a criminal offence. However, if there are facts indicating that the conduct of such protests constitutes a terrorist-related activity, or if the persons involved in them act in such a way as to praise, legitimise or encourage the terrorist organisation's methods of coercion,

violence and threats, such activities may be considered an offence (in the same vein, see *Esra Özkan Özakça*, § 89).

35. In this context, the facts relied upon by the investigation authorities, that the applicant's actions, which are the subject of the charges against her and which form the basis of the detention measure, were carried out under the instructions of the DHKP/C terrorist organisation and in accordance with the aims of that organisation, generally justify and support the said actions on certain platforms considered to be linked to that organisation. On the other hand, the investigation documents do not contain any concrete fact or finding that the applicant had carried out these actions within the framework of an organisational relationship or as part of an organisational attitude (in the same vein, see *Esra Özkan Özakça*, § 90). In addition, the applicant stated that she was the aunt of E.T., who started the hunger strike, that she had carried out the actions on 28 May 2020 and 29 June 2020 in order to support her nephew E.T., that she had chosen to do so as a way of seeking rights and that her actions had no organisational purpose. It has therefore been considered that the investigating authorities failed to provide concrete evidence that the applicant had carried out the alleged acts on the instructions of the organisation or that she had a link with the said organisation.

36. In this respect, it has been concluded that, in the light of the applicant's defence submissions and the scope of the file, the *strong suspicion of the commission of the offence*, which is a prerequisite for *detention* in the present case, was not sufficiently established.

37. In view of this conclusion, the Court has not found it necessary to examine further whether the grounds justifying the detention existed and whether the detention was proportionate.

38. Furthermore, in view of the above conclusion, the Court has not found it necessary to examine the alleged violations of freedom of expression and the right to hold meetings and demonstration marches as a result of the detention measure.

39. In the light of the foregoing, it must be held that there was a violation of the applicant's right to personal liberty and security guaranteed by Article 19 § 3 of the Constitution.

C. Alleged Unreasonable Length of the Applicant's Detention

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

40. The applicant claimed that her right to personal liberty and security had been violated and that her detention had exceeded a reasonable period of time.

41. In its observations, the Ministry stated that the legal remedies had not been exhausted, since the applicant had not exhausted the compensation remedy provided for in Article 141 of the CCP no. 5271.

42. In her counter-statement against the Ministry's observations, the applicant reiterated her statements in the individual application form.

2. The Court's Assessment

43. With regard to the individual applications made on the grounds that the detention had exceeded the maximum period or a reasonable period laid down by law, the Court has, referring to the relevant case-law of the Court of Cassation, considered the possibility of bringing an action for damages, provided for in Article 141 of the CCP no. 5271, as an effective legal remedy which must be exhausted in cases where the applicant has been released or sentenced at the time of examination of the individual application, even if the original proceedings have not yet been concluded (see *Erkam Abdurrahman Ak*, no. 2014/8515, 28 September 2016, §§ 48-62; *İrfan Gerçek*, no. 2014/6500, 29 September 2016, §§ 33-45; *Ahmet Kubilay Tezcan*, no. 2014/3473, 25 January 2018, § 26).

44. In the light of the foregoing, this part of the application must be declared inadmissible on the ground of *non-exhaustion of legal remedies*.

D. Damage

45. The procedures and principles for redressing the violation and the consequences thereof are laid down in Article 50 of the Code no. 6216 on the Establishment and Rules of Procedure of the Constitutional Court of 30 March 2011 ("Code no. 6216").

46. The applicant claimed 250,000 Turkish liras ("TRY") as compensation for non-pecuniary damage.

47. In the present case, it has been concluded that Article 19 § 3 of the Constitution was violated by the unlawfulness of the detention. In the context of the case in which she was tried, the applicant was released from detention, and her detention status ended. It has therefore been concluded that there is no legal interest in conducting a retrial in order to remedy the consequences of the violation.

48. On the other hand, it is evident that a finding of a violation in the present case would not be sufficient to compensate for the damage suffered by the applicant. In order to redress the violation of the applicant's right to personal liberty and security, it must be held that the applicant must be paid a net amount of TRY 67,500 in respect of non-pecuniary damage, which cannot be remedied by the mere finding of a violation.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 15 March 2022

A. That the request for legal aid be GRANTED;

B. 1. BY MAJORITY and by the dissenting opinion of Mr. Selahaddin MENTEŞ, that the alleged violation of the right to personal liberty and security be DECLARED ADMISSIBLE due to the unlawfulness of the detention;

2. UNANIMOUSLY, that the alleged violation of the right to personal liberty and security due to the detention exceeding a reasonable period of time be DECLARED INADMISSIBLE for *non-exhaustion of legal remedies*;

C. UNANIMOUSLY, that the right to personal liberty and security, safeguarded by Article 19 § 3 of the Constitution, was VIOLATED due to the unlawfulness of the detention;

D. That a net amount of TRY 67,500 be REIMBURSED to the applicant as compensation for non-pecuniary damage and that the remaining claims for compensation be REJECTED;

E. That the total litigation costs, consisting of the counsel fee of TRY 4,500, be REIMBURSED to the applicant;

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

G. That a copy of the judgment be SENT to the 29th Chamber of the İstanbul Assize Court (E.2020/215) for information; and

H. That a copy of the judgment be SENT to the Ministry of Justice for information.

DISSENTING OPINION OF JUSTICE SELAHADDİN MENTEŞ

I dissent from the majority's finding that the applicant's right to personal liberty and security was violated by the unlawfulness of her detention for the following reasons.

Pursuant to Article 148 § 3 of the Constitution and Article 45 § 1 of Code no. 6216, it is necessary to exhaust ordinary legal remedies in order to file an individual application with the Constitutional Court. Respect for fundamental rights and freedoms is a constitutional duty incumbent on all organs of the State, and it is the duty of the administrative and judicial authorities to remedy any violations that occur as a result of failure to comply with this duty. For this reason, alleged violations of fundamental rights and freedoms must first be brought before the inferior courts, evaluated by these authorities and then resolved by them (see *Ayşe Zıraman and Cennet Yeşilyurt*, no. 2012/403, 26 March 2013, § 16).

The remedies to be exhausted must not only be accessible, but must also be capable of providing a remedy and, if exhausted, must give the applicant a reasonable prospect of success in the obtaining a remedy for his/her grievances. In other words, to be considered effective, the remedy must be capable of establishing in substance that a particular right has been violated due to a breach of the constitutional guarantees and of providing an adequate redress. It is therefore not enough to simply include these remedies in legislation; they must also be proven to be effective in practice, or at least not ineffective (see *Ramazan Aras*, no. 2012/239, 2 July 2013, § 29). Moreover, the suspicion that a remedy which has a reasonable prospect of success *in abstracto* will not succeed in practice does not justify non-exhaustion of that remedy. In particular, remedies that have been created subsequently and have not yet been implemented should be assessed in this context (see *Ramazan Korkmaz*, no. 2016/36550, 19 July 2017, § 33).

Furthermore, the mere scepticism of applicants as to the effectiveness of a particular remedy does not relieve them of the obligation to attempt to exhaust that remedy. Applicants can be expected to resort to the judicial authorities in order to give them the opportunity to improve existing rights by exercising their powers of interpretation. However, in cases where, in the light of established case-law, there is no reasonable

prospect of a favourable outcome as a result of a remedy, the applicant's failure to exhaust the available remedies does not lead to the conclusion that the remedies have not been exhausted. In addition, the absence of precedents on the effective functioning of a remedy does not in itself relieve the applicant of the obligation to exhaust that remedy, unless there is a situation which shows that the remedy has failed. There is always the possibility that the courts will develop their jurisprudence in favour of the applicant if he/she makes use of this remedy.

In the present case, the applicant, who was arrested on 30 June 2020, filed an individual application on 30 September 2020, and her detention on criminal charges ended on 23 December 2020, when she was released. Since the applicant's detention on criminal charges ended on the date on which the Court examined the application, any finding of a violation that may be established in relation to the unlawfulness of the applicant's detention in the context of the individual application could only lead to the award of some compensation in favour of the applicant. Apart from this, there are no consequences for the applicant (e.g. release) as a result of a possible decision finding a violation.

In this case, in accordance with the subsidiary nature of the individual application mechanism, it is necessary to examine whether there is another remedy available to the applicant, other than the individual application, which would establish the unlawfulness of the detention and provide the applicant with compensation as a remedy.

In all applications to the Court based on an allegation of unlawful detention, the Court examines, first, whether there is a legal basis for the contested detention; second, whether there is a strong suspicion of an offence; third, whether there is a legitimate aim for the detention (whether there are grounds for detention); and, finally, whether the detention measure is proportionate.[1]

This examination by the Court is also in accordance with the provisions of Articles 100 and 101 of the Code of Criminal Procedure ("CCP") no. 5271. Article 100 § 1 of the CCP no. 5271 provides that "a detention order

1 *Halas Aslan*, no. 2014/4994, 16 February 2017.

may be issued against the suspect or accused if there are facts indicating the existence of a strong suspicion of an offence and the existence of a reason for detention. A detention order cannot be issued if the importance of the case is disproportionate to the expected punishment and the security measure to be imposed." Article 101 § 2 of the same Code states that "in the case of detention orders, the continuation of detention or the rejection of a request for release in this respect, a) the evidence of a strong suspicion of an offence, b) the existence of grounds for detention, c) the proportionality of the detention measure shall be justified by concrete facts and clearly shown".

Furthermore, according to Article 141 § 1 (a) of the CCP no. 5271, *"Persons who, in the course of the investigation or prosecution of a criminal offence, are arrested, detained or ordered to remain in detention, may claim from the State all kinds of compensation for the pecuniary and non-pecuniary damage, except for the conditions established by law"*.

As can be seen, Article 141 § 1 (a) also refers to "the conditions laid down by law for detention". Therefore, for a person who believes that he/she has been detained in violation of the conditions established by law (such as strong suspicion of guilt, reason for detention, proportionality), the law provides for the possibility of claiming and receiving compensation.

In its previous judgments on this issue, the Court has held that the applicant may bring an action for damages under Article 141 § 1 (a) of the CCP on the ground that the detention was unlawful if, at the time of the examination of the individual application, the conditions of the applicant's detention have expired and the acquittal or conviction in the criminal proceedings relating to the detention measure has become final, and has declared the above claim inadmissible on the ground of non-exhaustion of remedies.[2] However, even if the applicant has been released, in cases where the criminal proceedings against the applicant is still pending or the acquittal or conviction has not been finalised, the Court has excluded from the scope of Article 141 § 1 (a) of the CCP applications based on the

2 *Reşat Ertan*, no. 2013/5700, 15 April 2015, § 26; *Mehmet Emin Güneş*, no. 2013/5707, 16 April 2015, § 29; *Mecit Gümüş*, no. 2013/9105, 25 June 2015, § 32; *Hüseyin Hançer*, no. 2013/8319, 7 January 2016, §§ 39, 40; *Ömer Köse*, no. 2014/12036, 16 November 2016, § 34.

claim that the detention is unlawful and has examined the merits of the case.

As mentioned above, the Court has partially changed its approach to the application of unlawful detention. In the current approach of the Court, the only situation in which it is accepted that the claim of unlawful detention can be the subject of compensation within the scope of Article 141 of the CCP is the situation relating to the ground for compensation regulated in Article 141 § 1 (e) of the CCP.

According to many recent judgments of the Court, if the applicant has been acquitted in the case to which the detention giving rise to the application relates, or if a decision not to prosecute has been taken in the investigation initiated, and these decisions have become final at the time of the examination of the individual application, the allegation that the detention is unlawful is found inadmissible on the ground that the remedy of compensation provided for in Article 141 § 1 (a) and (e) of the CCP has not been exhausted.[3] In this case-law, the Court takes account of Article 141 § 1 (a) and (e) of the CCP and describes the remedy of compensation provided for in these provisions as an effective remedy for the alleged unlawfulness of detention.[4] In all applications based on the allegation that the detention is unlawful, the merits of the case are examined in all cases other than those mentioned.

In addition, the Court considers the decision ordering continued detention, except for the conditions laid down by law, which is governed by Article 141 § 1 (a), to fall within the scope of the remedy of compensation provided for by Article 141 § 1 (d) of the CCP, which provides that persons who are arrested in accordance with the law but are not brought before a judicial authority within a reasonable time and are not sentenced within that time may be entitled to compensation. In other words, the Court has rejected, on the grounds of non-exhaustion of remedies, the allegations that the reasonable or statutory period of detention had been exceeded due to unlawful prolongation of the detention with unjustified decisions,

3 *Kamil Erdoğan*, no. 2017/4023, 19 April 2018, § 40; *Bilal Canpolat*, §§ 37-43; *Fatma Maden*, § 49; *Ertuğrul Raşit Benal*, no. 2016/25245, 17 July 2018, § 42.

4 *Fatma Maden*, § 47; *Ertuğrul Raşit Benal*, § 40.

relying jointly on Article 141 § 1 (a) and (d) of the CCP.[5]

In addition to the above situation, the Court notes that the remedy of compensation under Article 141 of the CCP should also be applied in applications involving complaints of unlawful detention. In other words, in the case of complaints concerning the unlawfulness of detention, the Court issues an inadmissibility decision on the grounds of non-exhaustion of remedies, regardless of whether the case has resulted in a conviction or not and regardless of whether the case is still pending or not.[6]

Since the mentioned judgments refer to the judgments of the Court of Cassation, according to which it is not necessary to examine the merits of the applications in this context, although it can be argued that the remedy provided for in Article 141 of the CCP is undoubtedly an effective remedy for complaints concerning the unlawfulness of detention, it is not possible to rely on the mentioned allegation, since it is not necessary to examine whether there is a practice of the Court of Cassation in this matter, and the judgments of the Court of Cassation[7] referred to in the above-mentioned judgments do not relate to a detention which is alleged to have taken place without concrete evidence, unless a contrary practice has been consistently established by the Court of Cassation when issuing an inadmissibility decision for failure to exhaust remedies in applications based on an allegation of unlawful detention.[8]

It is therefore contradictory for the Court to decide, in applications containing both allegations of unlawful custody and detention measures, that compensation should be sought in respect of the allegation relating to the detention measure, but that no compensation should be sought in respect of the allegation relating to the detention measure of an applicant who has been released.

5 *Erkam Abdurrahman Ak*, no. 2014/8515, 28 September 2016, § 54; *İrfan Gerçek*, no. 2014/6500, 29 September 2016, § 37.

6 *Neslihan Aksakal*, no. 2016/42456, 26 December 2017, § 30-38; *Ahmet Ünal*, no. 2016/17624, 9 May 2018, § 24-26.

7 Judgment of the 12th Criminal Chamber of the Court of Cassation dated 1 October 2012 and numbered E.2012/21752, K.2012/20353.

8 With regard to similar situations, there are no precedents in the practice of the Court of Cassation showing that the remedy of compensation has been successfully applied, but there is no reason to claim that such a remedy would definitely fail.

Furthermore, in the *B.T.* judgment, the Court abandoned the approach of referring to practice in order to determine the existence of an effective remedy. In the *B.T.* judgment, the application involving the allegation that the conditions of detention in removal centres constituted ill-treatment was declared inadmissible on the ground of non-exhaustion of remedies. The Court did not examine the allegation that conditions in removal centres constituted ill-treatment, stating that it could be the subject of a full remedy action, although it had not identified any examples of successful outcomes in practice.

With regard to the application based on the alleged absence of an effective remedy against the conditions of administrative detention, the Court, after noting that the European Court of Human Rights ("ECHR") had held in its judgments that there was no effective remedy against the conditions of detention under Turkish law, stated that the fact that a remedy provided for by a statutory provision, which in view of the *erga omnes* principle of the law leaves no doubt as to its existence, had not actually been exercised or used was not sufficient to conclude that the remedy in question was not effective or did not exist. In the context of this finding, the Court pointed out that it would be wrong to say that there was no effective remedy for compensation on the basis that there was no court decision indicating that such a case had been brought and compensation had been awarded.[9]

In the *Cafer Yıldız* judgment, the inadmissibility decision was based on a similar assessment. In this judgment, the Court declared the application inadmissible on the ground that the allegations that the applicant had not been able to benefit from the available means of challenging his detention, because the decisions taken as a result of the detention examinations had not been notified or the challenge to his detention had not been resolved, could be examined in the context of the action to be brought under Article 141 § 1 (k) of the CCP. The Court noted that, although there was no precedent for the successful application of the compensation remedy in this case, there was nothing to suggest that such a remedy would necessarily fail and that it would be useful to have recourse to the courts

9 *B.T.* [Plenary], no. 2014/15769, 30 November 2017, §§ 40-60.

of first instance to determine the scope of the statutory provision and to give effect to this remedy, which is capable of resolving complaints of this nature.[10]

The possibility that the determination of the absence of strong suspicion of a criminal offence and other legal conditions for detention in the action for damages to be brought under Article 141 § 1 (a) of the CCP by the person who has been released and against whom a criminal case has been brought may interfere with ongoing criminal proceedings, and the possibility that the court hearing the action for damages may refrain from making such determinations, or whether, in an action for damages brought by persons who have been convicted and whose judgment is under review on appeal or has become final, the court will decide whether or not the detention measure is unlawful, notwithstanding the decision given or to be given by the appellate authority, are obviously of great importance for the effectiveness of the appeal. In this context, however, it would be appropriate to say that there is no decisive link between the detention and release of the person and the acquittal or conviction of the person.

According to the above situation, a person may be acquitted in the criminal case even though his/her detention is in accordance with the law, or a person may be convicted in the case against him/her even though his/her detention is unlawful. For this reason, it should be concluded that it is possible to conduct an independent review of the lawfulness of the detention in an action to be brought under 141 § 1 (a) of the CCP, independently of the criminal case against the person (Muzaffer Korkmaz, Actions for Damages Due to Protective Measures and Individual Applications to the Constitutional Court, Seçkin Publishing, Ankara 2019, p. 93). In examining the lawfulness of detention, it should not matter whether the case to which the detention relates has resulted in a conviction or acquittal or whether the case is pending. In fact, the Court also reviews the lawfulness of detention in the event of a conviction or pending trial.[11] If the pendency of a case or a conviction in a case constitutes an obstacle

10 *Cafer Yıldız*, no. 2014/9308, 9 January 2018, §§ 37-40; *Yaşar Saçlı*, no. 2014/9311, 24 January 2018, §§ 37-40.

11 See *Besime Konca*, no. 2017/5867, 3 July 2018.

to the review of the lawfulness of the detention, the Court should not be able to carry out such a review. Therefore, an acquittal or a decision not to prosecute in a case does not automatically render the detention unlawful, nor does a conviction automatically render the detention lawful. In fact, while the Court ruled that the detention of the applicant who was acquitted in the Mehmet Özdemir[12] case was in accordance with the law, it ruled that the detention of the applicant who was convicted in the Ali Bulaç[13] case was unlawful.

Indeed, it is understood that Article 141 § 1 (a) of the CCP does not make the filing of an action relating to the lawfulness of detention dependent on the conclusion of the judicial proceedings against the person and the existence of a final decision.

In the relevant judgments of the Court of Cassation[14], it is stated that the ground for compensation provided for in the aforementioned provision is not included in the grounds for compensation that may be subject to compensation depending on the outcome of the judicial proceedings. According to the aforementioned judgments, it is mandatory to await the final decision on the merits of the case for those who have been acquitted or found not guilty after having been arrested or detained in accordance with the law, and for those who have been convicted and whose period of custody or detention exceeds the period of conviction, or for those who have been sentenced to this punishment inevitably because the punishment prescribed by law for the offence committed is only a fine.

Thus, in practice, it is understood that there is no clear acceptance that the action for damages based on Article 141 § 1 (a) of the CCP regarding the alleged unlawfulness of the detention measure cannot be filed while the criminal case to which the detention is related/connected is pending.

In this context, it should be noted, as stated above, that it is not possible to accept the view that the court of first instance hearing the action for damages may refrain from examining the conditions of detention. This is

12 *Mehmet Özdemir*, no. 2017/37238, 29 November 2018.
13 *Ali Bulaç* [Plenary], no. 2017/6592, 3 May 2019.
14 See judgments of the 12th Criminal Chamber of the Court of Cassation dated 1 July 2015 and numbered E.2014/20624, K.2015/12265 and dated 1 October 2012 and numbered E.2012/21752, K. 2012/20353.

because, pursuant to Article 141 § 1 (a) of the CCP, the court hearing the action for damages (and the assize court) must be able to examine whether or not the conditions for detention are met. According to the above-mentioned provision, it is the duty of the court hearing the action for damages to determine, in accordance with the law, whether the detention complies with the conditions laid down by the law. In fact, a detention or release order issued by an assize court at the prosecution stage can be revoked by another assize court on appeal by examining whether or not the conditions for detention are met. This point is not disputed. It is therefore concluded that there is no obstacle to the court hearing the action for damages determining the unlawfulness of the detention order issued by an assize court or a magistrate judge.

The requirement of exhaustion of the compensation remedy under Article 141 § 1 (a) of the CCP for complaints concerning the unlawfulness of detention, other than detention based on a criminal charge, is also in line with the approach of the Court, which has held that claims that detention exceeds a reasonable period of time should be subject to the compensation remedy provided for in Article 141 § 1 (a) and (d) of the CCP, provided that the detention status has ended.[15] In an action for damages brought by a person who has been released and whose criminal proceedings are pending or whose conviction is under appeal or has become final, the court of first instance would, in accordance with the case-law of the Court, examine the lawfulness of the decisions ordering continued detention and, in doing so, would examine whether there is a strong suspicion of a criminal offence and whether the other grounds for detention continue to exist (Muzaffer Korkmaz, *ibid*., p. 94). In fact, the Court also examines whether there is a strong suspicion of a criminal offence and whether the grounds for detention continue to exist in the applications that are examined on the merits.[16] Furthermore, it is assumed that the court hearing the action for damages will also assess whether there is a strong suspicion of a criminal offence and whether there are grounds for detention in the applications on this subject that are declared inadmissible on the grounds of non-exhaustion of remedies. In case of the acknowledgement of the

15 *İrfan Gerçek*, no. 2014/6500, 29 September 2016, § 19, 37.
16 See, for instance *Hüsnü Aşkan*, no. 2015/4057, 31 October 2018, § 45, *Halas Aslan*, no. 2014/4994, 16 February 2017, § 87.

contrary, such applications should not have been referred to the action for damages. In conclusion, if the court hearing the action for damages can examine whether there is strong suspicion of a criminal offence and grounds for detention in cases of complaints about prolonged detention, it should also be able to examine the lawfulness of detention in cases arising from complaints about the lawfulness of detention.

The *Mustafa Avci* judgment[17] should also be mentioned at this point. In this case, the Court declared the applicant's complaint of prolonged detention inadmissible on the grounds that he had not exhausted the remedy of compensation provided for in Article 141 of the CCP, as he had been released at the time of the examination.[18] With regard to the applicant's allegation that all the acts which led to his detention were linked to his political activities and that his right to engage in political activities had therefore been violated, the Court held that, in the action for damages to be brought by the applicant in respect of his complaint of prolonged detention, the court of first instance would have to take into account all the circumstances of the case, including whether the measure constituted an interference with the right to engage in political activities other than the right to personal liberty and security, in order to determine the unlawfulness and provide an appropriate remedy. The Court pointed out that the compensation remedy provided for in Article 141 of the CCP is an effective remedy in cases where measures such as custody, arrest and detention result in an interference with the right to personal liberty and security and other fundamental rights and, in line with this acknowledgement, the Court held that the alleged violation of the right to engage in political activities was inadmissible on the ground of non-exhaustion of remedies.[19] In the present case, the applicant's allegation that all the acts which led to his detention were linked to his political activities and that his right to engage in political activities had therefore been violated is tacitly similar to the claim that the detention was unlawful. If the court hearing the action for damages is able to determine whether there has been a violation of freedom of expression in the case where this person relies on the remedy provided for in Article 141 of the

17 *Mustafa Avci*, no. 2014/1545, 22 March 2018.
18 *Mustafa Avci*, § 27.
19 *Mustafa Avci*, § 35-38.

CCP, in other words, if it is able to determine whether the acts which led to the applicant's detention fall within the scope of political activities, then it will of course be able to determine whether the detention is lawful or not. This is because it is not possible to determine that the detention has violated freedom of expression without examining the relevant evidence.

As mentioned above, the Court has ruled on inadmissibility on the grounds of non-exhaustion of legal remedies, indicating that in the event of acquittal or non-prosecution, and once this decision has become final, it is possible for individuals to receive compensation in accordance with Article 141 § 1 (a) and (e) of the CCP (see *Fatma Maden*, no. 2016/28719, 17 July 2018; *Ertuğrul Raşit Benal*, no. 2016/25245, 17 July 2018). In these judgments, the Court also refers to Article 141 § 1 (a) of the CCP. However, for the application of Article 141 § 1 (a) of the CCP, it is not required in the CCP that the case to which the detention is related/connected results in an acquittal or a decision not to prosecute. The condition that the case leading to the detention must result in an acquittal or a decision not to prosecute applies to Article 141 § 1 (e) of the CCP. In our opinion, it should be noted that the provision of Article 141 § 1 (e) of the CCP does not constitute a primary effective remedy with regard to the lawfulness of the detention in the case of acquittal or non-prosecution. Whether the detention is lawful is irrelevant to the right to compensation under Article 141 § 1 (e). If a person is acquitted, compensation is automatically paid under this subparagraph, without any determination as to whether or not the detention was lawful. However, for a remedy to be considered effective, it must be capable of establishing that the given right has been violated and of redressing the violation.[20] For similar reasons, the ECHR rejected the objection that the remedy under Article 141 § 1 (e) had to be exhausted in Mergen and Others. Therefore, in this context, it can be said that Article 141 § 1 (a), and not Article 141 § 1 (e), is an effective remedy. It was indeed in the light of this situation that the Court found it necessary to refer to Article 141 § 1 (a) in those judgments. Since Article 141 § 1 (a) does not depend on acquittal or non-prosecution, it cannot be said that this remedy is ineffective in the case of release.

20 *Mergen and Others v. Türkiye*, § 36.

Taken together, the above points lead to the conclusion that the remedy of compensation under Article 141 of the CCP must be exhausted in applications involving complaints of unlawful detention, even if the case relating to the detention has resulted in a conviction or the person has been released.

Since, for the reasons set out above, I consider that the application should have been declared inadmissible on the ground of non-exhaustion of remedies, I dissent from the majority's view that it was necessary to examine the merits of the application.

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

ZÜLKÜF KILIÇ

(Application no. 2018/27032)

14 September 2022

On 14 September 2022, the First Section of the Constitutional Court found a violation of the right to protect and improve one's corporeal and spiritual existence, safeguarded by Article 17 of the Constitution, in the individual application lodged by *Zülküf Kılıç* (no. 2018/27032).

THE FACTS

[4-18] At the material time, the applicant was an assistant professor at a state university. He was subject to nine different disciplinary sanctions between 2011 and 2013. Three of these sanctions were overturned by the Council of Higher Education (YÖK) following an appeal, and the others were annulled by the courts of instance on the grounds that they were unlawful. In the course of the proceedings, the applicant's doctoral thesis was annulled on the grounds of plagiarism and his doctoral degree was revoked, and the court discontinued the proceedings in this respect. On the other hand, the applicant was acquitted of the offence of insult in the proceedings initiated on the basis of a complaint lodged by the rector of the university where he worked. It was also decided to annul the procedure for terminating the applicant's service by not reappointing him at the end of his term of office.

In addition, during the period in which the disciplinary sanctions were imposed, various medical institutions issued rest reports on the applicant with diagnoses of *"depressed mood, anhedonia, insomnia and depressive episodes"*.

V. EXAMINATION AND GROUNDS

19. The Constitutional Court ("the Court"), at its session of 14 September 2022, examined the application and decided as follows:

A. Request for Legal Aid

20. The applicant stated that he could not afford to pay the litigation costs and therefore applied for legal aid.

21. In accordance with the principles set out by the Court in the case of *Mehmet Şerif Ay* (no. 2012/1181, 17 September 2013), the Court should

accept the applicant's request for legal aid, on the ground that it is not manifestly ill-founded, since it has been established that the applicant is unable to afford the litigation costs without suffering a significant burden.

B. Alleged Violation of the Right to Protection and Improvement of One's Corporeal and Spiritual Existence

1. The Applicant's Allegations

22. The applicant claimed that, although he had not previously suffered from psychological problems, he had had to undergo treatment as a result of the events he had experienced and that, as a result of the investigations carried out, he had been subject to nine different disciplinary sanctions which had been annulled by the courts. He also stated that during the process he was unable to apply for associate professorship and professorship, that his doctoral dissertation was annulled and his doctoral degree revoked, that he was dismissed without reappointment, and that before that he was forced to resign under pressure. The applicant, who stressed that he had been subjected to continuous and systematic psychological harassment in connection with the alleged events and that his request for a full remedy action in this regard had been rejected, claimed that his right to respect for private life had been violated.

2. The Court's Assessment

23. Article 17 §§ 1 and 3 of the Constitution, titled *"Personal inviolability, corporeal and spiritual existence of the individual"*, on which the assessment of the allegation is based, reads as follows:

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

...

No one shall be subjected to torture or ill-treatment; no one shall be subjected to punishment or treatment incompatible with human dignity."

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

judgments of the Court, all the complaints that were the subject of the applications were examined under Article 17 of the Constitution (see *Hüdayi Ercoşkun*, no. 2013/6235, 10 March 2016, §§ 59, 60; *Sümeyye Örnek*, no. 2014/11091, 7 June 2017, § 16; *Mehmet Bayrakcı*, § 50; *Ebru Bilgin*, § 70; *Türkan Aydoğmuş*, § 22).

25. Article 17 § 1 of the Constitution provides that everyone has the right to the protection and improvement of their corporeal and spiritual existence. This provision corresponds to the right to protection of physical and mental integrity guaranteed by the right to respect for private life enshrined in Article 8 of the European Convention on Human Rights ("the Convention") (see *Sevim Akat Eşki*, no. 2013/2187, 19 December 2013, § 30).

26. In its previous judgments, the Court has established principles concerning the fundamental rights safeguarded by Article 17 §§ 1 and 3 of the Constitution, the minimum threshold required for an act to fall within the scope of Article 17 § 3 of the Constitution, and the circumstances to be taken into account in determining this threshold (see *Şehnaz Ayhan*, no. 2013/6229, 15 April 2014, §§ 21-26; *Işıl Yaykır*, no. 2013/2284, 15 April 2014, §§ 31-36; *Emel Leloğlu*, no. 2013/3512, 17 July 2014, §§ 26-31; *Hüdayi Ercoşkun*, §§ 84-88; *Hacer Kahraman*, no. 2013/7935, 20 April 2016, §§ 51-56). In the light of these findings, the present application cannot be said to exceed the minimum threshold required for an assessment within the scope of Article 17 § 3 of the Constitution, as regards the manner and method of carrying out the treatments which are the subject of the present case and, in particular, the physical and mental effects which they have caused. It is therefore considered appropriate to examine the applicant's complaints under Article 17 § 1 of the Constitution (for considerations in the same vein, see *Mehmet Bayrakcı*, § 59; *Ebru Bilgin*, § 76; *Türkan Aydoğmuş*, § 24).

a. Admissibility

27. The alleged violation of the right to protection and improvement of one's corporeal and spiritual existence must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

i. General Principles

28. The negative and positive obligations of the State with regard to the protection of the corporeal and spiritual existence of working persons, as provided for in Article 17 and also in Articles 5, 12, 49 and 56 of the Constitution, the obligations of the States party to international conventions, in particular the Revised European Social Charter of 3 May 1996 and the conventions signed within the framework of the International Labour Organisation ("ILO"), as well as explanatory assessments and general principles regarding the regulations implemented in this direction, were included in the previous judgments of the Court (see *Mehmet Bayrakcı*, §§ 61, 72; *Ebru Bilgin*, §§ 79-83).

29. In the above assessments, the Court emphasised that, provided that each case is assessed on its own merits, certain elements should be sought for the acts, actions or omissions to which individuals claim to be subjected in their working environment to rise to the level of psychological harassment. In this regard, considering the publications and reports of the ILO and the Ministry of Labour and Social Security, in order for the treatment to be qualified as psychological harassment:

i. Interventions must be carried out or tolerated by managers and/or other employees in the workplace,

ii. They must be repeated, arbitrary, systematic and deliberate, with the aim of intimidation and exclusion,

iii. They must cause or entail a serious risk of harm to the victim's personality, professional status or health (see *Mehmet Bayrakcı*, § 69; *Ebru Bilgin*, § 80, *Türkan Aydoğmuş*, § 27).

30. The extent of the effects of the treatment may vary depending on many factors, including the status of the victim, the duration and frequency of the treatment, the perpetrator of the treatment and the gender, age and health status of the victim (see *Aynur Özdemir and Others*, no. 2013/2453, 24 March 2016, § 79; *Hacer Kahraman*, § 69, *Mehmet Bayrakcı*, § 70, *Ebru Bilgin*, § 81; *Türkan Aydoğmuş*, § 28).

31. On the basis of these assessments, the positive obligations which the State must assume under Article 17 § 1 with regard to acts, actions or omissions which threaten the integrity of the spiritual existence of employees by reaching an intolerable degree of severity and intensity in terms of their impact on their lives, and which are characterised as psychological harassment, can be listed as follows:

i. Take measures to prevent conduct that constitutes psychological harassment of employees,

ii. Establish supervisory mechanisms to effectively investigate complaints,

iii. Remove barriers to employees who should be afforded affirmative action and ensure that they benefit from affirmative action opportunities,

iv. Establish a legal infrastructure for the compensation of pecuniary and non-pecuniary damages suffered by those subjected to intimidating and deliberate acts and for the settlement of any disputes that may arise, and ensure that those responsible are punished within the legal framework in cases that constitute a criminal offence,

v. Ensure that victims enjoy effective procedural safeguards enabling them to defend their rights under fair conditions in proceedings to redress the damage suffered and that the courts explain their conclusions with relevant and adequate reasoning in a manner that protects the guarantees inherent in fundamental rights at the end of the proceedings (see *Mehmet Bayrakcı*, § 71; *Ebru Bilgin*, § 82; *Türkan Aydoğmuş*, § 29).

32. In its previous judgments, the Court has often emphasised that solving problems of interpretation of the law is primarily within the competence and responsibility of the inferior courts (courts of instance). It is undeniable that the inferior courts, which are in direct contact with all the parties to the case, are in a better position to assess the circumstances of the case in order to determine whether the acts, actions and omissions alleged to have been committed systematically, deliberately and unjustifiably can be considered to constitute psychological harassment. The role of the Court is therefore limited to determining whether the interpretation of these provisions is compatible with the Constitution (see *Aynur Özdemir*

and Others, § 81; *Hacer Kahraman*, § 70, *Mehmet Bayrakcı*, § 72; *Ebru Bilgin*, § 83; *Türkan Aydoğmuş*, § 30).

ii.Application of Principles to the Present Case

33. In the present case, it is undeniable that all the facts of the case should be considered together in order to assess whether the acts to which the applicant claims to have been unjustly subjected reached an intolerable degree of severity and intensity in terms of their impact on the applicant's life.

34. The applicant was subject to nine different disciplinary sanctions between 2011 and 2013. Three of these sanctions were overturned by the Council of Higher Education (YÖK) on appeal, and the others were annulled by the inferior courts on the grounds that they were unlawful. In the course of the proceedings, the applicant's doctoral thesis was annulled on the grounds of plagiarism and his doctoral degree was revoked, and the court discontinued the proceedings in this respect. On the other hand, the applicant was acquitted of the offence of insult in the proceedings initiated on the basis of a complaint lodged by the rector of the university where he worked. It was also decided to annul the procedure for terminating the applicant's service by not reappointing him at the end of his term of office.

35. On the other hand, during the period in which the disciplinary sanctions were imposed, medical institutions issued reports on the applicant with diagnoses of *"depressed mood, depressive episodes, anhedonia and insomnia"*. In this respect, it cannot be said that the aforementioned acts of the administration, which were annulled by the judicial authorities, did not reach an intolerable degree of severity and intensity in terms of their impact on the applicant's life and did not threaten the integrity of his spiritual existence and, consequently, did not rise to the level of psychological harassment. Consequently, the alleged violation of the applicant's integrity of corporeal and spiritual existence must be dealt with in the context of the State's positive obligations, in accordance with the principles set out above.

36. In the petitions submitted to the inferior courts, the applicant alleged that the disciplinary investigations and sanctions imposed on him

were used as a means of torture, that he was subjected to psychological harassment and that he had to undergo medical treatment during this process. In the present case, it was established that the applicant had been subject to nine different disciplinary sanctions over a period of two years, but that these proceedings had been annulled by the courts or overturned by the Council of Higher Education, and that the applicant had been diagnosed with mental illness during the same period. No assessment was made by the inferior courts, despite the fact that the applicant had made serious allegations in this regard, supported by events over a period of time. Indeed, the applicant's allegations of psychological harassment were not even included in the case summary of the judgment.

37. On the other hand, in the action for damages brought by the applicant against the persons concerned, it was decided to dismiss the action for lack of hostility on the grounds that the action should be brought against the administration and not against the persons. In addition, the applicant's complaint against the persons concerned for misconduct in office also remained inconclusive, as the Council of Higher Education decided that there was no need for an investigation.

38. Public authorities must not only identify situations that constitute psychological harassment, but also take prompt and effective action to prevent or remedy such conduct. It can be said that when public authorities are confronted with allegations of psychological harassment, they must act quickly to establish the truth, take measures to eliminate the psychological harassment, prevent its recurrence and ensure that the victim is compensated for the damage suffered, in the interest of the effective exercise of the public service and as a requirement of the positive obligation to protect one's corporeal and spiritual existence. However, it is undisputed that in the present case the full remedy action is the remedy that will provide redress in the context of the right to protection and improvement of corporeal and spiritual existence. However, in the circumstances of the present case, it has been held that the non-pecuniary damage suffered by the applicant, which clearly existed, could not be compensated for by the rejection of the full remedy action. In that regard, the Court has concluded that the said rejection does not contain relevant and sufficient reasons to safeguard the guarantees inherent in the right

to protect and improve one's corporeal and spiritual existence and to compensate the applicant for the damage suffered.

39. Consequently, it has been concluded that the positive obligations to be assumed by the public authorities in the context of the right to protect and improve one's corporeal and spiritual existence were not fulfilled, since the public authorities failed to take effective measures in the present case and the results reached by the inferior courts in the full remedy action were not explained with relevant and sufficient reasons.

40. In the light of the foregoing, it must be held that there was a violation of the applicant's right to protection and improvement of his corporeal and spiritual existence, guaranteed by Article 17 of the Constitution.

c. Damage

41. The applicant requested the Court to find a violation and to award him compensation for his pecuniary and non-pecuniary damages.

42. The procedures and principles for redressing the violation and the consequences thereof are laid down in Article 50 of the Code no. 6216 on the Establishment and Rules of Procedure of the Constitutional Court of 30 March 2011.

43. There is a legal interest in conducting a retrial in order to redress the consequences of the violations identified in the application. In this respect, the procedure to be followed by the judicial authorities to whom the judgment is remitted is to initiate the retrial procedures and to issue a new decision eliminating the reasons that led the Court to find a violation, in accordance with the principles set out in the judgment finding a violation (see *Mehmet Doğan* [Plenary], no. 2014/8875, 7 June 2018, §§ 54-60; *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019, §§ 53-60, 66; *Kadri Enis Berberoğlu (3)* [Plenary], no. 2020/32949, 21 January 2021, §§ 93-100 for the details of the retrial procedure in relation to the individual application set out in of Code no. 6216).

44. Furthermore, since it is evident that the retrial will provide an adequate redress in view of the nature of the violation, the applicant's claim for compensation must be dismissed.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 14 September 2022 that

A. The request for legal aid be GRANTED;

B. The alleged violation of the right to protection and improvement of one's corporeal and spiritual existence be DECLARED ADMISSIBLE;

C. The right to the protection and improvement of one's corporeal and spiritual existence, safeguarded by Article 17 of the Constitution, was VIOLATED;

D. A copy of the judgment be REMITTED to the 2nd Chamber of the Elazığ Administrative Court (E.2014/646, K.2014/1332) for retrial to redress the consequences of the violation of the right to the protection and improvement of one's corporeal and spiritual existence;

E. The applicant's claims for compensation be REJECTED; and

F. A copy of the judgment be SENT to the 8th Chamber of the Council of State and to the Ministry of Justice for information.

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

AYŞE ORTAK

(Application no. 2018/25011)

6 January 2022

On 6 January 2022, the Plenary of the Constitutional Court found a violation of the right to respect for private life safeguarded by Article 20 of the Constitution in the individual application lodged by *Ayşe Ortak* (no. 2018/25011).

THE FACTS

[9-30] The private school, where the applicant was serving as a teacher, was closed down for posing a threat to national security and its membership, affiliation or connection with the Fetullahist Terrorist Organisation and/or Parallel State Structure, pursuant to the Decree-Law no. 667 on the Measures to be taken under State of Emergency ("Decree-Law no. 667").

The applicant was notified by the Governor's Office that her permit to work at a private school had been revoked due to the school's closure pursuant to the Circular no. 7783529 ("the Circular") issued by the Ministry of National Education, and that a new permit to work at a different institution could not be issued to her. Upon the partial rejection by the Governor's Office of the applicant's request for the annulment of the administrative act, she brought an action for annulment before the incumbent administrative court, which ultimately dismissed the action. The applicant's subsequent appeal was also dismissed, with final effect, by the regional administrative court.

V. EXAMINATION AND GROUNDS

31. The Constitutional Court, at its session on 6 January 2022, examined the application and decided as follows:

A. Request for Legal Aid

32. The applicant stated that she could not afford to pay the litigation costs of the individual application and accordingly sought legal aid.

33. In accordance with the principles set out by the Court in the case of *Mehmet Şerif Ay* (no. 2012/1181, 17 September 2013), the Court has accepted the request for legal aid by the applicant, who has been found

to be unable to afford the litigation costs without suffering a significant financial burden, for not being manifestly ill-founded.

B. Examination Procedure

34. The Constitution provides for two legal regimes for the protection of fundamental rights and freedoms in ordinary and extraordinary times. The restriction of fundamental rights and freedoms in ordinary times is regulated in Article 13 of the Constitution while such a restriction or the exercise of fundamental rights and freedoms in extraordinary times is established in Article 15 of the Constitution (see the Court's judgment no. E.2018/89, K.2019/84, 14 November 2019, § 5).

35. According to Article 15 of the Constitution, in times of war, mobilization, or a state of emergency; the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures derogating the guarantees embodied in the Constitution may be taken. Nevertheless, this authority enshrined by Article 15 of the Constitution is not limitless. Measures taken against the safeguards embodied in other articles of the Constitution must not violate obligations under international law and must be taken to the extent required. Furthermore, it is indicated that even in such cases the individual's right to life, and the integrity of his/her corporeal and spiritual existence shall be inviolable and no one shall be compelled to reveal his/her religion, conscience, thoughts or opinion, nor be accused on account of them; and the presumption of innocence and the non-retroactivity of offences and sanction shall be still applied in such cases (see the Court's judgment no. E.2018/89, K.2019/84, 14 November 2019, § 8; *Aydın Yavuz and Others* [Plenary], no. 2016/22169, 20 June 2017 §§ 185, 186).

36. Additionally, the conditions should be laid out in the previous judgments of the Constitution Court in order for a measure to be qualified as a state of emergency measure and for the examination to be conducted within the scope of the review regime provided for the state of emergency in the Constitution. In this scope, in order for a measure to be considered as a state of emergency measure, the following conditions must also be met: the existence and declaration of the state of emergency; the measure must be aimed at eliminating the dangers and threats that led to the declaration

of the state of emergency; and the application of the relevant measure must be limited merely to the duration of the state of emergency *(Aydın Yavuz* and Others, §§ 188-191; see the Court's judgment no. E.2018/89, K.2019/84, 14 November 2019, § 11; *Tamer Mahmutoğlu* [Plenary], no. 2017/38953, 23 July 2020, §§ 71-75).

37. Article 15 of the Constitution is not taken into account in the review of cases where the application exceeds the period of the state of emergency. The individual applications falling within this scope will be examined pursuant to Article 13 of the Constitution, which regulates the restrictions of fundamental rights and freedoms and the scope of protection in ordinary times (see, for similar assessments, *Tamer Mahmutoğlu*, § 76).

38. It is clear that the impugned measure was introduced with a view to eliminating the dangers and threats that had led to the declaration of the state of emergency. However, it was understood that the impugned measure continued to be implemented even after the state of emergency was lifted due to an administrative act based on a Circular sent by the Ministry of Education to the governorates. On the other hand, the impugned measure was not mentioned in any law or decree-law enacted during the state of emergency. As a result, considering that the practice the applicant complained of has continued to be implemented in a way exceeding the state of emergency, it has been assessed that an examination under Article 15 of the Constitution cannot be conducted in the present case. In this regard, the application will be examined under Article 13 of the Constitution, pursuant to Article 13 of the Constitution, which regulates the restrictions of fundamental rights and freedoms and the scope of protection in ordinary times.

39. Additionally, in the light of the letters from the Ministry of Education and the content of the Circular, it was understood that the prohibition regarding the annulment of the work permits of the individuals covered by the Circular and the prohibition to issue a work permit for another private teaching institution and the processing of this data to MEBBIS (*Ministry of National Education Information Systems*) were implemented by a single administrative act. In this context, it can be noted that the annotation in the MEBBIS module stating that "*the institution was closed down by the Decree*

Law no. 667 and 2016/..." also emphasized that the person concerned will not be granted a work permit in any private educational institution (see § 19). It was also observed that the same work permit could not be used to work in another private educational institution, as the work permit was issued exclusively for the school applied for. In this case, if the institutions for which the work permit had been issued were closed, the work permit in question would no longer have any function and the actual situation would be established. In line with the considerations above, it can be indicated that the prohibition to work was a natural consequence of the annulment of the work permit and, in this respect, the two cannot be the subject of separate administrative proceedings or examinations. In this context, the annulment of the work permit and the resulting prohibition to work in private educational institutions should be examined as the same measure.

C. Alleged Violation of the Presumption of Innocence

1. The Applicant's Allegations

40. The applicant alleged that her presumption of innocence had been violated on the grounds that it was not possible to establish an association between her and the terrorist organisation without a judicial decision or an investigation; that the administration had accepted that those who had worked in the schools closed by the Decree-law were the members of the terrorist organisation; no investigation or proceedings had been initiated against her; that she had not committed an offence was proven; no working prohibition could be imposed on her.

2. The Court's Assessment

41. The presumption of innocence is regulated in Article 38 § 4 of the Constitution, which reads as: "*No one shall be considered guilty until proven guilty in a court of law.*" Article 36 of the Constitution provides that everyone has the right of litigation either as plaintiff or defendant and *the right to a fair trial*. In the reasoning of the amendment introducing the phrase "*the right to a fair trial*" in the aforementioned article, it was emphasised that the right to a fair trial, safeguarded by the international conventions to which Türkiye is a party was incorporated into the text of the article. Indeed, sub-paragraph (2) of Article 6 of the Convention stipulates that an individual

charged with a criminal offence must be presumed innocent until proven guilty by a court decision. In this regard, being an aspect of the right to fair trial safeguarded by Article 36 of the Constitution, the presumption of innocence is regulated in Article 38 of the Constitution which envisages that no one shall be considered guilty until proven guilty in a court of law (see, *Fameka İnş. Plastik San ve Tic. Ltd. Şirketi*, no. 2014/3905, 19 April 2017, § 27).

42. The presumption of innocence is one of the substantive requirements of the principle of the rule of law and it means that everyone charged with a criminal offence shall be presumed innocent until proven guilty by a final judgment rendered as a result of a fair trial (see the Court's judgment no. E.2013/133, K.2013/169, 26 December 2013). The presumption in question guarantees that an individual will not be presumed guilty without a finalized court decision as to the commission of an offence. Moreover, no one can be declared guilty and treated as a criminal by the judicial and public authorities unless their guilt has been established by a court decision (see *Kürşat Eyol,* no. 2012/665, 13 June 2013, § 26).

43. As an element of the right to a fair trial, the presumption of innocence provides a guarantee in terms of two aspects. The first aspect of the guarantee relates to the period up to the conclusion of the criminal proceedings against the individual, that is to say, the period in which a criminal offence was imputed on the applicant. This guarantee forbids putting forward early statements as to the individual's culpability or acts until a court ruling establishing the guilt of the individual is rendered. The first aspect of the guarantee does not only apply to the trial court. This aspect also requires all other administrative and criminal authorities to avoid making statements or implying that the individual is guilty until it has been established by a court decision. Therefore, a violation of the presumption of innocence may occur not only in the criminal proceedings dealing with the imputed offence but also in other legal procedures and proceedings (administrative, civil, disciplinary, etc.) that are conducted simultaneously (see *Galip Şahin,* no. 2015/6075, 11 June 2018, § 39).

44. The second aspect of the guarantee comes into play after the court rendered a decision other than a conviction as a result of criminal proceedings. This aspect ensures that no suspicion as to the individual's

innocence in relation to the alleged offence will become a matter of concern in future proceedings, and requires public institutions to avoid procedures and practices that give society the impression that the individual is guilty.

45. Alleged violations in cases that do not fall within the scope of the above guarantee of this principle and that do not involve criminal charges and accusations do not fall within the scope of the presumption of innocence.

46. In the present case, it is clear that no criminal proceedings have been brought against the applicant. Additionally, it has been established that the impugned decision of the inferior court referred to in the individual application did not contain an assessment as to the association or connection of the applicant with a terrorist organisation; that there was no criminal charge, that the impugned proceedings referred to in the individual application were not of the nature of criminal proceedings and that the wording of the decision did not call into question the applicant's innocence.

47. Accordingly, it was understood that the applicant's allegations did not fall within the scope of the presumption of innocence principle, as no criminal proceedings had been instituted against the applicant and no criminal charges had been brought against the applicant.

48. For these reasons, this part of the application must be declared inadmissible for being incompatible *ratione materiae.*

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

1. The Applicant's Allegations and Ministry's Observation

49. The applicant made the following submissions:

i. She claimed that the administrative proceedings were initiated due to the school where she worked; that the private schools were operated after they had been established in accordance with the law; that she could not be appointed to the public schools and therefore, she had to work in private school to earn her living. She further alleged that she could not possibly have known that the private school, which had been operating with the permission and under the supervision of the state, was linked to

a terrorist organisation, given that the state had failed for years to find out about this. She claimed that no investigation had been opened against her and that she had no links with a terrorist organisation, and stressed that she could not be prevented from exercising her profession because of her work in a private organisation that had been opened with the permission of the state.

ii. She maintained that the Circular on the basis of which her work permit was annulled was incompatible with the hierarchy of norms; since the Ministry of Education had enacted an unlawful amendment in violation of the Constitution by means of this circular, and that the provisions of the Circular were contrary to the principle of legal security and certainty, its limitations were not clear and it did not contain any precautions against the arbitrary implementation of the administration. She underlined that her connection with the terrorist organization was clearly established by the administrative and judicial authorities to annul her work permit and re-issue a new work permit and her request for a review in this respect was dismissed. She also noted that the degree she obtained after years of effort was annulled by a mere administrative procedure and stated that her right to respect for private life, right to a fair trial, right to property, and the right to work and the principle of equality had been violated.

50. In its observations, the Ministry stated as follows:

i. The Ministry has indicated that applicant allegations fall within the scope of the right to work and therefore a decision of incompatibility *ratione materiae* should be rendered.

ii. She reminded the provisions of Decree-Law no. 667; Law no. 5580 and the Circular and also stressed that the action for the annulment of the Circular was still pending; the employees to work in the private educational institutions are required to obtain a work permit from the Governorate and the Governorate may only annul the work permits issued by the Governorate itself due to the sphere of competence and the principle of parallelism in the procedure. In the present case, it was indicated that the applicant's work permit was annulled by the Governorate pursuant to the legal regulations and therefore it was concluded that this administrative act had a legal basis since a new work permit cannot be issued to the

applicant on the grounds that the annulment had been recorded in the system.

iii. In the aftermath of the failed coup attempt, the state of emergency had to be declared in order to restore national security, and the necessary measures were resorted to counter this serious terrorism threat. In this regard, it was emphasised that the measures taken included the closure of private educational institutions that were deemed to have a connection or affiliation with or to belong to FETÖ/PYD, an organisation established to pose a threat to national security, and the refusal to issue work permits to the employees of these institutions who applied work in public or private educational institutions. Subsequently, it was pointed out that the alleged interference with the applicant's right to respect for private life pursued legitimate aims, such as the maintenance of national security and public order and the commission of an offence in a country facing a serious terrorism threat.

iv. On the other hand, the Ministry has highlighted that the measures regulating the approval of the work permit allowing work in public institutions under the Ministry of National Education and in private institutions, only restricted the applicant's profession as a primary school teacher; that there was no obstacle preventing the applicant from engaging in any income-generating economic activity and working in other fields, and that the applicant had not made any concrete allegation claiming that she could not work in other professions.

51. In her counter-arguments against the observations of the Ministry, the applicant has made the following submissions:

i. She stated that the decision to annul the work permit was lifted by the letter of the General Directorate of Private Educational Institutions of the Ministry of National Education dated 2 June 2020 and by the decision of the Commission, rendered as a result of the Governorate's assessment dated 28 May 2020, and although she was informed of the fact that there was no obstacle to her working in institutions under the Ministry of National Education; arguing in favour of the annulment proceeding by the Ministry in the Observation caused discrepancies.

ii. The applicant further submitted that the Ministry's opinion as to her ability to work in other occupations had no legal value, that she had been practising her profession as a teacher for years, that the interference complained of was unlawful and arbitrary and that she therefore did not accept the Ministry's opinion.

2. The Court's Assessment

52. Article 20 § 1 of the Constitution, titled "*Privacy of private life*", provides insofar as relevant as follows:

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

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

54. It has been observed that the applicant's allegations concern her inability to exercise her profession due to the annulment of her work permit and the prevention of her working in another teaching institution. It is indisputable that professional life and private life are intertangled and that the right to respect for private life becomes an issue of discussion in the cases involving measures against or interferences with professional life are in question. Accordingly, at the outset, the criteria must be set out to determine what kinds of measures and interferences concerning professional life should be regarded as falling the ambit of private life and which parts of the impugned dispute can be examined in this respect and an assessment must be conducted in the light of those criteria (see *Tamer Mahmutoğlu,* § 82).

55. In the event that the present application is dealt with under this aspect and after it is determined that the right to respect for private life is applicable to the present case, it is considered that all the applicant's allegations should be examined in the framework of the right to respect for private life.

a. Applicability

56. In its several previous judgments, the Court has frequently stressed that the right to respect for private life also embodies the right to be in contact with those in the relevant person's circle and assures the right to maintain a private social life; and that individuals' professional life is closely interrelated with their private life (see *K.Ş.*, no. 2013/1614, 3 April 2014, § 36; *Serap Tortuk,* no. 2013/9660, 21 January 2015, § 37; *Bülent Polat* [Plenary], no. 2013/7666, 10 December 2015, § 62; *Ata Türkeri,* no. 2013/6057, 16 December 2015, § 31; *Ö.Ç.*; no. 2014/8203, 21 September 2016, § 50; *Haluk Öktem* [Plenary], no. 2014/13433, 13 October 2016, § 27; *E.G.* [Plenary], no. 2014/12428, 13 October 2016, § 34).

57. In its *Tamer Mahmutoğlu* judgment, the Constitutional Court ruled that *the right to respect for private life* is applicable in cases where private life concerns an individual's actions in his or her professional life. In the same judgment, the Court also defined the circumstances required to assess, in the context of the right to respect for private life, interference with professional life imposed without reference to a ground relating to private life (see *Tamer Mahmutoğlu,* §§ 84-90).

58. It was understood that the school where the applicant worked had been closed down by Decree Law no. 667 of the State of Emergency on the grounds of the school's links with the terrorist organisation FETÖ/PYD and that the applicant had been prohibited from working in another private educational establishment on the grounds of the refusal to re-issue a work permit following the cancellation of her previous work permit by the circular of the Ministry of National Education. As a preliminary point, it must be emphasised that the interference with the applicant's ability to exercise her profession as a teacher cannot automatically make the right to respect for private life applicable to the present case. In order to establish the applicability of the right to respect for private life to the present case, the latter must be assessed in the light of the criteria laid down in the above-mentioned decisions.

59. It is observed from the application file that the interference with the professional life of the applicant was not based on any grounds relating to her private life. It has been understood that the prohibition preventing

the applicant from practicing her profession came into effect on 29 July 2016 with the annulment of her work permit and was lifted on 28 May 2020. In this case, it can be said that the interference with the applicant's professional life preventing her from working as a teacher in private educational institutions significantly affected her private life and this effect reached a certain level of gravity. As a matter of fact, the measure taken can yield severe repercussions in terms of undermining the applicant's opportunity to establish and improve relationships, protecting his social and professional reputation, and practising her profession. In this respect, it has been concluded that the application can be examined within the scope of the right to respect for private life in light of the repercussions of the impugned interference and the applicant's allegations as to the practising her profession was assessed under the said right as a whole.

b. Admissibility

60. For an individual application to be lodged with the Court, the ordinary legal remedies must be primarily exhausted. Respect for fundamental rights and freedoms is the constitutional duty of all organs of the State, and it is the duty of administrative and judicial authorities to redress the violations of rights resulting from the neglect of this duty. Therefore, it is essential that the alleged violations of fundamental rights and freedoms be first brought before, and evaluated and ultimately resolved by, the inferior courts (see *Ayşe Zıraman and Cennet Yeşilyurt*, no. 2012/403, 26 March 2013, § 16).

61. Accordingly, individual application to the Constitutional Court is a remedy of subsidiary nature which may be resorted to in case of inferior courts' failure to redress the alleged violations. As required by the subsidiary nature of the individual application mechanism, in order for an individual application to be lodged with the Court, ordinary legal remedies must primarily be exhausted. In accordance with this principle, the applicant must first duly lodge his/her complaints with the competent administrative and judicial authorities in a timely manner, submit his/her information and evidence to the relevant authorities, and also exercise due diligence in pursuing his/her case and application during this process (see *Ayşe Zıraman and Cennet Yeşilyurt*, § 17).

62. The remedies to be exhausted must not only be accessible, but must also be capable of providing a remedy and, if exhausted, must give the applicant a reasonable prospect of success in redressing his/her grievances. In other words, to be considered effective, the remedy must be capable of essentially establishing that a given right has been violated due to a breach of the constitutional guarantees and providing an adequate remedy. It is therefore not enough to simply include these remedies in legislation; they must also be proven to be effective in practice, or at least not ineffective (see *Ramazan Aras*, no. 2012/239, 2 July 2013, § 29). Moreover, the suspicion that a remedy which has a reasonable prospect of success in abstracto will not succeed in practice does not justify the non-exhaustion of that remedy. In particular, remedies that have been created subsequently and have not yet been implemented should be assessed in this context (see *Ramazan Korkmaz*, no. 2016/36550, 19 July 2017, § 33).

63. In the present case, it was understood that commissions were established by the order of the Ministry of National Education to assess the administrative decisions as to the annulment of the work permit and the refusal to issue a new work permit. According to the letter of the Ministry of Education (see § 19), the functions of the commissions established by the governorates are limited to conducting a re-examination and informing the Ministry of Education of the individuals that were found to have no membership to, connection, or affiliation with the terrorist organisation. It was envisaged that a board operating under the presidency of the deputy minister of the Ministry of National Education would assess the state of the individuals found by the commission.

64. In the light of the explanations provided by the Ministry of National on the functioning of the Commission and the legislation, it was noted that no regulation was enacted concerning the establishment, structure, working procedure of the impugned Commission, the procedure for applying to the Commissions, the possible legal remedies against the decision of the Commission and the nature of the said decisions. Additionally, it is not clearly indicated how and on the basis of which documents the commission will carry out its examination and how the commissions will possess the authority to render decisions on the redress of the damages that might arise. In this sense, application to the commission cannot be accepted

as an effective legal remedy that needs to be exhausted and capable of offering redress by conducting an examination on the merits of the alleged violations. Therefore, the applicant cannot be expected to apply to the Commission, which, according to the applicant, does not offer an effective and sufficient remedy to redress the violation of the said right.

65. Furthermore, in the event that after a violation was found as to a measure or a decision in favour of the applicant and the administrative authorities and inferior courts redress the impugned violation in an appropriate and sufficient manner, the Constitutional Court cannot accept the allegations regarding the victim status of the applicant. Elimination of the victim status is dependent upon the nature of the right allegedly violated, the grounds of the violation decision and whether the damages arising due to the violation had been redressed (see *Sadık Koçak and Others*, no. 2013/841, 23 January 2014, §§ 83, 84).

66. It is understood from the mentioned decision of the Constitutional Court that *a finding of a violation (unlawfulness) and the redress of the repercussions of this violation are required* in order to be able to accept the elimination of the victim status. In the present application, it has been observed that the prohibition on the applicant's working was put into effect on 29 July 2016 and was lifted on 28 May 2020 by the Commission's decision and the applicant could not exercise her profession during this period. In view of the fact that the Commission established by a circular cannot assess the lawfulness of the proceedings against the applicant and cannot find any evidence that they are unlawful and given the lack of data on the commission's capacity to redress the consequences of the violation, the applicant's status as a victim is established. Due to the above-mentioned reasons, the alleged violation of the right to respect for private life is not manifestly ill-founded and it is not inadmissible on any other grounds. It must therefore be declared admissible.

c. Merits

67. It is not in every case possible to make an exact definition of, and a distinction between, negative and positive obligations inherent in the right to respect for private life. Negative obligations incumbent on the State require to refrain from any arbitrary interference with right to

respect for private life. Positive obligations on the other hand necessitate the protection of this right and taking of specific measures so as to afford the safeguards inherent in the respect for private life even in the sphere of relations among individuals (see, for similar assessments, *Adnan Oktar (3)*, no. 2013/1123, 2 October 2013, § 32; *Ömür Kara and Onursal Özbek,* no. 2013/4825, 24 March 2016, § 46; *Tamer Mahmutoğlu*, § 98).

68. Given that the applicant's work permit allowing the applicant to work as a teacher was annulled by the administration and a new work permit allowing her to work in another institution was not issued and this proceeding was upheld by the inferior courts; the application should be assessed within the context of the negative obligations of the state.

(i) Existence of an Interference

69. It has been concluded that the applicant's right to respect for private life was interfered with on the grounds that the administrative decision annulling the applicant's work permit and refusal to issue a new work permit was finalized following a court decision and the applicant was deprived of the opportunity to exercise her profession.

(ii) Whether the Interference Constituted a Violation

70. Article 13 of the Constitution reads as follows:

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

71. The aforementioned interference amounts to a violation of Article 20 of the Constitution unless it complies with the conditions set out in Article 13 thereof. Therefore, it must be determined whether the interference complied with the requirements of being prescribed by law, pursuing a legitimate aim and not being contrary to the principle of proportionality and the requirements of a democratic society order, which are relevant for the present application and laid down in Article 13 of the Constitution (see R.G. [Plenary], no. 2017/31619, 23 July 2020, § 82; *Halil Berk*, no. 2017/8758,

21 March 2018, § 49; *Süveyda Yarkın*, no. 2017/39967, 11 December 2019, § 32; *Şennur Acar*, no. 2017/9370, 27 February 2020, § 34).

(1) General Principles

72. The Constitution envisages that any form of restriction may be imposed absolutely by law. According to the well-established case-law of the Constitutional Court, the interference should formalistically rely on a law to fulfil the requirement of lawfulness prescribed in Article 13 of the Constitution (see *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 31; *Bülent Polat* [Plenary], no. 2013/7666, 10 December 2015, § 75; *Fatih Saraman* [Plenary], no. 2014/7256, 27 February 2019, § 65; *Turgut Duman*, no. 2014/15365, 29 May 2019, § 66; *Tamer Mahmutoğlu*, § 103).

73. However, the statutory arrangements concerning the restriction of fundamental rights and freedoms must not be available merely in theory. The lawfulness requirement also entails the existence of an effective content. At this point, what is of importance is the quality of the given law. The requirement of being restricted by law points to the accessible, foreseeable and precise nature of the restriction. It is thereby aimed at precluding any arbitrary acts of the practitioner and also enabling individuals to know the law, thereby ensuring legal security (see *Halime Sare Aysal* [Plenary], no. 2013/1789, 11 November 2015, § 62; *Fatih Saraman*, § 66; *Turgut Duman*, § 67; *Tamer Mahmutoğlu*, § 104).

74. A given law may be considered to comply with these requirements only when it is sufficiently accessible; when the citizens have adequate knowledge of the existence of the provisions of law which are applicable to a given case; when the relevant law affords appropriate protection against arbitrariness; and when it precisely defines the extent of the power afforded to the competent authorities and the way how such power may be exercised (see *Halime Sare Aysal*, § 63; *Fatih Saraman*, § 67; *Turgut Duman*, § 68; *Tamer Mahmutoğlu*, § 105).

75. The law itself, except for any administrative practice it would involve, explicitly defines the scope of the discretionary power afforded to the competent authorities to protect the individuals against arbitrary interferences also in consideration of the legitimate aim pursued by

the impugned act. The legal system should demonstrate to the citizens, with sufficiently explicit expressions, under which circumstances and within which limits the public authorities are empowered to interfere. In this sense, the legal system should enable the parties of an impugned interference to foresee the conditions underlying the interference and its possible outcomes (see *Halime Sare Aysal*, § 64; *Fatih Saraman*, § 68; *Turgut Duman*, § 69; *Tamer Mahmutoğlu*, § 106).

76. However, the extent of protection afforded by the legislation, which could not offer a solution for every opportunity, is mainly associated with its field and content, as well as the quality and quantity of its addressees. Therefore, the complex nature of a given provision of law, or its abstract nature to a certain degree, and thereby, its gaining clarity and precision through legal advice cannot be per se considered to fall foul of the principle of legal foreseeability. In this sense, the provision of law, allowing for interference with any right or freedom, may, of course, grant discretionary power, to a certain degree, to the executive; however, it is necessary that the limits of such discretionary power be set in a sufficiently clear manner, and the provision of law ensure a sufficient degree of certainty (see *Halime Sare Aysal*, § 65; *Fatih Saraman*, § 69; *Turgut Duman*, § 70; *Tamer Mahmutoğlu*, § 107).

77. In conclusion, the judicial bodies that have the authority to examine the fulfilment of the impugned criteria assess whether the legal provisions relied on by the authorities for interferences are accessible, foreseeable, and certain, and are obliged to implement the legal provisions to the case before them within the scope of the aforementioned framework (see *Tamer Mahmutoğlu*, § 108).

(2) Application of Principles to the Present Case

78. Given the decisions of the inferior courts, the impugned administrative proceeding in the present case relies on the Decree Law no. 667 of the State of Emergency, Law no. 5580; and the Circular dated 21 July 2016 of the Ministry of National Education. Firstly, it was observed that private educational institutions found to pose a threat to national security or to be in connection with the terrorist organisation were decided to be closed with the Decree Law no. 667 of the State of Emergency; however,

no regulations have been laid out as to the annulment of the work permit of the employees of these institutions and the prohibition on working in other private educational institutions.

79. Article 8 of Law no. 5580 stipulates that the governorate shall issue work permits to individuals having the status of manager, teacher, expert teacher and experienced teacher to work in private educational institutions provided that they fulfil the required conditions. Additionally, Article 10 of the same Law indicates that in the case of a failure found by the inspection report, the work permit can be annulled by the governorates. The procedure for applying for a work permit is laid down in Article 26 of the Regulation. Accordingly, the mentioned Law and the Regulation together provide that working in private education institutions were subjected to a work permit issued by the governorate, in this context the governorate can issue work permits to the individuals fulfilling the conditions indicated in the regulation as a result of its examination; however, this work permit will only allow the relevant individual to work in that specific school with which he/she has signed a contract.

80. In this regard, there was no clear regulation prescribing that work permits are required to be annulled in the case of the closure of private educational institutions, but general regulations indicating that the work permit can be issued and annulled by the governorates. Furthermore, it has been observed that there are no regulations as to imposing a direct prohibition on the individuals practising their professional dependent upon work permit to work in private institutions as a result of the annulment of the said work permit and the conditions of implementing such a prohibition. In this case, it can be concluded that the prohibition on the applicant to work in private educational institutions due to the closure of the school where she worked, without conducting any examination specific to the individual lacks legal basis.

81. On the other hand, the administrative and judicial authorities accepted that the interference with the applicant's private life had a legal basis by referring to the Law and the Regulation; however, in order to accept that the lawfulness criteria is met, it is not enough for the provisions relied on for the restriction of the fundamental rights and freedoms to exist

in a formalistic way. In addition, the law should offer substantive content enabling the interference, accessibility of the restriction, foreseeability, and certainty (see, for similar considerations, *Tamer Mahmutoğlu*, § 110).

82. Given the regulations pointed as the basis of the interference, it is clear that the general provisions are laid out as to the issuance of the work permit and its annulment but the conditions of the annulment, the scope, and the limits of the administration's margin of appreciation were not clearly defined in the regulations and the regulations in question does not offer a certainty capable of providing foreseeability of the rule. Additionally, the inferior courts failed to conduct a sufficient determination as to the applicability of the contested provision to the present case. It should be pointed out that Decree-Law no. 667 of the state of emergency only contains a provision requiring the closure of private educational institutions and does not contain any provisions regarding the teachers and staff working in these institutions and the prohibition of their working in other private educational institutions; this prohibition was established by the Circular and it is not possible to restrict fundamental rights and freedoms by means of a regulatory administrative act.

83. As mentioned, the first and foremost requirement for interference with the right to respect for private life to be accepted as compatible with the safeguards provided in the Constitution is the existence of a legal basis for the interference. In the present case, it is established that the interference with the applicant's private life relied on the circular of the Ministry of National Education. Accordingly, it has been understood that an administrative act prevented the applicant from exercising her profession without being clearly provided for by the relevant law.

84. In light of the above-mentioned findings, as it is concluded that the impugned interference did not meet the lawfulness criteria, it is not considered necessary to conduct a separate assessment as to the conformity of the interference with other safeguard criteria.

85. Due to the above-mentioned reasons, the Court decided that the right to respect private life guaranteed by Article 20 of the Constitution was violated.

E. Application of Article 50 of Code no. 6216

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

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

(2) If the violation found arises out of a court decision, the file shall be sent to the relevant court for holding a retrial in order for the violation and the consequences thereof to be removed. Where there is no legal interest in holding a retrial, the applicant may be awarded compensation or be invited to institute proceedings before the general courts. The court which is responsible for holding the retrial shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."

87. The applicant requested a finding of a violation, retrial, and compensation in the amount of TRY 500,000 for pecuniary damage and TRY 500,000 for non-pecuniary damage.

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

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

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

90. In the present case, it was concluded that the interference preventing the applicant from practising his profession had violated the right to respect for private life due to the lack of legal basis for the interference. It was understood that the impugned violation derived from the annulment of the work permit and the administrative act prescribing the prohibition on working. Furthermore, the inferior courts also failed to offer redress for the violation.

91. With regard to the damages incurred due to the administrative act which was found to lack legal basis, the full remedy action is functional for ensuring the restitution to the extent possible, that is to restore the situation to the state it was in prior to the violation. According to the applicant's statement, it is understood that the Commission decision dated 28 May 2020 lifted the act annulling her work permit and the prohibition on working. Therefore, given that the administrative act was lifted and the Constitutional Court found a violation due to the lack of legal basis for the impugned administrative act; it has been assessed that even though the applicant had suffered damages stemming from the administrative act in question, there has been no obstacle to directly filing for a full remedy action and that legal certainty in this regard was also established by the violation decision. There is no legal interest in conducting a re-trial as a result of the action for the annulment.

92. On the other hand, it is evident in the present case that a finding of a violation will remain insufficient to redress the damages the applicant had suffered. Therefore, it must be decided that the applicant be awarded by TRY 20,000 in respect of non-pecuniary damage for the damages that cannot be redressed by a finding of a violation of the right to respect for private life in order to eliminate all of the consequences of the violation.

93. In order for the Constitutional Court to award the applicant pecuniary compensation, there must be a causal link between the applicant and the harm which she/he considers to have sustained on account of the alleged

violation. Therefore, the applicant's claim for pecuniary compensation must be rejected on the grounds that she did not submit any documents on this matter.

94. The total litigation costs TRY 4,500 including the counsel's fee, as established on the basis of the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 6 January 2022 that

A. The request for legal aid be ACCEPTED

B. 1. The alleged violation of the presumption of innocence be DECLARED INADMISSIBLE due to *incompatibility ratione materiae*;

2. The alleged violations of the right to respect for private life be DECLARED ADMISSIBLE;

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

D. A net amount of TRY 20,000 be PAID to the applicant in compensation for non-pecuniary damage and that the remaining compensation claims be DISMISSED;

E. The total litigation costs of TRY 4,500 including the court fee be REIMBURSED to the applicant;

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

G. A copy of the judgment be SENT to the 11th Chamber of the İstanbul Administrative Court (E.2017/1621), the 7th Administrative Chamber of the İstanbul Regional Administrative Court (E.2018/461) and the Ministry of Justice for information.

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

RAMAZAN ŞAHİN

(Application no. 2018/11988)

10 March 2022

On 10 March 2022, the Plenary of the Constitutional Court found a violation of the right to the protection of personal data under the right to respect for private life, safeguarded by Article 20 of the Constitution, in the individual application lodged by *Ramazan Şahin* (no. 2018/11988).

THE FACTS

[8-28] The applicant works as a civil servant in the Municipality of Söke ("the Municipality"). Following the introduction of the fingerprinting system for tracking working time, the applicant's fingerprints were taken at his workplace. Following the Municipality's rejection of his application for annulment of the impugned practice, the applicant brought an action before the administrative court for annulment of the impugned administrative act.

The court upheld the action and decided to annul the impugned administrative act. In the reasoning of the decision, it was stressed that the issue of the monitoring of working hours by means of the fingerprint scanning system should be assessed in the context of the processing of personal data in the framework of the right to respect for private life, with reference to the relevant legislation. The Municipality filed an appeal on points of fact and law against the decision. The İzmir Regional Administrative Court ("the Regional Administrative Court") upheld the appeal and issued a final decision dismissing the action.

The applicant lodged an individual application on 5 February 2018.

V. EXAMINATION AND GROUNDS

29. The Constitutional Court ("the Court"), at its session of 10 March 2022, examined the application and decided as follows:

A. The Applicant's Allegations

30. The applicant made the following submissions:

i. Emphasising that fundamental rights and freedoms may be restricted only by law on the grounds set out in the Constitution, he submitted that Law no. 657 contained provisions on the working hours of civil

servants and the determination of the starting and ending times of the daily working hours, but that there was no provision on the monitoring (supervision) of the attendance of civil servants at work. The applicant further argued that the print on the last joint and the tips of the fingers is unique to each person and that the fingerprint reader generates a code by recording the fingerprint when the finger is pressed on the panel, thus processing personal data.

ii. He explained that for this system to work, employees' fingerprints would have to be stored somewhere within the Municipality, and that even the defendant Municipality could not guarantee how the stored data would be used or whether these records would be shared with other individuals and institutions. He further submitted that the Regional Administrative Court had dismissed the action for annulment on the basis of an erroneous assessment, despite the fact that the impugned act had no legal basis and that he had not given his consent to it, and that his right to respect for private life, the right to the protection of personal data, the right to a fair trial and the prohibition of forced labour had been violated.

B. The Court's Assessment

31. The first and third paragraphs of Article 20 of the Constitution, entitled *"Privacy of private life"*, which will be taken as basis in the assessment of the allegation, provide as follows:

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

...

Everyone has the right to request the protection of their personal data. This right includes being informed of, having access to, and requesting the correction or deletion of personal data, and being informed of whether these are used in consistency with envisaged objectives. Personal data may be processed only in the cases provided for by law or with the explicit consent of the person concerned. The principles and procedures regarding the protection of personal data shall be laid down by law."

32. The right to respect for private life is safeguarded by Article 20 of the Constitution. The State is obliged to refrain from arbitrary interference

in the private and family life of individuals and to prevent unjustified attacks by third parties. One of the legal interests protected by the right to respect for private life is the right to privacy, which includes not only the right to be left alone, but also the individual's legal interest in controlling information about him/her. An individual has an interest in ensuring that information about him/her is not disclosed or disseminated without his/her consent, that such information is not accessible to others, and that it is not used without his/her consent, in other words, that such information remains confidential. This refers to the individual's right to determine the future of information about him/her (see *Serap Tortuk*, no. 2013/9660, 21 January 2015, §§ 31, 32). The right to the protection of individuals' personal data, which falls under the right to respect for private life, is explicitly enshrined in Article 20 of the Constitution (see *Nurcan Belin*, no. 2014/14187, 10 January 2018, § 38).

33. Article 20 § 3 of the Constitution stipulates that everyone has the right to request the protection of their personal data, which includes the right to be informed about it, to have access to it, to request its correction or deletion and to check whether it is being used for the purposes intended. It also provides that personal data may be processed only in the cases provided for by law or with the explicit consent of the data subject, and that the principles and procedures for the protection of personal data shall be regulated by law. The right to the protection of personal data aims to protect the rights and freedoms of individuals with regard to the processing of their personal data, as a specific form of the right to the protection of human dignity and the free development of personality (see the Court's judgment no. E.2014/122, K.2015/123, 30 December 2015, §§ 19, 20; and *Nurcan Belin*, § 45).

34. As stated in the Court's judgments, personal data includes any information relating to an individual, provided that he/she is an identified or identifiable person. It should be noted that not only personal identifying information such as name, surname, date and place of birth, but also any information such as telephone number, motor vehicle registration number, social security number, passport number, curriculum vitae, photograph, camera and audio recordings, fingerprints, health information, genetic information, IP address, e-mail address, shopping habits, hobbies,

preferences, persons interacted with, group memberships and family information, which leads directly or indirectly to the identification of the person, are considered as personal data (see the Court's judgments no. E.2014/74, K.2014/201, 25 December 2014; no. E.2014/180, K.2015/30, 19 March 2015).

35. In order to carry out an examination from the point of view of the right to the protection of personal data safeguarded by Article 20 § 3 of the Constitution, it must first be determined whether there are personal data that must be protected under the said right. Given the wording of the relevant constitutional provision, relevant international documents and comparative law, any form of information relating to an identified or identifiable natural or legal person is considered personal data. However, in each case or application, the question of whether personal data within the meaning of Article 20 § 3 of the Constitution are involved is addressed autonomously in the particular circumstances of the case or application in question. In cases involving personal data, any form of restriction or interference with such data triggers the safeguards inherent in the said constitutional provision (see *E.Ü.*, § 59).

36. In addition, Article 6 of Law no. 6698 (see § 22) establishes a specific and limited list of *specific categories of personal data*, the processing of which is subject to more restrictive conditions than the processing of general categories of data. The aforementioned regulation also recognises biometric data as a specific category of personal data. Biometric data are considered as a specific category of personal data because they contain biological or behavioural information that makes it possible to distinguish one individual from another and to identify the individual's identity. It is clear that fingerprints also contain physiological information that is unique to the individual and that is used to directly identify the identity of the individual and, in this context, are considered as biometric data.

37. The Court is not bound by the legal qualification of the facts by the applicant and it makes such an assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). In the present case, the applicant, who worked as a civil servant, had his fingerprints registered in a system for monitoring his attendance at work and his working hours were monitored by that system. In view of the fact that fingerprints are different for each

individual and contain personal information which makes it possible to identify the person biologically, it is established that they are biometric data. In this case, considering that the applicant's fingerprint falls within the scope of *information relating to a specific natural person*, it has been considered that the access, use and processing of this information should be examined in the light of the right to request the protection of personal data in the context of the right to respect for private life.

1. Admissibility

38. The alleged violation of the applicant's right to request the protection of personal data under the right to respect for private life must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

a. Existence of an Interference

39. In the present case, it has been understood that the Municipality collected the applicant's fingerprints and used them for the monitoring of working hours with the fingerprint scanning system. There is no doubt that the applicant's fingerprints can be classified as *personal data*. Accordingly, it has been concluded that the processing of the personal data in question constitutes an interference with the right to request the protection of personal data in the context of the right to respect for private life, as guaranteed by Article 20 § 3 of the Constitution.

b. Whether the Interference Amounted to a Violation

40. Article 13 of the Constitution reads as follows:

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

41. The aforementioned interference amounts to a violation of Article 20 of the Constitution if it does not comply with the conditions set out in

Article 13 thereof. It must therefore be determined whether the interference satisfies the requirements of being prescribed by law, pursuing a legitimate aim and not being contrary to the principle of proportionality and the requirements of a democratic social order, which are relevant to the present application and are laid down in Article 13 of the Constitution (see *Halil Berk*, no. 2017/8758, 21 March 2018, § 49; *Süveyda Yarkın*, no. 2017/39967, 11 December 2019, § 32; *Şennur Acar*, no. 2017/9370, 27 February 2020, § 34; *R.G.* [Plenary], no. 2017/31619, 23 July 2020, § 82). In this respect, it must be examined in the present case whether the impugned interference had a legal basis.

i. General Principles

42. As set forth in the Constitution, the restriction of fundamental rights and freedoms must primarily be prescribed by law. The requirement of being prescribed by law, or the principle of lawfulness, is enshrined in Article 8 of the European Convention on Human Rights ("the Convention") as a criterion of restriction and protection. However, the notion of *being prescribed by law* laid down in the Convention is not exactly the same as *the principle of lawfulness* enshrined in the Constitution (see *Bülent Polat* [Plenary], no. 2013/7666, 10 December 2015, § 73).

43. The European Court of Human Rights ("the ECHR") interprets the requirements prescribed by law, i.e. lawfulness, in a broad manner and accordingly acknowledges that the principles laid down by established case-law in judicial decisions may also satisfy the requirement of lawfulness (see *Malone v. the United Kingdom* [GC], no. 8691/79, 2 August 1984, §§ 66-68; *Sunday Times v. the United Kingdom (no. 1)* [GC], no. 6538/74, 26 April 1979, § 47), whereas the Constitution provides that any form of restriction may be imposed absolutely *by law*, thereby offering broader protection than that afforded by the Convention (see *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 31; *Bülent Polat*, § 75). Article 13 of the Constitution, which stipulates that fundamental rights and freedoms may only be restricted by law, does not allow the executive and the administration to restrict any right or freedom by means of a first-hand regulatory act in the absence of a statutory provision (see *Tuğba Arslan* [Plenary], no. 2014/256, 25 June 2014, § 87).

44. Article 13 of the Constitution, which sets out the criteria for restricting fundamental rights and freedoms, provides that fundamental rights and freedoms may be restricted *only by law*. Moreover, the third sentence of Article 20 § 3 of the Constitution states that personal data may be processed *"only in the cases provided for by law or with the explicit consent of the person concerned"* and the fourth sentence states that the principles and procedures for the protection of personal data shall be regulated *"by law"*. Accordingly, the primary criterion to be taken into consideration in the case of any interference with the right to the protection of personal data is whether the interference in question has a legal basis (see *Arif Ali Cangı*, § 72).

45. However, the statutory provisions for restricting fundamental rights and freedoms must not be merely theoretical. The requirement of lawfulness also implies the existence of a substantive content. This is where the quality of the law is important. The requirement of being restricted by law refers to the accessible, foreseeable and precise nature of the restriction. It is thereby intended to preclude any arbitrary acts by the practitioner and also to enable the individual to know the law, thus ensuring legal security (see *Halime Sare Aysal* [Plenary], no. 2013/1789, 11 November 2015, § 62).

46. A given law can be considered to satisfy these requirements only if it is sufficiently accessible, if citizens have adequate knowledge of the existence of the legal provisions applicable to a given case, if the law in question provides adequate safeguards against arbitrariness, and if it clearly defines the scope of the power conferred on the competent authorities and the way how such power may be exercised (see *Halime Sare Aysal*, § 63).

47. The law itself, except for any administrative practice which it may entail, expressly defines the scope of the discretionary power granted to the competent authorities to protect individuals against arbitrary interference, also in the light of the legitimate aim pursued by the impugned act. The legal system should demonstrate the citizens, with sufficiently explicit expressions, that under which circumstances and within which limits the public authorities are empowered to interfere. In this sense, the legal

system should enable the parties of an impugned interference to foresee the conditions underlying the interference and its possible outcomes (see *Halime Sare Aysal*, § 64).

48. However, the extent of the protection afforded by the legislation, which could not provide a solution for every opportunity, is mainly associated with its field and content, as well as the quality and quantity of its addressees. Therefore, the complexity or, to a certain extent, the abstract nature of a given provision, and therefore its clarification and precision through legal advice, cannot *per se* be considered contrary to the principle of legal foreseeability. In this sense, a legal provision which allows for an interference with a right or a freedom may, of course, grant a certain margin of discretion to the practitioner; it is, however, necessary that the limits of such discretion be set out in a sufficiently clear manner and that the legal provision ensure a sufficient degree of certainty (see *Halime Sare Aysal*, § 65).

49. In this context, while the relevant legal provision sets the basic framework of the restriction in question, the conditions of its implementation and the procedural details may be determined by regulatory acts. In this case, however, the regulatory acts must be accessible to the parties concerned and must be clear and precise enough to enable the parties concerned to have sufficient knowledge of the contents thereof (see *Halime Sare Aysal*, § 66).

ii. Application of Principles to the Present Case

50. Article 20 of the Constitution stipulates that personal data may be processed *"only in the cases provided for by law or with the explicit consent of the person concerned"*. On the other hand, Law no. 6698 establishes different rules for the processing of personal data, depending on the nature of the data. In this regard, Article 5 § 1 of the aforementioned Law establishes that, as a general rule, personal data of a general nature may be processed with the explicit consent of the data subject, and Article 5 § 2 introduces the exceptions to this provision.

51. In Article 6 of Law no. 6698, the legislator has established more restrictive rules for the processing of *specific categories of personal data*

due to their importance. According to the contested regulation, specific categories of data, other than personal data concerning health and sexual life, may be processed with the explicit consent of the data subject. The only exception to this provision is that specific categories of personal data may be processed without the consent of the person concerned if required by the relevant legal provisions. In the light of Article 20 § 3 of the Constitution and the provisions of the aforementioned Law, it can be said that biometric data falling under specific categories of personal data may be processed without obtaining the consent of the person concerned if he/she has given his/her explicit consent or under the conditions provided for in the second sentence of Article 6 § 3 of the Law or in another law. Moreover, the contested regulation does not include the working arrangements of institutions or organisations among the grounds for processing data without consent. In the context of these considerations, in the present case, in order to record and use the fingerprints of the municipal employees, which fall within the specific category of personal data, this circumstance must be separately and clearly regulated by a law or the explicit consent of the employees must be obtained.

52. In the present case, it has been established that the Municipality used the fingerprint scanning system to monitor staff compliance with working hours and that the applicant's fingerprint was collected and stored accordingly. It can be seen that administrations and employers wishing to take advantage of technological developments are using methods such as magnetic ID cards, facial and iris scanning, fingerprint registration systems that can track working hours, and workplace entry and exit controls, with the aim of increasing staff efficiency and ensuring security.

53. Furthermore, it should be emphasised that the use of a staff monitoring system, in particular through the collection of biometric data, requires the explicit consent of the individual in cases not regulated by law. Moreover, the processing of specific categories of data on the basis of the employee's consent must necessarily respect the principle of lawfulness in the context of Article 13 of the Constitution. The existence of explicit consent requires, as a minimum, that the employee be adequately informed in advance of the scope, purpose, limitations and consequences

of the personal data to be processed. However, it can be said that the above-mentioned methods can be applied within the framework of the administrative power of control and management, as a rule, if there is a legitimate purpose, if there is no other way to achieve this purpose with less interference with rights and freedoms, and if it is limited to the purpose. In this regard, it should be borne in mind that the administration should provide constitutional safeguards to protect the rights and freedoms of employees when adopting methods involving the processing and sharing of personal data in the workplace.

54. In addition, in the absence of the employee's consent to the processing of personal data, specific categories of personal data may be processed only in cases expressly provided for by law. In other words, in cases where the principles and procedures for processing the employee's specific categories of personal data are regulated by law, the provisions of the relevant law may be applied even in the absence of consent. In addition, it should be stressed that the law should be such as to establish the basic principles and procedures regarding the matter, including the limitation of the fundamental rights and freedoms of the employee. In this context, it is expected that the principles governing the scope and retention of the processing of personal data will be set out in the law and in regulations based on the relevant law. The law should also contain clear and detailed rules on retention periods, third party access, and procedures for use and destruction of data, in order to ensure that addressees have adequate safeguards against disproportionate and arbitrary practices. It should also be recalled that any restriction imposed by law must, of course, meet the requirements of being prescribed by law, pursuing a legitimate aim and not being contrary to the principle of proportionality and the requirements of a democratic social order.

55. In the present case, it is undisputed that the applicant did not consent to the registration of his fingerprints by the Municipality for the purpose of monitoring the working hours of employees and, therefore, did not consent to the processing of sensitive personal data about him. However, in the absence of the individual's consent, the processing of specific categories of personal data may take place if it is expressly provided for by law. In this case, since there is no provision for *"explicit consent"* in Article 20 of the

Constitution and Article 6 of Law no. 6698, it should be examined whether the processing of fingerprints in the context of biometric data and their use for the monitoring of working hours is regulated by law. Firstly, it entails that the processing and use of specific categories of personal data (sensitive data) -in relation to the field of activity or sector concerned- is separately and expressly regulated in the laws, *without being expressly provided for in the laws* referred to in the contested legislation. In this context, Law no. 6698 is not a law that expressly regulates this matter, since it authorises the registration of fingerprints of municipal employees and the monitoring of their working hours through the fingerprint scanning system. In this case, it is necessary to examine whether Laws no. 657 and no. 5393, on which the administrations and the lower courts based their reasoning, contain a provision that is clear and appropriate to the present case.

56. In this context, when examining the contested legislation (see §§ 18-20), it can be noted that Law no. 657 contains provisions on the working hours of civil servants in general and on the determination of the starting and ending times of the daily working hours, but there is no explicit provision on the control of the employee's attendance at work and on the processing of sensitive personal data for this purpose. Law no. 5393 provides that the Mayor has the power to direct and manage the municipal organisation, but no provision has been made for the processing of sensitive personal data within the scope of this power.

57. In the light of the foregoing, it is clear that the contested legislation does not contain any provision laying down the basic principles and procedures governing the processing of special categories of personal data for the purposes of tracking working hours or monitoring employees and, in this context, the use of biometric tracking systems. In the context of the explanations, it has been concluded that the impugned act does not meet the requirement of lawfulness, considering that the applicant did not consent to the processing of specific categories of personal data and that the processing and use of biometric data for the control of the employee's compliance with the working hours is not separately and expressly regulated by the aforementioned laws.

58. Since it has been established that the impugned interference did not meet the requirement of lawfulness, there is no need to consider separately whether the alleged interference met other criteria relating to safeguards.

59. In the light of the foregoing, it must be held that the applicant's right to the protection of personal data under the right to respect for private life, safeguarded by Article 20 of the Constitution, was violated.

3. Application of Article 50 of Code no. 6216

60. Article 50 §§ 1 and 2 of Code no. 6216 on the Establishment and the Rules of Procedures of the Constitutional Court of 30 March 2011 ("Code no. 6216") read, insofar as relevant, as follows:

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

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

61. The applicant requested the Court to find a violation, order a retrial, and award him 10,000 Turkish liras ("TRY") in compensation for non-pecuniary damage.

62. In its judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court set out the general principles on how to remedy a violation found. In another judgment, the Court also referred to the consequences of failure to comply with a judgment finding a violation, stating that such a situation would constitute a continuing violation and would also lead to a second violation of the right in question (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

63. Accordingly, if a violation of a fundamental right is established in an individual application, the basic rule for redressing the violation and the consequences thereof is to ensure, as far as possible, restitution, that is to say, the restoration of the original situation prior to the violation. To this end, it is primarily necessary to identify the cause of the violation and then to put an end to the continuing violation, to revoke the decision or act which gave rise to the violation, to redress the consequences thereof, to compensate the pecuniary and non-pecuniary damage resulting from the violation and to take any other measures deemed appropriate in this context (see *Mehmet Doğan*, §§ 55, 57).

64. In cases where the violation results from a court decision or the [trial] court is unable to redress the violation; the Court decides, as a general rule, to send a copy of the judgment to the competent court for retrial in order to redress the violation and the consequences thereof, pursuant to Article 50 § 2 of Code no. 6216 and Article 79 § 1 (a) of the Internal Regulations of the Court. This statutory regulation, unlike similar legal practices available in procedural law, provides for a remedy specific to the individual application mechanism and leads to a retrial for the purpose of redressing the violation. For this reason, when the Court orders a retrial in connection with a judgment finding a violation, the court concerned has no discretion to accept the existence of grounds for a retrial, which differs in this respect from the practice of reopening proceedings in procedural law. Therefore, the court receiving such a judgment is under a statutory obligation to issue a decision to hold a retrial on the basis of the Court's finding of a violation, without waiting for a request to that effect from the person concerned, and to conduct the necessary procedures to redress the continuing violation (see *Mehmet Doğan*, §§ 58, 59; *Aligül Alkaya and Others (2)*, §§ 57-59, 66, 67).

65. In the present case, the Court has concluded that the right to request the protection of personal data in the context of respect for private life was violated by the Municipality's processing of sensitive personal data in the absence of a legal basis. Thus, the violation was deemed to have resulted from the Municipality's action. Furthermore, the lower courts failed to remedy the violation.

66. In the present case, there is a legal interest in conducting a retrial in order to remove the consequences of the violation of the right to request the protection of personal data. A retrial to be conducted in this context is aimed at removing the violation and its consequences in accordance with Article 50 § 2 of Code no. 6216, which contains a provision specific to the individual application mechanism. In this regard, the procedure to be followed is to decide to hold a retrial and to issue a new decision eliminating the reasons that led the Court to find a violation, in accordance with the principles set forth in the judgment finding a violation. For this reason, a copy of the judgment must be sent to the 1st Chamber of the Aydın Administrative Court for retrial.

67. Since it is clear that the retrial will provide an adequate remedy in view of the nature of the violation and its consequences, the applicant's claim for compensation must be dismissed.

68. The total litigation costs of TRY 4,794.70, including the court fee of TRY 294.70 and the counsel fee of TRY 4,500, as established on the basis of the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 10 March 2022 that

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

B. The right to the protection of personal data under the right to respect for private life, safeguarded by Article 20 of the Constitution, was VIOLATED;

C. A copy of the judgment be REMITTED to the 1st Chamber of the Aydın Administrative Court (E.2016/1055, K.2017/221) for retrial to redress the consequences of the violation of the right to the protection of personal data;

D. The applicant's claims for compensation be REJECTED;

E. The total litigation costs of TRY 4,794.70, including the court fee of TRY 294.70 and the counsel fee of TRY 4,500, be REIMBURSED to the applicant;

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

G. A copy of the judgment be SENT to the 2nd Administrative Chamber of the İzmir Regional Administrative Court (E.2017/7571) and to the Ministry of Justice for information.

FREEDOM OF COMMUNICATION (ARTICLE 22)

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

ÜMİT KARADUMAN

(Application no. 2020/20874)

2 February 2022

On 2 February 2022, the Second Section of the Constitutional Court found violations of the right to respect for private life and freedom of communication, safeguarded respectively by Articles 20 and 22 of the Constitution, in the individual application lodged by *Ümit Karaduman* (no. 2020/20874).

THE FACTS

[8-40] The applicant was detained on remand in a penitentiary institution for membership of an armed terrorist organisation.

Pursuant to the Circular of 10 October 2016, which was issued by the Directorate General for Prisons and Detention Houses, the penitentiary institutions throughout the country were informed by the chief public prosecutor's offices that "with the exception of faxes and letters in sealed envelopes sent by remand and convicted prisoners to their lawyers for defence purposes or for submission to the authorities, all letters, faxes and requests must be scanned and uploaded onto the National Judiciary Informatics System ("UYAP") server. The penitentiary institutions took the necessary steps in line with the Circular. The letters, which were sent and received by the applicants, were accordingly uploaded onto the UYAP server within the scope of the said Circular.

The applicant filed an application with the magistrate judge, seeking the termination of this practice and deletion of his records. The magistrate judge, examining the applicant's application, held that the practice in question was not unconstitutional, stressing that as envisaged in Article 68 § 2 of the Law no. 5275 on the Execution of Penalties and Security Measures, the letters, faxes and telegraphs sent and received by the convicts shall be monitored by the Correspondence-Reading Board, and in the absence of such a board, by the highest official of the penitentiary institution. The applicant's challenge against the magistrate judge's decision was dismissed by the assize court.

V. EXAMINATION AND GROUNDS

41. The Constitutional Court ("the Court"), at its session of 2 February 2022, examined the application and decided as follows:

A. Request for Legal Aid

42. The applicant stated that he could not afford to pay the litigation costs and accordingly sought legal aid.

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

B. Alleged Violations of the Right to Respect for Private Life and Freedom of Communication

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

44. The applicant claimed that the indefinite uploading of all letters, which he wished to send or which were sent to him in the penitentiary institution where he was detained on remand, onto the UYAP server without a legal basis had been in breach of his right to respect for private life and presumption of innocence. He also maintained that there was no legal basis for the continuation of the said measure introduced following the declaration of the state of emergency, despite the end of the state of emergency. He further stated that his right to a fair trial had been violated, stressing that the complaint he had made for the lifting of the said measure was rejected by the judicial authorities without justification, that the prosecutor's opinion was not notified to him during the proceedings, and that the execution judge did not fulfil its obligation to decide on the dispute within a week.

45. In the Ministry's observations;

i. It was emphasized that on 14 September 2020, the Plenary Session of Administrative Law Chambers suspended the Circular dated 10 October 2016, which was the basis of the measure prescribing the uploading of the letters onto the UYAP server, and that the General Directorate of Prisons and Detention Houses issued a Circular on 19 January 2021 by taking into account the deficiencies identified in the relevant decision.

ii. It reminded in its assessment centred on the new circular that it was a requirement of the principle of legality to introduce clear and detailed provisions regulating the scope and implementation of measures involving the recording, storage and use of personal data and ensuring that the addressees were provided with sufficient safeguards against excess of power and arbitrariness, especially with regard to procedures on duration, storage, use, access by third parties, confidentiality, integrity and destruction of data. Although in principle it is stipulated in Article 38 of Law no. 5271 that personal data shall be stored in the UYAP database, it emphasized that the details shall be determined through regulatory procedures and that the said measure shall be regulated by the Circulars dated 10 October 2016 and 19 January 2021. Considering that the aforementioned Circulars specify which letters and correspondence shall be uploaded onto the UYAP server, who can access them and for how long they can be kept in the system, the Ministry stated that there was a legal basis for uploading the relevant correspondence onto the UYAP server.

iii. However, it stated was that the impugned measure consisted of the uploading of the letters sent to prisoners or sent by prisoners to others onto the UYAP server, and that these correspondences, which were characterised as personal data, were not allowed to be accessed or used by any third party except the authorized officer in the penitentiary institution. It was added that since each user in the UYAP system was provided with the opportunity to access the data only to the extent they were authorised, others could in no way access the relevant data. In addition, it was noted that the administrative, criminal and legal sanctions to be imposed on those who were authorized to access the said data - a very limited number of persons - in the event that they abused this authority, delivered the data to third persons and institutions or made it accessible to them, except for the cases prescribed by the law, were stipulated in the relevant laws.

46. In his counter-statements, the applicant, reiterating his claims, argued that the Ministry had acknowledged the unlawfulness of the Circular of 2016 which had been implemented in the present case and had not commented on the impugned unlawfulness relying on the new circular. He maintained that his right to respect for private life and freedom of communication had been violated, stating that the uploading of his letters

onto the UYAP system regardless of whether they were objectionable or not, had no legal basis, that that it was only based on the Circular, and that the processing of his personal data in this way might be used arbitrarily.

2. The Court's Assessment

47. Article 20 of the Constitution, insofar as relevant, reads as follows:

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

…

Everyone has the right to request the protection of his/her personal data. This right includes being informed of, having access to and requesting the correction and deletion of his/ her personal data, and to be informed whether these are used in consistency with envisaged objectives. Personal data can be processed only in cases envisaged by law or by the person's explicit consent. The principles and procedures regarding the protection of personal data shall be laid down in law."

48. Article 22 of the Constitution reads as follows:

"Everyone has the freedom of communication. Privacy of communication is fundamental.

Unless there exists a decision duly given by a judge on one or several of the grounds of national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms of others, or unless there exists a written order of an agency authorized by law in cases where delay is prejudicial, again on the abovementioned grounds, communication shall not be impeded nor its privacy be violated. The decision of the competent authority shall be submitted for the approval of the judge having jurisdiction within twenty-four hours. The judge shall announce his decision within forty-eight hours from the time of seizure; otherwise, seizure shall be automatically lifted.

Public institutions and agencies where exceptions may be applied are prescribed in law."

49. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir*

Canan, no. 2012/969, 18 September 2013, § 16). The applicant's allegation concerns the uploading of the letters he wished to send or he received onto the UYAP server by the administration of the penitentiary institution. It is clear that the individual's personal data and her/his interest in the protection of these data fall within the scope of his/her private life. Undoubtedly, the interference in the form of recording the content and type of communication is a special form of the interference with the freedom of communication. Therefore, it has been considered that the present application regarding the right to privacy and the protection of the confidentiality of information in this respect and the surveillance of communication should be examined from the standpoint of the right to respect for private life and freedom of communication under Articles 20 and 22 of the Constitution (see *Kemal Karanfil*, no. 2017/24776, 24 May 2018, § 48).

a. Admissibility

50. The alleged violations of the right to protection of privacy and personal information as well as the freedom of communication within the scope of the right to respect for private life must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

i. Existence of an Interference

51. The Court, in its judgment in the case of *Kemal Karanfil*, concluded that, the inspection and recording onto the UYAP server -with some exceptions- of the applicant's correspondence with others by the institution administration and the reading and keeping of the letters containing personal information had constituted an interference with the applicant's private life and communication (see *Kemal Karanfil*, § 53).

ii. Whether the Interference Constituted a Violation

52. Article 13 of the Constitution reads as follows:

"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution

without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality."

53. The aforementioned interference amounts to a violation of Article 20 of the Constitution unless it complies with the conditions set out in Article 13 thereof. Therefore, it must be determined whether the interference complied with the requirements of being prescribed by law, pursuing a legitimate aim and not being contrary to the principle of proportionality and the requirements of a democratic society order, which are relevant for the present application and laid down in Article 13 of the Constitution (see *Halil Berk*, no. 2017/8758, 21 March 2018, § 49; *Süveyda Yarkın*, no. 2017/39967, 11 December 2019, § 32; *Şennur Acar*, no. 2017/9370, 27 February 2020, § 34; and *R.G.* [Plenary], no. 2017/31619, 23 July 2020, § 82). Accordingly, in the present application, it must first be examined whether there was a legal basis for the interference. It is deemed appropriate to conduct this examination limited to the provisions of the legislation in force as at the material time, even though the relevant legislation has been subject to certain amendments throughout the process.

(1) General Principles

54. As set forth in the Constitution, the restriction of fundamental rights and freedoms must be primarily prescribed by law. The requirement of being "prescribed by law" or the lawfulness principle is enshrined in Article 8 of the European Convention on Human Rights ("the Convention") as a criterion of restriction and protection. However, the notion of being prescribed by law laid down in the Convention is not exactly the same with the lawfulness principle enshrined in the Constitution (see *Bülent Polat* [Plenary], no. 2013/7666, 10 December 2015, § 73).

55. The European Court of Human Rights ("the ECHR") interprets the requirements prescribed in law, in other words, the lawfulness in a broad manner and accordingly acknowledges that the principles set through the established case-law in judicial decisions may also meet the lawfulness requirement (see *Malone v. the United Kingdom*, no. 8691/79, 2 August 1984, §§ 66-68; and *Sunday Times v. the United Kingdom (no. 1)*, no. 6538/74, 26 April 1979, § 47), whereas the Constitution envisages that any

form of restrictions may be imposed absolutely by law, thereby affording protection wider than that afforded by the Convention (see *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 31; and *Bülent Polat*, § 75). Article 13 of the Constitution, which sets forth that fundamental rights and freedoms may be restricted only by law, does not allow the executive and the administration to impose a restriction on any right or freedom through a first-hand regulatory act in the absence of any statutory provision (see *Tuğba Arslan* [Plenary], no. 2014/256, 25 June 2014, § 87).

56. Article 13 of the Constitution, where the criteria for restricting fundamental rights and freedoms are set forth, provides that fundamental rights and freedoms may be restricted only by law. Besides, the third sentence of Article 20 § 3 of the Constitution sets out that personal data may be processed "*only in cases prescribed by law or upon explicit consent of the relevant person*", and the fourth sentence sets forth that the principles and procedures as to the protection of personal data shall be determined "*by law*". Accordingly, the primary criterion to be taken into consideration in case of any interference with the right to the protection of personal data is whether the given interference has a legal basis (see *Arif Ali Cangı* [Plenary], no. 2016/4060, 17 September 2020, § 72).

57. However, the statutory arrangements concerning the restriction of fundamental rights and freedoms must not be available merely in theory. The lawfulness requirement also entails the existence of an effective content. At this point, what is of importance is the quality of the given law. The requirement of being restricted by law points to the accessible, foreseeable and precise nature of the restriction. It is thereby aimed at precluding any arbitrary acts of the practitioner and also enabling individuals to know the law, thereby ensuring legal security (see *Halime Sare Aysal* [Plenary], no. 2013/1789, 11 November 2015, § 62; *Fatih Saraman* [Plenary], no. 2014/7256, 27 February 2019, § 66; and *Turgut Duman*, no. 2014/15365, 29 May 2019, § 66).

58. A given law may be considered to comply with these requirements only when it is sufficiently accessible; when the citizens have adequate knowledge of the existence of the provisions of law which are applicable to a given case; when the relevant law affords appropriate protection

against arbitrariness; and when it precisely defines the extent of the power afforded to the competent authorities and the way how such power may be exercised (see *Halime Sare Aysal*, § 63; *Fatih Saraman*, § 67; and *Turgut Duman*, § 68).

59. The law itself, except for any administrative practice it would involve, explicitly defines the scope of the discretionary power afforded to the competent authorities to protect the individuals against arbitrary interferences also in consideration of the legitimate aim pursued by the impugned act. The legal system should demonstrate the citizens, with sufficiently explicit expressions, that under which circumstances and within which limits the public authorities are empowered to interfere. In this sense, the legal system should enable the parties of an impugned interference to foresee the conditions underlying the interference and its possible outcomes (see *Halime Sare Aysal*, § 64; *Fatih Saraman*, § 68; and *Turgut Duman*, § 69).

60. However, the extent of protection afforded by the legislation, which could not offer solution for every opportunity, is mainly associated with its field and content, as well as the quality and quantity of its addressees. Therefore, the complex nature of a given provision of law, or its abstract nature to a certain degree, and thereby, its gaining clarity and precision through legal advice cannot be per se considered to fall foul of the principle of legal foreseeability. In this sense, the provision of law, allowing for an interference with any right or freedom, may of course grant discretionary power, to a certain degree, to the executive; however, it is necessary that the limits of such discretionary power be set in a sufficiently clear manner, and the provision of law ensure a sufficient degree of certainty (see *Halime Sare Aysal*, § 65; *Fatih Saraman*, § 69; and *Turgut Duman*, § 70).

61. In this context, whereas the relevant provision of law sets the basic framework of the restriction in question, the conditions of its implementation and the procedural details may be determined through regulatory acts. However, in this case, the regulatory acts must be accessible to the relevant parties, as well as clear and precise to the extent that the concerned parties could have a sufficient knowledge of the contents thereof (see *Halime Sare Aysal*, § 66).

62. Considering the present case, it is obvious that the determination of definite and detailed rules regulating the scope and implementation of measures involving the recording, storage and use of personal data and ensuring that the addressees are provided with sufficient safeguards against excess of power and arbitrariness, in particular with regard to procedures related to the duration, storage, use, access by third parties, confidentiality, integrity and destruction of data, constitutes the basis for the relevant requirements (see *Bülent Kaya* [Plenary], no. 2013/2941, 11 May 2016, § 64).

63. In this scope, the uploading of the data onto the aforementioned system must pursue the legitimate aims underlying the said interference, and the relevant statutory regulation must contain explicit and detailed provisions regarding the data to be recorded, the authorities to whom such data may be communicated, the conditions under which such communication may be allowed, and the procedure to be followed in communicating the data to the relevant authorities. The regulation on the system employed must be foreseeable enough as regards the manner and scope of the exercise of the discretionary power granted to the competent authorities to collect, record and share with the relevant authorities the data or its use for other purposes (see *Bülent Kaya*, § 66).

(2) Application of Principles to the Present Case

64. The Court, in its judgment in the case of *Kemal Karanfil*, concluded that the impugned administrative process as well as the judicial proceedings had been carried out in accordance with Article 38 § A of Law no. 5271, Article 68 of Law no. 5275, Articles 122 and 123 of the Rules of the Court, and the Circular issued by the Ministry on 10 October 2016, which therefore had a legal basis (see *Kemal Karanfil,* §§ 56-69).

65. Besides, while it was concluded that the uploading of the correspondences of prisoners onto the UYAP server did not violate the right to respect for private life and the freedom of correspondence, it was underlined that the conclusion reached by the Court could not be interpreted to the effect that the public authorities were vested with limitless power in terms of recording the prisoners' correspondences. It was also stated that a violation might be found if the conditions specified in

the judgment and relied on in finding the interference proportionate were not actually met or the legitimate aim in recording the letters disappeared (see *Kemal Karanfil*, § 79).

66. Thus, it has been concluded that the impugned interference should be subject to reassessment, considering the practice introduced after the relevant judgment and the end of the state of emergency period. It has been observed that the uploading of the correspondences of prisoners onto the UYAP server was based on Article 38 § A of Law no. 5271, Article 68 of Law no. 5275, Articles 122 and 123 of the Rules of the Court, and the Circular issued by the Ministry on 10 October 2016.

67. First of all, it has been observed that the restriction imposed on the correspondences of the prisoners in the penitentiary institutions by way of monitoring them is regulated in Article 68 of the Law no. 5275, and the By-law issued with respect to the said regulation lays down the details of the monitoring procedure and consequences thereof. In considerations of these regulations, it has been observed that the penitentiary institutions are authorised to monitor the correspondences, and that accordingly, the letters found non-prejudicial shall be delivered or sent to the addressees, whereas those found prejudicial shall be kept in the penitentiary institution.

68. Besides, Article 38/A of Law no. 5271 provides for that all data, information, documents and decisions regarding the criminal trial procedures may be processed, recorded and saved through the UYAP server. Taken into consideration both laws and the relevant legislation as a whole, it may be said that there is a statutory regulation which enables, in principle, the uploading of the prisoners' correspondences onto the UYAP server within the scope of the monitoring power conferred upon the penitentiary institutions. However, merely the formal existence of statutory regulations regarding the restriction of fundamental rights and freedoms does not suffice. The lawfulness requirement also entails a substantive content, and in this sense, the quality of the law comes into prominence.

69. In this sense, it should also be stressed that regard being had to the fact that the prisoners' correspondences may involve issues which are related to their private lives and which the prisoners wish to remain

confidential, as well as which involve the information likely to fall into the scope of personal data, the laws imposing restrictions on the fundamental rights and freedoms must indicate the basic principles and procedures with respect thereto. Accordingly, the relevant law or the legislation issued on the basis of this law must set the principles regarding the scope of the systematic uploading of the correspondences and the storage of the letter and private information and personal data included therein. Moreover, the statutory arrangements must also embody clear and detailed provisions that would provide those concerned with sufficient safeguards against the excess of power and arbitrariness with respect to the storage period of the prisoners' correspondences, the access to these correspondences by third persons, the use and destruction of the data included therein, and ensuring the confidentiality of the data.

70. Pursuant to the Circular issued by the Ministry on 10 October 2016, which was relied on for the impugned measure in the present case, all faxes and correspondences, except for those in sealed envelopes submitted by any prisoner to official authorities or to his lawyer for defence, must be scanned and uploaded onto the UYAP server. It has been considered that the regulation giving rise to the present case enabled the uploading and storage of the prisoner's correspondences, which were found non-prejudicial, which contained personal data and which were not related to the trial processes, onto the UYAP, and that it thus gave rise to the departure from the procedure established by the legislation on the basis of whether the given letter was prejudicial or not.

71. However, it should be also emphasised that the impugned procedure enables the systematic uploading of all correspondences onto the UYAP server, without making any distinction on the basis of the characteristic of the offence leading to conviction or the statuses of a detainee and convict that indeed vary in the criminal law, and regardless of whether they are prejudicial. It has been further observed that there is no clear statutory arrangement as to the period during which the prisoner's correspondences will be stored in the system, under which conditions they will be accessed and used by third persons, the authorities to which the penitentiary institution may disclose them, and how the personal data and privacy will be protected. It has been also observed that there is an

uncertainty with respect to these issues also in practice. Thus, it can be said that there are no definite and clear provisions, which regulate the scope and implementation of measures involving the recording, keeping and use of the prisoner's private information and personal data as well as the limits of the administration's discretionary power, and which ensure that the addressees are provided with effective protection against excess of power and arbitrariness. In the light of these explanations, it has been concluded that the impugned interference with the right to respect for private life and freedom of communication had no legal basis.

72. For these reasons, it has been concluded that the applicant's right to respect for private life and freedom of communication within the scope of his right to protection of privacy and personal data, safeguarded by Articles 20 and 22 of the Constitution were violated.

73. Considering the findings above, it has been concluded that the impugned interference did not meet the lawfulness requirement, therefore, no separate examination has been made as to whether the said interference complied with other safeguarding criteria.

C. Application of Article 50 of Code no. 6216

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

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

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

75. The applicant requested the Court to find a violation, redress the violation along with its all consequences and award him 200,000 Turkish liras (TRY) for non-pecuniary damages.

76. In its judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court indicates the general principles as to how a violation of any fundamental right, which has been found established by the Constitutional Court, and its consequences will be redressed. In another judgment, the Court explained the relevant principles as well as the consequences of the failure to comply with its judgment finding a violation and pointed out that this would amount to the continuation of the violation and might also result in a violation for the second time (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

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

78. In cases where the violation results from a court decision, the Court holds that a copy of the judgment be sent to the relevant court for a retrial with a view to redressing the violation and the consequences thereof pursuant to Article 50 § 2 of the Code no. 6216 and Article 79 § 1 (a) of the Internal Regulations of the Constitutional Court. The relevant legal regulation, as different from the similar legal norms set out in the procedural law, provides for a remedy specific to the individual application and giving rise to a retrial for the redress of the violation. Therefore, in cases where the Court orders a retrial in connection with its judgment finding a violation, the relevant inferior court does not enjoy any margin of appreciation in acknowledging the existence of a ground for a retrial, as different from the practice of reopening of the proceedings set out in the procedural law. Thus, the inferior court to which such judgment is

notified is legally obliged to take the necessary steps, without awaiting a request of the person concerned, to redress the consequences of the continuing violation in line with the Court's judgment finding a violation and ordering a retrial (see *Mehmet Doğan*, §§ 58 and 59; *Aligül Alkaya and Others (2)*, §§ 57-59, 66 and 67).

79. In the present case it has been concluded that there were violations of the right to respect for private life and freedom of communication on the grounds that the administration had recorded the correspondences in the absence of statutory provisions indicating the limits and procedures of the interference. Accordingly, it has been understood that the said violation resulted from an administrative act. Besides, the trial courts failed to redress the violation.

80. In these circumstances, there is legal interest in conducting a retrial for redressing the consequences of the violation. Such retrial is intended for redressing the violation and the consequences thereof pursuant to Article 50 § 2 of the Code no. 6216 which contains a provision specific to individual applications. In this scope, the procedure required to be conducted in the retrial process is primarily to deliver a new decision eliminating the reasons leading the Court to find a violation in line with the principles indicated in the judgment finding a violation. Therefore, it must be held that a copy of the judgment be sent to the incumbent court for a retrial.

81. Since it has been understood that a retrial will provide sufficient redress for the violation and its consequences in the present case, the applicant's compensation claim must be dismissed.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 2 February 2022 that

A. The applicant's request for legal aid be ACCEPTED;

B. The alleged violations of the right to respect for private life and freedom of communication be declared ADMISSIBLE;

C. The right to respect for private life and freedom of communication safeguarded by Articles 20 and 22 of the Constitution were VIOLATED;

D. A copy of the judgment be REMITTED to the Tekirdağ 2nd Execution Judge (E.2020/398, K.2020/642) for a retrial so as to redress the consequences of the violations of the right to respect for private life and freedom of communication;

E. The applicant's compensation claim be REJECTED; and

F. A copy of the judgment be SENT to the 1st Chamber of the Tekirdağ Assize Court (E.2020/1034 miscellaneous) and the Ministry of Justice.

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

PILOT JUDGMENT

YENİ GÜN HABER AJANSI BASIN VE YAYINCILIK A.Ş. AND OTHERS

(Application no. 2016/5903)

10 March 2022

On 10 March 2022, the Plenary of the Constitutional Court found violations of the freedoms of expression and the press, safeguarded by Articles 26 and 28 of the Constitution, in the individual application lodged by *Yeni Gün Haber Ajansı Basın ve Yayıncılık A.Ş. and Others* (no. 2016/5903).

THE FACTS

[6-60] The applicants were the publishers of the relevant national newspapers at the material time. They challenged the decision whereby the Press Advertising Agency ("the Agency") ordered the suspension of their right to publish official announcements and advertisements for various periods of time due to certain news articles and columns published on their newspapers. Upon the rejection of their challenges by the incumbent inferior courts, the applicants respectively lodged individual applications with the Court.

The applicants claimed that the suspension of their right to publish official announcements and advertisements for various periods of time due to the publication of certain news articles and columns in their newspapers had violated their freedoms of expression and the press.

V. EXAMINATION AND GROUNDS

61. The Constitutional Court ("the Court"), at its session of 10 March 2022, examined the application and decided as follows:

A. The Applicants' Allegations and Ministry's Observations

62. The applicants alleged, in general terms, that;

i. The statements in the news articles that were used as grounds for the sanctions in the decisions of the Press Advertising Agency ("the Agency") were taken out of context, and that the sanctions were imposed without taking into account issues such as the limits of criticism and freedom of news reporting, and without applying the criteria of striking a balance between the conflicting rights,

ii. The decisions to impose sanctions on the newspapers were based on the Agency's General Assembly Resolution no. 129; these decisions

were not based on any law; the authority imposed sanctions based on the said General Assembly Resolution, which was not objective and did not contain any criteria; the criteria on the basis of which the fines of different amounts were determined were not explained, and the said amounts were not proportionate; in this respect, they did not satisfy the lawfulness principle,

iii. The Agency cannot render objective decisions as it is under the supervision of the government,

iv. The applicants argued that that their freedoms of expression and the press were violated, stating that when a decision was made to publish a retraction text for the same news report or article, the authority granted to the Agency to impose sanctions would constitute a sanction of secondary nature.

63. In its observations, the Ministry stated that there was no obvious and manifest imbalance in the assessment of rights in the decisions of the Agency and the courts, and the relevant decisions provided relevant and sufficient justification.

64. In their counter-statements, the applicants repeated their allegations raised in their individual application forms.

B. The Court's Assessment

65. Article 26 of the Constitution, titled *"Freedom of expression and dissemination of thought"*, insofar as relevant, reads as follows:

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

The exercise of these freedoms may be restricted for the purposes of …, protecting the reputation or rights of others….

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

66. Article 28 of the Constitution, titled *"Freedom of the press"*, insofar as relevant, reads as follows:

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

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

In the limitation of freedom of the press, the provisions of Articles 26 and 27 of the Constitution shall apply…"

67. Article 29 of the Constitution, titled *"Right to publish periodicals and non-periodicals"*, insofar as relevant, reads as follows:

"...The principles regarding the publication, the conditions of publication and the financial resources of periodicals, and the profession of journalism shall be regulated by law. The law shall not impose any political, economic, financial, and technical conditions obstructing or making difficult the free dissemination of news, thoughts, or opinions.

..."

1. Admissibility

68. The alleged violations of the freedoms of expression and the press must be declared admissible for not being manifestly ill-founded and there being no other grounds for their inadmissibility.

2. Merits

a. Existence of an Interference

69. Article 29 of the Constitution stipulates that the principles regarding the publication, the conditions of publication and the financial resources of periodicals, and the profession of journalism shall be regulated by law; the law shall not impose any political, economic, financial, and technical conditions obstructing or making difficult the free dissemination of news, thoughts, or opinions; periodicals shall have equal access to the means and facilities of the State, other public corporate bodies, and their agencies. In addition, Article 29 of the Constitution provides that the publication of periodicals or non-periodicals shall not be subject to prior authorization or

the deposit of a financial guarantee. The Press Advertising Agency, which seems to have been established to fulfil some of the objectives laid down in the Constitution, contributes to improving the quality of newspapers by ensuring a fair distribution of official announcements and advertisements, which are an important source of income for newspapers, and aims to support those who actually carry out journalistic activities by preventing the distribution of advertisements to newspapers that are published only to receive official announcements. Therefore, in applications similar to the present one, the use of the power of interference granted to the Agency regarding the interruption of official announcements and advertisements should be carefully assessed, taking into account Article 29 of the Constitution (for assessments in the same vein, see the Court's judgment no. E.2010/78, K.2011/177, 29 December 2011; *Ahmet Oğuz Çinko and Erkan Çelik* [Plenary], no. 2013/6237, 2 July 2015, § 54; *Uğurlu Gazetecilik Basın Yayın Mat. Rek. Ltd. Şti. (3)* no. 2016/5653, 9 January 2020, §§ 45-47; *Uğurlu Gazetecilik Basın Yayın Mat. Rek. Ltd. Şti. (4)* no. 2017/73997, 16 January 2020, §§ 36-38; *Estetik Yayıncılık Anonim Şirketi*, no. 2017/30591, 13 January 2021, §§ 43-45).

70. It was decided to suspend the official announcements and advertisements of the applicant newspapers for various periods of time. When the present applications are analysed in the light of the considerations set out above, it is clear that the sanctions whereby the applicant newspapers were deprived of their right to publish official announcements and advertisements for various periods of time amount to an interference with their freedoms of expression and the press.

b. Whether the Interference Constituted a Violation

71. The aforementioned interference would constitute a breach of Articles 26 and 28 of the Constitution, unless it satisfied the conditions set out in Article 13 of the Constitution. Article 13 of the Constitution, insofar as relevant, reads as follows:

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

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

73. In the present case, the freedoms of expression and the press were violated by suspending the official announcements and advertisements of the applicants' newspapers. The legal basis of the impugned interference was Article 49 of Law no. 195. This article defines the procedure for the examination of appeals concerning the imposition of sanctions entailing the suspension of announcements and advertisements on newspapers and magazines that fail to comply with the duties or principles of press ethics in line with the regulations issued in accordance with the law or the decisions to be taken by the Agency. In the previous applications to the Constitutional Court, challenging the suspension of official announcements and the advertisements by the Agency, the Court examined the merits of the applications after determining the legal basis of the interferences, without making a more detailed evaluation on lawfulness. Within the scope of the impugned applications, the Court noted certain constitutional setbacks in terms of the application of this statutory provision without making any further examination as to the principle of legality (see *Uğurlu Gazetecilik Basın Yayın Mat. Rek. Ltd. Şti. (3)*, §§ 51-55; *Estetik Yayıncılık Anonim Şirketi*, §§ 49-53).

74. On the other hand, it has been observed that the problematic practices continue in similar types of applications that have been brought before the Constitutional Court. Therefore, in the present case, since the interference with the applicants' freedoms of expression the press was directly related to the sanctions imposed by the Agency, it has been deemed necessary to carry out a more detailed review of Article 49 of Law No. 195 concerning the lawfulness of the interference.

i. Lawfulness of the Interference

75. In Article 13 of the Constitution setting out the regime concerning the restriction of fundamental rights and freedoms, it is laid down as a

basic principle that the rights and freedoms may be restricted "*only by law*". In order for an interference with any right safeguarded under Article 26 of the Constitution to be considered to meet the lawfulness requirement, the impugned interference necessarily has a legal basis within the meaning of Article 26 § 2 of the Constitution (for other outstanding judgments concerning the other aspects of the lawfulness requirement, see *Tuğba Arslan* [Plenary], no. 2014/256, 25 June 2014, § 82; *Halk Radyo ve Televizyon Yayıncılık A.Ş.* [Plenary], no. 2014/19270, 11 July 2019, § 35; *Sevim Akat Eşki*, no. 2013/2187, 19 December 2013, § 36; *Hayriye Özdemir*, no. 2013/3434, 25 June 2015, §§ 56-61).

76. The Court has on many occasions stated that as regards the restrictions on fundamental rights and freedoms, the lawfulness requirement primarily necessitates the formal existence of a law. (see *Tuğba Arslan*, § 96; and *Fikriye Aytin and Others*, no. 2013/6154, 11 December 2014, § 34). Law, as a legislative act, is a product of the will of the Grand National Assembly of Türkiye ("GNAT") and is enacted by the GNAT in compliance with the law-making procedures enshrined in the Constitution. Such an understanding affords a significant safeguard for fundamental rights and freedoms (see *Eğitim ve Bilim Emekçileri Sendikası and Others* [Plenary], no. 2014/920, 25 May 2017, § 54; and *Halk Radyo ve Televizyon Yayıncılık A.Ş.*, § 36).

77. Nevertheless, the lawfulness requirement also encompasses a material content and, thereby, the quality of the wording of the law becomes more of an issue. In this sense, this requirement guarantees "accessibility" and "foreseeability" of the provision regarding restrictions as well as its "clarity" which refers to its certainty (see *Metin Bayyar and People's Liberation Party* [Plenary], no. 2014/15220, 4 June 2015, § 56; *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 55; and H*alk Radyo ve Televizyon Yayıncılık A.Ş.*, § 37).

78. Certainty means that content of a provision must not give way to arbitrariness. The statutory arrangements concerning the restriction of fundamental rights must be precise in terms of their content, aim and scope and also clear to the extent that the parties concerned may know their legal status. This principle means that the statutory arrangements must

be sufficiently clear, non-ambiguous, understandable and applicable so as not to allow any hesitation or doubt on the part of both the administration and individuals and they must offer certain safeguards against arbitrary practices of public authorities. A provision of law must certainly indicate the legal consequences of the given acts or facts and in this sense, the extent and scope of the power of interference afforded to the public authorities in such cases. Only then individuals may be able to foresee their rights and obligations and act accordingly. Thus, the legal certainty is ensured, and the arbitrary acts of the authorities exercising public power is prevented (see *Hayriye Özdemir*, §§ 56, 57; *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 56; *Halk Radyo ve Televizyon Yayıncılık A.Ş.*, § 38; *Metin Bayyar and People's Liberation Party*, § 57; *Kardelen Hasret Kaygusuz*, no. 2018/38607, 18 May 2021, §§ 41, 42; and among many other decisions in constitutionality review cases regarding certainty, see the Court's judgments no. E.2009/51, K.2010/73, 20 May 2010; no. E.2011/18, K.2012/53, 11 April 2012; no. E.2015/41, K.2017/98, 4 May 2017, §§ 153, 154; no. E.2020/53, K.2021/55, 14 July 2021, § 95, 96).

(1) As regards the Certainty of the Legal Provision

79. First of all, it should be noted that Law no. 195 is a text prepared and adopted by the National Unity Committee following the coup d'état of 27 May 1960. In the session of the General Assembly of the National Unity Committee held on 2 January 1961, the justification and articles of the proposed law were discussed and approved. The justification of the Law was formulated as the establishment of an Agency in order to put an end to the distinction between "*newspapers that support the government and those that do not*" and to "*distribute advertisements on an equitable basis*" (National Unity Committee Plenary Meeting, 68th Assembly, 2 January 1961, Vol. 5, p. 9). Article 49 of Law no. 195, titled "*Sanctions*", was adopted by the General Assembly of the National Unity Committee in its session of 2 January 1961 and has not been amended to date.

80. There is no doubt that Article 49 of Law no. 195 is accessible. When a legal provision is accessible and foreseeable, it can be considered to be certain. Therefore, the principles of certainty and foreseeability are interconnected, and a statutory provision that forms the basis of decisions

regarding official announcement and advertisement sanctions that lead to the restriction of the freedoms of expression and the press must first be expressed with sufficient clarity. In addition, individuals should be able to know in advance what legal sanction or consequence will be imposed upon their actions and transactions. This is essential against arbitrary interference by bodies exercising public power and against the blanket application of a restriction to the prejudice of any party (for assessments in the same vein, see the Court's judgment no. E.2014/100, K.2015/6, 14 January 2015). In the present case, it is necessary to assess whether Article 49 of Law no. 195, which is the basis for the interference with the applicants' freedoms of expression and the press, satisfies the criteria of foreseeability and certainty.

81. Article 49 (a) of Law no. 195 provides that advertisements and announcements may be suspended for a period not exceeding two months upon the decision of the Agency's Board of Directors. The decisions of the Agency's Board of Directors, which constitute the grounds for the Agency's sanctions in the field of advertising and publicity, are taken within the framework of the Agency's General Assembly Resolution no. 129 on the Principles of Press Ethics. The General Assembly Resolutions used as the basis for the penalties in the current applications under review are listed above.

82. Within the framework of the aforementioned decisions of the General Assembly, Board of Directors of the Agency adopts a decision on the news and/or articles in newspapers and magazines *ex officio* or upon complaint. Article 49 of the Law regulates the procedure of appeal against this decision before the civil judge of the first instance. According to the law, the highest civil judge of first instance makes the final decision after examining the file.

83. The criteria for the exercise of the legal authority granted to the Agency to suspend advertising and announcing for a period of up to two months as a result of the decision of the Agency's Board of Directors are set forth in Article 1 and subparagraphs of Resolution no. 129 of the General Assembly of the Agency. Article 49 of Law no. 195 does not indicate, at least, the acts on account of which the applicants shall be

imposed a sanction entailing the suspension of official announcements and advertisements as well as the amounts of the sanctions prescribed for these acts, and it does not have the characteristics of a rule with sufficient clarity and certainty. Although the provision stipulates that sanctions be imposed on those who fail to comply with the "*principles of press ethics*", the law does not provide any explanation as to what these principles are. In other words, the authority to determine the principles of press ethics is entirely vested in the administration. This is clearly incompatible with the safeguard provided by Article 13 of the Constitution, which stipulates that fundamental rights and freedoms may be restricted only by law.

84. In addition, the principles of press ethics, which are determined by the General Assembly of the Agency and can be amended at any time with a new decision, do not provide any clear and specific criteria to ensure that the sanction is implemented in an objective and fair manner. As a matter of fact, in the relevant paragraphs of the Agency's General Assembly Resolution no. 129, there is no explanation as to how the rules of declaration of an offence, inciting or encouraging offences, promoting violence and terrorism and rendering the fight against terrorist organizations ineffective, causing harm to minors and young people, immorality, expressions that exceed the limits of criticism, violating the privacy of private life, distorting the content of the news and generating contradictions are determined and what the limits of these rules are. In addition, no criteria/threshold regarding the impugned news content has been determined in connection with these concepts. To the contrary, it has been understood that these regulations are seen as a chain of rules that provide an undefined path for the Agency's interference through sanctions entailing the suspension of official announcements and advertisements, both in wording and in practice.

85. It is a prerequisite of the rule of law that news which is in the nature of an attack on personal rights and exceeds the limits of criticism and/or falls within the scope of offences provided for by law shall be subject to sanctions. In this regard, an institution established for the purpose of improving the qualifications of the press and, in particular, ensuring the economic freedom of the press may be authorized to impose sanctions. However, legal regulations that interfere with the freedom of the press

should be drafted so as to be applicable within a very limited area, and each statutory provision should be drafted in clear and precise manner that does not allow for any controversy.

86. In consideration of Article 49 of Law no. 195 and the decisions of the General Assembly referred to by this article, it is observed that the regulations on which the sanctions for official announcements and advertisements are based contain ambiguous, abstract and imprecise expressions, that the gap between the amounts of sanctions provided for is in some cases maintained very broadly and that there is no explanation as to how these periods are determined, thus granting the public authorities a wide discretionary power. Such discretionary power creates a broad area of interference with the freedoms of expression and the press, as in the present cases, and renders the rules open to potential violations, broad interpretations to the prejudice of the freedoms of expression and the press, and arbitrary interferences. In fact, the Constitutional Court has already ruled that the freedoms of expression and the press have been violated in a number of cases for the aforementioned reasons (see *Uğurlu Gazetecilik Basın Yayın Mat. Rek. Ltd. Şti. (3),* § 55; *Estetik Yayıncılık Anonim Şirketi*, § 53).

87. As stated above, it has been observed that Article 49 of Law no. 195 vests the Agency with the authority to determine which acts shall be subject to sanctions and how they shall be sanctioned, and does not stipulate framework provisions for the General Assembly decisions taken by the Agency and the decisions of the Board of Directors, and allows for a regulation with imprecise boundaries. Therefore, Article 49 of Law no. 195, which prevents the applicants from foreseeing their rights and obligations and acting accordingly, cannot be said to satisfy the requirement of foreseeability (see, in the same vein, *Hayriye Özdemir*, §§ 56, 57; *Eğitim ve Bilim Emekçileri Sendikası and Others,* § 56; *Halk Radyo ve Televizyon Yayıncılık A.Ş.*, § 38; *Metin Bayyar and Halkın Kurtuluş Partisi,* § 57; for explanations on certainty in decisions on constitutionality review, among many decisions, see the Court's judgments no. E.2009/51, K.2010/73, 20 May 2010; E.2011/18, K.2012/53, 11 April 2012; E.2015/41, K.2017/98, 4 May 2017, §§ 153, 154; and E.2020/53, K.2021/55, 14 July 2021, § 95, 96).

(2) Judicial Review as regards the Application of the Provision

88. Article 49 of Law no. 195 stipulates that the decisions of the Agency may be appealed before the highest civil judge of the first instance. According to this provision, the judge's decision based on the examination of the documents shall be final. In this respect, the appeal procedure set forth in Article 49 of the Law is not within the scope of the adversarial proceedings and the decision becomes final upon the dismissal of the appeal and the applicants are faced with a financial burden. It is evident that such final decisions, which result in material sanctions, pose considerable dangers to freedoms of expression and the press. It is also evident that such restrictions for an indefinite period of time pose great dangers to the freedoms of expression and the press. In a state governed by rule of law, a given freedom cannot be restricted to the extent that would unreasonably prevent its exercise -whatever the aim pursued-.Therefore, a provision that is, in form, capable of bearing all the same consequences with a final decision and having a bearing for an indefinite period of time must certainly offer certain protective safeguards against any arbitrary and disproportionate interferences (see *Keskin Kalem Yayıncılık ve Ticaret A.Ş. ve diğerleri* [Plenary], no. 2018/14884, 27 October 2021, § 121; *Aykut Küçükkaya,* no. 2014/15916, 9 January 2020, § 67; *Ali Kıdık*, no. 2014/5552, 26 October 2017, § 88).

89. As in the present case, if the media organ publishing the impugned expressions and those responsible are caused to encounter great difficulties in submitting their defence submissions during a legal action brought against them and if the applicants are not provided with the opportunity to substantiate their allegations included in these expressions, their freedoms of expression and the press will be then violated. Therefore, a given provision imposing restriction on the freedoms of expression and the press should primarily afford the procedural safeguards of a trial against arbitrary and disproportionate interferences.

90. In the appeal procedure stipulated in Article 49 of the Law, the applicants were not provided with the opportunity to present their defence before the judge, to submit their evidence and to discuss the Agency's grounds for their punishment. In practice, judges conduct these cases in

their capacity as arbitrators and perform only a procedural review and then deliver a judgment.

91. Additionally, it has been observed that there is no consistency of implementation in a small number of decisions of the Court of Cassation. In fact, it has been noted that in one of the decisions of the competent chamber of the Court of Cassation submitted to the Constitutional Court, the Court of Cassation made an assessment on the merits, while in another decision it held that the court of first instance was entitled to conduct only a procedural review.

92. As a result, the law prescribes a formal examination of the documents; in practice, the courts do not resolve the merits of the case brought before them, but only examine whether the sanction was imposed in accordance with the established procedure. The practice regarding the procedure proposed by the Article of the Law under review has not yet been established; the judgments rendered on this issue at the appeal stage have further aggravated the uncertainty existing in the Law as to how the courts of first instance will conduct the proceedings in the cases before them.

(3) Final Considerations on Lawfulness

93. Although Article 49, which was adopted with the aim of ensuring that the press operates in accordance with ethical values, provides a legitimate ground for restriction, it does not define how the Agency will exercise its power to impose sanctions of up to two months' ban on advertising, nor does it provide the tools that will help it to intervene in the press freedom of newspapers in accordance with the criteria laid down in Article 13 of the Constitution. Considering the ambiguities of the above-mentioned appeal procedure and the fact that a conflicting judicial procedure in which the press organs can submit their objections and claims is excluded, in addition to the unpredictably extensive limits of the Agency's authority due to the lack of certainty about the scope and limits of the provision embodied in Article 49 of the Law, it has been assessed that there is no possibility of achieving results with the appeal procedure against the decisions of the Agency provided for in the same provision.

94. Assessing the above considerations as a whole, it has been concluded that the interferences subject to the application violated the rights of the applicants safeguarded by Articles 26 and 28 of the Constitution, and that the violation arises directly from the law, since it does not provide the basic guarantees for the protection of freedoms of expression and the press.

95. In addition, it has been observed that the assessment of the lawfulness criterion as regards the applications subject to the Agency's assessment in the present case alone would not be sufficient to resolve the problems encountered in practice. For this reason, it is necessary to determine whether the assessments of the Constitutional Court regarding the legal safeguard described above, as well as the decisions of the Agency's General Assembly and the procedure for reviewing the claims of the appellate courts against these decisions, meet the criteria of legitimate aim and compliance with the requirements of the democratic society.

ii. Legitimate Aim

96. In this context, in the particular circumstances of the present case, it has been concluded that the impugned decisions on the suspension official announcements and advertisements were generally part of the measures to protect the reputation or rights of others and thus pursued a legitimate aim.

iii. Compliance with the Requirements of a Democratic Society

(1) General Principles

97. In order for an interference with the freedom of expression to be considered as being compatible with the requirements of a democratic society, the interference must meet a pressing social need as well as be proportionate (see *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, §§ 53-55; *Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, §§ 70-72). The measure giving rise to the impugned interference may be considered to meet a pressing social need only when it is convenient for attaining the aim pursued and appears to be in the form of the last remedy to be resorted to or the last measure to be taken (see, *mutatis mutandis*, *Bekir Coşkun*, § 51; *Mehmet Ali Aydın*, § 68; and *Tansel Çölaşan*, no. 2014/6128, 7 July 2015, § 51).

98. Proportionality refers to the absence of an excessive imbalance between the aim pursued by the restriction and the restrictive measure employed. In other words, proportionality refers to establishing a fair balance between the rights of the individual and interests of the public or between the rights and interests of other individuals if the purpose of the interference is to protect the rights of others. A problem in terms of the principle of proportionality may be at issue in the event that a clearly disproportionate burden is imposed on the owner of the right, which was the subject of interference, when compared to public interest or the interests of others (see, *mutatis mutandis*, *Bekir Coşkun*, § 57; *Tansel Çölaşan*, §§ 46, 49, 50; *Hakan Yiğit*, no. 2015/3378, 5 July 2017, §§ 59, 68; *Levon Berç Kuzukoğlu and Ohannes Garbis Balmumciyan* [Plenary], no. 2014/17354, 22 May 2019, § 92).

99. The Court has stressed on many occasions that the freedom of expression enshrined in Article 26 of the Constitution and the freedom of the press, another form of the freedom of expression, which is subject to special safeguards enshrined in Article 28 of the Constitution, constitutes one of the main pillars of a democratic society and conditions sine qua non for the progress of the society and the improvement of individuals. It is evident that the freedom of the press affords one of the best means for the conveyance of various ideas and attitudes to the public and forming an opinion with respect thereto (see *İlhan Cihaner (2)*, no. 2013/5574, 30 June 2014, § 63). In this context, the Constitutional Court will examine the application in the light of the fact that freedom of expression applies to everyone and is essential for the functioning of democracy (see *Mehmet Ali Aydın*, § 69; and *Bekir Coşkun*, §§ 34-36).

100. With regard to the cases of *Uğurlu Gazetecilik Basın Yayın Mat. Rek. Ltd. Şti.* (3) *Uğurlu Gazetecilik Basın Yayın Mat. Rek. Ltd. Şti.* (4*); Estetik Yayıncılık Anonim Şirketi*, the Constitutional Court examined two applications that were similar to the present applications and made some observations on the procedure regarding the sanctions entailing the suspension of official announcements and advertisements under Law no. 195.

101. In the aforementioned judgments, it was stated that the exercise of the Agency's power to intervene in the *suspension of official announcements*

and advertisements should be assessed thoroughly, taking into account Article 29 of the Constitution. In this regard, it was stressed that the media organ involved in the decision should be provided with the safeguards relating to due process and a balance should be struck between the conflicting rights, and was is explained in detail how the balancing criteria should be applied (see *Uğurlu Gazetecilik Basın Yayın Mat. Rek. Ltd. Şti. (3)*, §§ 48-50; *Uğurlu Gazetecilik Basın Yayın Mat. Rek. Ltd. Şti. (4)*, §§ 39-41; and *Estetik Yayıncılık Anonim Şirketi*, §§ 46-48).

102. In the relevant judgments, the Constitutional Court reiterated the issues to be considered by the judicial authorities in interferences in the form of *suspension of official announcements and advertisements* within the scope of Article 49 of Law no. 195. In order to guide the inferior courts in their application, the Constitutional Court has consistently reiterated the scope of the balancing criteria and attempted to demonstrate how these criteria should be applied in the context of the present case. In order to strike a balance between the conflicting rights, the Constitutional Court has stated that the following information is required:

- The author of the news reports or articles,

- The targeted person, the extent of his or her reputation and previous behaviours, whether he or she is closely monitored by the press, whether the limits of acceptable criticism he or she has to endure are broader than those of an ordinary citizen,

- The subject of the news or article, the nature of the expressions used in it, the content, form and consequences of publication,

- Conditions for the publication of the news or article

- Whether there is a public interest in the disclosure, whether it contributes to a debate of general interest, and the balance of the rights of the public and others against the expression of opinion,

- The value of public information, the existence of public interest and the relevance of the issue,

- Whether the statements in the news report or article are based on

factual grounds and whether the disputed statements are sufficiently supported by concrete elements,

- Whether members of the press act in accordance with the mandatory rules, duties and responsibilities with which they must comply, in particular the duty to respect professional ethics, to act in good faith and to provide accurate and reliable information in cases where there is a possibility of damage to the reputation and rights of others,

- Whether there is an opportunity to respond to the views expressed in the news report or article,

- The Agency should consider the impact of the news report or article on the lives of the targeted persons to the extent applicable for the present case, and an assessment should be made pursuant to these criteria. In this respect, it is expected that the civil courts of first instance, which are the appellate bodies against the decisions of the Agency, will first examine whether the Agency has made an assessment in line with the prescribed criteria and, if necessary, redress any deficiencies. It was also stated that a proportionality should be established between the severity of the impugned news and the penalty imposed by the inferior courts (see *Uğurlu Gazetecilik Basın Yayın Mat. Rek. Ltd. Şti. (3)*, §§ 48-50; *Uğurlu Gazetecilik Basın Yayın Mat. Rek. Ltd. Şti. (4)*, §§ 39-41; and *Estetik Yayıncılık Anonim Şirketi*, §§ 46-48).

(2) Application of Principles to the Present Case

103. In spite of the existence of the aforementioned principles previously determined by the Constitutional Court, it could not be established that the Agency struck a fair balance between the conflicting rights in the present cases. When the reasoned decisions of the magistrate judges examining the challenges against the decisions of the Agency are examined, it appears that in some cases the evaluations of the Agency were directly relied on, but it was not discussed whether these evaluations satisfy the aforementioned balancing criteria, and the relevant authorities mostly contented themselves to indicate that the decisions of the Agency complied with the procedure and the law, and no further evaluation was made.

104. Therefore, it is not evident whether the allegations raised and evidence adduced by applicants regarding that the impugned suspension of official announcements and advertisements was not considered within the scope of the criteria employed for striking a balance between the conflicting rights, the reason and time of writing the news articles, against whom and how they were written, whether there were elements such as background information and factual basis, were examined and, if so, for what reasons they were not taken into account in the assessment.

105. In all of the actions brought before the Constitutional Court and joined in this case, the content subject to criminal sanctions relates to news articles published in printed editions or on the websites of national newspapers. It has been repeatedly underlined that the Agency, and subsequently the inferior courts, should strictly apply the balancing criteria and consider this form of interference as the last resort in relation to these news (see *Uğurlu Gazetecilik Basın Yayın Mat. Rek. Ltd. Şti. (3)*, § 51; *Uğurlu Gazetecilik Basın Yayın Mat. Rek. Ltd. Şti. (4)*, § 42; *Estetik Yayıncılık Anonim Şirketi*, § 49).

106. On the other hand, as regards the impugned cases, it has been observed that the judges of the courts of first instance rendered decisions without making an assessment as pointed out by the Constitutional Court. In this context, when considering the pending applications before the Court, it has been concluded that such repetitive judgments indicate a systematic problem. The systematic problem stems from the fact that the courts of first instance have not only applied a provision of the law which is so explicit that it is impossible for them to interpret it in accordance with the Constitution, but also from the fact that it has not been demonstrated that the interference carried out in accordance with this application arises from a pressing social need. In other words, the instrument used to interfere with the applicants' freedom of the press has no legal guarantee and the reasons for the use of this instrument have not been demonstrated with relevant and sufficient justification. In addition, the interference with the freedoms of expression and the press cannot be considered proportionate because of the chilling effect of such decisions, which were imposed in the absence of relevant and sufficient justification.

107. For these reasons, it must be held that there was a violation of the applicants' freedom of expression safeguarded by Article 26 of the Constitution and freedom of the press safeguarded by the Article 28 of the Constitution.

iv. Existence of a Systematic Problem

108. Considering that the decisions of the Agency and the inferior courts in the framework of Article 49 of Law no. 195 - which indicate the existence of a systematic problem - are in the same vein, it is obvious that the current system in our country needs to be reconsidered in order to prevent similar new violations.

109. As a matter of fact, according to the information and documents submitted by the Agency to the Constitutional Court, the Agency imposed sanctions entailing the suspension of official announcements and advertisements on newspapers for 39 days in 2018 statistics, 143 days in 2019 statistics, and 572 days in 2020 statistics for violating the principles of press ethics. Given the sanctions imposed, it has been observed that the powers granted to the Agency have exceeded the purpose of regulating the ethical values of the press and have become a means of punishment that may have a chilling effect on some members of the press, which has created a systematic problem.

110. Undoubtedly, it is within the margin of appreciation of the legislator to make legal regulations which constitute an important part of the state policy to be adopted in the field of freedom of the press. In order to ensure that the Agency's interference with the freedom of the press under Article 49 of Law no. 195 are in line with the requirements of the democratic social order pursuant to Article 13 of the Constitution and do not result in a violation of Article 26 of the Constitution, the following minimum standards/ suggestions should be taken into account in the new legal arrangements to be made within the framework of the assessments below:

i. The conditions regarding the sanctions entailing the suspension of official announcements and advertisements set forth in Article 49 of the Law should be framed and the article should be reformulated in substantive and procedural aspects with clear and precise phrases,

ii. In determining the scope of the procedure for suspending official announcements and advertisements under Article 49 of the Law, it must be borne in mind that the relevant provisions must be designed to allow for the most limited possible field of application and that their exercise must be restricted to situations where a pressing social need so requires, taking into account the balancing criteria set out in the previous paragraphs (see § 102). In this regard, the legal consequences to be attributed to which behaviour or facts and the authority to be granted to public authorities for an interference in this context must be established with a particular extent of certainty. Within this framework, the limits of the safeguards provided by Article 49 to enhance the ethical qualities of the press should be clarified and criteria should be established, such as the determination of a criterion/threshold at which respective actions will run counter to the aforementioned qualities.

iii. While regulating the appeal procedure against the sanctions for official announcements and advertisements provided for in Article 49 of the Law, the capacity in which the courts of first instance will adjudicate these cases - since it has been observed in practice that they mostly adjudicate these cases in the capacity of arbitrators - and the scope of the judicial procedure to be applied in this context should be clearly redefined.

Mr. Basri BAĞCI and Mr. Kenan YAŞAR agreed with this conclusion by expressing a concurring opinion.

Mr. Kadir ÖZKAYA, Mr. Recai AKYEL, Mr. Yıldız SEFERİNOĞLU, Mr. Selahaddin MENTEŞ and Mr. İrfan FİDAN expressed a dissenting opinion concluding that the freedom of expression safeguarded by Article 26 and the freedom of the press safeguarded by Article 28 of the Constitution had been violated.

3. Application of Article 50 of Code no. 6216

a. General Principles

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

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

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

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

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

114. Before indicating the steps required to be taken for the redress of a given violation and consequences thereof, the source of the violation must be identified. Accordingly, a violation may result from administrative acts and actions, judicial acts or legislative acts. The identification of the source

of the violation is of importance for the determination of the appropriate means of redress (see *Mehmet Doğan*, § 57).

115. If a violation has emerged as a result of the application by the administrative authorities or the inferior courts of a provision of law with such a clarity that does not enable them interpret it in accordance with the Constitution, then the violation stems not from the application of the law but directly from the law itself. In this case, the provision of law giving rise to the violation must either be repealed completely or amended in a way that will not lead to further violations so as to say that the violation has been redressed with all of its consequences. Moreover, in certain circumstances, the annulment of the impugned provision of law may not be sufficient, by itself, in order to redress all the consequences of the violation. In that case, certain measures might need to be taken within the scope of individual application, which could redress the pecuniary and non-pecuniary damages suffered by victims due to the violation (see *Y.T.* [Plenary], no. 2016/22418, 30 May 2019, § 68).

116. One of the ways that ensure the removal of the violation and its consequences pursuant to Article 50 of Code no. 6216 is the pilot judgment procedure envisaged by Article 75 of the Internal Regulations. In cases where the violation is found to be stemming from a structural problem and that it is leading to more applications, in other words to further violations, or where it is foreseen that this situation might lead to further violations, the mere finding of a violation in respect of the case in question will be far from offering a real protection for the fundamental rights and freedoms (see *Y.T.*, § 69).

117. In such a situation, the Court can initiate the pilot judgment procedure *ex officio* or upon request of the Ministry or the applicant. When the pilot judgment procedure is initiated, the structural problem must be identified and possible solutions thereto must be put forward (see *Y.T.*, § 70).

118. The foremost purpose of adopting the pilot judgement procedure is to ensure that the structural problem be corrected and the source of the violation be eliminated through resolution of similar applications by administrative authorities instead of judgments finding violations (see *Y.T.*, § 71).

119. In this framework, the Court may prescribe a period of time for the elimination of the structural problem identified by its pilot judgment and the resolution of similar applications, while in the meantime postponing the examination of other applications during this period. However, in such a case, the persons concerned must be informed of the decision on postponement. If the relevant authorities are unable to eliminate the structural problem and resolve the applications falling within that scope by the end of the period of time prescribed by the Court, it will become possible to rule collectively on the applications in the same vein (see *Y.T.*, § 72).

b. Application of Principles to the Present Case

120. All of the applicants requested the determination of the violation and holding of a retrial. The applicants also requested compensation in the amount to be deemed appropriate by the Constitutional Court in applications no. 2016/5903, 2018/7000 and 2020/37171; TRY 100,000 in applications no. 2018/13151, 2018/25044, 2018/5217 and 2019/16; TRY 10,000 for non-pecuniary damages in applications no. 2020/36656 and 2020/37547; TRY 25,000 for pecuniary damages and an amount deemed appropriate for non-pecuniary damages in application no. 2020/37386; TRY 110,000 for pecuniary damages in application no. 2020/37801; and in application no. 2020/37386, TRY 25,000 for pecuniary damages and an amount deemed appropriate for non-pecuniary damages; in application no. 2020/37801, TRY 110,000 for pecuniary and non-pecuniary damages; in individual application no. 2020/37846, TRY 10,000 for non-pecuniary damages, and the payment of the damage they were exposed to due to the sanction imposed. No claim for compensation was made in the application no. 2020/36962.

121. In the present case, it was concluded that the interference in the form of a sanction imposed on the applicant newspapers on the grounds of Article 49 of Law no. 195 violated the applicants' freedom of expression safeguarded by Article 26 of the Constitution, and the freedom of the press safeguarded by Article 28 of the Constitution. As stated above, the violation has resulted from a structural problem based on the wording of the legal provision itself and the practice of the inferior courts in this respect.

122. In this regard, many other complaints regarding the alleged violations of the freedoms of expression and the press have been submitted to the Constitutional Court through the individual application mechanism, as is the case in the present applications for the suspension official announcements and advertisements in accordance with Article 49 of Law no. 195.

123. In terms of the present applications and other pending applications, the Constitutional Court has decided that the delivery of further violation judgments within the scope of the principles set forth in its judgments in the cases of *Uğurlu Gazetecilik Basın Yayın Mat. Rek. Ltd. Şti.* (3), *Uğurlu Gazetecilik Basın Yayın Mat. Rek. Ltd. Şti.* (4), *Estetik Yayıncılık Anonim Şirketi* will not prevent the lodging of similar applications, nor will it lead to a change in the way the inferior courts examine the appeals against similar sanctions entailing the suspension of official announcements and advertisements. It has therefore been concluded that in order to redress the violation and its consequences, and to prevent similar violations in the future, the legal provision that led to the violation should be revised.

124. Considering that the decisions of the inferior courts in the same vein within the scope of Article 49 of Law no. 195, which indicate the existence of a systematic problem, derive directly from the provision of the law, it has been concluded that the above-mentioned points (§ 110) should be taken into account when redrafting the text of the article in order to ensure that the restrictions imposed relying on Article 49 of the Law comply with the requirements of the democratic social order and the principle of proportionality enshrined in Article 13 of the Constitution, and do not amount to a violation of Article 26 of the Constitution.

125. However, even though the regulation to be adopted by the legislature will prevent further applications, it will not be sufficient to resolve the increasing number of applications pending before the Constitutional Court. In this regard, it is necessary to introduce a temporary provision that provides a solution to the existing applications or to find another solution.

126. In this respect, the Court must render a decision to postpone the examination of the applications of similar nature that have been pending

until the date of this judgment, as well as of those that will be lodged thereafter with the Court for a period of one year as from the date when this judgment is published on the Official Gazette pursuant to Article 75 § 5 of the Internal Regulations of the Court.

127. However, merely sending a copy of the judgment to the legislature does not afford complete redress for the damage sustained by the applicants on account of the violation found by the Court in the present case. Therefore, there is a legal interest in conducting a retrial for the redress of the violations of the freedoms of expression and the press as well as the consequences thereof.

128. In cases where the Court orders a retrial in conjunction with its judgment finding a violation, the relevant court has no discretion to discuss the existence of the ground necessitating a retrial, which is different from the venue of re-opening of the proceedings available in the procedural law. Accordingly, the court receiving such a judgment is legally obliged to conduct a retrial by virtue of the violation judgment rendered by the Court, without awaiting for any such request by the person concerned, and to take the necessary actions to redress the consequences of the continuing violation (see *Mehmet Doğan*, §§ 58, 59; *Aligül Alkaya and Others (2)*, §§ 57-59, 66, 67). The retrial to be conducted is intended for redressing the violation and its consequences pursuant to Article 50 § 2 of Code no. 6216. In this scope, the step required to be taken is to revoke the court decision resulting in the violation and to issue, in line with the principles in the violation judgment, a fresh decision. Accordingly, a copy of the judgment must be sent to the relevant magistrate judges to conduct a retrial.

129. It must be held that the litigation costs consisting of the court fee and the counsel's fee be reimbursed to the applicants.

VI. JUDGMENT

For the reasons explained above, the Constitutional Court held on 10 March 2022

A. UNANIMOUSLY, that the application no. 2016/5903 and the applications joined under the application no. 2018/7000 be JOINED, due to the legal connection between them in terms of subject matter;

B. UNANIMOUSLY, that the alleged violations of the freedoms of expression and the press be DECLARED ADMISSIBLE;

C. BY MAJORITY and by the dissenting opinion of Mr. Kadir ÖZKAYA, Mr. Recai AKYEL, Mr. Yıldız SEFERİNOĞLU, Mr. Selahaddin MENTEŞ and Mr. İrfan FİDAN, that the freedom of expression safeguarded by Article 26 of the Constitution and the freedom of the press safeguarded by Article 28 of the Constitution were VIOLATED;

D. BY MAJORITY and by the dissenting opinion of Mr. Kadir ÖZKAYA, Mr. Recai AKYEL, Mr. Yıldız SEFERİNOĞLU, Mr. Selahaddin MENTEŞ and Mr. İrfan FİDAN, that the PILOT JUDGMENT PROCEDURE BE APPLIED as the violation has stemmed from a structural problem;

E. BY MAJORITY and by the dissenting opinion of Mr. Kadir ÖZKAYA, Mr. Recai AKYEL, Mr. Yıldız SEFERİNOĞLU, Mr. Selahaddin MENTEŞ and Mr. İrfan FİDAN, that the situation necessitating an amendment for the elimination of the structural problem be NOTIFIED to the Grand National Assembly of Türkiye;

F. The examination of the applications on the same matter that have been already lodged, and will be lodged after the delivery of this judgment, be POSTPONED FOR 1 YEAR as from the publication of the judgment in the Official Gazette;

G. The persons concerned whose applications fall within the scope of the pilot judgment be INFORMED of the situation via the announcement of their application numbers on the Court's website;

H. A copy of the judgment be REMITTED to the İstanbul 1st Magistrate Judge (no. E.2015/9, K.2015/24), İstanbul 14th Magistrate Judge (no. E.2016/38, K.2017/20), Küçükçekmece 1st Magistrate Judge (nos. E.2017/694, K.2017/336; E.2018/89, K.2018/99; E.2018/200, K.2018/365), Küçükçekmece 3rd Magistrate Judge (no. E.2018/416, K.2018/454), and İstanbul 3rd Magistrate Judge (nos. E.2020/2, K.2020/29; E.2020/26, K.2020/37; E.2020/28, K.2020/28; E.2020/48, K.2020/48; E.2020/58, K.2020/52; E.2020/43, K.2020/43; E.2020/37, K.2020/20; E.2020/54, K.2020/39) to hold a retrial to redress the consequences of the violations of the freedoms of expression and the press;

I. A net amount of TRY 13,500 be REIMBURSED respectively in applications no. 2016/5903, 2018/7000, 2020/37171, 2018/13151, 2018/25044, 2018/5217, 2019/16, 2020/37386, 2020/37801; a net amount of TRY 10,000 be REIMBURSED respectively in applications no. 2020/36656, 2020/37547 and 2020/37846, limited to the request, and other claims for compensation be REJECTED;

J. The total litigation costs of TRY 6,125.70, including the court fee of TRY 1,625.70 and the counsel's fee of TRY 4,500, be REIMBURSED to the applicant Estetik Yayıncılık ve Ticaret A.Ş.; the total litigation costs of TRY 4,946.90, including the court fee of TRY 446.90 and the counsel's fee of TRY 4,500, be REIMBURSED to the applicant Birgün Yayıncılık ve İletişim Ticaret A.Ş.; the total litigation costs of TRY 5,928.00, including the court fee of TRY 1,428.00 and the counsel's fee of TRY 4,500, be REIMBURSED to the applicant Yeni Gün Haber Ajansı Basın ve Yayıncılık A.Ş.; and the total litigation costs of TRY 5,840.70, including the court fee of TRY 1,340.70 and the counsel's fee of TRY 4,500, be REIMBURSED to the applicant Bülten Basın Yayın Reklamcılık Ticaret Limited Şirketi;

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

L. A copy of the judgment be SENT to the Ministry of Justice for information.

DISSENTING OPINION OF THE VICE-PRESIDENT KADİR ÖZKAYA AND JUSTICES RECAİ AKYEL, YILDIZ SEFERİNOĞLU, SELAHADDİN MENTEŞ AND İRFAN FİDAN

1. The application concerns the alleged violation of the applicants' freedoms of expression and the press by the decision to suspend official announcements and advertisements for various periods of time on the basis of news articles and columns published in some national newspapers.

2. The majority of the Court held that Article 49 of Law no. 195 dated 2 January 1961 on the Organization of the Press Advertising Agency and General Assembly Decision no. 129 on the Principles of Press Ethics of the Press Advertising Agency (General Assembly Decision), which were relied on for the decisions to suspend the applicants' official announcements and advertisements, which constituted an interference with their freedoms of expression and the press, did not meet the legality criterion stipulated by Article 13 of the Constitution, as they were not precise and foreseeable. In addition, it has been concluded that the remedy of appeal against the sanction entailing the suspension of official announcements and advertisements excluded the examination of the merits of the dispute and the safeguards of the principle of adversarial proceedings -categorically, without examining the impugned sanctions in their particular conditions, and that therefore, the applicants' freedoms of expression and the press were violated. In addition, it was decided by majority that the violation stemmed from a structural problem and the pilot judgment procedure be applied accordingly and the situation necessitating an amendment for the elimination of the structural problem be notified to the Grand National Assembly of Türkiye.

3. For the reasons stated below, we dissent with the conclusion on the grounds that in the absence of an examination in the particular circumstances of each case, the legality criterion was not met and that the appeal procedure excluded the examination of the merits of the dispute and ensuring the safeguards of the principle of adversarial proceedings, and with the decision based on the majority opinion that the pilot decision procedure should be applied due to the structural problem arising from the law and that it should be notified to the Grand National Assembly of Türkiye for the elimination of the impugned problem.

Lawfulness

4. In its review of lawfulness, the majority of the Court concentrated on two aspects in concluding that there had been a violation of the principle of certainty (Article 79 *et seq*.): firstly, that the acts subject to interference i.e. the suspension of official announcements and advertisements were not precise and foreseeable, and secondly, that the range of the sanction period stipulated by the Law was rather extensive and it was not clear how the said period was to be determined.

5. According to the majority's opinion, neither Article 49 of Law no. 195 nor the decision of the General Assembly satisfied the criteria of certainty and foreseeability in the aforementioned matters, and the administration was granted an unlimited margin of appreciation in determining the action constituting an interference in the form of suspending official announcements and advertisements and the duration of the sanction. Contrary to the majority, we are of the opinion that there is no problem in terms of certainty and foreseeability in these two aspects.

6. Prior to proceeding with the assessment of certainty and foreseeability, it is essential to determine which part of Article 49 § 1 of Law no. 195 constitutes the basis for the decisions to suspend official announcements and advertisements, which in the present cases constitute an interference with the applicants' freedoms of expression and the press.

7. This is because the aforementioned paragraph allows for interference in more than one case. In fact, the introductory sentence of the paragraph reads "*Without prejudice to the provisions of other laws, those who do not comply with this law or the regulations to be issued on the grounds of this law, or the duties imposed by the decisions of the General Assembly of the Agency on the matters specified in this law or the principles of press ethics ... shall be subject to the followings ...*".

8. Accordingly, the article stipulates four different situations that constitute the basis for the imposition of sanctions entailing the suspension of official announcements and advertisements. These are non-compliance with the followings:

(a) Law no. 195,

(b) The regulation to be issued pursuant to Law no. 195,

(c) The duties imposed by the decisions of the General Assembly of the Agency on the matters provided in Law no. 195,

(d) Principles of press ethics.

9. In all the cases that are the subject of the present applications, it can be observed that the decisions of the Agency to suspend official announcements and advertisements were based on the violation of the principles of press ethics. Therefore, the legal basis of the interferences that are the subject of the present applications is not the first paragraph of Article 49 of Law No. 195 in its entirety, but rather the section thereof *"... those... who... do not comply with the principles of press ethics... shall, without prejudice to the provisions of other laws, be subject to the followings:/ a) The announcements and advertisements to be given by the Institution to the newspaper or magazine concerned shall be suspended by the General Directorate of the Institution for a period not exceeding two months, based on the final decision of the Board of Directors. ..."* The evaluation in the dissenting opinion will be limited to this section.

10. Having established the legal basis of the interference in the form of suspending official announcements and advertisements that are the subject of the present applications, it will be separately assessed whether the aforementioned section of the Law is precise and foreseeable in terms of the action and sanction that are the subject of the interference.

11. The impugned act subject to the interference is defined in the Law as "failure to comply with the ethical principles of the press". Accordingly, in order to conclude whether the interferences in the present cases are based on a precise and foreseeable legal provision in terms of action, it is necessary to examine whether the concept of "press ethics" set forth in the Law is precise and foreseeable in a way that allows people to know the consequences of their behaviour.

12. First, it is evident that the concept of "ethical principles of the press" is to a certain extent abstract. However, the abstract nature of the concepts

set forth in the laws does not automatically mean that they are uncertain and unpredictable. In fact, the Court does not consider the abstract nature of the concepts in the laws as a reason for unconstitutionality in the context of certainty and predictability of the law. According to the Court, "*even if a rule is complex or of abstract nature to a certain extent and therefore becomes fully understandable through legal assistance or if the definitions of the concepts used therein are revealed as a result of a legal assessment, this does not per se fall foul of the principle of legal foreseeability (see Sara Akgül, § 109; Hayriye Özdemir, § 58).*" (see, among many others, the Court's judgment, *Hanifi Yaliçli* [Plenary], no. 2014/5224, 10 June 2021, § 104). In this regard, the Court, for instance, found no ambiguity in the concept of "obscenity" in a regulation on the press, stating that "*in view of the constantly changing social structure, the difficulty of determining in advance what constitutes obscene publications by the legislator cannot be ignored. However, it is also a fact that the concept of 'obscenity' has gained content and meaning over time through doctrine, practice and judicial decisions. Therefore, it cannot be said that the contested provision is ambiguous*" (see the Court's judgment no. E.2011/44, K.2012/99, 21 June 2012). In the same decision, the Court also commented on the concept of "public morality" as follows: "*As pointed out in many decisions of the Constitutional Court, public morality has a meaning that is easily understood and shows the acts related to the rules of morality adopted by the majority of the society at a certain time*". The Court did not find the abstract concepts of "affiliation" and "contact" with terrorist organizations, which also relate to the press, and which are included in a provision of the law that allows for more severe interference with the freedoms of expression and the press than the provision of the law under review, to be abstract and unpredictable (see the Court's judgment no. E.2018/91, K.2020/10, 19 February 2020). In the impugned judgment, the Court held that "*80. ... a rule restricting the freedoms of expression and the press must first of all satisfy the criterion of legality and must therefore be precise and foreseeable. The term "affiliation" in the rule means meeting, adjoining, merging, and the term "contact" means linked. Although the aforementioned expressions are general concepts, it cannot be concluded that they are categorically indefinite and unpredictable, for the reasons stated in the decision of the Constitutional Court of 14 November 2019 and numbered E.2018/89, K.2019/84*". **In the majority's opinion, the concept of "principles of press ethics" in the provision of the law,**

which is the basis of the interferences in the form of suspending official announcements and advertisements in the present cases, is found to be categorically imprecise and unpredictable due to its abstract nature, in contrast to the established case-law referred to above.

13. Second, the Court examines the degree of protection that laws should provide in terms of the criteria of certainty and predictability, largely in relation to the area regulated by the relevant legal text and the nature and number of its addressees. In this regard, the Court held in the judgment of "*Halime Sare Aysal*" ([Plenary], no. 2013/1789, 11 November 2015, § 65) that "*However, the extent of protection afforded by the legislation, which could not offer solution for every opportunity, is mainly associated with its field and content, as well as the quality and quantity of its addressees. Therefore, the complex nature of a given provision of law, or its abstract nature to a certain degree, and thereby, its gaining clarity and precision through legal advice cannot be per se considered to fall foul of the principle of legal foreseeability. In this sense, the provision of law, allowing for an interference with any right or freedom, may of course grant discretionary power, to a certain degree, to the executive; however, it is necessary that the limits of such discretionary power be set in a sufficiently clear manner, and the provision of law ensure a sufficient degree of certainty*". **In the majority's opinion, the level of protection that the legal provision on which the impugned interference was based should provide in terms of the criteria of certainty and foreseeability has not been evaluated, contrary to the aforementioned case-law, in terms of the area regulated by the law as well as the nature and number of its addressees.**

14. In the present case, it can be observed that the concept of "principles of press ethics" in the relevant section of the law, which constitutes the legal basis for the interference, is - relatively - abstract. However, the fact that this concept is somewhat abstract does not, in itself, create uncertainty and unpredictability, taking into account the established case-law of the Court referred to above. Due to the very nature of the concept, it may not be possible to define the concept of "press ethics" with complete clarity and in a way that exhausts all forms of contrary conduct. Moreover, the addressees of the regulation which includes the concept in question are not the masses of the public, but a relatively narrow group of press professionals. It can be said that this group - being composed

of professionals - has a general consensus on the nature of press ethics. For instance, it is reasonable to assume that everyone agrees that certain principles set forth below in the Agency's General Assembly Decision no. 129 constitute rules for the press to follow: "News cannot be obtained and published by illegal means", "No one can be declared guilty unless he/she has been declared guilty by a finalised court decision...", "Publications that incite or encourage crime and render the fight against crime ineffective cannot be published", "Broadcasts that incite violence and terrorism and render ineffective the fight against drugs and all types of organized crime shall not be allowed", "Broadcasts that harm the development and protection of the personality of minors and young people in society, or that encourage sexual harassment and violence against them shall not be allowed", "Broadcasts that encourage women to prevent the equal enjoyment of all rights and entitlements in the economic, social, political and cultural fields, that envisage discrimination between men and women, and that portray women only as "sexual objects" shall be prohibited" and "In broadcasts directed at individuals, institutions and social strata, derogatory words that exceed the limits of criticism shall not be uttered; insults, swearing, slander and false accusations shall not be allowed".

15. Thirdly, the majority opinion also indicates that the public authorities are granted a wide margin of appreciation in determining the principles of press ethics, which is incompatible with the principle of certainty of the law. First of all, it should be noted that the General Assembly of the Agency, in the relevant decision, stated the principles of press ethics in an explanatory manner, which can be said to have been agreed upon to a large extent. If the concept in question, which is enshrined in the law and, by its very nature, contains a certain degree of abstractness, does not give rise to uncertainty and unpredictability within the framework of the above-mentioned judgments of the Constitutional Court, the definition of the scope of this concept in secondary regulations does not in itself pose a problem in terms of legality. Moreover, the Court interprets the criterion of legality more flexibly in the case of administrative sanctions than in the case of judicial sanctions. Moreover, the Court did not find unconstitutional the provisions of the law regulating administrative fines, which are considered "penalties" within the framework of Article 38 of the

Constitution, and which should be subject to more stringent supervision than administrative sanctions, which are not considered "penalties" due to their nature, as in the concrete case, and which, unlike the provision of the contested law, do not even consider the act requiring the administrative sanction as an abstract concept and refer to administrative regulatory procedures in terms of the action.

16. In doing so, the Court has ruled as follows:

a. In its judgment dated 26 December 2003 and numbered E.2000/8, K.2003/104, the Board did not find the provision "*Real persons and legal entities who are found to act contrary to the regulations made pursuant to this Law, the standards and forms determined, and the general and special decisions taken by the Board shall be fined from 2 billion liras to 10 billion liras by the Board by stating the justification.*" contrary to Articles 38 and 125 of the Constitution for the reason stated as "*In the contested provisions, the subject, reason, limits, purpose of the administrative fines, the lower and upper limits of the sanction to be imposed by the Board in case of non-compliance, the time and procedure in the imposition of administrative fines, the place where the money will be paid and the procedure to be followed in the follow-up and collection in case of non-payment within the stipulated period are clearly shown, and there is no regulation preventing the application of judicial remedies against these administrative decisions. / In addition, since the general and special decisions taken by the Board mentioned in the first paragraph will be taken with reference to the Capital Markets Law and other laws, there can be no violation of the principle of legality.*"

b. In its judgment dated 2 June 2011 and numbered E.2008/115, K.2011/86, the Court did not find the provision "*The Agency is also authorized to temporarily suspend the activities of the operator or to impose on the operator the obligation to implement specific measures to prevent the violation, in cases to be determined in advance by regulation, in order to protect the requirements of public service and public order*." in breach of Articles 13 and 48 of the Constitution on the grounds that "*since the rapid changes in the electronic communications sector have led to a similar change and diversification in the concepts of the requirements of public service and public policy and in the acts which give rise to their infringement, it is very difficult to determine all*

these elements by law. For this reason, having established that administrative sanctions may be imposed for the purposes of the requirements of public service and the protection of public order, leaving the determination of the acts that require administrative sanctions and the concrete measures to be applied within the established limits to the regulation cannot be characterized as uncertainty or delegation of authority".

c. In its judgment dated 31 May 2017 and numbered E.2017/103, K.2017/108, the Court did not find the provision "*An administrative fine of five hundred thousand Turkish liras shall be imposed, without the need for a warning, in the event that this Law, secondary legislation or licensing regulations are violated in a manner that cannot be redressed after the violation has been committed*." in breach of Articles 2 and 38 of the Constitution on the grounds that "*the acts for which administrative sanctions are stipulated in the contested provision are contrary to Law no. 6446, secondary legislation or licensing provisions. The licensing regulations among these acts are specified in Article 5 of the Law. Therefore, the acts constituting a violation of Law no. 6446 and the license provisions specified in the Rule are specified in the Law. For some of the acts requiring administrative sanctions, reference is made to secondary legislation. The relevant articles of Law no. 6446 also specify the subjects to be regulated by secondary legislation. The fact that the legislator authorizes the administration to take certain decisions in order to ensure that the measures to be taken in matters of expertise and administrative technique comply with the requirements, does not constitute the creation of offences through administrative decisions and, therefore, does not violate the principle of legality and certainty. Moreover, in the case of regulatory administrative sanctions, since there is a specific, special area to which the sanction is applied, the generality of the framework drawn by the law does not violate the principle of certainty*".

d. In its decision of 11 December 2021, numbered E.2019/110, K.2021/85, the Constitutional Court did not find Article 19 § (1) of the Postal Services Act No. 6475 of 9 May 2013, which reads "*The Authority is authorized to impose administrative fines on service providers of up to 3 percent of their net profit in the previous calendar year ... in case of violation of the legislation [this phrase also includes secondary legislation] and the conditions of authorization ...*" in breach of Article 38 of the Constitution on the grounds that "*As stated in the decision of the Constitutional Court dated 31 May 2017 and numbered*

E.2017/103, K.2017/108, in the case of regulatory administrative sanctions, the general nature of the framework drawn by the law does not violate the principle of certainty, since there is a specific and special area where the sanction is applicable."

17. **The majority's opinion does not provide any explanation as to why the flexible interpretation of the criterion of legality adopted by the Court with respect to administrative sanctions, and applied even in the case of more severe sanctions, as described above, is not applied with respect to the legal provision that is the basis of the interferences in the present cases.**

18. As a fourth point, it can be observed from the majority's opinion that even if in Article 49 § 1 of Law no. 195 the act that is subject to interference is not defined as "not complying with the principles of press ethics", but rather - as in the Decision of the General Assembly of the Agency no. 129 - the situations that are contrary to the principles of press ethics are listed one by one, there would be a problem in terms of certainty and foreseeability. In fact, the majority opinion has concluded that even the situations listed in the decision of the General Assembly of the Agency and listed among the principles of press ethics are not precise and foreseeable. In this regard, the majority opinion states: *"When the relevant paragraphs of the 85th General Assembly decision are examined, there is no explanation of how the rules of declaring as criminal, inciting or encouraging crime, encouraging violence and terrorism and making the fight against terrorist organizations ineffective, negatively affecting minors and young people, immorality, expressions that exceed the limits of criticism, violating the confidentiality of private life, distorting the content of the news and creating contradictions are determined and what the limits of these rules are. In addition, no criterion/threshold for the content of the news to be evaluated has been established in connection with these concepts. On the contrary, it has been understood that these regulations are seen as a chain of rules that provide an undefined path for the Agency's interference in the form of suspension of official announcements and advertisements, both in terms of wording and in practice*". It is highly questionable to what extent it is possible to write in a clear and unambiguous way in such a way that it is not possible to discuss the illegality of General Assembly of the Agency's decision, such as declaring an offence, inciting or encouraging an offence, encouraging violence and terrorism and rendering the fight

against terrorist organizations ineffective, negatively affecting minors and young people, immorality, expressions that exceed the limits of criticism, violating the privacy of private life, distorting the content of the news and causing contradictions. Moreover, many of these circumstances emphasized in the majority opinion are also regulated as criminal offences and the aforementioned circumstances are also formulated in the same abstract manner in these regulations. For example, Article 134 § 1 of the Turkish Criminal Code no. 5237 of 26 September 2004 stipulates that "*Any person who violates the privacy of another person's personal life shall be sentenced to a penalty of imprisonment for a term of one to three years*." and Article 39 § 2 thereof stipulates that "*A person remains culpable as an assistant if he: a) encourages the commission of an offence, or reinforces the decision to commit an offence, or promises that he will assist after the commission of an act. ...*" If the majority opinion is approved, it will be necessary to conclude that the provisions of the aforementioned law - considering that they relate to judicial offences and penalties, which should be subject to a more stringent supervision of legality - do not meet the criteria of certainty and predictability and are unconstitutional. At this point, the following problem arises: **In a circumstance where the majority concludes that even the situations listed in the decision of the Agency's General Assembly, some of which are even included in criminal laws with the same wording, are not sufficient to ensure certainty and predictability, it remains unclear what kind of regulation of the Grand National Assembly of Türkiye, which is called upon in the decision to eliminate the structural problem, will provide the level of certainty and predictability desired by the majority.**

19. For these reasons, we are of the opinion that it is not ambiguous and unpredictable that the act subject to the interference is envisaged in the Law as "[failure] to comply with the principles of press ethics".

20. In the majority's opinion, the matter of certainty and predictability was also observed with regard to the duration of the sanction to be imposed on newspapers that do not comply with the principles of press ethics. In this context, the findings and comments were made as follows: "*84. ... Examining Article 49 of Law no. 195, it is seen that there is no legal provision that is at least framed, clear and precise regarding the amount of*

penalties foreseen for the acts ... that require sanctions for official announcements and advertisements against the applicants", "87. ... it is understood that the gap between the prescribed penalty periods is sometimes quite wide and that no explanation is given as to how these periods were determined, thus leaving a wide margin of appreciation to the authorities", "Such a margin of appreciation is susceptible to broad interpretation and arbitrary interference to the detriment of freedom of expression and the press, as in the present case." and "88. As stated above, it has been found that Article 49 of Law no. 195 leaves the question of which acts are subject to sanctions and how they are subject to sanctions entirely to the authority of the Agency, that there are no framework provisions for the decisions of the General Assembly of the Agency and the decisions of the Board of Directors, and that a regulation with unclear boundaries is allowed by law". In many cases, the Court has not ruled on the unconstitutionality of similar norms that grant a margin of discretion to the administration, and has considered it sufficient that the lower and upper limits of the sanction to be imposed on the administration are established (see the above-mentioned decisions, among many others). There is no doubt that Law no. 195, which constitutes the basis of the present interference, establishes the lower and upper limits of the sanction (from one day to two months) to be applied in case of non-compliance with the principles of press ethics. It is also obvious that the range between the lower and upper limits is not very wide. As a matter of course, the sanction between the lower and upper limits is determined by the Agency's Board of Directors in the particular circumstances of each case and according to the gravity of the violation. In addition, the claim that the duration of the sanction is disproportionate to the action - as well as other allegations of unlawfulness - can be appealed before the court and a judicial review can be conducted in this regard. For these reasons, we are of the opinion that there is no lack of clarity and predictability in the law with regard to the duration of the sanction.

21. The majority's opinion also evaluates the criterion of legality with regard to the judicial review of the application of Article 49 of Law no. 195 (§ 88 *et seq.*). As a basis for establishing that the appeal process involves a formal review, it is first pointed out that "*90. ... In practice, it is observed that judges examine these cases in their capacity as arbitrators and therefore decides on the basis of only a formal review*". It is not clear how there is a connection

between the fact that judges review appeals in their capacity as arbitrators and the fact that they do not review the merits of the dispute, but only conduct a formal review. Of course, the fact that a dispute is reviewed in the capacity of an arbitrator does not prevent the merits of the dispute from being reviewed. If it is argued to the contrary, reasons should be provided. In addition, the majority opinion states "*... it is observed that the courts... make decisions only by conducting a procedural review*". Since it reads "***it is observed***", it is concluded that the majority is well-aware of this situation as a material fact. However, the grounds for this determination of material fact are not clear from the majority opinion. In the present cases, however, there is no evidence that even the judges hearing the appeal - whose grounds for substantive review may or may not be deemed sufficient - conducted a procedural review limited to "*examining whether the sentence was imposed in accordance with the prescribed procedure*" in the sense understood by the majority. Second, the majority opinion states "*92. ... The law provides for a procedural review of the documents; in practice, the courts do not resolve the merits of the case before them, but only review whether the sentence was imposed in accordance with the prescribed procedure*". First of all, the second paragraph of Article 49 of Law No. 195, concerning the appellate procedure, reads "*In the cases referred to in subparagraphs (a) and (b), the decision of the Board of Directors may be appealed, within ten days of its notification, before the civil judge of first instance of the highest level in the locality. The judge shall decide on the matter within fifteen days at the latest, and his decision shall be final*". Neither the above paragraph nor any other part of the law provides for a procedural review. It is clear that a review of the record is not the same as a formal review, which is expressed in the majority opinion as "*a review of whether the penalty was imposed in accordance with the prescribed procedure*". Of course, the merits of the case can also be reviewed by examining the documents. Thirdly, the majority opinion states in one place that Law no. 195 provides for a formal examination, while in another place it states that the fact that the dispute is examined as an arbitrator causes a formal examination. According to the majority, this situation raises doubts as to the grounds for the procedural review. In the fourth instance, while the sections quoted above could be interpreted to the effect that the judiciary has a clear practice of conducting procedural examinations, the majority opinion indicates that there is no such clarity

in fact. As a matter of fact, according to the majority opinion, "*91. In addition, it has been understood that there is no unity of practice in the few judgments of the Court of Cassation. In fact, it is understood that the competent chamber of the Court of Cassation, in one of its judgments which was submitted to the Constitutional Court, made an assessment on the merits and in another judgment decided that the court of first instance was authorized to conduct only a formal review (see §§ 57, 58). / 92. ... The practice regarding the procedure proposed in the article of the law under review has not yet been established and the uncertainty existing in the law regarding the decisions made in this regard at the appeal stage and how the courts of first instance will conduct the proceedings in the cases before them has intensified*". In our opinion, there is no ambiguity in the law or in practice regarding procedural review. First of all, while the section quoted here refers to the "ambiguity(s) in the Law", the section quoted earlier clearly states that "the Law proposes a procedural review of the documents". However, as explained above, the law does not stipulate that a procedural review should be conducted in the appeal procedure, and it is also evident that a substantive review should be conducted in this procedure due to the nature of the matter, as it is not explicitly excluded. The problem lies in what we believe is the majority's misunderstanding of a decision of the Court of Cassation cited in the judgment. In the decision of the 4th Civil Chamber of the Court of Cassation, dated 12 April 2018 and numbered E.2018/14, K.2018/2945, it was decided by another judge in another judicial proceeding to publish a text of retraction to the news article that was subject to appeal. As a matter of fact, in the unquoted part of the decision, the circumstances of the present case are described as follows: *"... The applicant's lawyer stated that the ... lawyer sent a retraction letter to the editor-in-chief of the ... Newspaper by the ... lawyer due to the article titled "All acceptances of Mr. Gül are under record"* published in the issue of Sözcü Newspaper dated 18 June 2015; however, the text of the retraction was not published. "*The 1st Magistrate Judge with the decision numbered 2015/3304, ... upon the complaint ... decided to suspend the official announcements and advertisements for a period of 1 day, stating that there was no violation of paragraph (g) of Article 1 of the General Assembly decision numbered 129 on the Principles of Press Ethics as stated in the decision, and requested the decision to be annulled."* The Agency issued a sanction decision due to the fact that the newspaper in question did not

fulfil the requirements of the decision issued by another judge to publish a retraction text. In the appeal filed against the sanction decision, the court upheld the appeal, disregarding the fact that the dispute before it in the circumstances of this present case consisted only in determining whether the court decision had been fulfilled or not. The decision of the Court of Cassation draws attention to this issue and emphasizes that it is required to assess whether the newspaper in question has complied with the court judgment or not. The procedural examination, which the decision of the Court of Cassation mentioned in the majority opinion is supposed to have carried out, resulted from the characteristics of this concrete case, in other words, from the reason of the dispute in this case (whether the text of the retraction, which the Court had previously decided to publish, was published or not). **It is not reasonable to determine that there exists uncertainty in practice on the basis of a decision based solely on the characteristics of the present case.**

22. According to the majority opinion, the appellate procedure against the sanction of suspension of official publication and advertising does not allow for adversarial proceedings. The majority relied on that "*88. Article 49 of Law no. 195 stipulates that the decisions of the Agency can be appealed to the highest civil judge of the first instance. According to this provision, the judge's decision is final upon examination of the documents. In this respect, the appellate procedure in Article 49 of the Law does not fall within the scope of adversarial proceedings and the decision becomes final upon the rejection of the appeal and the applicants have to bear a financial burden ...*" and "*90. In the appeal procedure provided for in Article 49 of the Law, the applicants were not given the opportunity to defend their claims before the judge, to present their evidence and to discuss the reasons for the punishment of the Agency. ...*". First, contrary to the majority opinion, there is no direct link between the finality of decisions rendered on appeal and the principle of adversarial proceedings. The principle of adversarial proceedings entails that "the parties be granted the opportunity to have knowledge of, and comment on, the materials of the case file and thus requires the active involvement of the parties in the proceedings as a whole." (see, among many other judgments, *Adnan Şen* [Plenary], no. 2018/8903, 15 April 2021, § 156). Considering the fact that the right to a fair trial does not guarantee the

right to a trial before two levels of jurisdiction (among many decisions, see *Levent Tütüncü* (2), no. 2015/7108, 8 September 2020, §§ 55-58) and that the principle of adversarial proceedings is one of the safeguards that must be provided in a trial that does not necessarily have two stages, it is of course possible and even obligatory to ensure the requirements of the principle of adversarial proceedings within the one level appellate proceedings. The conclusiveness of the decision on the appeal may be related to the right to a trial before two levels of jurisdiction. However, taking into account Article 2 of Protocol No. (7) to the European Convention on Human Rights, the right to a trial before two levels of jurisdiction, except in "criminal" matters, does not fall within the common scope of protection in individual applications (see, among many decisions, *Levent Tütüncü* (2), §§ 55-58). The administrative sanction in the present case cannot be considered as a "penalty" in the autonomous sense. Second, contrary to the majority's opinion, there is no provision in the law that excludes the applicants from defending their claims before the judge, presenting their evidence and discussing the Agency's justifications. On the contrary, the meaning of the opening of the appeal against the decisions of the Agency in Article 49 of the Law is to allow individuals to discuss the decisions of the Agency before the judge and to present their evidence. If what is meant by the majority opinion is the opportunity to defend oneself before the judge in an oral hearing, there is no direct link between the safeguard of an oral hearing and the principle of the adversarial proceedings. Oral proceedings may be a guarantee that must be provided within the framework of the right to a public trial or, depending on the situation, its indirect relationship with other fair trial guarantees may be established. However, the examination of the documents in the context of the appeal procedure cannot be regarded as a situation which in itself prevents the conduct of an adversarial proceedings, in other words "the right of the parties to be informed of and to comment on the documents in the case, thus preventing them from taking an active part in the proceedings as a whole". In addition, Article 3 § 1 of the Decision of the General Assembly of the Agency no. 129 on the Principles of Press Ethics states that *"... applications alleging violation of the Principles of Press Ethics shall not be taken into consideration if they are not lodged within (30) days from the date of publication. The Directorate-General shall notify the newspaper concerned of any allegations made within this period*

and shall request it to submit its defence within (10) days. If the defence is not submitted within this period, the right of defence shall be deemed to have been waived. This shall be clearly stated in the letter containing the request for defence" and in the third paragraph: "*The period of (30) days referred to in the first paragraph shall be (60) days for violations dealt with directly by the Board of Directors. The provisions of this article shall be applied in the same manner to the request for defence and to the decision. ...*". Accordingly, the newspaper that is potentially exposed to the sanction entailing the suspension of official announcements and advertisements, whether upon request or *ex officio* by the Agency, has the opportunity to present its defence and evidence to Agency regarding the allegation that it has violated the principles of press ethics. In the event of a sanction decision, the newspaper in question may appeal to the closest civil judge of first instance of the highest rank within 10 days of the notification pursuant to Article 49 § 2 of Law no. 195. In case of an appeal, there is no obstacle for the newspaper to express its claims regarding the unlawfulness of the sanction decision and its defences against the allegations made against it in the statement of appeal. In addition, the court may, if it deems it necessary or if requested, demand from the Agency or the appellant the documents or information that are the subject of the sanction decision of the Agency. In this case, it does not seem possible to say that the objection procedure excludes adversarial proceedings.

23. In the majority's opinion, the interferences that were the subject of the application were also examined with regard to their legitimate aim and their conformity with the requirements of the democratic society, and a violation was found with reference to the criterion of conformity with the requirements of the democratic society in addition to the criterion of legality. For the reasons set out below, we dissent from the majority's conclusion of a violation in this respect.

Legitimate Aim

24. Although we agree with the majority's conclusion as to the existence of a legitimate aim, it is not accurate to define the legitimate aim solely as the protection of the reputation or rights of others. For example, in the application no. 2020/37547, the legitimate aim pursued by the sanction

entailing the suspension of official announcements and advertisements imposed due to an article titled "Does the Government Promise its Citizens to Become Martyrs" has been considered to be related to the national security and not the protection of the reputation or rights of others.

Compliance with the Requirements of a Democratic Society

25. In the majority opinion, a violation was found in terms of the criterion of conformity with the requirements of a democratic society, however, a violation was determined - categorically - on the basis of the structural problem, without evaluating the events. Since we have not observed a problem in terms of legality, we believe that instead of such a categorical and generalised evaluation, the grounds for interference should be examined individually for each case and whether an evaluation has been made in accordance with the criteria set out by the Constitutional Court. For this reason, we dissent from the conclusion that the interferences were not in accordance with the requirements of the democratic social order on the grounds that the justifications were inadequate in a blanket approach.

As regards Other Matters

26. In the majority's opinion, it was stated that "*109. ... According to the information and documents submitted by the Agency to the Constitutional Court, it has been observed that the Agency imposed 39 days suspension on official announcements and advertisements on newspapers for violating the principles of press ethics in the statistics of 2018, 143 days in the statistics of 2019 and 572 days in the statistics of 2020. Considering the penalties imposed in this direction, it has been observed that the powers vested in the Agency have gone beyond the purpose of regulating the ethical values of the press and have become a means of sanction that may have a chilling effect on some members of the press, and this situation has caused a systematic problem.*" Firstly, Article 49 of Law no. 195, which regulates the Agency's power to issue decisions on the suspension of official publications and advertisements, is already titled "Sanction". Therefore, the sanction of suspending official publications and advertisements is stipulated as a "means of punishment" (not "punishment" in the autonomous constitutional sense) and has a chilling effect by its very nature. In the majority's opinion, if the expression "turning into an instrument of punishment" implies that the sanction is being used

for purposes other than its intended purpose, for example for political purposes, this should be clearly stated and sufficient grounds should be provided. The mere listing of statistical data for three consecutive years cannot be accepted as a sufficient factual basis for misuse.

Conclusion

27. In conclusion, for the reasons set out above, the relevant part of Article 49 of Law no. 195, which constitutes the basis for the interferences in the form of sanctions entailing the suspension of official announcements and advertisements in the present cases, was neither unpredictable nor uncertain. The appeal against the sanction entailing the suspension of official announcements and advertisements does not exclude the examination of the merits of the dispute and the safeguards of the principle of adversarial proceedings. **Accordingly, we dissent from the majority's opinion, which concludes that the Agency's decisions on the suspension of official announcements and advertisements -categorically- violate the freedoms of expression and the press, without addressing the merits of the events in the files, by identifying a structural problem arising from the law -with an approach that is not in line with the Court's case-law and is based on insufficient legal and factual grounds- in both aspects.** In the present cases, the Agency and the judges may not have provided relevant and sufficient grounds to justify the interference with the freedoms of expression and the press in terms of conformity with the requirements of the democratic society and proportionality in accordance with the principles developed by the Court. However, in accordance with the established practice of the Court, this matter should have been examined on a case-by-case basis. In this way, it would have been possible to conclude that some of the decisions of the Agency which were the subject of the application were in violation of the law. **The majority adopted this procedure and found a violation with a categorical approach, instead of evaluating the impugned decisions of the Agency in their particular circumstances.**

28. For these reasons, we dissent from the violation judgment rendered in accordance with the majority's opinion.

CONCURRING OPINION OF JUSTICES BASRİ BAĞCI AND KENAN YAŞAR

Concurring Opinion (As regards the lawfulness criteria)

Article 49 of Law no. 195 on the Organisation of the Press Advertising Agency stipulates that those who violate the provisions of Law no. 195, the regulation to be issued in accordance with this law, the decisions to be taken by the General Assembly of the Press Advertising Agency and the principles of press ethics shall be penalised with the suspension of announcements and advertisements.

Within the framework of the foregoing principles of the Law, Resolution no. 129 of the General Assembly of the Press Advertising Board, published in the Official Gazette no. 22127 of 30 November 1994, and the Principles of Ethics of the Press, an accessible, specific and foreseeable regulation has been made, which constitutes the basis for the suspension of announcements and advertisements.

It is a requirement of Article 38 of the Constitution that there should be a certain degree of clarity in the provisions relating to offences and penalties, particularly in matters of criminal law. However, it is inevitable that every legal concept contains a certain degree of ambiguity and that this situation will be resolved by the interpretations to be made by the competent authorities.

This circumstance has been clarified many times in the judgments of the Constitutional Court. In the assessment of the ambiguity of the concept of "providing support to a terrorist organisation", it is explicitly established in the judgments of Sara Akgül (§ 109) and Hayriye Özdemir (§ 58) that the fact that a provision contains a certain degree of abstractness and can only be fully understood with the help of legal assistance does not mean that the provision is not foreseeable.

In a similar vein, the ambiguity and variation inherent in the concept of "obscenity" does not in itself render the provision ambiguous (see the Court's judgment no. 2011/44 E. 2012/99 K. 21 June 2012). In the same decision, the Court assessed the concept of "Public Morality" and ruled that it was determinable.

There is no doubt as to the fact that the definitions set out in Resolution no. 129 of the General Assembly of the Press Advertising Agency on the Principles of Press Ethics are predictable and agreeable in nature.

An issue that the law outlined in general terms has been clarified by a sub-regulatory act. Moreover, it does not seem possible to state that there is general uncertainty regarding the content.

The fact that the lower and upper limits of the sanction to be applied are laid down by law as "from one day to two months" is a concrete data indicating that the provision draws a general framework. The Constitutional Court has found no violation of the Constitution in its evaluation of the regulations containing similar provisions (in the judgment of 26 December 2003, docket numbered 2000/8 and numbered 2003/104, the fine of TRY 2 billion to TRY 10 billion in Article 47/A of the Capital Market Law no. 2499 was accepted as significant. In the judgment dated 11 November 2021, docket numbered 2019/110 (not yet published), Article 19/1 of the Postal Services Law no. 6475, according to which the administration may impose a fine of up to 3% of the net profit of the previous year on service providers, was found not to be unconstitutional).

On the other hand, leaving the detailed regulation of sanctions, the general framework of which is drawn by the law, to secondary legislation does not constitute a violation of the Constitution alone (see the Court's judgment no. E.2018/89, K.2019/84, 14 November 2019).

Within the framework of these evaluations, we dissent from the majority's opinion on this point, since we consider that the sanction provided for in Article 49 of the Law, despite constituting an interference with the freedom of expression, was not a sanction in the technical sense and at the level of standards within the scope of Article 38 of the Constitution, and since the provision is accessible, foreseeable and precise, no violation of the Constitution has been found in this regard.

On the other hand, we agree with the majority's opinion on the application of the pilot judgment procedure and its unconstitutionality, as we consider that the regulation in Article 49 § 2 of Law no. 195, which governs the procedures and principles of the appeals to be lodged against

the sanctions imposed, leads to systematic violations for representing one level jurisdiction, results in the evaluation of the matter only on the basis of the documents, and does not give the applicants the opportunity to submit their claims and statements through adversarial proceedings before the judge.

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

CEBRAİL PADAK

(Application no. 2019/41543)

15 June 2022

On 15 June 2022, the Second Section of the Constitutional Court found a violation of the freedom of expression safeguarded by Article 26 of the Constitution in the individual application lodged by *Cebrail Padak* (no. 2019/41543).

THE FACTS

[4-19] The applicant, a university student, was subject to warning, as a disciplinary sanction, by the university administration as he had hung a banner without permission. The disciplinary sanction challenged by the applicant was initially annulled by the administrative court. However, upon appeal by the university, the regional administrative court revoked the administrative court's decision and rejected, with final effect, the applicant's case.

V. EXAMINATION AND GROUNDS

20. The Constitutional Court ("the Court"), at its session of 15 June 2022, examined the application and decided as follows:

A. Request for Legal Aid

21. The applicant stated that he could not afford to pay the litigation costs and accordingly sought legal aid.

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

B. Alleged Violation of the Freedom of Expression

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

23. The applicant claimed that imposition of a disciplinary sanction due to the banner hung for commemorating Ali İsmail Korkmaz, a university student who had lost his life during the Gezi Park protests, on his birthday at the university where he had studied did not comply with the requirements of a democratic society. The applicant maintained that his freedom of expression had been violated, stating that was no

indication that the said poster had disturbed the peace at the university, posed such risk, hindered the education or caused tension. The applicant also claimed that his right to a fair trial had been violated, stating that the summons issued within the scope of the disciplinary investigation did not state the imputed offence, the statutory provision prescribing the sanction imposed and the evidence adduced, thereby eliminating the opportunity to defend himself.

24. In its observations, the Ministry stated that the freedom of expression was not an absolute right and might be restricted in accordance with the requirements of the democratic social order to ensure the protection of public security as well as the public order, if certain conditions were satisfied. The Ministry noted that the applicant had been imposed a disciplinary sanction since he had been seen hanging a banner on the wall and that the action for annulment he had brought to challenge the said procedure was rejected. It specified that in terms of relevant and sufficient grounds, the constitutional provisions, the case-law of the Constitutional Court and the content of the application should be taken into account in the examination of whether the applicant's freedom of expression was violated.

25. In his counter-statements against the Ministry's observations, the applicant reiterated his previous claims.

2. The Court's Assessment

26. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The applicant claimed that in addition to his freedom of expression, his right to a fair trial had also been violated. In consideration of the fact that the applicant's complaint had mainly been based on the disciplinary sanction imposed on him for hanging a banner without permission, it has been considered that the applicant's allegations as a whole should be examined under the freedom of expression.

27. Article 26 of the Constitution, titled *"Freedom of expression and dissemination of thought"*, insofar as relevant, reads as follows:

"Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually

or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities…

The exercise of these freedoms may be restricted for the purposes of … public order, …."

a. Admissibility

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

b. Merits

i. Existence of an Interference

29. The applicant was imposed a disciplinary sanction of warning for hanging a banner without permission. The impugned sanction constituted an interference with the applicant's freedom of expression.

ii. Whether the Interference Constituted a Violation

30. Article 13 of the Constitution, insofar as relevant, reads as follows:

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

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

(1) Lawfulness

32. The investigation procedures, authorities and sanctions regarding the disciplinary actions concerning the students attending higher education institutions are laid down in Article 54 of Law no. 2547. Article 65 § (a) (9) thereof stipulates that the disciplinary processes regarding students, the powers of disciplinary superiors as well as the formation and functioning

of disciplinary boards shall be regulated through materials to be issued by the Council of Higher Education. In this regard, it is specified in Article 5 § (1) (c) of the Higher Education Institutions Student Discipline Regulation ("the Regulation") that the act of hanging a banner without permission constitutes a disciplinary offence prescribed to be punished by reprimand. Thus, given the provisions of Law no. 2547 and of the Regulation, it has been concluded that the impugned interference with the freedom of expression met the criterion of *restriction by law*.

(2) Legitimate Aim

33. In the present case, the applicant was subject to warning, as a disciplinary sanction, by the university administration as he had hung a banner on the university campus without permission. It has been concluded that such an interference with the applicant's freedom of expression was made so as to maintain the discipline and order on the university campus, and that therefore, it pursued a legitimate aim.

(3) Compatibility with the Requirements of a Democratic Social Order

(a) General Principles

(i) Significance of the Freedom of Expression in a Democratic Society

34. The freedom of expression refers to a person's ability to have free access to the news and information, other people's opinions, not to be condemned due to the opinions and convictions they have acquired and to freely express, explain, defend, transmit to others and disseminate these either alone or with others. Expressing the ideas including those opposed to the majority by any means, gaining stakeholders for the ideas expressed, the efforts to materialise the ideas and to convince others in this sense, as well as the tolerance of these efforts are among the requirements of a pluralist democratic order. Therefore, ensuring social and political pluralism depends on the peaceful and free expression of thoughts. Thus, the freedom of expression and dissemination of thought is of vital importance for the functioning of democracy (see *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, §§ 33-35; *Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, §§ 42, 43; and *Tansel Çölaşan*, no. 2014/6128, 7 July 2015, §§ 35-38).

(ii) Academic Freedom

35. In order for an educational institution to function with maximum efficiency, it is essential that the coordination of the institution is not disrupted or there is no such risk. For this reason, with a view to maintaining order in schools, where education and training are provided, and to ensuring education in the most efficient way, certain fundamental rights and freedoms of students, including the right to education, may be restricted through disciplinary rules addressed to them (see *Ahmet Batur*, no. 2018/20182, 14 September 2021, § 35).

36. However, the educational status is of great importance in terms of the regulations imposed on students' freedom of expression. In this sense, the level of education attained by the individual subject to a disciplinary restriction is important. As the level of education increases, interference with the students' freedom of expression should decrease (see *Ahmet Batur*, § 43).

(iii) Whether the Interference Complied with the Requirements of a Democratic Social Order

37. The Court has previously expressed on many occasions how the concept of the requirements of a democratic social order should be interpreted in terms of the freedom of expression. Any interference with the freedom of expression may be considered to be compatible with the requirements of a democratic social order as long as it meets a pressing social need and is proportionate. Accordingly, unless an interference with the freedom of expression meets a pressing social need (see, *mutatis mutandis*, *Bekir Coşkun*, § 51; *Mehmet Ali Aydın*, § 68; *Tansel Çölaşan*, § 51; and *Ayşe Çelik*, no. 2017/36722, 9/5/2019, § 37) or unless it is proportionate even if it meets a pressing social need (see *Bekir Coşkun*, § 51; *Mehmet Ali Aydın*, § 68; *Tansel Çölaşan*, § 51; and *Bayram Akın*, no. 2015/19278, 9 May 2019, § 33), then it cannot be regarded as complying with the requirements of a democratic social order.

(iv) Grounds for the Interference

38. Any interference with the freedom of expression without a good cause or with any justification failing to fulfil the criteria set by the Court will be in breach of Article 26 of the Constitution. For an interference with the freedom of expression to be compatible with the requirements of a

democratic social order, the grounds relied on by public authorities must be relevant and sufficient (see, among other authorities, *Kemal Kılıçdaroğlu*, no. 2014/1577, 25 October 2017, § 58; *Bekir Coşkun*, § 56; and *Tansel Çölaşan*, § 56).

(b) Application of Principles to the Present Case

39. In the present case, the applicant was subject to warning, as a disciplinary sanction, by the university administration as he had hung a banner without permission. The applicant's challenge against the disciplinary sanction was dismissed on the basis of the footages of him hanging the banner. The applicant has claimed that his freedom of expression has been violated due to imposition of a disciplinary sanction for hanging a banner. There is no information pointing to the fact that the public authorities launched an investigation against the applicant due to the content of the banner.

40. The requirement of permission for hanging a banner at the university and the imposition of sanction for the acts performed without such permission are clearly serves the purpose of maintaining order on the university campus. However, given the legitimate aim pursued by the interference, the failure to get permission will not per se justify the impugned interference, and therefore, the said interference with the freedom of expression will have to be proven to have served the legitimate aim pursued. As a matter of fact, the necessity of the interference with the freedom of expression, which is an exceptional case, for the achievement of the legitimate aim pursued must be demonstrated by the public authorities relying on relevant and sufficient grounds. Therefore, it is incumbent on the public authorities to put forth that the said banner disturbed the peace on the university campus

41. It is laid down in Article 5 of the Regulation that the act of hanging banners without permission inside a higher education institution shall be subject to disciplinary sanction. A constitutional assessment should be made in the examination of the legal situation arising out of the application of the said provision. In other words, it is obvious that a review of an interference with the freedom of expression in accordance with the provisions of the regulation will not amount to a constitutionality review, on the contrary, it will mean an appellate review that is limited to the examination of whether the provisions of the regulation are applied

properly. In this regard, the impugned provision of the Regulation introduced relying on the Higher Education Law no. 2547 should be evaluated taking into consideration the legitimate purpose pursued.

42. In the present case, in consideration of the investigation report and the decisions of inferior courts, it was observed that they included no assessment as to the extent to which the banner disturbed the peace at the university or posed such risk. However, in the present case, the relevant administration and inferior courts confined their examination to the ascertainment of whether the impugned act had been performed by the applicant. Moreover, neither the administration nor the courts concluded that the banner caused visual or environmental pollution, but they only mentioned the temporary use of the university wall to announce the commemoration in question. The punishment of the students at universities merely on the ground that their conducts in contravention of certain statutory provisions may pose an abstract threat entails a risk of exerting pressure on several constitutional rights and freedoms notably the freedom of expression. Therefore, in imposing a sanction due to an expression of thought at a university, it should be demonstrated that the impugned expression has caused, to a certain extent, risk or damage under the particular circumstances of the given case (see, for similar assessments in another context, *Ayşe Çelik,* § 47; and *Zübeyde Füsun Üstel and Others* [Plenary], no. 2018/17635, 26 July 2019, § 84).

43. Besides, the banner was hung on a university campus. Disciplinary rules may be applied in order to maintain institutional order. However, it is also essential to create an environment of freedom of expression on the university campus, which is considered one of the centres of scientific production. Despite their being public institutions, in universities, interference with freedom of expression should be exceptional, since they are not of a nature of penitentiary institutions, police stations or places of formal education. In this context, in the academy, which is seen as the cradle of free thought and critical mind, more tolerance should be shown to university students who have different opinions and whose ways of expressing their opinions may be sharp. Freedom of expression necessitates that everyone, including university students, are able to freely express, communicate and disseminate their views and opinions. University students should therefore enjoy the strict protection of freedom of expression, even if those views and opinions are controversial or

unsupported (see, in the same vein, *Ahmet Batur*, § 43; and *Zübeyde Füsun Üstel and Others*, § 41).

44. The investigation procedures of the university administration and the decisions of the inferior courts included no evaluation as to the content of the banner hung without permission. Given its content, the said banner was aimed at commemorating Ali İsmail Korkmaz, who studied at the same department of the same university as the applicant and who lost his life during the Gezi Park protests, on his birthday. It was not claimed that the said banner contained insult, incitement to violence, hate speech or incitement to riot given its content and form. Therefore, considering as a whole the identity of the person who made the statement, as well as the time and content of the statement, it has been observed that the statement had been made in a context.

45. In view of above, no *sufficient and relevant justification* was provided to demonstrate that the imposition of a disciplinary sanction met a pressing social need. Therefore, the impugned interference was found to be incompatible with the *requirements of a democratic society*.

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

c. Application of Article 50 of Code no. 6216

47. The applicant requested retrial and claimed non-pecuniary compensation.

48. There is a legal interest in conducting a retrial in order to redress the consequences of the violation found. In this regard, the action to be taken by the judicial authorities is to initiate the retrial proceedings and to make a new decision which eliminates the reasons underlying the violation judgment rendered by the Court and which complies with the principles specified therein (for the details regarding retrial procedure in terms of individual application, which is laid down in Article 50 § 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, see *Mehmet Doğan* [Plenary], no. 2014/8875, 7 June 2018, §§ 54-60; *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019, §§ 53-60, 66; and *Kadri Enis Berberoğlu (3)* [Plenary], no. 2020/32949, 21 January 2021, §§ 93-100).

49. Besides, since it has been understood that a retrial would provide sufficient redress, the applicant's claim for non-pecuniary compensation has been dismissed.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 15 June 2022 that

A. The applicant's request for legal aid be ACCEPTED;

B. The alleged violation of the freedom of expression be declared ADMISSIBLE;

C. The freedom of expression safeguarded by Article 26 of the Constitution was VIOLATED;

D. A copy of the judgment be REMITTED to the 2nd Chamber of the Eskişehir Administrative Court (E.2018/369, K.2018/976) for a retrial so as to redress the consequences of the violation of the freedom of expression;

E. The applicant's request for non-pecuniary damage be REJECTED;

F. The litigation cost of TRY 4,500, consisting of the counsel fee, be REIMBURSED to the applicant;

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

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

ATİLLA YAZAR AND OTHERS

(Application no. 2016/1635)

5 July 2022

On 5 July 2022, the Plenary of the Constitutional Court found violations of the freedoms of expression and the right to hold meetings and demonstration marches, safeguarded by Articles 26 and 34 of the Constitution, in the individual application lodged by *Atilla Yazar and Others* (no. 2016/1635).

THE FACTS

[6-87] The applicants were sentenced to imprisonment or were imposed judicial fines due to the opinions they had expressed in various ways or for their acts during the meetings and demonstration marches they had participated in, but were bound by a supervision order for the following five years in accordance with a decision on the suspension of the pronouncement of the judgment (HAGB).

V. EXAMINATION AND GROUNDS

88. The Constitutional Court ("the Court"), at its session of 5 July 2022, examined the application and decided as follows:

A. Request for Legal Aid

89. In accordance with the principles set out by the Court in the case of *Mehmet Şerif Ay* (no. 2012/1181, 17 September 2013), the Court should accept the request for legal aid by the applicants Mr. Kutbettin Demir, Mr. Ümit Kavak, Ms. Sevinç İzol Özipek and Ms. Zeynep Çelik Daşğın, who have been found to be unable to afford the litigation costs without suffering a significant financial burden, for not being manifestly ill-founded.

B. Alleged Violations of the Freedom of Expression and the Right to Hold Meetings and Demonstration Marches

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

90. The applicants raised the following complaints:

i. The applicants argued that were convicted for expressing opinions within the scope of the freedom of expression, the right to hold meetings and demonstration marches, and the right to organisation; that the inferior

courts failed to follow the principles laid down in the case-law of the Court of Cassation, the European Court of Human Rights ("the ECHR") and the Constitutional Court; and that the HAGB decisions did not contain sufficient grounds justifying their conviction. They maintained that had been subject to proceedings in rush and sentenced based on assumptions, without effective investigations being conducted on whether the charges against them were found established.

ii. The applicants claimed that various guarantees under the right to a fair trial had been violated during the proceedings at the end of which HAGB decisions were issued. In this sense, the applicants argued that they had requested the court, by submitting various information, documents or reports, to conduct research that would affect the outcome of the proceedings and to hear the witnesses, and they had requested copies of the information and documents included in the case file; however, their requests had not been met or rejected without any reasons by the courts. They also maintained that the impugned HAGB decisions were issued without taking into consideration their rights to legal assistance and to be provided with necessary time and facilities for their defence.

iii. The applicants further argued that even if they had enjoyed their right to appeal against the HAGB decisions, the appellate authorities rejected their appeals on stereotypical and abstract grounds, many of them did not even conduct an examination on the merits and only considered whether the formal conditions for issuing HAGB decisions were met. The applicants claimed that the failure of the appellate authorities to consider their arguments rendered this remedy ineffective, thus infringing their right to legal remedies.

iv. Lastly, the applicants maintained that the trial courts failed to demonstrate that their punishment met a pressing social need, therefore their facing the threat of imprisonment with HAGB decisions constituted a disproportionate measure, and that such a threat had a chilling effect on their fundamental rights and freedoms such as the freedom of expression, the right to hold meetings and demonstration marches, the right to association and the right to organisation.

91. In its observations, the Ministry noted the followings:

i. Whether the applicants, by accepting the HAGB, waived their right to review the alleged interference with their freedom of expression or right to hold meetings and demonstration marches in return for the advantages they obtained from the HAGB, and thus whether they exhausted the effective legal remedies, should be evaluated within the scope of the examination on the admissibility.

ii. As regards the alleged violation of the freedom of expression, it was stated in some of the present cases that the alleged interference with the applicants' freedom of expression pursued the legitimate aim of protecting the reputation and rights of others, public order and the fundamental characteristics of the Republic.

iii. Considering that the words uttered against the President of the Republic, which constituted defamation offence, did not serve public interest, did not contribute to a public debate, exceeded the limits of criticism and amounted to insult as well as damaged the honour and dignity of the targeted person, the HAGB decisions issued were necessary and proportionate in a democratic society.

iv. Considering that some of the applicants made statements praising and glorifying the armed terrorist organisation namely PKK/KCK in accordance with the calls and instructions of the latter, legitimized the activities carried out by the PKK armed terrorist organisation and incited terrorism, the impugned interference was neither arbitrary nor disproportionate.

v. The applicants were not at the status of convict or accused with the HAGB decisions, nor were they subject to restrictions with respect to their rights concerning their civil, political or private lives. They waived their right to appeal of their own free will by accepting the HAGB decisions, and they had the opportunity to exercise their right to appeal against the impugned decision if they committed an intentional offence within the supervision period. In such a case, both the regional court of appeal and the Court of Cassation would be able to examine whether the applicant's expressions fell within the scope of the freedom of expression.

vi. As regards the alleged violation of the right to hold meetings and demonstration marches, the applicants, who engaged in demonstrations

without receiving a permission, did not disperse and continued their demonstrations despite being warned by the security forces and being subject to the latter's use of force in a proportionate manner.

vii. Lastly, the applicants' appeals against the HAGB decisions were examined and adjudicated by the assize courts.

92. In their counter-statements against the Ministry's observations, the applicants generally reiterated their claims raised in their application forms, stating that accepting the HAGB decisions did not mean that they waived acquittal or pleaded guilty.

2. The Court's Assessment

93. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). It has been considered that the applicant's aforementioned claims should be examined under the freedom of expression and the right to hold meetings and demonstration marches, safeguarded respectively by Articles 26 and 34 of the Constitution.

94. Article 26 of the Constitution, titled *"Freedom of expression and dissemination of thought"*, insofar as relevant, reads as follows:

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

The exercise of these freedoms may be restricted for the purposes of … public order, … protecting the reputation or rights … of others …

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

95. Article 34 of the Constitution, titled *"Right to hold meetings and demonstration marches"*, reads as follows:

"Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission.

The right to hold meetings and demonstration marches shall be restricted only by law on the grounds of national security, public order, prevention of commission of crime, protection of public health and public morals or the rights and freedoms of others.

The formalities, conditions, and procedures to be applied in the exercise of the right to hold meetings and demonstration marches shall be prescribed by law."

a. Admissibility

96. The alleged violations of the freedom of expression and the right to hold meetings and demonstration marches must be declared admissible for not being manifestly ill-founded and there being no other grounds for their inadmissibility.

b. Merits

i. Existence of an Interference

97. The applicants were sentenced to imprisonment or were imposed judicial fines due to the opinions they had expressed in various ways or for their acts during the meetings and demonstration marches they had participated in, but were bound by a supervision order for the following five years in accordance with a HAGB decision. Therefore, it has been concluded that all of the relevant HAGB decisions constituted an interference with the applicants' freedom of expression and their right to hold meetings and demonstration marches. As a matter of fact, the Constitutional Court has previously held in a number of judgments that the HAGB decisions and the supervision periods ordered for statements of opinions in various ways constituted an interference with and violated certain fundamental rights and freedoms of individuals, such as the freedom of expression and the press or the right to hold meetings and demonstration marches. Some of the aforementioned violation judgments of the Court are as follows:

- For the judgments in which a violation of the freedom of expression was found, see *Zerga Öztürk*, no. 2015/4556, 9 January 2020; *Şeyma Fenercioğlu*, no. 2015/12747, 7 November 2019; *Şaban Sevinç*, no. 2016/36782, 28 November 2019; *Emin Aydın*, no. 2013/2602, 23 January 2014; *Fatma*

Nida Olçar, no. 2014/5456, 8 February 2018; *Hulisi Elmas*, no. 2014/13607, 10 January 2018; *Deniz Benol and Others*, no. 2014/18780, 7/2/2019; *Meral Özata Özgürol*, no. 2015/2326, 26/12/2018; *Meki Katar* [GK], no. 2015/4916, 3/10/2019; *Erol Balcı*, no. 2015/7325, 10/5/2018; *Berrin Baran Eker ve Muzaffer Özbek*, no. 2015/11012, 9/1/2020; *Sinan Baran*, no. 2015/11494, 11/6/2018; *Esma Seydaoğlu*, no. 2015/15566, 8/1/2020; *Kenan Gül*, no. 2015/17892, 19/2/2019; *Bayram Akın*, no. 2015/19278, 7/3/2019; *S.A.*, no. 2015/19664, 7/2/2019; *Safure Güneş*, no. 2016/24905, 8/9/2020; *Şaban Sevinç (2)*, no. 2016/36777, 26/5/2021; *Ali Taştan*, no. 2017/5809, 29/1/2020; *Yaşar Gökoğlu*, no. 2017/6162, 8/6/2021; *Gökhan Çalışkan*, no. 2017/18316, 28/1/2020; *Ceyhun Tunç*, no. 2017/20822, 14/9/2021; *Diren Taşkıran*, no. 2017/26466, 26/5/2021; *Çağrı Yılmaz*, no. 2017/34463, 13/2/2020; *Zübeyde Füsun Üstel ve diğerleri* [GK], no. 2018/17635, 26/7/2019.

- For the judgments in which a violation of the freedom of the press was found, see *Orhan Pala*, no. 2014/2983, 15/2/2017; *Bekir Coşkun* [GK], no. 2014/12151, 4/6/2015; *Ufuk Çalışkan*, no. 2015/1570, 7/3/2019; *Erbil Tuşalp*, no. 2015/2595, 23/10/2019; *Hakan Yiğit*, no. 2015/3378, 5/7/2017; *Ş.Y.*, no. 2015/14044, 7/3/2019; *Kemal Baytaş*, no. 2016/1314, 4/7/2019; *Arifhan Mehmet Kızılyalın*, no. 2016/9398, 14/9/2021; *Şükrü Gündüz*, no. 2016/29297, 8/9/2020; *Abuzer Demir ve Aslı Peksezer*, no. 2016/73556, 23/10/2019.

- For the judgments in which a violation of the right to hold meetings and demonstration marches was found, see *Osman Erbil*, no. 2013/2394, 25/3/2015; *Ali Orak ve İrfan Gül*, no. 2014/10626, 18/4/2018; *Eylem Onuk*, no. 2015/8018, 15/11/2018; *Umut Şimşek ve diğerleri*, no. 2015/14310, 12/6/2018; *Ali Demirci ve diğerleri*, no. 2015/16311, 20/9/2018; *Erol Usta ve diğerleri*, no. 2016/10291, 13/4/2021 ve *Etem Aykaç ve diğerleri*, no. 2016/10633, 9/6/2020.

- For the judgments in which violations of the *nullum crimen, nulla poena sine lege* principle as well as the freedom of expression were found, see *Fikriye Aytin ve diğerleri*, no. 2013/6154, 11/12/2014.

ii. Whether the Interference Constituted a Violation

98. The aforementioned interference would amount to violations of Articles 26 and 34 of the Constitution, unless it complies with the conditions set out in Article 13 of the Constitution. Article 13 of the Constitution, insofar as relevant, reads as follows:

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

99. It must be determined whether the impugned interference complied with the requirements set out in Article 13 of the Constitution and applicable to the present case, namely being prescribed by law, relying on one or several justified reasons specified in the relevant provision of the Constitution and not being contrary to the requirements of a democratic society. Thus, in case of an interference with a right or freedom, it must first be determined whether there is a statutory provision underlying the interference.

(1) Lawfulness of the Interference

(a) General Principles

100. In Article 13 of the Constitution regulating the regime of restricting the fundamental rights and freedoms, it is laid down as basic principle that fundamental rights and freedoms may be restricted *only by law*. In order for an interference with Article 26 of the Constitution to meet the requirement of lawfulness, the said interference must necessarily have a legal basis under Article 26 § 2 of the Constitution (see, for the judgments where basic principles of the lawfulness requirement are laid down in different contexts, *Sevim Akat Eşki*, no. 2013/2187, 19 December 2013, § 36; *Tuğba Arslan* [Plenary], no. 2014/256, 25 June 2014, § 82; *Hayriye Özdemir*, no. 2013/3434, 25 June 2015, §§ 56-61; *Halk Radyo ve Televizyon Yayıncılık A.Ş.* [Plenary], no. 2014/19270, 11/7/2019, § 35; and *Hamit Yakut* [Plenary], no. 2014/6548, 10 June 2021, § 76).

101. The Court has on many occasions stated that for an interference to be considered to have a legal basis, primarily the *formal* existence of a law is necessary (see *Tuğba Arslan*, § 96; and *Fikriye Aytin and Others*, no. 2013/6154, 11 December 2014, § 34). As a matter of fact, law as a legislative act is a product of the will of the Grand National Assembly of Türkiye ("the GNAT") and is enacted by it in compliance with the law-making procedures enshrined in the Constitution. Such an understanding affords

a significant safeguard for fundamental rights and freedoms (see *Eğitim ve Bilim Emekçileri Sendikası and Others* [Plenary], no. 2014/920, 25 May 2017, § 54; *Halk Radyo ve Televizyon Yayıncılık A.Ş.*, § 36; and *Hamit Yakut*, § 77). Nevertheless, the lawfulness requirement also encompasses a *material* content, and thereby, the quality of the wording of the law becomes more of an issue. In this sense, this requirement guarantees accessibility and foreseeability of the provision imposing restriction, as well as its clarity which amounts to its certainty (see *Metin Bayyar and People's Liberation Party* [Plenary], no. 2014/15220, 4 June 2015, § 56; *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 55; *Halk Radyo ve Televizyon Yayıncılık A.Ş.*, § 37, and *Hamit Yakut*, § 78).

102. Certainty means that content of a provision must not lead to arbitrariness. The statutory arrangements concerning the restriction of fundamental rights must be precise in terms of its content, aim and scope, as well as clear to the extent that the addressees could know their legal status. According to this principle, legislative acts must be sufficiently clear, precise, comprehensible and applicable so as not to allow any hesitation or doubt on the part of both the administration and individuals. They must also *provide certain safeguards against arbitrary practices of public authorities*. A statutory arrangement should demonstrate, to a sufficiently certain extent, the legal consequences corresponding to a given criminal act or action and thus the limits of interference that the public authorities may be subject to. In that case, the individuals may foresee their rights and obligations and accordingly perform acts and actions (see *Hayriye Özdemir*, §§ 56, 57; *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 56; *Halk Radyo ve Televizyon Yayıncılık A.Ş.*, § 38; *Metin Bayyar and People's Liberation Party*, § 57; *Hamit Yakut*, § 79; and for explanations regarding certainty in the decisions of constitutionality-review cases, see among many other judgments, the Court's judgment no. E.2009/51, K.2010/73, 20 May 2010; and the Court's judgment no. E.2011/18, K.2012/53, 11 April 2012).

(b) Application of Principles to the Present Case

103. Following the ECHR's judgment in the case of *Adnan Erkuş v. Türkiye* and the Constitutional Court's judgment in the case of *Ali Gürsoy* (no. 2012/833, 26 March 2013), it has been no longer possible to bring a complaint

regarding fair trial before the Court before the suspended judgments are announced and finalised. However, the Court has previously examined on the merits the constitutionality of numerous interferences with the freedom of expression and the right to hold meetings and demonstration marches through the *HAGB decisions*, and *in most of these applications*, the Court concluded that the inferior courts failed to demonstrate that the impugned interferences served a pressing social need relying on relevant and sufficient justification, and hence found a violation.

104. The Court considers that there is a strong relationship between the aforementioned violations and the HAGB institution. In fact, the applicants claimed that the systematic procedural failures of the courts led to the violations of their fundamental rights. Therefore, the Court will not examine at the outset whether the relevant statutory provisions regulating the offences of which the applicants were convicted met the legality criterion, but whether the *HAGB institution*, which was applied to all applicants and considered by the Court as having a chilling effect on fundamental rights and freedoms, *met the legality criterion*. In this framework, the Court will reach a conclusion by evaluating whether the HAGB institution may redress the aforementioned and ongoing violations and prevent the arbitrary conducts of the authorities exercising public power, along with the impugned practices in the present cases. However, before proceeding with the aforementioned evaluations, it would be useful to mention some basic information about the HAGB institution.

(i) Overview of the HAGB (Suspension of the Pronouncement of the Judgment)

105. In 1987, the Committee of Ministers of the Council of Europe recommended the member states of the Council of Europe to simplify and speed up their judicial procedures through methods such as trial without holding hearings and extrajudicial agreements. As a matter of fact, with the adoption of the HAGB institution, the workload of the regional courts of appeal and the Court of Cassation has been reduced considerably. In principle, when applied properly, the HAGB institution, reducing the workload of the higher courts, provides a significant advantage in terms of expediting the adjudication process of the criminal cases, and allows these

courts to use their resources and opportunities in relatively more serious and important matters. In addition, the HAGB institution is accepted to be also related to the concept of restorative justice. In parallel with the resolutions of the Economic and Social Council of the United Nations, the HAGB institution enables the redress of the damages sustained by the victim, through compensation or restitution, thus satisfying the victim, and in addition, the reintegration of the victim and the offender at the end of a process in which the offender participates of his own free will.

106. The HAGB institution, despite being regulated in the preliminary drafts of the Turkish Criminal Code of 1989 and 1997, was not enacted. The institution was first introduced to our law with Article 23 of the Child Protection Law no. 5395 dated 3 July 2005, and was prescribed to be applied only for juvenile defendants (juvenile delinquency). Subsequently, pursuant to the paragraphs added to Article 231 of Law no. 5271 with Article 23 of Law no. 5560 dated 6 December 2006, which entered into force later, the HAGB institution was also accepted to be applied to adults in terms of imprisonment sentences of one year or less or judicial fines imposed due to crimes subject to complaint. Afterwards, an arrangement was made to expand the scope of the institution regarding its application. As a matter of fact, in accordance with Article 562 of Law no. 5728 dated 23 January 2008, Article 231 § 5 of Law no. 5271 was amended, and the upper limit of the imprisonment sentence specified therein was increased from one year to two years; and with the amendment made to Paragraph 14 thereof, the application of the HAGB institution was no longer made conditional upon the crime's being subject to a complaint.

107. Besides its other aspects, the HAGB institution is also one of the measures introduced by the State so as to reduce crime and criminality. Through this institution, the conviction of individuals undergoing criminal proceedings are prevented so that no conviction decision appears in their criminal records. Thus, individuals are not exposed to the various negative consequences of criminal conviction such as stigmatization, and therefore, their rapid adaptation to social life is ensured. Moreover, the HAGB institution also contributes to the reduction of criminal convictions and, as a consequence, to the reduction of the number of prisoners. Measures alternative to imprisonment are of vital importance for preventing the

overcrowding of penitentiary institutions in Türkiye. In addition to all these, HAGB functions to prevent negative consequences of penitentiary institutions on inmates as well as to eliminate the economic and social drawbacks of imprisonment on the society and the state. As a matter of fact, the report issued by the Justice Commission of the GNAT on Law no. 5560, stated the following observations regarding the HAGB institution:

"*In order to avoid the deprivations associated with a criminal conviction, it may be much more effective not to sentence the accused in terms of maintaining social peace, provided that he does not commit a new crime during the supervision period and acts in accordance with certain obligations imposed on him especially for the purpose of redressing the victim's suffering.*"

108. Despite being a recently introduced institution in the Turkish legal system, HAGB is widely applied in Türkiye since the relevant law entered into force in 2005. As a matter of fact, according to the data announced by the Ministry of Justice General Directorate of Criminal Records and Statistics for the year 2020 -the date closest to the date on which the present application has been examined- the number of decisions rendered by criminal courts was 3,246,170, the total number of convictions was 1,541,870, and the total number of HAGB decisions was 443,874. According to these statistical data, HAGB decisions constitute approximately one fourth of the convictions and 13.7% of the total number of decisions.

109. Besides, it would be useful to take a closer look at the statistics of the HAGB decisions which have the potential to be brought before the Constitutional Court with alleged violation of one of the rights and freedoms other than the right to a fair trial, such as freedom of expression and the right to hold meetings and demonstration marches. 10.3% of the criminal cases filed in 2020 were crimes against honour, including the offence of defamation, regulated under Articles 125 to 131 of the Turkish Criminal Code, and 44,475 of them, corresponding to 20.7%, were concluded with HAGB. During the same period, 17.3% of the cases concerning crimes against private life laid down in Articles 132-140 of the Turkish Criminal Code, 8.1% of the cases filed for acting in breach of Law no. 2911, 23.3% of the cases filed for acting in breach of Law no. 3713, and 30.6% of the cases filed for acting in breach of Law no. 5816 were concluded with HAGB.

110. Lastly, it should be noted that, in principle, the application of the HAGB institution is not expected to affect the acquittal rates. This is because the HAGB institution is related to conviction, not acquittal. In other words, since the HAGB institution is not a type of decision alternative to the acquittal, it has a potential to affect not the acquittal rates but the rates of sanctions alternative to the conviction. However, regard being had to the statistics issued by the Ministry, it is observed that while the ratio of acquittal to all other decisions was 22.2% in 2005, this ratio decreased to 18.4% in 2007 after the HAGB institution became applicable for minors in 2005 and for adults in 2006. Furthermore, while the ratio was 21.2% in 2008, the acquittal rate decreased to 19.5% following the statutory amendment in 2008 widening the scope of application of the HAGB institution. In parallel, the ratio of *other decisions*, including HAGB decisions, increased from 32.9% in 2007 to 43.6% in 2008 following the aforementioned amendment.

111. In conclusion, it may also be useful to take a look at the statistics of appeals against HAGB decisions. According to the statistics obtained from the Ministry of Justice General Directorate of Criminal Records and Statistics, 608,915 appeals against HAGB decisions were rejected, while 63,603 appeals were accepted between 1 January 2013 and 8 February 2022, and the rate of acceptance of the appeals was approximately 10.4%. On the other hand, in 2020, 12.6% of the cases adjudicated by the General Assembly of Criminal Chambers of the Court of Cassation were upheld and 32.6% were quashed, while 28.8% were upheld and 29.8% were quashed in criminal chambers.

The HAGB in Turkish Law

112. The HAGB institution is also found in the legal systems of the United States of America, England, France, Switzerland, Hungary, Germany and Austria, with some differences. The Turkish HAGB institution takes the German Criminal Code as a model. However, there are some differences between the Turkish and German HAGB institutions, and the HAGB institution is applied in an extremely limited area in the German system compared to the Turkish criminal justice system. As a matter of fact, while 716,000 people were convicted in Germany in 2019, the number of cases

in which the HAGB institution was applied was 6,153. The ratio of the HAGB decisions to all criminal convictions in Germany is around 0.86%.

113. It is laid down in Article 231 § 5 of Law no. 5271 that in order for the HAGB institution to become applicable, the sentence imposed at the end of the proceedings must be imprisonment for a term of two years or less or a judicial fine. Besides, the accused must not have been convicted of an intentional offence before, the damage suffered by the victim or the public must be fully redressed by restoration of the situation prior to the violation or award of compensation, and the court must be convinced that the accused will not commit a crime again, taking into account his personal characteristics and his attitude and behaviours at the hearing. Pursuant to Article 231 § 8 thereof, those who have previously been issued with a HAGB decision cannot avail of a HAGB decision again if they commit an intentional offence within the supervision period. Lastly, a HAGB decision can only be issued upon conviction.

114. The HAGB institution consists of two separate decisions, one is the conviction that does not have legal consequences yet due to its not being pronounced, and the other is the decision that suspends the legal effect of the conviction for a certain period of time. The first decision is the conviction, which is technically considered as a judgment, but cannot have legal effect due to the decision to suspend its pronouncement, thus not amount to a judgment, which will turn into a decision on dismissal of the case if the conditions are fulfilled, and will have legal effect if the conditions are not fulfilled. The second decision is the one that prevents the previous judgment to have legal effect. The most basic and distinctive feature of the second decision is that the preliminary judgment cannot have legal effect as long as the former continues to be effective (see, among many decisions, the General Assembly of Criminal Chambers of the Court of Cassation, no. E.2010/11-70, K.2010/159, 29 June 2010; and no. E.2013/14-102, K.2014/128, 11 March 2014).

Legal Character of the HAGB Institution

115. The HAGB is a judicial individualisation institution that directly adapts the sentence to the personality of the accused. Since the judicial process does not end completely with a HAGB decision and in this

respect, it is not a decision ending the judicial process, the HAGB decision is not a judgment (see the General Assembly of Criminal Chambers of the Court of Cassation no. E.2013/14-102, K.2014/128, 11 March 2014; and the 4th Criminal Chamber of the Court of Cassation no. E.2013/14-102, K.2014/128, 3 February 2020).

116. The HAGB institution, which refers to the fact that the decision on conviction in respect of the accused does not have any legal consequences under certain conditions, enables the dismissal of the criminal case in accordance with Article 223 of Law no. 5271 by annulling the suspended judgment, provided that a new offence is not committed intentionally within the supervision period of three years for minors and five years for adults, and the obligations, if any, are complied with. Therefore, the Court of Cassation considers that the HAGB institution is a conditional reason for dismissal that ends the criminal relationship between the accused and the state (see, among many decisions, the General Assembly of Criminal Chambers of the Court of Cassation, no. E.2009/6-163, K.2009/202, 14 July 2009; and no. E.2010/11-70, K.2010/159, 29 June 2010).

117. As a matter of fact, as set forth in Article 231 §§ 10 and 11 of Law no. 5271, unless a new intentional offence is committed within the supervision period and the obligations imposed within the scope of probation, if any, are fulfilled, the judgment the pronouncement of which has been suspended shall be annulled and the case shall be dismissed, whereas if a new intentional offence is committed within the supervision period or if the obligations are not complied with, the judgment shall be pronounced. One of the most important advantages afforded by the HAGB institution is that it provides the accused with the opportunity to be completely exempted from the punishment by ensuring the dismissal of the case if the conditions are complied with.

Pronouncement of the Judgment and the Procedure after the Pronouncement of the Judgment

118. The court, finding that the accused has committed a new intentional offence within the supervision period or failed to fulfil his obligations imposed within the scope of probation, shall pronounce the suspended judgment in accordance with Article 231 § 11 of Law no. 5271.

The pronouncement of the judgment does not mean that the judgment has been finalised and can be executed immediately. Except for the exceptional cases stipulated in the law, legal remedies of appeal on points of facts and law and, if the conditions are met, appeal on points of law can be applied against the pronounced judgment. The court that will pronounce the judgment is the one that issued the HAGB.

119. Although there is no clear provision in Law no. 5271 on how the judgment shall be announced, it is set forth in the Court of Cassation' case-law that in cases where the accused has committed a new intentional offence or failed to fulfil his obligations within the supervision period, the court must hold a hearing, summon the accused and the other persons concerned, and enable the accused to make his defence (see, among many decisions, the 4th Criminal Chamber of the Court of Cassation, no. E.2015/22506, K.2016/6619, 7 April 2016; the 13th Criminal Chamber of the Court of Cassation, no. E.2020/2154, K.2020/5389, 11 June 2020; and the 11th Criminal Chamber of the Court of Cassation, no. E.2017/1076, K.2020/3137, 16 June 2020).

120. If the court determines that the conditions are met, that the accused committed an intentional offence during the probation period or that he failed to comply with the obligations imposed on him, it shall pronounce the judgment as it is. The decisions rendered by the first instance courts may be appealed if the conditions specified in Article 272 of Law no. 5271 are met. Therefore, since the proceedings ends with the pronouncement of the suspended judgment, or with the dismissal of the case in the event that no new intentional offence is committed within the supervision period, these decisions can also be appealed, which have become judgments.

121. The legal remedy of appeal is applicable against the decisions of the court of first instance, which are not final, and where substantial and legal review is carried out. Instead of quashing the decision, the regional court of appeal may render a new decision by conducting a new investigation and eliminating the issues it finds unlawful. Article 286 of Law no. 5271 specifies the decisions of the criminal chambers of the regional courts of appeal that can be appealed. As a rule, more lenient sentences shall become final on appeal.

Some Consequences of the Application of the HAGB Institution

122. Issuance of a HAGB decision in a criminal case bear many legal consequences. Some of these, which may contribute to the resolution of the present application, can be listed as follows:

i. If a HAGB decision has been issued, there is a judgment rendered in respect of the accused but not finalised yet, therefore the case is still pending and the person concerned is still regarded as an accused (see the General Assembly of Criminal Chambers of the Court of Cassation, no. E.2010/11-70, K.2010/159, 29 June 2010).

ii. Minors are subject to a three-year supervision period while it is five years for the adults. The statute of limitations does not run during the supervision period. The accused may also be imposed certain obligations for certain periods of time within the scope of probation measure.

iii. If the accused commits a new intentional offence within the supervision period of acts contrary to his obligations the judgment shall be pronounced. Unless the accused commits a new intentional offence within the supervision period and unless he fulfils his obligations, the judgment shall be annulled and the case shall be dismissed.

iv. The HAGB institution shall not be applied again regarding other crimes committed within the supervision period.

(ii) Factors Affecting the Legality of the HAGB Institution

123. The Constitutional Court will examine whether the HAGB system is capable of meeting the legality criterion in light of the statutory regulations in force, the general explanations made above on the HAGB institution, and the experience it has gained in its previous violation decisions. In making such an examination, the impugned judicial processes before the inferior courts will be considered as a whole.

Disregarding the Safeguards Provided under the Right to a Fair Trial during the Proceedings Concluded with a HAGB Decision: Procedural Abuse

124. Under this heading, firstly, the meaning, scope and principles

of the various guarantees of the right to a fair trial, insofar as relevant, will be mentioned; then, in the light of the aforementioned principles, it will be assessed whether the inferior courts through their practices in the present cases disregarded these guarantees, in other words, whether the HAGB system has provided sufficient safeguards against *procedural abuse*. Finally, the effects of this assessment on various rights and freedoms such as freedom of expression or the right to hold meetings and demonstration marches, and whether the current system is capable of redressing ongoing violations within the scope of the legality criterion will be discussed.

Right to a Reasoned Decision

125. It is laid down in Article 141 § 3 of the Constitution that "*The decisions of all courts shall be written with a justification.*" which places an obligation on the courts to provide reasons for their decisions. As a requirement of the principle of constitutional integrity, the aforementioned constitutional provision should also be kept in mind when holding an assessment on the right to a reasoned decision (see *Abdullah Topçu*, no. 2014/8868, 19 April 2017, § 76). In addition, the legislator has introduced regulations in various provisions of Law no. 5271 with a view to ensuring that all decisions of the courts are issued with a reasoning.

126. The right to a reasoned decision aims to ensure and supervise a fair trial. Therefore, the courts are obliged to specify with sufficient clarity the grounds they relied on in their decisions. This right is also necessary to ensure that the parties know whether their claims raised during the proceedings have been properly examined and that the public is informed of the reasons for judicial decisions rendered on their behalf in a democratic society (see *Sencer Başat and Others* [Plenary], no. 2013/7800, 18 June 2014, §§ 31 and 34). However, even though the inferior courts are not obliged to address all allegations raised before them, it must be inferred from the reasoned decision that the main issues of the case were examined (see *Yasemin Ekşi*, no. 2013/5486, 4 December 2013, § 56). Trial courts are expected to justify with reasonable grounds the proof of the facts of the case, the evaluation of the evidence, the interpretation and application of the legal provisions, the resolution of the dispute, and the reasons for the discretionary power exercised in reaching the conclusion (see *İbrahim Ataş*, no. 2013/1235, 18 June 2013, § 23).

127. Besides, as regards the impact of the right to a reasoned decision, which is a procedural guarantee, on substantive rights, the Constitutional Court has stated in its many judgments that any interference with fundamental rights and freedoms such as freedom of expression or the right to hold meetings and demonstration marches in the absence of a justification or relying on a ground that does not meet the criteria set forth by the Court will be in breach of the relevant provisions of the Constitution (see, among many other judgments, *Kemal Kılıçdaroğlu*, no. 2014/1577, 25 October 2017, § 58; *Bekir Coşkun*, § 56; *Tansel Çölaşan*, no. 2014/6128, 7 July 2015, § 56; *Zübeyde Füsun Üstel and Others*, § 120; *Sırrı Süreyya Önder* [Plenary], no. 2018/38143, 3 October 2019, § 60; and *Candar Şafak Dönmez* [Plenary], no. 2015/15672, 5 November 2020, § 53).

128. In this regard, in the analysis of the grounds relied on by the courts in the present cases pointing to the commission of the offences subject to the HAGB decisions in the light of the aforementioned principles, it has been observed that the courts relied on the following grounds in respective cases:

- 2016/1635: "*the applicant disseminated terrorist propaganda*";

- 2016/24458: "*the applicants marched by holding posters and banners of the terrorist leader [A.Ö.]…*";

- 2017/11928: "*the expressions used by the accused exceeded the limits of criticism and freedom of thought, and constituted successive insult against the complainants due to their duty*";

- 2017/30787: "*the accused insulted the President by exceeding the limits of freedom of expression and criticism on his internet accounts*";

- 2017/31112: "*due to his expression 'July 15th happened once', the accused committed the imputed offence*";

- 2017/34930: "*the impugned posts did not fall within the scope of the freedom of thought and criticism, but attacked the honour, dignity and prestige of the Prime Minister of the Republic of Türkiye*";

- 2017/35324: "*the accused's profile picture on his Facebook account belonged to the so-called leader [A.Ö.] of the PKK/KCK armed terrorist organisation,*

and thus the accused disseminated the terrorist propaganda by praising the organisations violent acts";

- 2019/7003: "*the applicant committed the imputed offence since he made comments offending the honour, reputation and prestige of Atatürk under a video dated 23 November 2016 via his Facebook social networking account*";

- 2020/5067: "*the applicant and the other accused hold a banner on which "misogynist" was written and used expressions that humiliated and degraded the victim in public*"; and

- 2020/34078: "*the applicants disseminated propaganda for the PKK/PYD armed terrorist organization in such a way as to justify or praise its methods involving force, violence or threats, or to encourage resorting to such methods*".

129. The subjects of the proceedings needs a duly formulated judgment so that they can understand and evaluate the reasons for any conclusion in favour of or against them in the criminal proceedings, and a definite reason indicating beyond any doubt the grounds as well as the content and scope of the judgment. As a matter of fact, in order to secure such requirement, the legislator has made several arrangements in Law no. 5271 as well as Article 141 of the Constitution. Accordingly, the legislator has clearly stated that the reasoning of the judgment should include the observations put forward by the prosecution and the defence, the discussion and evaluation of the evidence, the evidence relied on for the judgment as well as the evidence rejected, the conclusion reached, and the act committed by the accused, which is considered to have constituted an offence, and its characterization. On the contrary, in the present cases, the trial courts failed to demonstrate how the material facts of the cases have been characterized, the reasons and legal provisions underlying the judgment, and the causal link between the material facts and the judgment.

130. Given the statements in the aforementioned decisions of the courts, it has been observed that the expressions or attitudes resulting in punishment were not discussed in any way and no allegations likely to be important in the resolution of the merits of the dispute were examined. It has also been understood that the said decisions did not specify why some of the claims or defences were addressed while some others were

overlooked, as well as they did not include any exhaustive reasoning for the rejection of the defence. It has been observed that the courts attempted to justify the HAGB decisions with expressions consisting of a repetition of the relevant statutory provisions or of the words uttered or the behaviours performed by the applicants, which was completely in contravention of the aforementioned guarantees. The assessments above on the reasoning of the impugned court decisions are very similar to the findings of the Constitutional Court regarding the HAGB decisions it examined and found to have violated various rights.

131. In fact, in some of the present cases, in the light of the principles set out by the Constitutional Court with regard to the offence of making terrorist propaganda (see, among many decisions, *Zübeyde Füsun Üstel and Others*, §§ 89-122; *Ayşe Çelik,* no. 2017/36722, 9 May 2019, §§ 41-61; *Sırrı Süreyya Önder*, §§ 61-86; and *Candar Şafak Dönmez*, §§ 54-73), the inferior courts accepted various expressions of thoughts as a terrorist propaganda, regardless of their context, their objective meanings and the entirety of the words uttered or attitudes performed by the applicants as a whole. The trial courts also failed to convince that the applicants' expressions praised or supported terrorism or incited violence, armed resistance or uprising directly or indirectly (see, for assessments in the same vein, *Ayşe Çelik*, § 57; and *Sırrı Süreyya Önder*, § 79). In the examination of the relevant decisions, it has been observed that the principles laid down by the Constitutional Court regarding the imputed offence have not been considered, and that in some of the decisions it was not even explained which acts or expressions (or the Turkish equivalents of expressions in another language) were taken as a basis for the sentence, while in some others merely the relevant statutory provisions were reiterated or irrelevant reasons were specified.

132. Moreover, regard being had to the HAGB decisions issued due to *defamation* in the present cases, it has been observed that the principles laid down by the Constitutional Court in its many judgments, indicating the steps to be taken by the inferior courts to strike a balance between the conflicting rights (*Nilgün Halloran,* B. No: 2012/1184, 16/7/2014, § 44; *Ergün Poyraz (2)*, § 56; *Kadir Sağdıç* [GK], B. No: 2013/6617, 8/4/2015, §§ 58-66; *İlhan Cihaner (2)*, B. No: 2013/5574, 30/6/2014, §§ 66-73), were not duly taken into consideration by the inferior courts, as well as the applicants'

expressions were not evaluated within the entirety of the case, without separating them from the context in which they were uttered (see *Nilgün Halloran*, § 52; and *Önder Balıkçı*, no. 2014/6009, 15 February 2017, § 45). It is noteworthy that the inferior courts contented themselves in their decisions with specifying that the statements taken as the basis for the impugned interferences were generally of a nature damaging the honour, dignity or prestige of the victims, and they made no further assessments. In other words, they put forward no arguments as to why the applicants could not benefit from the protection of the freedom of expression and why the statements constituted an unjustified and arbitrary attack, and they discussed none of the criteria set forth by the Court.

133. Lastly, in the present cases, the examination of the HAGB decisions issued for violations of the Law no. 2911 on Meetings and Demonstrations revealed that the trial courts in no way considered the principles set forth in various judgments of the Court emphasizing that the purpose of the right to assembly is to ensure the protection of the rights of individuals who do not resort to violence and express their opinions peacefully (see *Ali Rıza Özer and Others* [Plenary], no. 2013/3924, 6 January 2015, §§ 117, 118; *Osman Erbil*, § 47; *Gülşah Öztürk and Others*, no. 2013/3936, 17 February 2016, §§ 67, 68; *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 80; *Dilan Ögüz Canan* [Plenary], no. 2014/20411, 30 November 2017, § 37; and *Ömer Faruk Akyüz*, no. 2015/9247, 4 April 2018, § 54). As a matter of fact, the court decisions included no argument that violence had been resorted to during the meetings forming the basis for conviction, nor was there any finding to this effect in the decisions of the inferior courts. The inferior courts issued HAGB decisions in respect of the applicants using general and vague statements and repeating the provisions of the law.

Principle of Equality of Arms

134. Another element inherent in the right to a fair trial is the principle of equality of arms. This principle means that parties of a case shall be subject to the same conditions in terms of procedural rights and that both parties shall be afforded equal opportunities to submit their allegations and arguments before the courts, without placing any party in a disadvantageous position (see *Yaşasın Aslan*, no. 2013/1134, 16 May 2013,

§ 32). In order for the equality of arms to be ensured in the proceedings, it is necessary to determine whether the parties are provided with procedural guarantees and whether a fair balance is maintained between the prosecution and the defence. The Court will examine the applications in the light of these principles.

135. In the merged application no. 2017/11928, the applicant, who was an MP at the material time, claimed that his statements subject to the HAGB decision were within the scope of legislative irresponsibility, that the dates of the newspapers were written incorrectly in the indictment and that he was tried in two other courts for the same issue and the same offence. In this context, the applicant requested the court to obtain the newspapers containing the impugned statements from the National Library, to have the relevant internet newspapers examined by an expert, to obtain the impugned press statement from the Presidency of the GNAT, to obtain and examine some of the case files mentioned in his petition and to hear a witness. The Court, on the other hand, stated that it would consider these requests at the next hearing but rejected at the next hearing, where no one was present, the aforementioned requests on the grounds that they "*would not affect the result*" and issued a HAGB.

136. It has been observed that the requests of the applicant, who is an MP, which were clearly related to his case and the evidence he requested to be collected directly concerned whether the elements of the offence he was charged with existed; however, these requests were rejected by the court on unjustified, abstract and stereotypical grounds. Although it is of importance for ensuring the principle of equality of arms that the applicant is has the opportunity to submit his claims and defence, the enjoyment of this opportunity alone is not sufficient for the fulfilment of the obligations imposed on the State in accordance with the principle of equality of arms. The court is expected to demonstrate that it examines such claims seriously and conducts the proceedings with due diligence. However, in the present case, there is no indication that the court adequately examined the applicant's claims.

137. In the merged application no. 2021/39563, the defence counsel of the applicant Ms. Sevinç İzol Özipek claimed that the client could not

hear the warning made during the impugned meeting and demonstration march since she was suffering hearing loss, and in this sense, submitted the relevant report to the case file and requested the court to consider this issue. However, the court did not make any assessment on the issue. The applicant also requested a copy of the digital materials containing the video footage taken as the basis for his sentence, but her request was rejected. Furthermore, the applicant requested that the witnesses of the minutes be heard, but this request was also rejected by the court and the proceedings were concluded with a HAGB decision.

138. It is obvious that the applicant's requests for the reports on her hearing loss to be taken into consideration, for the video footage included in the digital evidence and taken as basis for the charges against her to be delivered to her, and for the witnesses of the minutes to be heard might be decisive in terms of proving the charge against her and of her criminal responsibility. However, the court's practice in this regard resulted in a failure to ensure the basic function of criminal proceedings in a way rendering the defence ineffective. As a matter of fact, the court either rejected or ignored the applicant's requests, which were clearly relevant to the case, and the evidence he requested to be collected throughout the proceedings, without relying on any reasonable grounds. In these circumstances, it has been concluded that the procedure and method followed by the court did not comply with the requirements of the principle of equality of arms, nor was it able to protect sufficiently the guarantees afforded to the defence against the prosecution, thus placing the former in a disadvantageous position.

Right to Adequate Time and Facilities for the Preparation of Defence and to Legal Assistance

139. Securing the right to defence in criminal proceedings is one of the fundamental principles of a democratic society (see *Erol Aydeğer*, no. 2013/4784, 7 March 2014, § 32). Unless the accused is provided with the opportunity to defend himself against the accusation, then the proceedings will not be fair. Sentencing individuals by depriving them of the right to defence is also incompatible with the presumption of innocence safeguarded by Article 38 of the Constitution. The accused must be able

to enjoy his right to defence not in form but in reality. For this purpose, the accused must be provided with necessary opportunities to make his defence, i.e. adequate time and facilities (see *Ufuk Rifat Çobanoğlu*, no. 2014/6971, 1 February 2017, §§ 36, 37).

140. So as to prevent the defence from being in a disadvantage position compared with the prosecution, it may be required to provide legal assistance for the suspect and the accused, along with the opportunity of defending himself personally (in person). The need for legal assistance of the person accused of a criminal offence may arise from overcoming difficulties in having an access to the evidence, lack of legal knowledge or the psychological state in which he is. Within this context, the right to legal assistance, ensuring the effective exercise of the right to defence, is also a requirement of the principle of *equality of arms*, which constitutes another element of the right to a fair trial. In other words, the right to legal assistance ensures not only the effective exercise of the right to defence, but also functionality of the principle of equality of arms (see *Yusuf Karakuş and Others*, no. 2014/12002, 8 December 2016, § 74). The facilities that must be provided to the person charged with an offence are those *necessary* for preparing his defence. One of these facilities is to allow the accused to submit his opinion on the evidence through his defence counsel during the prosecution phase (see, *mutatis mutandis*, *Ufuk Rifat Çobanoğlu*, §§ 43, 45). The Court will examine the present cases in the light of these principles.

141. In the merged application no. 2016/24458, the applicant Mr. Ersin Başak submitted a power of attorney to the court on 28 April 2016 and stated that he had appointed a defence counsel. The said power of attorney was read out by the court at the second hearing on 12 May 2016, at which no one was present, but no summons was issued for the defence counsel informing him of the date and time of the next hearing. Thus, the proceedings were terminated without asking his response to the prosecution's final opinion at the next hearing. Besides, the reasoned decision was not served on the applicant's counsel. As is seen, in the present case, the court did not involve the applicant's defence counsel in the proceedings, despite his appointment with a power of attorney and his reading it at the hearing. The court terminated the proceedings without informing him of the hearings as well as the decision. Thus, the court

completely ignored the special manifestations of the principle of equality of arms, namely the rights to legal assistance and to be afforded adequate time and facilities to prepare defence, and ultimately, issued a HAGB decision against the applicant.

142. In the merged application no. 2020/34078, the hearing was adjourned to 2 July 2020 at 10.35 a.m. to allow time for the applicants' defence counsel of the applicants to response to the final opinion on the merits. On the aforementioned date at 1.01 p.m., the applicants' defence counsel filed a petition of excuse on the grounds that the hearing of his clients could not start yet due to the extension of other hearings at the court, and that another client's statement was to be taken at the İstanbul Security Directorate, and therefore, requested the adjournment of the hearing in order to submit their defence on the merits. However, the court dismissed the said request on the grounds that the applicant's defence counsel had been given a deadline at the previous hearing but did not submit a written defence within the period allowed. As a result, the court concluded the proceedings by issuing a HAGB decision. The inability of the applicant's defence counsel, who had waited for nearly three hours for the hearing, to attend it due to reasons not attributable to him, and dismissal of his request on a ground disregarding the *principle of orality*, one of the most fundamental principles inherent in the criminal procedure law, was in breach of the special manifestations of the principle of equality of arms, namely the rights to legal assistance and to be afforded adequate time and facilities to prepare defence.

A Manifestation of Procedural Abuse: Appeal against HAGB Decisions

143. In order to resolve a dispute arising from the alleged erroneousness or unlawfulness of a judgment, individuals have been provided with the opportunity to appeal as a legal remedy. The aim of this remedy is to provide a more secure judicial service by enabling the review of the decisions rendered by judicial authorities by another judicial authority (see the Constitutional Court's judgment, E.2014/164, K.2015/12, 14 January 2015). Since appeal is of utmost importance for rendering lawful and accurate decisions, it provides a guarantee not only for the accused but also for the society. Besides, the case-law of the Constitutional Court

indicates that the safeguards under the right to a fair trial must also be provided during the appeal process (see *Emine Karagülmez*, no. 2013/3673, 11 December 2014, § 21). Therefore, the Court considers it extremely important in terms of the protection of fundamental rights and freedoms whether these violations are evaluated by the appellate authorities in cases where the first instance courts issue a HAGB decision in breach of constitutional guarantees.

144. As is known, in Law no. 5271, the legislator has explicitly envisaged the legal remedy of *appeal* against HAGB decisions. Appeal, which is an ordinary legal remedy, is a remedy that can be applied to challenge the decisions delivered by judges and -in cases prescribed by law- the court decisions. Appeal is a remedy of *second* instance, as it can be filed as regards *substantive* and *legal* issues. The second instance remedies are divided into two: (i) *appeal on points of law*, and (ii) *appeal on points of law and facts*, depending on whether they can be applied to challenge a judgment or not. The *appeal on points of law and facts* shall apply to *decisions other than judgments*. In this legal remedy, the appellate authority -unlike the appeal *on points of law*- may, if necessary, address the substantive matter as well as the legal matter, as well as it may conduct or order the conduct of investigations it deems necessary in accordance with Article 270 § 1 of Law no. 5271. Again, the appellate authority reviewing an appeal may hold a hearing pursuant to Article 270 § 1 of Law no. 5271 and may hear the public prosecutor, defence counsel or attorney.

145. It is specified in the Court's judgments that, as a rule, where an appellate authority finds the trial court's judgment appropriate, it is sufficient for it to include this conclusion in its decision either by using the same reasoning or making a reference. (*Yasemin Ekşi*, § 57). Besides, in cases where the court of first instance fails to address substantial claims or respond to them with reasonable grounds, there will not be any assessment by first-instance court that the appellate authority could refer to if the same claims are raised before it. In that case, the appellate authority is constitutionally obliged to hold an assessment on those points, which directly relate to the proceedings, and respond to them with reasonable grounds (see *Ümmügülsüm Salgar* [Plenary], no. 2016/12847, 21 October 2021, § 69).

146. On the other hand, since the introduction of the HAGB institution, there have been serious differences in practice regarding the remit of the legal remedy of appeal against HAGB decisions, and thus the alleged violations to be addressed. As a matter of fact, in the case of an appeal against a HAGB, the Court of Cassation initially held that the appellate authority would carry out a limited examination, which was confined to the formal conditions of the HAGB and would not examine whether the offence was proven, and later held that it should also conduct a substantive examination as well as the formal examination of the HAGB. It has been observed that there have been different practices between the chambers of the Court of Cassation in regard to the same process. The inconsistency of practices at this point constitutes only one of the problems encountered in terms of the appeal of the HAGB decisions.

147. The Court has previously examined a practical issue regarding a HAGB decision. It held that the execution of a confiscation order on the basis of a judgment that had not been pronounced and finalised yet, *without an effective supervision*, was in breach of the applicant's right to property (see *Mahmut Üçüncü*, no. 2014/1017, 13 July 2016, § 101; and for a judgment whereby the impugned arbitrariness was reported to the GNAT for the solution of the structural problem, see *Süleyman Başmeydan* [Plenary], no. 2015/6164, 20 June 2019, §§ 57-63, 73).

Judicial Reform Strategy Document and Appeal as A Legal Remedy

148. In addition to the considerations above regarding the HAGB institution, the Constitutional Court also considers that the determinations included in the Judicial Reform Strategy Document (Document) issued by the Ministry of Justice in 2019, which outlines a series of judicial reforms to strengthen the rule of law, promote rights and freedoms, and establish an effective and fast-functioning justice system, may be also observed in the final assessments on the HAGB institution. One of the objectives of the aforementioned judicial reform is to make statutory amendments to promote the freedom of expressions. In addition, it is also clearly envisaged in the Document that the HAGB decisions and the appeals against these decisions should be examined within the scope of the right to a fair trial. The objectives set forth in the Document are as follows:

"The issues covered in the document have two basic aspects. One covers the legislative infrastructure, while the other covers its application. It is planned to increase human rights sensitivity in practice. These efforts will focus particularly on the freedoms of expression and the press, right to hold meetings and demonstration marches, and application of the detention measure proportionately.

...

Another issue mentioned in the Document is the institution of "suspension of the pronouncement of the judgment". It is provided for that this institution and the appeals against the decisions rendered through this institution shall be reviewed under the right to a fair trial.

...

OBJECTIVE 7.2

...

c) The institution of suspension of the pronouncement of the judgment and the appeals against this decision will be reviewed within the scope of the right to a fair trial."

149. It is also clearly stated in the Document that within the framework of the amendments to the statutory provisions affecting the freedom of expression, the finalisation of the judgments rendered by the regional courts of appeal should be re-evaluated in terms of the articles regarding the freedom of expression, thus aiming to provide an additional assurance to individuals by ensuring the review of the judgments also by the Court of Cassation. In this scope, the Ministry expressed the said objective as follows: "*The appeal as a legal remedy against judicial decisions concerning the freedom of expression shall be more commonly applicable.*"

150. Within the scope of the aforementioned objective, Law no. 7188 has introduced a judicial reform that is closely related to the cases similar to the present one. Accordingly, the appeal as a legal remedy has been put into force to challenge a number of decisions that cannot be appealed inasmuch as they relate to certain offences having a a direct impact on the freedom of expression. Pursuant to Article 286 § 3 of Law no. 5271,

three levels of jurisdiction have become applicable to the offences directly related to the freedom of expression, such as defamation, threat to cause fear and panic in the public, incitement to commit offence, praising the crime and the criminal, inciting to hatred and hostility or insulting the public, incitement to disobey the laws, defamation of the President of the Republic, insulting the signs of state sovereignty, insulting the Turkish nation, the state of the Republic of Türkiye, and the institutions and bodies of the state, engaging in an armed organisation and causing the public to abstain from military service, and disseminating terrorist propaganda. In addition, three levels of jurisdiction have also become applicable to the offences enumerated in Article 28 § 1 of Law no. 2911 regarding the holding and organisation of meetings and demonstration marches, and participation in the related movements; in Article 31 thereof regarding the use of unlawful propaganda means and employment these means for the purpose of incitement to commit an offence; and in Article 32 thereof regarding the resistance against the warnings and use of force by not dispersing during unlawful meetings or demonstration marches.

151. It is specified in the legislative intent of Law no. 7188 that the relevant regulation aimed at preventing violations. When the legal amendments and their purposes are considered together, it can be clearly observed that the legislator aims to render the appellate review much more effective and of a multi-level nature so as to prevent violations, especially on matters having a bearing on the freedom of expression. On the other hand, it would not be wrong to say that *the effectiveness of the appeal against the HAGB decisions*, in its current situation, is far from the legislator's aim to enhance the guarantees surrounding fundamental rights in the aforementioned legal amendments, and that it hinders the goals that the legislator seeks to achieve as regards fundamental rights, especially the freedom of expression. HAGB decisions hinder the achievement of the goals that the legislator seeks to achieve through the aforementioned amendments, primarily *promoting appeals against judicial decisions concerning freedom of expression*.

152. In fact, as set forth in the "*Opinion no. 831/2015 of the European Commission for Democracy through Law (Venice Commission) on Articles 216, 299, 301 and 314 of the Penal Code of Türkiye*", dated 15 March 2016 (CDL-

AD(2016)002, § 31), the highest courts' guidance is very important for the lower courts in the interpretation and implementation of human rights standards in their case-law. It is obvious that an appellate review by the Court of Cassation, the highest appellate authority, would provide better guarantees to the parties concerned than an appeal mechanism before a court at the same level. In spite of all this, through HAGB decisions, which are widely resorted to in practice, and due to the interpretation contrary to the jurisprudence of the General Assembly of Criminal Chambers of the Court of Cassation regarding the scope of the appellate review, these proceedings, which constitute an interference with the freedom of expression, are left outside the scope of the appellate review, in breach of the aforementioned objective of the legislator.

153. Moreover, as regards the appeal mechanism, in *the Memorandum on freedom of expression and media freedom in Türkiye* no. CommDH (2017)5 issued by the Council of Europe Commissioner for Human Rights on 15 February 2017, it was noted that the blocking of access as a measure was commonly used in Türkiye, and it was specified therein that the magistrate judges vested with the authority to review the requests for blocking access and appeals against blocking orders rendered their decisions by carrying out insufficient examination as well as relying on insufficient legal grounds. It was also stated that both the inferior courts and the legislature seemed reluctant to follow the principles laid down by the Constitutional Court (see the relevant memorandum, §§ 107-109). The Court, in its judgment in the case of *Keskin Kalem Yayıncılık ve Ticaret A.Ş. and Others* ([Plenary], no. 2018/14884, 27 October 2021), examined the alleged violation of the right to an effective remedy in conjunction with the freedom of expression on account of the appeal against the decision on blocking of access and concluded that the remedy was not effective (see §§ 138-146 of the relevant judgment). It is clear that the findings in the aforementioned memorandum of the Commissioner for Human Rights and the relevant Constitutional Court judgment -albeit regarding the measure of blocking access- are also valid for the legal remedy of appeal against the HAGB decisions.

154. In addition, the sole availability of the remedy of appeal against HAGB decisions, which are commonly issued in the Turkish judiciary,

is not sufficient, and such a judicial remedy must also offer a prospect of success in practice. The absence of such a remedy, which is directly related to the regime of limitation of fundamental rights and freedoms, will lead to a violation of the substantive right, as it will mean that the provision underlying the interference cannot ensure the procedural safeguards of the procedural law.

155. In this scope, in many cases where the Court has previously found violations and in the present applications, although the applicants were able to apply to the appellate authorities to challenge the HAGB decisions as an ordinary remedy, the appellate authorities failed to consider the claims raised and evidence adduced by the applicants, failed to make an effort to balance the conflicting interests, failed to evaluate whether the impugned interference was in accordance with the requirements of the democratic social order and whether it was proportionate. In the current system, it has been observed that the decisions rendered by the appellate authorities regarding HAGB decisions are formulated over the case file in a uniform manner and usually consist of only one sentence reasoning specifying that the inferior courts' decisions complied with the law as regards formal requirements and that therefore the appeal has been rejected. Thus, it has been concluded that in practice, while the appellate authorities dealing with HAGB decisions should have examined separately the issues directly related to the case and should have responded relying on reasonable grounds, they systematically failed to fulfil their obligations in this regard.

The Principle of Subsidiarity in Individual Applications and Appeal on Points of Law and Facts

156. As is known, individual application to the Constitutional Court is a legal remedy of *subsidiary* nature. It is essential that the alleged violations of the fundamental rights and freedoms be dealt with and adjudicated primarily through ordinary legal remedies before the general judicial authorities. An individual may resort to the individual application mechanism only when the alleged violations could not be redressed through the ordinary review mechanism (see *Bayram Gök*, no. 2012/946, 26 March 2013, § 18). This principle necessitates the use of the facilities for the redress and resolution of violations of fundamental rights and freedoms within the hierarchical order of the general courts. For this reason, the

possibility of the Constitutional Court's first-hand examination of the HAGB decisions due to the failure of the appeal mechanism to function properly has the may undermine the subsidiarity of the individual application mechanism.

157. Before being brought before the Constitutional Court, the matters must have been addressed by organs exercising public power, courts and superior courts, the evidence must have been collected and discussed, and the parties must have fully presented their arguments. In an individual application to be brought before the Constitutional Court, the fact that most of the issues will be addressed for the first time and directly by the Court will require a first-hand evaluation of the evidence, facts and legal arguments. As a matter of fact, this is precisely the problem that arises in cases where the complaints are brought directly before the Constitutional Court after a HAGB decision is issued, without any examination of the substantive claims by the appellate authority, or even if they are examined, without a reasonable explanation to that end.

158. Moreover, any judgment of the Court regarding the cases in which a HAGB decision has been issued will also have an impact on the proceedings before the trial courts. As a matter of fact, if a case in which a HAGB decision was issued is found inadmissible by the Court and the suspended judgment is pronounced within the supervision period, then the allegations of unlawfulness can be brought before the appellate authorities. In this case, the Court will stand for as a remedy between the first instance court and the appellate authority, rather than a final remedy. Moreover, the same application can also be brought before the Constitutional Court once again after the finalisation of the judgment pronounced. Aside from the problems that are likely to arise due to the fact that a matter is first examined first by extraordinary legal remedy authorities and then by ordinary legal remedy authorities, such a practice is incompatible with the principle of subsidiarity of the individual application. In this context, it is clear that the current system is not capable of eliminating these problems created by the HAGB institution on the principle of subsidiarity.

Another Source of Procedural Abuse: Procedure for Obtaining the Accused's Declaration of Will Accepting the HAGB Decision

159. Despite the fulfilment of the conditions specified in the law, a HAGB decision cannot be issued without the consent of the accused. This is enshrined in the mandatory provision of the clause added, on 22 July 2010, to Article 231 § 6 of Law no. 5271, which reads "*Unless the accused agrees, the pronouncement of the judgment shall not be suspended*". Prior to the aforementioned date, the consent of the defendant was not required for a HAGB decision to be issued; the court convicting the accused could issue a HAGB decision *ex officio* if the conditions had been met.

160. If a criminal court considers that an indictment prepared and submitted by a public prosecutor meets the requirements of Law no. 5271, it accepts the indictment in accordance with Article 174 thereof. Such a decision theoretically means that the judge is convinced that the evidence presented by the prosecutor is sufficient to initiate the proceedings. Therefore, with the acceptance of the indictment by the criminal court, it can be assumed that a certain degree of *pressure* will be exerted on the accused, given the possibility of being sentenced. As a matter of fact, it has been argued that the HAGB requests were received under pressure in such an environment of fear.

161. It can be maintained that another important factor increasing this pressure is the fact that the accused's consent to a HAGB decision is asked *at the very beginning of the hearing* and most of the time during the defence-taking process. Indeed, asking the accused to express his will before the conclusion of the proceedings may cause him, in an attempt to secure himself, to engage in a kind of calculation of probability prior to the submission and discussion of the evidence, and to express his will in uncertainty. This situation may exert an unfair pressure at the very beginning of the hearing as regards issues related to the accused's fundamental rights and freedoms.

162. In fact, at the beginning of the hearing, when the evidence has not yet been presented, the judge asks the accused whether he wishes the suspension of the pronouncement of a possible future judgment. However, in such a case, it is completely unclear how the accused will decide whether he prefers the pronouncement of a judgment the substance or the details of which are yet unknown to him. The accused, who is asked whether he

wishes the suspension of the pronouncement of a judgment that has not been rendered and pronounced yet, is forced to predict the outcome of his trial and make a statement with an unclear will, at a stage where no suspicion has been clarified. At this point, the defendant is condemned to "*gamble*" on probabilities about his life. However, in accordance with subparagraph (c) of the United Nations basic principles on the use of restorative justice programmes in criminal matters, adopted by the United Nations Economic and Social Council on 24 July 2002 (Resolution 2002/12), "*…the offender should be coerced, or induced by unfair means, to participate in restorative processes or to accept restorative outcomes*."

163. The accused, who is asked -conditionally- for his consent to HAGB *in the event of a future conviction*, may refuse the offer because he thinks that accepting HAGB will create an opinion that he has admitted to committing the offence and that his will may be abused or that he has not committed the charged offence. In this case, it is very likely that the accused will refrain from behaviours that would lead the judge to presume that he has admitted his guilt in advance. However, this situation eliminates the accused's right to freely make his defence and compels him to act as a hero between unknown options.

164. In addition to all these, the aforementioned assessments of the Court on the abuse of the guarantees of the right to a fair trial in cases of HAGB clearly indicate that the inferior courts would suspend almost all the guarantees of the right to a fair trial in the later stages of the proceedings for the accused who consent to the HAGB at the very beginning of the proceedings. In other words, in the current situation, a system capable of compensating the pressure exerted on the accused due to the statement of their wills at the very beginning of the proceedings, with various guarantees of the right to a fair trial cannot be said to exist. In this respect, it can be indicated that in the current system, the express of will by the accused who consent to the issuance of a HAGB decision at the very beginning of the proceedings is also abused.

(iii) Final Assessments on the Legality Criterion

165. In the present cases, it has been accepted that the HAGB decisions issued as a result of violations of various guarantees of the right to a fair

trial, including the equality of arms, the right to defence, the right to legal assistance and the right to a reasoned decision, constituted an interference with the applicants' freedom of expression or right to hold meetings and demonstration marches. In this scope, it is necessary to determine whether the interference caused by the HAGB decisions issued as a result of the proceedings carried out separately against the applicants met the legality criterion.

166. In this context, it must be emphasised that in the individual applications lodged with the Court, the interpretation of a provision by the authorities exercising public power and inferior courts shall be subject to constitutional review insofar as it constitutes an interference with fundamental rights. The effect of the interpretation and implementation of a rule on the fundamental rights and freedoms of individuals may be considered unconstitutional even if such rule is not considered to contravene the Constitution in an abstract review. Accordingly, through its decisions on the individual applications lodged with it, the Court contributes to the compliance of authorities exercising public power and inferior courts with the Constitution (see *Hamit Yakut*, § 87). In this sense, in the assessment of the legality criterion as regards the interference, the Court must determine whether the legislation whereby the HAGB institution is regulated, which is the basis for the impugned interference, is effective insofar as it concerns the prevention of arbitrary interference of the inferior courts.

167. In the examination of the practices of the trial courts discussed in detail above, it has been concluded that the designation of the HAGB at the very beginning of the proceedings and especially the lack of any review on the merits of the judgment leads the judges, who are under serious workload pressure, to abuse procedural safeguards during the proceedings and to decide on conviction when they are stuck between conviction and acquittal. As a matter of fact, this consideration is supported by the judicial statistics, which clearly indicate that the rate of acquittals has decreased with the introduction of the HAGB institution, and the numerous violation judgments rendered by the Constitutional Court in matters concluded with a HAGB decision and constituting interference with the freedom of expression. In addition, the fact that in the proceedings concluded with a

HAGB decision, the majority of the violation judgments were based on the failure to put forward with relevant and sufficient justification whether the interference with the freedom of expression was necessary in a democratic society, indicates that in the HAGB decisions, the inferior courts make arbitrary assessments with no convincing justification.

168. Moreover, as also discussed in the Court of Cassation's quashing judgments, it has been observed many times that in practice, the accused has been issued with a HAGB decision for the acts not raised within the bill indictment to be considered within the scope of the criminal case, even without a hearing, infringing the right to legal assistance, disregarding the right to cross-examine the witnesses, in the absence of necessary investigations for conviction, or on the basis of insufficient grounds. Furthermore, in a given case, despite the withdrawal of a complaint regarding an offence, a HAGB decision was issued based on the provision of the repealed law, which was in breach of the *non bis in idem* principle, or in the absence of the accused's consent to the HAGB decision, and all these have been characterized by the Court of Cassation as *serious contradiction to law*.

169. The aforementioned contradiction to law as regards the HAGB decisions and in particular the lack of sufficient grounds for the decisions have been the subject of many violation judgments rendered by the ECHR on the freedom of expression. In fact, in the relevant judgments, the ECHR stated that the grounds relied on by the inferior courts in the HAGB decisions fell foul of the criteria set out in the ECHR's case-law, and thus, they failed to provide a satisfactory justification regarding the impugned interference. Furthermore, the ECHR found that the lack of justification in the domestic court decisions per se constituted a problem in terms of Article 10 of the Constitution.

170. In this framework, considering together its previous violation judgments, the unconstitutionality of the HAGB cases examined in the present application, the case-law of the ECHR and numerous quashing judgments of the Court of Cassation on the same matter, the Constitutional Court has reached the conclusion that the inferior courts caused the abuse of procedural guarantees by systematically ignoring almost all principles

inherent in the right to a fair trial in the cases where a HAGB decision was issued. The issuance of HAGB decisions against the applicants at the end of the proceedings in which procedural guarantees were abused in such manner, constituted an excessively arbitrary interference with the applicants' freedom of expression and their right to hold meetings and demonstration marches, since the charges against them also concerned the constitutionally protected acts such as participating in meetings or expressing thoughts.

171. The application of the HAGB institution as such would not only deter those who were previously found criminally liable from re-exercising their rights under Articles 26 and 34 of the Constitution, but would also undoubtedly deter other members of the public from freely expressing their thoughts and attending meetings and demonstration marches. The chilling effect caused by the fear of punishment at the end of unlawful proceedings gives rise to the silencing of different voices in the society and public and indisputably prevents the maintenance of a pluralistic society (see *Zübeyde Füsun Üstel and Others*, § 135; *Ergün Poyraz (2)* [Plenary], no. 2013/8503, 27 October 2015, § 79; and *Hamit Yakut*, § 115).

172. All in all, the applicable statutory regulations remain incapable of eliminating the above-mentioned problems arising from the application of the HAGB institution, as well as they cannot systematically eliminate the chilling effect on various fundamental rights of the applicants such as the freedom of expression and the right to hold meetings and demonstration marches. As a matter of fact, it has been observed that neither the amendments made to Law no. 5271 regarding the HAGB institution, nor the relevant case-law of the Court of Cassation, nor the practices of the inferior courts have been sufficient to eliminate the problems set out in detail above. In other words, the current practice of the competent judicial authorities is not appropriate for preventing arbitrary and disproportionate interference with fundamental rights and freedoms by suspending the pronouncement of a judgment rendered at the end of the criminal proceedings and keeping the applicants under supervision for a long period of time by imposing various obligations on them.

173. Thus, it has been concluded that the legislation constituting the HAGB institution contains structural problems leading to continuous

violations of fundamental rights and freedoms, especially the freedom of expression, and that these problems cannot be eliminated in a way other than a statutory regulation, for example, through the interpretations made by the judicial bodies. In the current situation, the inferior courts and the Court of Cassation could not prevent the violations of the constitutional rights of the applicants, safeguarded by Articles 26 and 34 of the Constitution, by the HAGB institution that was applied in all decisions subject to the present application.

(2) Conclusion

174. As a result of the considerations above, the Constitutional Court has concluded that in the present cases, any interference arising from the HAGB institution did not meet the legality criterion.

175. For the reasons explained above, it has been concluded that the applicants' freedom of expression and right to hold meetings and demonstration marches safeguarded by Articles 26 and 34 of the Constitution have been violated.

176. Since it has been understood that the impugned interferences in the present cases failed to meet the principle of legality, it has not been deemed necessary to make a further assessment on whether the other safeguard criteria were met as regards the impugned interferences.

177. Within the framework of the assessments above, it is evident that the current system operating in our country needs to be reconsidered in order to prevent further similar violations due to the HAGB decisions issued by the inferior courts in accordance with Article 231 of Law no. 5271, which indicate the existence of a systematic problem. Undoubtedly, it is at the discretion of the legislature to make legal arrangements which constitute an important part of the state policy to be adopted as regards the individualization of sentences. Within the framework of the assessments made throughout the judgment, it has been concluded that the following recommendations should be taken into consideration in the new legal arrangements to be made in order to ensure that any interference with fundamental rights such as the freedom of expression and the right to hold meetings and demonstration marches through the HAGB decisions

issued under Article 231 of Law no. 5271 comply with the requirements of the democratic social order pursuant to Article 13 of the Constitution and do not lead to violations of various constitutional provisions:

i. In order for the criminal proceedings to be concluded with a HAGB decision, the court must first acknowledge that the accused is guilty and then it must proceed to the decision phase. Considering the drawbacks of asking the accused to declare that he consents to a HAGB decision at the very beginning of the proceedings, he should be asked whether he consents to a HAGB decision, after the conviction order is read out during the decision phase, either by announcement or communication. Thus, the accused should be provided with the opportunity to evaluate his situation as a whole and to act accordingly.

ii. It is essential that the alleged violations of the fundamental rights and freedoms be dealt with and adjudicated primarily through ordinary legal remedies before the general judicial authorities. An individual may resort to the individual application mechanism only when the alleged violations could not be redressed through the ordinary review mechanism. This principle necessitates the use of the facilities for the redress and resolution of violations of fundamental rights and freedoms within the hierarchical order of the general courts. In this framework, although the legislator has stipulated that the HAGB decisions can be appealed, it appears from all the assesments made above that since the introduction of the HAGB institution, especially the mechanism of *appeal on points of law and facts* has not been functioning properly, judicial decisions have not been able to ensure this functionality, and thus a practice that is completely contrary to the legislative intent of Law no. 7188 has been established. Given that the current practice is clearly insufficient to prevent the ongoing violations, it is necessary to make some legal arrangements in order to resolve the alleged violations of fundamental rights and freedoms primarily through ordinary legal remedies (such as enabling the appeal on points of law and facts or the appeal on points of law) and thus to prevent the first-hand review of the HAGB decisions by the Constitutional Court.

iii. In the present case, finding the violations of the freedom of expression and the right to hold meetings and demonstration marches,

it has been concluded that the inferior courts acted in breach of various guarantees of the right to a fair trial -such as the principle of equality of arms, right to a reasoned decision, the right to adequate time and facilities for the preparation of defence, and right to legal assistance- in cases where Article 231 of Law no. 5271 was applicable, which constituted a *procedural abuse*. In addition, the ECHR and the Constitutional Court have previously concluded in many applications at the end of which a HAGB decision was issued that various fundamental rights and freedoms such as the freedoms of expression and the press or the right to hold meetings and demonstration marches were violated on the grounds that the inferior courts' decisions lacked relevant and sufficient justification. For this reason, legal arrangements should be made in order to prevent the procedural abuse in the cases concluded with a HAGB decision on the part of the inferior courts by applying the procedural safeguards enshrined in the Constitution and the Convention in contravention of the principles set out in the judgments delivered by the Constitutional Court and the prevent the procedural abuse through arbitrary decisions.

178. Consequently, it should be noted that the arrangement to be made by the legislature is of great importance in terms of preventing new violations.

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

1. The Applicants' Allegations

179. In the application no. 2020/19524, the applicants claimed that their right to personal liberty and security was violated, stating that they had been unlawfully detained and placed in custody for one day.

2. The Court's Assessments

180. The Constitutional Court –referring to the relevant case-law of the Court of Cassation– has concluded that although the original case has not been concluded on the date of examination of the individual application concerning the alleged unlawfulness of detention and custody, the action for compensation stipulated in Article 141 of Code no. 5271 was an effective legal remedy that needed to have been exhausted (see *Hikmet*

Kopar and Others [Plenary], no. 2014/14061, 8 April 2015, §§ 64-72; *Hidayet Karaca* [Plenary], no. 2015/144, 14 July 2015, §§ 53-64; *Günay Dağ and Others* [Plenary], no. 2013/1631, 17 December 2015, §§ 141-150; *İbrahim Sönmez and Nazmiye Kaya*, no. 2013/3193, 15 October 2015, §§ 34-47). In the present case, as regards the alleged unlawfulness of detention and custody, there is no situation necessitating the Court to depart from the findings it has reached in the aforementioned judgments.

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

D. Alleged Violation of the Right to a Trial within a Reasonable Time

1. The Applicants' Allegations

182. In the applications no. 2018/19146 and no. 2021/39563, the applicants claimed that their right to a fair trial was violated, stating that the proceedings carried out against them were not concluded within a reasonable time.

2. The Court's Assessment

183. In the determination of the length of criminal proceedings, the period to be taken into account begins to run as soon as a person is informed by the competent authorities of the fact that he is charged or on the date when the person is first affected by the charge due to the application of certain measures such as search and custody; and it ends once the final judgment is delivered in respect of the criminal charge or when, with regard to ongoing proceedings, the Court renders its judgment on an alleged violation of the right to a trial within a reasonable time (see *B.E.*, no. 2012/625, 9 January 2014, § 34). Matters such as the complexity of a case, levels of jurisdiction, the attitude of the parties and the relevant authorities during the proceedings and the applicants' interest in the speedy conclusion of the proceedings are the criteria which are taken into consideration in the determination of whether the length of the criminal proceedings is reasonable (*ibid*., § 29).

184. In the application no. 2018/19146, an investigation was launched against the applicant on 9 August 2017, and the criminal proceedings

were concluded on 8 May 2018 with the decision of the appellate authority dismissing the applicant's appeal. Thus, the proceedings lasted approximately 9 months before two levels of jurisdiction; and regard being had to the proceedings as a whole, it has been concluded that there was no delay causing the violations of the applicants' rights.

185. In the application no. 2021/39563, the investigation phase started with the statements-taking process of the applicant Mr. Servet Yazar on 10 December 2015, and the criminal proceedings were concluded on 16 July 2021 with the decision of the appellate authority dismissing the applicant's appeal. Thus, the proceedings lasted approximately 5 years and 7 months before two levels of jurisdiction. 19 accused including the applicant were involved in the criminal proceedings. Therefore, regard being had to the high number of the accused as well as to the entirety of the proceedings, it has been concluded that there was no delay causing the violations of the applicants' rights.

186. For the reasons explained above, these parts of the applications must be declared inadmissible as being *manifestly ill-founded*, there being no need for further examination in the light of the other admissibility criteria.

E. Other Allegations of Violations

187. Since it has been concluded that the applicants' freedom of expression and their right to hold meetings and demonstration marches were violated, the Court has not deemed it necessary to conduct a separate examination on the admissibility and merits of their other complaints regarding the alleged violations of the presumption of innocence, the right to be tried by an independent and impartial court and the *nullum crimen, nulla poena sine lege* principle.

F. Application of Article 50 of Code no. 6216

1. General Principles

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

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

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

189. In its judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court indicates the general principles as to how a violation of any fundamental right, which has been found established by the Constitutional Court, and its consequences will be redressed. In another judgment, the Court explained the relevant principles as well as the consequences of the failure to comply with its judgment finding a violation and pointed out that this would amount to the continuation of the violation and might also result in a violation for the second time (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

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

191. Before ruling on what needs to be done to redress the violation and its consequences, the source of the violation must first be ascertained. In this respect, a violation may stem from administrative acts and actions,

judicial acts, or legislative acts. Determining the source of the violation plays a significant role in finding the appropriate way of redress (see *Mehmet Doğan*, § 57).

2. Application of Principles to the Present Case

192. All of the applicants requested a finding of violation and a retrial. Some of them also claimed compensation for pecuniary and/or non-pecuniary damages allegedly sustained by them.

193. In view of the assessments above, the Court has concluded that in the current system, the HAGB institution per se could not prevent arbitrary interference by the bodies exercising public power. This conclusion indicates that the applicable system was not adequately capable of eliminating the ongoing violations of fundamental rights and freedoms, and that therefore, the Constitutional Court should make legal arrangements in order to prevent new similar violations, instead of examining the merits of all other cases individually in which a HAGB was issued.

194. In the present case, it has been concluded that the impugned interference caused by the HAGB decisions violated the applicants' freedom of expression and right to hold meetings and demonstration marches, respectively safeguarded by Articles 26 and 34 of the Constitution. As set out above, the violation arose from a structural problem pointing to the fact that the applicable laws failed to provide basic guarantees for the protection of fundamental rights and freedoms, such as the freedom of expression and the right to hold meetings and demonstration marches, as well as from the practices of the inferior courts in this regard.

195. In this scope, each passing day, more and more complaints regarding the alleged violations of fundamental rights and freedoms such as the freedom of expression and the right to hold meetings and demonstration marches are brought before the Constitutional Court through individual applications.

196. New violation judgments to be delivered by the Constitutional Court in the present cases as well as other pending cases in accordance

with the principles set out in the previous judgments will not prevent similar complaints to be brought before the Court, nor will it lead to a change in the methods of examination of the appeals against similar HAGB decisions by the inferior courts. Therefore, it has been understood that in order to redress the violation and its consequences and to prevent new similar violations, the legal arrangements leading to the violation should be reviewed. Therefore, a copy of the decision should be sent to the legislature.

197. Besides, finding of a violation and sending a copy of the judgment to the legislature does not completely ensure the applicants to lose their victim status caused by the violation in the present case. Thus, there is a legal interest in conducting a retrial in order to redress the consequences of the violations of the freedoms of expression and the right to hold meetings and demonstration marches. In this regard, the action to be taken by the judicial authorities is to initiate the retrial proceedings and to make a new decision which eliminates the reasons underlying the violation judgment rendered by the Court and which complies with the principles specified therein (for the details regarding retrial procedure in terms of individual application, which is laid down in Article 50 § 2 of Code no. 6216, see *Mehmet Doğan* [Plenary], no. 2014/8875, 7 June 2018, §§ 54-60; *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019, §§ 53-60, 66; and *Kadri Enis Berberoğlu (3)* [Plenary], no. 2020/32949, 21 January 2021, §§ 93-100).

Requirements for An Effective Retrial Process

198. In the retrial to be held by the judicial authorities, if an acquittal decision or a dismissal decision -for not committing a new offence deliberately and for complying with the obligations imposed within the supervision period- will not be issued, then the followings should be performed in the light of the detailed considerations above:

i. A trial in which all guarantees of the right to a fair trial, in particular the right to a reasoned decision, should be carried out.

ii. The judgment should be rendered before the accused is asked whether he consents to a HAGB decision, and he should be informed of the outcome of the proceedings through announcement or communication.

The accused who is not present at the hearing may be informed of the outcome of the proceedings and asked whether he consents to the HAGB decision through a certificate of service.

iii. The appellate authority should examine all alleged procedural and substantive violations, respond to them on reasonable grounds and balance all conflicting interests, rather than a formal examination of the HAGB institution based on stereotypical grounds.

199. The applicants have been placed under the threat of the future announcement of a judgment, and they have been only under supervision for a certain period of time -without any obligation being imposed. In addition, considering that the applicants have the right to appeal against the subsequently pronounced judgment, finding of a violation and holding of a retrial will provide a sufficient redress, and therefore, the applicants' compensation claims should be rejected.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 5 July 2022 that

A. The legal aid requests of the applicants Mr. Kutbettin Demir, Mr. Ümit Kavak, Ms. Sevinç İzol Özipek ve Ms. Zeynep Çelik Daşğın be ACCEPTED;

B. 1. The alleged violations of the freedom of expression and the right to hold meetings and demonstration marches be declared ADMISSIBLE; and the pilot judgment procedure not be APPLIED;

2. The alleged violation of the right to personal liberty and security be declared INADMISSIBLE for *non-exhaustion of legal remedies*;

3. The alleged violation of the right to a trial within a reasonable time be declared INADMISSIBLE as being *manifestly ill-founded*;

C. The freedom of expression and the right to hold meetings and demonstration marches, respectively safeguarded by Articles 26 and 34 of the Constitution were VIOLATED;

D. A copy of the judgment be SENT to the GNAT for information;

E. A copy of the judgment be REMITTED to the relevant inferior courts listed in the Annex for a retrial so as to redress the consequences of the violations of the freedom of expression and the right to hold meetings and demonstration marches;

F. The applicants' compensation claims be REJECTED,

G. The counsel fees be PAID JOINTLY to the applicants represented by the same lawyer, as listed in the annexed table, and SEPARATELY to the others, and the fees stated in Column (D) of the annexed table be paid as specified therein,

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

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

NEJLA DEMİRCİ

(Application no. 2019/25823)

30 March 2022

On 30 March 2022, the Second Section of the Constitutional Court found a violation of the freedom of expression safeguarded by Article 26 of the Constitution in the individual application lodged by *Nejla Demirci* (no. 2019/25823).

THE FACTS

[7-33] The applicant's sibling Y.D. and the latter's friend E.K. were dismissed from their professions under the state of emergency decree laws (decree laws). During this process, E.K. started to protest his situation through various activities. The applicant, who is a documentary film-maker, also wanted to shoot a documentary film in order to express the problems experienced by those dismissed from public office under decree laws in the person of Y.D. and E.K. For this purpose, the applicant notified the district governor's office on 7 September 2017 that she would shoot a documentary film. On 29 January 2018 she applied to the district governor's office again and stated that the law enforcement officers had interfered with her filming and requested that the necessary facilities be provided, that the law enforcement officers be informed and that she be notified if there was a restraining order regarding the documentary filming.

On 1 March 2018 the applicant once again applied to the district governor's office, requesting permission to film E.K. The district governor's office informed the applicant that the events to be held province-wide between 2 March 2018 and 1 April 2018 were subject to permission in accordance with the decision of the governorship and that it would not be appropriate to film E.K. in the municipality square on the specified date. On 3 May 2018 the applicant applied to the district governor's office again, stating that she could not obtain the footage required for the documentary film due to the constant interference by the law enforcement officers during the filming and requested that she be given a suitable date for filming. On 9 May 2018, the district governor's office rejected the applicant's request on the grounds that the state of emergency was still in force.

The applicant brought an administrative action, requesting the annulment of the aforementioned procedure and seeking the payment

of 10.000 Turkish liras (TRY) as compensation. The administrative court dismissed the case. The applicant's subsequent appeal was dismissed by the regional administrative court with final effect.

V. EXAMINATION AND GROUNDS

34. The Constitutional Court ("the Court"), at its session of 30 March 2022, examined the application and decided as follows:

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

35. The applicant claimed that her freedom of expression had been violated due to denial of her request for permission to shoot a documentary film on the problems encountered by those dismissed from public office in accordance with the state of emergency decree laws.

36. In its observations, the Ministry stated that it was found established that the applicant was filmed protesting within a group of people who had been dismissed from their office under decree laws on the grounds that they had been in contact and have relations with terrorist organizations and who were also known to have acted together with marginal groups, and that the applicant had recorded the demonstrations as documentary filming. The Ministry also stated that the relevant and sufficient justification was provided in the domestic court's decision, in which it was specified that there was a public interest in rejecting the applicant's request, considering that it was the state of emergency period in the aftermath of the coup attempt of 15 July and the public might be agitated in the heat of the events, and that a fair balance was struck between conflicting interests.

37. In his counter-statements against the Ministry's observations, the applicant raised claims similar to those indicated in the application form.

2. The Court's Assessment

38. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). It has been considered that the applicant's claims as a whole should be examined under the freedom of expression safeguarded by Article 26 of the Constitution.

39. Article 26 of the Constitution, titled *"Freedom of expression and dissemination of thought"*, insofar as relevant, reads as follows:

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

The exercise of these freedoms may be restricted for the purposes of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders ...

…

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

40. Article 27 of the Constitution, titled *"Scientific and artistic freedom"*, insofar as relevant, reads as follows:

"Everyone has the right to study and teach, express, and disseminate science and the arts, and to carry out research in these fields freely."

1. Applicability

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

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

Even under the circumstances indicated in the first paragraph, the individual's right to life, the integrity of his/her corporeal and spiritual existence shall be inviolable except where death occurs through acts in conformity with law of war; no one shall be compelled to reveal his/her religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties shall not

be made retroactive; nor shall anyone be held guilty until so proven by a court ruling."

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

43. The fact that the interference in the form of denying the applicant the necessary permission to shoot a documentary film had taken place during the state of emergency period and that the public authorities and the inferior courts had made the impugned interference for the purpose of eliminating the threat and danger leading to the declaration of the state of emergency does not necessarily mean that the interference can be examined within the scope of Article 15 of the Constitution. In the present case, since no direct relation could be established between the applicant's denial of permission for shooting a documentary film and the extraordinary administration procedure, the application will not be examined from the standpoint of Article 15 of the Constitution.

2. Admissibility

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

3. Merits

a. Existence of an Interference

45. The applicant's request for permission for shooting a documentary film was rejected, which constituted an interference with her freedom of expression.

b. Whether the Interference Constituted a Violation

46. The aforementioned interference shall be in breach of Article 26 of the Constitution, provided that it did not comply with the requirements of Article 13 thereof. Article 13 of the Constitution, insofar as relevant, reads as follows:

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

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

i. Lawfulness

48. It has been concluded that the impugned interference made in accordance with the Regulation issued under Article 14 of Law no. 5224 met the criterion of "*restriction by law*".

ii. Legitimate Aim

49. It has been concluded that the such an interference was made on the ground that "*there was a public interest in preventing the activities that might agitate the public during the state of emergency period*", and that therefore, it pursued a legitimate aim in terms of maintaining the public order.

iii. Compatibility with the Requirements of a Democratic Social Order

(1) General Principles

(a) Significance of the Freedom of Expression in a Democratic Society

50. The Court has previously expressed on many occasions how the concept of the *requirements of a democratic social order* should be interpreted

in terms of the freedom of expression. The freedom of expression refers to a person's ability to have free access to the news and information, other people's opinions, not to be condemned due to the opinions and convictions they have acquired and to freely express, explain, defend, transmit to others and disseminate these either alone or with others. Expressing the ideas including those opposed to the majority by any means, gaining stakeholders for the ideas expressed, the efforts to materialise the ideas and to convince others in this sense, as well as the tolerance of these efforts are among the requirements of a pluralist democratic order. Therefore, ensuring social and political pluralism depends on the peaceful and free expression of thoughts. Thus, the freedom of expression and dissemination of thought is of vital importance for the functioning of democracy (see *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, §§ 33-35; *Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, §§ 42, 43; and *Tansel Çölaşan*, no. 2014/6128, 7 July 2015, §§ 35-38).

51. Scientific and artistic freedom, which is a specific form of the freedom of expression, is specially guaranteed under Article 27 of the Constitution. In this connection, Article 26 and, especially Article 27 of the Constitution, also include the freedom of artistic expression within the scope of obtaining information and ideas and imparting thoughts. These constitutional guarantees offer the possibility to take part in the expression, dissemination and exchange of any cultural, political or social knowledge or idea. Persons who create, publish or disseminate works of literature such as the impugned book in the present case, have a considerable input in the dissemination of ideas and such artistic works are of great importance for a democratic society. For this reason, the State has to act more sensibly regarding the obligation of not interfering unnecessarily with the freedoms of expression of persons who have created the work of art (see *Fatih Taş* [Plenary], no. 2013/1461, 12 November 2014, § 104; and *İrfan Sancı*, no. 2014/20168, 26 October 2017, § 49).

52. In this context, the Court drew attention in its previous judgments to the fact that segregating any expressed and disseminated thought as *valuable-valueless* or *useful-useless* for the society on the basis of its content would involve subjective elements; thus, it would create a risk of arbitrary limitations on the freedom in question. It should be borne in mind that

the freedom of expression also encompasses the freedom to express and disseminate thoughts that may be regarded as *valueless* or *useless* by others (see *Ali Gürbüz and Hasan Bayar*, no. 2013/568, 24 June 2015, § 42; *Önder Balıkçı*, no. 2014/6009, 15 February 2017, § 40; and *İrfan Sancı*, § 56).

(b) Whether the Interference Complied with the Requirements of a Democratic Social Order

53 Any interference with the freedom of expression may be considered to be *compatible with* the requirements of a democratic social order as long as it meets a pressing social need and is proportionate (see *Bekir Coşkun*, §§ 53-55; *Mehmet Ali Aydın,* §§ 70-72; the Court's judgment no. E.2018/69, K.2018/47, 31 May 2018, § 15; and the Court's judgment no. E.2017/130, K.2017/165, 29 November 2017, § 18).

54. The restriction of the freedom of religion must pursue the aim of meeting a pressing social need in a democratic society and it must be exceptional. The measure giving rise to the impugned interference may be considered to meet a pressing social need only when it is convenient for attaining the aim pursued and appears to be in the form of the last remedy to be resorted to and the most lenient measure available. An interference which does not help achieving the aim or is obviously more restrictive and heavier vis-à-vis the aim pursued cannot be said to meet a pressing social need (see, *mutatis mutandis*, *Bekir Coşkun*, § 51; *Mehmet Ali Aydın*, § 68; and *Tansel Çölaşan*, § 51).

55. Another duty of the Court is to supervise whether a fair balance has been struck between the individuals' freedom of expression and the legitimate aims prescribed in Article 26 § 2 of the Constitution. It must be noted that the existence of legitimate aims in a given case does not render the right ineffective. What is important is to strike a balance between the legitimate aim and the right in the particular circumstances of the case (see *Bekir Coşkun*, §§ 44, 47, 48; and *Hakan Yiğit,* no. 2015/3378, 5 July 2017, §§ 58, 61, 66).

56. Commensurateness points to the necessity for a reasonable balance between the aim pursued and the means employed. In other words, commensurateness entails the striking of a fair balance between an

individual's right and the public interests or, if the aim of interference is to protect the others' rights, between the individual's right and the other individuals' rights as well as interests. If it is found out that a disproportionate burden has been imposed on the holder of the right, who was subject to an interference, in comparison to the public interest or other individuals' interest that is on the other side of the scales, a problem with respect to the principle of commensurateness may come into play. In their interference with the expression and dissemination of thoughts, the bodies wielding the public power must show on the basis of concrete facts the presence of an interest, which outweighs the interest arising from the exercise of the freedom of expression and which needs to be protected, as well as of the mechanisms that balance the burden placed on the individual (see *Bekir Coşkun*, § 57*; Tansel Çölaşan*, §§ 46, 49, 50; and *Hakan Yiğit*, §§ 59, 68).

57. Accordingly, if an interference with the freedom of expression fails to meet a pressing social need or is not proportionate despite meeting a pressing social need, it cannot be considered as an interference that complies with the requirements of the democratic social order.

58. Cinematographic works, which are within the scope of the artistic freedom enshrined in Article 27 of the Constitution, have two elements: those engage in cinema industry and the audiences. On one hand is the freedom of disseminating thoughts through these works, and on the other hand is the freedom to have access to these thoughts. It is incumbent on the State to strike a balance between these freedoms and public order as well as constitutional principles, in other words, to regulate and safeguard cinematographic freedoms.

59. The thoughts expressed through these works avail of the constitutional safeguards, regardless of the quality of the work. At this point, the constitutional review to be conducted will be independent of aesthetic evaluations of the work. That is because, when the work reaches the audience, it is perceived and interpreted differently by each audience. In this respect, every individual has the right to benefit from different ideas and to prefer to endure the negative effects of these thoughts. Although this situation is considered as a risk for the individual, it is also

the responsibility of the individual to decide whether to take such risk. If the work is precensored, the individual's right to access the ideas to the contrary will undoubtedly be precluded.

60. It should also be noted that this freedom is not unlimited. Article 26 of the Constitution does not afford unlimited freedom of expression. The obligation to comply with the restrictions specified in Article 26 § 2 imposes certain duties and responsibilities for the exercise of the freedom of expression, which is applicable to everyone (see, in the same vein, *R.V.Y. A.Ş.*, no. 2013/1429, 14 October 2015, § 35; *Fatih Taş*, § 67; and *Önder Balıkçı*, § 43). The extent of these responsibilities depends on the circumstances surrounding the applicant and the means by which he exercises his freedom of expression. The Court will also take this aspect into account when examining whether a given interference is compatible with the requirements of a democratic social order.

61. These freedoms, which impose duties and responsibilities on the State, may be subject to certain formalities, conditions, limitations and sanctions prescribed by law as necessary measures in a democratic society. However, in order for the interference to be justified and *proportionate to the legitimate aims pursued*, there must be *relevant and sufficient* grounds.

(2) Application of Principles to the Present Case

62. In the present case, the most important issue to be considered is the subject matter of the work to be produced. The applicant maintained that through her work, she wanted to express the problems experienced by those who had been dismissed from public office with the state of emergency decree laws. Public officials who were found to have membership, affiliation or association with, or connection with structures, formations or groups or terrorist organizations determined to carry out activities against the national security were dismissed from office in accordance with the state of emergency decree laws. During a period when the state of emergency was still in force, the subject matter of the documentary, which concerned those dismissed from public office, might have caused the organs exercising public power to be worried about the fact that their efforts to restore the public order disrupted by the coup attempt might be undermined.

63. Besides, many persons were dismissed from public office under the relevant decree laws. Thus, many more persons, especially the family members of those dismissed, were affected economically and socially.

64. When it comes to expressions of thoughts on highly controversial issues of public importance, it should be kept in mind that freedom of expression is vital for a democratic society and constitutes the fundamental values of democracy. Democracy is based on the ability to resolve problems through public debate (see *Ferhat Üstündağ*, no. 2014/15428, 17 July 2018, § 43; and *Zübeyde Füsun Üstel and Others* [Plenary], no. 2018/17635, 26 July 2019, § 113). At this point, any interference with the exercise of the freedom of expression in relation to works concerning social problems may harm and jeopardize democracy. Therefore, the public authorities entrusted with limited discretion in this sense must exercise it very carefully in their interference with the freedom of expression.

65. However, the public authorities enjoy broader powers in areas regarding, inter alia, war, terrorist propaganda and incitement to violence, which determine the limits of freedoms. For this reason, first of all, it should be assessed whether the documentary film requested to be shot served a terrorist propaganda as stated in the reasoning of the first instance decision.

66. In order for such an assessment to be made, attention should be paid to the content of the thoughts expressed in the work in question as well as to the context in which they were expressed, and it should be evaluated whether the impugned interference *served the purpose sought to be achieved* (see, in the same vein, *Ali Gürbüz and Hasan Bayar*, § 64; *Mehmet Ali Aydın*, § 76; *Bejdar Ro Amed*, § 76; *Murat Türk (2)*, § 72; and *Ali Gürbüz*, § 66).

67. In the examination of whether the content of the relevant work was aimed at terrorist organisation propaganda, the means employed should also be examined. The said work was intended to be shot as a documentary film. A documentary film is a type of film that deals with an event from real life in its natural flow and environment and aims to reveal problems and offer solutions. In this respect, social problems are one of the important themes of documentary films. Documentary films can achieve their purpose by conveying the artist's thoughts about society and

individuals to the audience. For this reason, documentary films should be evaluated as a whole with their audience.

68. In its reasoned decision, the first instance court stated that the applicant was filmed in Bodrum municipality square with a group of people who had been dismissed from public office through the state of emergency decree laws and who were known to act together with marginal structures, and that the group protested by throwing papers on which the word "OHAL (State of Emergency)" was written into a bucket on which the word "ÇÖP (TRASH)" was written, and that these acts were recorded as documentary footage.

69. It is clear that E.K., who protested his dismissal from public office every day in Bodrum municipality square with various activities, which was made the subject of a documentary film by the applicant, wished to express that the state of emergency decree laws meant nothing for them. E.K.'s aforementioned activities were considered inconvenient by the administration and inferior courts. However, the inferior courts accepted that the applicant's main purpose in recording E.K.'s protest was to make propaganda. Whether the court considered the impugned conduct of the applicant and E.K. as a terrorist propaganda is not clear from the reasoning of the decision. However, considering the fact that E.K. had been dismissed from public office for his having links with a terrorist organisation and that the applicant wished to shoot a documentary film about those in a similar situation with E.K. who had been dismissed from public office, it was concluded that the Court accepted the applicant's having made a terrorist propaganda.

70. Expression of thoughts that do not contain statements inciting to violence, that do not pose the risk of committing terrorist crimes, such as the views of various groups on social or political aims as well as political, economic and social problems that they intend to achieve without resorting to violence, cannot be regarded as terrorist propaganda, even if they are characterized as ideological and strict (see *Zübeyde Füsun Üstel and Others*, § 81; *Ayşe Çelik*, § 44; and *Candar Şafak Dönmez*, § 63).

71. In the present case, neither the administrative courts nor the inferior courts claimed that E.K. had praised a terrorist organisation or justified,

incited and legitimized violence through the imputed act. The expression tried to be disclosed through a protest action that the applicant intended to make the subject of her documentary film cannot per se be considered as terrorist propaganda. Therefore, it should be acknowledged that the applicant only attempted to record E.K.'s protest demonstration occurring in the meantime.

72. Undoubtedly, the State's interference with the freedom of artistic expression should be very limited. It should not be overlooked that the State has a wide range of instruments in realizing this limited interference. In this scope, the production of the work was directly prevented through denial of permission to shoot the relevant documentary film, whereas it was possible to cancel the shooting permission, to examine and classify the work after it was completed, and to make an evaluation according to the results of the examination and classification.

73. In the review of individual applications, the Constitutional Court does not interfere with the inferior courts' assessment of the facts and interpretation of the law as long as the constitutional rights of individuals are not violated. However, in the present case, the administration and the court of first instance failed to strike a balance between the applicant's freedom of expression and the aim of protecting the public order; they also failed to demonstrate the superior interest in the fulfilment of the obligation to maintain the public order and complying with constitutional principles vis a vis the applicant's freedom of expression. The administration and the court of first instance hindered the production of the work by taking into consideration only a little part of it. They evaluated it out of its context and integrity, and failed to demonstrate on the basis of a relevant and sufficient justification that the contested interference was of an exceptional nature and served a pressing social need.

74. Consequently, the Court found a violation of the freedom of expression safeguarded by Article 26 of the Constitution in the light of Article 27 thereof.

Mr. Engin YILDIRIM agreed with this conclusion by expressing a concurring opinion.

4. Application of Article 50 of Code no. 6216

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

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

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

76. The applicant requested the Court to find a violation and award him 30,000 Turkish liras (TRY) for non-pecuniary damages.

77. In its judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court indicates the general principles as to how a violation of any fundamental right, which has been found established by the Constitutional Court, and its consequences will be redressed. In another judgment, the Court explained the relevant principles as well as the consequences of the failure to comply with its judgment finding a violation and pointed out that this would amount to the continuation of the violation and might also result in a violation for the second time (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

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

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

79. It has been concluded that the applicant's freedom of expression was violated on the grounds that the inferior courts dismissed her complaint and challenge against the denial of her request for permission to shoot a documentary film. It has therefore been observed that the violation in the present case arises from the court decision. However, considering that the protest actions to be subject to the documentary film will not be repeated and that the applicant has no interest in this regard, it has been concluded that there is no legal interest in conducting a retrial.

80 In order to redress the violation and its consequences within the scope of *restoration to the former state existing prior to the violation*, a net amount of TRY 13,500 should be awarded to the applicant for her non-pecuniary damages that cannot be redressed only by the finding of a violation of her freedom of expression.

81. The total litigation costs of TRY 4,864.60 including the court fee of TRY 364.60 and the counsel fee of TRY 4,500, as established on the basis of the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 30 March 2022 that

A. The alleged violation of the freedom of expression be declared ADMISSIBLE;

B. The freedom of expression safeguarded by Article 26 of the Constitution was VIOLATED;

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

D. The total litigation costs of TRY 4,864.60 including the court fee of TRY 364.60 and the counsel fee of TRY 4,500, as established on the basis of the documents in the case file, be REIMBURSED to the applicant;

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

F. A copy of the judgment be SENT to the 1st Chamber of the Muğla Administrative Court for information (E.2018/937, K.2018/1758); and

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

CONCURRING OPINION OF JUSTICE ENGİN YILDIRIM

1. The Court has found a violation of the freedom of expression safeguarded by Article 26 of the Constitution. I consider that the violation should have been based on the artistic freedom safeguarded by Article 27 of the Constitution.

2. Since the artistic freedom is not incorporated as an independent right into the constitutional systems of some countries, it is regulated under the freedom of expression. The European Convention on Human Rights ("the Convention") also does not include an independent protection of artistic freedom, therefore, the European Court of Human Rights examines this freedom within the scope of freedom of expression safeguarded by Article 10 of the Convention.

3. In our country, artistic freedom is laid down as a separate right in Article 27 of the Constitution. Accordingly, "Everyone has the right to study and teach, express, and disseminate science and the arts, and to carry out research in these fields freely. The right to disseminate shall not be exercised for the purpose of changing the provisions of articles 1, 2 and 3 of the Constitution…" In addition, Article 64 of the Constitution also specifies positive obligations incumbent on the State to ensure the protection of the arts and artists.

4. It is set forth in Article 27 of the Constitution that the artistic freedom shall not be exercised for the purpose of amending first three articles of the Constitution. In this sense, the artistic freedom enjoys a broader protection in the Constitution, than the freedom of expression enshrined in Article 26 thereof, with which it is closely related, since the artistic freedom can only be restricted when it has a purpose or aspect regarding the amendment of irrevocable provisions of the Constitution.

5. According to the Court, "scientific and artistic freedom refers to the freedom to engage in the creation, promotion, dissemination and presentation to the public of all works of science and art without interference by the state or third parties (see the Court's judgment no. E.2014/177, K.2015/49, 14 May 2015). As specified in the Court's case-law, "the artistic freedom is inherent in the freedom of expression … also includes the right to freely learn and

teach art and to conduct research in this field. In addition to the persons (artists) who perform all kinds of actions inherent in the artistic work, the subjects of the artistic freedom are also those who deliver the work of art to third parties and ensure the spread of the work in public" (see the Court's judgment no. E.2014/177, K.2015/49, 14 May 2015; and the Court's judgment no. E.2013/95, K.2014/176, 13 November 2014).

6. Considering that the artistic freedom is laid down as a separate right in the Constitution, there is no constitutional obligation entailing the examination of this freedom within the scope of freedom of expression despite the close relationship between them. First of all, the artistic freedom has the characteristic of a special provision compared to the freedom of expression. As a matter of fact, the Court has underlined that the artistic freedom, which is a specific form of the freedom of expression, is specially guaranteed under Article 27 of the Constitution (see *Fatih Taş* [Plenary], no. 2013/1461, 12 November 2014, § 104; and *İrfan Sancı*, no. 2014/20168, 26 October 2017, § 49).

7. The artistic freedom is considered to have two dimensions that are not separated from each other with clear and precise lines and are very closely related: The emergence/creation/production/birth phase of the art and the sphere of influence and dissemination of the resulting work of art. Even if the artist acts only with aesthetic concerns when creating his work and attributes a unique meaning to it in his inner world, in other words, even if he does not feel obliged to convey a message or express something through his work, those who watch, see, read, hear and evaluate the work may attribute a meaning to it, and derive a message or thought from it. In this respect, the freedom of expression and the artistic freedom are intertwined in terms of the impact or dissemination phase of the art rather than its creation phase. In the formation stage of the art, the artistic freedom is manifested much more clearly and explicitly. I do not necessarily mean that the artist's freedom of expression does not come into play at this stage at all. I would like to stress that while the artistic freedom becomes much more visible at the formation stage of the art, it appears more clearly to be a special type of the freedom of expression at the stage where it has an impact, namely, during the process in which the art transforms into artistic expression.

8. It should also be borne in mind that although the artistic freedom is predominantly interpreted as the freedom of the artist, it should not be considered only as the freedom of the artist. Individuals (other artists, critics, commentators, audiences, and readers) and the society also have the right to aesthetically enjoy or not enjoy a work of art, to interpret and evaluate it, to derive an expression and message from it, as well as to make sense of it.

9. Considering that the freedom of expression is subject to more restrictions than the artistic freedom in the Constitution, the constitutional protection of the artistic freedom under the freedom of expression may result in the former's narrow interpretation. As we have just mentioned, it is observed that in general, the Court examines the artistic freedom within the scope of the freedom of expression in terms of both constitutionality review and individual application (see, for example, the Court's judgment no. E.2014/177, K.2015/49, 14 May 2015; and *Mehmet Ali Gündoğdu and Mustafa Demirsoy*, no. 2015/8147, 8 May 2019, §§ 48, 50). In this scope, the Court has stated that the grounds for restriction of the freedom of expression are not only applicable to Article 26 but also to Articles 27 and 28 of the Constitution (see, for example, *Fatih Taş* [Plenary], no. 2013/1461, 12 November 2014, § 62). As pointed out by the doctrine, this approach paves the way for the fact that the grounds for restriction that can be defined as legitimate aims in terms of the freedom of expression and the press may justify any interference with the artistic freedom.[1]

10. Any work of art produced also conveys a message and constitutes an expression of thought, regardless of the artist's intentions. In this respect, works of art should also be regarded as artistic expressions. Besides, this excludes the process in which the works of art are created, as no message has yet been conveyed to individuals and society. Interference with the creation of the art on grounds that can be considered legitimate within the scope of the freedom of expression will mean limiting the artistic freedom for reasons not specified in Article 27 of the Constitution from the very beginning, and may deprive the artist from creating his work. As a matter of fact, in the present case, the applicant's request for shooting of

1 Akgün, Deniz Polat, Sanat Özgürlüğü, 2020, İstanbul: Onikilevha, p. 280.

a documentary film, in other words, the creation of the work of art, was rejected from the very beginning. Thus, the aforementioned drawbacks have emerged in the present application.

11. When artistic works are transformed into artistic expressions, they may also enjoy the guarantee of the freedom of expression in the domain of art, but this would also result in artistic expressions being subject to the restrictions laid down Article 26 of the Constitution. Such a situation is in line with the general approach of the Court, but potentially poses the risk of limiting the formation phase of the art for reasons not listed in Article 27. The artistic freedom is not a simple reflection of the freedom of expression in the field of art. Moreover, although freedom of artistic expression per se constitutes a very important aspect of the artistic freedom, the latter encompasses not only the freedom of artistic expression but also the process of creating a work of art with aesthetic concerns and value. Excluding this process from the limitations specified in Article 26 of the Constitution is essential by the very nature of the artistic freedom.

12. Since a broader protection is afforded by the Constitution to the artistic freedom, which guarantees artistic creativity, than the freedom of expression, any interference with the former should be subject to a stricter constitutional review. In cases where a violation is found, characterising the violation of the artistic freedom as the violation of the freedom of expression entails the risk of ignoring the unique characteristics -inherent in the nature of art- of the artistic freedom which is laid down as a separate right in the Constitution. In cases where artistic expression, as a message and expression of a thought rather than the process of its creation, needs protection, i.e. in the sphere of artistic impact and dissemination, it is admissible to a certain extent that the artistic freedom is incorporated into the freedom of expression. However, the denial of permission for the creation of a work of art (a documentary film) from the very beginning, as in the present case, constitutes a matter which directly concerns the artistic freedom.

13. Besides, although it may be considered that artistic expressions can be exempted from the restrictions set out in Article 26 of the Constitution[2],

2 Akgün, p. 278.

this would mean that artistic expressions are afforded an extremely wide area of freedom that is not granted to any other type of expression. It can be said that this is a natural consequence of the fact that the artistic freedom is laid down as a separate special right in the Constitution. However, considering that the sphere of influence of the art also serves as an expression of thought and the transmission of a message, it may also cause trouble to grant artistic expressions a privilege not enjoyed by other types of expression. Regard being had to the fact that works of art can also be disseminated and have an impact through "speech, writing, pictures or other media" as defined in Article 26 of the Constitution, the artistic expressions disseminated in this way may be restricted under Article 26. However, such an approach should be adopted exceptionally in the particular circumstances of the case.

14. In the present case, the permission for shooting a documentary film regarding an issue concerning the society was denied. The state prevented the shooting of the documentary film in the absence of reasonable and legitimate grounds. To put it into plain language, the State did not like the subject matter of the documentary film and precensored it. Since not the producers and audiences but the State decided on the subject and content of the impugned work of art, the artist's artistic production and creativity was censored at a mental level from the very beginning. Restriction of the documentary film-maker's freedom to determine the content of his work in the absence of a legitimate purpose and disproportionately, and what is more, impairing the essence of the right, as in the present case, will jeopardize the maintenance of a democratic social order and structure. The creation and dissemination of works of art based on the artist's own creativity, without being subjected to external pressure and censorship, will contribute to the development and rooting of critical and creative thinking at the social level. Thus, critical and aesthetic values will prevail in a democratic society.

15. In conclusion, when considered in conjunction with Article 64 of the Constitution, whereby it is stipulated that the it is incumbent on the State to ensure the protection of art and artists, and to take the necessary measures to ensure the spread of the love of art, I consider that the applicant's artistic freedom safeguarded by Article 27 has been violated.

RIGHT TO HOLD MEETINGS AND DEMONSTRATION MARCHES (ARTICLE 34)

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

ADNAN VURAL AND OTHERS

(Application no. 2017/36237)

10 March 2022

On 10 March 2022, the Plenary of the Constitutional Court found a violation of the right to hold meetings and demonstration marches safeguarded by Article 34 of the Constitution in the individual application lodged by *Adnan Vural and Others* (no. 2017/36237).

THE FACTS

[5-32] The applicants attended meetings in Ankara at various dates with a view to protesting their dismissal from public office or, in general, the dismissals and the measures taken under the state of emergency, or to standing up for S.Ö, a former teacher, and N.G., a former academician, who had embarked on a hunger strike for being dismissed from their offices.

The Ankara Governor's Office decided, as a measure of the state of emergency, to ban the assemblies or to make them subject to permission. The applicants were subject to administrative fines for acting in breach of an order issued by the relevant authority, pursuant to Article 32 of the Misdemeanour Law no. 5326, as they had attained meetings at various dates within the period from the end of 2016 to the midst of 2018. The applicants' challenges to the administrative fines imposed on them were dismissed, with no right of appeal, by the incumbent magistrate judge as the impugned fines were compatible with the procedure and the law.

V. EXAMINATION AND GROUNDS

33. The Constitutional Court ("the Court"), at its session of 10 March 2022, examined the application and decided as follows:

A. Request for Legal Aid

34. Some of the applicants requested to be granted legal aid. In accordance with the principles set out in the judgment of the Court on the individual application of *Mehmet Şerif Ay* (no. 2012/1181, 17 September 2013), the request for legal aid made by the applicant, who could not apparently pay the litigation costs without suffering considerable financial difficulties, should be granted for not being manifestly ill-founded.

B. As regards the Applicant Perihan Pulat

35. The application may be struck out of the list in the absence of justifiable ground requiring the continuation of the application's examination under the circumstances set out in Article 80 § 1 of the Internal Regulations. However, the Court may continue the examination of the application if the implementation and interpretation of the Constitution or the determination of the scope and limits of the fundamental rights or the respect for human rights so requires pursuant to paragraph 2 of the impugned article.

36. In cases where the heirs of an applicant who has died after lodging an individual application fail to inform the Court, within a reasonable time, of their intent to pursue the application, the Court may find no ground to justify a continued examination of the application pursuant to the above-mentioned provisions of the Internal Regulations (*see İskender Kaya and Others*, no. 2014/7674, 23 March 2017, §§ 18-21). In the present case, the applicant Perihan Pulat died on 1 March 2021 after lodging her application but her heirs failed to inform the Court of their intent to pursue the application within a reasonable time. Nor is there any reason to justify a continued examination of the application or any of the reasons specified in Article 80 § 2 of the Internal Regulations.

37. For these reasons, the application must be dismissed as regards the applicant Perihan Pulat.

C. Alleged Violation of the Right to Hold Meetings and Demonstration Marches

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

38. All of the applicants maintained that their right to hold meetings and demonstration marches had been violated by the imposition of an administrative fine against them due to the unarmed and peaceful meetings in which they had participated. Some of the applicants also claimed that their freedoms of expression had also been violated accordingly.

39. Some of the applicants, who participated in the meetings in question following a decision by the trade union to which they were

members, claimed that the imposition of an administrative fine on them for participating in a trade union activity had been also a violation of their right to union.

40. In the Ministry's observation, the meetings subjected to the application were held at a time when the events that led to the coup attempt were being suppressed and the disrupted public order was being restored. In this regard, the Ministry stated that in order to protect national security and public order and welfare, to prevent the commission of crimes, to protect public health and morals or the rights and freedoms of others, and to ensure the safety of property and life, the Ankara Governorate had considered the prohibition of meetings, demonstrations, concerts, stalls, distribution of leaflets, installation of tents, sit-ins, etc. The Ministry also acknowledged that the discretionary power exercised by the Ankara Governorate had been reviewed by judicial decisions to determine its conformity to the procedure and the law and to ensure the application of safeguards against arbitrary practices. Accordingly, the Ministry was of the opinion that the impugned interferences had not violated the rights and freedoms enshrined in the Constitution and had not involved any manifest arbitrariness in a way that would undermine justice and common sense.

41. In their counter-statements in response to the Ministry's observations, the applicants reiterated the allegations made in their individual application forms.

2. The Court's Assessment

42. The Court is not bound by the legal qualification of the facts put forward by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The Court has concluded that the applicant's complaints, regarding the alleged unlawfulness of the administrative sanction imposed on them due to a non-violent meeting in which they had participated, must be examined mainly within the scope of the right to hold meetings and demonstration marches.

43. Article 34 of the Constitution, titled *"Right to hold meetings and demonstration marches"*, reads as follows:

"Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission.

The right to hold meetings and demonstration marches shall be restricted only by law on the grounds of national security, public order, prevention of commission of crime, protection of public health and public morals or the rights and freedoms of others.

The formalities, conditions, and procedures to be applied in the exercise of the right to hold meetings and demonstration marches shall be prescribed by law."

a. Applicability

44. Ankara Governor's Office issued the banning orders on which the administrative fines imposed on the applicants were based, at a time when a state of emergency was in effect throughout the country. It can be considered that these decisions were taken in order to prevent possible attacks by terrorist organizations in connection with the declaration of the state of emergency, and therefore aimed to eliminate the dangers during the state of emergency. Given that the administrative fines imposed pursuant to the banning decisions subject to the application do not have consequences that exceed the duration of the state of emergency, the examination of whether the applicants' right to organize meetings and demonstration marches has been violated will be carried out pursuant to Article 15 of the Constitution (see *Aydın Yavuz and Others*, § 324).

45. During this examination, a review will first be made to determine whether the measure contravened the guarantees set out in Article 13 and if so, an assessment will be made as to whether the criteria set out in Article 15 of the Constitution justified such contravention (with regard to the right to personal liberty and security, see *Aydın Yavuz and Others*, §§ 193-195, 242; with regard to the right to education, see *Mehmet Ali Eneze*, no. 2017/35352, 23 May 2018, § 31; with regard to the right to respect for family life and freedom of communication see *Bayram Sivri*, no. 2017/34955, 3 July 2018, § 47; with regard to the right to hold meetings see *Selma Elma*, no. 2017/24902, 4 July 2019, §§ 29-62).

Mr. Zühtü ARSLAN, Mr. Hasan Tahsin GÖKCAN, Mr. Engin YILDIRIM, Mr. Hicabi DURSUN, Mr. Emin KUZ and Mr. Yusuf Şevki

HAKYEMEZ agreed with this conclusion by expressing a concurring opinion.

b. Admissibility

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

c. Merits

i. Existence of Interference

47. The imposition of administrative fines against the applicants on the grounds that they acted in violation of the prohibition orders of the Ankara Governorate constituted an interference with the applicants' right to hold meetings and demonstration marches.

ii. Whether the Interference Amounted to a Violation

48. Article 13 of the Constitution provides as follows:

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

49. It must be determined whether the restriction complies with the conditions stipulated in Article 13 of the Constitution and applicable to the present case, such as being prescribed by law, being based on one or more of the justified reasons set out in Article 34 of the Constitution and not being incompatible with the requirements of a democratic society.

(1) Lawfulness

50. Pursuant to the relevant decisions of the Governorate of Ankara, all meetings and demonstrations were banned or subjected to a permit for a period of at least one month for nearly two years. In this instance, it does not appear plausible that the judgments in question were issued pursuant to Article 11(C) of Law No. 5442, which restricts the duration to fifteen days, or Article 17 of Law No. 2911, which restricts the period during

which an assembly may be postponed to one month and provides that a particular assembly may be banned. It has therefore been considered that the relevant prohibition decisions were issued pursuant to Article 11(m) of Law No 2935.

51. The interferences in the form of banning decisions issued by the Governor's Office of Ankara pursuant to Law No. 2935 and administrative fines imposed pursuant to Law No. 5326 on the grounds of violation of the said banning decisions were considered to be in accordance with the lawfulness principle.

(2) Legitimate Aim

52. It has been considered that the impugned interference pursued the legitimate aim of *maintaining public order* set out in Article 34 § 2 of the Constitution.

(3) Compliance with the Requirements of a Democratic Society

(a) General Principles

53. For the importance of the right to hold meetings and demonstration marches in a democratic society and the general principles governing the compatibility of restrictions on this right with the requirements of the democratic society, see *Dilan Özgüz Canan* (no. 2014/20411, 30 November 2017, §§ 32 - 34), *Ali Rıza Özer and Others* [Plenary] (no. 2013/3924, 6 January 2015, § 115-117), *Eğitim ve Bilim Emekçileri Sendikası and Others* ([Plenary] no. 2014/920, 25 May 2017, §§ 71-74), *Osman Erbil* (no. 2013/2394, 25 March 2015, §§ 45-47), *Gülşah Öztürk and Others* (no. 2013/3936, 17 February 2016, §§ 66-70; *Erdal Karadaş*, no. 2017/22700, 28 May 2019, §§ 54-58, 60,61).

54. Article 34 of the Constitution safeguards the right to hold meetings and demonstration marches in order to express opinions unarmed and without attack, in other words, in a peaceful manner. The purpose of the right to assembly is therefore the protection of the rights of individuals who do not resort to violence and who do express their opinions in a peaceful manner. Individuals who peacefully oppose the status quo and work to change it, must be afforded with the opportunity to enjoy the ability to express their political opinions through the right to assembly

and other legal means in a democratic society (see *Ali Rıza Özer ve diğerleri*, § 118; *Osman Erbil*, § 47; *Gülşah Öztürk and Others*, §§ 67, 68; *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 80; *Dilan Ögüz Canan*, § 37; *Ömer Faruk Akyüz*, B. No: 2015/9247, 4 April 2018, § 54). If the meeting involves violence or incitement to violence, it cannot be said to be peaceful and thus not entitled to the protection of Article 34 of the Constitution (see *Ferhat Üstündağ*, B. No: 2014/15428, 17 July 2018, § 51).

55. In the case of threats to public order arising from the exercise of the freedom of assembly, the competent authorities may adopt measures to mitigate such threats. Criminal penalties may also be imposed for organizing, participating in or committing offences during assemblies in violation of these measures (see *Dilan Ögüz Canan*, § 40; *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 81). These measures and sanctions should not result in indirect restrictions on the right of peaceful assembly. In the exercise of the right to peaceful assembly, individuals must also be protected against arbitrary interferences by public authorities (see *Dilan Ögüz Canan*, § 42; *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 82; *Gülşah Öztürk and Others*, § 76; *Erdal Karadaş*, § 61).

(b) Application of Principles to the Present Case

56. During the state of emergency declared following the coup attempt of 15 July 2016, holding meetings and demonstration marches was banned pursuant to Article 11 (m) of Law no. 2935 –*throughout the province of Ankara save for the decisions to ban dated 3 July 2017 and 24 May 2017, and for 24 hours save for the decision to ban dated 24 May 2017*. It was then made contingent upon permission of the relevant authority pursuant to the decision of 21 January 2018. Despite the less restrictive measures embodied in the same Law, such as the adjournment of the meetings, making them contingent upon permission, or designation by the relevant authority of a certain place and time for the meetings, the administration opted for imposing a blanket ban with respect to all meetings and demonstrations for a long period of time during the state of emergency (a total of approximately 11 months during the state of emergency lasting 2 years where the ban remained in force uninterruptedly for 8 months).

57. Where, as in the present case, authorities wielding public power interfere with constitutional rights in the form of a total prohibition, they must clearly demonstrate the security concern or other legitimate aim sought to be addressed by the decision on prohibition. If the justification for an interference with fundamental rights is based on the existence of a danger, the governor's offices and other authorities exercising public power must substantiate the existence of a serious and concrete danger on the basis of concrete facts. The concrete facts in question may be based on the reports of the security forces or on recent events which have clearly had a negative impact on the life of society and the State, as well as on individuals, or on the fact that public order has not yet been restored as a result of these events, or on the belief that this danger continues to exist.

58. It is a known fact that Türkiye has faced various risks of terrorism apart from the period of the state of emergency. That is because it has been affected directly and immediately by the activities conducted by the terrorist organisations in the neighbouring countries. Therefore, the interferences of continuous nature with fundamental rights, effectuated not in consideration of the material facts but merely on the ground of the risk of terrorism prevailing in the country, pose the risk of impairing the very essence of the rights. Besides, in the impugned decisions to ban, the administration concretely referred, as a ground for the ban on the demonstration supporting S.Ö. and N.G.; the disorder caused by the demonstration, as well as to the nuisance caused by the protests with loud noise at places such as parks and gardens where citizens mainly preferred spending time, whereas it referred to the risk of terrorism in abstracto. This caused doubt on the acknowledgment that the administration, in exercising its discretionary power, focused on a concrete risk of terrorism.

59. Prohibitions that are indefinite or of an unreasonable duration pose the risk of impairing the very essence of the rights that are interfered with, or even of eliminating the right altogether. In the present case, the detrimental situation created with regard to the right to hold meetings and demonstration marches was maintained for approximately 11 months, without it being demonstrated that there was a threat to public order that could not be eliminated by less restrictive measures. Additionally, it should be noted that there were no acts of violence at the meetings where

the applicants were penalized for attending during this process, meaning that the meetings continued to be peaceful.

60. Accordingly, in the present case, it is concluded that the successive prohibition decisions based on the same formalistic grounds have reached a level that makes the right to organise meetings and demonstration marches irrelevant and impracticable.

61. On the other hand, a separate evaluation should be carried out in terms of the decision to ban dated 30 August 2017 and the authorisation decision dated 21 January 2018 rendered by the Governor's Office of Ankara. Unlike the other decisions to ban issued by the Ankara Governor's Office, which are subject-matter of the present application, the decision to ban, dated 30 August 2017, is not available on its official website. The Governor's Office stated that it had no information as to whether a public announcement was made on the Governorate's website at the time of the impugned decision, as with other decisions. Accordingly, it must be acknowledged that the Ankara Governor's Office had not announced the decision to ban dated 30 August 2017 to the public in any way. In that case, the administrative fines imposed pursuant to the decision of 30 August 2017, which was issued by the Ankara Governor's Office but was not duly announced to the public, unlike the other impugned decisions to ban, cannot be said to be compatible with the requirements of a democratic society. This consideration, which set aside the certainty and foreseeability, may lead the administration to act in an arbitrary fashion.

62. As regards the decision of the Ankara Governor's Office, dated 21 January 2018, whereby to hold meetings and demonstration marches was made contingent upon its permission, no specific time-period was indicated, as different from the other impugned decisions to ban. The period during which the decision would remain in force and the date when it would expire were predicated on a military operation conducted abroad that was an issue completely at the administration's discretion and could not be foreseeable by individuals. It is evident that such a determination, which was quite far from ensuring certainty and foreseeability, would bring up doubts as yo the arbitrariness of the administration. Therefore, it has been considered that the administrative fines imposed pursuant

to the decision for authorization of the Ankara Governor's Office, which was dated 21 January 2018 and expiry of which was made contingent upon the termination of the military operation being conducted, were not compatible with the requirements of a democratic society, either.

63. For these reasons, it was concluded that the administrative fine imposed on the applicants pursuant to the decisions to ban and for authorisation subject to the application had been incompatible with the requirements of a democratic society, which was in breach of Article 13 of the Constitution. Nevertheless, an examination must be made as to whether the measure was legitimate within the meaning of Article 15 of the Constitution, which governs the suspension and restriction of the exercise of the fundamental rights and freedoms in times of emergency.

d. As regards Article 15 of the Constitution

64. The right to hold meetings and demonstration marches is not among the core rights enshrined in Article 15 § 2 of the Constitution as inviolable even in times when extraordinary administration procedures such as war, mobilisation or a state of emergency are in force. Therefore, it is possible to take measures, with respect to this right, in breach of the constitutional safeguards in times of a state of emergency.

65. Nor is this right among the non-derogable core rights laid down in the international conventions to which Türkiye is a party in the field of human rights as an obligation stemming from international law, notably Article 4 § 2 of the ICCPR and Article 15 § 2 of the ECHR, as well as the additional protocols thereto. Furthermore, it has not been found established that the impugned measure taken with respect to the applicants' right to organise meetings and demonstrations was in breach of any obligation (any safeguard continued to be preserved in times of emergency) stemming from the international law.

66. Accordingly, in examining the applicants' allegation of a violation of their right to hold meetings and demonstration marches, it must be determined whether the measure in question is to the extent required by the state of emergency pursuant to Article 15 of the Constitution.

67. The state of emergency decree of 21 July 2016 was declared mainly to eliminate FETÖ, which is considered to be the perpetrator of the coup attempt that took place about a week ago, with all its elements, to cleanse all its extensions in the public sector, especially in the Turkish Armed Forces, the judiciary, the police and universities, and thus to guarantee the rule of law and democracy by preventing any further coup attempt. Therefore, it must be acknowledged that the problems experienced by the State following the coup attempt, especially in the State institutions primarily responsible for public order and security, due to the terrorist organisation in question, placed the State in a very fragile position for a certain period of time. Thus, during the state of emergency declared in the aftermath of the coup attempt, several people were dismissed from public office by Decree-laws of the state of emergency for having a link with the FETÖ or other terrorist organisations.

68. As far as the present case is concerned, it is clear that this would prevent the State from fulfilling its obligation to maintain public order by preventing conflicts that may arise with the safety of those exercising their right to organise meetings and demonstrations, as is ordinarily expected of it. Additionally, all of the decisions that were the subject of the application took into account terrorist threats other than FETÖ and stated that intelligence had received information indicating that terrorist organisations might carry out attacks. As mentioned previously, terrorist threats other than FETÖ also had an impact on the declaration of the state of emergency, thus exacerbating the general danger posed by the coup attempt. In this context, the fact that terrorist attacks were carried out by other terrorist groups both before and after the declaration of the state of emergency demonstrates the gravity of the threat in this particular case.

69. However, as explained in the section above, the concrete facts regarding the threat of terrorism were not taken into account in the decision to ban the subject of the application. It is also observed that since the decision of 31 July 2017, some of the applicants have received administrative fines for their participation in all the decisions to ban, the focus was on the meetings held in and around Kızılay Yüksel Street to standing up for S.Ö., a former teacher, and N.G., a former academician, who had embarked on a hunger strike for being dismissed from their offices,

on the grounds that the DHKP/C terrorist organisation might organise a terrorist attack on these meetings and that citizens were disturbed by these meetings. Although the aforementioned demonstration for support was not explicitly mentioned in the decision dated 24 May 2017, considering the places where the meetings were banned according to the annexed diagram, it is understood that the administration again made a decision by focusing on the impugned demonstration for support.

70. It is quite disputable to claim the legitimacy of the justification expressed in the banning decisions as the nuisance caused by the protests with loud noise at places such as parks and gardens where citizens mainly preferred spending time, against the right to hold meetings and demonstration marches even in the absence of a state of emergency, especially considering the areas where the applicants gathered in the context of the present case (see § 58). In the present case, it is also not possible to accept that the justification was to the extent strictly required by the exigencies of the state of emergency.

71. In the immediate aftermath of the coup attempt on 15 July, when investigations were still ongoing, it must be recognised that there was a grave situation that posed a threat to the public order. It may also be considered that it was reasonable for the ban to cover the whole of Ankara for a specific and short period of time, at a time when a large number of public officials were under administrative or judicial investigation, the security vulnerability caused by the coup attempt continued and the problems of maintaining public order were severe. On the other hand, it is clear that the administration should evaluate whether it is possible to make some adjustments in the future, taking into account the sensitivities of the conditions that existed at the time for those who wish to exercise their right of assembly, such as the applicants. However, the administration and the inferior courts made no assessment on this issue during the banning process that began three months after the coup attempt and continued almost continuously for a long period of 11 months during the state of emergency. Therefore, considering that even at the time of the first decision to ban, a reasonable period of time had elapsed in terms of the state's ability to eliminate to a certain extent the threat posed to the public order and security and the functioning of public services and to

take the necessary measures, it was assessed that the justifications given in the impugned decisions of the Ankara Governor's Office could not prove that the interference with the applicants' right to assembly had been to the extent strictly required by the exigencies of the state of emergency.

72. Through its impugned decisions, the Ankara Governor's Office imposed a burden that caused the same effect with that of the decisions imposing categorical bans for an indefinite period of time, with respect to the right to hold meetings and demonstration marches. In doing so, the Governor's Office, however, failed to demonstrate that this burden imposed on the applicants was overridden by the threat posed to the public order. Besides, the administration resorted to the severest measure prescribed in the relevant Law, without demonstrating that taking more lenient measures, for striking a fair balance between the conflicting interests in the present case, would be insufficient. Nor was it found established that any acts of violence had taken place during these meetings.

73. Lastly, an assessment should be conducted on the decisions of the Ankara Governor's Office dated 30 August 2017 and of 21 January 2018 within the scope of the exigencies of the state of emergency. As mentioned above, it was thus considered that the decision of 30 August 2017, which had not been not announced to the public, and the decision of 21 January 2018, which would remain in force until the end of a military operation, had completely hindered the foreseeability and might thus lead to arbitrariness (see §§ 61, 62). It was accordingly concluded that the impugned decisions that might give rise to arbitrary practices had not been not to the extent strictly required by the exigencies of the state of emergency.

74. Under the light of all these considerations, it has been concluded that the imposition of administrative fines against the applicants on the grounds that they acted contrary to the decisions of the Ankara Governorate subject to the application cannot be said to be to the extent required by the exigencies state of emergency and therefore Articles 15 and 34 of the Constitution have been violated.

75. Some of the applicants claimed that their right to a fair trial had also been violated since they had not been not informed of the administration's response during the appellate process to the magistrate judge or because

their statements in opposition to such responses had not been not taken into consideration. Since it was decided that the applicants' right to hold meetings and demonstration marches had been violated, it was concluded that it was therefore not required to examine their complaints regarding the right to a fair trial.

D. Alleged Violation of the Prohibition of Torture and Ill-treatment

76. Some of the applicants maintained that the prohibition of torture and ill-treatment had been violated by the interference of the security forces during the impugned meetings.

77. The alleged violations of the prohibition of torture and ill-treatment were considered to be manifestly ill-founded on the grounds that they were unsubstantiated complaints, as it was established that the applicants had not provided any explanation that would require examination.

E. As regards Article 50 of Code no. 6216

78. It has been considered that there is legal interest in conducting a retrial for the elimination of the consequences of the violation. In this scope, the procedure required to be conducted is to deliver a new decision eliminating the reasons leading the Court to find a violation and order a retrial, in line with the principles indicated in the judgment finding a violation (see *Mehmet Doğan* [Plenary], no. 2014/8875, 7 June 2018, §§ 54-60; *Aligül Alkaya and Others* (2), no. 2016/12506, 7 November 2019, §§ 53-60, 66; *Kadri Enis Berberoğlu* (3), [Plenary], no. 2020/32949, 21 January 2021, §§ 93-100).

79. The applicants' claims for compensation must be rejected as it has been considered that ordering a retrial would constitute sufficient just satisfaction for the redress of the violation and consequences thereof.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 10 March 2022 that

A. The request for legal aid be ACCEPTED;

B. The application be DISMISSED as regards the Perihan Pulat due to the death of the applicant;

C. 1. The alleged violation of the right to hold meetings and demonstration marches be DECLARED ADMISSIBLE;

2. The alleged violation of the prohibition of ill-treatment be DECLARED INADMISSIBLE for being *manifestly ill-founded;*

D. The right to hold meetings and demonstration marches safeguarded by Article 34 of the Constitution was VIOLATED;

E. A copy of the judgment be REMITTED to the relevant courts specified in the attached table for a retrial with a view to redressing the violation of the right to hold meetings and demonstration marches and the consequences thereof;

F. The applicants' compensation claims for non-pecuniary damages be DISMISSED;

G. The litigation costs incurred be COVERED by the applicant as regards the applicant Perihan Pulat, and the litigation costs, consisting of the fees and counsel's fees shown in the enclosed Table, to be REIMBURSED to the other applicants,

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

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

CONCURRING OPINION OF PRESIDENT ZÜHTÜ ARSLAN

1. In the part of the judgment where the matter of "*applicability*" is addressed, it was decided to examine the impugned applications in terms of Article 15 of the Constitution while determining whether the interference with the right to hold meetings and demonstration marches constitutes as a State of Emergency measure, in accordance with the established jurisprudence that began with the *Aydın Yavuz and Others* judgment, by examining whether the measure (a) is aimed at eliminating the danger that caused the declaration of the state of emergency, and (b) is limited to the period of the state of emergency, but first by determining whether there is a violation of the safeguards provided in Article 13 of the Constitution (§§ 44, 45).

2. It should be noted that, regardless of the outcome, the dual review procedure for emergency measures has, over time, revealed some *shortcomings and redundancies* and therefore needs to be updated. As will be explained in more detail below, this different justification was drafted due to the view that the method of review should be revised and brought more in line with the letter and spirit of the Constitution.

3. The *shortcoming* of the existing method is that the *formal* requirements are not taken into account when deciding whether an interference is a state of emergency measure. The *redundancy* in the method of review is that, having decided that an interference is an emergency measure and should therefore be reviewed under Article 15, the interference is reviewed under Article 13 prior to that review. Therefore, the way to proceed is (a) to add to the aforementioned criteria, the criterion of whether the interference is based on a state of emergency legislation in the form of a law or a Presidential Decree, and (b) when it is determined that an interference is a state of emergency measure after applying the formal and substantive criteria, to conduct the examination in the individual application only in terms of Article 15 of the Constitution.

4. As established in the judgments of the Constitutional Court, the limits of extraordinary administrations in democratic states are determined by the Constitution and laws. In this sense, "*the state of emergency is ultimately a legal regime, although it grants considerable powers to the executive branch*

and significantly restricts rights and freedoms" (see the Court's judgment no. E.2016/171, K.2016/164, 02 November 2016, § 4).

5. The Constitution regulates how a state of emergency is declared and approved, and how fundamental rights are restricted during this period. In this regard, Article 119 of the Constitution provides that "*the manner of restriction and temporary suspension of fundamental rights and freedoms in line with the principles of the Article 15 … shall be regulated by law*." The same article stipulates that in times of emergency, a Presidential Decree may be issued for the purpose of restriction of fundamental rights and freedoms. Prior to the constitutional amendment of 2017, fundamental rights and freedoms could be restricted or suspended during a state of emergency through the "State of Emergency Law" and "Decree Law" (State of Emergency Decree Law) issued by the Council of Ministers chaired by the President (repealed Article 121).

6. Accordingly, in order for a restriction of fundamental rights and freedoms in a state of emergency to be examined under Article 15 of the Constitution, there must first be a law/state of emergency law or a provision of Presidential Decree/Decree Law issued pursuant to Article 119 of the Constitution. Interferences made by laws of ordinary times, Presidential Decrees and regulatory acts enacted on the basis of these laws should be reviewed under Article 13 of the Constitution. As at this point, it must be acknowledged that the legislator or the executive favours the provisions of the ordinary period in order to eliminate the danger that led to the state of emergency.

7. It can be argued that the *method of our Court, which does not take into account the procedural criterion* in determining whether an interference should be examined under Article 15, has two main drawbacks. Firstly, this method may result in granting to the administration the authority to take measures and restrict fundamental rights and freedoms in cases of emergency, which the Constitution vests exclusively in the legislature and the President as the Presidential Decree-maker. This may cause the restriction or even suspension of fundamental rights and freedoms by a regulatory or individual act of the administration that is not grounded in any law or Presidential Decree, even if it is a matter required by the state

of emergency. It is evident that this would be in breach of Article 2 of the Constitution, which establishes the principle of the rule of law, Article 6, which stipulates that no person or organ shall exercise any state authority that does not emanate from the Constitution, Article 7, which safeguards the inalienability of legislative power, and, in particular, Article 119.

8. The second drawback of the existing method, which is linked with the first, is that it may lead to a kind of normalization of the extraordinary by making extraordinary measures commonplace. In fact, if a duly enacted law or a regulation of the Presidential Decree is not required for an interference with fundamental rights and freedoms, it will lead to the review of regulations considered valid for the *ordinary* period within the scope of Article 15 of the Constitution, which explicitly provides for the review of measures taken "*in times of war, mobilization and a state of emergency*". However, the Constitution provides that the review of the interferences in ordinary times shall be carried out pursuant to the provisions of Article 13.

9. At this stage, it should be pointed out that the addition of the procedural criterion to the existing criteria does not affect the Court's decision on the merits of the application and may not change the outcome in terms of "applicability". As a matter of fact, in the case of the present application, the administration justified the interference with the right to organize meetings and demonstrations under the authority granted by Article 11 of the Law No. 2935 on State of Emergency. Nevertheless, the Constitution prescribes for a review under Article 13 for the interferences made during ordinary times.

10. Moreover, the examination of the compatibility of the interference to be examined under Article 15 of the Constitution with the guarantees of Article 13 of the Constitution may also entail some problems. According to the existing method, if no violation is found in the examination conducted pursuant to Article 13, no further examination is conducted pursuant to Article 15, whereas if a violation is found in accordance with Article 13, further examination is conducted in accordance with Article 15 of the Constitution.

11. There are at least three adverse implications of the *dual* review method in question. Firstly, examining the interference with a fundamental right or freedom under the special circumstances of a state of emergency with the criteria of the ordinary times may lead to an assessment of the issue that would be disconnected from the concrete facts. The examination of an interference made on the grounds of a state of emergency regulation as if it were *an* interference *made in the ordinary times* under Article 13 inevitably requires an abstract assessment. However, the interference examined in the individual application is not of an abstract or hypothetical nature, but is based on the concrete act or decision imposed on the applicant.

12. The second shortcoming of this method is that it leads the Constitutional Court to evaluate a state of emergency measure as if it were an ordinary measure and to reach a conclusion on the existence or non-existence of a violation, even though this is not required. This results in the Court delivering its opinion on a similar matter that may be brought before it after the state of emergency, by conducting an Article 13 review in advance. However, if the application brought before the Constitutional Court involves a measure in the nature of a state of emergency, it should be evaluated in light of the conditions of the extraordinary times.

13. The third and more crucial shortcoming is that the criteria for restricting fundamental rights of two different legal regimes are intertwined in a way that leads to confusion on notions. One could argue that this confusion manifests itself especially in the criteria of "lawfulness", "legitimate aim" and "proportionality".

14. According to Article 13 of the Constitution, in order to restrict a fundamental right or freedom, there must be a provision enacted by the legislature under the name of "*law*" and this provision must be clear, precise and specific. On the other hand, in a state of emergency, fundamental rights and freedoms can be restricted by State of Emergency Decree Law (named as Presidential Decree in the new system) along with the law. In this case, it is not ontologically possible to evaluate a State of Emergency decree or a Presidential Decree within the scope of the "*lawfulness*" principle stipulated in Article 13 of the Constitution for ordinary times. For this very reason, when examining an interference

made by the Emergency Decree Law in terms of Article 13, it is sometimes evaluated to "*meet the requirement of lawfulness*" by referring to the constitutional provision that fundamental rights and freedoms can be restricted by the Emergency Decree Law in extraordinary periods, and sometimes as "*an exception to lawfulness*", considering that the former evaluation would be erroneous. Nevertheless, after it is established that the impugned interference was a measure of the state of emergency, the assessment should not be conducted under Article 13 but under Article 15 which regulates the regime restricting fundamental rights and freedoms during the extraordinary times.

15. Likewise, the dual review method may also raise issues with respect to the "*legitimate aim*" principle. It cannot be claimed that the specific grounds for restriction listed in Article 13 of the Constitution also pertain to extraordinary measures. In other words, in the restriction of the fundamental rights and freedoms during the state of emergency, it is not obligatory to adhere to the grounds for the restriction laid down in the Constitution. Rights and freedoms may be restricted in order to eliminate the danger that led to the state of emergency, taking into account the "requirements of the emergency". Therefore, examining the "*legitimate aim* of a restriction imposed by an extraordinary measure in the context of Article 13 of the Constitution may lead to misinterpretation of constitutional provisions and generate confusion.

16. On the other hand, the principle of "*proportionality*" is a common criterion laid down in Articles 13 and 15 of the Constitution. It is a well-known fact that this principle shares the same sub-principles in ordinary and extraordinary times. Accordingly, for an interference not to constitute a violation, it must be in conformity with the principles of "*suitability*", "*necessity*" and "*commensurateness*" for the legitimate aim pursued by the interference. There is no doubt as to the fact that that there is a difference in extent between the proportionality in ordinary times and the proportionality in extraordinary times. In this respect, an interference that would be considered "*disproportionate*" in the ordinary times can be adopted "*to the extent required by the exigencies*" in the state of emergency. However, since this difference in extent is already due to the circumstances of the present case, an assessment can be made within the context of

the specific circumstances of each interference and the "*exigencies of the situation*". Therefore, examining an interference in terms of the principle of "*proportionality*" pursuant to both Article 13 and Article 15 may result in a chaotic situation. Furthermore, in reaching the conclusion that an interference is "*disproportionate*" in terms of Article 15 of the Constitution, the assessments made in the previous examinations under Article 13 are mostly taken into account.

17. In order to overcome all these shortcomings, it is necessary, on the one hand, to consider whether there is an emergency legislation before the existence of substantive criteria when determining the existence of an extraordinary measure and, on the other hand, once the existence of an emergency measure is established, the interference should be examined only under Article 15.

18. Considering that the existing dual examination method should be revised and updated as explained above, I agree with the conclusion reached by the majority that the examination in the present application should be conducted pursuant to Article 15, but on these grounds.

CONCURRING OPINION OF VICE-PRESIDENT HASAN TAHSİN GÖKCAN

1. The majority of our Court has adopted the method of examination of individual applications regarding the State of Emergency-era proceedings to continue the method adopted by the Constitutional Court in Aydın Yavuz and Others decision (no. 2016/22169, 20 June 2017, §§ 193-195, 242). Pursuant to this method, the review is first conducted under Article 13 of the Constitution, and if a violation of the Constitution is found, the review is finalized by conducting a review under Article 15 of the Constitution. Although the method of review preferred in the aforementioned decision and in another precedent decision (see *Selma Elma*, no. 2017/24902, 4 July 2019, §§ 29-62), in which the same method was applied in relation to the right to hold meetings, has been adopted and applied by the Court, the need to develop jurisprudence in accordance with constitutional review and the guarantee of fundamental rights has surfaced in the face of the emergence of some drawbacks of this method over time. For this reason, it was deemed necessary to draft a concurring opinion regarding the review method of the right to hold meetings and demonstration marches, which we agree with the violation conclusion reached by the majority.

2. As it is known, a state of emergency may be duly proclaimed for the reasons laid down in Article 119 of the Constitution and, during this period, and it may be possible to partially or fully suspend fundamental rights or impose certain obligations on citizens by means of presidential decrees. However, it should be noted that the only power vested in the administration to restrict fundamental rights during the State of Emergency is specific to the Presidential Decree, and that this power cannot be used in other administrative acts and actions. In the above-mentioned Aydın Yavuz judgment, our court held that the process that began with the declaration of the State of Emergency was also part of the constitutional legal order, and that although the scope of interferences with fundamental rights had been expanded, interferences with individual freedoms could not be arbitrary in the State of Emergency legal framework. (see *Aydın Yavuz*, §348). Once again, as provided for in Article 15 of the Constitution and as held in a judgment of our Court (see the Court's judgment no. 2016/171 E. - 2016/164 K., 2 November 2016), the legal order of the State

of Emergency does not grant unlimited powers to the state. In accordance with Article 15 of the Constitution, interferences with fundamental rights by means of State of Emergency Decree Laws must not be contrary to obligations arising from international law, may not prejudice the rights and freedoms referred to in paragraph 2 of the same Article, and may not be more severe than is required by the exigencies of the circumstances. Again, the restrictions imposed by the State of Emergency Decrees (and their enactment into law) are temporary, and these restrictions will be lifted when the State of Emergency ends. In addition, the limited powers granted to the political authority by Article 15 of the Constitution are for the partial or total suspension of fundamental rights, and the declaration of a State of Emergency does not entail that the provisions of the Constitution relating to the fundamental order of the State and other constitutional principles do not apply during that period. In other words, the provisions of the Constitution except for the powers vested under Articles 119 and 115 remain in force in the same manner during the State of Emergency. On the other hand, the suspending effect on fundamental rights and freedoms does not occur automatically with the declaration of a state of emergency, but only if it is stipulated in the Presidential Decree or in the laws to be adopted by the Turkish Grand National Assembly, or in the Law no. 2935 on the State of Emergency, which comes into force systematically in the case of a declaration of a state of emergency.

3. With regard to constitutional review, if an issue that restricts fundamental rights as a result of the declaration of a State of Emergency is regulated by Presidential Decree the review should be carried out pursuant to Article 15 instead of Article 13 as a result of the derogation. This is due to the fact that the criteria of Article 13 of the Constitution are currently suspended in an interference carried out through the State of Emergency legislation (Presidential Decrees on the State of Emergency, Law no. 2935 on the State of Emergency, and the State of Emergency Measures to be adopted by the Turkish Grand National Assembly by enacting a law), as the very act of declaring a State of Emergency is contrary to the criteria of Article 13 of the Constitution. As a matter of fact, the authorisation to regulate the State of Emergency legislation has already been granted by Articles 15 and 119 of the Constitution. In this case, only Article 15 of the

Constitution should be the benchmark for the constitutional review of the emergency measures provided for in the emergency legislation.

4. On the other hand, in order to determine the method of constitutional review, it is first necessary to determine whether the act or measure of the public authority which is the subject of the individual application is in the nature of a measure or rule of a State of Emergency. In the Aydın Yavuz judgment, on which the majority opinion is based, the following criteria were employed: the existence of a state of emergency and the declaration of a state of emergency, to be taken during the state of emergency, being in force during the state of emergency and being related to the state of emergency (§ 188-191). However, no distinction among these criteria has been made as to the legal basis of the state of emergency measure to be applied. For this reason, it has been acknowledged that a review in accordance with Articles 13-15 of the Constitution should be carried out for the secondary regulation or actual practice implemented by the administration on the basis of the general provisions on the matter, even if, for example, there is no regulation on the matter by the Presidential Decree (fundamental rights are not restricted) or the State of Emergency Act or a law enacted as a State of Emergency measure was not relied on. It must be pointed out that this recognition and application would be contrary to the State of Emergency order provided for by the Constitution. In fact, if the method based on the majority opinion is taken as a reference, it leads to the conclusion that a power that is not exercised by the legislative or executive bodies, which are authorised by the Constitution to adopt emergency measures, is being used by administrative bodies that are not authorised to do so. In fact, although no new regulation has been issued in the context of Article 15 of the Constitution, certain administrative acts and actions that maintain previous practices during the State of Emergency cannot in essence constitute a State of Emergency measure and cannot be legally characterised as such, the method used in the constitutional review may lead to such a result. In other words, by implementing this procedure, an administrative measure relating to the application of the ordinary time-law or of a procedure established in accordance with the rule laid down by the administration in a circular is characterised (so to speak 'treated') as a State of Emergency measure. For example, if the provisions of the

Code of Criminal Procedure no. 5271 on detention have not been revised, the application of the 13-15 examination method imposes a kind of emergency measure function on this measure, although a detention made during the State of Emergency in connection with the State of Emergency cannot be said to constitute a "State of Emergency measure". This method, which requires a review of Article 15 in all cases, poses the risk of creating grounds for public institutions to act without being entitled to on the basis of the necessities of the state of emergency, as if there were de facto such an authority, although they have no constitutional authority to issue a regulatory act related to the State of Emergency measure and there is no such regulation in this regard.

5. In this case, it would be necessary to establish case law to determine whether the act or measure which is the subject of the individual application qualifies as a State of Emergency measure. In this respect, as stated in the relevant discussions, the criterion that the State of Emergency measure is provided for by a law or a Presidential Decree should be included in the previous criteria. Accordingly, to reiterate the criteria; 1- Existence of a State of Emergency and declaration of a State of Emergency, 2- existence of a State of Emergency measure, a) the measure in question must be established on the basis of a Law or Law no. 2935 on the State of Emergency or a State of Emergency Decree, b) the measure must be valid during the State of Emergency, c) the measure must be in accordance with the criteria of jurisdiction of the State of Emergency in terms of location (such as Regional State of Emergency), d) the measure must be related to the state of emergency (due to the State of Emergency).

6. In the present case, the Governorate prohibited meetings and demonstration marches for at least one month at a time for a period of at least two years and made the meetings and demonstration marches subject to a permission. It is evident that the legal basis for such an authorisation cannot be provided by Article 11/C of Law no. 5442. In this case, it should be accepted that the authorisation and prohibition decisions on which the administrative fine relied, were issued within the framework of the Law no. 2935 on the State of Emergency, and therefore the review should only be carried out in accordance with Article 15 of the Constitution.

CONCURRING OPINION JUSTICE ENGİN YILDIRIM

1. Although we agree with the conclusion of violation drawn by our Court in the present application, this different justification is drafted with the consideration that the principles adopted by our court in the judgment of *Aydın Yavuz and Others* (Plenary, No.: 2016/22169, 20 June 2017) in the examination method of the applications related to the state of emergency period should be amended because they may lead to various problems, which we will discuss in the following. The present application will also be examined on this ground.

A) Method of Examination

2. As regards the method of examination of individual applications concerning the measures taken during the period of the state of emergency, the Constitutional Court first examines whether the measures comply with the criteria set out in Article 13 of the Constitution and, in the event of a breach, also carries out an examination in accordance with Article 15. On the other hand, it is argued that the review of fundamental rights violations based on state of emergency legislation (Law on State of Emergency, State of Emergency Presidential Decree or State of Emergency Decree Law) should be carried out directly through Article 15.

3. During a state of emergency, it may be required to restrict fundamental rights and freedoms to a much greater extent than in ordinary times. Article 15 of the Constitution entitles the State, in such circumstances, to restrict fundamental rights and freedoms to a greater extent than in ordinary times and to take measures contrary to the safeguards provided by the Constitution. Nevertheless, it cannot be claimed that Article 15 grants the State unlimited powers during times of a state of emergency.

4. In a state of emergency, declared in the face of a serious threat to the constitutional order, it is not to be expected that rights and freedoms will be exercised in the same way as in ordinary times. A contrary standpoint could turn the constitution into a kind of a "suicide pact"[1]. Additionally,

1 This concept was first used in a dissenting opinion written by Justice Robert Jackson of the United States Supreme Court. See Terminiello v. City of Chicago, 337 U.S. 1 (1949). In his dissenting opinion, Justice Jackson used the term as follows: "...will convert the constitutional Bill of Rights into a suicide pact". What is meant by the concept is striking a balance between

in the face of a serious threat to the existence of the state and the nation, what a democratic state should do is not to make the state of emergency as ordinary state under the perception of a constant threat, but to take measures to eliminate that threat while remaining in conformity with the constitution and the law.

5. In his "Second Treatise of Government", John Locke pointed out that "…men are so foolish that they take care to avoid what mischiefs may be done them by polecats or foxes, but are content, nay, think it safety, to be devoured by lions...".[2] The constitutional order must ensure that people are protected against danger from foxes and martens, but not swallowed by lions.

6. A state of emergency is a state of exception, but this does not imply that the constitution authorises a situation in which rights and freedoms are suspended, the constitution and legal norms are completely disregarded and unlawfulness is the rule, "in the name of preventing suicide". Fighting against threats such as war, rebellion, uprising, coup d'état and terrorism, which threaten human rights, the freedom of the individual, the security of life and property, public order, the existing constitutional democratic system in the country and the State, which is obliged to protect all these, is one of the reasons for the existence of the State and one of its primary duties. However, the measures taken and to be taken in the exercise of this duty must not be contrary to the Constitution, the rule of law and international human rights obligations, and must ensure that human rights are respected as far as possible.

7. In the constitutionality review, the Constitutional Court held that it is explicit in the wording of the Constitution that the constitutionality of the State of Emergency Decree Laws cannot be examined (see the Court's judgment no. E.2016/205, K.2019/63, 24 July 2019, § 9), but noted that the laws on the approval of the State of Emergency Decree Laws would be subject to a constitutionality review. In this regard, the Constitutional Court has acknowledged that the provisions in the State of Emergency

constitutional limitations on state power and the need for the survival of the state and the nation.

2 John Locke, Hükümet Üzerine İkinci İnceleme, trans. Aysel Doğan, İzmir: İlya Yayınevi, 2010, p. 88-89.

Decree Laws and subsequent ratification acts, which include measures considered to be related to the elimination of the state of emergency, should be examined pursuant to Article 15 of the Constitution, while measures that are not considered to be related to the state of emergency should be examined pursuant to Article 13 of the Constitution.

8. In the existing method, if, as a result of the examination based on Article 13 of the Constitution, it is determined that the interference with fundamental rights and freedoms violates the Constitution -in the ordinary times-, Article 15 is examined. It is the Article 15 examination that defines the final conclusion.

9. Pursuant to Article 15 § 1 of the Constitution, "In times of war, mobilization, a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures derogating the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated". Accordingly, fundamental rights and freedoms may be restricted in contrary to Article 13 and the guarantees enshrined in other articles of the Constitution, provided that such restrictions are not in breach of Article 15 of the Constitution. It goes without saying that Article 15 does not grant the state completely unregulated, unlimited and arbitrary powers, nor does it open the floodgates for it to operate freely. In order for this Article to be applicable, there must be a state of war, mobilisation or state of emergency, no violation of obligations arising from international law, the core area consisting of the rights and principles listed in the second paragraph of the Article must not be interfered with, and finally, the principle of proportionality must not be violated. These criteria are explicitly underlined in the judgments of the Constitutional Court (see the Court's judgment no. E.2016/171, K.2016/164, 2 November 2016).

10. While Article 13 of the Constitution is applicable in ordinary times, Article 15 is applicable in states of emergency, and therefore when examining the restriction of fundamental rights and freedoms in states of emergency, an assessment should not be conducted within the framework of Article 13 regulating ordinary times, and there is no necessity to do

so. On the other hand, in cases that are not associated with the state of emergency, but occurred during the state of emergency, Article 13 should be relied upon when examining the restrictions. The fact that a procedure or action under Article 15 of the Constitution is contrary to the safeguards stipulated in Article 13 of the Constitution does not indicate that Article 13 of the Constitution has been violated, since Article 15 is the article that should be taken as a basis in cases related to the state of emergency. Since there is no hierarchical relationship between these two Articles, Article 13 should not be regarded as a prerequisite for the implementation of Article 15. Article 15 does not require a determination of a violation of Article 13 in order for Article 15 to be applicable. Both articles actually serve the same purpose at different times. While Article 13 provides a safeguard for fundamental rights and freedoms in ordinary times and during the State of Emergency in cases not concerning the State of Emergency, Article 15 is invoked for the same safeguard in cases related to the State of Emergency during the State of Emergency.

11. The principle of proportionality, enshrined in Articles 13 and 15 of the Constitution, does not manifest itself in quite the same way in both Articles. In both articles, the principle of proportionality consists of three sub-principles: suitability, necessity and commensurateness. According to the principle of proportionality set forth in Article 15 § 1, the measure taken under the state of emergency must be suitable and necessary to attain the purpose for which the state of emergency was declared, and the means must not be disproportionate to the purpose. A measure restricting fundamental rights and freedoms may be found disproportionate in ordinary times and proportionate in states of emergency. This is because, unlike Article 13, Article 15 qualifies proportionality with the phrase “to the extent required by the exigencies of the situation”. The "situation" referred to here is the fact, event or series of events that led to declaring a State of Emergency. In a state of emergency, many fundamental rights and freedoms may be restricted due to the nature of the state of emergency, but these restrictions must be “to the extent required by the exigencies of the situation”. Otherwise, Article 15 would be violated.

12. In the restriction of fundamental rights and freedoms during periods of state of emergency, the conditions of restriction by law as set

out in Article 13 which are being grounded on the reasons specified in the relevant article, being in compliance with the letter and spirit of the Constitution, being in accordance with the requirements of the democratic social order, and not infringing the essence of the right, are not sought, but the restrictions must comply with Article 15. Additionally, pursuant to Article 119 of the Constitution, restrictions can only be stipulated either by a state of emergency law or by presidential decree (or State of Emergency decree). Therefore, it is not permitted for any authority other than the authorised bodies to issue regulations and adopt decisions that are contrary to the guarantees established in various articles of the Constitution relating to fundamental rights and freedoms.

13. The English text of Article 15 of the European Convention on Human Rights (the Convention) is entitled "*Derogation in time of emergency*", and the French version is entitled "*Derogation en cas d'etat d'urgence*". This heading is officially translated into Turkish as "*Olağanüstü hallerde yükümlülükleri askıya alma* (Suspension of obligations in times of emergency)". The English and French texts of Article 15 of the Convention also include the concept of "derogation". This statement is officially translated into our language as "*Anayasada öngörülen güvencelere aykırı tedbirler alınabilir* (Measures may be taken that are contrary to the safeguards provided by the Constitution)". The term "derogation" in the Convention should not be interpreted as referring to "suspension". This expression should be understood as "an exception to a rule of law... a mitigation or an alleviation of the content of a provision".[3]

14. Article 15 of the Constitution, entitled "Suspension of the exercise of fundamental rights and freedoms", contains the expression "may be suspended (durdurulabilir)". As can be seen, both the title and the wording mention "suspension". The concept of "suspension" implies that fundamental rights and freedoms can be entirely revoked. However, considering that Article 15 of the Constitution is derived largely from Article 15 of the Convention, the concept of "derogation" in the Convention should not be interpreted in our constitutional system as a suspension or

3 Batur Kaya, Semih "2017 Anayasa Değişiklikleri Çerçevesinde Olağanüstü Halin Hukuki Rejimi Üzerine Bir İnceleme (A Review on the 2017 Constitutional Amendments on the Legal Regime of the State of Emergency)", Türkiye Barolar Birliği Dergisi, 2022, vol. 158, p. 5.

abrogation. The term "suspension" in Article 15 of the Constitution should be interpreted in such a way that fundamental rights and freedoms may be more restricted during the state of emergency than during the ordinary times. In fact, if we look at the preamble of the Article, it states that "... the suspension of rights and freedoms or the imposition of measures contrary to the safeguards provided for these rights and freedoms shall be 'within the limits of the measure required by the situation', in other words, the principle of commensurateness in 'exceptional circumstances' shall be observed...".[4] This indicates that "suspension" is in fact a restriction, and that the main criterion here is "as the situation requires".

15. Article 121 § 2 of the Constitution stipulates that during a state of emergency, "fundamental rights and freedoms shall be restricted in accordance with the principles set out in Article 15". Taking this into account, there is in principle no significant difference between the concepts of "suspension" and "restriction". During the state of emergency, the constitution-maker did not grant the public power the power to carry out actions and proceedings that are contrary to the Constitution. The authorisation granted is to restrict rights and freedoms to the extent required by exigencies of the situation.

16. Article 15 of the Constitution applies to acts and actions of the public authorities during a state of emergency, by or on the basis of a state of emergency law, a presidential decree on a state of emergency (or a law on a decree on a state of emergency). In this framework, it should be assessed whether an interference with fundamental rights and freedoms under the State of Emergency is indeed a measure required by the State of Emergency and, if it is a measure required by the State of Emergency, whether it is proportionate. If the interference is not based on the State of Emergency legislation, if it is a measure that is not related to the eliminating the matter causing of the state of emergency, or if it is not proportionate, it is unconstitutional.

17. The additional examination under Article 15 of the Constitution of the conformity of an interference made in accordance with the laws of the ordinary period and found to be in violation of Article 13 of the

4 Constitutional Court, Constitution of the Republic of Türkiye (Reasoned), Ankara, 2019, p. 80.

Constitution bears the risk of paving the way for the bodies exercising public power to take decisions without relying on the State of Emergency Law or the State of Emergency Decree-Law no. 2935, merely relying on the requirements of the State of Emergency. The examination of interferences based on the State of Emergency legislation within the scope of the individual application only under Article 15 of the Constitution will prevent this risk from arising. this way, interferences claimed by public bodies to be necessary due to the state of emergency, but which do not arise from the state of emergency legislation, will be subject to the ordinary period of review (within the scope of Article 13). Otherwise, the measures adopted by the public authorities without resorting to the state of emergency legislation, on the grounds that the state of emergency requires such measures, may be deemed legitimate to the extent necessary under the state of emergency.

18. It would be highly problematic from a constitutional point of view if the authorities were able to take the measures required by the situation solely on the basis of their own judgement, without referring to the State of Emergency Law or the State of Emergency Decree Law. Article 119 § 5, 6 and 7 of the Constitution stipulates that during a state of emergency, "the manner in which fundamental rights and freedoms may be restricted or temporarily suspended, the provisions to be applied and the procedures to be followed shall be determined by law or presidential decree, in accordance with the principles set out in Article 15". Since the provisions of Article 119 are not suspended when a state of emergency is declared, it is not possible for the authorities to carry out any action or proceeding without resorting to the State of Emergency Law or to a Presidential Decree on the State of Emergency (or a State of Emergency Decree Law) or to ordinary legislation. If this occurs, it will violate the articles that regulate the fundamental rights and freedoms with which it interferes, in particular Articles 2, 15 and 119 of the Constitution.

19. Measures taken during the State of Emergency and on the basis of the State of Emergency legislation, but which have no relevance to the circumstances that led to the declaration of the State of Emergency in relation to the present case; measures that are not necessary for the elimination of the declared State of Emergency; or measures that are

necessary but not proportionate will not be in accordance with Article 15 of the Constitution.

20. In short, in order for Article 15 of the Constitution to be applied as a method of direct examination, there must first be a state of emergency and a state of emergency must be declared and a state of emergency measure must be in place. For a State of Emergency measure to exist, it must be based on a law or a presidential decree (decree-law), be in force for the duration of the State of Emergency and be in relation to the State of Emergency.

21. With regard to the scope of the examination to be carried out in accordance with Article 15 of the Constitution, it shall be examined, firstly, whether the principles set out in the second paragraph of that Article are complied with, in that they do not interfere with the rights and freedoms listed in the second paragraph of that Article and described as core rights, are not contrary to obligations under international law and are to the extent required by the exigencies of the situation.

B) Present Application

22. Following the explanations provided above, as to the present application, it is observed that the Ankara Governorate has been banning or authorising all meetings and demonstrations in this city for two years with successive decisions based on formalistic grounds. The applicants were imposed administrative fines for violating the aforementioned governorate orders. While some of the fines were imposed by police officers, others were imposed by the administrative offences bureau of the chief public prosecutor's office. The Ankara Governor's Office imposed the administrative fines during the state of emergency and pursuant to Law no. 2935. However, with the exception of the decision of 17 October 2016, the other decisions are based on Article 11(m) of Law no. 2935, Article 11(c) of Law no. 5442 and Article 17 of Law no. 2911. Accordingly, in view of both the provisions and the content of the decisions, there is uncertainty as to whether the decisions on which the fines constituting the interference in question are based, constitute an emergency measure or an ordinary state practice. As a matter of fact, although the relevant provision of Law no. 2935 constitutes an emergency measure, there is no need for a

declaration of a state of emergency in order to take an action according to the other provisions mentioned.

23. In order to determine the constitutional safeguards to be applied, it is important to determine whether the impugned interference is an emergency measure or an emergency procedure. If the interference is justified by emergency legislation, Article 15 of the Constitution must be invoked. The examination to be carried out in this context is to determine whether the impugned interference undermines the rights and freedoms enshrined in the second paragraph of the said Article, whether it is contrary to obligations pursuant to international law, and whether it is proportionate to the exigencies of the situation.

24. As per the relevant decisions of the Ankara Governorate, it can be noted that all meetings and demonstrations were banned and finally authorised for at least one month, although some of them did not specify the duration, for almost two years from the end of 2016, although not continuously. In the present case, it does not appear to be possible to acknowledge that the judgments in question were issued pursuant to Article 11(c) of Law no. 5442, which restricts the duration of such judgments to fifteen days, or pursuant to Article 17 of Law no. 2911, which restricts the period of postponement to one month and provides that a particular meeting may be banned.

25. In the light of the considerations set out above, it has been established that the authorisation and prohibition decisions on which the impugned administrative fines are based were adopted in accordance with Law no 2935. Therefore, taking into account the explanations provided in the previous section (A) on the method of examination, the examination of the impugned interference will be carried out directly in accordance with Article 15 of the Constitution.

26. The right to organise meetings and demonstrations is not one of the core rights that may not be infringed during times of war, mobilisation, martial law and extraordinary administrative procedures, in accordance with Article 15 § 2 of the Constitution. Therefore, in a state of emergency, it is possible to take measures that are contrary to the safeguards of the Constitution with regard to this right.

27. In addition, the right in question is not one of the core rights which the international conventions to which Türkiye is a party in the field of human rights, in particular Article 4(2) of the United Nations International Covenant on Civil and Political Rights and Article 15(2) of the European Convention on Human Rights and the Additional Protocols thereto, prohibit from being infringed as an obligation under international law, and in the present case it has not been established that the interference with the applicants' right to organise meetings and demonstrations is contrary to any other obligation under international law.

28. In considering the applicants' allegation that their right to hold meetings and demonstration marches had been violated, it was to be examined whether the impugned measure was to the extent required by the exigencies of the state of emergency pursuant to Article 15 of the Constitution.

29. In the decisions to ban the applicants, there were no concrete facts and information on the threat of terrorism, and in all banning decisions since the decision dated 31 July 2017, administrative fines were imposed on some of the applicants on the grounds that citizens were disturbed during the open-air meetings they attended. The reason given in the banning orders was the nuisance caused by the protests with loud noise at places such as parks and gardens where citizens mainly preferred spending time. In the present case, especially considering the areas where the applicants gathered, the legitimacy of this justification is highly questionable when it is weighted against the right to organise meetings and demonstrations even in ordinary times, let alone in a state of emergency. Accordingly, in the present application, the banning order is not a measure to the extent required by the exigencies of the state of emergency.

30. When, as in the present case, the bodies exercising public authority interfere with constitutional rights, they must clearly and factually demonstrate the security or other legitimate aim they are seeking to achieve with the decision to ban. Continuing to interfere with fundamental rights on the basis of the danger of terrorism in our country, with abstract and formulaic expressions that are not based on concrete facts, runs the risk of eliminating the essence of the right.

31. The Ankara Governor's Office issued categorical decisions to ban based on formalistic grounds and of uncertain duration with regard to the right of individuals to organise meetings and demonstration marches. The administrative and inferior courts did not review the bans, which were imposed three months after the coup attempt and continued almost constantly for a long period of 11 months. Prohibitions that are indefinite or unreasonably long entail the risk of infringing the very essence of the rights interfered with, or even of abolishing them altogether. For almost 11 months, the exercise of the right of assembly and demonstration has been prevented without any less restrictive means being used and without any danger having been demonstrated. It can be noted that the decisions taken one after another on the basis of formalistic grounds, without taking into consideration the concrete facts and conditions, render the right to organise meetings and demonstration marches impossible to exercise.

32. In addition, the decision to ban rendered by the Governorate of Ankara dated 30 August 2017 should be examined separately. Unlike the other banning decisions of the Governorate of Ankara, the banning decision dated 30 August 2017 is not available on the website of the Governorate. The Governorate has stated that there is no information on whether an announcement was made to the public on the Governorate's website on the date of the impugned decision. Therefore, since it is quite clear that the banning decision of the Ankara Governorate dated 30 August 2017 was not announced to the public in any way, it cannot be accepted that the administrative fines imposed on the basis of this banning decision, which, unlike the other banning decisions subject to the application, was not properly announced to the public, are also to the extent required by the exigencies of the state of emergency.

33. Finally, the decision of the Ankara Governor's Office dated 21 January 2018 to grant a permit should also be evaluated. This decision, unlike the other prohibition decisions that were the subject of the application, does not specify a specific period of time, but by stating "as long as the Operation Olive Branch continues", sets a period of time that is far from certainty and predictability. This uncertainty, considering that the decision in question was issued pursuant to the State of Emergency Law, may lead to the continuation of the prohibition in the event of the

end of the state of emergency. Therefore, it should be determined that the administrative fines imposed pursuant to the Ankara Governorate's authorisation decision of 21 January 2018, the validity of which depends on the end of the Operation Olive Branch, are not to the extent required by the state of emergency. The administration failed to prove that the administrative fines imposed on the applicants were to the extent required by the state of emergency.

34. For the reasons set out above, the decisions to ban the applicants' right to hold meetings and demonstration marches and the administrative fines imposed for exercising this right violate Articles 15 and 34 of the Constitution.

CONCURRING OPINION OF JUSTICES HİCABİ DURSUN AND YUSUF ŞEVKİ HAKYEMEZ

1. During the state of emergency declared after the attempted coup of 15 July 2016, the Constitutional Court first started to examine individual applications regarding disposals based on state of emergency measures during the period when the state of emergency was in force with the *Aydın Yavuz and Others* judgment (Aydın Yavuz and Others [Plenary], no. 2016/22169, 20 June 2017). In accordance with the method of examination adopted in this judgment, the Court has proceeded to rule on similar individual applications.

2. According to the method of examination adopted by our Court, in order to determine whether or not the impugned measure is a measure taken in a state of emergency, account is taken of the existence of a state of emergency at the time of the interference, whether the measure is aimed at eliminating the dangers of the state of emergency and whether it has consequences which go beyond the state of emergency in terms of the duration. If all these criteria are met, the impugned interference is considered to be an emergency measure and an examination is carried out in accordance with Article 15 of the Constitution. However, for the purposes of this examination, an examination pursuant to Article 13 of the Constitution is first carried out, and if it is concluded that the applicant's right under Article 13 of the Constitution is violated as a result of the examination carried out on the basis of the constitutional rules of the ordinary period, the examination as to whether there is a circumstance contrary to the safeguards of Article 15 of the Constitution in respect of the alleged violation is started, and the applicant's claim of violation is concluded in accordance with the examination carried out at this stage.

3. In the presence of these conditions, a conclusion is reached by checking the compliance with three important safeguards in Article 15 of the Constitution. These guarantees are whether the core rights specified in the article, which cannot be interfered with even during the state of emergency, are affected, whether the measure applied in the state of emergency is contrary to the obligations arising from international law, and whether this measure is to the extent required by the state of emergency.

4. Since the declaration of the state of emergency, the Court has examined and ruled on many individual applications in this manner. It should be noted that the most important examination in this context is the one carried out under Article 15 of the Constitution. This is because, as will be explained in more detail below, in cases where the alleged violations are related to the emergency measures provided for in Article 119 of the Constitution, it is considered that the examination carried out in accordance with the existing jurisprudence primarily in terms of Article 13 of the Constitution and the existence of a violation resulting from this examination do not serve any practical purpose. What is more important in this examination is whether the measures taken under the state of emergency violate the safeguards of Article 15 of the Constitution.

5. In this context, it is important to first make the following finding. Although both the Constitution and the constitutions of democratic countries as well as international human rights conventions provide for extraordinary administrative procedures and stipulate that fundamental rights and freedoms may be restricted more in extraordinary periods than in ordinary periods, it is observed that there are not many concrete jurisprudential examples of how this is to be applied in practice. In other words, there was no judicial/jurisprudential standard regarding the limitation of fundamental rights and freedoms during states of emergency. In this context, it was not possible to find examples in European countries on how to deal with the interference with human rights during states of emergency in individual application reviews. On July 15, 2016, with the declaration of the state of emergency after the coup attempt, the concretization of this state of emergency in practice and the emergence of the examination procedure on this issue took place for the first time in the case of Türkiye. In this respect, the jurisprudence of the Constitutional Court since the *Aydın Yavuz and Others* judgment has set an essential standard.

6. Almost five years after the aforementioned judgment, with the experience gained through the evaluation process of many judgments issued in this context, it is important for the development of the Court's jurisprudence on the method of review that the standard of review should be subject to some revisions, provided that the main framework of the

standard of review is preserved. In this context, it should be noted that due to the lack of any other example in Türkiye regarding the application of the regime of restriction of fundamental rights and freedoms under the state of emergency until the time of the July 15 coup attempt, and due to the technical aspects, especially of the constitutional review and individual application review, not all aspects of the issue could be presented with the same clarity when the case law was first presented after the state of emergency was declared after July 15. For this reason, it would be useful to make some contributions to the review methodology in this area, based on the Court's nearly five years of experience in reviewing individual applications during the state of emergency and to some of the detailed new issues that have arisen in this process.

7. For this reason, it is necessary to state that there is a need for a change in the current examination method regarding "applicability" in the examination of state of emergency measures in present individual application, and therefore we dissented from the majority's finding on this point. We are of the opinion that the adoption of this method, which differs from the majority decision in terms of applicability, will result in a simpler method of examination in individual applications regarding the violation of rights arising from the state of emergency measures.

8. In the context of our view of this issue of applicability, two important points emerge that differ from the approach to the method of review that the Court has taken to date and that the majority has chosen to maintain:

9. Firstly, in the examination of individual applications filed concerning the state of emergency, the Court first examines the allegations of violation in terms of compliance with Article 13 of the Constitution, which prescribes safeguards valid for the ordinary times, and if it concludes that there has been a violation, only then does it proceed to the examination phase in terms of the safeguards under Article 15 of the Constitution. In our view, such a review, which would prolong the process of examining individual applications, would have no practical benefit. This is because it would be more in line with the system provided by the Constitution to reach a conclusion by evaluating a claim of violation related to a state of emergency measure only with respect to the constitutional guarantees related to the

state of emergency in the individual application examination. Therefore, in individual applications of this kind, it should be considered a more appropriate method to examine directly with reference to the safeguards of Article 15 of the Constitution.

10. Accordingly, as stated above, there is no practical effect of reaching a conclusion of violation in an examination of such an alleged violation with respect to Article 13 of the Constitution. This is because if the violation in question arises from a state of emergency measure, then a constitutional review of the individual application must be conducted in terms of the guarantees of Article 15 of the Constitution.

11. In addition, in the examination of an individual application concerning an alleged violation based on a measure taken under a state of emergency, the examination carried out in terms of Article 13 of the Constitution may cause some technical legal problems and even lead to some contradictions. For example, in the case of an alleged violation based on a presidential decree on the state of emergency or a measure based on a decree-law on the state of emergency before the constitutional amendment of 2017, an issue will arise at the lawfulness stage of the examination under Article 13. However, the requirement of restriction of fundamental rights by law, as a fundamental constitutional guarantee, refers only to the ordinary period. It is not only impractical to examine a problem based on this in a state of emergency measure under Article 13, but it is also possible that it may lead to other problems in terms of the regime and guarantees of fundamental rights and freedoms. In the same way, if there is no special grounds for the restriction in the relevant article concerning the right in question, in the examinations under Article 13, especially in the stage of revealing the legitimate aim of the restriction, constitutional problems in relation to the state of emergency measure will unnecessarily arise due to Article 13 of the Constitution.

12. Therefore, the examination of individual applications arising from emergency measures directly based on Article 15 of the Constitution would not only be practical but would also completely eliminate the occurrence of the contradictory situations mentioned above.

13. When pointing out the problems in the above two examples, the perception that the state of emergency is an unguaranteed and unlawful regime may come to mind. However, it should be emphasized that the state of emergency is also a legal regime and the guarantees of this legal regime are clearly stated in Article 15 of the Constitution. Although we will not go into the details of this issue here, the following point, which we will express below as the second starting point of the majority opinion in terms of applicability in this context, supports our view and shows that the state of emergency is a legal regime that has consistent fundamentals in itself and provides for a strict legal order against arbitrariness.

14. As a prerequisite, the Constitutional Court, acting within the limits of its constitutional authority, shall take this aspect of the state of emergency into account when determining the legal regime to which fundamental rights and freedoms are subject during a state of emergency, and shall conduct a review accordingly.

15. The second point under the category of "applicability" for improving the method of examination in individual applications regarding the state of emergency is directly related to this. The emergency measure to be applied during the state of emergency must be based on a law or a presidential decree on the state of emergency (or, prior to the constitutional amendment of 2017, a decree-law on the state of emergency), as stipulated in Article 119 of the Constitution entitled "Administration of the State of Emergency". In addition to the State of Emergency Law no. 2935, which automatically enters into force upon the declaration of a state of emergency, it is clear that the it may be provided for other emergency measures through laws to be enacted by the TGNA. In this case, according to Article 119 of the Constitution, the state of emergency measures consist of the State of Emergency Law no. 2935, the Presidential Decrees on the State of Emergency, and the measures that the TGNA may prescribe by law in relation to and limited to the state of emergency.

16. As the safeguards regarding the restriction of fundamental rights in the state of emergency are regulated as a legal provision in Article 15 of the Constitution, Article 119 of the Constitution provides important details regarding the measures to be taken in the state of emergency.

Since the constitutional legislator has allowed the measures to be taken in extraordinary situations to be determined only by law (Law no. 2935 and other laws that provide for extraordinary measures to be enacted by the Turkish Grand National Assembly) and extraordinary presidential decrees, it is not possible to determine them by any other rule. Therefore, neither a presidential decree issued in the ordinary times nor a regulatory administrative act can directly provide for emergency measures.

17. If a state of emergency measure is enacted on the basis of a state of emergency law or an extraordinary presidential decree, the condition of applicability, which is a prerequisite for the examination of Article 15 of the Constitution in the individual application examination, is met. If this is the case, the examination of individual applications in relation to the state of emergency can only proceed to the assessment of the conformity with the safeguards pursuant to Article 15 of the Constitution: whether the core rights are protected, whether the restrictive measure imposed does not violate obligations under international law, and whether the principle of proportionality with regard to the state of emergency is met to the extent required by the exigencies of the situation.

18. Although this circumstance, which causes us to dissent from the majority of the Court with regard to its applicability, has not manifested itself much in the examination of individual applications so far, in our opinion, it aims to emphasize that the state of emergency is a legal regime in the applications filed concerning the state of emergency measure and, in this respect, it aims to prevent any measure from being deemed as a state of emergency measure without the will of the legislator or the President. As a matter of fact, there is no decision of the Constitutional Court so far, in which a claim for violation of rights based on an administrative act without such a basis has been rejected. On the contrary, such an emergency measure without a positive basis contradicts the fundamental rights regime established by Article 15 of the Constitution.

19. In this context, the essential aspect on which we dissent from the majority's conclusion is the explicit expression of a criterion as to whether a state of emergency measure is carried out under the formal conditions established in Article 119 of the Constitution. In our opinion, such a

formal criterion should be sought in the aspects of the requirement of applicability in applications filed in relation to an alleged violation during the state of emergency, and it is therefore recommended that this issue be clearly stated in the decisions.

20. In the absence of the aforementioned procedural criterion, it is reasonable to assume that a state of emergency may be established by any administrative act and that a procedure may be established on the basis of it. However, this situation would make the fundamental rights under the state of emergency extremely precarious. In fact, if Articles 15 and 119 of the Constitution are interpreted together, it is only possible for a state of emergency measure to be established by a law or a presidential decree on the state of emergency, provided that it is based on the reason for the declared state of emergency. Otherwise, it would be incompatible with the binding provisions of the Constitution to establish a measure of emergency by any administrative act and to invoke it as a basis.

21. In fact, to date, the Constitutional Court has not issued any decision allowing such measures. The contrary approach, contrary to what is provided by the Constitution, makes the emergency measures much more resorted during the state of emergency. This would be also incompatible with the state of emergency regime provided by the Constitution. Therefore, it is of utmost importance that this issue is settled clearly in the decisions of the Constitutional Court in order to demonstrate the level of safeguarding human rights during the state of emergency.

22. For the reasons stated above, we agree with the method of examination of the majority of the Court under the heading of "applicability" on the grounds that the examination in the present application should be carried out directly in terms of Article 15 of the Constitution and that the state of emergency measure must be based either on a law (Law no. 2935 and other laws providing for state of emergency measures to be enacted by the Turkish Grand National Assembly) or on the provision of a presidential decree on the state of emergency as a formal criterion under the conditions of applicability of Article 15 of the Constitution.

CONCURRING OPINION OF JUSTICE M. EMİN KUZ

In the applications concerning the alleged violation of the right to hold meetings and demonstration marches due to the administrative fines imposed on the applicants who participated in various meetings and demonstration marches by not complying with the decisions of the authorities during the state of emergency, it was decided that the impugned right had been violated.

Although the decision on the violation was made unanimously, I agree with the conclusion regarding the applicability of the assessments reached by the majority on different grounds.

As is well known, in times of emergency, it may be necessary to restrict fundamental rights and freedoms more than in ordinary times; Article 15 of the Constitution allows for more restrictions on fundamental rights than in ordinary times in order to meet this need and to take measures that are contrary to the guarantees provided by the Constitution. Certainly, it cannot be said that Article 15 establishes an arbitrary system and grants unlimited powers to the State.

Following the July 15 military coup attempt, the principles and method of examination in individual applications regarding the measures taken during the state of emergency, which was declared on 21 July 2016 and remained in effect until 20 July 2018, were established in *Aydın Yavuz and Others* ([Plenary], no. 2016/22169, 20 June 2017) and have been implemented in a consistent manner by our court.

In the judgment in question, a method of examination was adopted in which the measures enshrined in the emergency legislation to eliminate the dangers of the state of emergency may not contradict the guarantees of the Constitution, and for this reason, an examination under Article 13 of the Constitution was carried out first, and if a violation was found, an evaluation under Article 15 was carried out, and this procedure was continued in the ordinary period. It can be argued whether this examination under Article 13 of the Constitution is necessary due to the problems that may arise in terms of lawfulness and legitimate aim. On the other hand, an examination of the aforementioned case-law and our subsequent

decisions will demonstrate that there is no significant difference between the conclusions to be reached on merits as a result of this method and a direct examination under Article 15.

In fact, this decision unanimously concluded that there had been a violation, despite dissenting opinions on applicability.

In this regard, considering that it is no longer required to examine under Article 13 of the Constitution the actions and proceedings carried out based on the emergency legislation, similar to the method foreseen for the interferences that took place in the ordinary times, and that it is sufficient to make an assessment directly in terms of Article 15 if the conditions are met, instead of an examination to be made both within the scope of Articles 13 and 15, I agree with the conclusion of violation by dissenting from the majority opinion to the contrary regarding the method of examination.

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

CİHAN TÜZÜN AND OTHERS

(Application no. 2019/13258)

10 November 2022

On 10 November 2022, the Plenary of the Constitutional Court found a violation of the right to hold meetings and demonstration marches, safeguarded by Article 34 of the Constitution, in the individual application lodged by *Cihan Tüzün and Others* (no. 2019/13258).

THE FACTS

[5-15] At the time of the events, the applicant Nureddin Şimşek was a member of the Board of Directors and branch secretary of the Batman branch of the Education and Science Labourers' Union, and the applicants Deniz Topkan and Cihan Tüzün were, respectively, co-chairman and member of the Board of Directors of the Batman branch of the Health and Social Services Labourers' Union.

The Batman Governor's Office ("the Governor's Office") has decided that, due to the recent escalation of terrorist attacks in the city, meetings and demonstration marches planned to take place in the city centre for a period of fourteen days is contingent upon the permission (authorisation) of the local administrative authority. The Confederation of Public Employees' Trade Unions (KESK), to which the applicants' trade unions are affiliated, held that its members who were dismissed from public office between 5 and 9 November 2018 should apply to the Ombudsman Institution with a request for the dissolution of the Inquiry Commission on the State of Emergency Measures and their reinstatement.

In accordance with KESK's decision, the applicants took part in a collective protest by sending faxes to the Ombudsman Institution in front of the PTT (Post and Telegraph Organisation) headquarters in the centre of Batman. The applicants, who had not obtained a permission from the local administrative authority prior to carrying out their action, were each sentenced to an administrative fine of 259 Turkish liras ("TRY") on the ground that they had committed the offence of violating the order provided for in Article 32 of Law no. 5326 on Misdemeanours. The appeal lodged by the applicants against the administrative fines was dismissed by the 2nd Chamber of the Batman Criminal Judgeship of Peace ("the Judgeship").

The applicants lodged individual applications with the Constitutional Court on different dates, and the applications numbered 2019/15447 and 2019/15473 were consolidated with the application under examination.

V. EXAMINATION AND GROUNDS

16. The Constitutional Court ("the Court"), at its session of 10 November 2022, examined the application and decided as follows:

A. The Applicants' Allegations

17. The applicants claimed that the imposition of administrative fines for their participation in the contested meeting had violated their rights to hold meetings and demonstration marches, freedom of expression, and trade union representation, arguing that the mass protest involving the sending of faxes was peaceful and that there were no incidents that would have disrupted public services or public order in any way. The applicants Deniz Topkan and Cihan Tüzün also claimed that the decision of the Governor's Office had not been communicated to them or to the trade union of which they were members and that they had therefore not been informed of the contested decision.

18. The applicants alleged that their right to a reasoned decision had also been violated by the fact that their appellate request against the administrative fine was dismissed by the Judgeship in the absence of any justification.

B. The Court's Assessment

19. The Court is not bound by the legal qualification of the facts by the applicant and it makes such an assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The Court has concluded that the applicants' complaints concerning the alleged unlawfulness of the administrative fine imposed on them following a meeting in which they participated should be examined under this heading, primarily in the context of the right to hold meetings and demonstration marches.

20. Article 34 of the Constitution, titled *"Right to hold meetings and demonstration marches"*, reads as follows:

"Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission.

The right to hold meetings and demonstration marches shall be restricted by law only on grounds of national security, public order, the prevention of the commission of crime, the protection of public health or morals, or the rights and freedoms of others.

The formalities, conditions, and procedures to be applied in the exercise of the right to hold meetings and demonstration marches shall be prescribed by law."

1. Admissibility

21. The alleged violation of the applicants' right to hold meetings and demonstration marches must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

a. Existence of an Interference

22. It must be acknowledged that the imposition of an administrative fine on the applicants for participating in a meeting by not complying with the decision of the Governor's Office, which makes all events to be held in a province subject to permission, constitutes an interference with their right to hold meetings and demonstration marches.

b. Whether the Interference Amounted to a Violation

23. Article 13 of the Constitution provides as follows:

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

24. Article 34 of the Constitution does not envisage the right to hold meetings and demonstration marches as an unlimited right and accordingly, this right may be restricted by law only on grounds of

national security, public order, the prevention of the commission of crime, the protection of public health or morals, or the rights and freedoms of others. Any interference with the right to hold meetings and demonstration marches must also take account of Article 13 of the Constitution, which sets out the general principles governing restrictions on fundamental rights and freedoms. Pursuant to the article cited above, fundamental rights and freedoms may be restricted by law only on the grounds laid down in the relevant articles of the Constitution and in conformity with the requirements of a democratic social order and the principle of proportionality. Therefore, in order for the interference with the right to hold meetings and demonstration marches to be constitutional, it must comply with the letter (wording) of the Constitution.

25. If it is established that the grounds in question are incompatible with the wording of the Constitution and that there has been a breach of Article 34 § 1 of the Constitution, it may be then concluded that the applicant's right to hold meetings and demonstration marches has been violated. As in the case of constitutionality review, the Court is the competent authority to interpret the constitutional provisions, in a final and binding manner, also in the examination of individual applications (see *Kadri Enis Berberoğlu (2)* [Plenary], no. 2018/30030, 17 September 2020, § 71).

c. Compliance with the Wording of the Constitution as regards to Making Meetings and Demonstration Marches Subject to Permission

26. It is set forth in Article 13 of the Constitution that restrictions on fundamental rights and freedoms shall not run contrary to the wording of the Constitution. Accordingly, one of the criteria with respect to the restriction of fundamental rights and freedoms laid down in Article 13 of the Constitution is *"compliance with the wording of the Constitution"*. The Constitutional Court also examines, where necessary, whether the interference of authorities, vested with public powers, with fundamental rights and freedoms is in accordance with the wording of the Constitution. Such an examination is a prerequisite for the mandatory provision laid down in Article 13 of the Constitution (for considerations in the same vein, see *Kadri Enis Berberoğlu (2)*, § 68; *Kadri Enis Berberoğlu (3)* [Plenary], no. 2020/32949, 21 January 2021, § 79; see the Court's judgment no. E.2014/101, K.2017/142, 28 September 2017, § 84).

27. The term *"the letter of the Constitution"* in Article 13 of the Constitution refers to the text of the Constitution, i.e. its wording. The requirement that any interference with fundamental rights and freedoms must comply with the letter of the Constitution is particularly important when the *additional safeguards* introduced by various provisions of the Constitution are at stake. In most cases, the Constitution not only bestows a right or freedom, but also protects it by putting particular emphasis on, or attaching particular importance to, certain aspects of that right or freedom so as to guarantee the exercise thereof. In addition to acknowledging a right, the constitution-maker may also separately and specifically identify an aspect of that right falling under its normative scope and introduce an additional safeguard with respect thereto (see *Kadri Enis Berberoğlu (2)*, § 69; *Kadri Enis Berberoğlu (3)*, § 79). In this sense, restrictions on the rights and freedoms established in various articles of the Constitution that do not comply with the safeguards provided in addition to those established in Article 13 of the Constitution shall be contrary to the wording of the Constitution (see the Court's judgment no. E.2014/101, K.2017/142, 28 September 2017, § 84).

28. In the present case, due to the terrorist acts committed in the provincial centre of Batman and one of its districts, the Governor's Office restricted the impugned right by making all actions and events to be held throughout the province subject to the permission of the local administrative authority, with the exception of events such as official meetings, ceremonies, festivities, welcoming, opening stands, farewells, etc., to be held by official public institutions and organisations during the fourteen days between 7 and 21 November 2018, pursuant to Article 11 (c) of Law no. 5442 (see § 7). The impugned provision provides that the Governor may regulate or restrict the assembly of persons in certain places or at certain times in the province for a period not exceeding fifteen days if public order or security has deteriorated, or there are serious indications that it will deteriorate, to such an extent that ordinary life is suspended or interrupted.

29. The right to hold meetings and demonstration marches, enshrined in Article 34 of the Constitution, safeguards the freedom of individuals to assemble temporarily in public or private places for the purpose of

expressing their opinions without interference by public authorities or third parties. The first paragraph of the same article guarantees not only the right to hold meetings and demonstration marches, but also the right to exercise this right *"without prior permission"*, by stipulating that "*Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission"*. In other words, it is understood that the provision stating that the right in question cannot be subject to the requirement of *obtaining permission* is specifically guaranteed by the Constitution. Undoubtedly, it is evident that a restriction that violates the positive guarantee for the exercise of the right to hold meetings and demonstration marches *without prior permission*, even if it is based on the grounds for restriction provided for in the article of the Constitution that regulates the relevant fundamental right, shall be contrary to the wording of the Constitution as a matter of principle.

30. As a matter of fact, the Plenary of the Court found the provisions of Article 10 §§ 1 and 2 of Law no. 2911 on Meetings and Demonstrations dated 6 October 1983, which stipulate that a notification must be given before a meeting or demonstration march can be held, to be in conformity with the Constitution, on the grounds that, under the notification system, it is sufficient to notify the competent authority in order to hold meetings or demonstrations, and that the permission of the competent authority is not sought; therefore, the regulation stipulating a notification system does not contradict the constitutional guarantee of *not being subject to permission*. In its decision, the Court stated that Article 34 § 1 of the Constitution clearly stipulates that organising meetings and demonstration marches cannot be subject to the requirement of obtaining permission. The Court held that, in addition to the restrictions provided for in Article 13 of the Constitution, restrictions that do not comply with the safeguard provided for in Article 34 of the Constitution, according to which the right cannot be made subject to permission, are contrary to the wording of the Constitution (see the Court's judgment no. E.2014/101, K.2017/142, 28 September 2017, §§ 84-86).

31. Accordingly, in the present case, it has been concluded that the fact that the public authority makes all actions and activities subject to the permission of the local administrative authority is contrary to the

additional safeguard laid down in Article 34 § 1 of the Constitution, which provides that the right to hold unarmed and peaceful meetings and demonstration marches may be exercised *without prior permission*, and is in contradiction with the wording of the constitutional provision.

32. In the light of the foregoing, it must be held that there was a violation of the applicants' right to hold meetings and demonstration marches safeguarded by Article 34 of the Constitution.

3. Damage

33. The applicants requested the Court to find a violation, to order a retrial and to award them varying amounts -TRY 5,000 and 20,000- as compensation for their non-pecuniary damages.

34. Article 50 of Code no. 6216 on the Establishment and Rules of Procedures of the Constitutional Court of 30 March 2011 establishes the procedures and principles for redressing the violation and its consequences. It has been considered that there is a legal interest in conducting a retrial to redress the consequences of the violation. Within this scope, the procedure to be followed is to issue a new decision eliminating the grounds that led the Court to find a violation and to order a retrial in accordance with the principles set out in the judgment finding a violation (see *Mehmet Doğan* [Plenary], no. 2014/8875, 7 June 2018, §§ 54-60; *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019, §§ 53-60, 66; *Kadri Enis Berberoğlu (3)*, §§ 93-100).

35. Furthermore, the applicants' claims for compensation must be rejected, as it has been considered that holding a retrial would constitute sufficient just satisfaction to redress the violation and the consequences thereof.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 10 November 2022 that

A. The alleged violation of the right to hold meetings and demonstration marches be DECLARED ADMISSIBLE;

B. The right to hold meetings and demonstration marches, safeguarded by Article 34 of the Constitution, was VIOLATED;

C. A copy of the judgment be REMITTED to the 2nd Chamber of the Batman Criminal Judgeship of Peace (miscellaneous no. 2018/3796; miscellaneous no. 2018/3888; no. 2018/3892) for retrial to redress the consequences of the violation of the right to hold meetings and demonstration marches;

D. The applicants' claims for compensation be REJECTED;

E. The court fee of TRY 364.60 be REIMBURSED RESPECTIVELY to the applicants and the counsel fee of TRY 9,900 be REIMBURSED RESPECTIVELY to the applicants represented by Att. Erkan Şenses and be REIMBURSED JOINTLY to the applicants represented by Att. Linda Sevinç Hocaoğulları.

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

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

FREEDOM OF ASSOCIATION (ARTICLE 33)

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

ALİ KUŞ

(Application no. 2017/27822)

10 February 2022

On 10 February 2022, the Plenary of the Constitutional Court found a violation of the freedom of association, safeguarded by Article 33 of the Constitution, in the individual application lodged by *Ali Kuş* (no. 2017/27822).

THE FACTS

[8-18] As a result of an investigation carried out against the applicant while he was working as a teacher in 2000, the applicant was deemed to have withdrawn from the civil service for failing to attend work regularly, pursuant to Article 94 of Law no. 657 on Civil Servants, and was dismissed from the civil service pursuant to Article 98 of the same Law.

The applicant became a member of a political party in 2001 and held various positions in the party. In the meantime, the act of dismissal of the applicant from the civil service for failure to attend work while continuing to be a member of a political party was annulled by the court of instance in 2008 and the applicant resumed his service as a teacher in 2008. Following the applicant's return to the civil service, the Ministry of National Education initiated an investigation into the applicant's membership of a political party under the provisions of Law no. 657 and suspended him from the civil service. As a result of the investigation, the applicant was dismissed from the civil service by the decision of the Supreme Disciplinary Board of the Ministry of National Education.

The applicant brought an action for annulment of the relevant act, nevertheless the administrative court dismissed the challenge, holding that the impugned act was in conformity with the law. The judgment was subsequently upheld by a chamber of the Council of State, which also dismissed the applicant's request for rectification.

V. EXAMINATION AND GROUNDS

19. The Constitutional Court ("the Court"), at its session on 10 February 2022, examined the application and decided as follows:

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

20. The applicant claimed that his right to engage in political activities had been violated due to the sanction of dismissal imposed on him. He

also alleged that since there were no provisions prohibiting academics employed under Law no. 2547 on Higher Education of 4 November 1981 from being members of a political party, the prohibition of teachers from joining a political party under Law no. 657 was contrary to the principle of equality. The applicant stated that, while he had acted as head of the district branch of the political party to which he belonged, the party leader, who was also an academic, was also a civil servant and that there was no difference between him and this person. According to the applicant, since the establishment of the Republic, civil servants have been prohibited from being members of a political party and should be free to engage in political activities.

21. In its observations, the Ministry referred to the judgments of the Court in relation to the right to engage in political activities. In his counter-arguments against the observations of the Ministry, the applicant reiterated his explanations in the individual application form.

B. The Court's Assessment

22. The relevant part of Article 33 of the Constitution, entitled *"Freedom of association"*, which will be taken as basis in the assessment of the allegation, reads as follows:

"...

No one shall be compelled to become or remain a member of an association.

Freedom of association may only be restricted by law on the grounds of protection of national security and public order, prevention of and crime public morals, public health and protecting the freedoms of other individuals. The formalities, conditions, and procedures governing the exercise of freedom of association shall be prescribed by law.

...

Provisions of the first paragraph shall not prevent the imposition of restrictions on the rights of armed forces and security forces officials and civil servants to the extent that the duties of civil servants so require."

1. Applicability

23. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it makes such an assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The primary issue to be addressed by the Constitutional Court is whether the applicant's allegations as to the interference of dismissing him from the civil service due to his membership in a political party can be examined within the context of the right to engage in political activity.

24. The first paragraph of Article 67 of the Constitution, entitled *"Right to vote, to be elected and to engage in political activity"*, reads as follows:

"In conformity with the conditions set forth in the law, citizens have the right to vote, to be elected, to engage in political activities independently or in a political party, and to take part in a referendum."

25. Article 68, entitled *"Forming parties, membership and withdrawal from membership in a party"*, reads, insofar as relevant, as follows:

"Citizens have the right to form political parties and duly join and withdraw from them.

…

Judges and prosecutors, members of higher judicial organs, including those of the Court of Accounts, civil servants in public institutions and organisations, other public servants who are not considered to be labourers by virtue of the services they perform, members of the armed forces and students who are not yet in higher education shall not become members of political parties."

26. Article 3 of the Additional Protocol no. 1 to the European Convention on Human Rights ("the Convention") reads as follows:

"The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

27. Articles 67 and 68 guaranteed the right to vote, to be elected and to engage in political activity independently or within a political party, and

set the limits of these rights. In its previous judgments, the Constitutional Court has stated that the Parliament, as the holder of the legislative power, and the deputies, as its members, are the representatives of the diverse political opinions prevailing in society, within the limits set by the Constitution. According to the Constitutional Court, the main duties of deputies, who are empowered by free elections to take decisions on behalf of the people, are parliamentary activities and the performance of such duties by deputies is in pursuit of an overriding public interest and is of vital importance. The Court has further emphasised in its judgments that the right to stand for election includes not only the right to stand as a parliamentary candidate in elections, but also the ability of the elected person to exercise the power of representation in his/her capacity as a deputy after the election. In this respect, any interference with the participation of an elected deputy in legislative activities may constitute an interference not only with the right of the deputy to stand for election, but also with the right of voters to express their free will and the right to engage in political activities (for detailed assessments in this regard, see *Mustafa Ali Balbay*, no. 2012/1272, 4 December 2013, §§ 127, 128; *Sebahat Tuncel (2)*, no. 2014/1440, 26 February 2015, §§ 41, 42; *Kadri Enis Berberoğlu (2)*, no. 2018/30030, 17 September 2020, §§ 57-59).

28. As explained above, the Constitutional Court has examined the right to engage in political activities in the individual applications before it insofar as it relates to the sustainability of the right to be elected. It is therefore necessary to decide whether the applicant's allegations can be examined under the broader concept of the freedom of association.

29. Article 33 of the Constitution explicitly refers to associations and foundations as organisations, but does not specify which other organisations fall under the protection of this article, i.e. to which organisations this article applies. Nevertheless, the concept of organisation has an autonomous meaning in domestic law. In today's world, democracies function through political parties. In democratic societies, political parties are the production centres of the narratives that guide the masses. The exercise of freedom of expression by the masses is only part of the activities carried out by political parties, and this matter in itself gives the political parties the right to claim the protection of freedom of organisation. In this respect,

even though the Constitution does not explicitly refer to political parties in the relevant provision, political parties can be assessed within the scope of the concept of organisation.

30. The right to engage in political activities and the right to join a political party, which are regulated in Articles 67 and 68 of the Constitution, clearly indicate that activities carried out by individuals within the framework of political parties are protected by the Constitution. Political parties are legal entities formed voluntarily by individuals who come together around a particular political idea and who are free to join or leave. Given the inalienable role and importance of political parties in democracies, it must be recognised that any interference in political activities beyond the limits set by the Constitution undermines freedom of association. It would therefore be appropriate to assess the activities of individuals within political parties as falling within the scope of freedom of association.

31. In conclusion, the sanction of dismissal from the teaching profession was imposed on the applicant because of his membership of a political party. As stated above, it has been held that the applicant's allegations must be assessed as a whole in the framework of the freedom of association guaranteed under Article 33 of the Constitution.

2. Admissibility

32. The applicant is aware of the existence of Article 68 of the Constitution, which prohibits civil servants from joining political parties, and a significant part of his complaints relate to this constitutional prohibition. The applicant claims that the impugned prohibition is contrary to the logic of the Convention and to modern democratic understanding. It is arguable that the Court does not have the power to conduct an assessment as to the interference with a fundamental right deriving from a constitutional provision. In addition, the manner nature of the interference to be made in the event that a civil servant joins a political party is not directly regulated by the Constitution. It has therefore been concluded that the present application is significant for the implementation and interpretation of the Constitution and determining the scope and limits of the right to be a member of a political party.

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

3. Merits

a. Existence of an Interference

34. The dismissal of the applicant from his teaching post because of his membership in a political party clearly constitutes an interference with the freedom of association.

b. Whether the Interference Amounted to a Violation

35. The impugned interference will be in breach of Article 33 of the Constitution unless it complies with the conditions set out in Article 13 of the Constitution. The relevant part of Article 13 of the Constitution reads as follows:

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

36. Therefore, it must be assessed whether the interference complies with the requirements of Article 13 of the Constitution, namely being prescribed by law, relying on one or more justified grounds specified in the relevant provision of the Constitution, and not being contrary to the requirements of a democratic order of the society and the principle of proportionality.

i. Whether the Interference was Prescribed by Law

37. In the present case, the applicant's freedom of association was interfered with on account of his membership in a political party. The legal basis of the interference is Article 125 of Law no. 657. This article regulates the types of disciplinary sanctions to be imposed on civil servants and lists the acts and conduct for which a sanction is required. Article 125 § E (c) of Law no. 657 provides that a civil servant shall be punished by

dismissal from the civil service for being a member of a political party. It has been understood that this type of provision is absolute, the provision provides for a standard sanction for the relevant act, and therefore the relevant provision is formulated in such a precise manner that a civil servant who prefers to join a political party can foresee the sanction that will be imposed as a result of his/her act.

ii. Legitimate Aim

38. Article 68 § 5 of the Constitution regulates that the employees of public organisations and institutions cannot, by virtue of their status as civil servants, be members of political parties. In this regard, Article 125 of Law no. 657 prescribes that a civil servant who joins a political party shall be punished by dismissal from the civil service. It has been concluded that the contested decision of dismissal from the civil service was part of the measures taken in accordance with the principle of *"impartiality and allegiance to the State"* under Article 68 of the Constitution.

iii. Proportionality

(1) General Principles

39. Finally, it must be assessed whether there is a reasonable relationship of proportionality between the aim sought to be achieved by the public authorities' interference with the applicant's freedom of association and the means employed to achieve that aim.

40. The principle of proportionality consists of three sub-principles: *suitability, necessity* and *commensurateness*. *Suitability* requires that the intended interference is suitable for achieving the objective (aim) pursued; *necessity* requires that the interference is indispensable for achieving the objective pursued, in other words that the objective pursued cannot be achieved by a less severe interference; and *commensurateness* requires that a reasonable balance be struck between the interference with the individual's right and the objective pursued by the interference. (see the Court's judgments no. E.2011/111, K.2012/56, 11 April 2012; no. E.2016/16, K.2016/37, 5 May 2016; *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 38).

41. The means employed to restrict freedom of association must be suitable for the aim pursued. In addition, the means employed must be the least restrictive of the right in question. However, in order to conclude that the instrument which least restricts the impugned right should be preferred, the instrument in question must also be suitable for achieving the same aim. If the aim pursued could not be achieved by preferring the less restrictive instrument, it is not unconstitutional to resort to a more restrictive one. The public authorities also have a certain degree of margin of appreciation as to which means of interference are to be preferred (for considerations in the same vein, see *Hamdi Akın İpek*, no. 2015/17763, 24 May 2018, § 108; *Hanife Ensaroğlu*, no. 2014/14195, 20 September 2017, § 67).

42. In addition, interference with freedom of association must be commensurate. Commensurateness requires a fair balance between the aim and the means. Accordingly, there must be a reasonable commensurateness between the legitimate aim sought to be achieved by the restriction on freedom of association and the individual interest in the applicant's exercise of freedom of association. The burden imposed on the individual must not be excessive and disproportionate in relation to the public interest served by the achievement of the aim pursued (for considerations in the same vein, see *Mustafa Berberoğlu*, no. 2015/3324, 26 February 2020, § 49).

(2) Application of Principles to the Present Case

43. Civil servants are public officials who are obliged to provide public (civil) services in the interest of the public. The obligation of civil servants to be impartial also represents the impartiality of the State, since the impartiality of the State can only be exercised through the work of civil servants. In this respect, it is logical to impose heavy burdens on civil servants in the provision of public services and to prescribe strict measures to prevent possible disruptions in these services.

44. The provision in Article 68 of the Constitution that civil service and political party membership cannot coexist is intended to ensure the functioning of an impartial public administration based on the rule of law. According to this provision, even the mere implication that the

independent duties performed by a civil servant may be linked to political demands may undermine the objectivity of the State. According to Article 11 of the Constitution, the constitutional provisions are fundamental rules of law which are binding on the legislative, executive and judicial bodies, administrative authorities and other institutions and individuals.

45. For the above reasons, Law no. 657 stipulates that civil servants are prohibited from joining political parties as a part of their responsibility to be impartial and loyal to the State. Article 125 of the same Law, on the other hand, regulates that the act of joining and being a member of a political party by a civil servant shall be punished by his/her dismissal from the civil service.

46. There is no doubt that interference in the form of dismissal of civil servants on the grounds of their membership of a political party is certainly a *suitable* instrument of protecting the principle of impartiality and loyalty to the State. Moreover, it cannot be said that this prescribed regulation is not *necessary* in view of the binding provision of the Constitution. Therefore, a conclusion will be reached by determining whether the interference is *commensurate* or not. As a result, it must be determined whether the challenged provision is a last resort in terms of fulfilling the mandatory provision of the Constitution.

47. Both the wording of Article 125 of Law no. 657 and the practice of the courts of instance indicate that the coexistence of civil service and membership of a political party, *even for a moment*, is not accepted (see §§ 14, 15). According to the regulation, the competent authorities and the courts of instance reviewing the decisions of these authorities only assess whether a person is a member of a political party and do not carry out any further assessment in this respect. In this context, the fulfilment of the condition of joining a political party, as provided for in Article 125 of the aforementioned Law, leads to the termination of the civil service and to serious pecuniary and non-pecuniary consequences for the individual. From this point of view, it is clear that this provision constitutes a serious interference with the freedom of association. In this case, in view of this serious interference, it must be examined whether the interpretation of the relevant constitutional provisions and legal norms by the administration

and the courts of instance in the unique circumstances of the present case violates the Constitution.

48. In the present case, the applicant was not a civil servant when he was a member of a political party. However, he became a civil servant while his membership in the political party continued. The applicant was only a member of a legal political party and no allegation was made that he had engaged in non-peaceful actions and discourse, had taken a stance against the constitutional order and had acted contrary to the democratic social order. Subsequently, it was established that the applicant was a member of a political party and he was dismissed from the civil service as a sanction without being given the opportunity to terminate his political party membership of his own free will.

49. It has not been alleged on the basis of specific events that the applicant's membership in a political party has had unacceptable consequences. In this context, it is understood that less severe measures, such as allowing the applicant a certain period of time to withdraw his membership of a political party, offering him the opportunity to choose between membership in the political party and the civil service, or suspending his civil service, are possible in the light of the above-mentioned legal provisions and Article 68 of the Constitution. The immediate dismissal of the applicant from the civil service solely on the basis of his membership in a political party is considered to be the most serious interference incompatible with the principle of *last resort*.

50. Both Article 33 of the Constitution, which guarantees freedom of association, and Article 68, which prohibits civil servants from joining political parties, can only fulfil their functions if they are interpreted in the context of pluralist democracy and the right-based paradigm. According to established practice, it is possible for the administration and the courts to interpret the constitutional provisions in favour of freedoms.

51. In the light of the foregoing, it must be held that the failure to grant the applicant a reasonable time period within which to withdraw his membership in the political party violates the freedom of association guaranteed under Article 33 of the Constitution.

Mr. Yıldız SEFERİNOĞLU, Mr. Selahaddin MENTEŞ, Mr. Basri BAĞCI and Mr. İrfan FİDAN dissented from this opinion.

4. Application of Article 50 of Code no. 6216

52. There is a legal interest in conducting a retrial in order to redress the consequences of the violation of rights identified in the application. In this respect, the procedure to be followed by the judicial authority to whom the judgment is remitted is to initiate the retrial procedures and to issue a new decision eliminating the reasons that led the Court to find a violation, in accordance with the principles set out in the judgment finding a violation (see *Mehmet Doğan* [Plenary], no. 2014/8875, 7 June 2018, §§ 54-60; *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019, §§ 53-60, 66; *Kadri Enis Berberoğlu (3)* [Plenary], no. 2020/32949, 21 January 2021, §§ 93-100 for comprehensive explanations on the characteristics of the retrial for individual application regulated by Article 50 § 2 of Code no. 6216 on the Establishment and the Rules of Procedure of the Constitutional Court of 30 March 2011).

53. Furthermore, in view of the nature of the violation, the Court has decided that the applicant should be awarded 13,500 Turkish liras ("TRY") as non-pecuniary damages.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 10 February 2022

A. UNANIMOUSLY, that the alleged violation of the freedom of association be DECLARED ADMISSIBLE;

B. BY MAJORITY and by the dissenting opinions of Mr. Yıldız SEFERİNOĞLU, Mr. Selahaddin MENTEŞ, Mr. Basri BAĞCI and Mr. İrfan FİDAN, that the freedom of association, safeguarded by Article 33 of the Constitution, was VIOLATED;

C. That a copy of the judgment be REMITTED to the 2nd Chamber of the Ankara Administrative Court for retrial to redress the consequences of the violation of freedom of association (E.2009/578, K.2009/1597);

D. That a net amount of TRY 13,500 be REIMBURSED to the applicant as compensation for non-pecuniary damage and that the remaining compensation claims be REJECTED;

E. That the total litigation costs of TRY 257.50, including the court fee, be REIMBURSED to the applicant;

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

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

DISSENTING OPINION OF JUSTICES YILDIZ SEFERİNOĞLU, SELAHADDİN MENTEŞ, BASRİ BAĞCI AND İRFAN FİDAN

The applicant, who had previously worked as a teacher, was reinstated in the civil service following the proceedings initiated against him to dismiss him from his teaching post for failure to attend to work regularly.

The applicant became a member of a political party during the period in which he was dismissed from the civil service. Having established that the applicant's membership in a political party had continued after his reinstatement in the civil service, the authorities conducted a disciplinary investigation against the applicant and decided to dismiss him from the civil service pursuant to Article 125 § E (c) of the Law no. 657 on Civil Servants.

The applicant submits that his dismissal from the civil service because of his membership in a political party constitutes an act of interference in the exercise of his political rights and the right to engage in political activity.

In this respect, the applicant requests that individuals should be able to maintain their membership in a political party while serving as a civil servant under Law no. 657 on Civil Servants.

The majority considers that the fact that the applicant was not provided the opportunity to withdraw his membership in a political party when he became a civil servant constitutes a violation of the freedom of association.

In fact, there is no substantial overlap between the applicant's request and the subject matter assessed by the majority. Nowhere in his application did the applicant mention his intention to resign from the political party and that he had not been given the opportunity to do so.

Moreover, the present case does not involve a situation in which the applicant was dismissed from the civil service even though, after his reinstatement, he had terminated his membership in the political party. Accordingly, it is not the case that the applicant's civil service was

terminated despite his withdrawal from the political party. The position of the administration in this matter has not been tested.

In addition, the applicant had in fact had sufficient time and opportunity to resign from the relevant political party during the disciplinary investigation against him. Nevertheless, as can be understood from the applicant's application form, he argued that he needed to maintain his membership in the political party while continuing to work as a civil servant.

Article 68 § 5 of the Constitution, which prohibits civil servants from being members of political parties, is binding. This restrictive provision does not apply to all civil servants. Paragraph 6 of the same article allows academics to join a political party. Nevertheless, given that some of the public officials elected in the local administrations may be members of a political party, it is clear that the impugned prohibition is not absolute.

The law also specifies the sanction to be imposed in case of violation of the provision prohibiting civil servants from being members of a political party.

Article 125 § E (c) of Law no. 657 stipulates that if a civil servant becomes a member of a political party, he/she shall be dismissed from the civil service.

Although the question of whether a civil servant's membership in a political party can be assessed under this article is an aspect of the subject worthy of discussion, and given that the disciplinary provisions cannot be enforced as strictly as the provisions prescribed by criminal law, the impugned matter could go beyond the limits of discussion. Moreover, with regard to the provision of Article 7 of Law no. 657, which stipulates that "civil servants cannot be members of political parties", the legislator did not distinguish between cases in which a person becomes a civil servant despite being a member of a political party, and cases in which he/she becomes a member of a political party while continuing to be a civil servant.

In the light of Article 68 § 5 and the above-mentioned provisions of Law no. 657, the applicant's claim to be able to be a member of a political party while continuing to be a civil servant has no constitutional basis, and we therefore consider that there has been no violation of freedom of association in the present case and dissent from the majority opinion to the contrary.

RIGHT TO PROPERTY
(ARTICLE 35)

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

KÜBRA YILDIZ AND OTHERS

(Application no. 2018/32734)

28 July 2022

On 28 July 2022, the Plenary of the Constitutional Court found a violation of the right to property, safeguarded by Article 35 of the Constitution, in the individual application lodged *Kübra Yıldız and Others* (no. 2018/32734).

THE FACTS

[8-39] A power transmission line has twice crossed the applicant's property, before and after 1983, without expropriation or administrative easement. The applicants brought an action against the Turkish Electricity Distribution Corporation ("TEDAŞ") before the 1st Chamber of the Erciş Civil Court ("the Civil Court") for compensation for the contested confiscation without expropriation.

The Civil Court awarded the applicants 13,837.33 Turkish liras ("TRY"), which was determined by taking into account the proportion of oscillation indicated in the expert's report. TEDAŞ filed an appeal against this decision, and the Erzurum Regional Court of Appeal ("the Regional Court of Appeal"), after reviewing the case, overturned the Civil Court's decision. The Regional Court of Appeal decided to compensate the applicants a total of TRY 3,998.03, calculated on the basis of the projected area in the expert's report, as well as a fixed counsel fee of TRY 2,180 in favour of the defendant TEDAŞ, and decided that TRY 1,678.66 of the total litigation costs of TRY 2,518.80 should be borne by the applicants.

V. EXAMINATION AND GROUNDS

40. The Constitutional Court ("the Court"), at its session of 28 July 2022, examined the application and decided as follows:

A. The Applicants' Allegations

41. The applicants claimed that the oscillation area of the power transmission line should be included in the calculation of the loss in value caused by the easement. According to the applicants, the danger posed by power transmission lines to all living things is not limited to the area of the projection. It is neither legally nor technically possible to have a construction site next to a power transmission line. It does not

correspond to the normal course of life that the damage caused by the power transmission line to the immovable property is limited only to the projected area. Referring to the judgment of the 5th Civil Chamber of the Court of Cassation of 27 March 2018 and no. E.2017/26247, K.2018/5537, the applicants argued that the compensation for the right of easement is the damage caused to the entire immovable property and that the compensation determined only on the basis of the projected area of the line does not represent the actual damage. The applicants claimed that the approach of the Regional Court of Appeal was also incompatible with the definition contained in Article 11 § 4 of Law no. 2942. The applicants claimed that the failure to compensate for the real loss in value of the property violated their right to property.

42. The applicants claimed that their right to a reasoned decision had been violated since the appellate decision rendered by the Regional Court of Appeal was not reasoned.

43. The applicants maintained that the counsel fee awarded against them violated their right of access to a court. The applicants complained that, despite the award of TRY 3,998.03 compensation in their favour, TRY 2,180 counsel fee had been awarded against them and they had also been awarded TRY 1,678.66 in litigation costs.

B. The Court's Assessment

44. Article 35 of the Constitution, titled *"Right to Property"*, which will be taken as basis in the assessment of the allegation, reads as follows:

"Everyone has the right to own and inherit property.

These rights may be limited by law only in view of the public interest.

The exercise of the right to property shall not contravene the public interest."

45. Article 46 of the Constitution, titled *"Expropriation"*, reads as follows:

"The State and public corporations shall be entitled, when the public interest so requires, to expropriate privately owned real estate in whole or in part and to impose administrative servitude on it, in accordance with the principles and procedures prescribed by law, provided that the actual compensation is paid in advance.

Compensation for expropriation and the amount regarding its increase rendered by a final judgment shall be paid in cash and in advance. However, the procedure to be applied for compensation for land expropriated for the purpose of carrying out agriculture reform, major energy and irrigation projects, and housing and resettlement schemes, afforestation, and protecting coasts, and tourism shall be regulated by law. In the cases where the law may allow payment in instalments, the payment period shall not exceed five years, whence payments shall be made in equal instalments.

Compensation for land expropriated from small farmers who cultivate their own land shall be paid in advance in all cases.

An interest equivalent to the highest rate of interest paid on public claims shall apply in the instalments envisaged in the second paragraph and expropriation costs not paid for any reason."

46. The Court is not bound by the legal qualification of the facts by the applicant and it makes such an assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The essence of the applicants' complaint concerns the undervaluation of the value of the easement. It has been considered appropriate to examine the applicants' allegations under the right to a fair trial in the context of the right to property as a whole.

1. Admissibility

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

2. Merits

a. Existence of Property

48. There is no dispute as to the existence of the property, as the immovable property through which the power transmission line passed was owned by the applicants.

b. Existence of an Interference and Its Type

49. The right to property established in Article 35 of the Constitution covers both the surface and the subsoil of immovable property. In this

respect, the owner of immovable property may exercise the powers deriving from the right to property over and under the immovable property. In fact, Article 718 of the Turkish Civil Code no. 4721 of 22 November 2001, clearly states that the ownership of the land includes the space and layers both above and below the ground to the extent of the benefits of such use. In this respect, the construction of cable cars and similar transport lines and of bridges of any kind over the immovable property, as well as the construction of subways and similar rail transport systems under the immovable property, constitute an interference with the right to property (see the Court's judgment no. E.2014/177, K.2015/49, 14 May 2015). Accordingly, in the present case, there is no doubt that the establishment of an administrative easement by passing a power transmission line through part of the applicants' property by means of expropriation without confiscation constitutes an interference with the right to property.

50. Article 35 § 1 of the Constitution provides that everyone has the right to property, which sets out *the right to peaceful enjoyment of possessions*, and Article 35 § 2 establishes the framework for interference with the right to peaceful enjoyment of possessions. Article 35 § 2 of the Constitution defines the circumstances under which the right to property may be restricted in general and also sets out the general framework of conditions for *deprivation of property*. The last paragraph of Article 35 of the Constitution prohibits any exercise of the right to property in contravention to the public interest, thus enabling the State to *control and regulate the enjoyment of property*. Certain other articles of the Constitution also contain special provisions enabling the State to have control over property. It should also be noted that deprivation of property and regulation/control of property are specific forms of interference with the right to property (see *Recep Tarhan and Afife Tarhan*, §§ 55-58).

51. In the present case, the immovable property of the applicants was confiscated without the establishment of an administrative easement, and the easement right was registered in the title deed in the name of TEDAŞ on the basis of the court decision issued as a result of the action brought by the applicants. The establishment of an administrative easement provides for the establishment of an easement right instead of the expropriation of

the ownership of the land. Accordingly, it is essential to determine, taking into account the specific circumstances of each case, which of the impugned types of intervention the administrative easement falls under. In the present application, the primary purpose of the administrative easement is not to impose a construction ban or any other similar restriction. As mentioned above, in the light of Article 718 § 1 of Law no. 4721, the confiscation of the lower or upper layers of the immovable property, as in the present case, results in a partial deprivation of the property. In this way, the landowner is deprived of a part of the immovable property, namely *the air above or the subsoil below*. Accordingly, the interference caused by the establishment of an administrative easement for the purpose of laying a power transmission line through the applicant's immovable property must be examined under the second provision on deprivation of property (for considerations in the same vein, see *Şevket Karataş*, § 42).

c. Whether the Interference Amounted to a Violation

52. Article 13 of the Constitution reads as follows:

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

53. Article 35 of the Constitution provides that the right to property is not unlimited and may be limited by law and in the public interest. Any interference with the right to property must also take account of Article 13 of the Constitution, which sets out the general principles governing restrictions on fundamental rights and freedoms. For an interference with the right to property to be constitutional, it must have a legal basis, pursue the aim of the public interest, and be carried out in accordance with the principle of proportionality (see *Recep Tarhan and Afife Tarhan*, § 62).

i. Lawfulness

54. In its previous judgments, the Court has concluded that interventions by means of confiscation without expropriation led to a violation of the right to property, as they lacked a legal basis (see *Celalettin Aşçıoğlu*, no.

2013/1436, 6 March 2014; *Mustafa Asiler*, no. 2013/3578, 25 February 2015; *İbrahim Oğuz and Others*, no. 2013/5926, 6 October 2015; *Şevket Karataş*).

55. Confiscation without expropriation authorises the administration to use and acquire the property without expropriation. In the absence of such an expropriation procedure, the only element that can legitimise the transfer of the used immovable property and provide a degree of legal security is a court decision establishing that the administration's use is unlawful and *compensating individuals for confiscation without expropriation*. The act of confiscation without expropriation obliges the applicants, who remain the owners of the properties in the legal system, to bring an action against the administration which does not justify its action on the basis of any public interest. The reality of such a public interest justification will only be assessed by the courts at a later stage. In other words, confiscation without expropriation, of whatever nature, leads to the legal recognition of an unlawful situation deliberately created by the administration and provides the administration with the opportunity to profit from its unlawful act. Such a practice, which allows the administration to go beyond the formal rules of expropriation, carries the risk of unpredictable and arbitrary circumstances. This practice cannot be considered as an alternative to a properly conducted expropriation, which would provide sufficient legal security (see *Celalettin Aşçıoğlu*, § 57).

56. There is no reason to deviate from these principles in the present case. It has therefore been concluded that the expropriation of the applicants' property in question constitutes an interference which does not comply with the procedure established by Articles 13, 35 and 46 of the Constitution and by Law no. 2942, and that the interference with the right to property is in breach of the principle of lawfulness.

57. In view of the applicants' complaints, it is evident that in the present case it would not be sufficient to establish that there is no legal basis for confiscation without expropriation. The applicants also complained that the compensation awarded did not cover the actual loss in value of the property due to the easement and that this amount was reduced by the award of litigation costs against them. The impugned complaints of the applicants must also be examined separately.

ii. Compliance with the Wording of the Constitution

58. The applicants claim that the compensation determined on the basis of the projected area of the transmission line falls far short of compensating for the actual damage. The applicants also complained about the litigation costs awarded against them.

59. It is set forth in Article 13 of the Constitution that restrictions on fundamental rights and freedoms shall not run contrary to the wording of the Constitution. Accordingly, one of the criteria with respect to the restriction of fundamental rights and freedoms laid down in Article 13 of the Constitution is *"compliance with the wording of the Constitution"*. The Court also examines, where necessary, whether the interference of authorities, vested with public powers, with fundamental rights and freedoms is in accordance with the wording of the Constitution. Such an examination is a prerequisite for the mandatory provision laid down in Article 13 of the Constitution (see *Kadri Enis Berberoğlu (2)* [Plenary], no. 2018/30030, 17 September 2020, § 68; *Kadri Enis Berberoğlu (3)* [Plenary], no. 2020/32949, 21 January 2021, § 79).

60. The term *"the letter of the Constitution"* in Article 13 of the Constitution refers to the text of the Constitution, i.e. its wording. The requirement that any interference with fundamental rights and freedoms must comply with the letter of the Constitution is particularly important when the *additional safeguards* introduced by various provisions of the Constitution are at stake. In most cases, the Constitution not only bestows a right or freedom, but also protects it by putting particular emphasis on, or attaching particular importance to, certain aspects of that right or freedom so as to guarantee the exercise thereof. In addition to acknowledging a right, the constitution-maker may also separately and specifically identify an aspect of that right falling under its normative scope and introduce an additional safeguard with respect thereto (see *Kadri Enis Berberoğlu (2)*, § 69; *Kadri Enis Berberoğlu (3)*, § 79).

61. Article 46 § 1 of the Constitution establishes that expropriation is a measure that may be exercised on condition that *the actual (real) value of the immovable property is paid.* The payment of the actual value is a special safeguard introduced by Article 46 of the Constitution in favour

of the owners. Accordingly, expropriation procedures carried out without payment of the actual value of the immovable property violate the guarantee of *payment of the actual value* in Article 46 § 1 of the Constitution.

62. In addition, the payment of actual value is also a requirement of the principle of proportionality. In the case of interference with the right to property through the establishment of an administrative easement, a fair balance between the public interest sought and the individual interest of the owner can only be achieved by paying compensation to the owner. In other words, the payment of compensation to the owner in cases where the right to property is interfered with by the establishment of an administrative easement is a fundamental instrument to compensate for the excessive burden imposed on the owner by the impugned interference. Article 46 § 1 of the Constitution stipulates that the *actual value* of immovable property shall be paid both in the case of expropriation and in the case of the establishment of an administrative easement, and it is stated that the price which establishes a balance between the public interest and the interests of the owner shall be the actual value of the immovable property. In cases where an easement is granted, the actual compensation is the amount that covers the decrease in the value of the property due to the establishment of the easement. In this respect, it can be concluded that the interference is not proportionate, taking into account the circumstances of the present case, in cases where no compensation is paid to cover the loss in the value of the immovable property due to the establishment of an administrative easement (see, *mutatis mutandis*, *Saadet Ekin*, no. 2014/18103, 26 October 2017, § 35).

As regards the Easement Value

63. In the present case, the first report prepared by the expert committee determined the amount of damage separately based on the area of projection and the area of oscillation of the power transmission line and recommended that the sum of these amounts be paid to the applicants as compensation for the decrease in the value of the immovable property. However, in the additional report prepared upon the appeal of the defendant administration, it was stated that only the amount calculated on the basis of the oscillation area of the transmission line

should be paid as compensation. The Civil Court upheld the proposal in the additional expert's report and ruled that the applicants be reimbursed TRY 13,837.33, which was determined on the basis of the oscillation area of the line that had been passed through the immovable property before 1983, as compensation. The Court did not rule on the second line, which was built after 1983, as it decided to separate the second line. On the other hand, the Regional Court of Appeal quashed the decision on the grounds that the amount of compensation should be determined on the basis of the projected area of the line and awarded TRY 3,998.03 as compensation, calculated on the basis of the projection area of the (both) lines in the expert's report.

64. Although the decision of the Regional Court of Appeal establishes that the Civil Court imposed the sum of the amounts determined on the basis of the oscillation area and the projected area of the line, the Civil Court did not rely on the first expert's report. The Civil Court considered only the additional expert's report, which determined the amount of compensation based on the oscillation area of the line. It has therefore been considered that this reasoning of the Regional Court of Appeal was irrelevant.

65. Accordingly, the main issue in the present case is whether the amount of compensation awarded by the Regional Court of Appeal, calculated on the basis of the projected area of the line passing through the property, is the *actual equivalent* of the administrative easement within the meaning of Article 46 of the Constitution.

66. Determining the loss in value of immovable property is a technical and specialised matter. Therefore, the determination of the value of the expropriated immovable property falls within the jurisdiction and duty of specialised courts and specialised chambers of the Court of Cassation. The Court is not a specialised court in this field, nor does it have the jurisdiction to calculate the value or the equivalent of the loss in value in individual applications under the right to property. The Court's determination of the relationship between the interference with the right to property and the price to be paid is merely an examination of proportionality (see *Mukadder Sağlam and Others*, no. 2013/2511, 22 January 2015, § 49; *Abdülkerim Çakmak and Others*, § 52).

67. In examining the additional expert's report on which the Civil Court based its decision, it was noted that it did not justify why the loss in value of the property should be determined on the basis of the oscillation area of the power transmission line. This was not clarified in the Civil Court's decision. On the other hand, the decision of the Regional Court of Appeal did not provide any justification for taking the projected area of the line as a basis. Accordingly, it has been considered that the inferior courts did not indicate the method of determining the loss in value of the property in the event of the establishment of an administrative easement, which would be in accordance with *the guarantee of payment of the actual value* established in Article 46 of the Constitution.

68. Considering that the judgment of the 5th Civil Chamber of the Court of Cassation of 27 March 2018 and no. E.2017/26247, K.2018/5537, referred to by the applicant in the application form, according to which the compensation for the right of easement is the damage caused to the entire immovable property and that the compensation determined solely on the basis of the projected area of the line does not express the actual damage, it has been understood that the applicant's claim regarding the method of calculating the damage is not unfounded. In view of the fact that the applicants also raised similar allegations at the appellate stage, it has been concluded that the inferior courts did not clarify the actual compensation in the present case, which is one of the preconditions for the interference with the right to property to be in conformity with the Constitution.

69. Furthermore, in the case of administrative easements, it is not for the Court to determine whether the projected area or the oscillation area of the power transmission line is the actual equivalent of the loss in value of the property. This is a technical matter to be resolved by the relevant courts, with the assistance of experts if necessary. In the present case, the report drawn up by the committee of experts consulted by the Court falls far short of providing the judicial authorities with the relevant information. The aforementioned report stated that the oscillation area of the line should be used as a basis, without explaining why. In the present case, it cannot be argued that the courts have fulfilled their obligation to resolve the issue affecting the merits of the dispute concerning the applicants' right to property.

70. In this respect, since the method of calculating the compensation awarded by the Regional Court of Appeal in the present case did not provide a relevant and sufficient explanation as to whether it was the actual equivalent of the loss in value of the property, it has been concluded that the applicants' *guarantee of the actual value*, provided for in Article 46 § 1 of the Constitution under the right to property, was also violated.

Mr. Basri BAĞCI agreed with this conclusion by expressing a concurring opinion.

As regards the Award of Litigation Costs against the Applicants

71. As stated in the *Sadettin Ekiz* judgment of the Court, the determination of the value of the expropriated property is, in principle, the obligation of the public authorities. The costs of the administrative and judicial procedures carried out within the framework of this obligation can only be imposed on the owner of the property under certain conditions that can be justified. Otherwise, the imposition of these costs on the owner in any case, even if the property is expropriated, may constitute an excessive burden on the applicant and prevent the payment of the expropriation price at its actual value (see *Sadettin Ekiz,* § 65).

72. In the present case, the applicants, who were forced to file a lawsuit due to the *de facto* confiscation by TEDAŞ instead of following the legal procedure, had to pay TRY 3,858.66 (the sum of TRY 1,678.66 of court costs and TRY 2,180 of counsel fee) against the TRY 3,998.03 of administrative easement fee that was assessed in their favour as a result of this lawsuit. Accordingly, in reality, the easement fee granted to the applicants was reduced by TRY 3,858.66 to TRY 139.37. In this case, it does not seem possible to mention that the *actual value* of the administrative easement established in favour of the public interest on the applicants' immovable property was paid to the applicants.

73. In addition, Article 29 of Law no. 2942 provides that the expropriating administration shall bear the litigation costs in the cases of determination of the expropriation value. It has been understood that the impugned provision was introduced in order to prevent the expropriation price to be paid to the owner from being reduced by the award of litigation costs

against the owner, taking into account *the guarantee of payment of the actual value* provided for in Article 46 of the Constitution.

74. It can be considered that the present case is not a case of determining the expropriation price, but a case of compensation for confiscation without expropriation, and therefore the above-mentioned provision is not applicable in the present case. However, in view of the purpose and function of the action for compensation for confiscation without expropriation, there is no obstacle to the application of this provision in actions for compensation for confiscation without expropriation. In fact, the purpose of actions for compensation for confiscation without expropriation is to determine the value of the expropriation. Moreover, in these cases the amount of compensation is determined in the same way as in the cases where the value of the expropriation is determined. Since there is no explicit legal provision obliging the courts to charge the applicant with the counsel fee and the litigation costs in cases of confiscation without expropriation, it would be consistent with the principle of the supremacy of the Constitution for the courts to interpret in the light of the special safeguards of Article 46 of the Constitution and to determine the scope of Article 29 of Law no. 2942 within this framework.

75. The courts examining the actions for compensation for confiscation without expropriation should take into account that the failure of the administration to apply the ordinary expropriation procedure under Law no. 2942 or the failure to file a lawsuit for the determination of the expropriation price is not a simple matter of preference. It is a constitutional and legal obligation of the administration to follow the procedure established in Law no. 2942. Considering that the Administration has not fulfilled its constitutional obligation through the *de facto* confiscation, care should be taken not to put the Administration in a more advantageous position than in the ordinary expropriation procedure, since the action that should normally have been brought by the Administration was brought by the owners due to the Administration's attitude, which explicitly violates the Constitution. It should also be noted that confiscation without expropriation is a procedure that explicitly violates Article 46 of the Constitution, and in cases where the right to property is violated in this way, judgments and interpretations that create rights in favour

of the unlawful acts of public administrations and make these practices more advantageous to the administrations cannot be reconciled with the principle of the rule of law (see *Göksal Çetin and İsmail Temel* [Plenary], no. 2018/13305, 15 December 2021, § 68).

76. Lastly, in the *Sadettin Ekiz* judgment, the Court held that it may be considered proportionate to hold the owner liable for the costs of the proceedings if he has unduly caused the action to be brought or has caused the other party to incur unnecessary expenses during the proceedings (see *Sadettin Ekiz*, § 64), but it has been understood that the circumstances of the present case differed in this respect from those in the *Sadettin Ekiz* judgment. The main ground for the application in the present case is the fact of confiscation without expropriation. Therefore, unlike the case that was the subject of the *Sadettin Ekiz* judgment, there is no procurement procedure by the Administration (TEDAŞ) in the present case. In the *Sadettin Ekiz* judgment, the Court ruled that it would also consider whether the owners had caused an action to be brought against them as a criterion, but in the present case, considering that the price offered by the Administration was low compared to the price determined by the court, the Court held that the applicant was not in an unfair position by not settling with the Administration and concluded that the right to property had been violated. In the present case, it has been considered that the applicants were more justified in bringing an action against the Administration than in the *Sadettin Ekiz* case, since the Administration did not carry out the procurement procedure and did not take any initiatives to carry out the expropriation procedure for many years. Therefore, in the present application, it is neither necessary nor possible to make a proportionality comparison between the amount offered by the Administration and the amount awarded by the Court, as in the *Sadettin Ekiz* judgment, since no offer has been made.

77. Moreover, even if in the present case a counsel fee was awarded in favour of both parties, it should be borne in mind that, pursuant to Article 164 of Law no. 1136, the applicants are obliged to pay the counsel fee awarded in their favour to their counsel. Therefore, the counsel fee incurred by the applicants cannot be considered as a direct equivalent of the counsel fee awarded in their favour (see *Sadettin Ekiz*, § 67).

78. As a result, it has been established that the impugned intervention, which is not in conformity with the wording (letter) of the Constitution, violated the right to property safeguarded by Article 35 of the Constitution.

79. In the light of the foregoing, it must be held that there was a violation of the right to property safeguarded by Article 35 of the Constitution.

3. Application of Article 50 of Code no. 6216

80. Article 50 §§ 1 and 2 of Code no. 6216 on the Establishment and the Rules of Procedures of the Constitutional Court of 30 March 2011 ("Code no. 6216") read, insofar as relevant, as follows:

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

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

81. The applicants requested the Court to find a violation and to afford redress for the consequences thereof.

82. In its judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court set out the general principles on how to remedy a violation found. In another judgment, the Court also referred to the consequences of failure to comply with a judgment finding a violation, stating that such a situation would constitute a continuing violation and would also lead to a second violation of the right in question (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

83. Accordingly, if a violation of a fundamental right is established in an individual application, the basic rule for redressing the violation and

the consequences thereof is to ensure, as far as possible, restitution, that is to say, the restoration of the original situation prior to the violation. To this end, it is primarily necessary to identify the cause of the violation and then to put an end to the continuing violation, to revoke the decision or act which gave rise to the violation, to redress the consequences thereof, to compensate the pecuniary and non-pecuniary damages resulting from the violation and to take any other measures deemed appropriate in this context (see *Mehmet Doğan*, §§ 55, 57).

84. In cases where the violation results from a court decision or the [trial] court is unable to redress the violation; the Court decides, as a general rule, to send a copy of the judgment to the competent court for retrial in order to redress the violation and the consequences thereof, pursuant to Article 50 § 2 of Code no. 6216 and Article 79 § 1 (a) of the Internal Regulations of the Court. This statutory regulation, unlike similar legal practices available in procedural law, provides for a remedy specific to the individual application mechanism and leads to a retrial for the purpose of redressing the violation. For this reason, when the Court orders a retrial in connection with a judgment finding a violation, the court concerned has no discretion to accept the existence of grounds for a retrial, which differs in this respect from the practice of reopening proceedings in procedural law. Therefore, the court receiving such a judgment is under a statutory obligation to issue a decision to hold a retrial on the basis of the Court's finding of a violation, without waiting for a request to that effect from the person concerned, and to conduct the necessary procedures to redress the continuing violation (see *Mehmet Doğan*, §§ 58, 59; *Aligül Alkaya and Others (2)*, §§ 57-59, 66, 67).

85. In the present case, the Court has concluded that the right to property was violated by the confiscation of the applicants' properties without expropriation, by the failure to prove that the actual value of the administrative easement was determined in the action for compensation filed, and by the awarding of litigation costs and counsel fee against the applicants. Therefore, the violation resulted from both the administrative action and the court decision.

86. In the present case, there is a legal interest in conducting a retrial in order to remove the consequences of the violation of the right to property.

A retrial to be conducted in this context is aimed at removing the violation and its consequences in accordance with Article 50 § 2 of Code no. 6216, which contains a provision specific to the individual application mechanism. In this regard, the procedure to be followed is to decide to hold a retrial and to issue a new decision eliminating the reasons that led the Court to find a violation, in accordance with the principles set forth in the judgment finding a violation. For this reason, a copy of the judgment must be sent to the 1st Chamber of the Erciş Civil Court for retrial.

87. Furthermore, the practice of confiscation without expropriation is a very crucial issue that leads to the violation of the right to property in direct violation of Articles 13, 35 and Article 46 of the Constitution. On the other hand, Article 1 of Law no. 221 of 5 January 1961 on Real Estate Effectively Allocated for Public Services by Public Officials or Institutions provided for the liquidation of the practice of confiscation without expropriation until 9 October 1956, and Provisional Article 6 of Law no. 2942 provided for the liquidation of the practice of confiscation without expropriation between 9 October 1956 and 4 November 1983. Nevertheless, it has been observed that after 4 November 1983, the administrations still resort to confiscation without expropriation. Therefore, the practice of confiscation without expropriation, which leads to the violation of the right to property, which is safeguarded as a fundamental right, is a structural problem in our country.

88. In addition, the fact that the inferior courts only award pecuniary compensation, consisting of the expropriation value, and do not impose other sanctions, such as additional compensation or non-pecuniary compensation, leads administrations to prefer confiscation without expropriation to the ordinary expropriation procedure. However, confiscation without expropriation, which has no legal basis, cannot be considered as an alternative to the ordinary expropriation procedure, since it does not include the requirements for the protection of the right to property as provided for by the Constitution. In fact, the Human Rights Action Plan, attached to the Presidential Circular published in the Official Gazette dated 30 April 2021 and numbered 31470, states that it will be ensured that claims arising from acts of confiscation without expropriation will be heard first and that the damage suffered by the

owner will be compensated in the most expeditious manner and without delay, and that a regulation will be issued to impose the litigation costs and expenses and counsel fees on the competent administration in these cases. The importance of implementing these measures and regulations in order to put an end to the practice of expropriation without compensation is obvious.

89. Consequently, it should be taken into consideration that the interference with the right to property through confiscation without expropriation, which is in direct violation of the wording of the Constitution and not based on the law, is a structural problem as mentioned above. Therefore, a copy of the decision should also be sent to the Ministry of Energy and Natural Resources, to which TEDAŞ, the competent administration that confiscated the property, is affiliated, in order to take the necessary administrative measures and to prevent new violations of a similar nature, with the knowledge that the violation of the right to property guaranteed by the Constitution has been caused.

90. It must be held that the total litigation costs of TRY 4,794.70, including the court fee of TRY 294.70 and the counsel fee of TRY 4,500, as determined on the basis of the documents in the case file, be jointly reimbursed to the applicants.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 28 July 2022 that

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

B. The right to property, safeguarded by Article 35 of the Constitution, was VIOLATED;

C. A copy of the judgment be REMITTED to the 1st Chamber of the Erciş Civil Court (E.2016/683, K.2018/194) for retrial to redress the consequences of the violation of the right to property;

D. A copy of the judgment be REMITTED to the Ministry of Energy and Natural Resources, to which the Turkish Electricity Distribution Corporation (TEDAŞ) is affiliated;

E. The total litigation costs of TRY 4,794.70, including the court fee of TRY 294.70 and the counsel fee of TRY 4,500, be JOINTLY REIMBURSED to the applicants;

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

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

CONCURRING OPINION OF JUSTICE BASRİ BAĞCI

We agree with the judgment of violation in the cases of installation of a power transmission line through the property without expropriation, interference with the right to property without expropriation, and non-payment of the actual value due to the award of a counsel fee close to the expropriation price.

Secondly, the discussion as to which of the projected or oscillation areas should be taken as the basis for determining the value of the expropriation is in the nature of a legal remedy assessment and is a matter to be considered by the judicial decision-making authorities.

The disagreement between the inferior courts and the courts of appeal has centred precisely on which of these two possibilities should be preferred, and has reached a conclusion within its own judicial dynamics.

For the Court to take sides in this debate by pointing out the inadequacy of the reasoning and to resolve the dispute by attaching more weight to one of the preferences does not correspond to the function it performs in the individual application.

Since we are of the opinion that the issues of confiscation without expropriation and the award of counsel fee against them constitute sufficient grounds for violation, and since the dispute over the areas of projection or oscillation has been resolved by the judicial authorities, the opinion of violation is agreed in on these grounds.

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

AYŞE TEZEL AND OTHERS

(Application no. 2018/14186)

20 October 2022

On 20 October 2022, the Plenary of the Constitutional Court found a violation of the prohibition of discrimination, safeguarded by Article 10 of the Constitution, in conjunction with the right to property, safeguarded by Article 35 of the Constitution, in the individual application lodged by *Ayşe Tezel and Others* (no. 2018/14186).

THE FACTS

[10-37] The applicants are the children of Z.Y., who died on 15 April 2013, and the descendants of the founder of the *"El-Hac Ebubekir and İbrahim Beşe bin Topal Mehmet Ağa Foundation"* ("the Foundation"), known as the Burduroğlu İbrahim'in Menzili ve Dükkânları Foundation, established by a deed of foundation (legal constituent document) (*vakfiye*) dated 18 January 1722. This Foundation is a kind of *"zürri"* foundation, which is not obliged to engage in charitable works and the entire revenue (*galle*) of which is allocated to the descendants of the founder. According to the Foundation's deed of foundation, following the founder's death, a lineage order (*batın tertibi*) shall be determined and the sons shall accordingly be the equal beneficiaries entitled to the use of the foundation (*mutasarrıf*) and if there are no sons to be beneficiaries, the daughters shall be the beneficiaries according to the order of the inheritance line (*veraset tertibi*). The Foundation is under the administration of the Directorate General of Foundations as a fused foundation (*mazbut vakıf*), which is a type of foundation established before the entry into force of the repealed Law no. 743 and administered by the Directorate General of Foundations pursuant to the repealed Law no. 2762.

On 25 September 2012, Z.Y., the applicants' testator, brought an action against the Directorate General of Foundations before the 7th Chamber of the Adana Civil Court ("the Civil Court"), seeking the determination of the fact that she was from the firstborn of the lineage (*batn-ı evvel evlad*) who was entitled to benefit from the surplus revenue. The testator of the applicants died on 15 April 2013 while the case was pending, and the proceedings continued at the request of the heirs (inheritors) to pursue the case. Nevertheless, the Civil Court dismissed the case on the grounds that, as the founder had sons, it was not possible for the daughters to benefit

from the surplus revenue. On appeal by the heirs, the Court of Cassation upheld the impugned decision.

V. EXAMINATION AND GROUNDS

38. The Constitutional Court ("the Court"), at its session on 20 October 2022, examined the application and decided as follows:

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

39. The applicants argued that the condition that daughters could benefit from the surplus revenue only if there were no sons constituted a difference in treatment based on sex and was contrary to the principle of equality safeguarded by Article 10 of the Constitution. Referring to Article 101 § 4 of Law no. 4721, the applicants stated that the provisions of the Foundation's deed of foundation were contrary to the principle of equality, the binding provision, and Articles 10 and 13 of the Constitution.

40. The applicants claimed that the provision depriving the daughters of the surplus revenue violated the right to own and inherit property safeguarded by Article 35 of the Constitution.

41. The applicants also argued that the right to a fair trial had been violated by the Civil Court's interpretation that the right to benefit from the surplus revenue was strictly linked to the individual and that the heirs could therefore not pursue the proceedings initiated by Z.Y.

42. In its observations, the Ministry stated:

i. Articles 1 of the repealed Law no. 864 and Law no. 4722 regulate the matter relating to foundations founded before 4 October 1926 and the relevant legal relations established by these laws are maintained as they are. The Foundation in question was established in 1722 during the Ottoman period, and therefore the impugned matter is subject to the legal provisions enacted before 4 October 1926. Accordingly, it is necessary to accept that whether an individual can be considered as a child entitled to benefit from the revenue is determined by the conditions set by the founder of the foundation in the deed of foundation. It was argued that the application of the current legal provisions to the present case would

undermine the principle of legal security. It was considered that, since the present case concerned a legal event based on a deed of foundation of 1722 and became final before 23 September 2012, the date on which the Court's jurisdiction came into effect, the application must be declared inadmissible for lack of jurisdiction *ratione temporis*.

ii. It was submitted that the instance courts in the present case had dismissed the case on the ground that the applicants could only claim to benefit from the surplus revenue in a case initiated by them. In addition, it was reiterated that the applicant had brought an action before the 3rd Chamber of the Adana Civil Court, to benefit from the surplus revenue. If the application had been assessed in accordance with the general provisions of succession, the applicants had failed to exhaust the legal remedies in respect of their allegation that the founder's disposition had violated their right to succession. Therefore, it was argued that the legal remedies had not been exhausted.

iii. It was pointed out that the Civil Court, following the expert's report obtained by the first instance court, had dismissed the case on the grounds that many sons had benefited from the surplus revenue and had resolved the dispute in accordance with the regulations of the deed of foundation. It was therefore concluded that the decision was neither arbitrary nor unforeseeable.

iv. It was considered that the applicants did not have any economic possession falling within the scope of the right to property guaranteed by Article 35 of the Constitution, or at least no legitimate expectation of obtaining such possession. Therefore, the application must be declared inadmissible for being incompatible *ratione materiae*.

v. It was pointed out that the question of whether the applicants were descendants of the founder entitled to the revenue had not been determined in accordance with the general provisions of the law of succession, but in accordance with the requirements laid down by the founder of the foundation in question in the relevant deed of foundation, and that this did not amount to discrimination based on sex, but merely the realisation of the founder's will. It was stated that, in view of the legal provisions of the repealed Law no. 864 and of Law no. 4722, the acceptance of a contrary

conviction could result in the elimination of the will of the founder of a foundation established based on the basis of the legal provisions in force at the time.

43. In their counter-arguments against the Ministry's observations, the applicants argued that the provisions of the Foundation's deed of foundation were contrary to binding laws in force and the Constitution and could not be implemented. The applicants stressed that the provision of the deed of foundation providing for different treatment of daughters and sons should be declared null and void. Finally, the applicants disagreed with the Ministry's observation that the present dispute did not concern the provisions of the inheritance law. According to the applicants, the assets left by the testator to the descendants of her lineage (generation) should be considered as inheritance. In this respect, the deed of foundation is intertwined with the inheritance law.

B. The Court's Assessment

44. Article 35 of the Constitution reads as follows:

"Everyone has the right to own and inherit property.

These rights may be limited by law only in view of the public interest.

The exercise of the right to property shall not contravene the public interest."

45. Article 10 of the Constitution provides, insofar as relevant, as follows:

"Everyone is equal before the law, without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds.

...

State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings."

46. The Court is not bound by the legal qualification of the facts by the applicant and it makes such an assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). It has been assessed that the applicants'

complaints should be examined in the context of the prohibition of discrimination in conjunction with the right to property.

47. Although the applicants argued that their right to a fair trial had been violated by the Civil Court's interpretation that the right to benefit from the surplus revenue was strictly linked to the individual and that the heirs could therefore not pursue the proceedings initiated by Z.Y., examination of these allegations have not been found necessary considering that the Civil Court had also ruled on the merits of the case.

1. Admissibility

a. Jurisdiction *Ratione Temporis*

48. The Ministry argued that the legal relationship the subject matter of the present application, had been established and finalised before 4 October 1926 and therefore fell outside the Court's jurisdiction *ratione temporis.*

49. Article 148 § 3 of the Constitution and Article 45 § (1) of Law no. 6216 on the Establishment and the Rules of Procedure of the Constitutional Court of 30 March 2011 ("Code no. 6216") provide that any person may apply to the Court on the grounds that the public authorities have violated any of his/her fundamental rights and freedoms guaranteed by the Constitution, which fall within the scope of the European Convention on Human Rights ("the Convention") and its additional protocols, to which Türkiye is a party. Provisional Article 18 of the Constitution provides that individual applications shall be accepted from the date of entry into force of the implementing law, and Article 76 § 1 of Law no. 6216 provides that Articles 45 to 51 of the Law shall enter into force on 23 September 2012.

50. Provisional Article 1 § 8 of Law no. 6216 reads as follows:

"The court shall deal with individual applications against final proceedings and decisions which are finalised and notified after 23 September 2012."

51. In accordance with the above-mentioned provisions of the Constitution and Law no. 6216, the Court's jurisdiction *ratione temporis* begins on 23 September 2012 and the Court can only examine individual applications against final proceedings finalised after that date. In

view of these clear provisions, it is not possible to extend the scope of jurisdiction to final proceedings and decisions finalized before that date. As these regulations on the Court's jurisdiction *ratione temporis* relate to public order, they must be taken into account *ex officio* at all stages of the examination of the individual application (*Ahmet Melih Acar*, no. 2012/329, 12 February 2013, § 15; *G.S.*, no. 2012/832, 12 February 2013, § 14).

52. In order to determine accurately the Court's jurisdiction *ratione temporis*, it is necessary to accurately determine the finalisation date of proceedings and decisions and the date of the alleged interference. In making this determination, the events constituting the interference as well as the scope of the right allegedly infringed should be assessed together (*Zeycan Yedigöl* [Plenary], no. 2013/1566, 10 December 2015, § 31).

53. The dispute in the present case does not concern the legal existence of the Foundation, which was established by a deed of foundation dated 18 January 1722, but about who is to benefit from the surplus revenue generated by the assets. The individuals deemed to be entitled to the surplus revenue of the Foundation have the right to apply for the relevant disputes as long as the surplus revenue exists. In the present case, the action brought on 25 September 2012 by Z.Y., the applicants' testator, claiming that she was entitled to benefit from the surplus revenue, was finalised on 21 December 2017. The dispute therefore falls within the Court's jurisdiction *ratione temporis.*

b. Exhaustion of Ordinary Legal Remedies

54. The Ministry argued that the applicants had failed to exhaust ordinary legal remedies because the right to benefit from the surplus revenue was strictly linked to the individual and that the applicants should have brought a separate action to claim this right.

55. Article 148 § 3 of the Constitution and Article 45 § 2 of Law no. 6216 provide that all administrative and judicial remedies provided for by law in respect of the act, action or negligence giving rise to the alleged violation must be exhausted before an individual application is lodged. It is primarily for the inferior courts to redress violations of fundamental rights, which requires the exhaustion of all legal remedies (see *Necati*

Gündüz and Recep Gündüz, no. 2012/1027, 12 February 2013, §§ 19, 20; *Güher Ergun and Others*, no. 2012/13, 2 July 2013, § 26).

56. In the present case, the applicants notified the Civil Court, by a petition dated 14 January 2014, of their wish to pursue the case initiated by their testator. The Civil Court accepted the applicants' request to pursue the case and issued a decision against the applicants. It must be stressed that the Civil Court did not dismiss the case on the basis of the applicants' lack of capacity to pursue the case -due to the absence of a cause of action. Although the decision stated that the children of the deceased could not claim to benefit from the surplus revenue in an action brought by their mother, but would have to file a separate action to make such a claim, it has been observed that the Civil Court rendered a decision on the merits. In fact, it has been understood that the Civil Court referred to the Foundation's deed of foundation and indicated that, due to the existence of sons, the daughters could not benefit from the surplus revenue. Therefore, given that the Civil Court rendered a decision on the merits of the case and did not dismiss the case for lack of capacity to pursue the case, it is not possible to conclude that the ordinary legal remedies have not been exhausted.

c. Victim Status

57. In view of the fact that the applicants pursued the action initiated by their testator, whether the applicants have the capacity to file an individual application should be questioned.

58. Although, in principle, it is primarily the individuals directly affected by the violation (who have the status of direct victims) who may file an individual application in principle, depending on the circumstances of the case and the nature of the right allegedly violated, individuals who have a personal or special direct relationship with the direct victim and who have therefore been adversely affected by the violation of the Constitution and the Convention, or who have a legitimate and personal interest in the termination of the violation, may also file an individual application under the status of indirect victim (see *Engin Gök and Others*, no. 2013/3955, 14 April 2016, § 53).

59. Moreover, the existence of *indirect victim status* may vary depending on the circumstances of the case and the nature of the right violated. Indeed, the Court has held that in some cases where it is not possible for the victim to file an application personally and the applicants are closely related to the victim, the applicants can may file an application on their own behalf on the basis of the indirect effect of the alleged violation on them, even though they were not directly affected by the alleged violation (see *Sadık Koçak and Others*, no. 2013/841, 23 January 2014; *Rıfat Bakır and Others*, no. 2013/2782, 11 March 2015).

60. As a rule, the direct victim of an interference with the right to property is considered to be the owner of the property in question. However, since the right to property is a right that can be transferred by inheritance, it should be acknowledged that the heirs also have an interest in filing an individual application or pursuing an individual application initiated by the testator after the testator's death.

61. In the present case, the applicants notified the Court of their wish to continue the proceedings, initiated by the testator after her death, at first instance. The Civil Court accepted the request to pursue the proceedings and rendered a judgment against the applicants. It has been considered that the applicants have an interest in filing an individual application in respect of the judgment against them, since they had become parties to the proceedings before the instance courts. On the other hand, the Ministry pointed out in its observations that, although the applicants had brought an action in order to benefit personally from the surplus revenue following the testator's death, the subject matter and legal consequences of the case in question were not the same as those of the new case subsequently brought by the applicants. The present case concerns a request to establish that the applicants' testator was entitled to the surplus revenue and that a possible conclusion of the case in favour of the testator would affect the surplus revenue belonging to the period before the testator's death. The new action brought by the applicants, on the other hand, concerns the surplus revenue acquired after the death of the testator. It is not possible for the new action brought by the applicants in their own name to affect the period referred to in the action brought by their testator, that is to say, to produce a legal consequence in respect of the surplus revenue

belonging to the referred period. The applicants therefore also have an interest in pursuing the present case.

62. In this case, it must be held that the applicants have the capacity to file an individual application.

d. Conclusion

63. The alleged violation of the prohibition of discrimination in conjunction with the right to property must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

Mr. Kadir ÖZKAYA, Mr. İrfan FİDAN and Mr. Muhterem İNCE dissented from this conclusion.

2. Applicability

a. General Principles

64. The principle of equality is recognised both as a right in itself and as a fundamental principle governing the exercise of other rights and freedoms. Article 10 of the Constitution does not contain any restriction as to who may benefit from the principle of equality or as to its scope. Pursuant to Article 11 of the Constitution, which provides that *"the provisions of the Constitution are fundamental legal rules binding on the legislative, executive and judicial organs, administrative authorities and other institutions and individuals"*, the principle of equality set out in the *"General Principles"* section applies to the said organs, institutions, and individuals. In addition, the last paragraph of Article 10 of the Constitution, which stipulates that "*state organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings*," obliges the legislative, executive and judicial organs and administrative authorities to act in accordance with the principle of equality and the prohibition of discrimination (see *Nurcan Yolcu* [Plenary], no. 2013/9880, 11 November 2015, § 35; *Gülbu Özgüler* [Plenary], no. 2013/7979, 11 November 2015, § 42). As a matter of fact, in relation to Article 10 of the Constitution, the Advisory Council has stated in its reasoning that state organs and administrative authorities are obliged to carry out their state activities in their own proceedings, without discriminating between people.

65. Although Article 10 of the Constitution is not regulated in the form of the *prohibition of discrimination*, the prohibition of discrimination must be implemented more effectively, since the principle of equality has a normative value that can be invoked in all cases in the constitutional context (see the Court's judgment no. E.1996/15, K.1996/34, 23 September 1996). In other words, the principle of equality also embodies the prohibition of discrimination as a substantive norm of reference (see *Tuğba Arslan* [Plenary], no. 2014/256, 25 June 2014, § 108; *Nurcan Yolcu*, § 30; *Gülbu Özgüler*, § 37).

66. Since the prohibition of discrimination affects the enjoyment of the rights and freedoms safeguarded by the Constitution, it does not have a mere existence independent of the substantive rights and is complementary to other rights. Although the application of the prohibition of discrimination does not require a violation of other provisions, it is not possible to apply the prohibition of discrimination in the Court's assessment unless the disputed issue falls within the scope of one or more of the rights safeguarded by the Constitution (see *Nuriye Arpa*, no. 2018/18505, 16 June 2021, § 43).

67. In addition, a person who claims that his/her right to property has been infringed must first prove that he/she is entitled to benefit from that right. For this reason, it is necessary, first and foremost, to assess the legal status of the applicant with regard to whether or not he/she has an interest in property that requires protection under Article 35 of the Constitution (see *Cemile Ünlü*, no. 2013/382, 16 April 2013, § 26; *İhsan Vurucuoğlu*, no. 2013/539, 16 May 2013, § 31).

68. The right to property has a different meaning and scope from the concepts of property rights adopted in private law or administrative law, and the right to property recognised in these fields should be treated with an autonomous interpretation, independent of legal regulations and case-law (see *Hüseyin Remzi Polge*, no. 2013/2166, 25 June 2015, § 31). The right to property, enshrined in Article 35 of the Constitution, embraces all types of rights that have an economic value and can be valued in money (see the Court's judgment no. E.2015/39, K.2015/62, 1 July 2015, § 20). In this respect, in addition to movable and immovable property, which is

undoubtedly to be considered as property, the right to property includes the limited real rights (rights *in rem*) and the intellectual property rights established on the basis of these properties, as well as any enforceable claims (see *Mahmut Duran and Others*, no. 2014/11441, 1 February 2017, § 60).

69. The right to property enshrined in Article 35 of the Constitution is a safeguard that protects existing possessions, property and assets. A person's right to acquire property which he/she does not already possess does not fall within the concept of property protected by the Constitution, no matter how strong his/her interest in the matter. Exceptionally, in certain circumstances, an *economic value* or a *legitimate expectation* of obtaining an *enforceable claim* may benefit from the right to property safeguarded by the Constitution (see *Kemal Yeler and Ali Arslan Çelebi*, no. 2012/636, 15 April 2014, §§ 36, 37).

70. Finally, in cases where the prohibition of discrimination in relation to the right to property is allegedly violated on the basis of a statutory provision or case-law, if it is decided that the statutory provision or the case-law does not exist when assessing whether a property exists, it is also assessed whether the person would have an enforceable right in relation to the property that is the subject of the dispute (see *Nuriye Arpa*, § 47).

b. Application of Principles to the Present Case

71. The action brought by the applicants' testator to benefit from the surplus revenue of the Foundation, where it is undisputed that the founder is the testator's ascendant, was dismissed with reference to the Foundation's deed of foundation on the grounds that the daughters could not benefit from the surplus revenue because the founder had sons. In the present case, the Court must first determine whether the applicants' testator is entitled to benefit from the surplus revenue.

72. The revenue (*galle*) is the revenue generated by the real estate (property) of the foundation. The surplus revenue is defined by Article 3 of Law no. 5737 as *"the revenue remaining after the maintenance of the charities of the foundation and the real estate and after carrying out the charitable works indicated in the deed of foundation"*. In cases where the descendants

of the founder benefit from the revenue of *zürri* foundations (a type of foundation that is not obliged to engage in charitable works and the entire revenue (*galle*) is allocated to the descendants of the founder), the surplus revenue (*galle fazlası*) is distributed only among the descendants of the founder according to the conditions specified in the deed of foundation.

73. The Foundation in the present case was established in the Ottoman period and, according to its deed of foundation, it qualifies as a *zürri* foundation. It is undisputed that the Foundation has a surplus revenue and that the applicants are descendants of the founder. In addition, it has been understood that the benefit of the daughters from the surplus revenue was subject to the non-existence of sons of the same lineage according to the deed of foundation. The Civil Court concluded that the applicants were not entitled to benefit from the surplus revenue of their testator, since the founder had sons of the same lineage.

74. In view of the fact that the applicants' testator is the founder's child and could benefit from the surplus revenue in the absence of the discriminatory provision in the deed of foundation, it has been concluded that there is an economic interest worthy of protection under Article 35 of the Constitution.

75. In this context, the finding that the applicants have an economic interest under Article 35 of the Constitution is sufficient to carry out an examination under the prohibition of discrimination safeguarded by Article 10 of the Constitution.

3. Merits

a. General Principles

76. The principle of "equality before the law", enshrined in Article 10 of the Constitution, applies to those who experience the same legal conditions. The principle provides for legal equality, not *de facto* equality. The purpose of the principle of equality is to ensure that the same procedures are applied to people with the same legal status and to prevent discrimination and the granting of privileges. This principle prohibits violating the principle of equality before the law by applying different rules to certain people with the same legal status. Equality before

the law does not mean that everyone is treated equally in all respects. The special circumstances of certain individuals or communities require that different rules or applications be applied to them. If the same rules are applied to those with the same legal status and different rules are applied to those with a different legal status, the principle of equality enshrined in the Constitution would not be violated (see the Court's judgment no. E.2009/47, K.2011/51, 17 March 2011).

77. The principle of equality in Article 10 of the Constitution has a broad meaning, including the prohibition of discrimination safeguarded by Article 14 of the Convention. Therefore, it is not possible to examine all types of alleged violations of the principle of equality within the framework of the individual application mechanism, but only the prohibition of discrimination falling within the common sphere of protection can be examined (see *Reis Otomotiv Ticaret ve Sanayi A.Ş.* [Plenary], no. 2015/6728, 1 February 2018, § 78).

78. The existence of a matter which may be examined by the Court under Article 10 of the Constitution in the individual application procedure presupposes the existence of a difference in treatment between individuals in the same or a relatively similar situation. The requirement to prove the existence of a similar situation does not require the groups being compared to be identical (see *Nuriye Arpa*, § 55).

79. Not every difference in treatment automatically constitutes a violation of the prohibition of discrimination. Only differences of treatment and situations based on identifiable characteristics listed in Article 10 of the Constitution can constitute differences of treatment in this sense. Article 10 of the Constitution stipulates that *"everyone is equal before the law, without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds"* and clearly lists the grounds for discrimination as *"language, race, colour, sex, political opinion, philosophical belief, religion and sect*", which are also important grounds for discrimination in several international legal instruments. In addition, the phrases *"everyone"* and *"such grounds"* in the text of the article indicate that a non-restrictive approach was adopted in relation to individuals protected against discrimination and the grounds for discrimination, and

that the grounds for discrimination listed in the article are only examples (see *Hüseyin Kesici*, no. 2013/3440, 20 April 2016, § 56; *Reis Otomotiv Ticaret ve Sanayi A.Ş.*, § 79).

80. In interpreting the phrase *"any such grounds"*, the Court has clearly pointed out that the grounds for discrimination are not limited to those listed in the article, stating that *"… One of the most important concepts enshrined in the Constitution in relation to freedoms is the principle of equality before the law. ... The grounds for discrimination are not limited to those listed in the text of the article. The phrase "any such grounds" has broadened the grounds on which discrimination cannot be based, therefore clarifying the application of the provision"* (see the Court's judgment no. E.1986/11, K.1986/26, 4 November 1986).

81. The principle of equality enshrined in Article 10 of the Constitution prohibits the application of different treatment, without objective and justified reasons, to individuals who are in the same or a similar situation while enjoying the fundamental rights and freedoms safeguarded by the Constitution. A difference of treatment which cannot be objectively and reasonably justified, i.e. which is not based on a legitimate aim or which does not ensure a reasonable proportionality between the means chosen and the aim pursued, would be recognised as discriminatory within the meaning of Article 10 of the Constitution (see *Nuriye Arpa*, § 58).

82. There is no doubt that public authorities have a certain margin of appreciation in assessing whether the difference in treatment is based on justified reasons or to what extent the difference can be justified. Moreover, the extent of the margin of appreciation may vary depending on the nature of the right concerned and the conditions and characteristics of the present case (see *Nuriye Arpa*, § 59).

83. In the context of the prohibition of discrimination, the burden of proving the existence of a difference in treatment lies with the applicant. Once the applicant has established the existence of a difference in treatment, it is for the public authorities to prove that this difference in treatment is based on objective and justified grounds and that there is a reasonable proportionality between the means chosen and the aim pursued.

b. Application of Principles to the Present Case

84. In examining the allegation of discrimination, it is first necessary to assess whether there is a difference in treatment under Article 10 of the Constitution and, in this context, to determine whether there is a difference in treatment in relation to an interference with the right to property of individuals in the same or a similar situation. It must then be examined whether the difference in treatment is based on objective and reasonable grounds and is proportionate (see *Nuriye Arpa*, § 61).

85. At the outset, it must be emphasised that the impugned legal dispute does not concern the law of succession. The assets bequeathed by the founder to the Foundation established by the deed of foundation dated 18 January 1722 became the property of the Foundation. In accordance with the repealed Law no. 864, it was recognised that the assets mentioned in the deed of foundation were the property of the Foundation. Therefore, it is not the Court's duty to assess whether the founder's will (intention) to establish the Foundation dated 18 January 1722 is in conformity with the 1982 Constitution. The impugned dispute concerns the distribution of the Foundation's surplus revenue. The Court must therefore examine whether the procedure for the distribution of the surplus revenue complies with Articles 10 and 35 of the 1982 Constitution.

86. The request of the applicants' testator to benefit from the surplus revenue was rejected on the basis of the Foundation's deed of foundation. In the said deed of foundation, the possibility for daughters to benefit from the surplus revenue is conditional on the absence of sons of the founder. According to this document, as long as the founder has male children (descendants) of the same lineage, daughters cannot benefit from the surplus revenue. The rejection of the daughters' request to benefit from the surplus revenue on the basis of the existence of a son in the lineage and the fact that a daughter cannot benefit from the surplus revenue as long as there is a son of the same lineage clearly constitutes a difference in treatment based on sex.

87. It has been understood that the impugned difference in treatment is based on the need to respect the founder's will and to ensure legal security. Firstly, it is understandable that the public authorities pursue the aim of

respecting the founder's will. Similarly, the difference in treatment in the present case ensures legal security by protecting the interests of those who were entitled to benefit from the surplus of revenue. Therefore, it has been concluded that the differential treatment derives from an objective and justified reason for relying on the aim of respecting the will of the founder and ensuring legal security.

88. Furthermore, it should be examined whether there is a reasonable proportionality between the difference in treatment and the aim pursued. Proportionality means that there is no excessive imbalance between the aim pursued and the means employed. In other words, proportionality requires a fair balance between the aim and the means. According to this principle, in the exercise of the right to property, there must be a reasonable proportionality between the legitimate aim pursued and the individual interest. The burden imposed on the applicant should not be excessive and disproportionate in relation to the public interest to be achieved by the aim pursued.

89. It has been considered that the purposes of respecting the founder's will and ensuring legal security do not correspond to the best interest of the public to the extent that they justify the non-allocation of a share of the surplus revenue to the daughters. Although legal security includes, to a certain extent, the protection of the legal status that was completed and finalised during the Ottoman period, it should not be overlooked that the distribution of the surplus revenue of a foundation established during the Ottoman period is an ongoing phenomenon. The persons entitled to a share of the surplus revenue are determined at the time when the right in question arises. Therefore, disputes concerning the distribution of the surplus revenue cannot be considered as final and conclusive legal facts. Accordingly, the requests for the distribution of the surplus revenue of a foundation established during the Ottoman period cannot be rejected by the public authorities on the grounds of legal security.

90. Considering that the effects of the distribution of the surplus revenue come into play at the time of the distribution of the share, the proportionality test should be applied by taking into account the burdens at the time of the distribution. Discrimination based on sex is currently

prohibited by both international and national legal instruments, and States are entrusted with the obligation to take measures to prevent differences in treatment based on sex. Pursuant to Article 10 of the Constitution, it is not possible to tolerate differences in treatment based on sex in today's social order. In addition, such treatment is considered a practice that undermines public order. In other words, the prohibition of discrimination based on sex is considered to be the foundation of society. In this context, it has been concluded that the public interest sought to be achieved by respecting the founder's will can be ignored in the light of today's interpretation of public order. In other words, it has been considered that the burden on individuals of being deprived of their right to property because of a difference in treatment based on sex outweighs the public interest in protecting the founder's will and ensuring legal security.

91. Furthermore, in cases involving differences of treatment based on sex, the margin of appreciation of the public authorities should be restricted. Having regard to the circumstances of the present case, the Court has concluded that the public authorities exceeded their margin of appreciation in their duty to balance the needs of society by allowing a difference of treatment based on sex. The objective of protecting the founder's will and ensuring legal security cannot be regarded as outweighing the burdens imposed on the applicants by the refusal to allow the daughters to share in the surplus revenue.

92. In these circumstances, it has been concluded that the difference in treatment on grounds of sex, by refusing to allocate a share of the surplus revenue to the applicants' testator, who is the founder's daughter, on the ground that a son of the same lineage was still alive, was not based on a relationship of proportionality between the aim pursued and the means employed, despite the existence of a reasonable or justified reason, and therefore constituted discrimination.

93. Consequently, the Court has found a violation of the prohibition of discrimination, safeguarded by Article 10 of the Constitution, in conjunction with the right to property, safeguarded by Article 35 of the Constitution.

Mr. Kadir ÖZKAYA dissented from this conclusion.

4. Application of Article 50 of Code no. 6216

94. Article 50 of Code no. 6216 provides, insofar as relevant, as follows:

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

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

95. The applicants requested the Court to find a violation and order a retrial.

96. In its judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court set out the general principles on how to remedy a violation found. In another judgment, the Court also referred to the consequences of failure to comply with a judgment finding a violation, stating such a violation would constitute a continuing violation and would also lead to a second violation of the right in question (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

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

98. In cases where the violation results from a court decision or the [trial] court failed to redress the violation; the Court decides, as a general rule, to send a copy of the judgment to the competent court for retrial in order to redress the violation and the consequences thereof, pursuant to Article 50 § 2 of Code no. 6216 and Article 79 § 1 (a) of the Internal Regulations of the Court. This statutory regulation, unlike similar legal practices available in procedural law, provides for a remedy specific to the individual application mechanism and leads to a retrial for the purpose of redressing the violation. For this reason, when the Court orders a retrial in connection with a judgment finding a violation, the court concerned has no discretion to accept the existence of grounds for a retrial, which differs in this respect from the practice of reopening proceedings in procedural law. Therefore, the court receiving such a judgment is under a statutory obligation to issue a decision to hold a retrial on the basis of the Court's finding of a violation, without waiting for a request to that effect from the person concerned, and to conduct the necessary proceedings to redress the continuing violation (see *Mehmet Doğan*, §§ 58, 59; *Aligül Alkaya and Others (2)*, §§ 57-59, 66, 67).

99. In the present case, the Court has found a violation of the prohibition of discrimination in connection with the right to property on the ground that the action brought by the applicants' testator to benefit from the surplus revenue had been dismissed on the basis of sex. The violation therefore resulted from the Civil Court's decision.

100. In the present case, there is a legal interest in conducting a retrial in order to remove the consequences of the violation of the right to property. A retrial to be conducted in this context is aimed at removing the violation and its consequences in accordance with Article 50 § 2 of Law no. 6216, which contains a provision specific to the individual application mechanism. In this regard, the procedure to be followed is to hold a retrial and to issue a new decision eliminating the reasons that led the Court to find a violation, in accordance with the principles set forth in the judgment finding a violation. For this reason, a copy of the judgment must be sent to the 7th Chamber of the Adana Civil Court for retrial.

101. The total litigation costs of 10,784.10 Turkish liras ("TRY"), including the court fee of TRY 884.10 and the lawyer fee of TRY 9,900,

as determined on the basis of the documents in the file, are to be jointly reimbursed to the applicants.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 20 October 2022

A. BY MAJORITY and by the dissenting opinions of Mr. Kadir ÖZKAYA, Mr. İrfan FİDAN and Mr. Muhterem İNCE, that the alleged violation of the prohibition of discrimination in conjunction with the right to property be DECLARED ADMISSIBLE;

B. BY MAJORITY and by the dissenting opinion of Mr. Kadir ÖZKAYA, that the prohibition of discrimination, safeguarded by Article 10 of the Constitution, in conjunction with the right to property, safeguarded by Article 35 of the Constitution, was VIOLATED;

C. That a copy of the judgment be REMITTED to the 7th Chamber of the Adana Civil Court (E.2012/1061, K.2014/124) for retrial to redress the consequences of the violation of the prohibition of discrimination in conjunction with the right to property;

D. That the total litigation costs of TRY 10,784.10, including the court fee of TRY 884.10 and the lawyer fee of TRY 9,900, be JOINTLY REIMBURSED to the applicants;

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

F. That a copy of the judgment be SENT to the Ministry of Justice for information.

DISSENTING OPINION OF VICE-PRESIDENT KADİR ÖZKAYA

1. In the present application filed on the grounds of the inability of the female descendants of the founder to benefit from the surplus revenue of the fused (*mazbut*) foundation (the type of foundation established before the entry into force of the repealed Law no. 743 and administered by the Directorate General of Foundations pursuant to the repealed Law no. 2762), our Court, by a majority, has found a violation of the prohibition of discrimination, safeguarded by Article 10 of the Constitution, in conjunction with the right to property safeguarded by Article 35 of the Constitution. I dissent from this opinion for the grounds set out below:

A. ADMISSIBILITY

a. Individual Application Process

2. The impugned action referred to in the present case was brought by Z.Y., the applicants' mother. According to the petition dated 25 September 2012, it was requested to establish that Z.Y. is a child of the *"zürri"* foundation named *"El-Hac Ebubekir ve İbrahim Beşe bin Topal Mehmet Ağa Vakfı"*, known as *"Burduroğlu İbrahim'in Menzili ve Dükkânları Vakfı"*, which was established by the foundation deed dated 18 January 1722, and that she is a child of the founder (the firstborn of the lineage (*batn-ı evvel evlad*) entitled to benefit from the surplus revenue.

3. Z.Y. lost her life on 15 April 2013 while the case was still pending.

4. Subsequently, the female applicants, who are the heirs (inheritors) of Z.Y., and other male heirs (Y.Y. and B.Y.), through their lawyer, filed a petition dated 10 January 2014 to pursue the case.

5. At the hearing on 7 March 2014, the Civil Court dismissed the action brought by the applicants.

6. In the dismissal decision, it was stated that, according to the circumstances of the case, the foundation deed and the relevant legislation, the claimant Z.Y. could not benefit from the surplus value, that the claimant's children could not pursue the action brought by the deceased claimant Z.Y., that they therefore could not submit such a request and that

they could only request to benefit from the surplus revenue in a separate action filed by themselves.

7. An appeal was lodged against this decision. The appeal stated that daughters and sons should benefit equally from the surplus revenue and that **the heirs were entitled to pursue the proceedings initiated by the testator regarding the surplus revenue, which was not strictly linked to individuals**, since, despite the inclusion of a phrase indicating the order of lineage, formulated on the basis of the sex of the children, in "Allocation (*Tahsis*)" section of the Summary Factsheet of the Deed of Foundation, it was not included in the "Surplus Revenue/Provisions on Children" section.

8. In its reply to the appeal, the respondent, the Directorate General of Foundations, stated that the heirs could not pursue the proceedings brought by the testator, since the matter concerned a strictly personal right, and that they should bring a separate action in their own name; therefore, in the present case, it was not possible to discuss whether the daughters could benefit from the surplus revenue in the same way as the sons, as mentioned in the petition of the claimant's lawyer.

9. The decision was upheld by the judgment dated 13 October 2015 of the 18th Civil Chamber of the Court of Cassation. On 21 December 2017, the request for rectification of the judgment was also rejected by the same Chamber and the impugned decision became final.

10. The issues raised in the petition of appeal were reiterated in the petition for rectification.

11. In the present case, it must first be established whether the applicants have filed such an application. In this respect, it is important for the course of the proceedings before the instance courts in relation to the applicants and therefore the scope of the individual application should be determined.

b. Scope of the Application

12. The action brought by the applicants' testator was a declaratory action to determine whether she was a child of the founder and entitled to

benefit from the surplus revenue. During the course of the proceedings, the testator lost her life. The applicants applied to pursue the case.

13. In the judgment delivered by the majority, the following have been stated: The applicants informed the Court of their wish to pursue the action brought by their testator after her death at the first instance stage, that wish was accepted by the Civil Court and a decision was delivered against the applicants, as a result of which the applicants became parties to the proceedings before the courts of instance; it must therefore be accepted that the applicants had an interest in filing an individual application concerning the decision against them; whereas, however, the subject matter and the legal consequences of the action brought by the applicants after the death of the testator to benefit from the surplus revenue were not the same as the subject matter and the legal consequences of the present case; the purpose of the present case was to determine whether the applicants' testator was entitled to the surplus revenue; the outcome of the present case in favour of the claimant (testator) would affect only the surplus revenue accrued before the testator's death, whereas the new action brought by the applicants would affect the surplus revenue accrued after the testator's death, it was not possible for the new action brought by the applicants to affect the period relating to the proceedings initiated by their testator and to bear legal consequences for the surplus revenue accrued during that period, so that the applicants had an interest in pursuing the present case in that respect and, accordingly, the applicants had the legal capacity in that respect.

14. It has been understood from this reasoning, based on the opinion of the majority, that the request submitted by the applicants to the Court in the course of the impugned proceedings relates to the determination of whether the applicants' testator was a child of the founder entitled to benefit from the surplus revenue. According to the judgment, the applicants brought a separate action for a declaration that they were descendants of the founder entitled to benefit from the surplus revenue.

15. Nevertheless, the applicants' request in the proceedings which are the subject of the present application is not to establish that the claimant testator was entitled to the surplus revenue, but to establish that they

themselves are entitled to the surplus revenue. At least that is what they seek to have established.

16. According to the documents in the case file, the petition filed with the Civil Court on 10 January 2014, following the death of the claimant testator, did not contain any request to establish that the claimant testator or the heirs were the children/descendants of the founder who were entitled to benefit from the surplus revenue. The minutes of the hearing of the lawyer of the heirs, including the applicants, did not contain any statement in this regard.

17. In the petition, the applicants simply stated that the claimant testator had died, that the persons whose names were mentioned in the list (including the applicants) remained as heirs, that they had submitted the certificate of inheritance and the power of attorney as heirs, and requested that the necessary procedures be carried out.

18. The last page of the petition of appeal submitted by the lawyer of the heirs, including the applicants, reads as follows: *"Zeliha Yahşi, the claimant of the appealed decision, lost her life during the investigations and after the death of the claimant, the heirs of the claimant requested ... to establish that they were the firstborn of the lineage (batn-ı evvel evlad) entitled to benefit from the surplus revenue of the Foundation."*

19. Although there is no statement as referred to in the request for rectification of the decision submitted upon the rejection of the appeal request, it was stated: *"2- THE HEIRS OF THE DECEASED ARE ENTITLED TO PURSUE THE CASE BROUGHT BY THE DECEASED ZELİHA YAHŞİ AND TO SUBMIT THEIR REQUESTS IN THIS CASE."*

20. In view of the statements made in both petitions, it is the overwhelming conclusion that the heirs, including the applicants, sought to establish their status as descendants of the founder entitled to benefit from the surplus revenue, instead of requesting to pursue the proceedings initiated by the claimant testator.

21. As a matter of fact, the statement in the reasoned decision that *"the children of the deceased claimant could only request to benefit from the surplus revenue in a separate case initiated by themselves and this cannot be requested*

in the case initiated by their mother..." indicates that the Civil Court also specifically assessed the said request as a request made in the interest of the heirs, including the applicants.

22. Therefore, it has been understood that the applicants did not seek to establish the status of claimant testator, but their own status as descendants of the founder entitled to benefit from the surplus revenue.

23. In addition, each applicant filed a separate application, which was later joined. Under the heading "B. The rights allegedly violated within the framework of the individual application and the reasons for the violation, and substantial explanations pertaining to the relevant grounds and evidence" of the individual application forms, the applicants referred, under various headings, to procedures that violated Article 10 of the Constitution, as well as to acts that violated Articles 13, 35 and 36 of the Constitution.

24. Under the heading "B. The rights allegedly violated within the framework of the individual application and the reasons for the violation, and substantial explanations pertaining to the relevant grounds and evidence", the Court was requested to ***"establish that the claimants were descendants of the lineage entitled to benefit from the surplus revenue"***. It was also pointed out that ***"the decision of the Civil Court dismissing the female claimants' request on the basis of the provision in the deed of foundation that 'only sons could benefit from the surplus revenue' contradicts the provision ... in Article 10 of the Constitution of the Republic of Türkiye"***.

25. According to the above statements, it has been understood that the applicants were requesting the establishment of their own status -not that of their testator- as descendants of the founder entitled to benefit from the surplus revenue. The phrase "clients" did not refer to an individual person and this phrase clearly referred to the applicants, considering that the claimant testator could not be a client in the individual application form due to her death.

26. The applicants alleged that the dismissal of their request on the basis of the discriminatory condition (requirement) between daughters and sons laid down in the Foundation's deed of foundation was contrary

to the principle of equality. According to the applicants, the freedom of contract and the freedom of will (it being understood that, in the present case, the freedom of will refers to the founder's freedom of will) are restricted by the binding statutory provisions. The impugned condition in the deed of foundation fell foul of the binding statutory provision of Article 10 of the Constitution and, in this context, the binding provision must be implemented instead of the condition in the deed of foundation.

27. The applicants also argued that the condition in the deed of foundation, which was contrary to the principle of equality, was also contrary to Article 13 of the Constitution, which provides that the fundamental rights and freedoms may be restricted only on the grounds specified in the Constitution, and that this condition should therefore be declared null and void.

28. Other grounds put forward by the applicants are as follows: The condition in the deed of foundation that the daughters could not benefit from the surplus revenue in case of the existence of a son violates their right to property and "right of inheritance". In fact, in order to protect the right of inheritance, certain restrictions were placed on the arbitrary acts of the testator, and the heirs were granted with the right to a reserved portion. Moreover, within the framework of the right to property, in addition to negative obligations, States have positive obligations to protect rights against the interference of third parties (it has been understood that the third party in this case refers to the founder).

29. In their submissions, under Articles 10 and 35 of the Constitution, the applicants, unlike those under the next heading, have not invoked on the inheritance relationship between the testator and themselves and have not referred to the testator's assets and therefore to the refusal to award the claim over the assets subject to inheritance (*tereke*). Instead, they have relied on the inheritance relationship between the founder and themselves, strongly implying and even clearly stating that the founder, who is the original testator, prejudiced the reserved right of the female heirs, including themselves, contrary to the principle of equality.

30. In the submissions relating to the violation of Article 36 of the Constitution, it was stated: *"The Civil Court's decision that 'the claimants*

could not bring a claim in a case brought by their mother', in relation to the proceedings pursued by my clients after the death of their mother, violated the provision ... prescribed in Article 36 of the Constitution. ... In the present case, the decision that the clients could not pursue the case brought by the testator is contrary to the right to a fair trial enshrined in Article 36 of the Constitution."

31. According to the applicants, *"The claimants' testator brought the action to claim her rights arising from the Foundation. The testator's rights are not strictly personal rights. As a matter of fact, if the case were to be upheld, the testator would be entitled to the surplus revenue. The right to the surplus revenue is a right in relation to the assets. Therefore, the impugned rights were transferred to my clients through inheritance upon the death of the testator. In addition, since the testator's rights arising from the Foundation were transferred to the heirs on the basis of universal succession (külli halefiyet), the assessment of whether the clients are the descendants of the lineage entitled to benefit from the surplus revenue should be carried out in this context."*

32. According to the submissions under this section, it has been understood that the applicants, although relying on the relationship of inheritance between the claimant testator and themselves, were seeking a determination that they were descendants of the founder entitled to benefit from the surplus revenue, rather than a determination of the status of their testator. The phrase "clients" does not refer to an individual person and this phrase clearly refers to the applicants, considering that the claimant testator could not be a client in the individual application form due to her death.

33. In such a case, the question of whether the applicants have exhausted the legal remedies available should be addressed.

c. Whether the Legal Remedies Had Been Exhausted

34. In the judgment, the following statements were included in relation to the exhaustion of ordinary legal remedies:

56. In the present case, the applicants notified the Civil Court, by a petition dated 14 January 2014, of their wish to pursue the case initiated by their testator. The Civil Court accepted the applicants' request to pursue the case and issued a decision against the applicants. It must be stressed that the Civil Court did

not dismiss the case on the basis of the applicants' lack of capacity to pursue the case -due to the absence of a cause of action. Although the decision stated that the children of the deceased could not claim to benefit from the surplus revenue in an action brought by their mother, but would have to file a separate action to make such a claim, it has been observed that the Civil Court rendered a decision on merits. In fact, it has been understood that the Civil Court referred to the Foundation's deed of foundation and indicated that, due to the existence of sons, the daughters could not benefit from the surplus revenue. Therefore, given that the Civil Court rendered a decision on the merits and did not dismiss the case for lack of capacity to pursue the case, it is not possible to conclude that the ordinary legal remedies have not been exhausted.

35. I dissent from this opinion for the reasons set out above.

36. According to the established practice of the Court of Cassation, the action for the determination of the descendant of the founder and the declaration that the descendant of the founder is entitled to benefit from the surplus revenue is bound to individuals. In this type of proceedings, if the person who originally brought the action loses his/her life, the heirs cannot pursue the said case and they must bring a separate action to assert their own right (see the decision of the 8th Civil Chamber of the Court of Cassation, no. E.2020/715, K.2021/4025, 4 May 2021). On the relevant date, the applicants could have foreseen and known the said matter. This matter was also highlighted in the judgment of the Court in the case of *Bensan Aktaş and Others* (no. 2015/7288, 29 November 2018). The subject matter in the mentioned judgment concerns a *zürri* foundation for which a lineage order had to be determined. The applicants brought an action of debt for the payment of the surplus revenue of the impugned foundation, which was classified as a fused foundation. However, this request was dismissed by the instance courts on the grounds that there was no judicial decision establishing that the applicants were descendants of the founder and entitled to the surplus revenue. The applicants filed an individual application with the Court, claiming that their right to property had been violated.

37. In the mentioned case, the Court stated the following: *"38. In the present case, the instance courts clearly indicated that the applicants could not*

claim the impugned receivable by direct reference to the provisions of the law of succession. Therefore, it is neither arbitrary nor unforeseeable to request the applicants, as a precondition, to submit the decision establishing that they were descendants of the founder who, in accordance with the provisions of the deed of foundation, were entitled to the surplus revenue, by carrying out an assessment limited with the request relying on the provisions of the law of succession, since the claim for the surplus revenue was set out in the petition of action on the basis of the provisions of the law of succession. In this regard, this matter indicates that the applicants failed to duly exhaust the legal remedies provided by the legal system. The applicants did not submit any document or information to show that they had made use of such remedies in the context of the individual application. Nevertheless, it has been observed from the case-law of the Court that the application for recognition as a descendant of the foundation entitled to benefit from the surplus revenue constitutes an effective legal remedy which must be exhausted." As a result, the Court declared the application inadmissible for failure to exhaust available legal remedies.

38. Although the judgment referred to concerns the action brought for the surplus revenue, the following points are also relevant to the present case: The Court has considered that an action could not be brought solely on the basis of the status of heir and that it was neither arbitrary nor unforeseeable to request the applicants, as a prerequisite, to bring actions to establish that they were descendants of the founder before filing such an application, and the Court has required the applicants to exhaust the available legal remedies.

39. The following events occurred in the present case: The impugned case in the present application was brought by the applicants' testator during the course of the impugned case; the testator lost her life; the heirs, including the applicants, filed a petition to pursue the case; subsequently, in the first hearing, the defendant's lawyer stated that the heirs could not pursue the case, recalling the nature of the proceedings as explained above; the Civil Court adjourned the hearing solely to conduct an assessment of this issue; the parties presented their arguments on the issue in the first hearing held thereafter; and the Civil Court decided to dismiss the case in the same hearing. In the reasoned decision, it was indicated that the heirs could not assert claims in a case brought by their testator; the heirs,

including the applicants, raised objections in their petitions for appeal and rectification of the decision that they should continue the case, in addition to the other objections regarding the appeal; the defendant's lawyer, in his reply to the petition for appeal, stated that the other objections regarding the appeal could not be taken into consideration since the heirs could not pursue the case; and the Court of Cassation rejected the requests for appeal and rectification of the decision without providing any further explanation beyond the reasoning of the Civil Court.

40. Accordingly, contrary to the assessment in our Court's judgment, with which the majority agreed, it is not true that *"the Civil Court accepted the applicants' request to pursue the case"*. In the light of the assessment of the Court's reasoning, together with the above-mentioned process, it has been observed that, in the impugned case, the Civil Court did not carry out an assessment of the merits (in relation to all the heirs, including the applicants), but instead carried out an assessment of the merits in relation to the claimant testator (in fact, this is also considered to be a technical error) and rejected the applicants' request -without carrying out an assessment of the merits- on the grounds that they should have brought a separate action for their claims.

41. This assessment is also confirmed by the absence of separate reasons put forward by the Civil Court for the dismissal of the case in favour of the male heirs of the claimant testator and the absence of different assessments made in respect of daughters and sons.

42. If the Civil Court had accepted the heirs' wish to pursue the case and had ruled on the merits of their own case, the inclusion of the statement *"the heirs may request to benefit from the surplus revenue in an action they will bring in their own name"* would be meaningless. In this case, the Civil Court would accept the heirs' requests and assess the merits, and in this case, it would be contrary to this act of the Civil Court to request them to bring another action in their own name.

43. In these circumstances, it is not possible to agree with the statement in the Court's judgment that *"it must be stressed that the Civil Court did not dismiss the case on the ground that the applicants lacked the legal capacity to pursue the case"*.

44. Furthermore, although the Civil Court included in the reasoning part of the impugned proceedings some assessments of the merits of the claimant testator, it has been understood that the Civil Court did not actually rule on the merits and that this assessment, which was not required, was in fact a technical error[1].

45. In my opinion, the technical error committed by the Civil Court does not invalidate the above assessment. Although the Civil Court made a technical error in the action brought by the testator, it is evident that, in any event, it did not accept the heirs' wish to continue the proceedings and become parties to the case, and asked them to bring a separate action.

46. Consequently, the applicants did not become parties to the impugned case and their allegations concerning the merits were not assessed, and they were invited to bring a separate action in their own name.

47. In this respect, it has been understood that, during that period, the applicants brought a separate action in their own name, that the said action has still been pending and that, therefore, there has been ongoing proceedings in respect of the dispute which is the subject of the individual application before the Court.

48. In addition, under the heading *"Alleged Violation of Article 36 of the Constitution of the Republic of Türkiye"*, the applicants stated that *"the Civil Court's decision that 'the claimants could not bring a claim in a case brought by their mother', in relation to the proceedings pursued by my clients following the death of their mother, violated the provision ... prescribed in Article 36 of the Constitution. ... In the present case, the decision to the effect that the clients could not pursue the case brought by the testator is contrary to the right to a fair trial enshrined in Article 36 of the Constitution"*. This claim of the applicants concerns the right of access to a court in the context of the right to a fair trial. Therefore, the applicants also pointed out that their wish to pursue the action brought by their testator had not been accepted by the instance court.

1 In the light of the established case-law of the Court of Cassation, it has been concluded that the Civil Court, by deciding to dismiss the case, made a technical error instead of deciding that there was no reason to issue a decision for the continuation of the impugned proceedings after the death of the testator.

49. Even if it is accepted for a moment that the claims of the heirs, including the applicants, were examined and rejected on the merits at the end of the first proceedings, and even if it is accepted that their claims before the Civil Court did not concern their rights and were limited to the request to establish the status of their testator as the founder's child entitled to the surplus revenue, it must be noted that the applicants' claims before the Civil Court concerning their entitlement to the surplus revenue on the basis of the right to property are different from the allegations submitted to the Court.

50. Indeed, the applicants claimed before the Civil Court that the condition discriminating between daughters and sons in the deed of foundation related to the ownership of assets and that there was no such discrimination in the said document as regards the condition for benefiting from the surplus revenue. However, the applicants argued before the Court that there was a condition discriminating between daughters and sons in respect of the surplus revenue and that this condition was contrary to the principle of equality under Article 10 of the Constitution and should therefore be annulled. Thus, the applicants raised for the first time before the Court the allegation that the terms of the deed of foundation should be declared null and void for being contrary to the Constitution, and they had not previously raised this claim before the courts of instance. In other words, **the applicants did not avail themselves of the opportunity to submit the claim which they raised for the first time before the Court before the appeal and rectification stages, although they had such an opportunity.** Nevertheless, the applicants could have raised their allegation that the terms of the deed of foundation contrary to the Constitution should be declared null and void as an alternative claim -in addition to the other claims submitted to the courts of instance- at any stage of the judicial proceedings. It cannot be said that this matter imposed an unforeseeable and excessive burden on the applicants. In these circumstances, if the Court was to examine the merits of this allegation, it would be the first court to do so.

51. In the light of the foregoing, it must be held that the present application, insofar as it relates to the right to property, must be declared inadmissible for failure to exhaust all the legal remedies available.

52. In addition, a problem of jurisdiction *ratione personae* arises, even if it is accepted that the claims brought by the applicants before the Civil Court after the death of their testator were in fact related to the establishment of their testator's status as a child of the founder entitled to benefit from the surplus revenue.

d. Jurisdiction *Ratione Personae*

53. The judgment delivered by the majority included the following assessments as regards the jurisdiction *ratione personae* (the victim status):

"57. In view of the fact that the applicants pursued the action initiated by their testator, whether the applicants have the capacity to file an individual application should be questioned.

60. As a rule, the direct victim of an interference with the right to property is considered to be the owner of the property in question. However, since the right to property is a right that can be transferred by inheritance, it should be acknowledged that the heirs also have an interest in filing an individual application or pursuing an individual application initiated by the testator after the testator's death.

61. In the present case, the applicants notified the Court of their wish to continue the proceedings, initiated by the testator after her death, at first instance. The Civil Court accepted the request to continue the proceedings and rendered a judgment against the applicants. It has been considered that the applicants have an interest in filing an individual application in respect of the judgment against them, since they had become parties to the proceedings before the instance courts. On the other hand, the Ministry pointed out in its observations that, although the applicants had brought an action in order to benefit personally from the surplus revenue following the testator's death, the subject matter and legal consequences of the case in question were not the same as those of the new case subsequently brought by the applicants. The present case concerns a request to establish that the applicants' testator was entitled to the surplus revenue and that a possible conclusion of the case in favour of the testator would affect the surplus revenue belonging to the period before the testator's death. The new action brought by the applicants, on the other hand, concerns the surplus revenue acquired after the death of the testator. It is not possible for the new action brought by the applicants in their own name to affect the period referred to in the action brought by their

testator, that is to say, to produce a legal consequence in respect of the surplus revenue belonging to the referred period. The applicants therefore also have an interest in pursuing the present case.

62. In this case, it must be held that the applicants have the capacity to file an individual application."

54. I dissent from this opinion for the grounds set out below:

55. It must be emphasised that the proceedings before the courts of instance, which are the subject of the present application, were limited to establishing the status of the claimant testator (Z.Y.) as the founder child entitled to the surplus revenue. The present case does not concern the surplus revenue. It concerns the question of whether the relevant person was a child of the founder entitled to the surplus revenue. Therefore, this case is of a declaratory nature. The case concerning the claim to the surplus revenue is an action for performance (*eda davası*). A case concerning the surplus revenue cannot be initiated *unless* a *decision has been obtained in favour of the claimant* as a result of a declaratory action to establish that the claimant is a child of the founder who is entitled to the surplus revenue. This matter was also confirmed by the Court in the case of *Bensan Aktaş and Others*. In order to prove that the claimant is a child of the founder who is entitled to the surplus revenue, there must be *a court decision.* This decision is delivered as a result of a declaratory action by establishing that the person in question is a child of the founder who is entitled to the surplus revenue. In this action, it must first be proven that the person concerned was born into the lineage (generation) of the founder and then that he/she fulfils the conditions laid down in the deed of foundation.

56. Unless these two matters are established by a court decision, the person cannot be legally entitled to the surplus revenue. According to the relevant regulation, "the date on which these persons become entitled to the surplus revenue is the date of the first instance court decision". The payment of the surplus revenue to these persons would be made "after the said court decision has become final". Therefore, there would be no legally recognised right until at least a court of first instance has established entitlement to the surplus revenue. After this stage, however, there may be claims on the assets. Prior to this stage, the persons concerned have

no rights other than the right to bring a declaratory action. Moreover, according to the case-law of the Court of Cassation, the right in question is linked to the individual and cannot be transferred to the heirs. Therefore, if the claimant has lost his/her life, there is no right to the claimant's property and therefore a claim to the inheritance could be at stake before this stage; there is no right that can be transferred to the heirs.

57. Moreover, the right to the surplus revenue does not arise from the inheritance relationship (based on the paternal relationship) between the founder and his children, but from the will of the founder, who unilaterally established the foundation. Therefore, the right in question is not subject to the law of succession, but to the law of foundations. This matter was also confirmed by the Court in the case of *Bensan Aktaş and Others*.

58. According to Islamic and Ottoman law, foundations are established in order to feel close to God (Allah) (*kurbet kastı*) by carrying out charitable works. The founder himself/herself determines the persons for whom he/she will do good, i.e. the persons who will benefit from the work of the foundation. The founder can define the beneficiaries as a certain part of society, such as a certain group, the poor, students, as well as specific individuals by specifying their names. In this way, the founder can designate his/her descendants as beneficiaries. In this case, the fact that the applicants are descended from the founder or from their mother, who was an original heir (*kök mirasçı*) of the founder, and are therefore heirs, is not in itself relevant to the acquisition of a right to the surplus revenue. What is important is whether the applicants fulfil the conditions set by the founder to benefit from the surplus revenue. Although the founder designates the persons of his/her lineage as the beneficiaries, he/she may also designate the poor or others in addition to the persons of his/her lineage, one, two or more generations later. Even if the founder decides that the beneficiaries will be the persons of his/her lineage up to the end of one generation, he/she may require that other conditions be fulfilled. For this reason, the persons who wish to benefit from the surplus revenue must prove that they are the persons who comply with the founder's will, i.e. the persons who fulfil the conditions imposed by the founder. No one can have a legal interest in the determination that another person is a child of the founder who is entitled to benefit from the surplus revenue, except

for the interest in the recognition of the testator's claim by a declaratory decision of the court of first instance and in becoming a party with a claim to these assets. Furthermore, in cases where a lineage condition has been provided for in the deed of foundation and a person of the upper generation has died, the share of the said person in the surplus revenue will not pass to the heirs, but to other persons of the same lineage, unless otherwise provided by the founder.

59. In the present case, the applicants' testator (the claimant) died *before a judgment could be rendered by a court of first instance*. It has not yet been established that the testator was a child of the founder who was entitled to the surplus revenue. Therefore, there is no legally recognised right passed on to the heirs to benefit from the testator's assets and thus from her inheritance after her death. Therefore, the applicants have no legal interest in a declaration that their testator was a child of the founder who was entitled to the surplus revenue.

60. In these circumstances, even if it is accepted that the action brought by the applicants before the Civil Court, following the death of their testator, in the course of the proceedings referred to in the individual application, did in fact relate to the establishment of their testator's status as a child of the founder entitled to benefit from the surplus revenue, the application must be declared inadmissible insofar as it relates to the complaint concerning the right to property for lack of jurisdiction *ratione personae*.

e. Jurisdiction *Ratione Temporis*

61. The majority of our Court made the following assessments with regard to the jurisdiction *ratione temporis*:

"52. In order to determine accurately the Court's jurisdiction ratione temporis, it is necessary to accurately determine the date of the final proceedings and decisions and the date of the alleged interference. In making this determination, the events constituting the interference as well as the scope of the right allegedly infringed should be assessed together (Zeycan Yedigöl [Plenary], no. 2013/1566, 10 December 2015, § 31).

53. The dispute in the present case does not concern the legal existence of the Foundation which was established by a deed of foundation dated 18 January 1722, but about who is to benefit from the surplus revenue generated by the assets. The individuals deemed to be entitled to the surplus revenue of the Foundation have the right to apply for the relevant disputes as long as the surplus revenue exists. In the present case, the action brought on 25 September 2012 by Z.Y., the applicants' testator, claiming that she was entitled to benefit from the surplus revenue, was finalised on 21 December 2017. The dispute therefore falls within the Court's jurisdiction ratione temporis."

62. In accordance with the above-mentioned provisions of the Constitution and Code no. 6216, the Court's jurisdiction *ratione temporis* begins on 23 September 2012 and the Court can only examine individual applications against final proceedings and decisions adopted after that date. In view of these clear provisions, it is not possible to extend the scope of jurisdiction to final proceedings and decisions adopted before that date. As these regulations on the Court's jurisdiction *ratione temporis* relate to public order, they must be taken into account *ex officio* at all stages of the individual application (*Ahmet Melih Acar*, no. 2012/329, 12 February 2013, § 15; *G.S.*, no. 2012/832, 12 February 2013, § 14).

63. In order to resolve the problem of jurisdiction *ratione temporis* problem in the present case, it is necessary to define the nature of the dispute before the court of instance and the Court, regardless of how the applicants define it.

64. The applicants argued before the Civil Court that the condition discriminating between daughters and sons in the deed of foundation related to the ownership of assets and that there was no such discrimination in the said document as regards the condition for benefiting from the surplus revenue. However, the defendant argued that there had been discrimination between daughters and sons in the conditions set out in the deed of foundation for benefiting from the surplus revenue. Nevertheless, the applicants argued before the Court that there was a condition which discriminated between daughters and sons in respect of the surplus revenue and that this condition was contrary to the principle of equality under Article 10 of the Constitution and should therefore be annulled.

65. In these circumstances, the dispute brought by the applicants before the Civil Court concerns the interpretation of a condition contained in the deed of foundation (moreover, the applicants did not submit their dispute in accordance with the procedure) and, in addition, the applicants can claim that they are descendants of the founder and are entitled to benefit from the surplus revenue by means of a declaratory action to be duly brought in accordance with the relevant legislation. They can also file an application with the Court against this decision, without having to deal with the requirement of jurisdiction *ratione temporis*. Nevertheless, the same cannot be said of the applicants' allegation before the Court that the conditions in the deed of foundation (the provisions in the Foundation's document, in other words the condition against their interests) are contrary to the Constitution and should be declared null and void.

66. As stated in the judgment, the impugned dispute in the present case (the dispute brought before the Court by the applicants) does not concern the legal assets of the Foundation, but the interpretation of the conditions laid down in the deed of foundation and, moreover, it does not concern the implementation of those provisions, depending on the preferred interpretation, but directly those conditions themselves. The applicants claim that the discrimination between daughters and sons with regard to the surplus revenue violates Article 10 of the Constitution and should be declared null and void. If such a claim is upheld, the provision in the deed of foundation will have been changed.

67. As in the case of the Foundation in the present application, old foundations were established during the Ottoman period under and in accordance with the former law in force. At least the impugned Foundation, which is the subject of the present case, was officially registered and benefits from the presumption of lawfulness. Old foundations, like new foundations, were established by a unilateral legal act of the founder. This act -in the sense of *inter vivos* acts- was embodied in a document called the deed of foundation. Through this unilateral act, the founders determined the terms of the foundations, including the assets to be endowed, the purpose of the foundation, the administration (*tevliyet*) and the beneficiaries of the foundation's assets and profits. This legal act containing the terms of the foundation was also finalised during the Ottoman period. Accordingly,

the application filed by the applicants on the basis of the allegation that the condition in the deed of foundation discriminating between daughters and son should be annulled (by declaring it null and void) and amended falls outside the Court's jurisdiction *ratione temporis*. Moreover, if a legal remedy is available against acts finalised before the critical date for the start of jurisdiction *ratione temporis*, the present dispute may fall within the jurisdiction *ratione temporis*. It should be examined whether such a case is relevant to the present application.

68. The repealed Law no. 2762 of 5 June 1935 on Foundations and Law no. 5737 of 20 February 2008 on Foundations, allowed the continued existence of old foundations, including the impugned Foundation. Although the establishment of certain types of foundations, such as *zürri* foundations, was prohibited during the Republican period, the existence of such foundations established under the old law was preserved. Although some amendments have been made to the administration of foundations in the relevant legislation, the terms and conditions of foundations have generally remained the same, usually based on the founder's will. To date, the judicial authorities have relied on the founder's will in resolving disputes arising from the terms and conditions of foundations. This also applies to the conditions concerning the surplus revenue and the additional conditions that discriminate between daughters and sons.

69. Furthermore, the legislation contained some exceptions that allowed the conditions of the foundation to be amended or challenged. Firstly, the repealed Law no. 2762 and Law no. 5737 stipulate that the conditions in the deed of foundation may be amended only if there is no possibility of fulfilling the conditions of the foundation *de facto* and *de jure*. Nevertheless, in the present case, there is no clear impossibility, *de facto* or *de jure*, in this respect. Moreover, in such a case, Article 14 of Law no. 5737 provides that the Council of Foundations is empowered to amend the impugned conditions at the request of the administrators of annexed, community and merchants' (*mülhak, cemaat ve esnaf*) foundations and at the request of the Directorate General for fused foundations. Contrary to the situation in the present case, individuals cannot change the conditions of the foundation by bringing an action directly before the civil courts. If individuals apply to the competent administrative authorities and their

applications are rejected by these authorities, they may be able to bring an action before the administrative courts. However, this is not the case in the present application. Secondly, Article 6 of Law no. 5737 stipulates that annexed foundations shall be administered and represented by the administrators appointed by the Council of Foundations, in accordance with the terms of the deed of foundation that do not conflict with the Constitution. This practice concerns annexed foundations and there are no such practices applicable to fused foundations. According to the letter of the Adana Regional Directorate of Foundations dated 30 March 2015, the impugned Foundation is a fused foundation and does not qualify as an annexed foundation. In addition, the said provision was foreseen in terms of administrative and representative conditions. The impugned dispute does not concern the administrative and representative conditions. In addition, Article 75 of Law no. 5737, which regulates the rights of usufruct (*intifa hakları*), including the disputed surplus revenue, and stipulates that "the rights of the person concerned shall be reserved in accordance with the conditions provided for in the deed of foundation of the fused (*mazbut*) and annexed (*mülhak*) foundations", does not contain a provision on discrepancy with the Constitution that is different from the provisions on administrative and representative provisions. Even if the provision of Article 6 of Law no. 5737 is accepted as applicable to all conditions, the Council of Foundations is responsible for the regulation of the said article. On the basis of this provision, individuals cannot directly bring an action before the civil courts to request a review of the constitutionality of a condition. It is possible that, if individuals apply to the administration and obtain a decision of dismissal, they may later bring an action before the administrative courts. However, this is not the issue in the present case.

70. According to all the explanations, there was no provision for a remedy that would allow the amendment of a condition regarding the surplus revenue of a foundation whose deed of foundation was concluded during the Ottoman period by declaring it null and void on the grounds of its incompatibility with the Constitution. Declaratory actions brought first by the applicants' testator and then by the applicants in their own names to establish the descendant of the founder entitled to the surplus revenue do not offer such possibilities. In this case, it is only established whether

the person in question was a child of the founder entitled to the surplus revenue.

71. Furthermore, Provisional Article 1 § 8 of Code no. 6216 provides that "*the court shall deal with individual applications against final proceedings and decisions which are finalised and notified after 23 September 2012*". According to this provision, the jurisdiction *ratione temporis* of the Court is limited to individual applications filed against final proceedings and decisions finalised and notified after 23 September 2012. In the light of the clear provisions in question, it is not possible to extend the scope of jurisdiction to include the proceedings and decisions finalised before that date (*G.S.*, no. 2012/832, 12 February 2013, § 14).

72. According to the Court's judgment in the individual application no. 2012/832 of 12 February 2013, the applicant was arrested on 10 May 2012, which falls outside the Court's jurisdiction *ratione temporis*, and was released on the same day to meet with his family after being held in custody for five hours. As a result of the trial, the applicant was acquitted by decision of 8 January 2014. The decision became final on 16 January 2014. By a petition dated 20 February 2014, the applicant brought an action against the State Treasury before the Assize Court, seeking non-pecuniary compensation for the suffering he had experienced during the proceedings conducted against him, in the course of which he had been acquitted. One of the grounds on which the applicant based his claim for compensation was that "the deprivation of liberty resulting from the arrest was unlawful". The court dismissed the applicant's claim.

73. The applicant filed an individual application on the basis of his claim for compensation. The Court stated that it could not examine the applicant's claim relating to the alleged unlawfulness of the contested arrest on the ground that the applicant's deprivation of liberty as a result of the arrest (as of the date of its occurrence) fell outside its jurisdiction *ratione temporis*. The Court added that even if the negative outcome of the legal remedy (action for damages) filed to remedy the impugned interference against the applicant, which was the subject of the individual application, corresponded to a date after the beginning of the Court's jurisdiction *ratione temporis*, this would not bring the interference within

the scope of the Court's jurisdiction *ratione temporis*. The Court therefore noted that the fact that the action for damages was exhausted after the date on which the Court's jurisdiction *ratione temporis* had commenced did not affect on the Court's jurisdiction *ratione temporis* in respect of the individual applications.[2]

74. In the light of the foregoing, the claim relating to the right to property must be declared inadmissible for lack of jurisdiction *ratione temporis*.

f. Jurisdiction *Ratione Materiae*

75. Regardless of whether it is accepted that the request submitted by the applicants to the Civil Court following their testator's death relates to the establishment of their testator's status as a child of the founder entitled to the surplus revenue or to the establishment of their own status as descendants of the founder entitled to the surplus revenue, the present application also raises a question of jurisdiction *ratione materiae* in relation to the right to property.

76. The majority of our Court made the following assessments in the judgment:

66. Since the prohibition of discrimination affects the enjoyment of the rights and freedoms safeguarded by the Constitution, it does not have a mere existence independent of the substantive rights and is complementary to other rights. Although the application of the prohibition of discrimination does not require a violation of other provisions, it is not possible to apply the prohibition of discrimination in the Court's assessment unless the disputed issue falls within the scope of one or more of the rights safeguarded by the Constitution (see Nuriye Arpa, no. 2018/18505, 16 June 2021, § 43).

67. In addition, a person who claims that his/her right to property has been infringed must first prove that he/she is entitled to benefit from that right. For this reason, it is necessary, first and foremost, to assess the legal status of the applicant with regard to whether or not he/she has an interest in property that requires protection under Article 35 of the Constitution (see Cemile Ünlü, no. 2013/382, 16 April 2013, § 26; İhsan Vurucuoğlu, no. 2013/539, 16 May 2013, § 31).

2 The Court has rendered several judgments on this issue.

69. The right to property enshrined in Article 35 of the Constitution is a safeguard that protects existing possessions, property and assets. A person's right to acquire property which he/she does not already possess does not fall within the concept of property protected by the Constitution, no matter how strong his/her interest in the matter. Exceptionally, in certain circumstances, an economic value or a legitimate expectation of obtaining an enforceable claim may benefit from the right to property safeguarded by the Constitution (see Kemal Yeler and Ali Arslan Çelebi, no. 2012/636, 15 April 2014, §§ 36, 37).

70. Finally, in cases where the prohibition of discrimination in relation to the right to property is allegedly violated on the basis of a statutory provision or case-law, if it is decided that the statutory provision or the case-law does not exist when assessing whether a property exists, it is also assessed whether the person would have an enforceable right in relation to the property that is the subject of the dispute (see Nuriye Arpa, § 47)."

aa. The case that the applicants' claim before the Civil Court, subject to the individual application after the death of their testator, was related to the establishment of their own status as descendants of the founder entitled to the surplus revenue

77. The applicants have alleged that they were not recognised as descendants of the founder entitled to the surplus revenue and could not receive their share of the surplus revenue due to the discriminatory condition between daughters and sons in the deed of foundation. However, even in the absence of the impugned condition, it is not possible for the applicants to be recognised as descendants of the founder entitled to the surplus revenue and to receive their share of the surplus revenue. In fact, a condition for determining the lineage order (order of succession) is provided in the deed of foundation before the condition that applies different standards for daughters and sons. The condition for determining the lineage order in the old foundations stipulates that if a child of the founder is still alive in the previous generation, the descendants in the later generations cannot receive a share of the surplus revenue. If a person of the previous generation dies, his/her share does not pass to his/her heirs, unless otherwise specified by the founder, but to other living descendants of the founder of the previous generation. Furthermore, the descendants

of the next generation can only receive a share of the surplus revenue if all the descendants of the founder in the previous generation lose their lives. In the present case, according to the list submitted to the Civil Court by the Adana Regional Directorate of Foundations, there were 13 descendants of the founder who were entitled to the surplus revenue. Only one of them on the list is deceased. As stated in the petition of action, one of the names on the list is the applicants' uncle, Y.Ç. Accordingly, the generation that could benefit from the surplus revenue of the impugned Foundation is currently not the generation of the applicants, but the generation of their uncle. Unless everyone in that generation loses their lives, no one in the applicants' generation can benefit from the surplus revenue. Therefore, even if the applicants' claim that the discriminatory condition between daughters and sons should be declared null and void were to be accepted, the applicants would currently have no economic interest in the surplus revenue. No one can guarantee that the applicants will not lose their lives before the death of every member of the previous generations, and that they will continue to live thereafter. Accordingly, the applicants have no interest arising from any property or legitimate aim under the right to property.

78. Furthermore, as explained under the heading "Jurisdiction *Ratione Personae*", in order for a person to acquire the right to the surplus revenue, it must be established by a court decision that he/she fulfils the conditions laid down in the foundation deed and that he/she has the status of a descendant of the founder who is entitled to the surplus revenue. Otherwise, he/she cannot benefit from the surplus revenue and has no legal claim to the surplus revenue. In the present case, neither the applicants' nor the applicants' testator's status as descendants of the founder entitled to benefit from the surplus revenue has been established by a court decision. Therefore, even in the absence of a condition that discriminates between daughters and sons, *it is not possible for the applicants to have a legally enforceable right.*

79. Accordingly, in the context of the above-mentioned principle in the established case-law of the Court, which states that *"… in cases where the prohibition of discrimination in relation to the right to property is alleged to have been violated, if it is decided that the statutory provision or the case-law does*

not exist when assessing whether a property exists, it is also assessed whether the person would have an enforceable right in relation to the property that is the subject of the dispute", it is not possible in the present case to claim an interest to be assessed in relation to the right to property in accordance with the law in force.

ab. The case that the applicants' claim before the Civil Court, subject to the individual application after the death of their testator, was related to the establishment of their testator's (their mother) status as a child of the founder entitled to the surplus revenue

80. The situation described above does not change even if it is accepted that, in the present case, the proceedings before the Civil Court and the scope of the individual application are limited to establishing the status of the applicants' testator as a child of the founder entitled to benefit from the surplus revenue. It is considered that the applicants cannot have "any existing property or legitimate aim" within the framework of a decision to be rendered in relation to the testator. In this matter, it was indicated in the judgment: *"74. In view of the fact that the applicants' testator is the founder's child and could benefit from the surplus revenue in the absence of the discriminatory provision in the deed of foundation, it has been concluded that there is an economic interest worthy of protection under Article 35 of the Constitution."* This assessment suggests that the applicants were substituted for their deceased testator. In the present case, the applicant is not the testator but her female heirs. Such an assessment cannot be made for the heirs. The fact that "the applicants' testator ... will benefit from the surplus revenue in the absence of the allegedly discriminatory condition in the deed of foundation" is irrelevant for the heirs who are applicants. In addition, the testator did not have a right to the property or inheritance recognised by a court of first instance before her death, as required by the relevant legislation. The right to bring an action and to pursue the proceedings initiated to establish the status of a child of the founder entitled to benefit from the surplus revenue was the only legally recognised right of the testator before her death.

81. In the light of the foregoing, it must be held that the complaint relating to the right to property must be declared inadmissible for lack

of jurisdiction *ratione materiae*, since it has been understood that the applicants do not have an interest within the meaning of Article 35 of the Constitution.

g. Complaint concerning the Right to a Fair Trial

82. Under a separate heading, the applicants alleged that their right to a fair trial had also been violated. The judgment did not examine this complaint separately, pointing out that all the applicants' complaints had to be examined in the context of the prohibition of discrimination in conjunction with the right to property.

83. In relation to the allegation under Article 36 of the Constitution, the applicants made the following submissions: *"The Civil Court's decision that 'the claimants could not bring a claim in a case brought by their mother', in relation to the proceedings pursued by my clients following the death of their mother, violated the provision ... prescribed in Article 36 of the Constitution. ... In the present case, the decision to the effect that the clients could not pursue the case brought by the testator is contrary to the right to a fair trial enshrined in Article 36 of the Constitution."* According to the applicants, *"The claimants' testator brought the action to claim her rights arising from the Foundation. The testator's rights are not strictly personal rights. As a matter of fact, if the case were to be upheld, the testator would be entitled to the surplus revenue. The right to the surplus revenue is a right in relation to the assets. Therefore, the impugned rights were transferred to my clients through inheritance upon the death of the testator. In addition, since the testator's rights arising from the Foundation were transferred to the heirs on the basis of universal succession (külli halefiyet), the assessment of whether the clients are the descendants of the lineage entitled to benefit from the surplus revenue should be carried out in this context."*

84. In the present case, if it is accepted that the proceedings before the courts of instance and the scope of the individual application in question are limited to establishing the status of the claimant testator as a child of the founder entitled to benefit from the surplus revenue, the complaint concerning the right to a fair trial must be declared inadmissible for lack of jurisdiction *ratione materiae*. In addition, as explained under the relevant headings above, the applicants have no legal interest in establishing the status of the testator as a child of the founder entitled to benefit from the

surplus revenue. Accordingly, this case, which does not explicitly concern an alleged criminal offence, does not appear to affect any civil rights or obligations of the heirs, including the applicants.

85. In the present case, if it is accepted that the proceedings before the courts of instance and the scope of the individual application in question are limited to establishing the applicants' status as descendants of the founder entitled to benefit from the surplus revenue, the complaint concerning the right to a fair trial must be declared inadmissible for being manifestly ill-founded. The applicants' complaints can be assessed in relation to the right of access to a court under the right to a fair trial. The Civil Court ruled that the applicants' claim to establish their own status as descendants of the founder and entitled to benefit from the surplus revenue should not be brought in a case initiated by another party (their mother), but in a separate case brought by themselves. The right of access to a court gives individuals the guarantee that they will be able to bring their complaint before the national court for a decision on the merits. It does not allow individuals to submit their own disputes in the context of a case brought by another individual. As a matter of fact, the applicants already have the right to request a judicial assessment of the merits of their claim to establish their status as descendants of the founder entitled to benefit from the surplus revenue. In the present case, the applicants have also brought a separate action. Accordingly, there has been no interference with the applicants' right of access to a court.

B. MERITS

86. A number of observations must be made before conducting an assessment of the merits.

87. In accordance with the judgment of the majority and the reasons set out above, I consider that the assessment of the merits (even though I do not agree with it) must be based on the assumption that the proceedings before the Civil Court in the present case and the scope of the individual application are limited to establishing the status of the applicants' testator as a child of the founder entitled to benefit from the surplus revenue.

88. As a matter of fact, there are ongoing proceedings to establish the applicants' status as descendants of the founder entitled to benefit from

the surplus revenue, and there is no *de facto* obstacle to fulfilling the requirement to exhaust all legal remedies. In fact, the judgment contained a limited assessment of the merits of the request to establish the testator's status as a child of the founder entitled to benefit from the surplus revenue.[3]

89. Furthermore, there is a difference between the applicants' claims before the courts of instance and the claims submitted to the Court under the right to property. In their individual application, the applicants acknowledged the existence of a condition discriminating between daughters and sons in the deed of foundation and alleged that this condition was contrary to Article 10 of the Constitution and should therefore be declared null and void.

90. In my opinion, a limited examination has been conducted as to whether the condition discriminating between daughters and sons in the deed of foundation is contrary to Article 35 of the Constitution read in conjunction with Article 10 of the Constitution.

91. In the judgment, the following assessment has been made:

85. At the outset, it must be emphasised that the impugned legal dispute does not concern the law of succession. The assets bequeathed by the founder to the Foundation established by the deed of foundation dated 18 January 1722 became the property of the Foundation. In accordance with the repealed Law no. 864, it was recognised that the assets mentioned in the deed of foundation were the property of the Foundation. Therefore, it is not the Court's duty to assess whether the founder's will (intention) to establish the Foundation dated 18 January 1722 is in conformity with the 1982 Constitution. The impugned dispute concerns the distribution of the Foundation's surplus revenue. The Court must therefore examine whether the procedure for the distribution of the surplus revenue complies with Articles 10 and 35 of the 1982 Constitution.

92. In the judgment, it has been stated at the outset that part of the assets were transferred the Foundation by the founder's will during the Ottoman period and that this matter was subsequently recognised by laws

3 Irrespective of the argument to be accepted as to the scope, however, I maintain my arguments on the above grounds of inadmissibility. Ignoring these grounds of inadmissibility would affect the principles and statutory regulations of the law of foundations. In other words, an assessment of the merits would have a significant impact on the law of foundations.

during the Republican period, and it has been concluded with the word "therefore" -in other words, referring to the previous findings as the basis for the said conclusion- that *"it is not the Court's duty to assess whether the founder's will (intention) to establish the Foundation dated 18 January 1722 is in conformity with the 1982 Constitution"*. According to this conclusion, it is not the Court's duty to examine the constitutionality of "*the founder's will to establish a foundation*." Subsequently, the judgment has distinguished between "*the will to establish a foundation*" and "*the manner of distributing the surplus revenue*" and concluded that the latter could be subject to a constitutionality review. This gives rise to the following problems.

93. Defining the subject matter of the individual application as "the procedure for the distribution of the surplus revenue" could lead to misunderstandings. The procedure for the distribution of the surplus revenue is determined by the provisions of the foundation deed drafted by the founder's will. In other words, this procedure is formulated by the founder's will. Unlike the claims in the proceedings before the courts of instance, the subject matter of the application does not concern the misinterpretation of the condition in the deed of foundation and its application within the scope of that interpretation in such a way as to create discrimination between daughters and sons. The subject matter concerns the allegation that the condition in the deed of foundation, formulated by the founder's will and determining "the procedure for the distribution of the surplus revenue", which discriminates between daughters and sons, falls foul of the Constitution. In their application form and in their counter-statements against the Ministry's observations, the applicants explicitly stated that the said condition in the deed of foundation was contrary to the Constitution. Indeed, it has been accepted that the discrimination in question arises from the condition in the deed of foundation by the following statement: *"86. The request of the applicants' testator to benefit from the surplus revenue was rejected on the basis of the Foundation's deed of foundation. In the said deed of foundation, the possibility for daughters to benefit from the surplus revenue is conditional on the absence of sons of the founder. According to this document, as long as the founder has male children (descendants) from the same lineage, daughters cannot benefit from the surplus revenue."*

94. In such a situation, the judgment apparently takes the view that, although it is not the Court's duty to examine the constitutionality of "the founder's will to establish a foundation", it is incumbent upon the Court to carry out a constitutionality review of "the founder's will to determine the conditions in the deed of foundation (the question of who can benefit from the Foundation in the present case)".

95. Such an opinion makes a clear distinction between the founder's will to establish a foundation and the founder's will to determine the conditions in the deed of foundation. However, it is not possible to make such a distinction.

96. According to the Court's decisions no. E.1969/35, K.1969/70 of 4 December 1969 and no. E.2013/70, K.2013/166 of 26 December 2013, a foundation is a social and charitable institution that has its roots in Islamic law and depends on the will of the founder. The foundation means that the benefits of a property are reserved for the public good, abolishing private ownership of it and prohibiting its transfer and appropriation, in order to be allocated to social and cultural services.

97. According to Article 101 of the Turkish Civil Code no. 4721 of 22 November 2001, newly established foundations are *"property communities with legal personality formed by natural or legal persons by reserving sufficient property and rights for a specific and permanent purpose"*. As stated in the judgment of the Court of Cassation (see the judgment of the General Assembly of Civil Chambers of the Court of Cassation no. E.2007/18-293, K.2007/310, 30 May 2007), the Ottoman law defines the old foundation as *"removing a property from ownership and allocating its benefits to a charitable purpose forever under certain conditions"*.

98. Thus, contrary to the misleading wording of the judgment, the will to establish a foundation does not only imply the transfer of a property or a right from the founder's assets to the foundation's assets, but, more importantly, it implies the reservation of the property for a specific purpose and, in the sense of the previous statutory provisions, the allocation of the property for a charitable purpose. This reservation or allocation for charitable purposes includes the determination of the conditions of the foundations, such as the charitable acts for which the property is

transferred to the foundation or the purposes for which its income is to be used or spent, and thus the beneficiaries of the foundation. Even the old types of foundations (*hayri*, *zürri* and *avarız* foundations) were categorised according to the conditions regarding the beneficiaries of the foundation.

99. Furthermore, the establishment of a foundation is a unilateral legal act. The founder's will -with regard to foundations established during his lifetime- is embodied in the foundation deed for new foundations and in the legal constituent document (deed of foundation) for old foundations. Accordingly, Article 102 of Code no. 4721 provides that "the will (intention) to establish a foundation shall be declared ... by means of an official deed [foundation deed]". Article 106 of the same Law states that "the foundation deed shall contain the name of the foundation, its purpose, the property and rights reserved for this purpose, the manner of its organisation and management and its domicile". With regard to previously established foundations, Article 3 of Law no. 5737 stipulates that the deed of foundation refers to "the documents containing the assets of fused (*mazbut*), annexed (*mülhak*) and merchants' (*cemaat*) foundations, the conditions of the foundation and the wishes of the founder". The above provisions show that the will of the founder to establish a foundation and the will of the founder to determine the conditions in the deed of foundation cannot be separated from each other.

100. After it is accepted that there is no difference between "the will of the founder to establish a foundation" and "the will of the founder to determine the conditions in the deed of foundation" and that the two cannot be distinguished from each other, the opinion in the judgment should be reviewed.

101. In the judgment, the reason for the conclusion that it is not the Court's duty to review the constitutionality of "the will of the founder ... to establish a foundation" is the fact that, under the previous law, part of the assets were transferred to the Foundation's assets by the founder's will and that this matter, which was regulated by the law at the time, was already recognised by law in the Republican period. The same reasons apply to "the will of the founder to determine the conditions of the foundation". In this respect, the conditions of the foundation were determined by the

will of the founder in the law of the time and these conditions were later recognised by the laws enacted during the Republican period. In addition, the relevant legislation also provided for specific provisions regarding surplus revenue.

102. Nevertheless, the assessments in the judgment give the impression that the fact that the public authorities discriminated in the present case was accepted and that the examination of the merits was based on this acceptance. This point is important because it concerns the determination of the State's obligation in the present case as negative or positive. The State's obligations arising from private law relations between third parties are different from those arising from interference by public authorities with the rights of individuals.

103. The following assessments have been made in the judgment: *"87. … it is understandable that the public authorities pursue the aim of respecting the founder's will."*; *"89. ... Accordingly, the requests for the distribution of the surplus revenue of a foundation established during the Ottoman period cannot be rejected by the public authorities on the grounds of legal security."*; *"91. Furthermore, in cases involving differences of treatment based on sex, the margin of appreciation of the public authorities should be restricted. Having regard to the circumstances of the present case, the Court has concluded that the public authorities exceeded their margin of appreciation in their duty to balance the needs of society by allowing a difference of treatment based on sex."*

104. In my opinion, the discrimination between daughters and sons in the present case does not arise from the "public authorities ... exceeding their margin of appreciation". This discrimination arises from the will of the founder (contained in the deed of foundation), which was applicable under the Ottoman law. This will was also recognised by the laws enacted during the Republican period. The relevant laws entrusted the Directorate General of Foundations with the administration of the fused foundations. As indicated in the Court's previous judgments, this matter did not lead to any change in the legal status of the foundations. The relevant legislation maintains the same conditions for foundations, in particular the conditions relating to surplus revenue. Furthermore, refusal to comply with the conditions of the deed of foundation is mentioned as a ground

for dismissal of the administrators. Therefore, the laws do not grant any margin of appreciation to the public authorities, including the courts, in the application of the conditions of the deed of foundation. The public authorities can only have a margin of appreciation in interpreting the conditions (terms) of the foundation deed, in other words, in revealing what the founder's will is. However, unlike the proceedings before the courts of instance, in the present application there is no dispute as to whether there is a condition that discriminates between daughters and sons and as to how the relevant condition should be interpreted. The applicants, while filing an individual application, accept the existence of the impugned condition but argue that the condition is unconstitutional and should therefore be declared null and void.

105. The act of establishing a foundation is a unilateral act of private law. The beneficiaries do not benefit from the foundation by virtue of a certain power granted to the public authorities and the use of this discretionary power (margin of appreciation) in this matter, but within the framework of the founder's will, which is based on private law. Moreover, foundations, including those previously established, have the status of legal persons under private law. The fact that the Directorate General of Foundations has been entrusted with the administration of the fused foundations does not change the situation.

106. As stated in the judgments of the Court (see *Emine Görgülü*, no. 2014/5871, 6 July 2017, § 42), "*This distinctive tutelage relationship does not cause a change in the legal status of the fused foundations*." The relationship between the beneficiaries, who fulfil the conditions established unilaterally by the founder's will through a private-law act, and the foundation as a private-law legal entity is a private-law relationship.

107. Accordingly, the request of the applicants, who wish to benefit from the surplus revenue of the Foundation, which has the status of a legal person under private law, to have one of the legal acts created unilaterally by the founder within the framework of a relationship under private law declared null and void on the ground that it does not comply with the Constitution, does not relate to a dispute between public institutions and private persons, but indicates a dispute between private persons.

The present application must therefore be examined in the context of the positive obligations of the State. It should be recalled that the applicants have also referred to the positive obligations of the State. As a matter of fact, in a judgment on the right to property, the Court stated that *"... there is no direct interference by the public authorities with the applicant's right to property. Moreover, in its numerous previous judgments, the Court has acknowledged that in some cases the State may have positive obligations in disputes between private persons (see Türkiye Emekliler Derneği, no. 2012/1035, 17 July 2014, § 34; Eyyüp Boynukara, no. 2013/7842, 17 February 2016, §§ 39-41; Osmanoğlu İnşaat Eğitim Gıda Temizlik Hizmetleri A.Ş., no. 2014/8649, 15 February 2017, § 44; Selahattin Turan, no. 2014/11410, 22 June 2017, §§ 36-41)".* In this judgment, the Court, referring to its previous case-law, also assessed the disputes between private persons within the scope of the positive obligations of the State (see *Şeyhmus Terece* [Plenary], no. 2017/26532, 23 July 2020, §§ 37 *et seq*.).

108. In accordance with my findings, and given that the dispute in the present case concerns a relationship between private persons and that there is no direct interference by public authorities, the accuracy of the following paragraph of the judgment, which refers to the public interest, would be debatable: *"89. It has been considered that the purposes of respecting the founder's will and ensuring legal security do not correspond to the best interest of the public to the extent that they justify the non-allocation of a share of the surplus of revenue to the daughters.* Private parties are not obliged to take the public interest into account when imposing a condition.

109. In the *Şeyhmus Terece* case, the Court referred to its previous case-law on the positive obligations of the State in the context of the right to property and stated the following relevant principles in this respect:

"38. The effective and practical protection of the right to property, safeguarded as a fundamental right under Article 35 of the Constitution, requires the adoption of certain measures to protect the right to property in cases, including disputes between private persons, within the framework of positive obligations under Articles 5 and 35 of the Constitution, in addition to the absence of interference by the State (see Eyyüp Boynukara, §§ 39-41; Osmanoğlu İnşaat Eğitim Gıda Temizlik Hizmetleri A.Ş., § 44).

39. Disputes between private persons involve the conflicting interests of the parties. It is therefore necessary to determine whether the State, which is obliged to protect the right to property, has complied with the substantive and procedural safeguards, taking into account the conflicting interests of individuals. In this respect, it must first be determined whether a specific, accessible and foreseeable provision concerning the State's obligation to establish an effective mechanism is in place (see Novartis Ag, no. 2015/11867, 14 November 2018, § 76; Nobel İlaç Pazarlama ve Sanayii Ltd. Şti., no. 2016/4887, 3 July 2019, § 61)."

110. In another judgment, the Court assessed the State's positive obligation in relation to the right to property as follows (see *Cengiz İnş. San. ve Tic. A.Ş. ve Mirax Tur. İnş. Tic. A.Ş.* [Plenary], no. 2015/7846, 26 June 2019):

"The positive obligations of the State include the establishment of an effective legal framework, including judicial remedies, providing procedural safeguards against interference with the right to property and ensuring that judicial and administrative authorities can effectively and fairly adjudicate on disputes between private persons within the scope of that legal framework (see Selahattin Turan, no. 2014/11410, 22 June 2017, § 41)."

111. Accordingly, it has been understood that in the context of the right to property, the State has an obligation to establish an effective legal framework, including judicial remedies, which provides procedural safeguards against interference with the right to property, and to ensure that judicial and administrative authorities can decide effectively and fairly.[4]

112. The subject matter of the application is that the conditions in the deed of foundation differentiate between daughters and sons. Since this differentiation was caused by a private person, the State's obligation to create mechanisms may -if necessary- prohibit the inclusion of such conditions in the legal procedure for the establishment of a foundation, and if such conditions have already been included, the State may consider these conditions as null and void. Article 101 of Code no. 4721 contains

4 Although the State may have other obligations in addition to the obligation to protect under its positive obligations, the present case does not involve an issue relating to the obligation to protect.

such a provision for newly established foundations: *"No foundation shall be established in contrary to the characteristics of the Republic as set forth in the Constitution, the fundamental principles of the Constitution, the rule of law, morality, national unity and national interests, or with the aim of supporting a particular race or members of the community."* Nevertheless, there is no such provision for previously established foundations, with the exception of the provision in Article 6 of Law no. 5737, which stipulates that *"annexed (mülhak) foundations shall be administered and represented by the administrators appointed by the Council of Foundations in accordance with the conditions (terms) of the deed of foundation which do not conflict with the Constitution."*[5] On the contrary, the conditions of the deed of foundation were maintained for old foundations. Article 75 of Law no. 5737 states: "All the rights of the persons concerned shall be reserved pursuant to the conditions of the deed of foundation of the fused (*mazbut*) and annexed (*mülhak*) foundations", and **there has been no provision that these conditions should not be applied, if they were contrary to the Constitution.**

113. Furthermore, Article 33 of the Constitution regulates the right to freedom of association (freedom of organisation) as a fundamental right and freedom, stating that *"freedom of association may be restricted only by law ... / The formalities, conditions and procedures to be applied in the exercise of freedom of association shall be prescribed by law."* The final paragraph of the same article states: "*The provisions of this article shall also apply to foundations*." Similarly, Article 13 of the Constitution stipulates that *"fundamental rights and freedoms may be restricted only by law..."*

114. To consider a condition that reflects the will of the founder as invalid, in other words to declare it "null and void", as the applicants put it, would undoubtedly constitute an interference with the freedom of organisation. Moreover, changing the condition established by the founder would also affect the property rights of the other persons who have already benefited from the surplus revenue of the foundation, by reducing the amount received. In fact, this matter increases the number of persons entitled to the surplus revenue of the same lineage and reduces the amount of the share obtained from the surplus revenue. In this respect,

5 It has been argued under the relevant heading that this provision does not apply to the condition in the present case.

it constitutes an interference with the right to property of the said persons. Therefore, in order for there to be an interference with fundamental rights and freedoms, there must be a clear statutory provision authorising it. In the absence of such a provision, the courts of instance and administrative courts cannot consider a condition in the deed of foundation to be null and void and refuse to apply that condition on the basis of their power of interpretation, even though the law provides that the conditions in the deed of foundation shall be applied. Therefore, if there were a constitutional issue at stake in the present case, it would concern the positive obligation of the State to establish an effective legal mechanism.

115. In the absence of such a legal mechanism in the present case, there is no positive obligation to ensure that judicial and administrative authorities can reach a decision effectively and fairly.

116. This issue is important because it affects the review of constitutionality conducted by our Court. This is because, in my opinion, it determines which authority is the addressee in fulfilling the requirements of the judgment finding a violation.

117. In order to determine whether there is a constitutional violation in the present case with regard to the positive obligation of the State to establish a legal mechanism, the following question should first be asked and then answered: "Is the legislator obliged to create statutory regulations to ensure that private statutory (legal) acts are in conformity with fundamental rights and freedoms and, if so, whether these acts include the establishment of a foundation?"

118. The answer to this question will be affirmative in some cases concerning foundations to be established by acts that have not yet been implemented or are yet to be implemented. As a matter of fact, as explained above, with regard to newly established foundations, the relevant provision of Code no. 4721 prohibits the establishment of a foundation that is contrary to the fundamental principles of the Constitution. However, the present case does not concern a request to declare null and void a condition of the foundation, which is planned to be established under the new legal order.

119. Accordingly, the main question to be asked and answered in the present case is the following: Is the legislator obliged to draft a statutory regulation to amend and/or annul the terms of the old foundations on the grounds of non-compliance with the fundamental rights and freedoms safeguarded by the Constitution, which came into force at a later date? It is not easy to answer this question.

120. In the first place, the nullification of private law relationships established under the old legal order, taking into account the new legal order, could lead to a difficult, and in some cases even impossible, disruption of interpersonal relations in general. For this reason, there is undoubtedly a public interest, which concerns society in general, in maintaining in the new legal order the private law relationships established under the old legal order, even if the said relationship is contrary to the new legal order.

121. Secondly, there is no problem of certainty and foreseeability with regard to the statutory provisions stating that foundations to be established in the new period should comply with the principles of the Constitution. This problem only arises in the case of old foundations. In fact, these foundations were established by an act of private law at a time when the Constitution and laws had not yet been enacted in accordance with Ottoman law, and their conditions were determined in accordance with the law in force at that time.

122. Thirdly, the nullification of a condition in the foundation deed due to its non-compliance with the Constitution may, depending on the nature of the condition, prevent other persons who benefit from the foundation on the basis of that condition from exercising that right or may reduce the right already exercised. In this respect, it constitutes an interference with the right to property of the persons concerned.

123. However, in some cases, the maintenance and application of a condition established under the old legal order (and which entered into force at a later date) and understood to be contrary to the Constitution (even in the era of the new Constitution) may undermine to an intolerable extent the fundamental rights and freedoms of some persons guaranteed by the new Constitution.

124. In practice, where the legal system has undergone fundamental changes and a new state is established to replace the old one, as in the present case, private law relationships created in the old legal system are usually preserved as a rule in the new legal system.

125. For instance, Article 1 of the repealed Law no. 864 on the Enforcement and Procedural Application of the Civil Code (*Kanunu Medeninin Sureti Mer'iyet ve Şekli Tatbiki Kanunu*) of 29 May 1926 generally stated that the acts and their consequences that were performed when the old legal system was in force would continue to be subject to the conditions of the old legal system in the new era. Moreover, Article 8 of this Law, titled "Foundations and Facilities Established Before the Civil Code", states: *"A separate implementing law shall be published for foundations established before the entry into force of the Civil Code. Foundations established after the entry into force of the Civil Code shall be subject to the provisions of the Civil Code."* According to this Law, it was considered inappropriate for foundations established before 4 October 1926, when Law no. 743 entered into force, to be subject to the provisions of the new law and it was indicated that separate statutory regulations would be drafted for the old foundations. Accordingly, Law no. 2762 of 5 June 1935 on Foundations entered into force. The legislator who drafted Law no. 2762 respected the will of the founders of the old foundations and their freedom of contract, did not change the status of the old foundations and the legal relationships arising from the foundation when drafting the regulations on the old foundations, and preferred to preserve the legal status of the foundations established before 4 October 1926 as the same. In Article 8 of Law no. 4722 on the Enforcement and Procedural Application of the Turkish Civil Code no. 4721, the legal status of foundations established before 4 October 1926 was maintained as the same. This matter is still preserved in Law no. 5737 on Foundations.

126. Marriages and divorces concluded on the basis of the old legal system (Article 9) and contracts for the administration of the spouses' property (Article 11) in accordance with the repealed Law no. 864 of 29 May 1926 on the Enforcement and Procedural Application of the Civil Code (*Kanunu Medeninin Sureti Mer'iyet ve Şekli Tatbiki Kanunu*) shall also be valid in the new legal system. Similarly, Article 16 of the same Law

provides that the succession of a person who dies while the old legal system is in force shall be governed by the conditions of the old system, even when the new system is in force; Article 17 provides that the acts dependent on death or the annulment of such acts shall be governed by the old system; and Article 18 provides that rights *in rem* granted under the old system shall be preserved.

127. In fact, these regulations validated the legal relationships established under the old legal system, which were contrary to the principles of the new legal system, by disregarding the matters of the new legal system, which established the system of private law, most of which are directly related to constitutional principles, such as marriage and divorce, monogamy, equality between women and men in marriage, equality between women and men in inheritance matters. In addition, these regulations also maintained the application of the old legal system in certain matters in the era of the new legal system.

128. Assessments of the legal status of the old foundations were included in the decisions of the Court (see the Court's judgments no. E.1969/35, K.1969/70, 4 December 1969; no. E.1967/47, K.1969/9, 30 January 1969 and no. E.2013/70, K.2013/166, 26 December 2013), decision of the General Assembly of Civil Chambers of the Court of Cassation on the Harmonisation of Case-Law (see decision no. E.1935/78, K.1935/6, 26 May 1935), decision of the General Assembly of Civil Chambers of the Court of Cassation (see decision no. E.2007/18-293, K.2007/310, 30 May 2007), and decision of the Board of Administrative Case Chambers of the Council of State (see decision no. E.2018/142, K.2019/3130, 19 June 2019). In view of the reasons given in the decisions on the matter at issue, the validity of the above-mentioned finding is reaffirmed.

129. In these circumstances, the judgment in the present case would not affect the distribution of the surplus revenue, but it will be a judgment that has the potential to affect all these issues in theory.[6]

6 For instance, the inheritance of a person who died during the Ottoman period could still be the subject of a dispute and the provisions of Islamic inheritance law could still be applied to the situation. In fact, as it was stated in the decision of the Court of Cassation (see, *inter alia*, decision no. E.2007/11462, K.2007/11554 of 19 July 2007 of the 2nd Civil Chamber of the Court of Cassation), *"the inheritance of a person who died before the entry into force of the Turkish Civil Code should be subject to the conditions of the old legal system. In this case, the purparty should be determined on the basis of inheritance and succession rules of Islamic law in force at the time of death"*.

130. In this context, taking into account the issue of uncertainty/unforeseeability of the parties to the said act and the protection of the rights of the parties to the act or third parties affected by the act, as well as the public interest, the following can be observed: As a general rule, the refusal to interfere with the private law acts adopted on the basis of the old legal system and the refusal to annul the application of the provisions of the said act that are contrary to the provisions of the new legal system is at the discretion of the legislator and may be a requirement for the protection of the fundamental rights and freedoms of the persons concerned. Nevertheless, compliance with legal acts adopted on the basis of the old legal system may adversely affect the fundamental rights and freedoms of individuals under the new legal system to such an extent that it may be necessary to disregard the fundamental rights and freedoms of others. This matter should be determined by taking into account the specificities of each case.

131. Accordingly, the issue to be resolved in the present case is whether the lack of intervention by the legislator in the new legal system to annul the conditions of the deed of foundation drawn up during the period of the old legal order on the basis of the provisions of that order (the legal validity of which is not disputed), and which constituted a differentiation between daughters and sons as regards the entitlement to benefit from the surplus revenue, results in an intolerable burden for the applicants and other persons in a similar situation.

132. The Ottoman law defines the concept of foundation as "the removal of property from ownership and the perpetual allocation of its interests to a charitable purpose under certain conditions". In this respect, the old foundations, including the present one, were established for charitable purposes. The establishment of these foundations, which are based on the understanding of "*sadaka-i câriye*" (continuous flow of charity/good deeds), is necessary to achieve the order of God (*kurbet kastı*), that is, to get close to God. Although there are different opinions as to whether *zürri* foundations, which were established to ensure that the descendants of the founder would benefit from an asset or its profit, have the purpose of achieving the order of God, the general opinion in Ottoman law recognised

this type of foundation as legally permissible and the practice developed accordingly.

133. According to the same law (Ottoman law), this type of foundation is valid, provided that the other conditions for the establishment of a foundation are also met, unless it is established that there is no subjective intention to achieve God's order (a subjective aspect related to the inner world of the founder), in other words, it is established that such foundations are established in bad faith in order to find a way around the provisions of the law of succession in order to avoid a possible confiscation by using the inviolability of the foundation's property. Like any other act, the act of establishing a foundation is presumed to be lawful until the contrary is proven.

134. The practice in the previous period reveals that the founders could determine the beneficiaries of the charity, in other words the individuals who were to benefit from the foundations; they could also determine the beneficiaries of the charity as the whole society, certain groups of people such as the poor and students, or certain individuals by naming them. In practice, the founders of the *zürri* foundations can designate the persons of their lineage (generation) as beneficiaries of the charity. Therefore, the right of descendants to benefit from the surplus revenue of these *zürri* foundations does not derive from their right of inheritance, which is recognised by all legal systems, but from the will of the founder to designate the persons of his/her lineage (generation) as beneficiaries of the charity. These are the people who benefit from the founder's allocation to charity of assets that are fully within the founder's legal power of disposition. In other words, these people are the beneficiaries of the charity. Otherwise, these people have no claim arising from inheritance rights or other rights against the founder.

135. In the case of the Foundation in the present case, according to the two family trees relied on in other proceedings concerning the same Foundation, which were included in the case file of the Civil Court, it has been observed that the founders of the Foundation were two siblings, one of whom, Hacı Ebubekir, died without any children, while İbrahim Baş had two daughters and no sons. In this case, there is no factual evidence to

suggest that these persons drafted the conditions in the deed of foundation with the intention of hiding property from their daughters. In these circumstances, in accordance with the explanations given in paras. 132, 133 and 134, it has been concluded in the present case that the founders legitimately established the said *zürri* foundation under the old law for the purpose of *"getting close to God through charity to their descendants"* and determined the beneficiaries of the charity.

136. In the light of the foregoing, it has been concluded that the difference in treatment between daughters and sons as regards the entitlement to the surplus revenue is due to the fact that the founders designated only sons as beneficiaries of the Foundation and did not intend to deprive their daughters of their property. In addition, it cannot be said that the conditions in the foundation deed which give rise to the said difference in treatment as regards entitlement to the surplus revenue and the refusal to annul the condition in question through the intervention of the legislator in the new legal system do not lead to a problem of uncertainty and unforeseeability and create an intolerable burden for the persons concerned, weighed against the interest in protecting the parties to the act and third parties affected by the act.

137. Furthermore, the attitude adopted by the public authorities in the impugned act and decisions, which are the subject of the present case, was merely to implement the founder's will, and the public authorities did not discriminate on the basis of sex in this respect. Therefore, the principle of equality with regard to the applicants' right to property was not violated.

138. For the reasons set out above, I dissent from the judgment of the majority which finds a violation, because it should have been held that there was no violation of the prohibition of discrimination guaranteed by Article 10 of the Constitution in conjunction with the right to property regulated by Article 35 of the Constitution.

139. Moreover, the majority's finding of a violation on the grounds that the public authorities had exceeded their margin of appreciation (discretion), instead of relying on the absence of statutory provisions, and its decision to hold a retrial instead of calling on the legislative bodies, force the courts of instance to interfere with fundamental rights and freedoms

(the freedom of organisation of the Foundation and the right to property of the founder's descendants, who are entitled to the available surplus revenue) without a clear statutory provision (despite the existence of clear statutory provisions to the contrary). In other words, this judgment of the Court forces the trial courts to decide on the merits of the case, contrary to the clear provision of Article 13 of the Constitution, which states that *"fundamental rights and freedoms ... may be restricted only by law"*. For this reason, I also dissent from the Court's decision to hold a retrial to redress the violation.

DISSENTING OPINION OF JUSTICES İRFAN FİDAN AND MUHTEREM İNCE

1. In the present application, which was filed on the basis of the complaint that the female descendants of the founder could not benefit from the surplus revenue of the fused foundation, the majority of the Court held that the application, which was based on the alleged violation of the prohibition of discrimination guaranteed by Article 10 of the Constitution in conjunction with the right to property regulated by Article 35 of the Constitution, should be declared admissible. Since we consider that the legal remedies in the present case have not been exhausted, we could not agree with the decision on admissibility for the reasons set out below.

2. The impugned action referred to in the present case was brought by Z.Y., the applicants' mother. According to the petition dated 25 September 2012, it was requested to establish that Z.Y. is a child of the "*zürri*" foundation named "El-Hac Ebubekir ve İbrahim Beşe bin Topal Mehmet Ağa Vakfı", known as "Burduroğlu İbrahim'in Menzili ve Dükkânları Vakfı", which was established by the foundation deed dated 18 January 1722, and that she is a child of the founder (the firstborn of the lineage (*batn-ı evvel evlad*) entitled to benefit from the surplus of revenue).

3. Z.Y. lost her life on 15 April 2013 while the case was still pending.

4. Subsequently, the female applicants, who are the heirs (inheritors) of Z.Y., and other male heirs (Y.Y. and B.Y.), through their lawyer, filed a petition dated 10 January 2014 to pursue the case. At the hearing on 7 March 2014, the Civil Court dismissed the action brought by the applicants.

5. In the dismissal decision, it was stated that, according to the circumstances of the case, the foundation deed and the relevant legislation, the claimant Z.Y. could not benefit from the surplus value, that the claimant's children could not pursue the action brought by the deceased claimant Z.Y., that they therefore could not submit such a request and that they could only request to benefit from the surplus revenue in a separate action filed by themselves.

6. In the judgment delivered by the majority, the following have been stated: The applicants informed the Court of their wish to pursue the action

brought by their testator after her death at the first instance stage, that wish was accepted by the Civil Court and a decision was delivered against the applicants, as a result of which the applicants became parties to the proceedings before the courts of instance; it must therefore be accepted that the applicants had an interest in filing an individual application concerning the decision against them; whereas, however, the subject matter and the legal consequences of the action brought by the applicants after the death of the testator to benefit from the surplus revenue were not the same as the subject matter and the legal consequences of the present case; the purpose of the present case was to determine whether the applicants' testator was entitled to the surplus revenue; the outcome of the present case in favour of the claimant (testator) would affect only the surplus revenue accrued before the testator's death, whereas the new action brought by the applicants would affect the surplus revenue accrued after the testator's death, it was not possible for the new action brought by the applicants to affect the period relating to the proceedings initiated by their testator and to bear legal consequences for the surplus revenue accrued during that period, so that the applicants had an interest in pursuing the present case in that respect and, accordingly, the applicants had the legal capacity in that respect.

7. From this reasoning in the decision on admissibility, which was based on the opinion of the majority, it could be inferred that the request submitted by the applicants to the Court in the course of the impugned proceedings relates to the determination of whether the applicants' testator was a child of the founder entitled to benefit from the surplus revenue. According to the judgment, the applicants brought a separate action in order to establish that they were descendants of the founder entitled to benefit from the surplus revenue.

8. Nevertheless, the applicants' request in the course of the proceedings which are the subject of the present application does not relate to the determination of the status of the claimant testator as a child of the founder, but to the determination that they are descendants of the founder who are entitled to benefit from the surplus revenue. At the very least, they request that this be established.

9. According to the documents in the case file, the petition filed with the Civil Court on 10 January 2014, following the death of the claimant testator, did not contain any request to establish that the claimant testator or the heirs were the children/descendants of the founder who were entitled to benefit from the surplus revenue. The minutes of the hearing of the lawyer of the heirs, including the applicants, did not contain any statement in this regard.

10. In the petition, the applicants simply stated that the claimant testator had died, that the persons whose names were mentioned in the list (including the applicants) remained as heirs, that they had submitted the certificate of inheritance and the power of attorney as heirs, and requested that the necessary procedures be carried out.

11. The last page of the petition of appeal submitted by the lawyer of the heirs, including the applicants, reads as follows: *"Zeliha Yahşi, the claimant of the appealed decision, lost her life during the investigations and after the death of the claimant, the heirs of the claimant requested ... to establish that they were the firstborn of the lineage (batn-ı evvel evlad) entitled to benefit from the surplus revenue of the Foundation."*

12. Although there is no statement as referred to in the request for rectification of the decision submitted upon the rejection of the appeal request, it was stated: *"2- THE HEIRS OF THE DECEASED ARE ENTITLED TO PURSUE THE CASE BROUGHT BY THE DECEASED ZELİHA YAHŞİ AND TO SUBMIT THEIR REQUESTS IN THIS CASE."*

13. In view of the statements made in both petitions, it is the overwhelming conclusion that the heirs, including the applicants, sought to establish their status as descendants of the founder entitled to benefit from the surplus revenue, instead of requesting to pursue the proceedings initiated by the claimant testator.

14. As a matter of fact, the statement in the reasoned decision that *"the children of the deceased claimant could only request to benefit from the surplus revenue in a separate case initiated by themselves and this cannot be requested in the case initiated by their mother..."* indicates that the Civil Court also specifically assessed the said request as a request made in the interest of the heirs, including the applicants.

15. Therefore, it has been understood that the applicants did not seek to establish the status of claimant testator, but their own status as descendants of the founder entitled to benefit from the surplus revenue.

16. In addition, each applicant filed a separate application, which was later joined. Under the heading "B. The rights allegedly violated within the framework of the individual application and the reasons for the violation, and substantial explanations pertaining to the relevant grounds and evidence" of the individual application forms, the applicants referred, under various headings, to procedures that violated Article 10 of the Constitution, as well as to acts that violated Article 13, 35 and 36 of the Constitution.

17. Under the heading "B. The rights allegedly violated within the framework of the individual application and the reasons for the violation, and substantial explanations pertaining to the relevant grounds and evidence", the Court was requested to ***"establish that the claimants were descendants of the lineage entitled to benefit from the surplus revenue"***. It was also pointed out that ***"the decision of the Civil Court dismissing the female claimants' request on the basis of the provision in the deed of foundation that 'only sons could benefit from the surplus revenue' contradicts the provision ... in Article 10 of the Constitution of the Republic of Türkiye."***

18. According to the above statements, it has been understood that the applicants were requesting the establishment of their own status -not that of their testator- as descendants of the founder entitled to benefit from the surplus revenue. The phrase "clients" did not refer to an individual person and this phrase clearly referred to the applicants, considering that the claimant testator could not be a client in the individual application form due to her death.

19. The applicants alleged that the dismissal of their request on the basis of the discriminatory condition (requirement) between daughters and sons laid down in the Foundation's deed of foundation was contrary to the principle of equality. According to the applicants, the freedom of contract and the freedom of will (it being understood that, in the present case, the freedom of will refers to the founder's freedom of will) are

restricted by the binding statutory provisions. The impugned condition in the deed of foundation fell foul of the binding statutory provision of Article 10 of the Constitution and, in this context, the binding provision must be implemented instead of the condition in the deed of foundation.

20. The applicants also argued that the condition in the deed of foundation, which was contrary to the principle of equality, was also contrary to Article 13 of the Constitution, which provides that fundamental rights and freedoms may be restricted only on the grounds specified in the Constitution, and that this condition should therefore be declared null and void.

21. Other grounds put forward by the applicants are as follows: The condition in the deed of foundation that the daughters could not benefit from the surplus revenue in case of the existence of a son violates their right to property and "right of inheritance." In fact, in order to protect the right of inheritance, certain restrictions were placed on the arbitrary acts of the testator, and the heirs were granted the right to a reserved portion. Moreover, within the framework of the right to property, in addition to negative obligations, States have positive obligations to protect the rights against the interference of third parties (it has been understood that the third party in this case refers to the founder).

22. In their submissions, under Articles 10 and 35 of the Constitution, the applicants, unlike those under the next heading, have not invoked the inheritance relationship between the testator and themselves and have not referred to the testator's assets and therefore to the refusal to award the claim over the assets subject to inheritance (*tereke*). Instead, they have relied on the inheritance relationship between the founder and themselves, strongly implying and even clearly stating that the founder, who is the original testator, prejudiced the reserved right of the female heirs, including themselves, contrary to the principle of equality.

23. In the submissions relating to the violation of Article 36 of the Constitution in the application form, it has been understood that the applicants, although relying on the relationship of inheritance between the claimant testator and themselves, were seeking a determination that they were descendants of the founder entitled to benefit from the surplus

revenue, rather than a determination of the status of their testator. The phrase "clients" does not refer to an individual person and this phrase clearly refers to the applicants, considering that the claimant testator could not be a client in the individual application form due to her death.

24. In the judgment, the following statements were included in relation to the exhaustion of ordinary legal remedies:

"56. In the present case, the applicants notified the Civil Court, by a petition dated 14 January 2014, of their wish to pursue the case initiated by their testator. The Civil Court accepted the applicants' request to pursue the case and issued a decision against the applicants. It must be stressed that the Civil Court did not dismiss the case on the basis of the applicants' lack of capacity to pursue the case -due to the absence of a cause of action. Although the decision stated that the children of the deceased could not claim to benefit from the surplus revenue in an action brought by their mother, but would have to file a separate action to make such a claim, it has been observed that the Civil Court rendered a decision on merits. In fact, it has been understood that the Civil Court referred to the Foundation's deed of foundation and indicated that, due to the existence of sons, the daughters could not benefit from the surplus revenue. Therefore, given the Civil Court rendered a decision on the merits and did not dismiss the case for lack of capacity to pursue the case, it is not possible to conclude that the ordinary legal remedies have not been exhausted."

25. According to the established practice of the Court of Cassation, the action for the determination of the descendant of the founder and the declaration that the descendant of the founder is entitled to benefit from the surplus revenue is bound to individuals. In this type of proceedings, if the person who originally brought the action loses his/her life, the heirs cannot pursue the said case and they must bring a separate action to assert their own right (see the decision of the 8th Civil Chamber of the Court of Cassation, no. E.2020/715, K.2021/4025, 4 May 2021). On the relevant date, the applicants could have foreseen and known the said matter. This matter was also highlighted in the judgment of the Court in the case of *Bensan Aktaş and Others* (no. 2015/7288, 29 November 2018). The subject matter in the mentioned judgment concerns a *zürri* foundation for which a lineage order had to be determined. The applicants brought an action of

debt for the payment of the surplus revenue of the impugned foundation, which was classified as a fused foundation. However, this request was dismissed by the instance courts on the grounds that there was no judicial decision establishing that the applicants were descendants of the founder and entitled to the surplus revenue. The applicants filed an individual application with the Court, claiming that their right to property had been violated. As a result, the Court declared the application inadmissible for failure to exhaust available legal remedies.

26. Although the judgment referred to concerns the action brought for the surplus revenue, the following points are also relevant to the present case: The Court has considered that an action could not be brought solely on the basis of the status of heir and that it was neither arbitrary nor unforeseeable to request the applicants, as a prerequisite, to bring actions to establish that they were descendants of the founder before filing such an application, and the Court has required the applicants to exhaust the available legal remedies.

27. The following events occurred in the present case: The impugned case in the present application was brought by the applicants' testator during the course of the impugned case; the testator lost her life; the heirs, including the applicants, filed a petition to pursue the case; subsequently, in the first hearing, the defendant's lawyer stated that the heirs could not pursue the case, recalling the nature of the proceedings as explained above; the Civil Court adjourned the hearing solely to conduct an assessment of this issue; the parties presented their arguments on the issue in the first hearing held thereafter; and the Civil Court decided to dismiss the case in the same hearing. In the reasoned decision, it was indicated that the heirs could not assert claims in a case brought by their testator; the heirs, including the applicants, raised objections in their petitions for appeal and rectification of the decision that they should continue the case, in addition to the other objections regarding the appeal; the defendant's lawyer, in his reply to the petition for appeal stated that the other objections regarding the appeal could not be taken into consideration since the heirs could not pursue the case; and the Court of Cassation rejected the requests for appeal and rectification of the decision without providing any further explanation beyond the reasoning of the Civil Court.

28. Accordingly, contrary to the assessment in our Court's judgment, with which the majority agreed, it is not true that *"the Civil Court accepted the applicants' request to pursue the case"*. In the light of the assessment of the Court's reasoning, together with the above-mentioned process, it has been observed that, in the impugned case, the Civil Court did not carry out an assessment of the merits (in relation to all the heirs, including the applicants), but instead carried out an assessment of the merits in relation to the claimant testator (in fact, this is also considered to be a technical error) and rejected the applicants' request -without carrying out an assessment of the merits- on the grounds that they should have brought a separate action for their claims.

29. This assessment is also confirmed by the absence of separate reasons put forward by the Civil Court for the dismissal of the case in favour of the male heirs of the claimant testator and the absence of different assessments made in respect of daughters and sons.

30. If the Civil Court had accepted the heirs' wish to pursue the case and had ruled on the merits of their own case, the inclusion of the statement *"the heirs may request to benefit from the surplus revenue in an action they will bring in their own name"* would be meaningless. In this case, the Civil Court would accept the heirs' requests and assess the merits, and in this case, it would be contrary to this act of the Civil Court to request them to bring another action in their own name.

31. In these circumstances, it is not possible to agree with the statement in the Court's judgment that *"it must be stressed that the Civil Court did not dismiss the case on the ground that the applicants lacked the legal capacity to pursue the case"*.

32. Furthermore, although the Civil Court included in the reasoning part of the impugned proceedings some assessments of the merits of the claimant testator, it has been understood that the Civil Court did not actually rule on the merits and that this assessment, which was not required, was in fact a technical error[1].

1 In the light of the established case-law of the Court of Cassation, it has been concluded the Civil Court, by deciding to dismiss the case, made a technical error instead of deciding that there was no reason to issue a decision for the continuation of the impugned proceedings after the death of the testator.

33. In our opinion, the technical error committed by the Civil Court does not invalidate the above assessment. Although the Civil Court made a technical error in the action brought by the testator, it is evident that, in any event, it did not accept the heirs' wish to continue the proceedings and become parties to the case, and asked them to bring a separate action.

34. Consequently, the applicants did not become parties to the impugned case and their allegations concerning the merits were not assessed, and they were invited to bring a separate action in their own name.

35. In this respect, it has been understood that, during that period, the applicants brought a separate action in their own name, that the said action has still been pending and that, therefore, there has been ongoing proceedings in respect of the dispute which is the subject of the individual application before the Court.

36. In addition, under the heading *"Alleged Violation of Article 36 of the Constitution of the Republic of Türkiye"*, the applicants stated that *"the Civil Court's decision that 'the claimants could not bring a claim in a case brought by their mother', in relation to the proceedings pursued by my clients following the death of their mother, violated the provision ... prescribed in Article 36 of the Constitution. ... In the present case, the decision to the effect that the clients could not pursue the case brought by the testator is contrary to the right to a fair trial enshrined in Article 36 of the Constitution"*. This claim of the applicants concerns the right of access to a court in the context of the right to a fair trial. Therefore, the applicants also pointed out that their wish to pursue the action brought by their testator had not been accepted by the instance court.

37. Even if it is accepted for a moment that the claims of the heirs, including the applicants, were examined and rejected on the merits at the end of the first proceedings, and even if it also accepted that their claims before the Civil Court did not concern their rights and were limited to the request to establish the status of their testator as the founder's child entitled to the surplus revenue, it must be noted that the applicants' claims before the Civil Court concerning their entitlement to the surplus revenue on the basis of the right to property are different from the allegations

submitted to the Court. As these claims are different, the available legal remedies have in any case not been exhausted.

38. Indeed, the applicants claimed before the Civil Court that the condition discriminating between daughter and sons in the deed of foundation related to the ownership of assets and that there was no such discrimination in the said document as regards the condition for benefiting from the surplus revenue. However, the applicants argued before the Court that there was a condition discriminating between daughters and sons in respect of the surplus revenue and that this condition was contrary to the principle of equality under Article 10 of the Constitution and should therefore be annulled. Thus, the applicants raised for the first time before the Court the allegation that the terms of the deed of foundation should be declared null and void for being contrary to the Constitution, and they had not previously raised this claim before the courts of instance. In other words, the applicants did not avail themselves of the opportunity to submit the claim which they raised for the first time before the Court before the appeal and rectification stages, although they had such an opportunity. Nevertheless, the applicants could have raised their allegation that the terms of the deed of foundation contrary to the Constitution should be declared null and void as an alternative claim -in addition to the other claims submitted to the courts of instance- at any stage of the judicial proceedings. It cannot be said that this matter imposed an unforeseeable and excessive burden on the applicants. In these circumstances, if the Court was to examine the merits of this allegation, it would be the first court to do so.

39. In the light of the foregoing, it must be held that the present application, insofar as it relates to the right to property, must be declared inadmissible for failure to exhaust all the legal remedies.

40. For the reasons set out above, we dissent from the judgment declaring the application admissible on the ground that it is not possible to examine the merits of the case.

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

AYŞE SABAHAT GENCER

(Application no. 2018/34950)

20 October 2022

On 20 October 2022, the Plenary of the Constitutional Court found a violation of the right to property safeguarded by Article 35 of the Constitution in the individual application lodged by *Ayşe Sabahat Gencer* (no. 2018/34950).

THE FACTS

[5-48] The operating license of Asya Katılım Bankası Anonim Şirketi ("Bank") was revoked by the Banking Regulation and Supervision Agency ("Agency") on 22 July 2016 pursuant to Articles 106 and 107 of the Banking Law no. 5411, and the Bank was transferred to the Savings Deposit Insurance Fund ("Fund"). With the decision of the Fund dated 24 November 2016, a precautionary blockage was placed on the participation fund in the Bank for being in the nature of doubtful receivables.

The applicant in respect of whom an investigation was initiated and an arrest warrant was issued for her alleged membership of the Fetullahist Terrorist Organization/Parallel State Structure ("FETÖ/PDY") and who had three separate accounts at the relevant Bank - one was a special current account and the other two were participation accounts - applied to Vakıf Participation Bank and the Fund, seeking the lifting of the blockage on her participation fund, if any, as well as information about the legal ground of such blockage. The applicant filed an action before the 6th Chamber of the İstanbul Administrative Court ("Administrative Court") upon the rejection of her application for the lifting of the blockage. The Administrative Court dismissed the applicant's request. The applicant's appeal against this decision was also rejected, with no right of appeal, by the Regional Administrative Court.

V. EXAMINATION AND GROUNDS

49. The Constitutional Court ("the Court"), at its session of 20 October 2022, examined the application and decided as follows:

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

50. The applicant maintained that although there was no ongoing investigation against her and she did not have any link with the Fetullahist

Terrorist Organisation/Parallel State Structure ("FETÖ/PDY"), her bank account was considered suspicious and subject to an enquiry; and that the presumption of innocence was violated as the burden of proof was caused to shift on account of the court decision endorsing this examination and process, which were not based on concrete data. She also claimed that the injunction imposed on her bank account was not based on a court decision; that there was no concrete data indicating that she had deposited money in line with the instructions of FETÖ/PDY; and that the impugned injunction, even if temporary, prevented her from using her assets for years, thus causing pecuniary damage. The applicant accordingly maintained that her right to property was violated.

51. In its observations, the Ministry of Justice ("Ministry") stated:

i. The impugned acts were performed on the basis of Articles 63, 106 and 107 of Banking Law No. 5411 ("Law no. 5411"), which were clear and foreseeable, and that the impugned interference had a legal basis. Merely the suspicious accounts in the relevant bank were audited for the purpose of revealing the financing of FETÖ/PDY. The primary purpose of the injunction was to prevent the financing of terrorism and the commission of offences, which would ultimately ensure the prevention of re-occurrence of the events of 15 July 2016, giving rise to the declaration of a state of emergency throughout the country, as well as the maintenance of public order throughout the country.

ii. In consideration of the temporary nature of the blocking of the applicant's bank account, the fair balance between the public interest sought to be achieved by restricting the applicant's right to property and the applicant's said right was not impaired. According to the National Judiciary Informatics System (UYAP), there was an ongoing investigation against the applicant by the İstanbul Chief Public Prosecutor's Office for her alleged membership of FETÖ/PDY, and an arrest warrant had been issued by the İstanbul Magistrate Judge no. 9 on 9 July 2019.

iii. Finally, the blockage placed on the applicant's bank account was intended for the fulfilment of Türkiye's international obligations to combat terrorism and organized crime, to eliminate the financial resources of these organizations and to prevent the laundering of the proceeds of crime, as

laid down in the Council of Europe Convention on the Suppression of Terrorism and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, and the applicant's alleged violation of right to property was manifestly unfounded.

52. In her counter-statements, the applicant argued that Article 10 of the Regulation, which was relied on as the legal basis of the injunction, provided for that in case of a notification by the official authorities that an investigation had been initiated due to the Repealed Law no. 4208, no payment would be made until the conclusion of the proceedings, and the savings deposits and participation funds within this scope would be kept in a blocked account until the conclusion of the proceedings, whereas the injunction imposed on her did not indeed have a legal basis due to the lack of an investigation conducted against her under the Repealed Law no. 4208; and that the impugned acts were arbitrary and disproportionate.

53. The applicant reiterated her previous complaints submitted in reply to the letters of the Saving Deposit Insurance Fund (Fund) and Vakıf Participation Bank.

B. The Court's Assessment

54. Article 35 of the Constitution, titled *"Right to property"*, reads as follows:

"Everyone has the right to own and inherit property.

These rights may be limited by law only in view of public interest.

The exercise of the right to property shall not contravene public interest."

54. The Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The applicant also maintained that in addition to the right to property, there had been also violations of the presumption of innocence and right to a fair trial. As it has been observed that the applicant's complaint concerning the injunction imposed on her bank accounts following the handing over of the management and control

of the relevant Bank is, in essence, related to the right to property, all complaints raised by her must be examined under the right to property.

1. Admissibility

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

2. Merits

a. Existence of a Property

57. The right to property safeguarded by Article 35 of the Constitution covers the right to any asset having an economic and monetary money (see the Court's judgment no. E.2015/39, K.2015/62, 1 July 2015, § 20). In the present case, the money in the applicant's blocked account undoubtedly constituted property.

b. Existence of an Interference and its Type

58. The Court has previously held that the measures in the form of confiscation or expropriation of property constitute an interference with the right to property and has examined the interferences -even if they result in deprivation of property- within the framework of the third subparagraph on the control or regulation of the use of property in the public interest, taking into account their nature and purpose (see *Bekir Yazıcı* [Plenary], no. 2013/3044, 17 December 2015, §§ 57, 58; *Mahmut Üçüncü*, no. 2014/1017, 13 July 2016, §§ 67-70; *Eyyüp Baran*, no. 2014/8060, 29 September 2016, §§ 62-67; *Fatma Çavuşoğlu ve Bilal Çavuşoğlu*, B. No: 2014/5167, 28 September 2016, §§ 58-62).

59. There is no ground in the present case that would require the Court to depart from these principles. Therefore, it is clear that the injunction imposed on the participation fund in the Bank, whose operating license was revoked by the Banking Regulation and Supervision Agency pursuant to Articles 106 and 107 of Law no. 5411, on the grounds that it was a doubtful receivable (for being likely to have a link with FETÖ/PDY) pursuant to Article 63 of the same Law, constitutes an interference

with the right to property. The Court examined the interference within the framework of the third subparagraph regarding the control or regulation of the use of property.

c. Whether the Interference Constituted a Violation

60. Article 13 of the Constitution provides as follows:

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

61. Article 35 of the Constitution does not envisage the right to property as an unlimited right; and accordingly, this right may be limited by law and in the interest of the public. In interfering with the right to property, Article 13 of the Constitution must also be taken into consideration as it governs the general principles concerning the restriction of fundamental rights and freedoms. In order for the interference with the right to property to be constitutional, the interference must have a legal basis, pursue the aim of public interest and be carried out in accordance with the principle of proportionality (see *Recep Tarhan and Afife Tarhan*, no. 2014/1546, 2 February 2017, § 62).

i. Lawfulness

62. The regulation by law of rights and freedoms, as well as of the interferences and restrictions to be imposed thereon, is one of the most important elements of a democratic state governed by rule of law that prevent arbitrary interference with these rights and freedoms and ensure legal security (see *Tahsin Erdoğan*, no. 2012/1246, 6 February 2014, § 60).

63. The fact that the interference is based on law primarily necessitates the formal existence of a law. A law in the formal sense is a regulatory legislative act enacted by the Grand National Assembly of Türkiye ("GNAT"), under the name of law, in accordance with the procedure specified in the Constitution. Interference with rights and freedoms is conditional upon the inclusion of a provision justifying a given interference

in the regulatory acts enacted by the legislature under the name of law. The absence of a formal legal provision enacted by the GNAT leads the interference with a given right to be deprived of a constitutional basis (see *Ali Hıdır Akyol and Others* [Plenary], no. 2015/17510, 18 October 2017, § 56).

64. Equally important as the existence of the law is the necessity that the text and application of the law has legal certainty to a degree that individuals may foresee the consequences of their actions. In other words, the quality of the law plays an important role in the determination of whether the requirement of legality has been satisfied (see *Necmiye Çiftçi and Others*, no. 2013/1301, 30 December 2014, § 55). For an interference to be based on law, there must be sufficiently accessible and foreseeable provisions regarding the interference (see *Türkiye İş Bankası A.Ş.* [Plenary], no. 2014/6192, 12 November 2014, § 44).

65. In the present case, the deposits in the Bank, whose operating license was revoked and transferred to the Fund by the Agency pursuant to Articles 106 and 107 of the Law no. 5411, were imposed an injunction pursuant to Article 63 of the same Law on the grounds that they were suspicious receivables (alleged link with FETÖ/PDY). Article 63 of the Law no. 5411 provides for that the insured portion of the deposits and participation funds, accuracy of which is proven beyond any doubt, in the credit institutions whose operating license has been revoked shall be paid from the Fund resources. Therefore, the precautionary blocking process performed to prevent the payment of the receivables, the accuracy of which is considered to be doubtful, until the completion of the auditing and enquiry to be carried out in accordance with the relevant part of Article 10 of the Regulation, had a legal basis in the formal sense within the meaning of Article 63 of Law no. 5411.

66. However, the phrase *"...the insured portion of the deposit and participation fund, the accuracy of which is proven beyond any doubt, shall be covered by the Fund"* in the last paragraph of Article 63 of the Law no. 5411, which constitutes the basis for the injunction, clearly points to the depositors to whom payment shall be made. The inferior courts, applying a contrary interpretation (*a contrario*) of the provision, assumed that this phrase pointing to which depositors may be paid also includes

the provision regarding which depositors will not be paid. Therefore, by interpreting the provision that the Fund will pay the deposits and participation funds whose accuracy is not in doubt, it is not arbitrary or unforeseeable to reach a conclusion that the Fund will not pay the suspicious accounts, which are not of this nature. However, Law no. 5411 does not contain any provisions regarding the procedure to be applied in relation to the deposits and participation shares on which injunction has been imposed. Although Article 10 of the Regulation issued pursuant to Law no. 5411 includes certain arrangements with respect to these issues, there is no clear provision as to the consequences of non-compliance with this procedure and the authorities to which persons may apply in case of any non-compliance. Although these factors have caused doubts as to the quality of the underlying legal provision and accordingly whether the condition of lawfulness has been met, it has been concluded that it would be more appropriate to make the final assessment of whether there is a violation in terms of the principle of proportionality under the particular circumstances of the present case, given that the applicant has had the opportunity to exhaust judicial remedies.

ii. Legitimate Aim

67. According to Articles 13 and 35 of the Constitution, the right to property may only be restricted in the interest of the public. In addition to allowing for the restriction of the right to property as deemed necessary by the public interest and being a reason for the restriction, the notion of public interest effectively protects the right to property by envisaging that this right cannot be restricted except for the cases in the interest of public and thus setting the limits of the restriction in this respect. The concept of public interest brings along the margin of appreciation of the public bodies, and this concept with no objective definition must be assessed on the basis of the particular circumstances of each case (see *Nusrat Külah*, no. 2013/6151, 21 April 2016, §§ 53, 56; and *Yunis Ağlar*, no. 2013/1239, 20 March 2014, §§ 28, 29).

68. The confiscation or the deprivation of the offender of any asset used or made ready to be used in commission of offence or obtained by committing an offence despite the conviction by way of confiscation is

intended for preventing income from offence, as well as for precluding the risks posed by the asset related to an offence or constituting an offence itself to the national economy, public order and security, public and environmental health.

Thus, it is aimed to provide deterrence in pursuance of the fight against crime, to prevent the commission of further crimes and to prevent the use and transfer of the said asset posing a danger (see *Fatma Çavuşoğlu and Bilal* Çavuşoğlu, § 69).

69. In the present case, the relevant provisions of the Law no. 5411 and the Regulation stipulate that the receivables of the Bank transferred to the Fund shall be determined in such a way that there is no doubt as to their accuracy; and that the part covered by insurance shall be determined and paid within a certain period of time. It is explicit that these provisions aim to prevent public damage by determining the receivables whose accuracy is beyond doubt. Therefore, the impugned interference undoubtedly had a legitimate aim based on public-interest grounds.

iii. Proportionality

70. Finally, it should be examined whether there was a reasonable proportionality between the aim sought to be achieved by the public authorities through the interference with the applicant's right to property and the means employed to achieve this aim.

(1) General Principles

71. The principle of proportionality consists of three sub-principles, which are *suitability*, *necessity* and *commensurateness*. *Suitability* requires that a given interference be suitable for achieving the aim pursued; *necessity* requires that the impugned interference be necessary for achieving the aim pursued, in other words, it is not possible to achieve the pursued aim with a less severe interference; and *commensurateness* requires that a reasonable balance be struck between the interference with the individual's right and the aim sought to be achieved by the interference (see the Court's judgments no. E.2011/111, K.2012/56, 11/4/2012; E.2014/176, K.2015/53, 27/5/2015; E.2016/13, K.2016/127, 22/6/2016, § 18; and *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 38).

72. In order for an interference with the right to property to be proportionate pursuant to Articles 13 and 35 of the Constitution, it must above all be capable of achieving the public interest aim pursued by this measure. Moreover, in the performance of the interference, the means that is best suited to achieve the relevant public interest aim must be chosen. In this respect, it is primarily for the relevant public authorities to decide which means to be employed since they are in a better position to make the appropriate decision. For this reason, the administrations have margin of appreciation to a certain extent with respect to the means to be preferred. Nonetheless, this margin of appreciation enjoyed by the administrations in regard to the necessity of the means chosen is not an unlimited power. Where the means employed has aggravated the interference distinctly in comparison with the aim it sought to achieve, the Court may conclude that the interference was not exigent or necessary. However, the Court's supervisory role in this context is not directed towards the degree of appropriateness of the means chosen but the gravity of the interference with rights and freedoms (see, *mutatis mutandis*, *Hamdi Akın İpek*, no. 2015/17763, 24 May 2018, § 108; and *Hanife Ensaroğlu*, no. 2014/14195, 20 September 2017, § 67).

73. Pursuant to the principle of commensurateness, a fair balance must be struck between the public interest sought in restricting the right to property and the individual's rights. This fair balance will have been upset where it is found out that the applicant has personally borne an excessive burden. In the assessment of proportionality of the interference, the Court will take account of the burden imposed on the applicant by considering, on the one hand, the importance of the legitimate aim sought to be achieved; and, on the other, the nature of the interference along with the attitudes of the applicant and the public authorities (see, *mutatis mutandis*, *Arif Güven*, no. 2014/13966, 15 February 2017, §§ 58, 60).

74. Article 35 of the Constitution does not refer to an explicit procedural safeguard. However, in order to offer a real protection for the right to property, this provision, as noted in various judgments of the Court, encompasses the guarantee that the property owner is given the opportunity to effectively raise his/her defences and objections before the responsible authorities that a given interference is unlawful or arbitrary

or unreasonable. This assessment must be made in consideration of the process as a whole (see *Züliye Öztürk*, no. 2014/1734, 14/9/2017, § 36; and *Bekir Yazıcı*, § 71).

75. Moreover, the measures constituting an interference with the right to property must not be applied in an arbitrary or unforeseeable fashion. Otherwise, it would not be possible to protect the right to property effectively. For this reason, the public authorities must make a reasonable assessment showing that there is a link between the applicant's action and the unlawfulness that led to the measure. In this context, in order to ensure that interferences with the right to property through measures such as seizure or confiscation do not upset the fair balance between the interests of the individual and the public interest, there must be an appropriate causal link between the conduct of the owner of the property constituting the offence or misdemeanour and the violation of the law, and the *bona fide* owner must be given the opportunity to recover his property – on condition of posing no danger - or the bona fide owner must be compensated for the damage he suffered on account thereof (see *Bekir Yazıcı*, §§ 31-80; *Hanife Ensaroğlu*, § 66; and *Hamdi Akın İpek*, § 115).

(2) Application of Principles to the Present Case

76. In the present case, the participation fund in the Bank, whose operating license had been revoked by the Agency on 22 July 2016 and transferred to the Fund in accordance with Articles 106 and 107 of the Law No. 5411, was blocked by the Fund's decision dated 24 November 2016 in accordance with Article 63 of the same Law and Article 10 of the Regulation on the grounds that it was a doubtful receivable (for being likely to have a link with FETÖ/PDY).

77. The applicant claimed that her right to property had been violated, stating that the prolonged injunction had prevented her from using her property for years and caused her material damage.

78. In the present case, there is no doubt that the interference through the injunction, which is revealed to be of a temporary nature, is a *suitable* means to achieve the purpose of preventing public damage by suspending the payment of doubtful receivables.

79. The payment of the deposits to their owners was temporarily suspended due to the suspicion of the authenticity of the deposits in the Bank, the management and supervision of which was first transferred to the Agency and then the operating license of which was revoked by the Fund for failing to fulfil the conditions laid down in Law no. 5411. It is also undisputed that the impugned interference was *necessary*, as it has been considered that the impact of this temporary injunction, which was imposed in order not to cause the loss of the assets of the Fund, which are in the form of state property, and unjust enrichment of persons, is at the minimum level compared to that of the other alternative methods in terms of the aim sought to be achieved.

80. The Court has concluded that an enquiry was carried out so as to ascertain whether the accounts covered by insurance from the participation funds at the Bank were related to FETÖ/PDY or whether they were intended to support the organization, and that there was no unlawfulness in the blocking process established as an injunction until the enquiry was concluded and the doubts as to the accuracy of the accounts were eliminated. It appears that according to the Fund's response dated 25 November 2021, the injunction was not lifted, but according to the response of 4 April 2022, the impugned injunction was lifted. Therefore, the Court would make an examination -regarding the complaint concerning the injunction imposed by the Fund's decision dated 24 November 2016 and lifted by 25 November 2021- as to whether the interference was proportionate in the context of the length of the injunction period.

81. When Article 63 of the Law no. 5411 and Article 10 of the Regulation are taken together, the following conclusions are reached: The accuracy of the deposit and participation fund accounts at the credit institutions whose operating license has been revoked will be examined by the commission in line with the procedure set forth in paragraph (1) of Article 10 of the Regulation. The assessment to be made by the commission on the accuracy of insured deposits and insured participation funds will be completed within three months by the date of the revocation of the bank's operating license, based on the determinations and decisions of the Agency and judicial and administrative authorities, documents submitted by account holders, records kept by the Insurance and Risk Monitoring Department,

bank records and other relevant documents. If necessary, this period may be extended for three months, and if the three-month extension period is insufficient due to compelling reasons, this period may be extended by the Fund Board of the Agency for two more times, each not exceeding three months. Accordingly, it is explicit that the commission must make a decision on the accuracy of the deposit and participation fund accounts at the end of one year at the latest from the date when the bank's operating license was revoked. However, in the present case, no decision was made on the accuracy of the applicant's deposit and participation fund accounts from 22 July 2016, when the revocation of the bank's operating license was ordered, to 25 November 2021. Nor is there any information or document showing that any research or examination was carried out according to the procedure set out in the Regulation.

82. It is clear that in order for the measures imposed on the assets of persons to be considered proportionate, it is necessary to demonstrate the reasons that justify the continued application of the measures as well as the existence of a reasonable justification for the measure. In addition, the measure should not become incommensurate and thus disproportionate due to the length of time. In the present case, the inferior court rejected the request for lifting the injunction on the grounds that the examination on the accuracy of the accounts was pending. In consideration of the court's reasoning, it has been observed that no assessment was made as to whether the Fund has conducted an examination in accordance with the provisions of Article 63 of Law no. 5411 and Article 10 of the Regulation and whether there were reasons justifying the continued application of the injunction. It has been accordingly observed that the Fund's operations were not audited and that the injunction remained in force for a period over 5 years and 4 months. In the absence of any fault attributable to the applicant for the prolonged continuation of the injunction, and in the absence of any ground to justify the exceeding of the one-year period set out in the Regulation, the duration of the injunction on the applicant's bank account, which continued for more than 5 years and 4 months, cannot be considered foreseeable and reasonable. Therefore, it has been concluded that the prolonged continuation of the injunction imposes an excessive personal burden on the applicant, that therefore, the interference upset

the fair balance between the public interest and the applicant's property right to the detriment of the applicant, and that the interference was not proportionate.

83. For these reasons, the Court found a violation of the right to property safeguarded by Article 35 of the Constitution.

3. Damage

84. The applicant requested the Court to find a violation as well as to order the lifting of the blockage on her bank account and reimbursement of 97,567.55 Turkish Liras ("TRY") in the account, plus any commercial interest to accrue.

85. The procedures and principles for redressing the violation and the consequences thereof are laid down in Article 50 of Code no. 6216 on the Establishment and Rules of Procedure of the Constitutional Court, dated 30 March 2011.

86. It appears that the effective remedy to eliminate the consequences of the violation of the right to property found in the applicant's case is awarding compensation. The Court has considered that in view of the nature of the violation, the applicant must be awarded TRY 13,500 in compensation for non-pecuniary damage suffered due to the violation of her right to property. Since the blockage on the applicant's account had been lifted by the time when the individual application was under examination, the Court found it sufficient to only award compensation for non-pecuniary damage in order to eliminate the consequences of the violation of the right to property.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 20 October 2022 that

A. The alleged violation of the right to property be declared ADMISSIBLE;

B. The right to property safeguarded by Article 35 of the Constitution was VIOLATED;

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

D. The total litigation costs of TRY 10,194.70 including the court fee of TRY 294.70 and the counsel fee of TRY 9,900 be REIMBURSED to the applicant;

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

F. A copy of the judgment be SENT to the 6th Chamber of the İstanbul Administrative Court (E. 2018/7, K. 2018/667) for information; and

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

SAMANDAĞ VAKIFLI KÖYÜ ERMENİ ORTODOKS KİLİSESİ

(Application no. 2018/9214)

27 October 2022

On 27 October 2022, the Plenary of the Constitutional Court found a violation of the right to property, safeguarded by Article 35 of the Constitution, in the individual application lodged by *Samandağ Vakıflı Köyü Ermeni Ortodoks Kilisesi* (no. 2018/9214).

THE FACTS

[11-45] The applicant is a foundation established by members of the Armenian community, based in Hatay. It is a community foundation within the meaning of Article 3 of the Law no. 5737 of 20 February 2008 on Foundations.

The applicant applied to the Hatay Regional Directorate of Foundations for the registration of 36 properties within the borders of the Samandağ district of Hatay in accordance with Provisional Article 11 § 1 of Law no. 5737. The application for 33 of these properties was rejected by the Council of Foundations under the Directorate General of Foundations on the grounds that the Foundation did not have the 1936 Declaration. The application for the other three properties was rejected for the same reasons. Separate actions against both procedures were dismissed.

V. EXAMINATION AND GROUNDS

46. The Constitutional Court ("the Court"), at its session of 27 October 2022, examined the application and decided as follows:

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

47. The applicant (the Foundation) made the following submissions:

i.The applicant claimed that its right to a fair trial and its right to property had been violated by the failure of the inferior courts to address the substantive claims raised by the applicant during the proceedings. The applicant argued that the law-maker had introduced Provisional Articles 7 and 11 of Law no. 5737 in order to remedy the injustices caused by the case-law of the Court of Cassation of 1974, but that it had been unable to benefit from these avenues because of the interpretations of the inferior courts. It argued that community foundations dispose of immovable

properties in the name of a pseudonym or the name of a deceased person and complained that the Administration and the courts had refrained from issuing registration decisions in respect of such registrations.

ii. The applicant complained that its application had been rejected on the basis of the Circular which was the subject of the individual application, despite the fact that it had attached to the application, which had been submitted within the prescribed period of time in order to benefit from the provisions of Provisional Article 7 § 1 (a) of Law no. 5737, documents such as a copy of the table of legal entities, a property tax return, various lease agreements, a cadastral survey report, a title deed report, etc. The applicant stressed that the properties in respect of which he had applied for registration were in the possession of the Administration, stated that he had not acted solely on the basis of oral information, and defended that all the documents proving the ownership of the properties were available to the Administration.

iii. Recalling that Hatay was not part of Türkiye at the time of the 1936 Declaration, the applicant stated that it was legally and factually impossible for it to submit a declaration in 1936 and therefore claimed that the requirement to fulfil this condition prevented the applicant from recovering its property. The applicant argued that this situation violated the right to property, the right to a fair trial and the principle of equality.

iv. The applicant stated that the actions it had brought against the rejection of its application under Provisional Article 11 of Law no. 5737 had been rejected on the basis of an incomplete examination. It complained that, despite the provisions of Law no. 5737, the judicial remedy was recommended.

v. The applicant claimed that the law-maker had introduced Provisional Article 11 because most of the applications submitted under Provisional Article 7 § 1 (a) of Law no. 5737 had been rejected by the Administration. The applicant pointed out that the rejection of the application for 36 properties on the grounds that the Foundation did not have the 1936 Declaration made it impossible to exercise the right. The Foundation stated that after the annexation of Hatay to Türkiye in 1939, it was not asked to submit a declaration. It stated that a document dated

5 October 2012, which was presented to the Chairman of the Foundation, contained the following statement: *"The Foundation is a community foundation and the date of its establishment was accepted as the date of Hatay's annexation to the motherland."*

vi. The applicant recalled that the Administration had not objected to the fact that the Foundation was an Ottoman institution. It argued that the requirement to have submitted the 1936 Declaration should not be required in respect of its application. The applicant stated that the rejection of its application on the grounds that it did not have the 1936 Declaration resulted in a loss of rights, even though the Administration had documents such as a copy of the table of legal entities and the cadastral survey report, and it was evident from these documents that the property belonged to the applicant.

vii. The applicant claimed that an analysis of the title deeds of 36 properties showed that all of them contained the name *"Armenian"* and the phrases indicating that they belonged to the respective community, school, church, foundation and municipality. In this case, the applicant argued that it was unlawful for the Administration to reject the application as a whole, whereas the application for each property should have been examined separately. Although 20 of the properties were listed in the Declaration submitted to the Administration on 27 June 1950, the Foundation noted that these properties were no longer in its possession

viii. The applicant argued that the Administration's interpretation was incompatible with the purpose of the law (*ratio legis*) and that, if accepted, it would exclude some community foundations from the scope of the law, which would be contrary to the principle of equality.

ix. The applicant asserted that the Administrative Court's reasoning that the requirement of the 1936 Declaration must be sought indicated that it had an attitude towards community foundations that was far from legal.

48. In its observations, the Ministry stated:

i. In view of the fact that the Directorate General of Foundations rejected the application for registration before 23 September 2012, the

Court should examine whether the application falls within the Court's jurisdiction *ratione temporis*.

ii. Referring to the judgment of the European Court of Human Rights ("ECHR") in the case of the *Foundation of the Syriac Monastery of Saint Gabriel in Midyat v. Türkiye* (no. 61412/11, 9 May 2019, §§ 35-51), it was stated that it was necessary to examine whether the request of the applicant, who was not the registered owner in the title deeds of the properties at issue, had been transformed into a legitimate expectation based on a specific legal provision or an act which went beyond a mere expectation of registration. It was pointed out that the decision of the Council of Foundations under the Directorate General of Foundations stated that the applicant Foundation did not fulfil the required conditions and that the applicant could not provide any arguments, information, documents and evidence to refute the statement that the applicant Foundation did not fulfil the conditions laid down in the legislation. In these circumstances, it was considered impossible to accept the applicant's request for registration of the relevant properties under the applicable regulations. For this reason, it was argued that the applicant had neither an existing property nor a legitimate expectation based on a sufficient legal basis. It was stated that it would be appropriate for the Court to assess the question of jurisdiction on the merits, taking into account the fact that the documents ensuring the registration of the properties in the name of the applicant had not been submitted to the Directorate General of Foundations and the judgment of the Court of Cassation that there could be no acquisition by possession.

iii. It was noted that the registration in the name of the applicant Foundation of properties registered in the name of legal entities and natural persons could only be achieved by means of an action for cancellation of the title deeds and registration, which would have to be brought before the courts, and that the judicial procedure followed by the applicant was not considered to be an effective remedy. It was also pointed out that the applicant's request for registration had been rejected by the act dated 29 November 2010 because the applicant had not submitted the necessary documents within the additional period granted to the applicant, but that no lawsuit had been brought against that act. It was pointed out that the applicant had not filed an application despite the fact that more than 70

years had passed since 1939, when Hatay was annexed to Türkiye. For these reasons, it was pointed out that it was at the discretion of the Court to assess whether remedies had been exhausted.

iv. It was pointed out that benefiting from Provisional Article 7 of Law no. 5737 was made conditional on the immovable property being at the disposal of the community foundations, and therefore the interested parties should first prove that the immovable property they are requesting is at their disposal. In the present case, it was recalled that the applicant had failed to submit the 1936 Declaration and the documents proving the current status of the immovable properties and the fact that they were in the possession of the Foundation with the decision of the Board of Directors. In view of the applicant's failure to comply with its obligations, it was considered that the applicant's claim had no legal basis.

v. It was also noted that the applicant had not attached to the application any document proving that the Foundation had been established before 4 October 1926, when the repealed Law no. 743 entered into force.

vi. The circular stated that the documents proving that the property was owned by the Foundation and those proving that the property was the subject of litigation were requested and that all these documents were held by the community foundations and could not be found in the archives of other institutions. On the other hand, it was noted that the applicant had failed to present the 1936 Declaration and the documents proving that the properties were owned by the Foundation. It was stated that the burden of proving its claim to ownership in accordance with the Circular did not place an excessive burden on the applicant. It was emphasised that the Council of State's finding that the Circular was in the nature of an implementation of the law did not contain any manifest error of judgment or arbitrariness.

49. In its counter-statements against the Ministry's observations, the applicant essentially reiterated the views it had expressed in the application form. The applicant also stated that all the documents requested in the Circular were available in the archives of the Directorate General of Foundations. The applicant pointed out that since the inferior courts had

rejected its claims on the basis of the requirement of the presence of the 1936 Declaration, there could be no discussions of the documents proving its right to the property.

B. The Court's Assessment

50. Article 35 of the Constitution, titled *"Right to Property"*, on which the assessment of the allegation is based, reads as follows:

"Everyone has the right to own and inherit property.

These rights may be limited by law only in view of the public interest.

The exercise of the right to property shall not contravene the public interest."

51. The Court is not bound by the legal qualification of the facts by the applicant and it makes such an assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The applicant's complaint concerns the failure to return the Foundation's properties registered in the name of the Treasury and other institutions and persons. It was therefore considered appropriate to examine the applicant's complaints concerning the right to a fair trial and the principle of equality in the context of the right to property as a whole.

1. Admissibility

a. Jurisdiction *Ratione Temporis*

52. Given the nature of the application, the issue of jurisdiction *ratione temporis* should be discussed first. As a matter of fact, the Ministry also pointed out that the issue of jurisdiction *ratione temporis* should be discussed.

53. Article 148 § 3 of the Constitution and Article 45 § 1 of the Code no. 6216 on the Establishment and the Rules of Procedure of the Constitutional Court of 30 March 2011 ("Code no. 6216") provide that any person may apply to the Court on the grounds that the public authorities have violated any of his/her fundamental rights and freedoms guaranteed by the Constitution, which fall within the scope of the European Convention on Human Rights ("the Convention") and its additional protocols, to which

Türkiye is a party. Provisional Article 18 of the Constitution provides that individual applications shall be accepted from the date of entry into force of the implementing law, and Article 76 § 1 of Code no. 6216 provides that Articles 45 to 51 of the Code shall enter into force on 23 September 2012.

54. Provisional Article 1 § 8 of Code no. 6216 reads as follows:

"The Court shall deal with individual applications against final proceedings and decisions which are finalised and notified after 23 September 2012."

55. In accordance with the above-mentioned provisions of the Constitution and Code no. 6216, the Court's jurisdiction *ratione temporis* begins on 23 September 2012 and the Court can only examine individual applications against final proceedings and decisions adopted after that date. In view of these clear regulations, it is not possible to extend the scope of jurisdiction to final proceedings and decisions adopted before that date. As these regulations on the Court's jurisdiction *ratione temporis* relate to public order, they must be taken into account *ex officio* at all stages of the individual application (see *Ahmet Melih Acar*, no. 2012/329, 12 February 2013, § 15; *G.S.*, no. 2012/832, 12 February 2013, § 14).

56. In order to determine accurately the Court's jurisdiction *ratione temporis*, it is necessary to accurately determine the date of the final proceedings and decision and the date of the alleged interference. In making this determination, the events constituting the interference as well as the scope of the right allegedly infringed should be assessed together (see *Zeycan Yedigöl* [Plenary], no. 2013/1566, 10 December 2015, § 31).

57. It appears from the file that the properties that are the subject of the case were registered in the name of the Treasury and other institutions and persons before 23 September 2012, although the exact date is not clear from the file. Whether or not the applicant owns properties will be assessed below.

58. In the judgment of *Agavni Mari Hazaryan and others* (no. 2014/4715, 15 June 2016), the Court discussed in which cases an individual application can be lodged with a complaint on the right to property in relation to immovable property whose ownership was lost before 23 September 2012,

when the individual application came into force (see *Agavni Mari Hazaryan and others*, §§ 96-119). In the above-mentioned judgment, reference is made to the ECHR case-law and a distinction is made between the interference as *a momentary act* and *an ongoing situation*. The principles of the above judgment can be summarised as follows:

i. In the case of interference in the form of a momentary act, the date to be taken into account for jurisdictional purposes shall be the date of the occurrence of the event constituting the alleged infringement or, if an action for the cessation of the infringement has been brought, the date of the final decision in that case.

ii. On the other hand, if the act or event that began before 23 September 2012 and constitutes a violation continues after that date, the Court has the power to examine the application because there is a *"continuing situation"* in this case.

iii. Interferences in the form of deprivation of property are of a momentary nature and, in such cases, if the legal proceedings instituted against the acts constituting the interference have been concluded before 23 September 2012, it is accepted as a rule that the interference does not fall within the scope of the Court's jurisdiction *ratione temporis*.

iv. On the other hand, the right of the owner to lodge an individual application is revived if, after the date on which the loss of property was established, a new remedy is introduced which provides for full restitution or the payment of compensation in lieu thereof. In this case, the Court's jurisdiction *ratione temporis* is determined by taking into account the date of the final decision issued after exhaustion of the newly introduced remedy. Accordingly, if the final decision falls on a date after 23 September 2012, an individual application challenging that decision falls within the Court's jurisdiction *ratione temporis*.

59. Provisional Article 7 of Law no. 5737, which entered into force on 27 February 2008, introduced the possibility of returning to the community foundations the immovable property listed in the 1936 Declaration and registered in the title deeds in the name of a pseudonym or the name of a deceased person and still held by these foundations. Provisional Article

11 § 1 of Law no. 5737, which entered into force on 27 August 2011, allows the registration in the name of community foundations of immovable property belonging to community foundations registered in the 1936 Declaration and whose owner is unknown; immovable property registered in the 1936 Declaration and registered in the name of the Treasury, the Directorate General of Foundations, municipalities and special provincial administrations for reasons other than expropriation, sale and exchange; and cemeteries and fountains registered in the 1936 Declaration and registered in the name of public institutions.

60. There is no doubt that the applicant is a community foundation. On the other hand, it is also a fact that the immovable property which the applicant wished to have registered in its name had been somehow transferred to the Treasury and other institutions and persons. The applicant also submitted some documents showing that these properties had previously been owned by non-Muslim persons/communities. In this case, a cursory examination shows that the applicant's situation falls within the scope of Provisional Articles 7 and 11 of Law no. 5737 and that its claim for restitution of the immovable properties has a justifiable basis in this sense. It is crystal clear that the actions brought by the applicant on the basis of those articles were concluded after the Court's jurisdiction *ratione temporis* began.

61. Although the public authorities were of the opinion that the applicant's situation did not fall within the scope of these articles in view of its failure to produce the 1936 Declaration, it was considered that it would be more appropriate to examine this issue in conjunction with the merits of the application, since this issue was linked to the merits of the application and the main point of contention in the case brought by the applicant centred on this issue. It is therefore considered that the application falls within the Court's jurisdiction *ratione temporis*.

b. Exhaustion of Ordinary Legal Remedies

62. The Ministry argued that the remedy provided for in Provisional Articles 7 and 11 of Law no. 5737 was not an appropriate means of assessing the applicant's allegations and that these allegations could only be resolved in judicial proceedings.

63. Article 148 § 3 of the Constitution and Article 45 § 2 of Code no. 6216 provide that all administrative and judicial remedies provided for by law in respect of the act, action or omission giving rise to the alleged violation must be exhausted before an individual application is lodged. It is primarily for the inferior courts to redress violations of fundamental rights, which requires the exhaustion of all legal remedies (see *Necati Gündüz and Recep Gündüz*, no. 2012/1027, 12 February 2013, §§ 19, 20; *Güher Ergün and Others*, no. 2012/13, 2 July 2013, § 26).

64. For the requirement of exhaustion of domestic remedies to apply, the legal system must provide for an administrative or judicial remedy available to a person claiming to be a victim of a violation. In addition, such a remedy must not only be effective, capable of remedying the effects of the alleged violation and accessible to the applicant with reasonable effort, but also available both in theory and in practice. The applicant cannot be expected to exhaust a remedy that is not available. Similarly, the applicant is not obliged to exhaust remedies which are not legally or practically effective, which are not capable of remedying the consequences of an infringement, or which are not accessible and applicable in practice because of the existence of certain formalistic requirements which are excessive and exceptional (see *Fatma Yıldırım*, no. 2014/6577, 16 February 2017, § 39). However, any doubt that a remedy which in theory offers a reasonable prospect of success would not be successful in practice does not justify the failure to exhaust that remedy (see *Sait Orçan*, no. 2016/29085, 19 July 2017, § 36).

65. The question of whether the applicant can be considered to have done all that could reasonably be expected of him must be assessed in the light of the particular circumstances of each case (see *S.S.A.*, no. 2013/2355, 7 November 2013, §§ 27, 28). However, where it appears that exhaustion of the available remedies would not serve the purpose or would be ineffective in the particular circumstances of a given case, an application submitted without exhaustion of such remedies may be considered (see *Şehap Korkmaz*, no. 2013/8975, 23 July 2014, § 33). Moreover, the exhaustion of legal remedies is not an absolute rule to be applied so strictly. If, in the particular circumstances of a given case, exhaustion of a legal remedy which is theoretically available would impose an exceptional burden on

the applicant, it may be decided that exhaustion of that remedy is not necessary (see *Rasul Kocatürk* [Plenary], no. 2016/8080, 26 December 2019, § 38).

66. In the present case, two different judicial procedures were carried out. In the first, the applicant's application to benefit from Provisional Article 7 of Law no. 5737 was rejected, while in the second, the applicant was not granted the benefit of Provisional Article 11 of the same Law.

67. Provisional Article 7 of Law no. 5737 allows for the administrative registration of properties listed in the 1936 Declaration and registered in the title deeds in the name of a pseudonym or in the name of a deceased person, and which are still owned by community foundations, in the names of the foundations that made the request.

68. Provisional Article 11 of Law no. 5737 allows the registration in the name of community foundations of (1) immovable property registered in the 1936 Declaration and whose owner is unknown; (2) immovable property registered in the 1936 Declaration and registered in the name of the Treasury, the Directorate General of Foundations, municipalities and special provincial administrations for reasons other than expropriation, sale and exchange; (3) cemeteries and fountains registered in the 1936 Declaration and registered in the name of public institutions.

69. It appears that the main reason for the rejection of the applicant's two applications by the administrative and judicial authorities was the absence of the 1936 Declaration. The public authorities' assessment of the need for the 1936 Declaration is closely linked to the merits of the case. It has therefore been concluded that it would be appropriate to assess this issue together with the merits of the case.

70. In the *Boyacıköy Panayia Evangelistra Kilisesi ve Mektebi Vakfı* judgment, the Court ruled that Provisional Article 7 of Law no. 5737 could not be applied in cases where the properties for which registration was requested were not registered in the title deeds in the name of a pseudonym or in the name of a deceased person or were currently registered in the name of persons other than the Treasury or the Directorate General of Foundations (see *Boyacıköy Panayia Evangelistra Kilisesi ve Mektebi Vakfı*, §§ 44-53). In the present case, it has not been established by the inferior courts whether the

10 properties, the registration of which was requested by the applicant in the application made pursuant to Provisional Article 7 of Law no. 5737, and which are the subject matter of the present application, are not registered in the title deeds in the name of a pseudonym or in the name of a deceased person, or whether they are currently registered in the name of persons other than the Treasury or the Directorate General of Foundations.

71. The possibility provided for by Provisional Article 11 of Law no. 5737 has a wider scope than Provisional Article 7. In this respect, not only the properties registered in the title deeds in the name of a pseudonym or in the name of a deceased person, but also the properties whose owner's name is unknown, fall within the scope of application of Provisional Article 11. In addition, the scope of the article includes not only immovable property registered in the name of the Treasury or the Directorate General of Foundations for reasons of inability to acquire property, but also all types of immovable property registered in the name of the Treasury, the Directorate General of Foundations, municipalities and special provincial administrations for reasons other than expropriation, sale and exchange. Finally, unlike Provisional Article 7, Provisional Article 11 obliges the Foundation to pay compensation in excess of the current value of the immovable property registered in the name of a third party.

72. In the judicial proceedings initiated by the applicant in respect of the 36 properties which are the subject of the second application, the final decision of the Council of State did not establish that the conditions, other than the absence of the 1936 Declaration, had not been fulfilled.

73. In this respect, there is no reason to conclude that the remedies provided for in Provisional Articles 7 and 11 of Law no. 5737 are not effective in the present case, except for the condition of the absence of the 1936 Declaration. The condition of the absence of the 1936 Declaration will be analysed below, together with the merits of the case.

c. Conclusion

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

2. Merits

a. Existence of Property

75. In addition, a person who claims that his/her right to property has been infringed must first prove that he/she is entitled to benefit from that right. For this reason, it is necessary, first and foremost, to assess the legal status of the applicant with regard to whether or not he/she has an interest in property that requires protection under Article 35 of the Constitution (see *Cemile Ünlü*, no. 2013/382, 16 April 2013, § 26; *İhsan Vurucuoğlu*, no. 2013/539, 16 May 2013, § 31).

76. The right to property has a different meaning and scope from the concepts of property rights adopted in private law or administrative law, and the right to property recognised in these fields should be treated with an autonomous interpretation, independent of legal regulations and jurisprudence (see *Hüseyin Remzi Polge*, no. 2013/2166, 25 June 2015, § 31). The right to property, enshrined in Article 35 of the Constitution, embraces all types of rights that have an economic value and can be valued in money (see the Court's judgment no. E.2015/39, K.2015/62, 1 July 2015, § 20). In this respect, in addition to movable and immovable property, which is undoubtedly to be considered as property, the right to property includes the limited real rights (rights in rem) and the intellectual property rights established on the basis of these properties, as well as any enforceable claims (see *Mahmut Duran and Others*, no. 2014/11441, 1 February 2017, § 60).

77. In the present case, the applicant requested the registration of 10 properties in the part of the application made under Provisional Article 7 of Law no. 5737 and 36 properties in the part of the application made under Provisional Article 11 of the same Law. The applicant's claims in both applications were finally rejected on the grounds that the applicant had failed to submit the 1936 Declaration. The decisions in the cases brought by the applicant did not find that these properties had not belonged to the applicant before they were registered in the name of the Treasury or other persons, and the cases were not rejected on this basis. In the decisions which were the subject of the individual application, it was established that the applicant had not fulfilled the condition of submitting

the 1936 Declaration in order to benefit from the possibilities introduced by Provisional Articles 7 and 11 of Law no. 5737, and the examination of the ownership status of the properties before they were registered in the name of the Treasury or other institutions and persons could not proceed. One of the main objectives of the proceedings instituted by the applicant is to determine whether the properties claimed by the applicant belonged to the applicant before they were registered in the name of the public. In other words, it will be possible to determine whether the properties claimed by the applicant belonged to the applicant before they were registered in the name of the Treasury or other institutions and persons. Given that the names of the owners of the community foundations may not be known and that there is no 1936 Declaration in respect of the properties claimed by the applicant in the present case, it would not be fair and equitable to expect full proof of the existence of the property. In this case, the fact that the applicant has submitted documents showing that the properties belong to the applicant should be considered sufficient to prove the existence of the property. In the present case, the applicant has submitted documents to the inferior courts, such as a copy of the table of legal entities and the cadastral survey report. Therefore, having considered all these issues, it was concluded that the applicant was the owner of the property.

b. Existence of an Interference and Its Type

78. The right to property, guaranteed as a fundamental right by Article 35 of the Constitution, is a right that allows the individual to use, enjoy and dispose of what he/she owns, provided that he/she does not infringe the rights of others and that he/she respects the limitations imposed by law (see *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 32). Therefore, any restriction on the owner's power to use his/her property, to enjoy its fruits and to dispose of it constitutes an interference with the right to property (see *Recep Tarhan and Afife Tarhan*, no. 2014/1546, 2 February 2017, § 53).

79. In the light of Article 35 of the Constitution, read together with other articles relating to the right to property, the Constitution lays down three rules relating to interference with the right to property. In this respect, Article 35 § 1 of the Constitution provides that everyone has the right to

property, which sets out *the right to peaceful enjoyment of possessions*, and Article 35 § 2 establishes the framework for interference with the right to peaceful enjoyment of possessions. Article 35 § 2 of the Constitution defines the circumstances under which the right to property may be restricted in general and also sets out the general framework of the conditions for *deprivation of property*. The last paragraph of Article 35 of the Constitution prohibits any exercise of the right to property in contravention to the public interest, thus enabling the State to *control and regulate the enjoyment of property*. Certain other articles of the Constitution also contain special provisions enabling the State to have control over property. It should also be noted that deprivation of property and regulation/control of property are specific forms of interference with the right to property (see *Recep Tarhan and Afife Tarhan*, § 55-58).

80. The properties claimed by the applicant were registered in the name of the Treasury and other institutions and persons. There is therefore no doubt that there was an interference with the applicant's right to property. On the other hand, in view of its nature and purpose, it is considered appropriate to examine the interference in the context of the provision on deprivation of property.

c. Whether the Interference Amounted to a Violation

81. Article 13 of the Constitution provides as follows:

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

82. Article 35 of the Constitution provides that the right to property is not unlimited and may be limited by law and in the public interest. Any interference with the right to property must also take account of Article 13 of the Constitution, which sets out the general principles governing restrictions on fundamental rights and freedoms. For an interference with the right to property to be constitutional, it must have a legal basis, pursue the aim of the public interest, and be carried out in accordance with the principle of proportionality (see *Recep Tarhan and Afife Tarhan*, § 62).

i. Lawfulness

83. Article 35 § 2 of the Constitution stipulates that any interference with the right to property must be prescribed by law, as it provides that the right to property may be limited by law and in the public interest. Similarly, Article 13 of the Constitution, which sets out the general principles governing the limitation of fundamental rights and freedoms, established the basic principle that *rights and freedoms may be limited only by law*. Accordingly, the primary criterion to be considered in relation to interference with the right to property is whether the interference is based on law (see *Ford Motor Company*, no. 2014/13518, 26 October 2017, § 49).

84. The foundations administered by non-Muslim communities during the Ottoman period were listed in Article 1 of the repealed Law no. 2762 of 5 June 1935 among the appendant foundations to be administered by their trustees or elected committees. Article 44 of the same Law provides that the immovable property at the disposal of community foundations shall be registered in the foundation register and in the land register. Furthermore, Provisional Article 1 of the aforementioned law stipulates that the persons who manage non-Muslim community foundations must notify the Directorate General of Foundations with a declaration of all assets, income and where they are spent by these foundations. These declarations, known in practice as the 1936 Declaration, were accepted by the Court of Cassation as the foundation deed. By virtue of the decision of the General Assembly of the Civil Chambers of the Court of Cassation of 8 May 1974 and no. E.1971/2-820, K.1974/505, it was established that the declarations submitted by the community foundations in 1936 would be accepted as foundation deeds. Therefore, immovable property not included in the 1936 Declaration was not recognised as property of community foundations.

85. The authorities do not claim that the applicant is not a foundation dating back to the Ottoman era. On the other hand, it is understood that the immovable properties claimed by the applicant were transferred to the ownership of the Treasury and other institutions after 1939, but on dates that are not clear from the file.

86. It should be noted that Hatay was ceded to the Syrian border under the French mandate on 20 October 1921 and rejoined the Republic of Türkiye on 7 July 1939. Therefore, at the time (1936) when the declaration had to be submitted according to Provisional Article 1 of the repealed Law no. 2762, the applicant Foundation was not under the sovereignty of the Republic of Türkiye, nor were the immovable properties over which it claimed rights part of the territory under the sovereignty of Türkiye. In the present case, there are doubts as to the applicability of Article 1 of the repealed Law no. 2762 and the obligation to submit a declaration imposed by that article on the applicant, established in Hatay, which was annexed to Türkiye in 1939. For this reason, there are doubts as to whether there is a legal basis for the registration of the properties claimed by the Foundation on behalf of the public on the grounds that it has not fulfilled its obligation to submit a declaration pursuant to Article 1 of the repealed Law no. 2762. However, since the dispute in the present case concerns the fulfilment of the conditions for benefiting from the possibility of registration introduced by Provisional Articles 7 and 11 of Law no. 5737, it has not been considered necessary to elaborate further on this issue.

87. In both legal proceedings instituted by the applicant, the main reason for the rejection of the cases was the absence of a 1936 Declaration. Provisional Articles 7 and 11 of Law no. 5737 stipulate that the condition of registration in the 1936 Declaration is required for properties registered in the title deed in the name of a pseudonym or in the name of a deceased person, or for properties whose owner's name is unknown in the title deed. On the other hand, it is undisputed that the applicant did not produce the 1936 Declaration. Therefore, the rejection of the applicant's applications by the public authorities on the ground that the applicant did not have a 1936 Declaration had a legal basis.

ii. Legitimate Aim

88. According to Articles 13 and 35 of the Constitution, the right to property may only be restricted in the public interest. The concept of public interest serves both as a restrictive instrument, allowing the imposition of restrictions on the right to property where the public interest so requires, and as an effective protective mechanism, setting limits to restrictions

by preventing the imposition of any restrictions on the right to property outside the public interest. The concept of the public interest is that of the margin of discretion of the public authorities and must be assessed on a case-by-case basis, since it does not correspond to a single objective definition (see *Nusrat Külah*, no. 2013/6151, 21 April 2016, § 53, 65; *Yunis Ağlar*, no. 2013/1239, 20 March 2014, § 28, 29).

89. It has been observed that the reason why the immovable properties claimed by the applicant were registered in the name of the Treasury and other institutions and persons and were not returned was that the applicant did not fulfil its obligation to submit the 1936 Declaration. The purpose of the obligation to submit a declaration provided for in Provisional Article 1 of the repealed Law no. 2762 is to identify the properties of the community foundations that were granted a new status after the repealed Law no. 743 came into force. Since this obligation has not been fulfilled for the properties registered in the name of a pseudonym or in the name of a deceased person, or for the properties whose owner's name is unknown in the title deed, it appears that the registration of the properties in the name of the Treasury and other public institutions has a purpose of public interest. On the other hand, it has been concluded that the purpose of not returning these properties is to protect the interests of the Treasury and other institutions and persons in whose name the properties are registered, which is in the public interest.

iii. Proportionality

(a) General Principles

90. Proportionality, which is one of the criteria to be taken into account when restricting rights and freedoms under Article 13 of the Constitution, derives from the principle of the rule of law. Since the restriction of rights and freedoms is an exceptional power in a state governed by the rule of law, this power can only be justified to the extent required by the situation. It would be incompatible with the rule of law to restrict the rights and freedoms of individuals more than the concrete circumstances require, since this would mean exceeding the powers conferred on the public authorities (see the Court's judgment no. E.2013/95, K.2014/176, 13 November 2014).

91. The principle of proportionality in Article 13 of the Constitution consists of three sub-principles: *suitability*, *necessity* and *commensurateness*. *Suitability* requires that the intended interference is suitable for achieving the objective (aim) pursued; *necessity* requires that the interference is indispensable for achieving the objective pursued, in other words that the objective pursued cannot be achieved by a less severe interference; and *commensurateness* requires that a reasonable balance be struck between the interference with the individual's right and the objective pursued by the interference (see the Court's judgments no. E.2011/111, K.2012/56, 11 April 2012; no. E.2016/16, K.2016/37, 5 May 2016; *Mehmet Akdoğan and Others*, § 38).

92. Accordingly, for an interference with the right to property to be constitutional, it must be both *suitable* and *necessary* to achieve the objective. *Necessity*, as noted above, refers to the choice of the least intrusive means (the means that least impairs the right) among several means that constitute an interference with the right. Whichever of the measures restricting rights and freedoms results in less interference with the normative field of the right compared to the others, that measure should be preferred. However, it should also be accepted that public authorities have a certain margin of discretion in choosing the means that will interfere with the right. This is because the competent public authorities are in a better position to make a sound judgment as to which means will be effective and efficient in achieving the legitimate aim. In particular, where there are no alternative means, or where the available alternatives are ineffective or less effective in achieving the legitimate aim, there must be very strong grounds for concluding that the means chosen by the public authorities do not satisfy the *necessity* criterion (see *D.C.*, no. 2018/13863, 16 June 2021, § 48).

93. On the other hand, any interference with the right to property must be commensurate. Commensurateness refers to the absence of an excessive imbalance between the objective to be achieved by the restriction and the restrictive measure applied. In other words, commensurateness requires a fair balance between the objective pursued and the means employed. Accordingly, there must be a reasonable relationship of proportionality between the legitimate aim to be achieved by the restriction of the right to property and the individual benefit of the applicant's enjoyment of the

right to property. The burden imposed on the individual by the restriction must not be excessive and disproportionate in relation to the public interest served by the achievement of the objective pursued (see *D.C.*, § 49).

94. In some cases, a finding that the means chosen impose a disproportionate burden on the individual in relation to the objective to be achieved may not in itself be sufficient to establish a violation. The existence of mechanisms to compensate for the burden imposed on the individual is also of great importance. If there are legal mechanisms to alleviate the excessive burden imposed on the individual by the choice of means deemed suitable and necessary, it may be concluded that there is no violation (see *D.C.*, § 50).

95. In assessing the commensurateness of an interference with the right to property, it is also considered whether any fault can be attributed to the applicant and the administration. Factors to be taken into account in this regard include what legal obligations the parties had, whether they were negligent in fulfilling those obligations and, if so, whether such negligence had an effect on the unlawful consequence (see *D.C.*, § 51).

96. The existence of procedural safeguards may play an important role in the assessment of commensurateness. In this context, the absence of legal remedies enabling an individual to challenge the lawfulness of an interference or to seek compensation for the pecuniary and non-pecuniary damage caused by the alleged interference may be considered as a factor aggravating the burden imposed on the individual in certain cases. In this respect, an effective examination of the alleged unlawfulness by a court is important for the commensurateness of the interference (see *D.C.*, § 52).

(b) Application of Principles to the Present Case

97. The applicant's applications to benefit from the avenues offered by Provisional Articles 7 and 11 of Law no. 5737 were rejected on the ground that the applicant did not have a 1936 Declaration.

98. In the present case, given that the legal remedies exhausted by the applicant are an *a posteriori* mechanism for remedying the violation of the right to property by registering the property in the name of the public,

there is no point in carrying out an assessment in terms of the elements of suitability and necessity. The main element to be discussed in the present application is commensurateness. If the proposed measure imposes an excessive and extraordinary burden on the owner, it cannot be said that the interference is commensurate. In this respect, it is necessary to determine whether the measure imposes an excessive and disproportionate burden on the applicant.

99. It should be pointed out that, at the time when the obligation to submit a declaration provided for in Provisional Article 1 of the repealed Law no. 2762 arose and had to be fulfilled, the applicant Foundation was not under the sovereignty of the Republic of Türkiye and the immovable properties in respect of which it claimed rights were not part of the territory of the Republic of Türkiye. It was therefore neither *de jure* nor *de facto* possible for the applicant to submit the 1936 Declaration. On the other hand, it has not been established that, in the period following the annexation of Hatay to the Republic of Türkiye, legislation was enacted requiring the community foundations established in Hatay to submit a declaration similar to the 1936 Declaration. In the present case, to make the applicant's enjoyment of the possibilities offered by Provisional Articles 7 and 11 of Law no. 5737 dependent on the fact that the applicant had submitted a declaration in 1936 would have imposed a heavy burden on the applicant which could not be met.

100. On the other hand, it is important to recall the ambiguity regarding the legal basis for the registration of the immovable properties of the community foundations in Hatay in the name of the public, due to their failure to comply with the obligation to submit a declaration provided for in Provisional Article 1 of the repealed Law no. 2762. As stated above, it is accepted that the legal basis for the registration of the ownership of immovable properties not included in the 1936 Declaration in the name of the Treasury is Provisional Article 1 of the repealed Law no. 2762. In this case, it is not foreseeable to accept that the immovable properties of the foundations established in Hatay, which joined Türkiye on 7 July 1939, will be registered in the name of the Treasury after the entry into force of Provisional Article 1 of the repealed Law no. 2762 and the expiration of the declaration period due to the failure to fulfil this obligation. It is not clear

whether the 1974 decision of the General Assembly of the Civil Chambers of the Court of Cassation took into account this specific situation of Hatay. It has been observed that the authorities and the inferior courts did not take this fact into account.

101. Although it is primarily for the inferior courts to interpret the statutory provisions to be applied in the dispute, the courts are obliged to interpret them in the light of the Constitution. In cases where a statutory provision is not susceptible to a single interpretation, the courts are expected not to adopt the interpretation that is incompatible with the Constitution.

102. One of the purposes of Provisional Articles 7 and 11 of Law no. 5737 is to ensure the return to the community foundations of the properties included in the 1936 Declaration and registered in the title deed in the name of a pseudonym or in the name of a deceased person, or whose owner's name is unknown in the title deed, and which were registered in the name of the Treasury or other institutions during the procedure. It cannot be assumed that the law-maker intended to exclude the properties in Hatay, which was annexed to Türkiye on 7 July 1939, and which have similar conditions, from the possibility of registration introduced by Provisional Articles 7 and 11 of Law no. 5737. There is no justification for treating community foundations established in Hatay, which date back to the Ottoman period, differently from other foundations that fulfil the same conditions. The failure of the inferior courts to take into account the specific situation of the foundations in Hatay, which were unable to submit the 1936 Declaration, led to a difference in practice between the applicant Foundation and community foundations established in other provinces. It is evident that interpreting the above articles in such a way as to create a difference in treatment that has no justifiable basis will undermine Article 35 of the Constitution as well as Article 10, which regulates the principle of equality.

103. It has been observed that in the judicial process of the application filed under Provisional Article 7 of Law no. 5737, the Chamber evaluated the claim that Hatay had been annexed to the territory of Türkiye in 1939, and therefore it was not possible to submit the 1936 Declaration

regarding the properties in question. However, it is difficult to say that the Chamber's reasoning, which consists in emphasising that the immovable property must be owned by the community foundations in order to be registered and in stating that the procedure was established on the basis of the Circular, which is not contrary to the law, satisfies this claim of the applicant.

104. On the other hand, it should be noted that the assessment of the court of first instance, according to which, if the condition of presenting the 1936 Declaration is not requested, the right to property of the institutions and persons in whose name the immovable property is registered will be violated in the judicial proceedings on the application filed under Provisional Article 11 of Law no. 5737, is also incomprehensible in view of the explanations given above. The inclusion of public institutions in the scope of the constitutional provision guaranteeing the rights and freedoms of individuals was not considered reasonable. Moreover, the court's interpretation was based on ignoring the fact that Hatay joined Türkiye on 7 July 1939. Therefore, the reasoning of the court cannot be considered relevant and sufficient.

105. As a result of this interpretation by the inferior court and the Chamber, the applicant was deprived of the possibility of registering the properties in its name by proving that the other conditions of Provisional Articles 7 and 11 of Law no. 5737 were met. Subjecting the applicant to the condition that he had submitted the 1936 Declaration -since it was impossible for the applicant to do so as Hatay had joined Türkiye on 7 July 1939- rendered the provision of the above facilities meaningless and imposed an excessive burden on the applicant. In this case, it was concluded that a fair balance could not be struck between the public interest and the individual interest of the applicant and that the interference with the right to property was not proportionate.

106. Finally, the Chamber, in its capacity as a court of first instance, held that the impugned Circular did not in itself give rise to a violation. The Chamber's assessment that the Circular is in the nature of an explanation of the legal provision is not arbitrary and unfounded. It has been concluded that the main cause of the violation in the present case is the interpretation of the legal provisions.

107. In the light of the foregoing, it must be held that there was a violation of the right to property guaranteed by Article 35 of the Constitution.

3. Application of Article 50 of Code no. 6216

108. Article 50 §§ 1 and 2 of Code no. 6216 read, insofar as relevant, as follows:

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

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

109. The applicant requested the finding of a violation and the grant of a remedy.

110. In its judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court set out the general principles on how to remedy a violation found. In another judgment, the Court also referred to the consequences of failure to comply with a judgment finding a violation, stating that such a situation would constitute a continuing violation and would also lead to a second violation of the right in question (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

111. Accordingly, if a violation of a fundamental right is established in an individual application, the basic rule for redressing the violation and the consequences thereof is to ensure, as far as possible, restitution, that is to say, the restoration of the original situation prior to the violation. To this end, it is primarily necessary to identify the cause of the violation and then to put an end to the continuing violation, to revoke the decision or

act which gave rise to the violation, to redress the consequences thereof, to compensate the pecuniary and non-pecuniary damages resulting from the violation and to take any other measures deemed appropriate in this context (see *Mehmet Doğan*, §§ 55, 57).

112. In cases where the violation results from a court decision or the [trial] court is unable to redress the violation; the Court decides, as a general rule, to send a copy of the judgment to the competent court for retrial in order to redress the violation and the consequences thereof, pursuant to Article 50 § 2 of Code no. 6216 and Article 79 § 1 (a) of the Internal Regulations of the Court. This statutory regulation, unlike similar legal practices available in procedural law, provides for a remedy specific to the individual application mechanism and leads to a retrial for the purpose of redressing the violation. For this reason, when the Court orders a retrial in connection with a judgment finding a violation, the court concerned has no discretion to accept the existence of grounds for a retrial, which differs in this respect from the practice of reopening proceedings in procedural law. Therefore, the court receiving such a judgment is under a statutory obligation to issue a decision to hold a retrial on the basis of the Court's finding of a violation, without waiting for a request to that effect from the person concerned, and to conduct the necessary procedures to redress the continuing violation (see *Mehmet Doğan*, §§ 58, 59; *Aligül Alkaya and Others (2)*, §§ 57-59, 66, 67).

113. In the present case, it has been concluded that the applicant's right to property was violated by subjecting the applicant to submit the 1936 Declaration. It therefore appears that the violation stems from the administrative act. However, the incumbent courts have also failed to remedy the violation.

114. In the present case, there is a legal interest in conducting a retrial in order to remove the consequences of the violation of the right to property. A retrial to be conducted in this context is aimed at removing the violation and its consequences in accordance with Article 50 § 2 of Code no. 6216, which contains a provision specific to the individual application mechanism. In this regard, the procedure to be followed is to hold a retrial and to issue a new decision eliminating the reasons that led

the Court to find a violation, in accordance with the principles set forth in the judgment finding a violation. For this reason, a copy of the judgment must be remitted to the 10th Chamber of the Council of State and the 1st Chamber of the Hatay Administrative Court for retrial.

115. The total litigation costs of 10,923.90 Turkish liras ("TRY"), including the court fee of TRY 1,023.90 and the counsel fee of TRY 9,900, as determined on the basis of the documents in the file, are to be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 27 October 2022 that

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

B. The right to property, safeguarded by Article 35 of the Constitution, was VIOLATED;

C. A copy of the judgment be REMITTED to the 10th Chamber of the Council of State (E.2010/10390, K.2014/7620) and to the 1st Chamber of the Hatay Administrative Court (E.2013/280, K.2013/1836; E.2013/281, K. 2013/1864) for retrial to redress the consequences of the violation of the right to property;

D. The total litigation costs of TRY 10,923.90, including the court fee of TRY 1,023.90 and the counsel fee of TRY 9,900, be REIMBURSED to the applicant;

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

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

TARIK YÜKSEL

(Application no. 2019/1255)

10 Nowember 2022

On 10 November 2022, the Plenary of the Constitutional Court found violations of the right to property, safeguarded by Article 35 of the Constitution, and right to an effective remedy in conjunction with the right to property, safeguarded by Article 40 of the Constitution, in the individual application lodged by *Tarık Yüksel* (no. 2019/1255).

THE FACTS

[6-29] The Housing Development Administration of Türkiye (TOKİ) expropriated the applicant's immovable properties in the absence of a decision indicating the existence of a public interest. On 24 January 2007 the TOKİ brought an action before the civil court seeking the determination and registration of the expropriation price. On 27 February 2008 the court ordered the registration of the immovables on behalf of the TOKİ, which was subsequently upheld. Meanwhile, on 6 March 2007 the applicant filed a case before the administrative court seeking the annulment of the expropriation process. The administrative court dismissed the case on the grounds that the TOKİ was authorised to carry out expropriation without being bound by any plan. The Council of State quashed the decision on the grounds that a decision should be made after investigating whether there was an implementary development plan. The administrative court emphasized that the implementary development plan entered into force in 2011. However, the court annulled the expropriation, indicating that the implementary development plan did not exist at the time of the expropriation. After the Council of State quashed the decision by pointing out that the implementary development plan had entered into force, albeit later, the administrative court dismissed the case. Upon the applicant's subsequent appeal, the Council of State upheld the court's decision.

V. EXAMINATION AND GROUNDS

30. The Constitutional Court ("the Court"), at its session of 10 November 2022, examined the application and decided as follows:

A. Alleged Violation of the Right to Property

1. The Applicant's Allegations

31. The applicant claimed that his right to property had been violated

due to expropriation in the absence of a decision indicating the existence of public interest

2. The Court's Assessment

32. Article 35 of the Constitution, titled *"Right to property"*, reads as follows:

"Everyone has the right to own and inherit property.

These rights may be limited by law only in view of public interest.

The exercise of the right to property shall not contravene public interest."

a. Admissibility

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

b. Merits

i. Existence of a Property

34. Any individual complaining that his/her right to property was violated must prove in the first place that such a right existed (see *Mustafa Ateşoğlu and Others*, no. 2013/1178, 5 November 2015, §§ 49-54). The applicant is the owner of immovable properties with Parcel nos. 56, 72 and 142 in Delikkaya Village, Hadımköy Town, Çatalca District of İstanbul Province. Therefore, there is no dispute as to the existence of the property.

ii. Existence and Type of Interference

35. In the present case, the applicant's immovable properties had been expropriated and registered on behalf of the TOKİ in accordance with the decision of the civil court dated 27 February 2008. Undoubtedly, the impugned expropriation constituted an interference with the applicant's right to property.

36. In view of Article 35 of the Constitution, read together with other articles that touch upon the right to property, the Constitution lays down three rules in regard to interference with the right to property. In this

respect, the first paragraph of Article 35 of the Constitution provides that everyone has the right to property, setting out the *right to peaceful enjoyment of possessions*, and the second paragraph draws the framework of interference with the right to peaceful enjoyment of possessions. Article 35 § 2 of the Constitution lays down the circumstances under which the right to property may be restricted in general and also draws out the general framework of conditions of *deprivation of property*. The last paragraph of Article 35 of the Constitution forbids any exercise of the right to property in contravention to the interest of the public; thus, it enables the State to *control and regulate the enjoyment of property*. Certain other articles of the Constitution also contain special provisions that enable the State to have control over property. It should further be pointed out that deprivation of property and regulation/control of property are specific forms of interference with the right to property (see *Recep Tarhan and Afife Tarhan*, §§ 55-58).

37. The registration of the said immovable properties on behalf of the TOKİ as a result of expropriation deprived the applicant of his property. Therefore, the impugned interference in the present consisted of the deprivation of property.

iii. Whether the Interference Constituted a Violation

38. Article 13 of the Constitution provides as follows:

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

39. Article 35 of the Constitution does not envisage the right to property as an unlimited right; and accordingly, this right may be limited by law and in the interest of the public. In interfering with the right to property, Article 13 of the Constitution must also be taken into consideration as it governs the general principles concerning the restriction of fundamental rights and freedoms. In order for the interference with the right to property to be constitutional, the interference must have a legal basis, pursue the aim of public interest, and be carried out in accordance with the principle

of proportionality (see *Recep Tarhan and Afife Tarhan*, § 62). Thus, the first criterion required to be examined is whether the interference had a basis in law.

40. Article 35 § 2 of the Constitution stipulates that any interference with the right to property must be prescribed by law as it provides that the right to property may be limited by law and in the interest of the public. Similarly, governing the general principles surrounding the restriction of fundamental rights and freedoms, Article 13 of the Constitution adopts the basic principle that *rights and freedoms may only be restricted by law*. Accordingly, the primary criterion to be taken into account in interferences with the right to property is whether the interference is based on the law. Where it is established that this criterion was not met, the Court will arrive at the conclusion that there has been a breach of the right to property, without holding any examination under the remaining criteria (see *Ford Motor Company*, no. 2014/13518, 26 October 2017, § 49).

41. In the present case, the TOKİ decided to expropriate the applicant's immovable properties on 28 September 2006 in the absence of a decision indicating the existence of a public interest. In the quashing decision of the Chamber dated 7 July 2010, Article 6 of Law no. 2942 was referred to and it was stated that although a decision indicating the existence of a public interest must be taken before the expropriation order, there was no need for a such a decision and approval of the plan for the services to be carried out according to the approved development plan, and that a decision should be made after investigating whether there was an implementary development plan for the given area. Although the administrative court, complying with the quashing decision, determined that the implementary development plan entered into force on 14 March 2011, it emphasized that there was no such plan in the area where the applicant's immovables were located at the time of the expropriation, and therefore concluded that the expropriation process was unlawful.

42. Thus, there is no doubt that no implementary development plan was available at the time of the expropriation. Although the Chamber, with its decision dated 22 October 2013, quashed the decision of the administrative court by pointing out that the implementary development plan was approved on 14 March 2011, this situation does not change the

fact that there was no decision indicating the existence of a public interest or an applicable implementary development plan at the time of the expropriation. The second quashing decision of the Chamber contained no explanation to the effect that it had misinterpreted Article 6 of Law no. 2942 in its previous decision. On the contrary, in the second decision, an assessment was made based on the interpretation of Article 6 of Law no. 2942 as it had been in the first decision, but it was acknowledged that the public interest condition sought in the relevant article was met upon the entry into force of the implementary development plan while the case was pending.

43. In the present case, since no decision had been issued indicating the existence of a public interest or there was no implementary development plan, as required by Article 6 of Law no. 2942, at the time of expropriation, it has been observed that the impugned expropriation process lacked a legal basis.

44. Besides, as also stated in the Court's judgment in the case of *Nusrat Külah* (no. 2013/6151, 21 April 2016), a process resulting in the deprivation of property must not only pursue the aim of public interest in abstract terms, but it must also be based on material grounds to that end (see *Nusrat Külah*, §§ 65, 69; *Motais de Norbonne v. Fransa*, no. 48161/99, 2 July 2002, § 20; *Keçecioğlu and Others v.* Türkiye, no. 37546/02, 8 April 2008, §§ 26, 27). The Constitutional Court concluded in its judgment in the case of *Ahmet Yazı* ([Plenary], no. 2018/357, 29 September 2021, § 59) that these assessments were also applicable to the TOKİ-related cases.

45. For these reasons, the Court found a violation of the right to property safeguarded by Article 35 of the Constitution.

B. Alleged Violation of the Right to an Effective Remedy in conjunction with the Right to Property

1. The Applicant's Allegations

46. The applicant claimed that the expropriation of his property without duly determining the purpose for which it would be used was unlawful, and that the rejection of the annulment case on the basis of the implementary development plan, which was adopted later, impaired

the principle of legal certainty. The applicant stressed that the absence of the purpose of the expropriation rendered it impossible to conduct an administrative judicial review of whether the expropriation served the public interest, and claimed that the Chamber's acceptance would provide an opportunity for the administration to expropriate in order to meet the future need for immovable properties without specifying the purpose. The applicant stated that pursuant to Article 46 of the Constitution, immovable properties can only be expropriated for public interest and in accordance with the procedures stipulated by law, and claimed that the aforesaid provision of the Constitution was violated in the present case.

2. The Court's Assessment

47. Article 40 § 1 of the Constitution, titled *"Protection of fundamental rights and freedoms"*, provides as follows:

"Everyone whose constitutional rights and freedoms have been violated has the right to request prompt access to the competent authorities."

48. The Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The applicant complained about the failure to conduct a judicial review as to whether there was a public interest in the expropriation of his property. It has been concluded that the complaint raised by the applicant must be examined under the right to an effective remedy safeguarded by Article 40 of the Constitution in conjunction with the right to property safeguarded by Article 35 thereof.

a. Admissibility

49. The alleged violation of the right to an effective remedy in conjunction with the right to property must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

i. General Principles

50. The right to an effective remedy may be described as ensuring that everyone who claims to have suffered a violation of one of his

constitutional rights are provided with an opportunity to submit applications with administrative and judicial remedies that are reasonable, accessible, and capable of preventing the violation from occurring or ceasing its continuation or eliminating its consequences (i.e. offering adequate redress), whereby the person concerned can have his allegations examined in a manner compatible with the nature of the right at stake (see *Y.T.* [Plenary], no. 2016/22418, 30 May 2019, § 47; and *Murat Haliç*, no. 2017/24356, 8 July 2020, § 44).

51. The existence of effective legal remedies capable of enabling an examination on the merits of the complaints and, when necessary, affording appropriate redress is a requisite of the exercise of the right to an effective remedy. Accordingly, the mere existence of legal remedies designed to afford redress in the relevant legislation is not per se sufficient, and such remedy must offer reasonable prospects of success also in practice. In assessing whether the conditions sought to be fulfilled for having a recourse to these remedies are satisfied under the particular circumstances of given cases, the arguable claims resulting from an impugned act, action or negligence must be considered in a comprehensive manner; and if it is concluded that the necessary conditions are not satisfied, the incumbent tribunals must provide relevant and sufficient grounds to justify their decisions (*see İlhan Gökhan*, no. 2017/27957, 9 September 2020, §§ 47, 49).

52. Article 35 of the Constitution provides "*Everyone has the right to own and inherit property.*" thereby safeguarding the right to property. It is also laid down in Article 5 of the Constitution that it is among the State's aims and duties to set the conditions to ensure the development of individual's corporeal and spiritual existence. The genuine and effective exercise of the right safeguarded as a fundamental right under Article 35 of the Constitution does not depend merely on the State's duty not to interfere. Pursuant to Articles 5 and 35 of the Constitution, the State also has positive obligations to protect the right to property. These positive obligations may require the State to take certain measures necessary to protect the right to property even in the context of disputes between private individuals in certain cases (see the Court's judgments no. E.2019/11, K.2019/86, 14 November 2019, § 13; and no. E.2019/40, K.2020/40, 17 July 2020, § 37; *Türkiye Emekliler Derneği*, no. 2012/1035, 17 July 2014, §§ 34-38; *Eyyüp*

Boynukara, no. 2013/7842, 17 February 2016, §§ 39-41; and *Osmanoğlu İnşaat Eğitim Gıda Temizlik Hizmetleri Petrol Ürünleri Sanayi Ticaret Limitet Şirketi*, no. 2014/8649, 15 February 2017, § 43).

53. The positive obligations imposed on the State by virtue of the right to property may require the State to take protective and remedial measures. Protective measures refer to measures capable of preventing an interference with the right to property while remedial measures cover legal, administrative and practical measures capable of remedying, in other words, redressing the effects of the interference. It is a requirement of the positive obligations of the State to establish administrative or judicial legal mechanisms that ensure the restoration of the negative consequences of the interference with the right to property, if possible, and if not possible, to redress the damages and losses sustained by the owner (see *Osmanoğlu İnşaat Eğitim Gıda Temizlik Hizmetleri Petrol Ürünleri Sanayi Ticaret Limited Şirketi*, §§ 46-48).

54. It is laid down in Article 46 of the Constitution that expropriation shall be resorted to only *in cases required by virtue of the public interest and in accordance with the principles and procedures prescribed by law*. Expropriation of an immovable property without public interest would be contrary to Article 46 of the Constitution and in breach of the right to property. Therefore, it is a requirement of Article 40 of the Constitution that the owner whose immovable has been expropriated shall be provided with the opportunity to apply to the competent authority to determine whether the expropriation served the public interest, in other words, he/she shall be provided with the right to an effective remedy.

ii. Application of Principles to the Present Case

55. Law no. 2942 regulates the decision indicating the existence of a public interest and the decision on expropriation as two separate phases of the expropriation process, and the former is considered as a prerequisite to be fulfilled prior to the decision on expropriation. However, it is set forth in Article 6 § 3 of Law no. 2942 that for the services to be provided in accordance with the approved development plan, no decision indicating the existence of a public interest is sought. Pursuant to Article 6 thereof, an action for annulment can be brought before the administrative jurisdiction

to determine whether the aforementioned decision has complied with the law. Besides, a person whose immovable property has been allocated for public service in accordance with the approved development plan is entitled to file an action for annulment against the development plan, and thus, to seek the judicial review of the alleged public interest in the allocation of the immovable property for public service.

56. In the present case, there was no decision issued indicating the existence of a public interest before the expropriation decision regarding the applicant's immovables, nor was there an approved development plan indicating that the immovables were allocated for public service. Therefore, the applicant could not enjoy the opportunity to ensure the judicial review of whether the expropriation served the public interest independently of the expropriation process. In his action brought against the expropriation, the applicant argued that the expropriation was unlawful because a decision indicating the existence of a public interest had not been issued before the expropriation process; however, the Chamber dismissed the case, considering that the implementary development plan was adopted pending the proceedings.

57. Moreover, it has been observed that the quashing decision of the Chamber included no assessment as to whether there was a public interest in the expropriation of the applicant's immovable properties. Considering that the existence of a public interest in the allocation of an immovable property to public service through the implementary development plan can be examined throughout the proceedings initiated against the development plan, it may be deemed reasonable for the Chamber not to examine whether the expropriation of the applicant's immovables served the public interest. However, in order for a judicial review to be effective with regard to the alleged lack of public interest in the allocation of the immovable to the public service, such a review must be completed before the finalisation of the expropriation process. Otherwise, the availability of a legal remedy to challenge the decision regarding the public interest would make no sense.

58. The development plan envisaging the use of the applicant's property partly as a road and partly as an industrial area, was adopted on 14 March 2011. Although in theory, the applicant can bring an action

against the aforementioned development plan, it is doubtful that such an action would be concluded before the finalisation of the action brought against the expropriation process. It should also be noted that the applicant's immovables were registered on behalf of the TOKİ pursuant to the civil court's decision of 27 February 2008, which was issued as a result of the expropriation price determination and registration case. In this case, it became impossible for the applicant to have his claim that the expropriation of the immovables did not serve the public interest examined by the judicial authorities before the date he lost ownership of the immovables.

59. Since the civil court rendered the registration decision on a date prior to the second quashing decision of the Chamber dated 22 October 2013, it may be considered that the quashing decision per se was not the reason why the legality of the decision indicating the existence of a public interest decision cannot be examined before the date of loss of ownership. Indeed, the applicant had lost ownership of the immovables long before the second quashing decision of the Chamber. Therefore, even if the Chamber upheld the decision, the applicant would not automatically hold the ownership of the immovables again. However, apparently, the final rejection of the action challenging the expropriation process reduced the applicant's prospect of success in possible administrative and judicial applications for remedying the violation of his right to property through an unconstitutional interference. It is obvious that the applicant would have a higher prospect of success in his applications for the return of his immovable properties or the payment of compensation as a substitute for it after a decision determining that the expropriation process was conducted in the absence of a decision indicating the existence of a public interest in breach of the procedure laid down in Article 6 of Law no. 2942.

60. Consequently, it should be concluded that the right to an effective remedy safeguarded by Article 40 of the Constitution was violated in conjunction with the right to property safeguarded by Article 35 thereof due to the applicant's inability to have the judicial authorities to examine whether there was a public interest in the allocation of his immovable property partially as a road and partially as an industrial area, before the finalisation of the expropriation process.

C. Damage

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

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

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

62. The applicant requested the Court to find a violation, order a retrial and award him 23,792,250 Turkish liras (TRY) and TRY 3,000,000 for pecuniary and non-pecuniary damages respectively.

63. In its judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court indicates the general principles as to how a violation of any fundamental right, which has been found established by the Constitutional Court, and its consequences will be redressed. In another judgment, the Court explained the relevant principles as well as the consequences of the failure to comply with its judgment finding a violation and pointed out that this would amount to the continuation of the violation and might also result in a violation for the second time (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

64. Where a violation of any fundamental right is found within the scope of an individual application, the basic rule for the redress of the violation and the consequences thereof is to ensure restitution to the extent possible, that is to say, to ensure restoration of the original state prior to the

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

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

66. In the present case, it has been concluded that the right to property was violated due to the expropriation process conducted in the absence of a decision indicating the existence of a public interest or implementary development plan as required by Article 6 of Law no. 2942; and the right to an effective remedy in conjunction with the right to property was violated due to the inability to have the judicial authorities review the existence of a public interest before the expropriation process was finalised. Therefore, the violation of the right to property resulted from an administrative act, and the violation of the right to an effective remedy in conjunction with the right to property resulted from a judicial decision.

67. Considering that the expropriation process was finalised and the expropriation price was paid, there is no legal interest in holding a retrial for the violation of the right to an effective remedy in conjunction with the right to property. However, a court decision that reaches a different conclusion than that of the Constitutional Court on the violation of the right to property will no longer have legal effect. In addition, regard being had to Article 12 of the Administrative Procedure Law no. 2577 dated 6 January 1982, the annulment of the administrative act will enable the applicant to bring a full remedy action for compensation for the pecuniary damages arising from the unlawful act. Therefore, there is a legal interest in a retrial regarding the violation of the right to property. The retrial to be conducted is aimed at redressing the violation and its consequences in accordance with Article 50 § 2 of Code no. 6216, which contains a regulation on the individual application. In this context, a decision on retrial should be held, and a new decision that will eliminate the reasons leading to the violation and will comply with the principles stated in the violation judgment should be issued. For this reason, a copy of the judgment must be remitted to the incumbent court for retrial.

68. However, the mere finding of a violation of the right to an effective remedy in conjunction with the right to property will not be sufficient to redress the damage suffered by the applicant. Therefore, in order to redress the violation with all its consequences, the applicant should be awarded 17,000 Turkish liras (TRY) for compensating the non-pecuniary damages that cannot be eliminated by the mere finding of a violation regarding the right to an effective remedy in conjunction with the right to property.

69. Besides, it should be noted that the examination carried out on the lawfulness of the expropriation and the determination of the expropriation price before different courts and jurisdictions weakens the effectiveness of the proceedings before the administrative jurisdiction in some cases. The judicial proceedings regarding the determination of the expropriation price may be concluded before the conclusion of the administrative proceedings regarding the annulment of the expropriation process. As a matter of fact, in practice, administrative cases are mostly finalised after the judicial cases. Accordingly, there is a high risk that an

annulment decision to be rendered by an administrative court regarding the expropriation process will remain inconclusive.

70. Although it is stipulated in Article 10 § 14 of Law no. 2942 that in cases where an action for annulment is brought by the right holders before an administrative court against the expropriation process at the end of which a stay of execution is ordered, the proceedings before the administrative court shall be considered as a preliminary issue by the judicial court that will take an action accordingly, the said provision cannot be considered to provide sufficient guarantee in terms of the effectiveness of the administrative proceedings, since a decision on stay of execution is sought for the characterisation of the administrative proceedings as a preliminary issue before the judicial court. The relevant provision does not completely eliminate the risk of finalisation of the case on the determination of the expropriation price before the annulment of the expropriation process in cases where the requests for stay of execution cannot be resolved quickly, or in cases where the request for stay of execution is rejected but a decision of annulment on the merits is issued.

71. Although the immediate action of the administrative courts during the proceedings initiated seeking the annulment of the expropriation process and the judicial court's characterisation of the administrative proceedings as a preliminary issue may reduce the aforementioned risk, the lack of statutory regulations in this regard will make it hardly possible for the judicial and administrative courts to act in the specified manner. Therefore, the introduction of statutory regulations that would require the administrative court to decide on the case in a more rapid manner and the judicial court not to decide before the administrative court would guarantee the execution of an annulment decision that may be issued in the case filed against the expropriation process and prevent the violation of Article 40 of the Constitution. As a matter of fact, it is specified in the Human Rights Action Plan that Law no. 2942 and other relevant legislation will be revised to include provisions on expeditious expropriation in order to ensure the effective protection of the right to property.

72. Accordingly, it has been understood that in order prevent similar new violations, the applicable legislation should include safeguards

to ensure that the action brought before the judicial court for the determination of the expropriation price is not concluded before the action brought before the administrative court for the annulment of the expropriation process, and to prevent that an annulment decision to be rendered by the administrative court remains inconclusive. Therefore, a copy of the decision should be sent to the legislature.

73. The total litigation costs of TRY 10,264.60 including the court fee of TRY 364.60 and the counsel fee of TRY 9,900, as established on the basis of the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 10 November 2022 that

A. The application be SEPARATED as regards the alleged violation of the right to a trial within a reasonable time, and a new application number be assigned;

B. 1. The alleged violation of the right to property be declared ADMISSIBLE;

2. The alleged violation of the right to an effective remedy in conjunction with the right to property be declared ADMISSIBLE;

C. 1. The right to property safeguarded by Article 35 of the Constitution was VIOLATED;

2. The right to an effective remedy safeguarded by Article 40 of the Constitution was VIOLATED in conjunction with the right to property safeguarded by Article 35 of the Constitution;

D. A copy of the judgment be REMITTED to the 7th Chamber of the İstanbul Administrative Court (E.2015/1100, K.2015/2369) for a retrial to redress the consequences of the violation of the right to property;

E. A net amount of TRY 17,000 be PAID to the applicant in compensation for non-pecuniary damage;

F. The situation be NOTIFIED to the Grand National Assembly of Türkiye to resolve the structural problem;

G. The total litigation costs of TRY 10,264.60 including the court fee of TRY 364.60 and the counsel fee of TRY 9,900 be REIMBURSED to the applicant;

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

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

RIGHT TO A FAIR TRIAL (ARTICLE 36)

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

ALİ OĞUZ (2)

(Application no. 2019/2285)

15 March 2022

On 15 March 2022, the First Section of the Constitutional Court found a violation of the right to a fair hearing in conjunction with the right to legal counsel under the right to a fair trial safeguarded by Article 36 of the Constitution in the individual application lodged by *Ali Oğuz (2)* (no. 2019/2285).

THE FACTS

[8-32] The 12th chamber of the assize court, stating that the applicant, along with the other accused, was proven -on the basis of the statements of the accused taken by the police and the prosecutor, identification and location reports, the weapons and organisational documents seized as well as the other pieces of evidence included in the case file- to have been a senior member of a terrorist organisation and carried out activities in accordance with the decisions they had taken on behalf of the said organisation, sentenced him to life imprisonment for attempting to overthrow the constitutional order by force in his capacity as a senior member of the armed terrorist organisation. This decision was upheld by the Court of Cassation.

Lodging an individual application, the applicant argued that the proceedings conducted against him had lacked fairness and that he had been convicted on the basis of his statements which had been taken under pressure and in the absence of a lawyer.

The Court held that the applicant's right to a fair hearing had been violated in conjunction with his right to legal counsel. After the Court's judgment had been sent to the 12th chamber of the assize court, the latter dismissed the request for a retrial without holding a hearing. The applicant's subsequent appeal was also dismissed by the 13th chamber of the assize court over the case-file with final effect.

V. EXAMINATION AND GROUNDS

33. The Constitutional Court ("the Court"), at its session of 15 March 2022, examined the application and decided as follows:

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

34. The applicant claimed that the judgment delivered by the Constitutional Court finding a violation of his right to a fair hearing in conjunction with his right to legal counsel was not executed by the incumbent court, that the subsequent decision on dismissal of the request for retrial did not comply with the law, and that the judgment was issued over the case file without holding a hearing and with no justification. In this regard, he complained that his rights safeguarded by Articles 36, 141 and 153 of the Constitution were violated.

35. In its observations, the Ministry underlined that at the outset, while deciding on admissibility by referring to the case-law of the European Court of Human Rights ("the ECHR"), it should be considered whether the dismissal of the request for a retrial fell within the ambit of the right to a fair trial. Afterwards, it was noted that the assize court evaluating the request for a retrial, dismissed the relevant request on the grounds that the applicant was found to have been a senior member of and have carried out activities on behalf of the armed terrorist organisation, namely TKP/ML-TİKKO, and that the applicant had been arrested in the house of the organisation with a long-barreled Kalashnikov weapon as well as certain documents belonging to the organisation. Taken together with the other pieces of evidence against the applicant, holding of a retrial would not chance the outcome of the proceedings. In conclusion, the Ministry stated that it is at the discretion of the Constitutional Court to decide on whether the applicant's right to a fair trial had been violated within the integrity of the criminal proceedings carried out against him.

36. In his counter-statements, the applicant argued that the decision on dismissal of his request for a retrial without a hearing being held rendered the Court's violation judgment ineffective, stating that it was for the Court to examine whether the violation judgment had been duly executed within the scope of the individual application filed after the dismissal of his request for a retrial following the former's violation judgment.

B. The Court's Assessment

37. Article 36 § 1 of the Constitution reads as follows:

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

38. The applicant's allegations that his constitutional rights were violated for the authorities' failure to execute the Court's violation judgment must be examined from the standpoint of the right to a fair hearing safeguarded by Article 36 of the Constitution in conjunction with the right to legal counsel.

1. Admissibility

39. The present application must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

a. General Principles

40. According to Article 148 § 3 of the Constitution and Article 45 § 1 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, every person may apply to the Constitutional Court alleging that the public authorities have violated any one of his/her fundamental rights and freedoms safeguarded under the Constitution, which falls into the scope of the European Convention on Human Rights and its additional protocols, to which Türkiye is a party. Pursuant to Article 148 § 1 of the Constitution, the Court is authorised to adjudicate these applications (see *Şahin Alpay (3)*, no. 2018/10327, 3 December 2020, § 36; and *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019, § 49).

41. In this sense, the Court is to examine and adjudicate individual applications involving alleged violations of any fundamental rights and freedoms that are within the joint protection realm of the Constitution and the Convention. During the process where the individual applications are dealt with, the Court decides on "*whether a fundamental right is violated or not*" and "*the way how a given violation will be redressed*" (see *Şahin Alpay (3)*, § 54; and *Aligül Alkaya and Others (2)*, § 50).

42. The execution of a judgment in which the Court finds a violation of any fundamental right and freedom is a necessity resulting from the Court's authority and duty to adjudicate the individual applications. Considering the legislative intention of the relevant constitutional amendment, it is understood that one of the purposes underlying the introduction of the individual application mechanism is to establish an effective domestic remedy for the alleged violations of fundamental rights and freedoms and thus to reduce the number of applications to the ECHR against Türkiye. A judicial remedy incapable of yielding final and binding decisions cannot be regarded as effective. Indeed, the ECHR, which concludes in its *Hasan Uzun v. Türkiye* (no. 10755/13, 30 April 2013) judgment that the individual application to the Constitutional Court is a domestic remedy needed to be exhausted before lodging an application with it, makes a reference to Article 153 § 6 of the Constitution therein and accordingly takes into account the binding effect of the Constitutional Court's judgments over all natural and legal persons, as well as the state organs (see *Şahin Alpay (2)*, § 67).

43. The failure to duly execute a judgment finding a violation, which has been issued by the Court, results in the continuation of the violation previously found. In this sense, it is also for the Court, which is authorised to examine individual applications, to deal with the alleged failure to duly execute a violation judgment of the Court. Otherwise, it would be incompatible with the constitutional provisions stipulating the effective protection of fundamental rights and freedoms falling under the joint protection realm of the Constitution and the Convention through individual application mechanism. However, the examination to be carried out by the Court will not involve a re-examination of the facts from the outset but will be confined to ascertaining whether the violation judgment already rendered by the Court has been duly executed (see *Aligül Alkaya and Others (2)*, § 52).

44. As a matter of fact, it is provided in Article 50 § 1 of Law no. 6216 that in conclusion of an examination to be made on the merits of an individual application, it will be decided whether the applicant's right has been violated; and that if a violation is found, the steps to be taken in order to redress the violation and its consequences will be indicated. Accordingly,

the Court's powers and duties within the scope of individual applications are not limited to the determination of whether the right has been violated or not, but they also include the indication of the steps and actions to be taken in order to redress the violation and its consequences (see *Şahin Alpay (2)*, § 56).

45. On the other hand, Article 50 § 1 of Code no. 6216 precludes the Court from rendering decisions or judgments in the nature of an administrative act or action when determining the way to redress the violation and its consequences. Accordingly, in determining the way to redress the violation and its consequences, the Court may not take an action by substituting itself for the administration, the judicial authorities or the legislative branch. The Court decides on the remedy through which the violation and its consequences would be redressed and remits its judgment to the relevant authorities for the necessary action to be taken (see *Şahin Alpay (2)* [Plenary], § 57).

46. In this regard, the Court, in principle, leaves a margin of appreciation to the relevant authorities in respect of the questions as to how and by which means the violation and its consequences would be redressed (see *Savaş Çetinkaya*, no. 2012/1303, 21 November 2013, § 67). Having regard to the nature of the judgment finding a violation, the relevant authority takes necessary actions with a view to redressing the violation and its consequences. In certain circumstances, the Court taking into account the nature of the case may point out the principles as to how and by which means the violation and its consequences would be redressed (see *Bizim FM Radyo Yayıncılığı ve Reklamcılık A.Ş.* [Plenary], no. 2014/11028, 18 October 2017, §§ 71 and 72).

47. Besides, in cases where a violation of any fundamental right and freedom is found within the scope of the individual application, the basic rule for redressing the violation and its consequences is to ensure restitution as much as possible, that is to say, to ensure restoring to the former state prior to the violation. To that end, it must be primarily required to end the continuing violation, to eliminate the decision or the act giving rise to the violation or their consequences, to compensate the pecuniary and non-pecuniary damages resulting from the violation, as well as to take

the other measures deemed necessary in this respect (see *Abdullah Altun*, no. 2014/2894, 17 July 2018, § 49). In other words, the consequence of the violation must be redressed in real, not formal, terms (see *Aligül Alkaya and Others (2)*, § 56).

48. In cases where the violation results from a court decision, the Court holds that a copy of the judgment be sent to the relevant court for a retrial with a view to redressing the violation and the consequences thereof pursuant to Article 50 § 2 of the Code no. 6216. The relevant legal regulation, as different from the similar legal norms set out in the procedural law, provides for a remedy specific to the individual application and giving rise to a retrial for the redress of the violation. Therefore, in cases where the Court orders a retrial in connection with its judgment finding a violation, the relevant inferior court does not enjoy any margin of appreciation in acknowledging the existence of a ground for a retrial, as different from the practice of reopening of the proceedings set out in the procedural law. Thus, the inferior court to which such judgment is notified is legally obliged to take the necessary steps to redress the consequences of the continuing violation in line with the Court's judgment finding a violation (see *Aligül Alkaya and Others (2)*, § 57; and *Kadri Enis Berberoğlu (2)* [Plenary], no. 2018/30030, 17 September 2020, § 134).

49. In addition, in cases where the Court decides to communicate its violation judgment to the relevant inferior court to conduct a retrial for the redress of the violation and consequences thereof, the inferior court is liable to conduct a retrial without waiting for an application by the relevant parties, which is a case different from the retrial procedure laid down in the relevant procedural laws. Therefore, in cases where a retrial will be held in accordance with the violation judgment of the Court, there is not a stage as to the admissibility of the retrial, as distinct from the process of re-opening of the proceedings prescribed in the procedural law (see *Aligül Alkaya and Others (2)*, § 58).

50. In this regard, what the trial court is expected to perform at the outset is to acknowledge that it has initiated the retrial process in accordance with the Court's violation judgment. Subsequently, the court is obliged to take the necessary actions with a view to redressing the consequences of the

violation found by the Court. Within this framework, where the violation stems from a procedural shortcoming, action or another deficiency during the proceedings, the matter must be eliminated/redressed in a way that does not lead to a violation. However, such an obligation should not necessarily be interpreted to the effect that the inferior courts cannot execute certain violation judgments by ruling contrary to their previous decisions over the case file, without holding a hearing, or by making some changes in their decisions that eliminate the cause of violation. If it is considered that the violations noted in the Court's judgment can be eliminated without holding a hearing, the consequences of the violation can also be remedied through this method. In determination of the method that may remedy the consequences of the violation, an assessment should be made taking into account the nature of the violation (see *Aligül Alkaya and Others (2)*, § 59).

51. In some exceptional cases, the nature of the violation found may leave the incumbent authorities with only one option in terms of remedying the consequences of the violation. In this case, the Court shall clearly indicate the measure or method to be employed in order to remedy the violation and its consequences, and then the relevant authority shall take the necessary action (see *Kenan Yıldırım and Turan Yıldırım*, no. 2013/711, 3 April 2014, § 82).

b. Application of Principles to the Present Case

52. The Court, in its previous judgment finding a violation, noted that the applicant's statement taken in custody in the absence of a lawyer had been taken as the decisive basis for the trial court's decision, that there was a forensic report which might have substantiated the applicant's claim that he had been subjected to physical coercion during his detention at the police station, and that at every stage from the statement-taking process before the public prosecutor's office, the applicant gave his statements under pressure in the absence of a lawyer and did not accept their content. Furthermore, in the same decision, it was also stated that the identification and location processes concerning the other accused, which were also taken as basis for the trial court's decision, had been carried out in the absence of a lawyer and had not been accepted by the other accused

at the subsequent stages, and that the weapons and various publications considered as part of the offence had been seized after the location process carried out in the absence of a lawyer, and it was evaluated that the assistance of a lawyer the applicant had access to at the later stages of the proceedings and other guarantees provided within the scope of the trial procedure could not redress the infringement of the right to defence at the very beginning of the investigation. Accordingly, it has been concluded that the applicant's right to a fair trial was violated in conjunction with his right to legal counsel on the grounds that the applicant could not have access to a lawyer in custody and that the infringement of his right to defence hindered the fairness of the overall proceedings.

53. In its many judgments, the Court has set out the principles covered by Article 36 § 1 of the Constitution regarding everyone's *right to a fair hearing* and *right to legal counsel* within the scope of the *right to a fair trial*.

54. Thus, in the event that the confession of the accused under the supervision of law-enforcement officers in the absence of a defence counsel is relied on in his conviction, this shall lead to an irredeemable infringement of the right to defence. If the confession, obtained during the investigation, is disaffirmed for having been obtained under torture and ill-treatment, the reliance on this confession by the trial court without considering the disaffirmation points to a significant absence of due diligence (see *Yusuf Karakuş and Others*, no. 2014/12002, 8 December 2016, § 79).

55. The Court had previously noted that depriving the suspects for offences falling within the jurisdiction of the state security courts of legal assistance was a legislative practice (see *Aligül Alkaya and Others*, § 144; *Sami Özbil*, no. 2012/543, 15 October 2014, § 71; and *Güllüzar Erman*, no. 2012/542, 4 November 2014, § 48); however, it found violations for the failure to remedy the right to legal counsel (see *Aligül Alkaya and Others*, §§ 127-145, *Sami Özbil*, §§ 56-76; *Aynur Avyüzen*, no. 2014/784, 27 October 2016, §§ 37-58; and *Veli Özdemir*, no. 2014/785, 27 October 2016, §§ 39-62).

56. The violations identified in the violation judgments of the Court may be remedied without a hearing being held, in the circumstances of the case. For example, the requirements of some violation judgments may

be fulfilled by delivering a judgment contrary to the previous one over the case file, or by making some changes in the judgment, thus eliminating the ground of the violation. In other words, even if a hearing is not required given the ground of the violation, the retrial may be carried out over the case file and by rewriting the reasoned judgment, and even the same conclusion may be reached provided that the ground for violation is eliminated. Nevertheless, retrial cannot be denied based on the presumption that the result will not change. In the present case, in order for the requirements of the violation judgment of the Court to be fulfilled in accordance with the above-mentioned principles, the first instance court must at the outset decide on *retrial* and -in consideration of the nature of the violation- *hold a hearing*. In such cases where the Court finds a violation and orders the redress of the violation and its consequences, the relevant judicial authorities must act in a way to redress the violation and its consequences, in accordance with the violation judgment. However, even if the applicant's statement taken at the police station during the investigation phase was disregarded, the first instance court *dismissed the request for reopening of the proceedings* on the grounds that the court would not reach a different conclusion, that the applicant had been arrested with a long-barreled weapon as well as certain documents belonging to the organisation, and that the applicant had made a tacit confession during the prosecution phase, which was in violation of the court's legal obligation. Indeed, what should have been done was to conduct a retrial to remedy the grounds for the violation of procedural safeguards, to evaluate the outcome of the proceedings on the basis of the state of evidence and accordingly, to render a new judgment (see, in the same vein, *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

57. Whether the denial of legal assistance to the applicant in custody and therefore the infringement of his right to defence prevented the overall fairness of the proceedings cannot be examined without holding a hearing. Moreover, whether the applicant's statements had been taken under ill-treatment and torture during the investigation phase, whether they can be used as evidence for his conviction, and whether the statements of the other defendant, according to which identification and location procedures had been carried out in the absence of a lawyer, can be taken as a basis for the

applicant's conviction are to be discovered through retrial and by holding a hearing. Therefore, it has been observed that the interpretation made by the assize court when rejecting the request for a retrial does not comply with the Court's violation judgment, that although holding of a hearing is necessitated by the very nature of the violation, it failed to be to the extent and lacked due diligence required by Article 36 of the Constitution, and that therefore, the trial courts failed to redress the violation found by the Court as well as the consequences thereof.

58. For there reasons, it has been concluded that the right to a fair hearing was violated on the grounds that the Court's violation judgment had not been executed, which did not comply with the safeguards provided by the right to a fair hearing in conjunction with the right to legal counsel within the scope of the right to a fair trial safeguarded by Article 36 of the Constitution.

3. Application of Article 50 of Code no. 6216

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

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

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

60. The applicant requested the Court to find a violation, order a retrial and award him 30,000 Turkish liras (TRY) for non-pecuniary damages.

61. In its judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court indicates the general principles as to how a violation of any fundamental right, which has been found established by the Constitutional Court, and its consequences would be redressed.

62. The Court has concluded that the applicant's right to a fair trial was violated due to the failure of the trial courts to redress the violation previously found by the Court as well as the consequences thereof. Therefore, it has been observed that the violation in the present case arose from a court decision.

63. Given *the nature of the violation found*, it has been considered that in order for the violation and its consequences to be redressed, it is the only and the last remedy to hold a retrial and hearing. Thus, a copy of the judgment must be remitted to the 12th Chamber of the İstanbul Assize Court for retrial.

64. Given that a second violation judgment has been rendered due to the failure to fulfil the requirements of the previous one regarding the right to a fair hearing in conjunction with the right to legal custody, it has been considered that the mere finding of a violation or holding of a retrial will not be sufficient to redress the applicant's situation. Thus, the applicant must be paid a net amount of TRY 20,000 in respect of non-pecuniary damages.

65. The total litigation costs of TRY 4,864.60 including the court fee of TRY 364.60 and the counsel fee of TRY 4,500, as established on the basis of the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 15 March 2022 that

A. The alleged violation of the right to a fair hearing in conjunction with the right to legal counsel be declared ADMISSIBLE;

B. The right to a fair hearing in conjunction with the right to legal counsel within the scope of the right to a fair trial safeguarded by Article 36 of the Constitution was VIOLATED;

C. A copy of the judgment be REMITTED to the 12th Chamber of the İstanbul Assize Court (Additional decision: E.2010/373, K.2013/199, 4 September 2018) for a retrial so as to redress the consequences of the violation of the right to a fair hearing in conjunction with the right to legal counsel;

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

E. The total litigation costs of TRY 4,864.60 including the court fee of TRY 364.60 and the counsel fee of TRY 4,500 be REIMBURSED to the applicant;

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

H. A copy of the judgment be SENT to the Council of Judges and Prosecutors and the Ministry of Justice.

RIGHT TO AN EFFECTIVE REMEDY (ARTICLE 40)

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

PILOT JUDGMENT

NEVRİYE KURUÇ

(Application no. 2021/58970)

5 July 2022

On 5 July 2022, the Plenary of the Constitutional Court found a violation of the right to a trial within a reasonable time, safeguarded by Article 36 of the Constitution, and the right to an effective remedy, safeguarded by Article 40 of the Constitution, in the individual application lodged by *Nevriye Kuruç* (no. 2021/58970).

THE FACTS

[5-37] The applicant brought an action for severance pay, overtime pay and payment of wages for work on national and religious holidays, claiming that she had worked until her retirement in the hospital where she had started as a cleaner. The 7th Chamber of the Bakırköy Labour Court (Labour Court) decided that the proceeding be partially upheld. Upon the request for appeal, the Regional Court of Appeal annulled decision of the Labour Court and remitted the case to the relevant court to deliver a new decision. The Labour Court decided that the proceeding be partially upheld at the end of the trial in line with the decision of the Regional Court of Appeal. The defendant has lodged an appeal against the aforementioned decision, and the decision has not yet been finalised.

V. EXAMINATION AND GROUNDS

38. The Constitutional Court ("the Court"), at its session of 5 July 2022, examined the application and decided as follows:

A. Alleged Violation of the Right to a Trial within a Reasonable Time

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

39. The applicant maintained that her right to a trial within a reasonable time was violated, stating that the action she brought before the Labour Court regarding the receivables to which she was entitled as an employee had been pending for approximately 7 years, and that it was not clear when it would be concluded.

2. The Court's Assessment

40. Article 36 of the Constitution, titled *"Right to legal remedies"*, reads as follows: *"Everyone has the right of litigation either as plaintiff or defendant*

and the right to a fair trial before the courts through legitimate means and procedures.

No court shall refuse to hear a case within its jurisdiction."

41. Article 141 of the Constitution, titled *"Publicity of hearings and the necessity of justification for verdicts"*, reads as follows:

"…It is the duty of the judiciary to conclude trials as quickly as possible and at minimum cost."

a. Admissibility

42. The alleged violation of the right to a trial within a reasonable time must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

43. Pursuant to Article 36 of the Constitution and Article 6 of the European Convention on Human Rights ("Convention"), disputes concerning civil rights and obligations and criminal charges must be resolved within a reasonable time. The present case concerns the action brought on the basis of the Labour Law no. 4857, dated 22 May 2003, with the request for payment of employee receivables, and there is no doubt that the proceedings carried out in the present case in accordance with the procedural provisions of Laws no. 7036 and no. 6100 in order to resolve this dispute is a trial on civil rights and obligations.

44. The right to a fair trial imposes a duty on the State to set up a judicial system that guarantees the final settlement of disputes within a reasonable time. For this purpose, the law-maker, taking into account the employee-protective nature of labour law and the characteristics of labour proceedings, has established a special labour proceedings system outside the general courts and aimed to conclude labour proceedings in a quick, simple and cost-effective manner as much as possible by specialized courts. As a matter of fact, both the Law no. 7036 and the repealed Law no. 5521 have made arrangements to ensure that the proceedings be carried out in a speedy manner, and it is envisaged that the appeal proceedings before

the Court of Cassation and Regional Court of Appeal will be concluded in a short time. For this reason, it is aimed to conclude the proceedings before the labour court in a shorter time by applying the simple trial procedure.

45. In consideration of the fact that the periods stipulated in the aforementioned Laws are of a regulatory nature, the hearings and intervals between hearings, waiting for expert reports, hearing witnesses, as well as of notification procedures, it is seen that these periods may be exceeded. Therefore, it cannot be said that every trial period exceeding the prescribed period is unreasonable and in breach of the right to a fair trial. However, considering the value, for the applicant, of the actions filed for the payment of workers' receivables and the personal interest of the applicant in conclusion of the proceedings in a short time, it should be taken into consideration that assessments regarding the duration of the proceedings in such cases should be made in a more delicate manner (see *Nesrin Kılıç*, no. 2013/772, 7 November 2013, §§ 57, 58).

46. In determining the duration of the proceedings regarding disputes related to civil rights and obligations, the date of filing of the action shall be taken as the starting date of the duration, and the date of the end of the proceedings, frequently including the execution phase, shall be taken as the date of the end of the duration. As regards the cases which have not been concluded yet, the date when the Court rendered a judgment on the complaint regarding the alleged violation of the right to a trial within a reasonable time shall be taken as the date of the end of the duration (see *Güher Ergun and Others*, §§ 50-52).

47. In the examination of reasonable time, several factors related to the nature of the case, such as the complexity of the case materials consisting of material facts and means of proof or the statutory provisions to be applied, the attitude of the parties in the proceedings in general, the influence of their attitude on the prolongation of the proceedings and whether they have shown due care and diligence in exercising their procedural rights will be assessed. In addition, it is necessary to decide on whether there is a delay caused by structural problems and lack of organization attributable to all state organs exercising public power in relation to the proceedings as well as to the judicial authorities, whether due care has been shown to

conclude the proceedings expeditiously, what is the benefit of the applicant in obtaining legal protection for the applicant as soon as possible, must be taken into consideration as a whole, and accordingly a decision must be issued (see *Güher Ergun and Others*, §§ 42-46).

48. In making an assessment as to the reasonable time in the present application, the significance (value) for the applicant of the action giving rise to the present application and the personal benefit of the applicant will be taken into consideration, each of the elements that caused delay in the proceedings will be determined, and their effect on the process will be determined and the reasonable time criteria will be evaluated as a whole.

49. In the present case, the applicant brought an action on 10 December 2014 and sought the payment of severance pay, overtime wages, allowance for national and religious holidays, stating that he worked at Yedikule Chest Diseases Hospital from 23 July 1999 to 27 October 2014 when she retired. The Labour Court decided to partially accept the action on 18 October 2017. Upon the appeal on points of facts and law, the Regional Court of Appeal annulled the decision of the Labour Court on 8 January 2020 and remitted the file to the Labour Court for a new decision. The Labour Court partially accepted the action on 7 December 2021 at the end of the proceedings in line with the decision of the Regional Court of Appeal. The defendant lodged an appeal on points of facts and law against the decision, and thus the decision has not yet been finalized.

50. As a result of the examination of the applicant's case, it has been observed that the impugned action was not of a complex nature in consideration of the criteria such as the difficulty in settlement of the legal issue, the complexity of the facts, the obstacles encountered in the collection of evidence and the number of parties. Nor can it be said that the applicant significantly prolonged the proceedings by her attitude and behaviour as well as due to her careless behaviour in exercising her procedural rights.

51. In view of the above-mentioned principles and the Court's judgments in similar cases, it has been concluded that the action brought by the applicant on 10 December 2014 is still pending, and that the trial period lasting over 7 years in the present case is unreasonable, considering

the above-mentioned principles and the judgments of the Constitutional Court in similar applications.

52. For these reasons, the Court found a violation of the right to a trial within a reasonable time safeguarded by Article 36 of the Constitution.

B. Alleged Violation of the Right to an Effective Remedy Taken in conjunction with the Right to a Trial within a Reasonable Time

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

53. The applicant alleged that her right to an effective remedy taken in conjunction with the right to a trial within a reasonable time was violated due to lack of a remedy to which she could resort for the prolongation of the proceedings which could not be concluded within a reasonable time.

2. The Court's Assessment

54. Article 40 of the Constitution, titled *"Protection of fundamental rights and freedoms"*, provides as follows:

"Everyone whose constitutional rights and freedoms have been violated has the right to request prompt access to the competent authorities.

The State is obliged to indicate in its proceedings, the legal remedies and authorities to which the persons concerned should apply and the time limits of the applications.

Damages incurred to any person through unlawful treatment by public officials shall be compensated for by the State as per the law. The State reserves the right of recourse to the official responsible."

55. Article 148 §§ 3 and 4 of the Constitution, titled *"Functions and powers"*, provides as follows:

"…

Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities. In order to make an application, ordinary legal remedies must be exhausted.

In the individual application, judicial review shall not be made on matters required to be taken into account during the process of legal remedies."

56. Article 45 §§ 1 and 2, titled *"Right to individual application"*, of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court provides as follows:

"(1) Everyone can apply to the Constitutional Court based on the claim that any one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights and the additional protocols thereto, to which Türkiye is a party, which are guaranteed by the Constitution has been violated by public force.

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

57. Article 75, titled *"Pilot decision procedure"*, of the Internal Regulations of the Court provides as follows:

"(1) In the event that the Sections determine that an application stems from a structural problem and that this problem has led to other applications or that they envisage that this situation will lead to new applications, they can implement the pilot decision procedure. In this procedure, a pilot decision shall be made by the Section in relation to the matter. Applications of similar nature shall be resolved by administrative offices within the framework of these principles; in the event that they are not resolved, they shall be reviewed and concluded collectively by the Court.

(2) The Section can initiate the pilot decision procedure ex officio or upon the request of the Ministry of Justice or the applicant.

(3) The application which has been selected for the pilot decision practice shall be considered as part of the prioritized affairs on the agenda.

(4) In its pilot decision, the Section shall demonstrate the structural problem it has identified and the measures which need to be taken for its solution.

(5) With the pilot decision, the Section can postpone the examination of similar applications which are related to the structural problem that is the subject of this decision. The concerned shall be informed regarding the decision of postponement. In the event that it deems this to be necessary, the Section can put on the agenda and conclude the applications it has postponed."

a. Admissibility

58. The applicant's allegations concerning the violation of the right to an effective remedy enshrined in Article 40 of the Constitution and Article 13 of the Convention cannot be assessed *in abstracto* and must be considered in conjunction with other fundamental rights and freedoms set forth in the Constitution and the Convention. In order to discuss whether the right to an effective remedy has been violated, the applicant must demonstrate which of her fundamental right and freedom has been restricted.

59. The right to an effective remedy does not have an independent function of protection, but is among the complementary rights that guarantee the exercise and protection of fundamental rights and freedoms, as well as the legal remedies. In the present case, the right to an effective remedy safeguarded by Article 40 of the Constitution is linked to the right to a trial within a reasonable time enshrined in Article 36 of the Constitution. Therefore, this right falls within the scope of the protection realm of fundamental rights and freedoms guaranteed under the Constitution and also covered by the Convention. Therefore, it is possible to make an examination under the right to an effective remedy in conjunction with the right to a trial within a reasonable time.

60. For these reasons, the alleged violation of the right to an effective remedy must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

i. General Principles

Necessity for the establishment of an effective remedy in conjunction with the right to a trial within a reasonable time

61. Article 40 of the Constitution enshrines the right, for those whose fundamental rights and freedoms safeguarded in the Constitution have been violated, to be provided with the opportunity to apply to a competent authority without delay (right to an effective remedy). This right is designated as a means of reviewing whether fundamental rights and freedoms have been violated in the exercise of public duties and powers.

62. The right to an effective remedy may be described as ensuring that everyone who claims to have suffered a violation of one of his constitutional rights are provided with an opportunity to submit applications with administrative and judicial remedies that are reasonable, accessible, and capable of preventing the violation from taking place or ceasing its continuation or eliminating its consequences (i.e. offering adequate redress), whereby the person concerned can have his allegations examined in a manner compatible with the nature of the right at stake (see *Y.T.* [Plenary], no. 2016/22418, 30 May 2019, § 47; and *Murat Haliç*, no. 2017/24356, 8 July 2020, § 44).

63. This right is a complementary right that cannot be exercised independently, but can only be exercised if there is an allegation that another fundamental right and freedom guaranteed under the Constitution has been violated. In other words, in order to examine whether the right to an effective remedy has been violated, it must be first addressed in respect of which fundamental right and freedom the right to an effective remedy has been restricted (see *Onurhan Solmaz*, no. 2012/1049, 26 March 2013, §§ 33, 34; and *Sıtkı Güngör*, no. 2013/5617, 21 April 2016, § 86).

64. The right to an effective remedy requires that a person who considers that he has suffered due to any issue alleged to be unconstitutional should be able to resort to a legal remedy for both obtaining a decision on his allegations and, if possible, the redress of the damage. In other words, anyone who claims to be aggrieved by an arguable violation of one of the fundamental rights and freedoms set out in the Constitution has the right to an effective remedy under Article 40 of the Constitution (see *Sıtkı Güngör*, § 87).

65. The scope and extent of the guarantee that individuals have in terms of the right to an effective remedy varies by the very nature of

the right related to the alleged violation. However, it should be stated in general that the remedy that must be provided pursuant to Article 40 of the Constitution must, both in theory and in practice, prevent the alleged violation, put an end to the violation if it continues, and provide reasonable compensation for violations that have already ended (see *K.A.* [Plenary], no. 2014/13044, 11 November 2015, § 71).

66. The provision of effective remedies that enable the examination of the merits of complaints and provide, when necessary, an appropriate redress is a requirement of ensuring the right to an effective remedy. Accordingly, the mere formulation in the legislation of the judicial remedies envisaged in order to eliminate the grievances of the persons does not suffice, but this remedy must offer a prospect of success also in practice. In applying the conditions set for resorting to this remedy to the concrete cases, the arguable allegations arising from the underlying acts, actions or omissions must be assessed broadly in this sense, and if it is concluded that the conditions are not met, the judicial authorities must demonstrate the relevant and sufficient grounds thereof (see *İlhan Gökhan*, no. 2017/27957, 9 September 2020, §§ 47, 49).

67. The Court set out the basic principles regarding the right to a trial within a reasonable time in its judgments in *Güher Ergun and Others* (no. 2012/1198, 7 November 2013) in civil cases, *Selahattin Akyıl* (no. 2012/1198, 7 November 2013) in administrative cases and *B.E.* (no. 2012/625, 9 January 2014) in criminal cases.

68. Delays attributable to the competent authorities may arise from a lack of due diligence in concluding the proceedings in a speedy fashion, as well as from structural problems and lack of organization. Articles 36 and 141 of the Constitution impose on the State the responsibility to organize the legal system in such a way as to fulfil the guarantees inherent in the right to a fair trial, including the obligation of the judicial authorities to adjudicate the cases within a reasonable time. The State is obliged to take all necessary measures to ensure that disputes and cases pending resolution in the judicial system be concluded within a reasonable time. This obligation is a manifestation of the responsibility to organize the legal system in such a way as to fulfil the basic guarantees of the right to a fair trial.

69. The failure to conclude the proceedings within a reasonable time due to the increase and accumulation of disputes awaiting resolution in the judicial system on account of delays resulting from structural problems and organizational deficiencies gives rise to a violation under Article 36 of the Constitution. Pursuant to this provision, the judicial system must be designated in such a way that the courts can fulfil their obligation to adjudicate the cases within a reasonable time. It is clear that the structural and organizational deficiencies in the legal system cannot justify the failure to conclude the proceedings within a reasonable time.

70. In this context, it is clear that in order to secure the right to a trial within a reasonable time, which is enshrined in Article 36 of the Constitution, and to prevent public authorities from infringing these rights, it is necessary to furnish effective remedies that may be resorted to in case of alleged violations of the right to a trial within a reasonable time. This remedy should be capable of offering solutions to redress the damages that may arise due to the prolongation of the impugned proceedings or case.

Existence of a structural problem with respect to the right to a trial within a reasonable time, and steps taken and mechanisms established to overcome this problem

71. According to the Court's statistics dated 1 July 2022, since 2012, when the individual application was adopted, in a total of 16,887 cases, the Court found a violation of the right to a trial within a reasonable time. According to the statistics of the same date, there are still approximately 55,000 applications pending before the Court concerning the very same right. In view of the statistics of the Court for the last three years, it appears that while the number of applications lodged in 2020 was 40,402, this number increased to 66,121 in 2021, and in 2022, approximately 65,000 applications were lodged just in the first six months. Regard been had to the applications involving the alleged violation of the right to a trial within a reasonable time, it is seen that 6,782 applications were filed in 2020, 24,553 in 2021 and approximately 34,000 applications were lodged just in the first six months of 2022. Accordingly, it is possible to say that the rate of increase in the individual applications with respect to the right in question is very high. The number of pending applications before the

Court is around 108,000, and more than half of these pending applications are related to the right to a trial within a reasonable time. Moreover, it should also be noted that the number of violation judgments issued in cases regarding this right is high.

72. It is known that various measures have been taken - both by international organizations and by legislative, executive and judicial bodies - to ensure that trials are completed within a reasonable time, which is one of the basic guarantees inherent in the right to a fair trial safeguarded by the Convention and the Constitution.

73. In this context, the European Commission for the Efficiency of the European Judiciary (CEPEJ) established the Centre for Time Management in the Judiciary (SATURN) in 2007 in order to prevent prolonged trials by more effectively observing the principle of the conclusion of proceedings within a reasonable time, which is an important aspect of the right to a fair trial by the member states of the Council of Europe, including Türkiye. The Centre has taken many steps to ensure that trials are completed within a reasonable time. On 6 December 2016, the CEPEJ Plenary adopted the implementation guidelines for the conclusion of proceedings in a reasonable time, drafted by the SATURN working group. In these guidelines, member states are recommended to conclude cases within 1, 2 and 3 years. However, it is stated that the main target for member states is the conclusion of cases within one year. The guideline introduces an integrated system that envisages setting a target time-limit, monitoring compliance with the prescribed time-limit, establishing a monitoring mechanism and developing solutions for prolonged cases. This practice ensures transparency and public scrutiny of the judiciary by providing beneficiaries with a predictable judicial process and timely completion of proceedings without compromising the quality of the proceedings.

74. Within this framework, *"the practice of target time in the judiciary""* was initiated in Türkiye. First, Article 28 § 7 of the Law on Judges and Prosecutors no. 2802, dated 24 February 1983, stipulates that the target periods for the completion of the investigation, prosecution or trial shall be determined by the Ministry in consultation with the Council of Judges and Prosecutors (Council).

75. The Regulation on Determination and Implementation of Target Periods in Investigation, Prosecution or Proceedings, which sets the procedures and principles regarding the determination and implementation of target periods pursuant to the provisions of this Law, was published in the Official Gazette of 23 June 2017 and took effect on 1 September 2017.

76. On the other hand, in subparagraph (c) of Article 5 § 1 of the Regulation on the Arrangement of Appellate Stage Assessment Forms, which determines the procedures and principles regarding the appellate stage assessment forms to be prepared for judges and public prosecutors of the judicial jurisdiction and judges of the administrative jurisdiction as a result of the review of appellate stage and entered into force on 30 September 2016, it is stipulated that the issue of *" conclusion of the investigation, prosecution or trial within the target period"* will be taken into consideration in the assessment.

77. The Human Rights Action Plan, which was implemented by the Ministry within the scope of the judicial reform strategy, aims to conclude investigations and prosecutions within a reasonable time through the practice of *target time in the judiciary* which is included in the target of *strengthening the right to a trial within a reasonable time*. This practice aims to prevent delays in judicial processes. In this context, target periods were set for each type of case and investigation, and the plaintiffs are notified of these prescribed periods at the time when an action is brought.

78. In addition, many applications were made to the European Court of Human Rights ("ECHR"), involving an alleged violation of the right to a trial within a reasonable time, and the ECHR found violations of the right to a trial within a reasonable time and the right to an effective remedy (see §§ 32-44). In its recent judgment *Ümmühan Kaplan v. Türkiye*, the ECHR pointing to the structural problem in this regard and to the lack of an effective remedy, decided to apply the pilot judgment procedure (see §§ 45-50). Following this judgment, through the Law no. 6384, the power and duty to examine the applications lodged with the ECHR with an alleged violation of the right to a trial within a reasonable time was granted to the Compensation Commission of the Ministry ("Compensation Commission").

79. As a result of the large number of applications made to the Court, the provisional Article 2 of the aforementioned Law sets forth the *""an application may be made to the Commission regarding certain individual applications pending before the Constitutional Court"*. With the aforementioned provision, it is set forth that the individual applications pending before the Court as of 31 July 2018, when the provisional Article 2 entered into force, can be examined by the Compensation Commission upon the application to be made within three months as from the notification of the inadmissibility decision issued by the Court for non-exhaustion of available remedies. Following this regulation, the Court declared the application inadmissible due to the non-exhaustion of available remedies, acknowledging that the remedy before the Compensation Commission has the capacity of offering a *prima facie* prospect of success, as well as of providing adequate redress (see *Ferat Yüksel*, no. 2014/13828, 12 September 2018).

80. After the introduction of Provisional Article 2 of Law no. 6384 and the *Ferat Yüksel* judgment issued after this amendment, all of the individual applications pending as of 31 July 2018 involving the alleged violations of the right to a trial within a reasonable time and delayed execution or non-execution of court decisions were declared inadmissible on the grounds of non-exhaustion of available remedies.

81. Finally, it appears that the decisions of the higher judicial bodies frequently include the principles regarding the right to a trial within a reasonable time. As a matter of fact, in the decision of the Criminal General Assembly of the Court of Cassation dated 14 December 2021 and no. E.2018/62, K.2021/363, it is stated that *""The purpose of the right to a trial within a reasonable time is to protect the parties from material and moral pressure and distress due to the prolonged proceedings, to secure justice properly and to preserve the confidence in the law, and due attention should be paid to this issue in the resolution of the legal dispute."* (see, for the relevant decision of the Council of State, the decision of the 13th Chamber of the Council of State no. E.2016/1621, K.2016/2257, dated 8June 2016).

82. As is seen, it has been recognized by both the Court and the ECHR that there is a structural problem regarding the right to a trial within

a reasonable time, which leads to the violation of this constitutional fundamental right. Being aware of this fact, the legislator, administrative authorities and judicial bodies have taken various steps to solve the problem and have implemented certain measures. In fact, it should be reminded again that according to Articles 36 and 141 of the Constitution, the judicial authorities have the obligation to conclude the cases within a reasonable time. However, in cases where the proceedings are not concluded within a reasonable time and take a long time despite all kinds of measures taken, there is no mechanism and therefore no effective remedy to offer redress for the damages arising from this violation. As a matter of fact, it is clear that the Compensation Commission remedy envisaged in the above-mentioned legislation envisages *provisional* solutions to conclude the applications before the ECHR and the Court, which were filed before the dates set by the relevant legal provisions.

83. Finally, it should be noted that the Human Rights Action Plan (2021-2023), which was announced through the Presidential Circular no. 2021/9 and dated 29 April 2021, includes some measures deemed appropriate to be taken to strengthen the right to a trial within a reasonable time under Target 2.4. These measures are as follows:

"In line with the results of courthouse and file-based analysis, new steps will be taken to improve the 'Target Time in Judiciary' practice in a way to ensure trials within reasonable time.

In order to conclude the proceedings quickly and prevent the victimization of citizens, the target time application will be extended to include the appeal proceedings and the procedures of the Forensic Medicine Institution.

Necessary measures will be taken to quickly finalize jurisdictional disputes arising during the investigation phase, particularly in crimes committed in the field of informatics and fraud crimes.

Problems regarding the jurisdiction and competence disputes of courts will be resolved in order to ensure the right to a trial within a reasonable time.

The lawyers of the parties will be notified that the court judge will be absent from discovery and hearings due to an excused absence, and an upper time limit will be imposed on the appointment of a new hearing date in such cases.

In order to prevent delays arising from the fact that the decisions of the Court of Jurisdictional Dispute are not binding in similar cases, the legislation will be amended to make the decisions of this Court binding for other cases as well.

In administrative judiciary, the rule necessitating the formulation of the reasoned decision within thirty days will be introduced.

In order to complete the proceedings in a reasonable time and to facilitate the work of citizens, the electronic notification procedure will be extended to citizens residing abroad, and regular training will be provided to PTT officials in order to ensure that notification procedures are duly carried out.

The scope of procedures such as speedy trial and simple trial in criminal proceedings will be expanded and thus, judicial processes will be completed in a faster and more effective manner.

Arrangements will be made to ensure that institutions and organizations that are requested information and documents during the judicial process fulfil these requests as soon as possible.

In labour cases, judges will be able to access all records of the Social Security Institution through the information system, limited to the subject matter of the case, and thus the cases will be finalized faster.

It will be ensured that the files in which a quashing decision has been issued will be heard with priority and urgency."

84. In addition, the same instrument also includes an aim under Target 1.2: *"Damages arising from lengthy trials will be redressed by the Human Rights Compensation Commission in a short time without the need to apply to the Constitutional Court."*

Problems stemming from the lack of an effective remedy with respect to a trial within a reasonable time

- Being in contravention of the Subsidiary Nature of Individual Application Mechanism

85. It should also be borne in mind that the individual application to the Constitutional Court is a remedy of subsidiary nature. It is essential that alleged violations of fundamental rights and freedoms are first resolved

before the general courts through ordinary legal remedies. Only when it is not possible to redress the alleged violations through this ordinary review mechanism, an individual application may be lodged (see *Bayram Gök*, no. 2012/946, 2 March 2013, § 18).

86. As stated above, pursuant to Article 40 of the Constitution, it is clear that everyone who claims that any of his fundamental rights and freedoms has been violated must have effective remedies to which he may resort before applying to the Court. The respect for fundamental rights and freedoms is a principle that all organs of the State must comply with, and if this principle is not complied with, the violation should first be brought before the competent administrative authorities and the courts of first instance.

87. In this sense, as a requirement of subsidiarity principle, Article 148 § 3 of the Constitution and Article 45 § 2 of Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, provide that all the administrative and judicial remedies provided for by the law in respect of the procedure, act or negligence which constitutes the basis of the alleged violation must be exhausted before lodging an individual application. Therefore, the lack of an effective remedy whereby a violation of the right to a trial within a reasonable time is found and the damages suffered on account thereof are redressed by way of compensation is incompatible with the principle of subsidiarity of the individual application. The Court is not an authority where alleged violations are directly examined at first hand, and such an examination by the Court would be incompatible with the purpose of the individual application.

- Problems arisen with respect to the right to individual application

88. The right to individual application is enshrined in Article 148 § 3 of the Constitution. Accordingly, everyone may apply to the Court, alleging that any of his fundamental rights and freedoms guaranteed in the Constitution and also covered by the Convention has been violated by a public authority. This right is a special aspect of the right to an effective remedy safeguarded by Article 40 of the Constitution (see *Ruhi Abat*, no. 2014/4724, 7 March 2019, § 44).

89. Individual application is a constitutional right that enables those whose constitutional rights have been violated as a result of the acts and actions of the authorities wielding public power to apply to the Court for the finding and redress of the violation upon the exhaustion of the available ordinary remedies. The individual application to the Court has the function of determining the scope of constitutional rights and freedoms, ensuring that a uniform law of rights and freedoms prevails throughout the country, as well as redressing individual grievances (see *Ruhi Abat*, § 48).

90. The individual application is one of the most important means for the protection of rights and freedoms. It is also clear that the complaints of the applicants should be examined within a short period of time in order for the individual application system to function effectively. At this stage, it should be noted that the right to an effective remedy regulated under Article 40 of the Constitution means that administrative and judicial remedies that can be resorted to before the individual application should be set up, which ensure the exercise of the right to individual application enshrined in Article 148 of the Constitution and the effective functioning of this remedy. In consideration of the number of individual applications to the Court, involving an alleged violation of the right to a trial within a reasonable time, the first-hand examination of these allegations by the Court significantly complicates the exercise of the right to individual application under Article 148 of the Constitution and the effective functioning of this remedy.

91. Therefore, regard been had to Article 40 and Article 148 § 3 of the Constitution, in order to eliminate the grievances arising from the violation of the right to a trial within a reasonable time, an effective remedy should be provided before exercising the right to an individual application to the Constitutional Court. It is also clear that there is an opportunity to apply to the Court after the exhaustion of this remedy and the relevant judicial remedies.

92. The establishment of an effective remedy that can be applied before the individual application to the Constitutional Court in case of an alleged violation of the right to a trial within a reasonable time will

facilitate the examination of the application, which will first be addressed by administrative or judicial authorities, before the Constitutional Court.

93. Following the Court's judgments pointing to the structural problems, other State organs are expected to review the effectiveness of existing remedies and establish effective domestic legal mechanisms to prevent the same matter from being brought before the Court again. In consideration of the number of applications and violations mentioned above, as well as especially of the applications regarding the right to a trial within a reasonable time, the continued functioning of the system in this way would not be compatible with the aims and objectives envisaged by the constitution-maker in establishing the individual application. However, in the legislative intent of Article 148 of the Constitution, it is stated that *"the establishment of a well-functioning individual application system in Türkiye will raise the standards on the basis of rights and the rule of law"*. The constitution-maker has thereby emphasized the importance it attaches to the establishment of a well-functioning individual application system.

94. Moreover, the applications involving alleged violation of the right to a trial within a reasonable time may not only make it difficult for the Court to examine other applications concerning fundamental rights and freedoms such as the right to life, prohibition of torture and ill-treatment, right to personal liberty and security, which are under the joint protection realm of the Constitution and the Convention, but may also lead to a setback concerning the right to a trial within a reasonable time trial in terms of the time taken before the Court itself. As a matter of fact, in some applications, the ECHR has assessed whether the examination by the Court was carried out within a reasonable time by taking into account the time taken before it (see, for cases regarding Article 5 of the Convention, *Sabuncu and Others v. Türkiye*, no. 23199/17, 10 November 2020, §§ 197-200, and for cases regarding Article 6 of the Convention, *Çevikel v. Türkiye*, no. 23121/15, 23 May 2017, §§ 34-66). Therefore, since the failure to set up an effective remedy regarding the right to a trial within a reasonable time may lead to a separate reasonable-time problem in terms of the proceedings before the Court itself, which may also have consequences that are incompatible with the purposes stated in the legislative intent of Article 148 of the Constitution.

Principles as to the efficiency of the legal remedies that may be set up with respect to the right to a trial within a reasonable time

95. Some of the measures envisaged by administrative and judicial authorities and the legislature to prevent violations of the right to a trial within a reasonable time are listed above. However, as stated above, in cases where a violation has occurred despite the measures taken, it is obligatory and necessary to set up a compensation remedy in order to redress the damages resulting from the violation, in accordance with Article 40 of the Constitution. The continued first-hand and direct examination of these applications by the Court would be incompatible with the wording and purpose of Article 148 of the Constitution. In order for the remedy to be established to that end to be considered effective, the following principles must be observed:

- There must also be the possibility to apply for pending proceedings and cases.

- The request for compensation must be concluded within a reasonable time.

- The compensation awarded must be paid within a reasonable time.

- The procedural rules of the remedy must comply with constitutional guarantees.

- The costs of resorting to the remedy as well as of the proceedings should not be such as to constitute a heavy burden on the applicants.

- The amount of compensation must be assessed in accordance with the amounts of compensation awarded by the Court in similar cases.

96. As a matter of fact, various remedies were previously introduced by the legislator regarding the applications concerning the right to a trial within a reasonable time, and the Court found these remedies in compliance with the relevant criteria and accordingly held that they must be exhausted before applying to the Court. Moreover, it is seen that the Human Rights Action Plan has already set a target to establish such a remedy and even announced the implementation schedule.

97. Consequently, in consideration of the number of applications before the Court and the violation judgments rendered, it has been concluded that there is a structural problem that leads to the violation of the right to a trial within a reasonable time. Despite all kinds of measures taken to eliminate this structural problem, an effective remedy must be established before the individual application in accordance with Article 40 of the Constitution in order to compensate the damages arising from the violation of the right to a trial within a reasonable time.

ii. Application of Principles to the Present Case

98. In the present case, on 10 December 2014, the applicant filed an action before the Labour Court for the collection of her employee receivables. The proceedings are still pending. Individual application is a subsidiary, that is to say, a unique, extraordinary and constitutional remedy that can be resorted to only after the exhaustion of administrative and judicial remedies. Since there is no administrative or judicial remedy that can be resorted to for the finding of the violation and redress of the damage incurred before applying to the Court with an alleged violation of the right to a trial within a reasonable time safeguarded by Article 36 of the Constitution, it has been held that the guarantees inherent in the right to an effective remedy enshrined in Article 40 of the Constitution have not been afforded also in the present application.

99. For the reasons, the Court found a violation of the right to an effective remedy enshrined in Article 40 of the Constitution in conjunction with the right to a trial within a reasonable time safeguarded by Article 36 of the Constitution.

3. Application of Article 50 of Code no. 6216

100. The relevant parts of Article 50 §§ 1 and 2 of Code no. 6216 read as follows:

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

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

101. The applicant did not claim any pecuniary and non-pecuniary compensation.

102. In its judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court sets out the general principles on how to remedy a violation found. In another judgment, the Court also referred to the consequences of failure to comply with a judgment finding a violation, stating that such a situation would constitute a continuing violation and also lead to a second violation of the right in question (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

103. Accordingly, if a violation of a fundamental right is established in an individual application, the basic rule for remedying the violation and its consequences is to ensure, as far as possible, restitution, i.e. the restoration of the situation prior to the violation. To this end, the continuing violation should be brought to an end, the decision or act giving rise to the violation and the consequences thereof should be eliminated, and, where appropriate, compensation for the pecuniary and non-pecuniary damage caused by the violation should be granted, as well as such other measures as may be deemed appropriate in the circumstances (see *Mehmet Doğan*, §§ 55, 57).

104. Before ruling on the steps to be taken to eliminate the violation and its consequences, the source of the violation must be determined. Accordingly, the violation may arise from administrative acts and actions, judicial proceedings or legislative acts. Determining the source of the violation is important for determining the appropriate remedy (see *Mehmet Doğan*, § 57).

105. A given violation may arise from the absence of a statutory provision concerning the administrative or judicial remedy which may be resorted before an application is lodged to the Court. In this case, it is possible to say that the violation in question has been eliminated with all its consequences only when a statutory arrangement is introduced regarding the subject that led to the violation or the relevant provisions are amended in a way that would not lead to new violations. In addition, in some cases, the mere introduction of statutory arrangements may not be sufficient to eliminate all the consequences of the violation. In this case, it may also be necessary to take certain measures, within the scope of the individual application, to compensate the pecuniary and non-pecuniary damages suffered by the victims on account of the violation.

106. One of the ways that ensure the removal of the violation and its consequences pursuant to Article 50 of Code no. 6216 is the pilot judgment procedure envisaged by Article 75 of the Internal Regulations. In cases where the violation is found to be stemming from a structural problem and that it is leading to more applications, in other words to further violations, or where it is foreseen that this situation might lead to further violations, the mere finding of a violation in respect of the case in question will be far from offering a real protection for the fundamental rights and freedoms (see *Y.T.* [Plenary], no. 2016/22418, 30 May 2019, § 69).

107. In such a situation, the Court can initiate the pilot judgment procedure ex officio or upon request of the Ministry or the applicant. When the pilot judgment procedure is initiated, the structural problem must be identified and possible solutions thereto must be put forward (see *Y.T.*, § 70).

108. The foremost purpose of adopting the pilot judgement procedure is to ensure that the structural problem be corrected and the source of the violation be eliminated through resolution of similar applications by administrative authorities instead of judgments finding violations (see *Y.T.*, § 71).

109. In this framework, the Court may prescribe a period of time for the elimination of the structural problem identified by its pilot judgment and the resolution of similar applications, while in the meantime postponing

the examination of other applications during this period. However, in such a case, the persons concerned must be informed of the decision on postponement. If the relevant authorities are unable to eliminate the structural problem and resolve the applications falling within that scope by the end of the period of time prescribed by the Court, it will become possible to rule collectively on the applications in the same vein (see *Y.T.*, § 72).

110. In the present case, it has been concluded that there is no remedy that can be resorted to for the alleged violation of the right to a trial within a reasonable time, and nor is there any statutory arrangement in this regard. It has been concluded that this situation was in breach of the right to an effective remedy, enshrined in Article 40, in conjunction with Article 36 of the Constitution.

111. In this context, the number of individual applications involving the alleged violation of the right to a trial within a reasonable time is increasing day by day, and many complaints in this regard are brought before the Court through individual application mechanism.

112. Even if the Court renders new judgments finding a violation within the framework of the principles set out in its previous judgments in the present case and other pending applications and awards compensation so as to redress the damage suffered due to the violation of the right to a trial within a reasonable time, this will not prevent further similar applications. Nor will it put an end to the violations arising from the pending proceedings that are not concluded within a reasonable time. Therefore, taking into account the subsidiarity nature of the individual application to the Constitutional Court and the fact that it is a constitutional remedy that can be applied after exhausting the remedies provided in the legal system, it is necessary to establish an avenue that can be resorted to in such cases through a statutory arrangement in order to redress the situation that arises due to violations arising from the long duration of the proceedings and constitutes a structural problem. It is clear that the remedy to be set up should be capable of redressing the damages of the applicants due to the prolongation of the proceedings.

113. In the Preamble of the Constitution, it is stated that the separation of powers does not imply an order of superiority between the organs of the State, but amounts to the exercise of certain powers and duties, and that there is a civilized division of labour and cooperation between the powers. In this context, the Court, in fulfilling its powers and duties assigned by the Constitution, has determined that an effective remedy should be established for the alleged violation of the right to a trial within a reasonable time. Therefore, a copy of the judgment should also be notified to the Grand National Assembly of Türkiye for the solution of the structural problem in question, which has been found to be in breach of a given fundamental right and freedom under the joint protection realm of the Constitution and the Convention.

114. In this context, pursuant to Article 75 § 5 of the Internal Regulation, the Court has decided to postpone the examination of the individual applications involving the alleged violation of the right to a trial within a reasonable time until the date of publication of this judgment in the Official Gazette, as well as of the individual applications of the same nature to be lodged after this date for a period of four months from the publication of the judgment in the Official Gazette.

115. In addition, the mere finding of a violation does not completely redress the grievances suffered by the applicant on account of the violation in the present case. The determination of the structural problem does not eliminate the damage suffered due to the violation of the right to a trial within a reasonable time and the lack of an effective remedy. Therefore, the applicant must be awarded compensation for the violation of the right to a trial within a reasonable time and the right to an effective remedy. In order to eliminate the violation with all its consequences, the applicant must be awarded 35,000 Turkish Liras (TRY) in compensation for the non-pecuniary damage due to the violations of the rights to a trial within a reasonable time and to an effective remedy in conjunction with the former right, which cannot be eliminated by the mere finding of a violation.

116. In order for the Court to award compensation in respect of pecuniary damage, there must be a causal link between the alleged pecuniary damage and the violation found. Since the applicant failed

to provide any document to that effect, her claims for compensation in respect of pecuniary damage must be dismissed.

117. The total litigation costs of TRY 4,987.60 including the court fee of TRY 487.60 and the counsel fee of TRY 4,500, as established on the basis of the documents in the case file, must be reimbursed to the applicant.

V. JUDGMENT

For these reasons, the Constitutional Court held UNANIMOUSLY on 5 July 2022 that

A. 1. The alleged violation of the right to a trial within a reasonable time be DECLARED ADMISSIBLE;

2. The alleged violation of the right to an effective remedy be DECLARED ADMISSIBLE;

B. 1. The right to a trial within a reasonable time safeguarded by Article 36 of the Constitution was VIOLATED;

2. The right to an effective remedy safeguarded by Article 40 of the Constitution was VIOLATED;

C. Considering that the violation has stemmed from a structural problem, the PILOT JUDGMENT PROCEDURE BE APPLIED;

D. For the resolution of the structural problem, the situation be COMMUNICATED to the Grand National Assembly of Türkiye;

E. The examination on the applications involving the alleged violation of the right to a trial within a reasonable time that have been lodged until the delivery of this judgment as well as the applications of the same nature to be lodged thereafter be POSTPONED FOR 4 MONTHS from the publication of the judgment in the Official Gazette;

F. A copy of the judgment be SENT to the applicant;

G. A net amount of TRY 35,000 be PAID to the applicant in compensation for non-pecuniary damage due to the violations of the right to a trial within a reasonable time and the right to an effective remedy in conjunction with the former right, and other claims for compensation be DISMISSED;

H. The total expense of TRY 4,987.60 including the court fee of TRY 487.60 and the counsel fee of TRY 4.500 be REIMBURSED to the applicant;

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

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

RIGHT TO EDUCATION (ARTICLE 42)

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

HÜSEYİN EL AND NAZLI ŞİRİN EL

(Application no. 2014/15345)

7 April 2022

On 7 April 2022, the Plenary of the Constitutional Court found a violation of the parents' right to respect for their religious and philosophical convictions, safeguarded by Article 24 of the Constitution, in the individual application lodged by *Hüseyin El and Nazlı Şirin El* (no. 2014/15345).

THE FACTS

[9-130] The applicant (Hüseyin El) applied to the administration of the school where his daughter (Nazlı Şirin El) was a fourth grader in primary school at the relevant time through his petition of 1 October 2009, seeking his daughter to exempt from religious education and ethics classes. In reply to this petition, the school administration served the letter of 22 October 2009, which was issued by the Ministry of National Education, Directorate General for Primary School, on the applicant whose request was thereby dismissed. It is noted in the letter, with a reference to the decision of the Supreme Educational Council dated 9 July 1990 and no. 1, that the pupils of Turkish nationality studying at the primary and secondary schools, save for the schools of minorities, and followers of the Christian or Jewish religions are not obliged to attend the religious education and ethics classes on condition of proving that they are a follower of these religions.

Upon the applicant's request following the reply letter in question, the indication "Islam" on his and his daughter's identity cards was removed by the civil registry office. Stating that the indication Islam had been removed from the identity cards, the applicant then brought an action, on behalf of his daughter, for the stay of execution of the administration's act, whereby his request for exemption of his daughter from religious education and ethics classes had been dismissed, before the incumbent administrative court. The administrative court revoked the impugned act. However, this decision was quashed by the Council of State at the appellate stage. The first instance court, re-handling the action upon quashing, acted in line with the quashing decision and dismissed the applicant's action, which was ultimately upheld by the Council of State.

V. EXAMINATION AND GROUNDS

131. The Constitutional Court ("the Court"), at its session of 7 April 2022, examined the application and decided as follows:

A. The Alleged Violation of the Parents' Right to Respect for Their Religious and Philosophical Convictions in Education and Instruction

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

132. The applicants' allegations were as follows:

i. The syllabus of compulsory religious culture and ethics classes and the general nature of course were neither pluralist nor objective and were also out of the applicant's own mindset;

ii. The compulsory nature of religious culture and ethics classes, the offering of no option, other than being a follower of Christian and Jewish religions, for an exemption from compulsory classes, as well as the dismissal of the request for an exemption therefrom fell foul of the freedom of thought, religion and conscience enshrined in Articles 24 and 25 of the Constitution and Article 9 of the European Convention on Human Rights ("Convention"), as well as of the parents' right to respect for their religious and philosophical convictions safeguarded by the second sentence of Article 2 of the Additional Protocol no. 1;

iii. Even if the assertion by the respondent administration that the syllabus met the criteria of pluralism and objectivity, enabling pupils to develop a critical mind with regard to religious matters following the changes of 2011-2012 in the syllabus for religious culture and ethics was acceptable, this change took effect during the 2011-2012 school year, approximately two years after the applicant's request for an exemption before the administration. The introduction of such change in the syllabus was also an indication that the administration had indeed accepted their allegations.

133. In its observations, the Ministry has presented the following submissions:

i. The European Court of Human Rights ("ECHR") examined the cases regarding the compulsory religious education, namely *Hasan and Eylem Zengin v. Türkiye* and *Mansur Yalçın and Others v. Türkiye*, under the second sentence of Article 2 of the Additional Protocol no. 1. However, unlike the Convention, neither Article 42 of the Constitution, where the right to education is enshrined, nor any other constitutional provision explicitly places an obligation on the State to ensure the conduct of education in line with the parents' faiths. This issue must be taken into consideration in the assessment as to the jurisdiction *ratione materiae*.

ii. The particular circumstances of the present case are rather similar to those of the case of *Hasan and Eylem Zengin v. Türkiye* as both cases concerned an exemption from compulsory attendance at religious culture and ethics classes.

iii. The legal basis of the compulsory teaching of religious culture and ethics in primary and secondary schools is the Constitution itself. In assessing whether the compulsory nature of these classes constituted a violation of any fundamental right, the legal basis laid down in the Constitution, which indeed justified the impugned interference, and the consequences thereof must be taken into consideration.

iv. The syllabus of religious culture and ethics, which is currently applied, and the purpose of this course are in compliance with the pluralism and objectivity principles enshrined in Article 2 of the Additional Protocol no. 1. The new syllabuses having been in force since 2011-2012 school year gave particular importance to different cultures and religious values inherent in these cultures, thus aiming at teaching how to embrace, understand and establish empathy with differences by adopting a *supra-sectarian* approach and a model based on *religions initiative*. The *unitary model* inherent in the approach embracing supra-sectarian religious instruction was employed until 2000s, and thereafter, the syllabuses of religious culture and ethics have evolved into *pluralist model*.

v. The syllabuses of religious culture and ethics not only include religious thoughts and movements in Türkiye, but also provide an insight into different religious beliefs and cultures notably Judaism and Christianity as well as Buddhism, Hinduism, Sikhism, Shintoism and

Taoism. The syllabuses also aim to show a certain degree of tolerance towards the followers of others religions by means of having knowledge on their basic characteristics. In this context, the syllabuses of religious culture and ethics are in keeping with one of the Toledo principles, which requires to have basic knowledge about different religions and belief systems and the diversity inherent in them. This course does not aim to impose any religious or sectarian understanding and is intended to inform students about issues regarding religious culture and ethics in an objective manner.

vi. The compulsory religious culture and ethics course is included in the curriculum in order to develop objective attitudes and behaviours about religion, to contribute to the correct understanding and consideration of different religions and cultures by conveying accurate information about them. To that end, it prioritizes the religious and ethical understanding of the society in which individuals live, and the teaching of other religions not followed by majority of the society is left to the will of individuals and their parents within the scope of Article 24 of the Constitution.

vii. The Constitution prescribes the compulsory instruction of religious culture and ethics course in consideration of the social and historical conditions of the country and the pertinent region. The existence of terrorist organisations that exploit religion (such as FETÖ/PDY, DAESH) reveals how important it is to provide accurate and objective information about religions and different cultures.

viii. With reference to the ECHR's judgments in the cases of *Valsamis v. Greece* and *Folgerø and Others v. Norway* where it is set forth that the arrangements as to the curriculum may vary according to the country and the era, the setting and planning of the curriculum fall in principle within the competence of the States.

ix. In its judgment in the case of *Osmanoğlu and Koçabaş v. Switzerland* (no. 29086/12, 10 January 2017), the ECHR examined the allegations under the freedom of faith and ultimately found no violation of the Convention due to the refusal to grant an exemption from the mixed swimming classes by finding justified the Swiss Government’s argument that the course was intended for the integration of foreign children.

x. In the said judgment, the ECHR considered that the compulsory swimming classes were intended for the integration of foreign children from different cultures and religions; and that the measure was intended to protect foreign pupils from any form of social exclusion. The ECHR took into consideration the specific circumstance of Switzerland sheltering a considerable number of immigrants from different religions and cultures.

134. In their counter-statements, the applicants reiterating their previous arguments have also added:

i. They disagreed with the Ministry's observations on admissibility on the grounds that to the contrary of what the Ministry stated, Article 42 of the Constitution, in which the right to education was enshrined, do not indeed exclude the right to request an exemption from course for not clearly imposing an obligation on the State to ensure instruction in line with the parents' beliefs.

ii. The compulsory requirement laid down in Article 24 of the Constitution points to the requirement of the compulsory inclusion of the religious culture and ethics course in the syllabus. The granting of an exemption from the course do not fall foul of the requirement prescribed in Article 24.

iii. In its observations, the Ministry has noted that the religious culture and ethics syllabus for the 201120/12 school year, considered to comply with the ECHR's criteria, was assessed in the ECHR's judgment in the case of *Mansur Yalçın and Others v. Türkiye*; that the ECHR concluded that despite the considerable changes in the syllabus and textbooks of religious culture and ethics in the 2011/2012 school year, the Turkish system of education had not been yet equipped with appropriate means in order to ensure respect for parents' convictions, and even following the judgment *Mansur Yalçın and Others v. Türkiye*, the education system still failed to provide a mechanism that would respect the religious convictions of parents.

2. The Court's Assessment

135. The Court is not bound by the legal qualification of the facts by the applicants and it makes such assessment itself (see *Tahir Canan*, no.

2012/969, 18 September 2013, § 16). The applicants' complaints concern in essence the alleged violation of the parents' right to respect for their religious and philosophical convictions in education and instruction due to the refusal to grant an exemption for the compulsory religious culture and ethics classes. Therefore, it has been concluded that the applicants' complaints be assessed as a whole under Article 24 § 4 of the Constitution titled *"Freedom of Religion and Conscience"*.

a. Admissibility

i. Jurisdiction *Ratione Materiae*

136. Pursuant to Article 148 § 3 of the Constitution and Article 45 § 1 of Code on the Establishment and Rules of Procedures of the Constitutional Court, no. 6216 and dated 30 March 2011, in order for an individual application to be examined, a given right allegedly violated by the public power has to be guaranteed by the Constitution and fall within the scope of the Convention and additional protocols to the Convention to which Türkiye is a party, as well. The applications involving an alleged violation of rights outside the joint protective realm of the Constitution and the Convention do not fall within the scope of the individual application mechanism (see *Onurhan Solmaz*, no. 2012/1049, 26 March 2013, § 18).

137. The second sentence of Article 2 of Protocol no.1 reads as follows:

"In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

138. Paragraph 4 of Article 24 of the Constitution, titled *"Freedom of religion and conscience"*, reads as follows:

"Religious and moral education and instruction shall be conducted under state supervision and control. Instruction in religious culture and morals shall be one of the compulsory lessons in the curricula of primary and secondary schools. Other religious education and instruction shall be subject to the individual's own desire, and in the case of minors, to the request of their legal representatives."

139. Article 24 § 4 *in fine* of the Constitution sets forth that education and instruction in religious culture and ethics course, other than the one

prescribed to be compulsory at the primary and secondary schools, shall be subject to the individuals' own desire, and in the case of minors, to the request of their legal representative. In this sense, the Constitution makes the teaching of religious culture and ethics intended for minors, other than the one prescribed to be compulsory at the primary and secondary institutions, subject to the request of the legal representatives.

140. As a result, the Court has noted that the parents' right to respect for their religious and philosophical convictions is afforded constitutional protection under Article 24 § 4 *in fine* of the Constitution, thus falling under the joint protection realm of Additional Protocol no. 1 to the Convention and the Constitution.

141. For these reasons, the Court has considered that the Court's power to examine under the individual application mechanism also encompasses the parents' right to respect for their religious and philosophical convictions.

ii. Exhaustion of Available Remedies

142. The party to the case before the inferior courts is the applicant's daughter. The applicant filed the case on behalf of his daughter. Therefore, it must be assessed whether the applicant exhausted the available remedies before lodging an individual application.

143. Article 148 § 3 of the Constitution and Article 45 § 2 of Code no. 6216 provide for that ordinary legal remedies must firstly be exhausted in order to lodge an application with the Court.

144. Individual application is a subsidiary form of remedy that may be resorted in cases where an alleged violation cannot be remedied by the inferior courts. As a requirement of the subsidiary nature of this remedy, ordinary legal remedies must primarily be exhausted in order to lodge an individual application with the Court. Accordingly, the applicant must have duly submitted his complaint in his individual application primarily to the competent administrative and judicial authorities in a timely manner, submitted to the authorities the relevant information and evidence available to him, and exercised due diligence in this process to

pursue his case and application (see *İsmail Buğra İşlek*, no. 2013/1177, 26 March 2013, § 17).

145. The requirement of exhaustion of available remedies laid down in the above-cited provisions of the Constitution and Code no. 6216 is the natural consequence of the individual application mechanism, being the last resort of an extraordinary nature for the prevention of the violation of fundamental rights and freedoms (see *Necati Gündüz and Recep Gündüz*, no. 2012/1027, 12 February 2013, § 20).

146. Respect for fundamental rights and freedoms is a constitutional duty incumbent on all organs of the State, and it is the duty of administrative and judicial authorities to redress the violations of rights resulting from the neglect of this duty. For this reason, it is essential that the alleged violations of fundamental rights and freedoms be first brought before, addressed and ultimately resolved by, the inferior courts (see *Ayşe Zıraman and Cennet Yeşilyurt*, no. 2012/403, 26 March 2013, § 16).

147. The remedies required to be exhausted are accessible and effective remedies, which are capable of offering a reasonable prospect of success in terms of the applicant's complaints. Besides, the rule of exhaustion of remedies is applicable neither as a certain nor as a formal requirement. In assessing the compliance with this requirement, the particular circumstances of every case must be taken into consideration. In this sense, not only the mere existence of certain remedies in a legal system, but also the conditions for the employment of these remedies as well as the individual conditions of the applicant must be taken into consideration in a realistic manner. Therefore, in assessing whether a given applicant has taken all steps that could be reasonably expected of him to exhaust the available remedies, the particular circumstances of his case must be taken into consideration (see *S.S.A.*, no. 2013/2355, 7 November 2013, § 28).

148. In the present case, following the dismissal of the request for the exemption of the applicant's daughter from the compulsory class, the applicant brought an action against the impugned dismissal on behalf of his daughter as the latter was the addressee of the impugned process.

149. In this case, the Court has taken into consideration that the original addressee of the impugned dismissal process is the applicant's daughter within the meaning of the administrative procedure law. It has also considered that the issues addressed during the administrative proceedings are generally related to the right of the parents to respect for their religious and philosophical convictions.

150. In this sense, although the applicant is not a party, in technical sense, to the proceedings before the inferior courts, the dismissal of his request for the exemption of his daughter from compulsory class is directly related to the right of the parents to respect for their religious and philosophical convictions (for a similar assessment by the ECHR in another context, see among many other judgments *Kapmaz v. Türkiye*, no. 13716/12, 7 January 2020, §§ 21-23). It has been accordingly concluded that the applicant exhausted the available remedies in the present case.

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

Mr. Kadir ÖZKAYA, Mr. Recai AKYEL, Mr. Yıldız SEFERİNOĞLU, Mr. Selahaddin MENTEŞ, Mr. Basri BAĞCI and Mr. İrfan FİDAN dissented from this conclusion.

b. Merits

i. General Principles on Education and Instruction in Religion and Ethics

152. As regards the general principles on education and instruction in religion and ethics, Article 24 § 4 of the Constitution must be considered in conjunction with the concept, secularism, laid down in the *"Preamble"* of the Constitution as well as in Articles 2, 13, 14, 68, 81, 103, 136 and 174 thereof.

153. Secularism is a constitutional principle that ensures the State's impartiality *vis-à-vis* religion and beliefs and determines the State's legal position, duties, powers and boundaries in this regard. A secular state is a state that does not have an official religion, stands at an equal distance

from all religions and beliefs, ensures a legal order in which individuals can freely learn and manifest their religious beliefs in peace and secures the freedom of religion and conscience (see the Court's judgment no. E.2012/65, K.2012/128, 20 September 2012; and *Tuğba Arslan* [Plenary], no. 2014/256, 25 June 2014, § 136).

154. Secularism imposes negative and positive obligations on the State. The negative obligation requires the State not to officially adopt a religion or belief and to abstain from any arbitrary interference with individuals' freedom of religion and conscience in the absence of compelling reasons. The positive obligation, on the other hand, entails the State's duty to remove obstacles to freedom of religion and conscience and to provide a suitable environment where individuals can live as they believe and the necessary means for this (see the Court's judgment no. E.2012/65, K.2012/128, 20 September 2012; and *Tuğba Arslan*, § 138).

155. The positive obligation incumbent on the State by virtue of secularism derives from Articles 5 and 24 of the Constitution. As set forth in Article 5 of the Constitution, *"The fundamental aims and duties of the State are to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence."* (see the Court's judgment no. E.2012/65, K.2012/128, 20 September 2012; and *Tuğba Arslan*, § 138).

156. The religious education and instruction is laid down in Article 24 of the Constitution as a requisite of the freedom of religion and conscience. It is set forth in this provision that religious and ethical education and instruction shall be conducted under State's supervision and control; that instruction in religious culture and ethics shall be one of the compulsory lessons in the curricula of primary and secondary schools; and other religious education and instruction shall be subject to the individual's own desire, and in the case of minors, to the request of their legal representatives (see the Court's judgment no. E.2012/65, K.2012/128, 20 September 2012).

157. Although the secular state is neutral towards religions, it is not indifferent to meeting the religious needs of the society. In the West, where

the principle of secularism emerged and developed, it has not resulted in the complete exclusion of religion from the social and public sphere, but brought along State policies to meet religious needs (see the Court's judgment no. E.2012/65, K.2012/128, 20 September 2012).

158. In Türkiye, following the adoption of Law no. 430, it was envisaged that schools providing religious education be established by the State, and accordingly, the opening of private schools in this field was prohibited. According to Article 3 of the Law no. 5580 on Private Education Institutions dated 8 February 2007, *"Private education institutions that are the same or similar to institutions providing religious education cannot be opened."* Therefore, according to this Law, it is the State that is the sole authority to decide on the opening of religious education institutions on the one hand, and on the determination of compulsory and elective religious education courses in schools on the other. The absence of any institutional alternatives, save for the State institutions, for individuals to receive religious education and instruction makes the positive obligation imposed on the State by virtue of secularism more understandable and important (see the Court's judgment no. E.2012/65, K.2012/128, 20 September 2012).

159. On the other hand, when considered as a whole, it cannot be said that the principle of secularism in Türkiye absolutely excluded, from the very beginning, the institutional relationship between the State and the Islamic religion at the constitutional level and in practice. The Constitution does not provide for an official religion, but it envisages official mechanisms to meet the needs of members of the religions embraced by the majority such as belief, worship and education (see the Court's judgment no. E.2012/65, K.2012/128, 20 September 2012).

160. Similarly, Law no. 430 is one of the reform laws that aim to protect the secular character of the Republic of Türkiye and cannot be interpreted or understood as unconstitutional as laid down in Article 174 of the Constitution. According to Article 4 of this Law, *"The Ministry of National Education will establish a Faculty of Theology at Darülfünunda in order to train high religious experts and establish similar schools for the training of civil servants charged with the performance of religious duties such as imamate and oratory."* It is clear that concepts such as *imamate* and *oratory* are concepts belonging

to the Islamic religion, and therefore the duty entrusted to the Ministry of National Education is the duty to establish educational institutions to train people who will fulfil the religious services of the followers of the Islamic religion (see the Court's judgment no. E.2012/65, K.2012/128, 20 September 2012).

161. In conclusion, the Constitution recognizes religious services as a social need and imposes obligations on the State to meet these needs, which is also reflected by Article 24 of the Constitution setting forth that religious education and instruction shall be conducted under the supervision and control of the State. The principle of secularism enshrined in the Constitution, prevents religion from determining the principles of the State on the one hand, and allows the provision of the religious services, including religious education and instruction, by the State on the other (see the Court's judgment no. E.2012/65, K.2012/128, 20 September 2012).

162. The measures and practices that offer individuals options in the field of freedom of religion and conscience and facilitate the fulfilment of the common and collective needs of individuals forming the society in this field cannot be deemed contrary to the principle of secularism. As a matter of fact, religious education and instruction in almost every country gives a certain weight to the dominant religion in the society and gives certain priorities to the members of the majority religion over other religions (see the Court's judgment no. E.2012/65, K.2012/128, 20 September 2012).

163. Besides, freedom of religion and conscience requires the State to abstain from imposing a particular religion or belief on individuals (see *Tuğba Arslan*, § 58). In a secular state, the education and instruction of a particular religion cannot be made compulsory. As a matter of fact, as a requirement of this principle, Article 24 § 4 of the Constitution explicitly states that *religious education and instruction* shall be subject to the individual's own will and the permission of the legal representative of minors. In other words, according to Article 24 § 4 of the Constitution, religious education and instruction can only be provided upon the request of individuals. In addition, the very same constitutional provision includes religious culture and ethics classes among the compulsory courses taught

in primary and secondary schools in order to provide impartial and introductory information about religions and to instil moral values. In this sense, the use of *religious culture* class instead of religious education clearly points to this purpose (see the Court's judgment no. E.1997/62, K.1998/52, 16 September 1998).

164. The religious culture and ethics classes stipulated in Article 24 § 4 of the Constitution to be compulsory in primary and secondary schools, are not intended, insofar as they concern the *religious culture*, to make students adopt a particular religion or to provide education regarding a particular religion. The aim of this compulsory class is to provide students with general information and a general culture about religions. The courses that go beyond this aim by offering students the education and instruction of a particular religion or belief are not in the form of teaching of religious culture and should be, therefore, considered to fall under the scope of religious education and teaching.

165. Indeed, as a consequence of this distinction between teaching of religious culture and religious education and instruction, Article 24 § 4 of the Constitution stipulates that religious education and instruction for minors, which exceed *religious culture* instruction is subject to the request of the legal representative of the minor. Many international agreements to which Türkiye is a party and which must be taken as a basis, for being related to fundamental rights, in case of disputes arising from different provisions on the same subject in laws as set forth in Article 90 of the Constitution also include provisions envisaging that the State is obliged to respect the right of parents to provide their children with religious and ethical education in accordance with their own beliefs.

166. In consideration of this distinction, the instruction provided in the compulsory classes of religious culture and ethics -regardless of the content of such instruction- does not entail an automatic violation of the parents' right to respect for their religious and philosophical convictions in education and instruction, despite their subjective perception that such instruction does not respect their religious or philosophical convictions. In such classes, ideas contrary to one's religious or philosophical convictions may also be taught. In addition, in compulsory classes of religious culture

and ethics, information on the majority religion may be encompassed much more in comparison to other religious and philosophical convictions within the framework of our country's unique historical background and sociological structure, in consideration of the needs of the majority of the society. The inclusion of information on the majority religion to an extent more than that on the other religions and philosophical convictions does not constitute a violation of the parents' right to respect for their religious and philosophical convictions in education and instruction, provided that these courses do not amount to *religious education and instruction* that goes beyond the instruction of *religious culture*.

167. In this context, in consideration of the historical background and sociological structure of the country, the State has a certain margin of appreciation in planning and organizing the syllabuses of the compulsory classes of *religious culture*. However, it is also clear that the State will have a much wider margin of appreciation in planning and organizing the syllabuses of classes in *religious education and instruction*, which offer the education and instruction of a particular religion or belief and which may be attended on an optional basis.

168. If a course -regardless of whether its name is religious culture and ethics- has reached to an extent that amounts to religious education and instruction and thus goes beyond, by its content, *religious culture* instruction, it is no longer possible to consider this course within the scope of "*instruction of religious culture and ethics*", which is among the compulsory classes as set forth in the second sentence of Article 24 § 4 of the Constitution. In such case, the State is obliged to take the necessary steps so as to prevent students from facing a conflict between this education and instruction and their parents' religious and philosophical convictions.

169. In this framework, the State should offer options such as enabling parents -who do not want their children to attend classes that can be considered to fall within the scope of religious education and instruction- to be entitled to an exemption, offering alternative classes to religious education and instruction, or providing the opportunity to enrol or not to enrol in the said class - without the need to provide any excuse or information and documents. In cases where such options are offered

for parents who do not want their children to attend classes that can be classified as religious education and instruction, then it will be ensured that their right to respect for their religious and philosophical convictions in education and instruction be respected.

170. It should be especially noted that requiring individuals to justify their requests for options such as exemption or requesting information and documents regarding their religious and philosophical convictions so as to decide on the request constitutes a violation of *the right not to reveal their religious beliefs and convictions*, which is safeguarded by Article 24 § 3 of the Constitution and is among the core rights that cannot be suspended even in times of war, mobilization or states of emergency as laid down in Article 15 of the Constitution.

ii. Application of Principles to the Present Case

171. As mentioned above, according to the second sentence of Article 24 § 4 of the Constitution, *"Instruction in religious culture and ethics shall be one of the compulsory classes in the curricula of primary and secondary schools"*. As no exception is prescribed in the Constitution to this provision, teaching of *religious culture and ethics* is compulsory in all primary and secondary schools in Türkiye. In this sense, the lack of an exemption for compulsory classes of *religious culture and ethics* would not lead to a violation of any rights in constitutional terms. However, as it has been emphasized above, the last sentence of Article 24 § 4 of the Constitution, which reads *"Other religious education and instruction shall be subject to the individual's own desire, and in the case of minors, to the request of their legal representatives"*, stipulates that *religious education and instruction* other than *instruction of religious culture and ethics* shall not be compulsory and can only be provided on a voluntary basis.

172. In that case, the issue to be addressed in the present application is to ascertain whether the Religious Culture and Ethics class, which was conducted according to the syllabus in force at the relevant time and which the applicant's daughter had to attend as her request for exemption had been rejected, can be classified as *religious education and instruction* that can only be provided on demand by going beyond the scope of *instruction in religious culture and ethics*, which is envisaged to be compulsory

in the Constitution. If it is found out that the class that the applicant's daughter had to attend does not go beyond the scope of *religious culture and ethics instruction*, which is envisaged to be compulsory according to the Constitution, it will be concluded that there is no violation without any further examination in accordance with the second sentence of Article 24 § 4 of the Constitution. However, if it is concluded that the class that the applicant's daughter had to attend goes beyond the scope of *religious culture and ethics instruction*, which is foreseen to be compulsory in the Constitution, then an examination will be made under the last sentence of Article 24 § 4 of the Constitution, which states that *"Other religious education and instruction shall be subject to the individual's own desire, and in the case of minors, to the request of their legal representatives"*, and it will be considered whether there are any alternatives offered to the parents who want their children to be exempted from attending this class. It will be accordingly concluded whether there is any violation.

173. One of the most important issues to be taken into consideration with respect to the present application is the necessity that the examination to be conducted by the Court must be limited merely to the syllabus to which the applicant's daughter was subject. As inferred from the application file, the applicant's daughter started studying at university in 2018. Therefore, the syllabuses of the primary school (4th grade), secondary school and religious (*imam-hatip*) secondary school (5th-8th grades), adopted by the decision of the Board of Education and Discipline ("Board") dated 19 January 2018 and no. 2, as well as of the religious education course of the secondary education (9th-12th grades), adopted by the Board's decision dated 19 January 2018 and no. 18, all of which were introduced by the 2018/2019 school year (they are still in force), were not applied with respect to the applicant's daughter. Accordingly, the syllabuses of religious culture and ethics course that have been in force since the 2018-2019 school year were not examined in the applicants' case. In other words, the considerations and assessments herein are not pertaining to the syllabuses of religious culture and ethics course introduced after 2018-2019 school year.

174. The assessments in this case were made on the basis of, and limited to, the syllabus on the religious culture and ethics of the 9th, 10th, 11th and 12th grades of the secondary school, which was in force at the relevant time

when the applicant's daughter was a pupil of the primary and secondary schools, was also dealt with by the ECHR in its judgment *Mansur Yalçın and Others v. Türkiye*, and adopted by the Board's decision no. 16 and dated 31 March 2005, the syllabus on the religious culture and ethics of the 4th, 5th, 6th, 7th and 8th grades of the primary school, which was adopted by the Board's decision no. 410 and dated 28 December 2006, as well as the syllabuses on the religious education and ethics, which were intended for introducing amendments to former two syllabuses, issued by the decisions no. 328 and 329 and dated 30 December 2010, and which were first applied in the 2011-2012 school year. Although the administrative application regarding the request for an exemption was made in 2009 and the action before the inferior courts was filed in 2009, the syllabuses, which were regulated by the decisions dated 30/12/2010 and no. 328 and 329 and started to be implemented in the 2011-2012 school year, were also applied to the applicant's daughter. Therefore, the Court would examine the present application not only in the light of the syllabus of religious culture and ethics taught at the relevant time, but also in consideration of the other developments in the respective syllabus until the 2018-2019 school year.

175. In Türkiye, from the period of the 1924 Constitution to the present -save for the period from the beginning of 1930s to the end of 1940s-, religious courses have been included in the syllabuses of the primary and secondary schools. Generally, this course, which was included in the curriculum in the early years of the 1924 constitutional period, was made optional in the 1930s, and in the period from the beginning of the 1930s until the end of the 1940s, the education system became increasingly isolated from religious education and instruction.

176. In terms of religious classes, which were reintroduced into the curriculum from the 1950s onwards, the principle *enabling those who did not want to attend the classes to be exempted therefrom* was generally adopted in the aforementioned years, whereas during the period of the 1961 Constitution, the principle *envisaging that merely those who wished to attend the classes would attend* was generally adopted, or the procedures whereby parents state, in a special column in the enrolment statement during enrolment, whether their children would attend this class.

177. During the period of 1961 Constitution, in addition to the elective religious courses, the compulsory classes of ethics were also included in the syllabus. During the period before the 1982 Constitution, the scope and content of religious classes were determined on the basis of the Islamic religion.

178. Following an amendment to Article 24 of the 1982 Constitution, it is set forth that the instruction of religious culture and ethics shall be among the compulsory classes in the primary and secondary schools. At the present time, the instruction of religious culture and ethics is among the compulsory classes in the primary and secondary schools.

179. The theme and scope of the religious education and ethics course, which was a compulsory course during the 1982 Constitution, were at the outset designated in line with the interpretation of the Islamic religion embraced by the majority of the population in Türkiye. At the subsequent period, information pertaining to different religions and faiths was also incorporated into the syllabus. Notably by the end of the 2000s and in line with the ECHR's violation judgment *Hasan and Eylem Zengin v. Türkiye*, significant changes were made in the syllabus of the course for the purpose of providing an insight into different faiths within the society, especially the Alevi faith. However, despite all efforts exerted to that end, the ECHR has concluded that at the outset these changes were primarily intended to facilitate the provision of information on the various faiths existing in Türkiye; however, the changes did not entail a real overhaul of the key components of the syllabus, which focuses primarily on knowledge of Islam as practised and interpreted by the majority of the population in Türkiye; and that despite the significant changes introduced in the syllabus and textbooks, the Turkish system of education was not equipped with methods appropriate for ensuring respect for the parents' faiths. Referring to the ECHR's judgment *Mansur Yalçın and Others v. Türkiye* as well as to the judgment *Hasan and Eylem Zengin v. Türkiye* cited in the former judgment, the Council of State also concluded that in Türkiye *"the instruction in 'religious culture and ethics course' cannot be provided in an objective and rational fashion in pursuance of pluralism"*, and found unconstitutional the dismissal of the requests for exemption from religious culture and ethics classes. However, in its decision of 2017, the

Council of State concluded that the instruction in religious culture and ethics was in accordance with Article 24 of the Constitution but did not explain the reasons why it changed its previous case-law to the effect that in Türkiye, the instruction the *religious culture and ethics* cannot be provided in an objective and rational fashion in pursuance of pluralism.

180. In consideration of the ECHR's respective judgments and the assessments made by the Council of State in its previous decisions, the syllabus on the religious culture and ethics of the 9th, 10th, 11th and 12th grades of the secondary school, which was adopted by the Board's decision no. 16 and dated 31 March 2005, the syllabus on the religious culture and ethics of the 4th, 5th, 6th, 7th and 8th grades of the primary school, which was adopted by the Board's decision no. 410 and dated 28 December 2006, as well as the syllabuses on the religious education and ethics, which were intended for introducing amendments to these syllabuses, issued by the decisions no. 328 and 329 and dated 30 December 2010 and first applied in the 2011-2012 school year, were subject to a comprehensive examination. As regards the syllabus on religious culture and ethics, which remained in force until the 2018-2019 school year, there is no ground to require to Court to depart from the ECHR's conclusions that this syllabus primarily focuses on knowledge of Islam; that the changes did not entail a real overhaul of the key components of the syllabus; as well as from the conclusion reached by the Council of State that the instruction in the religious culture and ethics course was not provided in an objective and rational fashion in pursuance of pluralism.

181. The examinations carried out with respect to the syllabuses reveal that the syllabus of the religious culture and ethics course at the primary school (4th, 5th, 6th, 7th and 8th grades) mainly focus on the information as to the Islam, as practiced and interpreted by the majority of the Turkish nation within the framework of the historical background and sociological structure of the country; that merely the religious practices of the Islamic religion are taught; and that the syllabus went beyond *instruction* and thus amounted to *education*. Therefore, it has been concluded that until the 2018-2019 school year, this course could not be qualified as a course of *religious culture and ethics* which is prescribed to be compulsory in Article 24 § 4 of the Constitution for providing impartial and introductory information about religions and ensuring the adoption of moral values.

182. In other words, it has been concluded that the religious culture and ethics course insofar as it concerns the syllabus applied until 2018-2019 school year went beyond the boundaries of the *instruction in religious culture and ethics* which is a *compulsory course* at the primary and secondary schools pursuant to the second sentence of Article 24 § 4 of the Constitution; and that it is in the nature of *religious education and instruction* that must be received upon the *person's own desire and, in case of minors, request of their legal representative*, as laid down in the third sentence of the same provision. Therefore, in order not to give rise to a violation of the parents' right to respect for their religious and philosophical convictions in education and instruction, alternative options must be provided -such as exemption from the course- to the parents who do not want their children to attend the classes in the form of religious education and instruction, another course alternative to the religious education and instruction or the option to attend or not to attend the classes in question.

183. However, as explained in detail above, during the period until the 2018-2019 school year, the Turkish system of education did not offer any opportunity for exemption from the religious culture and ethics classes, which is considered to go beyond the instruction in *religious culture* or any other alternative which may meet the demands of the parents who do not want their children to attend these classes, save for the practice whereby the pupils who are followers of the Christian and Jewish religions may be exempted from attendance at the religious culture and ethics classes provided they affirm their adherence to those religions.

184. As a result, the syllabus of the religious culture and ethics course applied until the 2018-2019 school year, the subject of the assessments in the present case, is not considered to fall into the scope of *religious culture* instruction prescribed to be compulsory so as to provide impartial and introductory information about religions, but as the instruction and education of a particular interpretation of the Islam religion, which went beyond the scope of *religious culture* instruction. Therefore, the failure to offer any appropriate alternative for the applicant who did not want her daughter to attend the classes in religious culture and ethics breached the parents' right to respect for their religious and philosophical convictions in education and instruction.

185. However, it is beyond doubt that this conclusion reached by the Court cannot be construed to the effect that the instruction and education of the Islamic religion at schools under the third sentence of Article 24 § 4 of the Constitution is unconstitutional. In this sense, the Court has held that *"the measures and practices within the meaning of religious education and instruction that offer alternatives to the persons and facilitate the meeting of the common and collective needs of the society,* as well as the teaching of courses *"Koran" and "Life of the Prophet Muhammad"* at the secondary schools and high schools as an optional course could not be considered unconstitutional (see the Court's judgment no. E.2012/65, K.2012/128, 20 September 2012).

In its previous judgments, the Court has stated that *"freedom of religion and conscience is one of the foundations of a democratic society"* and that this is primarily because *"it is one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for the formation of the social life"* (see *Tuğba Arslan* [Plenary], no. 2014/256, 25 June 2014, § 52; and *Sara Akgül* [Plenary], no. 2015/269, 22 November 2018, § 79). What is more, the Court considers not only that the religious education and instruction are not unconstitutional but also that it falls among the positive obligations incumbent on the State within the scope of the freedom of religion and conscience. According to the Court, *"religious education and instruction is considered as a requisite of freedom of religion and conscience, as enshrined in Article 24 of the Constitution… The Constitution regards the religious services as a social need and places obligations on the State for the fulfilment of these needs, which is also indicated by Article 24 of the Constitution necessitating that the religious education and instruction be conducted under the State's supervision and control "* (see the Court's judgment no. E.2012/65, K.2012/128, 20 September 2012).

186. Consequently, the Court found a violation of the parents' right to respect for their religious and philosophical convictions in education and instruction safeguarded by Article 24 § 4 of the Constitution.

Mr. Kadir ÖZKAYA, Mr. Hicabi DURSUN, Mr. Muammer TOPAL, Mr. Recai AKYEL, Mr. Yıldız SEFERİNOĞLU, Mr. Selahaddin MENTEŞ and Mr. İrfan FİDAN dissented from the majority's conclusion.

B. Alleged Violation of the Right to a Trial within a Reasonable Time

1. The Applicants' Allegations

187. The applicants maintained that there had been a violation of the right to a trial within a reasonable time due to the excessive length of the proceedings.

2. The Court's Assessment

188. By Article 20 of Law no. 7145 dated 25 July 2018, promulgated in the Official Gazette no. 30495 and dated 31 July 2018, a provisional article was added to Law no. 6384, which is dated 9 January 2013, on the Settlement of Certain Applications Lodged with the European Court of Human Rights through Payment of Compensation.

189. In Provisional Article added to Law no. 6384, it is set forth that individual applications lodged with the Court due to excessive length of the proceedings, delayed or incomplete execution or non-execution of judicial decisions and pending before the Court by the date of entry into force of this article shall be examined by the Human Rights Compensation Commission of the Ministry of Justice ("the Compensation Commission"), upon an application to be filed within three months as from the notification of the inadmissibility decision issued for non-exhaustion of the available remedies.

190. In its judgment *Ferat Yüksel* (no. 2014/13828, 12 September 2018), the Court examined whether the remedy of filing an application with the Compensation Commission in relation to individual applications lodged before 31 July 2018 with the alleged failure of the relevant authorities to conclude the proceedings in a reasonable period of time or to timely and fully execute court decisions was accessible and capable of offering reasonable prospects of success, as well as providing adequate redress, thereby discussed its effectiveness (see *Ferat Yüksel*, § 26).

191. In brief, the Court has held in the *Ferat Yüksel* judgment that the aforementioned remedy is accessible as it does not put individuals under financial burden and facilitates the application process; that it is capable of providing a reasonable prospect of success for alleged violations given the

way it is arranged; and that it has potential to provide adequate redress as it offers the possibility to award compensation and/or, where this is not possible, any other means for redress (see *Ferat Yüksel*, §§ 27-34). In accordance with these explanations, the Court has concluded that the examination of the present application lodged without the exhaustion of the remedy before the Compensation Commission, which is accessible at first sight and is considered to have the capacity to offer a prospect of success and to provide adequate redress, was incompatible with the *subsidiary nature* of the individual application mechanism. The Court has accordingly declared this part of the application inadmissible for non-exhaustion of the available remedies (see *Ferat Yüksel*, §§ 35, 36).

192. In the present case, there is no ground which requires the Court to depart from the conclusions in its *Ferat Yüksel* judgment insofar as it relates to this part of the application.

193. Consequently, this part of the application must be declared inadmissible *for non-exhaustion of legal remedies*.

C. Other Alleged Violations

194. The applicants also claimed that

i. There had been a violation of the freedom of religion as the student (the applicant's daughter) was compelled to receive education in a religion of which she was -according to her own statement- not a follower;

ii. In the petition, they claimed that the Religious Culture and Ethics course was not in compliance with their religious or philosophical convictions and requested the exemption of the applicant's daughter from this course within the scope of freedom of religion and belief, regardless of whether she was a follower of any religion or not. However, the first instance court stated that *"The dispute … as the plaintiff did not claim that the curriculum of the Religious Culture and Ethics course was contrary to the applicant's mindset and that she requested to be exempted from the Religious Culture and Ethics course for having no religious belief"*, which led to the narrowing of the grounds and claims of the plaintiff. Therefore, there had been violations of the rights to obtain a proper examination of the case and to a reasoned decision falling under the right to a fair trial;

iii. The right to obtain a proper examination of the case under the right to a fair trial was violated due to the lack of an examination by an impartial and independent expert as to the religious culture and ethics course;

iv. They were compelled to disclose their beliefs and philosophical convictions by virtue of the administration's reply letter, which led to a violation of their rights protected by Article 24 of the Constitution, Article 9 of the Convention and the second sentence of Article 2 of Additional Protocol no. 1;

v. Their being compelled to declare their religious and philosophical beliefs and convictions in the petition submitted to the civil registry office to be exempted from the religious culture and ethics course was in breach of Article 24 of the Constitution and Article 9 of the Convention;

vi. With a reference to the ECHR's conclusion in its judgment in the case of *Sinan Işık v. Türkiye* (no. 21924/05, 2 February 2010, § 46) to the effect that *"the assessment of the applicant's religion by the domestic authorities, on the basis of an opinion issued by an authority responsible for Islamic religious affairs (Turkish Directorate of Religious Affairs), is in breach of the State's duty of neutrality and impartiality"*, there was no explanation in the first instance decisions as to the fields of the court experts formulating the export reports, which had been relied on in another trial; and that even in cases where such an examination was conducted by the court experts appointed from the particular field of expertise, this would also be in breach of the freedom of religion and conscience.

195. In its observations, the Ministry stated that the application could be examined from the standpoint of the right to education safeguarded by Article 2 of the Protocol no. 1 and Article 42 of the Constitution or the freedom of belief safeguarded by Article 24 of the Constitution and Article 9 of the Convention. In submitting its observations on the merits of the case, the Ministry, however, did not distinguish between the parents' right to respect for their religious and philosophical convictions in education and instruction and freedom of belief.

196. For these reasons, it was accepted that the observations submitted by the Ministry regarding the parents' right to respect for their religious

and philosophical convictions in education and instruction (see § 133) and the replies provided by the applicants to these observations (see § 134) were applicable also to the freedom of religion. The Ministry did not make an assessment, in its observations, as to the other alleged violations of the applicants.

197. Considering the finding of a violation of the parents' right to respect for their religious and philosophical convictions in education and instruction in the present case, the Court found it not necessary to examine the other allegations raised by the applicants.

198. Therefore, the Court did not make a separate examination as to the other alleged violations.

D. Application of Article 50 of Code no. 6216

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

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

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

200. The applicants requested the Court to find a violation, to return of the case-file to the relevant court for a retrial, and to award them 20,000 Turkish liras ("TRY") in respect of non-pecuniary damages.

201. In its judgment on the individual application of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court set out the general

principles concerning the redress of the violation. In another judgment, the Court explained the relevant principles as well as the consequences of the failure to comply with its judgment finding a violation and pointed out that this would amount to the continuation of the violation and might also result in a violation for the second time (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

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

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

204. In the present case, the violation of the parents' right to respect for their religious and philosophical convictions in education and instruction essentially resulted from the refusal by the administration to grant an exemption. The inferior courts failed to redress the said violation.

205. However, as the applicant's daughter has been a university student since 2018 and she would not attend the religious culture and ethics class at the primary and secondary schools by the date of this judgment, there is no legal interest in ordering a retrial for the redress of the consequences of the violation.

206. Furthermore, it is clear that the finding of a violation of the parents' right to respect for their religious and philosophical convictions in education and instruction would be insufficient for the redress of the damages sustained by the applicants. Thus, the applicants must be jointly awarded a net amount of TRY 20,000 –being bound by their claims– in compensation for non-pecuniary damages.

207. The total litigation costs of TRY 4,706.10 including the court fee of TRY 206.10 and the counsel fee of TRY 4,500, as established on the basis of the documents in the case file, must be reimbursed jointly to the applicants.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 7 April 2022:

A. 1. BY MAJORITY and by dissenting opinions of Mr. Kadir ÖZKAYA, Mr. Recai AKYEL, Mr. Yıldız SEFERİNOĞLU, Mr. Selahaddin MENTEŞ, Mr. Basri BAĞCI ve Mr. İrfan FİDAN, that the alleged violation of the right of the parents to respect for their religious and philosophical convictions in education and instruction be DECLARED ADMISSIBLE;

2. UNANIMOUSLY that the alleged violation of the right to a trial within a reasonable time be declared INADMISSIBLE FOR NON-EXHAUSTION OF REMEDIES;

B. BY MAJORITY and by dissenting opinions of Mr. Kadir ÖZKAYA, Mr. Recai AKYEL, Mr. Yıldız SEFERİNOĞLU, Mr. Selahaddin MENTEŞ, Mr. Basri BAĞCI ve Mr. İrfan FİDAN, that the parents' right to respect for

their religious and philosophical convictions in education and instruction was VIOLATED;

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

D. That the total litigation costs of TRY 4,706.10 including the court fee of TRY 206.10 and the counsel fee of TRY 4,500 be REIMBURSED JOINTLY to the applicants;

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

F. That a copy of the judgment be SENT to the Council of State and the Ministry of National Education for information; and

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

DISSENTING OPINION OF VICE-PRESIDENT KADİR ÖZKAYA AND JUSTICES RECAİ AKYEL, YILDIZ SEFERİNOĞLU, SELAHADDİN MENTEŞ AND İRFAN FİDAN

1. In the present case, the majority of the Court held that there had been a violation of the parents' right to respect for their religious and philosophical convictions in education and instruction, which is safeguarded in Article 24 § 4 of the Constitution. We dissented from the majority's conclusion for the following reasons.

A. ADMISSIBILITY

a. Whether There is Any Action Brought on behalf of Hüseyin El

2. The administrative action, which is subject-matter of the individual application in question, was filed by the father Hüseyin El on behalf of his daughter Nazlı Şirin El. In the decisions of the incumbent administrative court and the 8th Chamber of the Council of State, the "plaintiff" is "the father Hüseyin El in the name of Nazlı Şirin El". Neither in the petition nor in the decisions, there is no indication to the effect that in his own name as principal and in the name of his daughter as guardian. In the decisions, the father, Hüseyin El, himself was not a party to the proceedings as the plaintiff, which was the case for the whole administrative proceedings. Therefore, there is no action brought by Hüseyin El on his own behalf. Accordingly, the action subject-matter of the present individual application is only the one brought in the name of Nazlı Şirin El. However, the individual application in question was lodged by the father, Hüseyin El, both in his own name as principal and in the name of his daughter, Nazlı Şirin El, as guardian.

3. Although the majority of the Court has also acknowledged and accepted this situation, and it has been taken into account that the applicant's daughter is the main addressee of the dismissal of the request for an exemption in the context of administrative proceedings law, the Majority has stated that the issues dealt with during the administrative proceedings are directly related to the applicant's right to respect for his religious and philosophical convictions in education and instruction. It has been accordingly concluded that the available remedies were exhausted in the present case by presuming that there was an action brought by

Hüseyin El on his behalf, and the application was examined on behalf of Hüseyin El.

4. In consideration of the relation and link between the parents' right to respect for their religious and philosophical convictions in education and instruction and the freedom of religion of their children under their custody, it is undoubted that the rejection of the applicant's request for the exemption of his daughter from the religious culture and ethics classes has a bearing on the interests of both his daughter and the father Hüseyin El himself. However, this commonality of relevance and interest cannot lead to the conclusion that the action brought only on behalf of the child Nazlı Şirin El was also filed on behalf of the father Hüseyin El. A situation that has not been brought before the administrative court, a remedy that has not been exhausted, a right that has not been exercised by Hüseyin El cannot be accepted by the Court as if it was done, exhausted or exercised. As in all cases, administrative actions and individual applications are subject to certain formal requirements. It is an obligation for the relevant and competent authorities to observe whether these conditions are complied with. The employment of the aforementioned method of interpretation in establishing link between the scope of the cases and third parties may lead to the possibility of unauthorized expansion of the scope of many individual applications.

5. Therefore, in the present application, it is not possible to decide on the merits of the case by accepting that the available remedies have been duly exhausted in respect of the father Hüseyin El.

b. As regards the Father Hüseyin El's Power to Represent Alone Nazlı Şirin El

6. On the other hand, in consideration of the process regarding the action filed on behalf of Nazlı Şirin El, which was taken as a basis by the majority of the Court for the examination on behalf of the father Hüseyin El, it then brings along the questions whether the action brought on behalf of Nazlı Şirin El can be filed by the father Hüseyin El alone, and therefore whether the action filed on behalf of Nazlı Şirin El only by the father Hüseyin El is convenient for accepting that the available remedies have been exhausted with respect to the father Hüseyin El.

7. Article 24 § 4 of the Constitution makes "religious culture and ethics instruction" compulsory in primary and secondary education. It is also emphasised therein that any other form of religious education and instruction is subject to the request of the child's legal representative. Article 2 of Additional Protocol No. 1 to the European Convention on Human Rights (ECHR) stipulates the respect for the right of parents to ensure children's religious education and instruction in conformity with their own religious and philosophical convictions.

8. In parallel to the provisions of the Constitution and the Convention, the first paragraph of Article 341 of the Turkish Civil Code states that "The right to decide on the religious education of the child belongs to the mother and father." Thus, the right to determine the religious education of the child is granted to the **mother and father**, which they can **jointly** exercise.

9. Regard being had to the facts that the issue is exclusively regulated by a special provision in the Turkish Civil Code and that a joint authority is granted to the mother and father at the same time, it is concluded that even the spouse who no longer has parental authority for any reason has the right to have a say in the religious education of his/her child, however, the mother or father whose parental authority has been taken away from him/her for any reason can exercise the right to determine the religious education of his/her child independently of the parental authority and only together with the other spouse.

10. In addition, it is explicitly set forth in Article 336 of the Turkish Civil Code that "the parents shall exercise custody jointly as long as their marriage continues."

11. In both national and international legislation, there is no regulation that categorically gives superiority to either the will of the mother or the will of the father regarding the decision on the religious education of the child. Accordingly, there is no doubt that any differences of opinion that may arise during the joint exercise of the right shall be resolved through the methods specified by law.

12. In the present case, all acts and actions performed during the administrative and judicial proceedings, including the individual

application to the Court, were carried out by the father Hüseyin El alone. Nazlı Şirin El's mother did not take part in any stage of the proceedings.

13. It is inferred that the applicant Hüseyin El did not provide any information on the legal status of his wife, who is the mother and guardian of his daughter Nazlı Şirin El.

14. As mentioned above, unlike general custody practices, the issue of religious education is specifically regulated in the Turkish Civil Code. It is clearly emphasised that the right to decide on this issue shall be exercised by the parents. Therefore, all procedures to be carried out regarding the religious education of children are procedures that must be carried out jointly by the mother and father. As long as she is alive, the mother also has the right to have a say in the religious education of her child, who is a minor, even if she does not have parental custody. In this respect, the assumption that any action carried out by one of the spouses is performed with the consent of the other spouse is not applicable to the present case.

15. In the present case, the entire legal process regarding the religious education of the child, in which the mother had an absolute right to have a say, was carried out without asking her will. At no stage of the process (including the process before the Court) there was any information about the mother's legal and actual situation, and she was excluded from the process at all stages.

16. Therefore, at least at the individual application stage, the Court should not have proceeded to the examination of the merits of the case without asking whether the mother of the child Nazlı Şirin El consented to the present application.

c. As regards Nazlı Şirin El's Consent

17. On the other hand, Nazlı Şirin El, who was 9 years old at the beginning of the events giving rise to the present application regarding the freedom of religion and conscience, which is a strictly individual right, and 14 years old at the date when the application was lodged with the Court, has become an adult for reaching the age of 18 as of the examination date of this application. Therefore, her opinion should have been sought,

for being a person of full age, so as to ascertain whether she wishes to pursue the application made on her behalf by her father based on his parental authority.

18. Therefore, as is the case for the mother, at least at the individual application stage, the Court should not have proceeded to examine the merits of the case without obtaining the opinion of Nazlı Şirin El.

d. As regards the Scope of the Examination

19. Following the consideration of the above-mentioned issues, it must be then discussed under which scope the present application should be examined.

20. Through his petition dated 1 October 2009, the applicant Hüseyin El applied to Eskişehir Havacılar Primary School, seeking the exemption of his daughter Nazlı Şirin El, a 4th grader at the aforementioned school, from attending the religious culture and ethics classes. He did not rely on any specific reason in the petition.

21. In reply to his petition, a letter of 22 October 2009 issued by the Ministry of National Education, Directorate General for Primary Education was served on the applicant. In the letter, referring to the decision of the Higher Council of Education and Instruction no. 1 and dated 9 July 1990, it is stated that students of Turkish nationality who are followers of Christianity and Judaism and study in primary and secondary schools other than minority schools are not obliged to attend the religious culture and ethics classes, provided that they certify that they are followers of one of these religions.

22. In the meantime, the applicant applied to the Civil Registry Office on 16 November 2009 and requested that the indication "Islam" on his and his daughter's identity cards be removed and that the religion section be left blank or, if this was not possible, that the indication be replaced with the phrase atheist. Upon his request, the indication Islam was removed from the section of religion on the applicant's and his daughter's identity cards.

23. On 7 April 2010, the applicant brought an administrative action for the annulment of the process regarding the notification of the letter of 22 October 2009, which was issued by the Ministry of National Education, Directorate General for Primary Education and which amounted to the dismissal of his request for an exemption.

24. The administrative court, considering that the plaintiff requested the exemption of his child from attending the religion course, claiming that the syllabus taught in primary and secondary schools was not in compliance with his religious and philosophical convictions, concluded that the dispute resulted from the syllabus of the religious culture and ethics course. Therefore, the administrative court addressed the syllabus of the religious culture and ethics course and examined whether the plaintiff's claim was justified within the framework of this syllabus. Accordingly, it assessed whether the syllabus taught in primary and secondary schools was "instruction in religious culture and ethics" or "religious education".

25. Referring to various judgments of the Court and the European Court of Human Rights, the administrative court annulled the impugned act by concluding that although the instruction in primary and secondary schools was named as religious culture and ethics, it cannot be considered as instruction in religious culture and ethics by its content; and that therefore, making compulsory the attendance of the applicant's child at a course of such nature amounted to a violation of the right enshrined in Article 24 of the Constitution.

26. The administrative court's decision was quashed by the 8th Chamber of the Council of State through the decision no. E. 2011/5904 K. 2011/6141 and dated 29 November 2011.

27. The reason for quashing by the 8th Chamber of the Council of State is the fact that *"the administrative court, considering that the plaintiff requested the exemption of his child from attending the relevant course, claiming that the syllabus taught in primary and secondary schools was not in compliance with his religious and philosophical convictions, concluded that the dispute resulted from the syllabus of the religious culture and ethics course". The 8th Chamber noted that* ***"…as inferred from the file, the plaintiff did not raise any claim that the syllabus of religious culture and ethics course was contrary to his***

mindset and requested an exemption from the course for indeed having no religious faith. Therefore, the action must be re-examined on the basis of the plaintiff's claim.". **Therefore, it was found established that the action brought by the applicant was related merely to request for an exemption, irrespective of the nature and content of the syllabus.**

28. In the quashing decision, it was also stated that the case subject-matter of the ECHR's judgment, which was relied on by the administrative court, was of no relevance to the present case; that the syllabus dealt with in the said judgment was related to religious culture and ethics, which had been implemented before 1 October 2009, when the plaintiff (applicant) applied to the administration and was formulated for 4th, 5th, 6th, 7th and 8th grades in the 2005 - 2006 school year; that this syllabus was no longer in force by virtue of the decision of the Board of Education and Discipline no. 410 and dated 28 December 2006; and that therefore, it was of no relevance to the plaintiff as well as to his action.

29. In addition, it was also stated that the action brought for the annulment of the new syllabus, which entered into force as of the 2007-2008 school year, was also dismissed through a decision upheld by the relevant Chamber of the Council of State. In the decision dismissing the plaintiff's action, it was also stated that the religious culture and ethics course taught as of the 2007-2008 school year was not in the nature of a religious course thanks to its new syllabus and was accepted, by its content, as instruction in religious culture and ethics.

30. The request for rectification of the quashing decision was also rejected by the aforementioned Chamber of the Council of State on 23 May 2012. Upon the quashing of the decision, the first instance court complied with the quashing decision and dismissed the actions on the grounds stated therein.

31. In the dismissal decision dated 11 October 2012, it was stated that the action was brought on the basis of the allegations that making his child subject to compulsory religious education was contrary to Article 9 of the European Convention on Human Rights, Article 2 of Additional Protocol no. 1, Article 24 of the Constitution and judicial decisions; that the plaintiff did not claim that the syllabus of the religious culture and ethics course

was contrary to his mindset; that he requested an exemption from the religious culture and ethics course for having no religious faith; and that therefore, the action was examined on the basis of the plaintiff's request.

32. Accordingly, although the decision also referred to the acknowledgment that the syllabus applied on 1 October 2009, when the plaintiff brought an action, did not amount to religious education but to instruction in religious culture and ethics in accordance with Article 24 of the Constitution, it has been observed that the action was dismissed essentially on the basis of the ground that *"As Article 24 of the Constitution and Article 12 of the Basic Law on National Education no. 1739 make the religious culture and ethics course compulsory for all citizens without any distinction, the refusal to exempt the plaintiff's child from this course because the child has no religious faith was not found contrary to the said provision…"*

33. It appears that the dismissal decision was upheld by the 8th Chamber of the Council of State on 13 November 2013 and thereafter became final following the dismissal of the request for rectification of the decision by the same Chamber on 27 June 2014; and that the applicants lodged an individual application on 12 September 2014.

34. In the judgment issued by the majority, the essence of the complaint was classified as the *"alleged violation of the parents' right to respect for their religious and philosophical convictions in education and instruction due to the rejection of their request for an exemption from the religious culture and ethics course, which is a compulsory class in primary and secondary schools and alleged to be religious education by its content"*.

35. We disagree with this classification. In the petition of 1 October 2010, which was submitted by the applicant to the administration, he did not refer to the scope of the religious culture and ethics course to which her daughter was subject, the reasons why the scope was inadequate or objectionable for them, and which information was provided to her daughter within the scope of this course even though she did not want. He only stated that *"" I request the student Nazlı Şirin El, who is a ……. grader with number…… studying at your school, to be exempted from religious culture and ethics classes."* Following the notification that his request was rejected, he applied to the civil registry office, requesting that the indication Islam

on his and his daughter's identity cards be removed and that the religion section be left blank, or if this was not possible, that the indication atheist be noted on the religion section.

36. Following the acceptance of his request and the removal of the indication Islam from his and his daughter's identity cards, he brought an action. In bringing an action through his petition dated 18 November 2009, he also stated that the indication Islam was removed from the religion section of his identity card.

37. In the petition, the plaintiff stated that he requested his daughter to be exempted from the compulsory religious culture and ethics course in schools for being contrary to the principle of secularism guaranteed by the Constitution and also being incompatible with his and his family's religious and philosophical convictions. He further maintained that although he and his daughter were not followers of any religion *(However, In the petition, it is noted as "followers of any religion". It is considered that this was erroneously written in order to emphasize that they were not followers of any religion. This is because the applicant requested that the religion section on both his and his daughter's civil registration records be left blank - or changed as atheist - and did not name any religion. Moreover, the result would be the same even if the applicant was considered to be "followers of any religion")* his daughter was compelled to attend the religious culture and ethics classes, which was unlawful and unfair within the meaning of the exercise of freedom of religion.

38. He also maintained that it should be accepted that Article 24 of the Constitution made instruction in religious culture and ethics compulsory for those who were followers of the Islamic religion; that any acknowledgement to the contrary would be incompatible with the purpose of the right to protection of religious faith, which was guaranteed in the same provision; and that the refusal to exempt his child from religious culture and ethics class which was not in accordance with the child's religious and philosophical convictions, regardless of her personal situation was not appropriate. In addition, he also emphasised that according to national and international legislation, no one could be subject to a religious education against his/her will through a syllabus

that was contrary to his/her religious and philosophical convictions; and that therefore, his daughter must not be given a course which was not intended for an objective and rational education but based on a certain understanding of religion and which therefore could not be accepted as instruction of religious culture and ethics.

39. In consideration of the applicant's petitions both before the administration and the administrative court, it has been observed that within the context of the above-mentioned allegations, he did not provide any information about the scope of the religious culture and ethics class where his daughter was to attend; the aspects in respect of which the course was inadequate or objectionable for them; the information, which should not have been provided according to them, was given to his daughter within the scope of the course; which faiths or philosophical convictions were overemphasised, ignored or underemphasised in the course; on account of which concrete circumstances, the course turned into a religious education; and for which reasons, the course was contrary to his mindset. Nor was any concrete evidence submitted in these regards.

40. Moreover, it has been observed that in the same petitions and at the following stages, not a single concrete word was used to indicate which of the contents in the syllabus, or the syllabus itself in general, was contrary to Article 24 of the Constitution; that no concrete justification was put forward so as to indicate which aspects of the syllabus in force and its content contravened the Constitution, the judgments of the Court, the European Convention on Human Rights and the objective criteria set out in the relevant judgments of the European Court of Human Rights; that no explanation was provided as to how the religious culture and ethics course, both as a whole and by its content, infringed the freedoms of religion and conscience, and although judgments in other cases were cited, no specific reference was made to any judgment finding that the content of the syllabus to which Nazlı Şirin El was subject was contrary to the Constitution and international conventions; that only after referring to the judgments of the Court dated 16 September 1998, the European Court of Human Rights dated 9 October 2007 and the 8th Chamber of the Council of State dated 29 February 2008 and 28 December 2007, which seem to be of no relevance to the said syllabus, it was stated in an abstract fashion that

according to national and international legislation, no one can be provided with a religious education against his/her will through a syllabus contrary to his/her religious and philosophical convictions; and that therefore, it was maintained therein that her daughter should not have received a course which was not intended for an objective and rational education but based on a certain understanding of religion and which could not be therefore accepted as instruction of religious culture and ethics.

41. Therefore, although it was stated in the subsequent periods that the applicant requested exemption from the course due to the unconstitutionality of the content of the syllabus to which her daughter was subject, it has been concluded that the applicant's request (from the administration and the administrative court) was for her daughter (notified to be atheist before the civil registry office) to be completely exempted from the religious culture and ethics course, regardless of its content **(he did not maintain that her daughter could attend the class if the content of the course was in accordance with her religious belief or philosophical convictions, and that her daughter should be exempted from the class because the content currently applied was not of this nature)**.

42. As a matter of fact, although the administrative court concluded that the dispute arose from the syllabus of the religious culture and ethics course at the first stage and issued a decision accordingly, it agreed with the conclusion reached to the contrary by the 8th Chamber of the Council of State and accordingly accepted that the plaintiff did not claim that the syllabus of the Religious Culture and Ethics course was contrary to his mindset, and that he requested an exemption from the religious culture and ethics course for having no religious faith.

43. Therefore, it has been concluded that the administrative action giving rise to the present individual application was brought with the said request and within the said scope; and that therefore, the present application must be assessed within this scope (within the scope of exemption, regardless of the content of the religious culture and ethics course).

44. In the fourth paragraph of Article 24 of the Constitution, titled "Freedom of religion and conscience", it is set forth that "…Religious and moral education and instruction shall be conducted under state supervision and control. Instruction in religious culture and morals shall be one of the compulsory lessons in the curricula of primary and secondary schools. Other religious education and instruction shall be subject to the individual's own desire, and in the case of minors, to the request of their legal representatives".

45. In consideration of the enactment process of the provision, it is seen that the wording of the relevant paragraph, as formulated by the Advisory Council was as follows: "Religious and ethical education and instruction shall be compulsory in primary and secondary schools and subject to the supervision and control of the State. It is optional for non-Islamic persons to attend religious classes" on the basis of the legislative intent to the effect that "... in order to prevent abuse and misuse, religious and ethical education and instruction are subject to the State's control and supervision. Likewise, this education is compulsory in primary and secondary schools. Non-Muslims are, as a mere exception, excluded from this compulsory education. ...". The wording was then changed by the Constitutional Commission as in the follows: "Religious and moral education and instruction shall be conducted under the state supervision and control. Instruction in religious culture and ethics shall be one of the compulsory lessons in the curricula of primary and secondary schools. Other religious education and instruction shall be subject to the individual's own desire, and in the case of minors, to the request of their legal representative". It has been accordingly observed that the right of choice proposed for persons who are not followers of the Islamic religion was removed from the draft text, and the paragraph was enacted as stated above in Paragraph 44.

46. Regard being had to both the wording of the paragraph and the developments taking place during the enactment process thereof, it has been understood that religious culture and ethics instruction is compulsory for every citizen in primary and secondary schools, provided that it is not in the nature of religious education (in the absence of a complaint with respect to the syllabus).

47. In other words, Article 24 § 4 of the Constitution makes the instruction of religious culture and ethics compulsory for every citizen in primary and secondary schools so long as it does not amount to religious education.

48. Therefore, it is not possible to examine the allegations raised in the application form in the context of the alleged unconstitutionality in connection with the right of parents to respect for their religious and philosophical convictions in education and instruction falling under the freedom of religion and conscience safeguarded by Article 24 of the Constitution.

49. For these reasons, the application should have been declared inadmissible for being manifestly ill-founded as it is not possible, in constitutional terms, to exempt the applicant's daughter from religious culture and ethics course, regardless of the content of the syllabus.

B. MERITS

50. Pursuant to Article 24 § 4 of the Constitution, **"Instruction in religious culture and morals shall be one of the compulsory lessons in the curricula of primary and secondary schools. Other religious education and instruction shall be subject to the individual's own desire, and in the case of minors, to the request of their legal representatives."**

51. Accordingly, it has been understood that the Turkish Constitution provides for two types of religious education and instruction, namely compulsory and optional; that the Constitution renders religious culture and ethics education compulsory for primary and secondary school students; and that this obligation is of absolute nature, permitting of no exception.[1]

52. In other words, the Constitution itself is the legal basis for the compulsory instruction of the religious culture and ethics course in primary and secondary schools. Therefore, it is imperative to take this factor into account when evaluating whether the compulsory teaching of

1 Kemal Gözler, *"1982 Anayasasına Göre Din Eğitim ve Öğretimi" ("Religious Education and Instruction pursuant to the 1982 Constitution")*, Prof. Dr. Tunçer Karamustafaoğlu'na Armağan, Ankara, Adalet Yayınevi, 2010, sayfa 317-334 (Türk Anayasa Hukuku Sitesi(https://www.anayasa.gen.tr/din-eğitimi.htm)

this course infringes any fundamental right. It should also be noted that according to the Constitution, this teaching is an activity to be carried out under the supervision and control of the State.

53. However, there is no definition in the Constitution as to the exact meaning of the religious culture and moral education stated in the paragraph. However, since the paragraph in question sets forth "**...Other religious education and instruction...**" following the phrase "**Instruction in religious culture and morals shall be one of the compulsory lessons in the curricula of primary and secondary schools.**", it has revealed as a common opinion that "instruction within the scope of the religious culture course" and "religious education and instruction" have different meanings; and that the aim pursued by religious culture and ethics instruction is not to provide religious education to students, but to ensure the adoption of a culture in this regard in consideration of religions in general and the religious structure of our society.

54. Therefore, in essence, it can be said that the information to be provided within the scope of the course in question should be limited to the information that may be necessary for everyone; and that there is no constitutional problem in making religious culture and ethics of such nature compulsory for everyone.[2] In other words, in accordance with the aforementioned mandatory provision of the Constitution, the compulsory instruction of "religious culture and ethics" in primary and secondary schools in Türkiye and allowing for no exemption in this regard do not cause a violation of any right in constitutional terms.

55. In this case, the constitutional problem in this sense can only arise from the scope of "**...religious culture and ethics instruction...**", that is to say, the content that is not in the nature of "religious culture". This being the case, the question arises as to the nature and scope of the religious culture and ethics course so that it would amount to the instruction of religious culture and ethics in accordance with Article 24 of the Constitution.

56. In the judgment based on the majority's view, it is primarily noted that if the syllabus of the religious culture and ethics course is determined

2 Kemal Gözler, *ibid*.

by focusing on information about the form of Islam as practiced and interpreted by the majority of the Turkish nation within the framework of the unique historical accumulation and sociological structure of the country, departing from the principles set out in the judgments of the ECHR and the Council of State, and if alternatives to accommodate the wishes of parents who do not want their children to attend these classes -such as the exemption from this course, or providing alternative courses to religious education and instruction or the opportunity not to enrol in the aforementioned course- are not offered, then it would violate the right of parents to respect for their religious and philosophical convictions in education and instruction. It is then stated that in the previous periods until the 2018-2019 school year, despite attempts to pluralize its content in the light of the judgments of the ECHR and the Council of State, the entire curriculum, all syllabuses of the religious culture and ethics course, including the one subject-matter of this individual application (in the judgment rendered by the majority, it is stated that no assessment was made regarding the syllabus implemented as from the 2018-2019 school year), could not be ensured to provide the content of religious culture and ethics teaching envisaged in Article 24 § 4 of the Constitution; that the syllabuses focus on information about the form of Islam as practiced and interpreted by the majority of the Turkish nation; that they are not within the scope of religious culture instruction, which is foreseen to be compulsory in order to provide neutral and introductory information about religions, but within the scope of religious education and instruction, which goes beyond religious culture teaching and is intended for the education and instruction of the religion of Islam and its certain interpretation. Therefore, it has been concluded that the right of parents to respect for their religious and philosophical convictions in education and instruction was violated, as the applicant's child was not offered appropriate alternatives such as exemption from attending classes, alternative courses to religious education and instruction, or not enrolling in the aforementioned course.

57. Religion is "the sole guide to truth and salvation for believers and a metaphysical illusion for non-believers." Whether it is accepted as a "criterion of truth" or as an "illusion", religion is an indispensable part of human and social life as well as culture. It has an important function both in the self-definition of individuals and in the shaping of social and

political life.[3] As a being that constantly develops and renews itself, human beings may need religion to develop themselves and discover the meaning of life.

58. In addition, religion has a great influence on the way people communicate with each other, get to know each other, and internalize social values and judgments. This brings up the importance of religious education and instruction. They way in which religion should be taught and instructed may differ from society to society and from culture to culture. There may be differences of opinion, debates and different preferences within each society and between societies. At this point, what is of importance is the acknowledgment by almost all civilised societies that religious education is a requisite.[4]

59. In consideration of the rights of children and young people as well as their parents, religion and ethics, which have an important place in individual and social life, cannot be ignored in the field of education and instruction. Globalization, which has emerged with the developments in technology and economic, social and cultural changes and interactions, has provided people with a multi-religious and multi-cultural living environment. Given the role and influence of religion as regards social life, the aforementioned situation indicates that the religious culture and ethics course of general nature, which includes information that may be necessary for everyone in terms of a peaceful social life, can be made compulsory, and within the scope of this compulsion, it is necessary to teach other religions and philosophical convictions in addition to the religion of which the students are followers.[5]

60. On the other hand, learning or teaching of a religion and accepting it as a correct belief system are two different things. Paying respect to a religion is even more different. People of different faiths or no faith at all

3 Zühtü ARSLAN, "*Avrupa İnsan Hakları Sözleşmesinde Din Özgürlüğü*" (*"Freedom of Religion in the European Convention on Human Rights")*.

4 Yıldız KIZILABDULLAH, *"Toledo Kılavuz İlkeleri ve Din Kültürü ve Ahlak Bilgisi Programı"* (*"Toledo Guiding Principles and Curriculum of Religious Culture and Ethics*"), Dini Araştırmalar (*"Religious Researches)*, September – December 2008, Vol. 11, p. 175-191.

5 İlhan YILDIZ, *"Din Kültürü ve Ahlak Bilgisi Dersi: Zorunlu mu Kalmalı, Yoksa Seçmeli mi Olmalı" (Religious Culture and Ethics: Whether to be Compulsory or Optional")*, TUBAV Bilim Dergisi Year: 2009, Vol. 2, Issue: 2, p. 243-256.

should be able to exchange information on religious matters in order to share their experiences with each other, through debate within the civilised framework or without any debate, and without offending one another. This is of utmost importance for people of different faiths or philosophical convictions to be tolerant of the other's faith and philosophical convictions as well as their way of life.

61. Therefore, the richness that religious culture and ethics course of general nature which is based on rational and objective data and includes information that may be necessary for everyone, can made in the faith and culture of students and the contribution it can make to society and world peace should not be ignored. In fact, the "Toledo Guiding Principles" published by the OSCE as a result of the studies on religious education in schools states that there is no inconvenience in making religion courses in schools elective or compulsory, provided that the teaching of religion and belief is done objectively.

62. However, as mentioned above, the way in which religious education and instruction should be carried out, in other words, the quality of religious instruction in schools may differ, or differs, from country to country, society to society, culture to culture. The quality of religious instruction in schools and the rules on religious education in the constitution of that country are *"related to many factors such as the relevant laws, the geography of belief, the historical and social importance of religion, the demands and expectations of the people of that country regarding religious education*".[6]

63. According to research conducted by experts in the field, in some European countries (e.g. Finland, Sweden, Norway and Greece) religion classes are compulsory, but the degree of compulsion varies from country to country. In some European countries (e.g. Austria, the UK, Denmark, Ireland) it is also compulsory, but students are exempted from this obligation under certain conditions. In these countries, students are provided partially or completely with only the knowledge of the religious belief which they "follow". In some countries such as Poland, Portugal, Romania, Russia, religion is taught as an elective course; whereas in

6 İlhan YILDIZ, *ibid*.

countries such as Germany, Belgium, the Netherlands and Switzerland, a different elective system is applied, and in some of these countries, a sect-based religion course is taught. When the syllabuses and practices in these countries are examined by the same experts, it is observed that the religion classes in schools, by their content, basically focus on the prevalent and dominant religious belief in the given country, and include predominant information about the dominant belief. For instance, in countries with a Catholic population, the religious course does not mainly focus on Orthodoxy or Protestantism; in countries with a Protestant population, it does not mainly focus on Catholicism or Orthodoxy, and in countries with an Orthodox majority, it does not mainly focus on Catholicism or Protestantism.[7]

64. This shows that the syllabus of religious classes, whether voluntary or compulsory, should be determined in line with the realities of each country's own historical and sociological structure. However, it should be especially emphasized at this point that the fact that the syllabuses of religion classes predominantly include topics related to the predominant religion of the society does and should not mean that information about other religions would not be covered or that other religions would be taught in an unfavourable way.[8]

65. On the other hand, it is also stated by the same experts that today, due to the social situations that have emerged as a result of certain phenomenal processes such as migration and globalization, the view that *"students should be informed about different religions and beliefs in order to become good, harmonious and tolerant citizens"* has become widespread also in the international arena; and that for this reason, -beyond the debates on whether there should be religious classes or whether they should be compulsory or elective - many countries are focusing on the nature, structure, pedagogy, relevance and relationship with other disciplines and the content of these courses. It is also stated that *"in recent years, many countries have been trying to develop different methods for the teaching of religious course"*. [9]

7 İlhan YILDIZ, *ibid*.
8 İlhan YILDIZ, *ibid*.
9 İlhan YILDIZ, *ibid*.

66. It has been also observed that the practice of making religious culture and ethics classes compulsory, as foreseen in Article 24 of the Constitution, was not introduced suddenly in our country; that elective (optional) religious classes were practiced for 30 years before 1982, and following a number of developments and events during the 30-year period, after a significant accumulation and experience were gained in this regard, the compulsory practice, also including optional religious education, was introduced as a result of the social demand for a rational and objective teaching of religion and ethics based on objective data.

67. In its observations, the Ministry of Justice has provided the following explanations regarding the individual application in question: the syllabuses of religious culture and ethics not only include religious thoughts and movements in Türkiye, but also aim to *"recognize other religions with their basic characteristics and approach their members with tolerance"*. In this context, different religious faiths and cultures such as Judaism, Christianity, as well as Buddhism, Hinduism, Sikhism, Sintoism and Taoism are included in the syllabus of the course, and a phenomenological approach is adopted in the formation of the beliefs, traditions and rituals of these religions, and the syllabuses include no explanations that are incompatible with the tenets of these religions and that are not included in their main sources. These syllabuses are in line with the objective of *"having basic knowledge about different religions and belief systems and the diversity within them"*, which is among the TOLEDO principles. The course does not aim to impose any religious or sectarian understanding. Its application aims to inform students about religious culture and ethics in an objective manner by taking into account the sociological situation in Türkiye and in the world. Within the same scope, it is aimed to ensure that the Turkish society is informed based on common and accurate knowledge in the field of religion and ethics, thus preventing misunderstanding of the existing intra-religious and inter-religious differences in the society in which they live due to reasons such as ignorance and prejudices. The aim of religious culture and ethics course is *inter alia* to strengthen social peace, unity and solidarity and to restore basic moral and cultural values by eliminating the prejudices arising from the lack of knowledge in the field of religion. The existence of terrorist

organizations that exploit religion reveals the importance of accurate and objective information about religions and different cultures. In this context, one of the positive obligations of the State is to provide objective information about religions. The State has discretionary power regarding objective enlightenment on religious culture and ethics, and therefore, the arrangements in this sense may vary by countries and eras, which is also supported by the ECHR's judgments. Furthermore, in its judgment in the case of *Osmanoğlu and Kocabaş v. Switzerland*, the ECHR has acknowledged that the compulsory swimming class aims at the integration of foreigners from different cultures and religions and accordingly concluded that the measure in question is aimed at preventing the social exclusion of foreign students. Therefore, the present application should be assessed by taking into account the impact of religion on social life in the geography in which our country is located and even the fact that inaccurate knowledge on religion can be easily abused.

68. In the letter dated 16 March 2020 sent by the Ministry of National Education in response to the Constitutional Court's letter dated 9 March 2020, it is stated that the decision of the administrative court regarding the exemption from the religious culture and ethics course in the case, which is subject-matter of the present application, is in accordance with Article 24 of the Turkish Constitution titled 'Freedom of Religion and Conscience' and that there is no indication in the judgments of the European Court of Human Rights that necessitates the religious culture and ethics course to be no longer compulsory.

69. It is also set forth in the letter: *"As can be understood from the examination of the curricula, merely information is provided to the students on the subjects, and the students are not asked to do any practice. Therefore, religious education is not given in this course, but information is provided as in other culture courses.*

...The syllabuses of religious culture and ethics, which are prepared by taking into account the developmental levels of students, cover subjects that include basic values without dwelling into differences of ideas and interpretation.

These syllabuses are prepared in accordance with the provisions of the Constitution and the Basic Law on National Education.

As will be seen when the Supreme Court, if deemed necessary, has the syllabuses examined by an expert committee composed of experts in the field, the syllabuses do not focus on any religion or philosophical doctrine, and scientific and research-based knowledge is prioritized in the syllabuses. Superstition or false information based on superstition are avoided, root values that will encompass all religious formations are emphasized, and attention is paid to ensure that the subjects included in the syllabuses are common denominators that unite all humanity.

In the preparation of the said syllabuses, the followings are targeted:

a. Through a sound instruction of religion and ethics, to ensure the students to adopt national, moral, humanitarian and cultural values that are expressed among the General Objectives of Turkish National Education, and to develop in a balanced and healthy way in terms of body, mind, morality, spirit and emotion, thus preventing cultural alienation;

b. Religion is an important factor in the relations between people, societies and nations in a universal dimension, and in order for these relations to develop positively, individuals need religious instruction to be given with scientific method;

c. Taking into account the influence of Islam on our culture, language, art, customs and traditions, stress is placed on the introduction and teaching of the Islamic religion and the ethics, customs and traditions that stem from it;

d. To give general information about other religions in order to provide students with a broad perspective on the worlds of faith and culture and to enable them to behave in a more tolerant and understanding manner towards those of other religions or different opinions;

e. Not only to teach religion as knowledge, but also to internalise moral virtues and values in students;

f. To contribute to the correct understanding and interpretation of religion, which has been effective on individuals and society throughout human history,

g. To ensure the correction of false religious beliefs that arise from incomplete knowledge or ignorance in society,

h. To ensure the improvement of the student's sense of self-confidence and encouraging the student to research;

i. To raise students as spiritually healthy individuals; and

j. To ensure an increase and establishment of democracy awareness.

As can be seen from the syllabus objectives listed above, the religious culture and education course is not intended only for students of the Islamic religion, but also for all students regardless of their sectarian or philosophical beliefs.

Therefore, the plaintiff's child is obliged to study this course just as he/she is obliged to study other courses because it is a course that aims to promote social peace, mutual love, respect and tolerance, and unification in common values.

… As listed above, religious culture and ethics courses aim to provide students with general information about religion and religions in general, to ensure unity and solidarity in society, to strengthen the bonds of love, respect and friendship, to adopt lofty concepts such as homeland, nation and state, to be tolerant towards those who think differently from oneself and to respect the opposite opinion...".

70. In conclusion, taking into account the above-mentioned points, in the context of offering a complete constitutional solution to the matter regarding the scope and the content of religious culture and ethics instruction, which is regulated under Article 24 of the Constitution, and with respect to the syllabus of the religious culture and ethics course, which is the subject-matter of the present individual application, it has been concluded that an examination should be carried out by a board consisting of faculty members specialized in fields such as philosophy, sociology, psychology, religious education, pedagogy in the relevant faculties of our universities such as theology, education, medicine and law in order to determine the principles regarding the content of the religious culture and ethics courses specific to our country in line with international objective standards by taking into account the principles set forth in both the case-law of the Council of State and the judgments of the European Court of Human Rights and the explanations made above, and that a decision should be made by considering the principles and procedures determined in the report to be prepared as a result of the examination.

71. Therefore, we have dissented from the majority's conclusion finding a violation as the application should have been declared inadmissible and, as noted above, an expert examination should have been carried out.

DISSENTING OPINION OF JUSTICE HİCABİ DURSUN

I dissented from the majority's view, with respect to the individual application no. 2014/15345, on the grounds explained above under the heading of **"merits"** in the dissenting opinion submitted by Mr. Kadir ÖZKAYA, Mr. Recai AKYEL, Mr. Yıldız SEFERİNOĞLU, Mr. Selahaddin MENTEŞ and Mr. İrfan FİDAN.

DISSENTING OPINION OF JUSTICE MUAMMER TOPAL

1. Article 2 of the Constitution stipulates that the Republic of Türkiye is a democratic, secular and social state of law, based on the fundamental principles set out in the preamble, respectful of human rights, loyal to Atatürk's nationalism, in the spirit of social peace, national solidarity and justice.

2. In the legislative intent of this provision, it is stated that the Republic of Türkiye is first and foremost a society which adheres to Atatürk's nationalism; that is to say, a society in which all its members are common in grief, joy and sorrow, living as an indivisible whole, in other words, within the understanding of national solidarity and justice; that this society has adopted the democratic regime, which respects human rights and best protects, realizes and guarantees human dignity among the political regimes based on Atatürk's principles stated in the preamble; that the democratic regime is based on the principles of secularism and the social state of law, and democracy is a political regime in which sovereignty belongs to the nation; and that secularism, which never means irreligiousness, means that every individual can have any belief, sect, worship and not be treated differently from other citizens on the ground of their religious faiths.

3. In the fifth paragraph of the "Preamble" referred to in the said article, it is stated that the Constitution stipulates that no act and activity shall infringe the principles of Turkish national interests, the indivisibility of the Turkish existence with its State and country, the historical and spiritual values of Turkishness, Atatürk's nationalism, the principles, reforms and civilised nature of the Turkish Republic; and that, as a requirement of the principle of secularism, sacred religious feelings cannot be interfered with the State affairs and politics. It is also noted that the Constitution is entrusted to the children of Türkiye in pursuance of these ideas, belief and consideration as well as for being interpreted and implemented with respect and absolute loyalty to its word and spirit.

4. As laid down in Article 24 § 4 of the Constitution, "Religious and moral education and instruction shall be conducted under state supervision and control. Instruction in religious culture and morals shall be one of the compulsory lessons in the curricula of primary and secondary schools. Other religious education and instruction shall be subject to the individual's own desire, and in the case of minors, to the request of their legal representatives."

5. According to this article, it is clear that "religious instruction" is among the compulsory courses that must be provided under the supervision of the State, and therefore the State has positive obligations in this respect. In other words, the State is obliged to provide religious instruction in primary and secondary schools and to form the relevant syllabus.

6. Article 12 of Law no. 1739 also embodies a provision in parallel with that laid down in the Constitution.

7. The first three paragraphs of Article 24 of the Constitution stipulate that everyone has the right to freedom of conscience, religious belief and conviction, and that no one shall be compelled to worship, to participate in religious rites and ceremonies, or to manifest his religious beliefs and convictions; and that nor shall anyone be condemned or accused on account of his religious beliefs and convictions.

8. In the first sentence of Article 24 § 4 laid down above, it is stated that "education and instruction" is that which is carried out under the

supervision and control of the State; in the second sentence, it is stated that the compulsory course is "religious culture and ethics"; and in the third sentence, it is stated that "religious education and instruction" is that which is subject to the individual's own will and to the request of the legal representative of minors. This paragraph reveals that "education" is optional and "instruction" is compulsory. It must be accepted that the term "religion" in the provision is intended to cover all religions. The removal of the term "Islam" from the fourth paragraph, as adopted by the Advisory Council, is also in support of this consideration. Accordingly, it is understood that not a majoritarian but a pluralist approach has been adopted. Türkiye is known as a mosaic of religions where people of all religions and beliefs can live individually or as a community. In this case, it is considered that compulsory religious instruction covers all religions; and that the scope and content of the course should also encompass all religions. The formulation and formation of the scope and content of the course in this way will undoubtedly contribute to the individuals in the society getting to know and understand each other in a proper fashion, and thereby to the realization of the rule of law based on "national solidarity" and "respect for human rights", as stated in Article 2 of the Constitution.

9. In interpreting Article 24, it is necessary to take into consideration the formulation process of the provision during the deliberations of the National Security Council. During the deliberations, it is notably stated that "instruction of religious culture and ethics" should be understood to mean the history and rules of religion and that it is intended to ensure that children should have a religious culture by the time they finish primary and secondary school through the questions "What is Islam? How was it born? How did it develop?". It is specifically stated that "education" is not included. It is emphasized that the phrase "among the subjects taught" should be understood to mean that, just as history, geography and mathematics could not be dispensed with, religious education could not be dispensed with in these schools, and that it was in a sense compulsory. The purpose of making religious education compulsory was to emphasize the necessity of teaching this subject as a cultural subject, just like history, geography and chemistry; religious education was not only about culture, but also about practice, and everyone was left free

at this stage; the course, which was introduced to provide information on the birth, principles and philosophy of Islam, was intended not only for Muslims who were citizens of the Republic of Türkiye, but also for citizens of other religions in Türkiye. However, religious culture would be taught to those who are followers of the Islamic religion; others would learn their own religious culture. The expression "among the compulsory courses" was inserted because it arose out of a natural need. It does not aim to "teach" a course contrary to secularism; since the sentence contains the expression "teaching religious culture", there is no objection to the term "compulsory courses". The aim is not to force anyone to follow all the requirements of religion, but to ensure that they understand religious culture. As religion is the unifying element of society in other countries, it is only natural that everyone should know about it. Since the majority of Turkish society is follower of Islam, it would be more appropriate to give them this opportunity and to ensure that they receive their knowledge under the control of the State. If the parents of a child know that his/her child will be taught religious culture in primary and secondary schools, he/she will not prefer *imam-hatip* schools. The term "compulsory" is never contrary to secularism and should not be used in a way that is subject to abuse. It should be also noted that another reason for including the phrase "Religious culture and ethics ... is among the compulsory courses" is to prevent the preference for Imam-Hatip schools and Qur'an courses.

10. The National Security Council's discussions on Article 24 reveal that the "religious Culture and ethics" course, which is intended to be taught "among compulsory courses", was designated to include Islam at a "minimum" level; that religious education was never intended in this course; that this course did not include other religions; and that the education and instruction of other religions was left to the individual's own will under the supervision and control of the State, and to the legal representatives of minors. It has been concluded that at the end of the discussions, it was agreed that Islam should be taught during the instruction of the said course as being the majority religion practiced in the country.

11. The reason why religious education should be provided under the supervision and control of the State is, as stated in the legislative intent of

the relevant provision, to prevent the abuse of the freedom of teaching in this field. Taking into account the socio-cultural and religious structure of Turkish society, it can be considered that the explicit provision in the Constitution that this teaching must be provided by the State serves the purpose of preventing this teaching from being provided by other individuals or groups who lack knowledge on formation, have incorrect or erroneous religious knowledge and understanding, and who are completely contrary to the social and legal structure of the State of the Republic of Türkiye. Moreover, the determination of the scope and content of this teaching by the State and also the undertaking of its inspection and supervision by the State provides assurance in terms of access to accurate information and the elimination of incomplete or erroneous information.

12. In addition to the constitutional obligation of the religious culture and ethics course, examining its repercussion in society is at least as important as its legal aspect in terms of addressing the sociological dimension of the course. This is because this course is not a technical subject like mathematics, physics or chemistry. It can be considered a social subject such as literature, history and geography. It is a fact that there are those who favour and oppose the introduction of the course, as well as its content has been widely debated. It cannot be ignored that this course has a full social response. Examining the impact and consequences of this course in society is not a matter of a review of expediency, but a necessity in order to understand its legal aspects. Religion and ethics classes in Türkiye have followed a course parallel to the development of democracy and have been accepted by the governments as the desire of the masses. Therefore, as long as democracy continues in Türkiye, moral and religious education will be among the services that citizens expect from the State.

13. The religious culture and ethics course also encompasses the concept “ethics”. It is an undeniable fact that this concept is important for all religions and all beliefs. Therefore, it is considered that it would be useful to focus on the concept of "ethics" first.

14. Ethics is a system of interpersonal relations, which is acquired through learning. If others did not take good or bad attitudes towards our

behaviour, there would be no question of being ethical. In fact, ethically favourable behaviour is the behaviour that others expect of us. Especially the child is not old enough to develop an ethical theory on his own, he learns the rules of conduct from others.

15. Throughout their life, individuals do not always behave according to the expectations and reactions of others. As they reach the necessary mental maturity, they adopt these rules of conduct as a system and now evaluate every behaviour according to this system. At this point, the internal control mechanism, we call conscience, is thereby formed. Conscience both saves us from inconsistency in ethical behaviour and enables us to behave ethically in the absence of external control.

16. The judgment of society and that of the individual may not overlap whether an act is unethical or not. Since ethical behaviour depends on the conscience of the individual, psychological criteria will be used to judge unethical violations. If a person considers an act wrong and feels guilty when he or she commits it, the act is unethical. The ideal of ethical education is to reconcile this individual conscience with the conscience of society, that is, to remove the difference between what society considers bad and what the individual considers bad. This is an ideal, and in most societies, it cannot be fully realised. However, the defects in ethical behaviour often stem not from a clash of values, but from deficiencies in the individual's ethical knowledge.

17. Religious and ethical instruction has many problems that have emerged since its inception in the Republican era, which have not been addressed by the ideological debates in our country. In Türkiye, it can still be argued that religious education is contrary to secularism. Those who claim that it is not contrary to secularism, on the other hand, have exerted all their attention and efforts to convince the objectors with the defensive attitude they have developed over the years. As a reflection thereof, it is a well-known fact that for decades in the past, the Muslim majority of the country lived like a minority. At this point, it is enough to recall the public sphere debates on religious issues until very recently. In reality, since religion is among, even the primary of, the issues that lead to differences in attitudes among various ideological groups, there will always be those

who object to the teaching of religion, both in principle and in content. Moreover, in a democratic regime, this right to object must be considered as legitimate.

18. Today, most Turkish citizens above middle age have acquired their knowledge of religion on their own after reaching a certain age, and they received information that they would have indeed learned in primary school in their twenties. In the meantime, hundreds of thousands of Turkish youth who have never come into contact with Islam, either by being in modern circles or by staying outside the understanding of Islam accepted by the majority of society, have become alienated from society and alienated from Islam. Another aspect of this situation is that due to their administrative or political positions in society, they had to make decisions or express opinions about religious life. It is obvious that it will be difficult for such individuals to reconcile with society. This is why religion is the main point of friction between those who are "educated" and the public in Türkiye. Unfortunately, some of our intellectuals still do not realise that this friction is due to their own ignorance and they explain the problem with the ignorance of the public.

19. Religious instruction should not always be understood in terms of indoctrination. Those who are given religious instruction do not necessarily have to adopt and practice what they are taught as part of their own personality. For this reason, it is a fact that in secular and democratic societies, religious instruction is freely provided, whereas in societies ruled by totalitarian regimes it is shunned. Totalitarian regimes do not teach religion, not even philosophy outside of a certain ideology. According to these regimes, learning a philosophy is the same as adopting it, and a regime that wants only a certain ideology to be adopted should only teach it. However, in teaching both philosophy and religion, the aim of imparting knowledge should never be forgotten. In a secular country, no one is obliged to accept or practice a religion he does not embrace. Any consideration to the contrary means to live according to the desires of others. In terms of religious life, it is possible to characterize this situation as "the most miserable life". However, everyone should know what a religion embraced by society (as well as other religions) is composed of. Moreover, one must learn the religion practiced in one's own country in

detail, just in the way he must learn the history and geography of one's own country. Secularism is freedom of belief, not freedom of ignorance.

20. In a secular state, the teaching of a particular religion may be made compulsory. However, religious education cannot be made compulsory. Article 24 of the Constitution makes religious education subject to the individual's own will and to the request of the legal representative of minors.

21. It is a sociological reality that religion is a major factor in the formation of societies' lifestyles, traditions and customs. It is also possible to say that it would be easier for the individuals who make up the society to understand each other by knowing the religion of the other person. It cannot be ignored that religious instruction is a course aiming at social peace, mutual love, respect and tolerance, and unification in common values. It should not be overlooked that this course can make a great contribution to the formation of a society in which all its members live as an indivisible whole, common in grief, joy and sorrow, in national solidarity and justice, as stated in the legislative intent of the Constitution.

22. It has already been mentioned above that the majority of the individuals who make up the Republic of Türkiye are followers of the Islamic religion and that there are also individuals belonging to other religions or belief groups in society. At this point, it is necessary to re-examine the fourth paragraph of Article 24 of the Constitution. The second sentence of the fourth paragraph makes the instruction of religious culture and ethics compulsory for all citizens, regardless of their religion. In this way, all citizens will be able to learn, at a minimum, about all religions practiced in society, and according to the next sentence, they will be able to receive both instruction and education of their own religion or beliefs voluntarily or upon the request of their legal representative. As stated in the reference made in the judgment to the administration's opinion, the religious culture and ethics course covers all religions according to their proportion in the population. Again, as stated in the judgment, members of religions other than Islam are exempted from this course. In this case, members of other religions will not be able to learn about Islam, but they will be able to both teach and study their own religion

in accordance with the third sentence of Article 24 § 4. For different sects and belief groups under the Islamic religion, the religious culture and ethics course is compulsory. This obligation does not violate the freedom of religion. Rather, it can be said that "excess knowledge" is provided. It is mentioned above that this "excess knowledge" is important for social solidarity. Persons from different sects and belief groups are subject to compulsory religion classes in accordance with the second sentence of the aforementioned paragraph, and unless they request exemption, they will not be compelled to disclose their beliefs in the educational institution they attend. If people claim that the compulsory religious culture and education course is incomplete or inadequate, they can demand both the education and instruction in a different faith, sect or philosophical thought. This education and instruction can also take place in another institution, civil or official, if desired. In this way, the real freedom of religion is manifested. In the event that such a request from the administration is rejected, it is certain that the "freedom of religion and conscience" guaranteed by the Constitution, as well as the right of parents to d respect for their religious and philosophical convictions in education and instruction, must be argued to be violated. There is no information in the file that such an application was made. In this case, it is not possible to mention that the applicant's "freedom of religion and conscience" under Article 24 of the Constitution has been violated.

23. Freedom to manifest one's religious faiths encompasses situations in which it is undesirable to reveal religious beliefs or even to be in a position where it is understood that one does not hold the majority faith. This can only be ensured through the contribution of the person concerned as noted above.

24. The compulsory nature of religious instruction and the scope and content of religious instruction are two different concepts. In this case, the compulsory nature of religious instruction by the State would not be unconstitutional. However, the scope and content of religious instruction may require a separate discussion or assessment. It should be taken into consideration that the scope and content of religious instruction provided by the State can be subject to scrutiny of other public institutions and especially by judicial institutions. This issue has nothing to do with the compulsory nature of religious course.

25. The question whether the scope and content of religious instruction is created or provided in an objective and rational manner in pursuance of pluralism requires a separate judicial review and examination upon an application to be filed, as stated above. Since this application does not concern the scope and content of religious instruction, the compulsory nature of religious instruction should be distinguished, in judicial terms, from the scope and content of this instruction.

26. Undoubtedly, in consideration of the above-mentioned purpose of religious instruction, it should be provided through a curriculum in accordance with the purpose envisaged by the Constitution, its scope and content should be objective and pluralistic. Besides, religion should not be used as an element of discrimination and inequality, and the State should be equal, objective and impartial. It should be borne in mind that all of these issues are related to the scope and content of the religious course.

27. Although the content was changed by the decisions of the Board of Education and Discipline before or after the 2018-2019 school year, it has been observed that the religious culture and ethics course is a supra-sectarian, non-practical, informative course that appeals to all students regardless of their sectarian or philosophical beliefs. Focusing on a particular religious understanding does not mean that the course has turned into "religious education", but rather that the majority religion is taken as the basis for instruction.

28. Even if it is accepted that this course is primarily intended to teach Islam, it cannot be concluded that it is in breach of the parent's freedom of religion, as the compulsory nature pursues the aim of providing information about the majority religion.

29. As a result, the "religious culture and ethics" course, which is made compulsory by Article 24 of the Constitution, involves instruction, not education. Granting an exemption for followers of other religions from this course neither removes this obligation, nor does it change its nature. Therefore, this obligation is considered not to be in breach of "freedom of religion and conscience". If the content of this compulsory course is deemed insufficient, the student or his/her parents may request the education or instruction of the religion of their choice. The fulfilment of

this requirement by the State is a requirement of respect for religious or philosophical faiths.

30. For these reasons, I dissented from the majority's conclusion that there had been a violation of the right of the parents to respect for their religious and philosophical convictions in education and instruction.

DISSENTING OPINION OF JUSTICE BASRİ BAĞCI

As laid down in Article 12 of the Constitution, "Everyone possesses inherent fundamental rights and freedoms, which are inviolable and inalienable".

The freedom of religion and conscience is a right, which is enshrined in Article 24 of the Constitution and is, by its very nature, among the rights defined in Article 12 thereof and which affords the individual of full age the right to freely make religious preferences (Article 341 *in fine* of the Turkish Civil Code no. 4721 and Article 35 § 2 of the Civil Registry Law no. 5490).

In conjunction with this right, the right not to be compelled to disclose one's religious and conscientious convictions is considered as an absolute right under Article 15 of the Constitution.

Article 35 § 2 of the Civil Registry Law allows the individuals to have a say in the formation or amendment of records related to religion in civil registers.

On the other hand, the religious education is regulated in Article 24 § 4 of the Constitution where it is emphasised that while education in religious culture and ethics is compulsory in primary and secondary schools, and that other form of religious education and instruction shall be, in the case of minors, subject to the request of their legal representatives.

Article 2 of Additional Protocol no. 1 to the European Convention on Human Rights stipulates that the education and teaching of religious education of the children be ensured to be in conformity with the religious and philosophical convictions of the parents.

In parallel to the provisions of the Constitution and the European Convention on Human Rights ("Convention"), Article 341 § 1 of the Turkish Civil Code grants the parents the right to decide on the religious education of the child, which may be exercised jointly.

In consideration of the fact that this issue is exclusively regulated through a special provision in the Turkish Civil Code and that the parents are granted joint authority at the same time, it is obvious that a mother or father who has been deprived of the parental right for various reasons can exercise the right to decide on the religious education of the child independently of the parental right and only together with the other spouse.

In Article 336 of the Turkish Civil Code, it is clearly set forth that as long as the marriage continues, the parents will exercise custody jointly. Moreover, as laid down in the special arrangement in the first sentence of Article 341 § 1 (f) thereof mentioned above, even the spouse who no longer has the parental right has the right to have a say in the religious education of his/her child.

In the choice regarding the religious education of the child, neither national nor international legislation categorically gives superiority to either the will of the mother or the father. Accordingly, there is no doubt that the methods specified in the law will be employed in case of any difference in opinion that may arise during the joint exercise of the right.

In the present case, the applicant Hüseyin El applied to the relevant administration on 1 October 2009, seeking the exemption of his 9-year old daughter, who would be a 4th grader at that year, from the religious culture and ethics course.

At the subsequent period, the applicant Hüseyin El alone requested the removal of the indication "Islam" on his and his daughter's identity cars, brought an administrative action against the refusal to exempt his daughter from the compulsory class, made use of the available legal remedies and ultimately lodged an individual application with the Court.

It has been understood from the file that no information was provided on the legal status of the wife of the applicant Hüseyin El, who is also the mother and guardian of the other applicant Nazlı Şirin El.

All the procedures listed in the preceding paragraph regarding the religious education of children are procedures that must be carried out jointly by the mother and father in accordance with the provisions of our legislation. As long as the mother is alive, she has the right to have a say in the religious education of her minor child, even if she does not have parental custody.

During the course of this legal process, both administrative and judicial authorities must ensure the involvement of the mother in the process. At the very least, the mother's consent to the said procedures should be sought.

Article 342 § 2 of the Turkish Civil Code providing for that "Bona fide third parties may assume that each spouse has acted with the consent of the other" is not applicable in the present case. In the exercise of a constitutional right, the addressee public authorities cannot be qualified as bona fide third parties.

Moreover, unlike general custody practices, the issue of religious education is specifically regulated in the Turkish Civil Code, and it is explicitly emphasized that the right of choice in this regard shall be exercised by the parents (Article 341). Due to this special provision, the assumption that a step taken by one of the spouses has been taken with the consent of the other spouse is not applicable to the present case.

In the present case, the entire legal process on a matter such as the religious education of the child, in which the mother has an absolute right to have a say, was conducted without asking the mother's will.

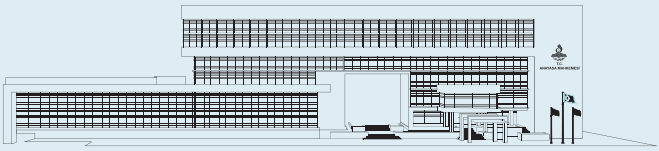
No information on the mother's legal and *de facto* situation was included in the application form, and the authorities (including the Court) conducted a process in which the mother was excluded.

In addition, Nazlı Şirin El, who was 9 years old at the beginning of the impugned events and 14 years old at the date of the application, has become an adult by reaching the age of 18 as of the date of the examination. However, she was represented before the Court by a lawyer authorized by her father on the basis of her parental authority. As a matter of fact, the power of attorney relationship should have been re-established as she has

been of full age, and as to the relevant issues, her opinion should have been obtained as an adolescent.

In the present case, these factors were not taken into consideration, and thus the will of the person was overridden in the exercise of a strictly individual right.

For these reasons, I dissented from the majority's conclusion as I consider that the application should have been declared inadmissible due to the above-mentioned deficiencies.



İncek Şehit Savcı Mehmet Selim Kiraz Bulvarı No: 4
06805 Çankaya / Ankara / TÜRKİYE
Phone: +90 312 463 73 00 • Fax: +90 312 463 74 00
E-mail: tcc@anayasa.gov.tr
twitter.com/aymconstcourt

www.anayasa.gov.tr/en

9 786052 378984